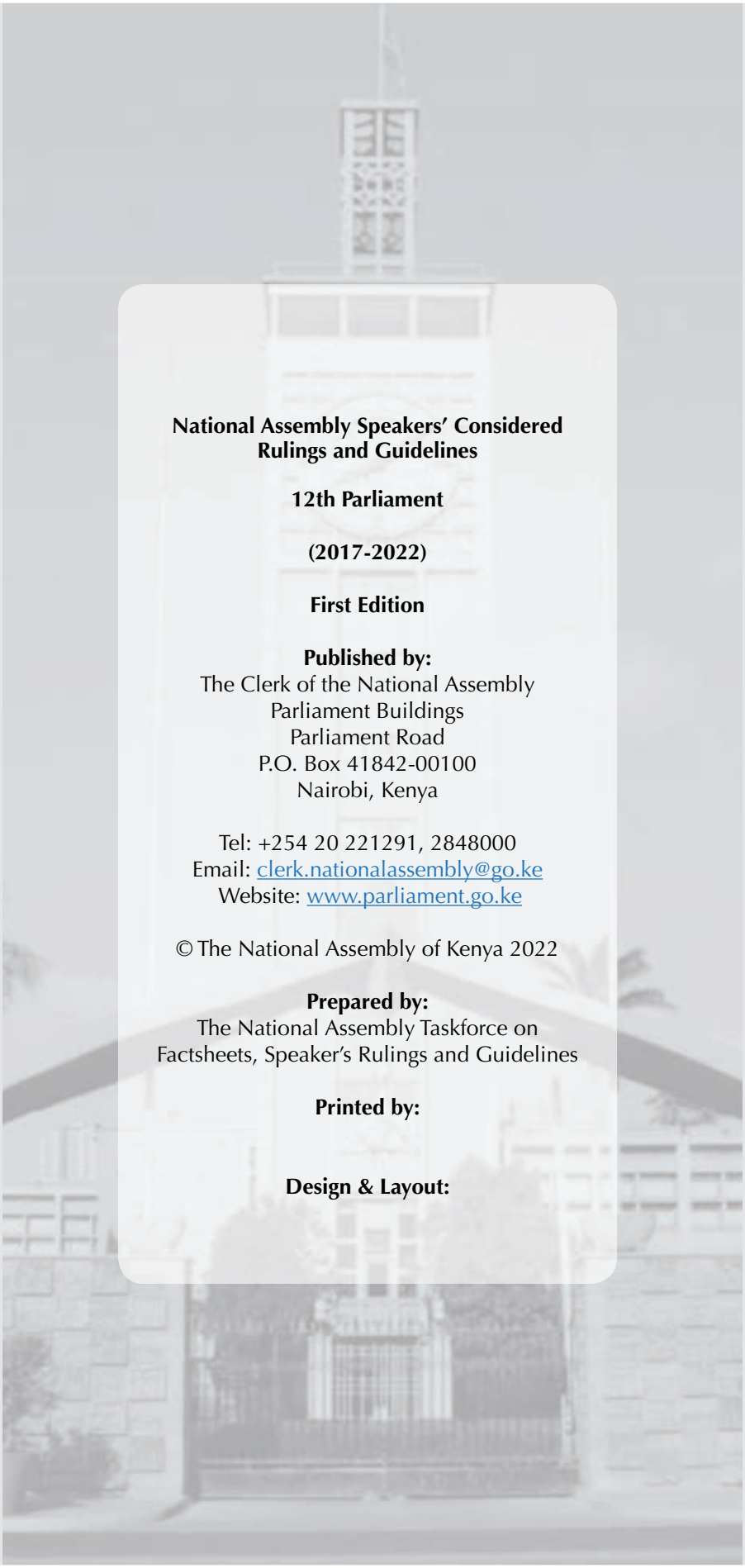
Parliament of Kenya

The National Assembly

Speakers' Considered Rulings and Guidelines

12th Parliament

2017 - 2022



National Assembly Speakers' Considered Rulings and Guidelines

12th Parliament

(2017-2022)

First Edition

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PREFACE

The first compendium of *Speakers' Considered Rulings* in the Parliament of Kenya was compiled in 2004. The collection was intended for the use of the Speaker, other presiding officers, and the Clerks-at-the-Table, who, from time to time, are required to advise presiding officers on the rules and practices of the House. It focused on rulings made by Speakers Sir Humphrey Slade, Fred Mati, Prof Jonathan Kimetet arap Ng'eno, Kiprono arap Keino and Francis Xavier ole Kaparo between 1963 and 2007. Efforts are being made to compile rulings made by colonial presiding officers (who before 1948 included Governors) and Speakers of the Legislative Councils between 1907 and 1962.

In 2017, the National Assembly made a remarkable milestone in consolidating Speakers' Rulings by publishing two collections of *'National Assembly Speakers' Considered Rulings and Guidelines'*. The first compendium was on rulings issued in the Tenth Parliament (2008 – 2013) by Speaker Kenneth Otiato Marende, EGH, MP and the second one was a compilation of those issued by Speaker Justin B.N. Muturi, EGH, MP in the Eleventh Parliament (2013-2017).

This edition is a compilation of the *'National Assembly Speakers' Considered Rulings and Guidelines'* issued by Speaker Justin B.N. Muturi, EGH, MP during the 12th Parliament. The *National Assembly Speakers' Considered Rulings and Guidelines* provide an easily accessible collection of rulings and other important precedents, quite helpful when a matter arises in the course of a sitting. The rulings and guidelines provide an extract deemed useful in a readily usable form, with as much similarity as was issued by the Speaker. It is not itself an authoritative source. That source instead resides in the pages of the Hansard.

This edition includes considered rulings issued when the Twelfth Parliament adjourned *sine die*. The rulings are grouped per Session for ease of chronological sequencing. This edition is a full presentation of the text of the rulings as given by the presiding officers, and for ease of reference, we have included the dates the rulings and guidelines were issued, both in the Table of Contents for each Session and also in the text of each of the ruling or guideline. To ensure clarity and to ease search, we have also reviewed some of the titlings of the rulings. We hope the future compilations of considered rulings and guidelines shall be serialized, indexed and where possible, thematically grouped.

Michael R. Sialai, CBS
Clerk of the National Assembly
July 2022

FOREWORD

It is an important tradition for all deliberative bodies, Parliaments included, to make rules to regulate their business. The Standing Orders, the usages, forms, precedents, customs, procedures and traditions, Speakers' rules and orders form the complex body of parliamentary rules and procedures. The rulings and guidelines made by the Presiding Officers during the course of the proceedings of the House help clarify the rules, and provide valuable insights into the working of Parliament. Each House of Parliament makes its own rules and both Houses make Joint Rules. The Presiding Officers through their rulings and guidelines interpret the rules in a way that is consistent with parliamentary traditions and precedents established over a long period. Some of the rulings have great precedent value.

This is the official edition of *The National Assembly Speakers' Considered Rulings and Guidelines* containing select rulings and guidelines covering the Twelfth (2017 to 2022) Parliament. This edition captures the text of the rulings or guidelines without attempting any interpretation, thematic or other form of classification. Nonetheless, they contain highlights of the context behind each ruling as well as a summary of the decisions made by the Honourable Speaker. They are also dated for ease of reference from the Hansard. Future editions shall focus more on a thematic classification as we progressively review the style and format of delivering the rulings including their numbering and indexing for ease of search and reference.

I hope that Members of Parliament, academics, researchers and others who are interested in the functioning of parliamentary institutions, especially the procedural matters, will find this publication useful.

I wish to give special thanks to the Office of the Clerk, and in particular the Members of the National Assembly Taskforce on Factsheets, Speaker's Rulings and Guidelines, namely, Mr. Kipkemoi arap Kirui, Deputy Director, Directorate of Legislative and Procedural Services (Team Leader), Mr. Rana Tiampati, Mr. Kenedy Malinda, Mr. Samuel Kalama, Ms. Anna Musandu, Mr. Salem Lorot, Ms. Anne Shibuko, Mr. Finlay Muriuki, Mr. Inzofu Mwale, Ms. Laureen Wesonga, Mr. Morrice Shilungu, Mr. James Macharia, Ms. Rabeca Munyao and Mr. Stephen Omunzi for their commitment and dedication to duty while undertaking this important exercise

The Hon. Justin B.N. Muturi, EGH, MP
Speaker of the National Assembly
August 2022

INTRODUCTION

A Ruling of the Speaker is usually necessitated by the need to guide the House on an emerging or ongoing issue of concern that requires clarity or direction. In making a ruling, the Speaker draws on a full range of procedural information and examines the precedents to determine how the rules of procedure have been applied and interpreted in the past.

The Speaker may be called upon to deal with situations not provided for in the Standing Orders, and may turn to parliamentary practice or traditions in other jurisdictions.

It is the right of the Speaker to interpret the Constitution and Rules, so far as matters in or relating to the House are concerned, and no one can enter into any argument or controversy with the Speaker over such interpretation[1].

The Speaker's rulings constitute precedents by which subsequent Speakers, members and officers are guided. Such precedents are collected and in the course of time, formulated as rules of procedure or followed as conventions. While good procedure requires that there be consistency in the interpretation of practice and in the application of the Standing Orders, Speakers are sometimes called upon to create new precedents when faced with an apparent contradiction between the Standing Orders and contemporary values. Accordingly, Speakers have declared past rules to be redundant and have invited the House to ponder the consequences of changing circumstances.

In other cases, Speakers may choose to rule in accordance with past practice but acknowledge that circumstances have changed, and suggest that the House may wish to address the matter by changing its rules.

The Speaker will often allow Members to address the issue raised to give them an opportunity to present facts that might help shed some light on the case at hand. In such cases the Speaker will often reserve his or her decision in order that he or she may reflect on the matter, request that further research be undertaken or seek further advice on the questions being raised. At other times, a ruling will be made immediately without Members' intervention. It is left to the Speaker to determine what method he or she will use.

All Speakers base their rulings on established practice. However, in many cases, their rulings build upon past precedent, and in some cases their decisions improve or clarify best practices.

The Speaker's rulings cannot be questioned except on a substantive Motion. A member who protests against the ruling of the Speaker commits contempt of the House and the Speaker. The Speaker's decision is binding. The Speaker is not bound to give reasons for his decisions. In commonwealth practice, Members cannot criticise directly or indirectly, inside or outside the House, any rulings given, opinion expressed or statement made, by the Speaker.

Challenging the Chair

The rules and practices for challenging the Chair differ somewhat from jurisdiction to jurisdiction. The ruling or decision of the Speaker has occasionally been challenged through a formal appeal, a substantive motion, criticism outside the House, disobedience, or even threats and intimidation or all of these approaches depending on circumstances prevailing at the time.

In the Canadian House of Commons, the ability to appeal a ruling of the Speaker ended in 1965. Most Canadian jurisdictions disallow appeal. The Speaker's decision is never a subject

of debate or appeal.

Speaker Jean-Pierre Charbonneau in the Québec National Assembly in June of 2001 summed up the prevailing parliamentary law thus:

> *Our parliamentary law, in its wisdom, holds that one may not impugn the conduct of a Member unless it be by recourse to a formal procedure, to wit a substantive motion. [...] Parliamentary law is even more stringent when the conduct of a Presiding Officer is concerned. Not only is it forbidden to impugn the conduct of a Presiding Officer otherwise than by means of a substantive motion, but to do so may even place one in contempt of the Assembly.*

In other words, unless a Member is willing to give notice of and introduce a substantive motion in the House, any dissent from a ruling of the Speaker, or a reflection on his or her impartiality, is strictly forbidden. However, the prohibitions on appeals to the rulings of the Speaker do not necessarily apply to those occupying other chairs. This is likely a reflection of the lower standard of impartiality imposed on deputy speakers and the chairs of committees. In Committee of the Whole, for example, it is generally accepted that decisions of the Chair may be appealed to the House.

The Standing Orders of the National Assembly do not provide for a procedure to challenge or appeal the decision of the Speaker. It is also important to observe that appeals or avenues for challenging the decision of the Speaker have been abolished or restricted in most Westminster-styled legislatures. However, the rules and practices vary from jurisdiction to jurisdiction. In some jurisdictions, it is only the Speaker's decision pertaining to the rules of the House that is not challengeable. In others, members have an avenue to appeal against a ruling made by the Chair.

In the US Congress**,** an appeal from the decision of the Chair is applied as a form of challenge to a ruling of the Chair, but such appeals must be made immediately after the ruling. If debate has progressed, a challenge is not in order.

Previous Speakers of the National Assembly have by practice never entertained the challenging or appeal against the rulings of the Speaker. However, the Speaker is at liberty to review any decision should the need arise.

Below are selected rulings issued by Honourable Speaker Justin B. N. Muturi, EGH MP during the 12th Parliament (2017 to 2022).

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First Session

(31st August 2017 to 12th February 2018)

DETERMINATION ON ELECTION LAWS (AMENDMENT) BILL

Thursday, 28th September 2017

Context:
The Speaker was to determine whether the Election Laws (Amendment) Bill 2017 was a Bill concerning county governments, and whether it would be transmitted to the Senate for concurrence.

Decision of the Speaker:
1) The Election Laws (Amendment) Bill 2017 concerned county governments.
2) The Bill would, if passed, be forwarded to the Senate for concurrence.

"Honourable Members, I have a Communication to make with regard to the Election Laws (Amendment) Bill. Honourable Members, a question has been raised this afternoon in my office with regard to whether the Election Laws (Amendment) Bill 2017 (National Assembly Bill No. 39 of 2017) is a Bill concerning country governments and whether the Bill will be transmitted to the Senate for concurrence, if passed by this House.

Hon. Members, Article 110 of the Constitution defines a Bill concerning county governments and outlines the procedure applicable whenever a question arises as to whether the Bill concerns county governments. Under Article 110(1) of the Constitution, a Bill concerning county governments is defined as follows:

"In this Constitution, "a Bill concerning county government" means:

a) a Bill containing provisions affecting the functions and powers of the county governments set out in the Fourth Schedule;

b) a Bill relating to the election of members of a county assembly or a county executive; and,

c) a Bill referred to in Chapter Twelve affecting the finances of county governments."

Further, Hon. Members, Article 110(3) of the Constitution provides as follows with regards to any question on the issue:

"Before either House considers a Bill, the Speakers of the National Assembly and Senate shall jointly resolve any question as to whether it is a Bill concerning counties and, if it is, whether it is a special or an ordinary Bill."

Hon. Members, consideration of a Bill happens at any Second Reading onwards and the question may arise at any time. In this regard, I wish to inform the House that I have, this afternoon, consulted with the Speaker of the Senate on the question raised with regard to the Election Laws (Amendment) Bill, 2017. Accordingly, there are so many similarities between a start-up venture and a political campaign, the rhythm and the tempo, the hours and the intensity, pursuant to the provisions of Article 110(3) of the Constitution and in answer to the question raised, the Speaker of the Senate and I have jointly determined that the Election Laws (Amendment) Bill 2017 (National Assembly Bill No. 39 of 2017) is a Bill concerning county governments. Members will note that the Bill seeks to amend several statutes among them the Elections Act 2011, which makes the Bill fall squarely within the definition set out at Article 110(1)(b) of the Constitution to the extent that it relates "*to the election of members of a county assembly*". If passed by this House, the Bill shall be forwarded to the Senate for consideration.

The House is guided accordingly. I thank you."

APPOINTMENT OF LEADERS OF THE MINORITY PARTY

Thursday, 12th October 2017

Context:
Procedure for filling up seats reserved for the leadership of the Minority Party or Minority Coalition in the National Assembly.

Decision of the Speaker:
The matter of the procedure for filling up seats reserved for the Minority Party or Minority Coalition is left to the party or coalition.

"Honourable Members, this is Communication relates to the matter of appointment of the Leader of the Minority Party, the Deputy Leader of the Minority Party, the Minority Whip and the Deputy Minority Whip.

My Office is in receipt of several communications relating to the filling of the various leadership positions by the minority coalition in this 12th Parliament. More specifically, I have received the following correspondences and minutes relating to the filling of the positions of Leader of the Minority Party, Deputy Leader of the Minority Party, Minority Whip and Deputy Minority Whip:

1) A letter dated 13th September 2017 from Senator Moses Wetangula notifying my office of a resolution of the NASA Coalition appointing Hon. John Mbadi, MP as the Minority Party Leader, Hon. Ayub Savula, MP as the Deputy Minority Party Leader, Hon. Robert Mbui, MP as the Minority Whip and Hon. Chrisantus Wamalwa, MP as the Deputy Minority Whip in the National Assembly;

2) A letter dated 21st September 2017 from Hon. John Mbadi, MP notifying my office of a decision by the NASA Coalition to leave vacant the offices of the Deputy Leader of Minority, Minority Whip and Deputy Minority Whip awaiting a NASA parliamentary group meeting where the coalition will deliberate on and fill the positions. Hon. Mbadi attached a letter from the Chief Executive Officer of the NASA Coalition, one Mr. Norman Magaya, dated 21st September 2017 signifying the same;

3) A letter dated 20th September 2017 from the Registrar of Political Parties confirming the existence of a pre-election coalition agreement between the NASA Coalition parties;

4) Minutes of the Amani National Congress (ANC) Party held on 16th August 2017;

5) Minutes of the FORD-Kenya Party held on 6th September 2017;

6) Minutes of the Wiper Democratic Movement-Kenya Parliamentary Group meeting held on 13th September 2017.

Hon. Members, I have isolated three issues arising out of these correspondences for which I am obliged to give directions. These issues are:

1) Whether the leadership positions for the Minority in the House will be filled by individual party or a coalition of parties;

2) Who the lawful authority is to make and communicate the decision of the Minority appointing its leadership; and,

3) Whether the provisions of the Constitution, the law and the Standing Orders have been complied with by the Minority coalition as regards the filing of its leadership positions.

The first question: Is the Minority a party or coalition of parties?

Hon. Members, the first issue relates as to whether the leadership positions for the Minority in the House will be filled by individual party or a coalition of parties. Article 108 of the Constitution provides for the party leadership in the House as follows-

*"**Party leaders***

108 (1) There shall be a leader of the majority party and a leader of the minority party.

(2) The leader of the majority party shall be the person who is the leader in the National Assembly of the largest party or coalition of parties.

(3) The leader of the minority party shall be the person who is the leader in the National Assembly of the second largest party or coalition of parties."

Clause (4) further goes ahead to place the Leader of the Minority Party third in the order of precedence to be observed in the National Assembly after the Speaker of the National Assembly and the Leader of the Majority Party. Under Section 10 of the Political Parties Act, two or more political parties may form a coalition before or after an election and a coalition agreement entered into before an election shall be deposited with the Registrar, at least, three months before that election.

My office is in receipt of a letter dated 20th September 2017 from the Registrar of Political Parties in which she confirms a pre-election coalition agreement having been deposited in her custody between the Orange Democratic Movement, the Wiper Democratic Movement-Kenya, FORD-Kenya, Amani National Congress and Chama Cha Mashinani. Accordingly, all the aforementioned parties are, subject to any post-election agreement that may be made, eligible to constitute a coalition within the meaning of Article 108(3) of the Constitution and Standing Order 20 for purposes of election of the Leader of the Minority Party, the Deputy Leader of the Minority Party, the Minority Whip and the Deputy Minority Whip.

Hon. Members, the second issue relates to who is the lawful authority to make and communicate the decision of the Minority in appointing its House leadership. Article 108 of the Constitution does not provide for the manner of election or removal of the Leader of the Minority Party. This is however provided for in Standing Order 20 which provides as follows:

"20. (1) The Minority party or coalition of parties in the National Assembly shall elect—

(a) a member of the National Assembly belonging to the party or coalition of parties to be the Leader of the Minority Party;

(b) a member of the National Assembly belonging to the party or coalition of parties to be the Deputy Leader of the Minority Party.

(2) In electing members under paragraph (1), the minority party or coalition of parties in

the National Assembly shall take into account—

(a) any existing coalition agreement entered into pursuant to the Political Parties Act;

(b) The need for gender balance.

(3) A member elected under paragraph (2) may be removed by a majority of votes of all members of the Minority party or coalition of parties in the National Assembly.

(4) The whip of the minority party or coalition of parties in the National Assembly shall forthwith, upon a decision being made under this Standing Order, communicate to the Speaker, in writing, the decision together with the minutes of the meeting at which the decision was made"

Under Paragraph 3 of the Third Schedule to the Political Parties Act, a coalition agreement, amongst other things, shall state the criteria or formula for sharing of positions in the coalition structure, roles and responsibilities within the coalition and the decision-making structure, rules and procedures of the coalition. Article 7 of the coalition agreement forwarded to my office by the Registrar of Political Parties in her letter under reference stipulates the decision-making organ of the Minority coalition to be its summit.

Indeed, Members are aware that matters relating to political parties and coalitions thereof are governed by the Political Parties Act which has its own mechanisms for dispute resolution in relation to any disputes that may arise under the Act. I will therefore refrain from commenting on matters that fall under the purview of that Act and restrict myself to the requirements of the Standing Orders of the House.

It is however, true to conclude that our Standing Orders as read together with the Political Parties Act contemplate a decision appointing the Minority leadership in the House to be made by the decision-making organ of the coalition of parties forming the Minority coalition and further that the decision made be conveyed to my office in writing by the Whip of the Minority party or coalition of parties who is also obliged to attach the minutes of the meeting at which the decision was made. The Question to ask is: Has the Minority coalition complied with the Constitution, the law and the Standing Orders in appointing its leadership?

This issue relates to whether the provisions of Constitution, the law and the Standing Orders have been complied with by the Minority coalition as regards the filling of its leadership positions as follows: The Leader of Minority Party, Deputy Leader of Minority Party, Minority Whip and Deputy Minority Whip. Standing Order 20(4) requires the whip of the Minority party or coalition of parties in the National Assembly to forthwith, upon a decision being made on the Leader of the Minority Party and the Deputy Minority Leader, communicate to the Speaker, in writing the decision together with the minutes of the meeting at which the decision was made.

My Office, as I said, received a letter dated 13th September 2013 from Senator Moses Wetangula notifying my office of a resolution of the NASA Coalition appointing Hon. John Mbadi as the Minority Leader, Hon. Ayub Savula as the Deputy Minority Leader, Hon. Robert Mbui, MP as the Minority Whip and Hon. Chrisantus Wamalwa as the Deputy Minority Whip. In terms of compliance with the requirements of Standing Orders 20(4), there were no minutes attached to this communication and, secondly, it is obvious that Senator Wetangula cannot be the Minority Whip to a House to which he does not belong.

My office subsequently received another letter dated 21st September 2017 from Hon. John Mbadi, notifying me of a decision by the NASA coalition to leave the offices of the Deputy Leader of Minority, Minority Whip and Deputy Minority Whip vacant awaiting a NASA parliamentary group meeting where the coalition was to deliberate and fill these positions. Hon. Mbadi attached a letter from the Chief Executive Officer of the coalition, one Norman Magaya, dated the same date signifying the same. In terms of compliance of Standing Order 20(4), there were also no minutes attached to this correspondence.

On a different note, however, these two letters from Hon. Mbadi and the said Magaya by implication confirmed that the NASA Coalition had, indeed, made the resolution communicated to my office by Senator Wetangula on 13th September 2017. More specifically, Mr. Magaya indicated in his letter that:

> *"By dint of this letter, I request that you write to both the Speaker of the National Assembly and Senate and ask them to stand over the earlier communication in respect of the other house leadership positions."*

Although this statement, especially coming from the Chief Executive Officer of the NASA Secretariat, can be inferred as a confirmation of the authority for Senator Wetangula's letter, the statement still falls short of the threshold of Standing Order 20(4) which requires communication to be made by the Whip and attachment of the minutes of the meeting.

The matters herein are not new to the House. Indeed, considered rulings have previously been sought and issued regarding leadership in political parties. Just to jog your memory a bit, in November 1993, the Chair was invited to guide the House on a matter regarding the issue of the Official Opposition Party in the House. Then, two opposition parties namely FORD-Kenya and FORD-Asili, each had 30 Members in the House, which was the requirement for a party to be declared the official opposition. However, the Chair never got the opportunity to give guidance as one of the Members of FORD-Asili defected to the then ruling party, KANU. Therefore, it became obvious that FORD-Kenya became the official opposition party. Similarly, in 2006 the Chair was again called upon to rule on the position of Official Leader of the Opposition. On Wednesday, 29 November 2006, the then Member for Eldoret North Constituency, Hon. William Ruto, rose on a point of order and sought guidance from the Chair to rule on some issues, including the position of the Leader of the Official Opposition, in an apparent reference to purported changes in the leadership of the Official Opposition Party, KANU.

In his ruling, the Chair noted that party proceedings are foreign to the House unless properly and formally introduced through established mechanisms. Without taking you back, the Chair noted that:

> *"Registration of political party officials is extraneous, foreign and inconsequential to the conduct of parliamentary business or proceedings in this House. The constitutional responsibilities of conducting, managing, regulating and guiding parliamentary business lies nowhere else on earth but on the shoulders of the Chair."*

The Chair then ruled that:

> *"To give the guidance sought by the Member for Eldoret North, I hereby order and rule that the Leader of the Official Opposition party remains the Hon. Uhuru Kenyatta, the Official Opposition Chief Whip remains the Hon. Justin Muturi and the Shadow Cabinet remains as submitted by the Leader of the Official Opposition, Hon. Uhuru Kenyatta, vide his letter dated 11 June, 2003, as he had not received any notification that the KANU parliamentary caucus has met and made any changes in their leadership."*

In light of the foregoing, I am constrained to make the following observations:

Firstly, the communications I have received from the Minority coalition relating to the filling of its leadership positions have all fallen short of fulfilling the requirements of Standing Order 20(4) in terms of who should communicate and how the communication ought to be done.

Secondly, the perceived appointment of Hon. John Mbadi as the Minority Leader is premised on the letter dated 21st September 2017 from the Chief Executive Officer of the NASA Secretariat. It stills falls short of the requirement.

Thirdly, as the Speaker of the House, I am bound to apply the rules of this House without fear or favour, especially in cases where the Standing Orders have expressly provided for the matter in question. Standing Order 1 only gives me discretion to decide on procedural questions not expressly provided for by the Standing Orders. In the instant case, Standing Order 20 has expressly provided for the matter in question and my duty as your Speaker is to uphold the rules of the House.

In view of the foregoing, I am unable to act on the correspondences from parties forming the NASA Coalition and I call upon the Coalition to consider the matter and submit the necessary names in strict fulfillment of the laid down procedures, including those governing the Coalition. This ought to be concluded by the time the House resumes from the short recess, that is, November 7, 2017. For the time being, I remain open to receiving communication in the manner stated above. For now, every Member in the NASA coalition is on his or her own.

I thank you, Hon. Members."

APPOINTMENT OF THE HOUSE LEADERSHIP OF THE MINORITY PARTY

Thursday, 7th December 2017

Context:
Ensuring regional and gender balance in designation of Members serving in the leadership of the Minority Coalition in the National Assembly.

Decision of the Speaker:
1) *It is the Political Parties Disputes Tribunal that is legally mandated to handle disputes between the members of a political party, disputes between a member of a political party and a political party, disputes between political parties, disputes between an independent candidate and a political party, and disputes between coalition partners.*
2) *The Speaker cannot intervene where a party or coalition fails to adhere to gender and regional balance in its composition of its leadership since this is an internal party matter.*

"Honourable Members, this Communication relates to a matter on procedure relating to the appointment of the House leadership of the Minority Party. As you recall, on Thursday, 30th November 2017 during the Afternoon Sitting, the Member for Lugari Constituency, Hon. Ayub Savula, rose on a point of order seeking direction of the Speaker on the composition of the list submitted by the Minority Party outlining its House leadership, pursuant to the provision of Standing Order No.20. Specifically, the Member was of the view that the list submitted by the Minority Party violated Standing Order No.20 with regard to regional and gender balance. His point of order related to the Communication that I delivered during the Afternoon Sitting on Wednesday, 29th November 2017 informing the House of my receipt of letters dated 16th November 2017 and 29th November 2017, respectively from the National Super Alliance (NASA) forwarding the names of its House leadership. In reserving the matter for a considered ruling, I mentioned that other Members had also expressed concerns with the list since its communication, notably Hon. Ramadhani Suleiman Dori and Hon. Baya Owen Yaa from the Minority Party.

Hon. Members, at the time the matter was raised by the Member, you will also recall the intervention of the Leader of the Majority Party and the Member for Seme, Hon. (Dr.) James Nyikal, calling for restraint with regard to the intervention by the Speaker in a matter that, in their opinion, should be left for consideration and resolution by the Minority Party.
Standing Order No. 20, upon which the Member's concern is premised, outlines the procedure for the election of the Leader of the Minority Party and Deputy Leader of the Minority Party. Paragraph (4) of the Standing Order is instructive with regard to the submission of the outcome of the election process to the House through the Speaker.

Standing Order No. 20(4) says:

> *"The whip of the minority party or coalition of parties in the National Assembly shall forthwith, upon a decision being made under this Standing Order, communicate to the Speaker, in writing the decision together with the minutes of the meeting at which the decision was made."*

Hon. Members, a clear reading of Standing Order No. 20 reveals that the Speaker has no role in the process of the election of the leadership of the Minority Party and the Majority Party. Under the said Standing Order, the election process is, and remains an internal affair of the

party which only communicates the outcome of the process in writing to the Speaker. The Speaker's duty thereafter is limited to ensuring that the list submitted by the Minority Party is accompanied by the minutes of the meeting at which the party made its decision. Indeed, as you may recall Members, on 12th October 2017, I issued a Communication directing the Minority Coalition to comply with the provisions of Standing Order No. 20(4) and the rules of the Coalition in communicating to my office the names of its House leadership.

In directing the Minority Party to comply with its rules, I was cognisant of my limited role in the matter and the fact that any disputes arising from the procedure would be resolved purely according to the party's rules and any coalition agreement entered into. Neither I nor other persons who are not members of the Minority Party are fully kept abreast of its leadership contests or disputes. Indeed, as noted in the text: *The Selection of Political Party Leaders in Contemporary Parliamentary Democracies* as pointed out by Jean-Benoit Pilet and William Cross Editions, the authors note as follows with regard to party leadership politics in Australia:

> *"Leadership politics are governed by the norms and traditions of the party room as they exist at any point in time. Accurate records of party room votes are usually not kept, nor officially reported."*

For our purposes, the only evidence the Standing Orders require from the Minority Party is a copy of the minutes of the meeting at which the decision on its leadership was made. I confirmed to the House that the Minority Party fulfilled this requirement and that action in itself settles the matter. I play no other role in the process and any issues raised with regard to the constitution of the Minority leadership or the process undertaken to constitute it therefore fall squarely within the purview of the Minority Party and its internal dispute resolution mechanisms.

Hon. Savula further sought direction from the Speaker on the remedies available to address his concerns. Standing Order No. 20, upon which the Member rose, provides adequate guidance with regard to any dispute or disaffection with the House leadership of the Minority Party. In addition, and in the event the Member's concern relates to the internal democracy of his party or coalition, the Political Parties Act may offer some respite. As Members are aware, the Political Parties Act established the Political Parties Disputes Tribunal, which pursuant to section 40, is mandated to determine:

1) Disputes between the members of a political party;
2) Disputes between a member of a political party and a political party;
3) Disputes between political parties;
4) Disputes between an independent candidate and a political party; and
5) Disputes between coalition partners.

Hon. Members, in conclusion, I have noted the concern raised by various Members on the apparent gender imbalance in the House leadership of the Minority Party. Though direct intervention into the manner in which the Minority Party decides to constitute its leadership is outside my purview, I am not precluded from reminding the Minority Party of the two-thirds gender principle which is entrenched in the provisions of Article 27(8) and 81(b) of the Constitution.

Indeed, the provisions of our own Standing Order No. 20(2)(b) enjoin the Minority Party to take gender balance into account when deciding the composition of its House leadership. However, it only extends to me pointing out that. I cannot therefore venture into resolving or

attempting to resolve any complaints or grievances that any Member of the coalition of the parties may have against any decision taken and evidently shown to have been taken by the party leadership in making the decision. Please be guided accordingly. Thank you."

PROCEDURE FOR CONDUCTING ELECTION OF MEMBERS TO THE EAST AFRICAN LEGISLATIVE ASSEMBLY

Thursday, 14th December 2017

Context:
Procedure for conducting the election of Members to the East African Legislative Assembly (EALA).

Decision of the Speaker:
1) *Close-up shots showing the manner in which a Member had voted were prohibited;*
2) *In cases of any tie between two or more candidates amongst those with highest votes in any clusters, the process would have to be repeated in both Houses;*
3) *In order to safeguard gender balance, the persons to be declared elected in respect of the Jubilee Party cluster would be five with the highest number of votes, who must include at least two candidates of either gender, while the persons to be declared elected in respect to the National Super Alliance (NASA) coalition cluster shall be the four candidates with the highest number of votes who must include at least one candidate of either gender; and*
4) *Any attempt by a candidate to withdraw their candidacy past the stipulated deadline would be disallowed.*

"This Communication relates to the procedure for conducting the election of Members of the East African Legislative Assembly (EALA) on the Election Day. Today, being the 14th day of December 2017, a day designated by the Houses of Parliament for conducting the election of Members to the EALA, I wish to make a brief Communication to guide the House on the steps to follow, being designated as one of the returning officers in accordance with Rules 2 and 17 of the EALA Elections (Election of Members of the Assembly) Rules, 2017.

From the outset, let me remind the House that in accordance with the said rules, the presiding officer in the case of the election in this House is the Clerk of the National Assembly. In furtherance to Rule 17 (1) of the rules, the Speaker of the Senate and I have designated the Senate and the National Assembly Chambers as the respective polling stations for purposes of the election by the Members of the Senate and this House. In accordance with Rule 17(2) of the rules, voting is by secret ballot. In this regard, members of the Press are also notified that in keeping with paragraph 3(c) of the Broadcast Rules, close-up shots that may show the manner in which a Member has voted are prohibited.

At the beginning, I will order that the Bell be rung as if on a Division. This will signify the commencement of the voting process and also allow the presiding officer to prepare the voting station in the Chamber ready for voting. At the expiry of 10 minutes, the doors and the Bars shall remain open unlike in ordinary Division periods where the Bar would be drawn and the doors closed. Thereupon, the Clerk shall open the roll of voters - being the usual Division list - display the ballot boxes and each Member who is willing to vote shall approach the polling table and be issued with a ballot paper. Thereupon, the Clerk shall also cross out the Member's name from the Division list.

Each Member, on receiving a ballot paper which has been duly stamped - and it is important that you ensure that the ballot paper you receive is duly stamped - shall proceed to one of the polling booths and secretly record his or her votes by putting a mark in the space provided

on the ballot paper against the names of your preferred candidates as clustered. After marking the ballot paper and whilst still in the booth, a Member must fold his or her ballot paper and proceed to deposit it in the ballot box. After bowing to the Chair, the Member shall resume his or her seat.

It is important for me to emphasize the following important four aspects of this election. Hon. Members at the door, if you do not wish to listen, you can as well walk out. You have no business making it impossible for others to listen. If you do not desire to listen, just open the door and walk out.

I will repeat. The following are four important aspects of this election:

1) The ballot paper is divided into two clusters. There is the Jubilee Party's cluster which has 14 candidates and the National Super Alliance (NASA) coalition cluster which has 11 candidates;

2) Each Member has a total of nine votes. To exhaust all your nine votes, a Member should choose not more than five candidates from the Jubilee Party's cluster, who should include at least two candidates of either gender, and should also choose not more than four candidates from the NASA coalition's candidates, who should also include at least one candidate of either gender. I stress that you should not exceed nine candidates in total. Do not choose the nine from one cluster;

3) Do not make any other mark on the ballot paper. In accordance with the provision of Rule 17 (4), should a voter mark more than nine places in a ballot paper, it will be regarded as spoilt; and

4) Pursuant to Rule 17 (6), a Member who accidentally spoils a ballot paper while voting is in progress shall, on surrendering the spoilt ballot paper to the Clerks-at-the-Table, be issued with a replacement by the presiding officer.

Hon. Members, at the end of the voting exercise, that is after all Members present and desiring to vote have done so, the presiding officer shall open the ballot boxes and commence the counting and tallying process in the presence of two counting agents. In this regard and as required under Rule 18, the counting agents are the Chief Whips of the Majority and Minority parties. During the tallying and counting process, the House will remain suspended but any Member present in the House will be required to be seated. After the votes have been counted and the result of the election ascertained, I, as the returning officer, will announce the results of the voting exercise in the case of the National Assembly. The presiding officer will report this as required under Rule 19 (a). Thereafter, I will also announce the results of the voting from the Senate. I will also announce the consolidated results to the House after adding up the results. I will cause a message to be transmitted to the Senate in respect of the results of the election conducted in the National Assembly.

Hon. Members, at the end, the persons to be declared elected in respect of the Jubilee Party cluster shall be five with the highest number of votes, who must include at least two candidates of either gender. The persons to be declared elected in respect to the National Super Alliance (NASA) Coalition cluster shall be the four candidates with the highest number of votes who must include at least one candidate of either gender.

Hon. Members, should there be any tie between two or more candidates amongst those with highest votes in any of the two clusters, the process will be repeated in both Houses between the candidates.

I hope that I have explained the process clearly. Members are also reminded that during the exercise, the rules of procedure including the Standing Orders pertaining to orderly conduct remain in force and applicable by the Speaker.

Before I conclude, I also wish to report to the House that on 8th December 2017, the offices of the presiding officers, that is the two Clerks, received a letter from one, Ms. Angela Mweni Munyasia, a candidate under the National Super Alliance (NASA) cluster indicating her withdrawal from the election process. However, under Rule 11 (1)(2) the deadline for withdrawal of candidacy was on Friday, 1st December 2017 at 4.00 p.m. This may be reminiscent of recent events.

In this regard, Hon. Members, the presiding officers did not accept her withdrawal, consequent to which her name appears in the ballot paper notwithstanding her intended withdrawal. The same applies to one, Ms. Doris Ndonya Aburi, who withdrew yesterday past the deadline as well. Ms. Doris Ndonya Aburi was in the Jubilee cluster. Therefore, I order the presiding officer to ring the Division Bell for 10 minutes and prepare the Chamber for voting. I thank you."

Second Session

(13th February 2018 to 11th February 2019)

PETITION FOR REMOVAL OF MEMBERS OF THE JUDICIAL SERVICE COMMISSION

Tuesday, 27th February 2018

Context:

The Speaker had received a Public Petition seeking the removal of a member of the Judicial Service Commission pursuant to Article 251 of the Constitution and National Assembly Standing Order 230, and had been asked to determine the admissibility of the Petition in terms of the Petitions to Parliament (Procedure) Act and the National Assembly Standing Orders

Decision of the Speaker:

1) *The petition did not state with a degree of precision the provisions of the Constitution or any other written law that each member of the JSC is alleged to have violated;*

2) *The petition did not indicate the nexus between the individual commissioners and the alleged grounds for which their removal is sought apart from corporate decisions made in the exercise of their constitutional functions as members of the Judicial Service Commission; and,*

3) *The particulars in the petition in support of the grounds related to administrative actions taken or failed to be taken by the Judicial Service Commission, which could be subjected to judicial review.*

"Honourable Members, I wish to inform the House that my office is in receipt of a petition from one Adrian Kamotho Njenga seeking the removal of Hon. Justice David Maraga, Hon. Lady Justice Philomena Mwilu, Hon. Justice Mohamed Warsame, Hon. Justice Aggrey Muchelule, Prof. Tom Ojienda, Hon. Emily Ominde and Hon. Mercy Deche as members of the Judicial Service Commission pursuant to Article 251 of the Constitution. In support of the Petition, the Petitioner outlines a number of particulars including, among others:

1) Violation of Article 3 on defence of the Constitution, Article 10 on national values and principles of governance, Article 27 on equality and freedom from discrimination, Article 35 on access to information, Article 73 on responsibilities of leadership, Article 168 on removal from office, Article 172 on functions of the Judicial Service Commission and Article 232 on values and principles of public service;

2) Discrimination and victimisation in the treatment of complaints and disciplinary proceedings against judicial officers; and

3) Failure to recommend persons for appointment as Judges of the Court of Appeal.

Hon. Members, the Petitioner calls upon the National Assembly to exercise its mandate under Articles 94, 95 and 251 of the Constitution to ensure that the Judicial Service Commission does not degenerate into further mediocrity on account of unconstitutional conduct by its members by holding the seven commissioners accountable for derogation from binding constitutional standards. He prays that the House:

1) Finds the seven commissioners, jointly and severally:

    a) to have contravened the Constitution and the law;

    b) to have committed acts of gross misconduct in the performance of functions or otherwise; and,

    c) incompetence.

2) Finds that the Petition discloses overwhelming grounds for removal of the seven commissioners as enunciated in Article 251(1) of the Constitution.

3) The House be pleased to send the Petition to His Excellency the President, for the appointment of a tribunal to investigate the matter expeditiously, report on the facts and make a binding recommendation to the President.

Hon. Members, as you are aware, petitions to this House are governed by the provisions of Article 119 of the Constitution where any member of the public can petition Parliament to consider any matter within its authority, including the enactment, amendment or repeal of legislation. Further**,** Hon. Members, this House has enacted the Petition to Parliament (Procedures) Act, 2012 which outlines the modalities of petitioning the House. The procedure set out in the Act is mirrored in the Standing Orders of the House at Standing Order No. 223 for Ordinary Petitions and Standing Order No. 230 for petitions seeking the removal of a member of a constitutional commission or holder of an independent office.

Hon. Members, before I venture into the general admissibility of the in terms of the Standing Orders, I shall first deal with a material issue which the Petition raises by seeking the removal of the Chief Justice as a Commissioner of the JSC. As Members are aware, once a person is appointed as Chief Justice under Article 166 of the Constitution, that person is automatically designated as the President of the Supreme Court and Chairperson of the JSC under Articles 163(1)(a) and 171(2)(a) respectively. With this in mind, a clear reading of the Constitution reveals that the Office of the Chief Justice and that of Chairperson of the JSC are joined at the hip and may only be held by one person. Therefore, a person desirous of removing the Chairperson of the JSC from office must necessarily seek for his or her removal as the Chief Justice. In this regard, a person must petition the JSC for the removal of the Chief Justice via the express procedures provided under Article 168 of the Constitution. Indeed, and by analogy, Article 127(2)(a) of the Constitution automatically designates the person elected as Speaker of the National Assembly to be the Chairperson of the Parliamentary Service Commission. Therefore, a person seeking the removal of the Chairperson of the PSC from office must necessarily seek for the removal from office of the Speaker under Article 106(2)(c) of the Constitution.

Hon. Members, the inclusion of the Chief Justice as a subject of the Petition by the said Adrian Kamotho Njenga, therefore, is, in itself, misplaced and fatal to the Petition. The petitioner, by purporting to move the National Assembly to consider removal of the Chairperson of the Judicial Service Commission by using Article 251 of the Constitution is a long shot, pedestrian and engaging in a fishing expedition. As a result, the House will not be in a position to address itself to the rest of the contents of the Petition in light of that material irregularity alone. It, therefore, follows that this Petition falls on its own sword. I shall, however, proceed to address the rest of the contents of the Petition that similarly raise issues of concern in order to restate the procedural requirements governing petitions for the removal of constitutional office holders and independent offices.

Hon. Members, the Petition as filed seeks the removal of seven members of the Judicial Service Commission jointly and severally on three of the six grounds specified under Article 251(1) of the Constitution, these are, and I quote:

"(a) serious violation of this Constitution or any other law, including a contravention of

Chapter Six;

(b) gross misconduct, whether in the performance of the member's or the office

holder's functions or otherwise;

(c) physical or mental incapacity to perform the functions of office;

(d) incompetence; or

(e) bankruptcy."

Hon. Members, the Petitioner outlines several particulars in support of the grounds without particularity as to which ground they support and which specific member of the Judicial Service Commission they relate to. I have previously guided the House on this issue in a Communication issued on 22nd October 2015 on the processing of Special Motions under Articles 145, 150(2), 152(6) and 251 of the Constitution. In that Communication, I ruled that the grounds outlined for the removal of a constitutional office holder should specifically relate to the individual office-holder with sufficient particularity and annexures or sworn testimonies in support. This House, at the close of the 11th Parliament, amended its Standing Orders to accord with that Communication by including this requirement for particularity at Standing Order No. 230, a Standing Order which provides, and I quote:

"1. In addition to complying with the requirements of paragraphs (a), (b), (c), (d), (h),(i),(j),(l) and (m) of Standing Order No.223 (Form of petition), a petition to the House for removal of a member of a commission or holder of an independent office under Article 251 of the Constitution —

(a)shall—

(i) indicate the grounds under Article 251(1) of the Constitution which the member of the commission or holder of an Independent Office is in breach;

(ii) where the grounds in subparagraph (i) above relate to violation of the Constitution or any other law, state with a degree of precision the provisions of the Constitution or any other written law that have been alleged to be violated;

(iii) indicate the nexus between the member or office holder concerned and the alleged grounds on which removal is sought; and

(b) may contain affidavits or other documents annexed to it."

Hon. Members, a further close look at Article 251 of the Constitution and National Assembly Standing Order 230 reveals that a petition to this House pursuant to Article 251 of the Constitution must relate to an individual. The grounds advanced against the individual must be stated with particularity and be adequately supported in order to guide the Speaker and the House in admitting the petition or subsequently recommending the formation of a tribunal as stipulated under the Article. The petition filed by the said Adrian Kamotho Njenga is couched

in corporate terms and therefore fails the admissibility test on that count.

Hon. Members, in the particulars provided in support of the omnibus grounds for removal of the cited members of the Judicial Service Commission, the petitioner alleges discrimination and victimisation by the Commission in the treatment of complaints and disciplinary proceedings against named judicial officers. It is my considered opinion that disciplinary proceedings commenced against judges or other judicial officers are in the nature of administrative actions governed by Article 47 of the Constitution on fair administrative action, and the provisions of the Fair Administrative Action Act, 2015. You may agree with me that this House is not an appellate forum for ventilating appeals arising out of administrative proceedings of the JSC. I wish to caution members of the public that Parliament is not a place to settle constitutional grievances without first adhering to the very same Constitution that they seek to rely on, especially matters administrative. Consequently, a judge or complainant aggrieved by any administrative action taken or not taken by the Judicial Service Commission has an adequate remedy in judicial review before the courts.

Hon. Members, as a matter of procedure, the Petition to Parliament (Procedure) Act, 2012 obliges the Clerk of the National Assembly to verify the admissibility of a petition to the House and advise the Hon. Speaker on whether the petition should be tabled in the House. Where a petition is found to be inadmissible, the Clerk responds to the petitioner, drawing his or her attention to the nature of inadmissibility.

I have taken this unprecedented step of issuing this communication to the House on this petition before its tabling in light of the subject it relates to; being a constitutional commission which deals with matters of one arm of the Government, and the amount of public interest that this petition has generated. Therefore, I accordingly direct that the petition by the said Adrian Kamotho Njenga is hereby inadmissible as it seeks the removal from office of the chairperson of the Judicial Service Commission in a manner not contemplated by the Constitution; a prayer that is fatal to the entire petition. In addition, the petition by the said Adrian Kamotho Njenga is inadmissible as:

1) it does not state with a degree of precision the provisions of the Constitution or any other written law that each Member of the Judicial Service Commission is alleged to have violated;

2) it does not indicate the nexus between the individual commissioners and the alleged grounds for which their removal is sought apart from corporate decisions made in the exercise of their constitutional functions as the Judicial Service Commission; and,

3) the particulars indicated in support of the grounds relate to administrative actions taken or failed to be taken by the Judicial Service Commission, which are subject to judicial review.

Therefore, I direct that the Clerk prepares and conveys an appropriate response to the petitioner informing him that his petition has failed miserably and is, accordingly, inadmissible.

Please be guided accordingly."

THE ALLEGED *SUB JUDICE* STATUS AND UNCONSTITUTIONALITY OF THE NAIROBI METROPOLITAN AREA TRANSPORT AUTHORITY BILL

Tuesday, 20th March 2018

Context:

1) *The Speaker had been asked to declare the Nairobi Metropolitan Area Transport Authority Bill (National Assembly Bill No. 41 of 2017) inadmissible for consideration by the House on grounds of unconstitutionality.*

2) *In substantiation of the inadmissibility claim, documents were tabled and included a copy of a High Court Petition No. 94 of 2018 as proof of sub judice.*

Decision of the Speaker:

1) *Standing Order No. 89 relating to matters sub judice does not apply as the referenced High Court Petition relates to a different matter separate from matters addressed in the particular Bill.*

2) *The claims made by the Member neither cited nor indicated the particular clause of the Bill that was likely to offend any provision of the Constitution, was the Bill to be passed by the House.*

"Honourable Members, you may recall that on Thursday, 15th March 2018, the Member for Mathare Constituency, Hon. Anthony Tom Oluoch, rose on a point of order and invited the Speaker to declare the Nairobi Metropolitan Area Transport Authority Bill (National Assembly Bill No. 41 of 2017) inadmissible for consideration by the House on grounds of unconstitutionality under application of Standing Order No.89 relating to matters *sub judice*.

In his submissions, the Member referred to Articles 187 and 189 of the Constitution, the Inter-Governmental Relations Act of 2012, and Standing Orders No. 83(3), 89(4), 117(c) and 118. The Member also questioned the Memorandum of Understanding (MOU) signed between the National Government and the five County Governments towards the establishment of the Nairobi Metropolitan Transport Authority and then proceeded to lay before the House a letter addressed to the Speaker of the National Assembly in connection with his claims. He also laid an annexure containing among other items a copy of a High Court Petition No. 94 of 2018, the parties being one Wanjiru Gikonyo versus the Attorney-General and others.

Hon. Members, in the ensuing debate, various Members amongst them the Hon. Jude Njomo, Hon. Rahab Mukami, Hon. Waihenya Ndirangu, Hon. Rindikiri Murwithania and Hon. David Pkosing ventilated on the various aspects of the Bill. In particular, Hon. David Pkosing, who is also the Chairperson of the Departmental Committee on Transport, Public Works and Housing, stated that the MoU between the two levels of Government had been signed in connection with the operations of Nairobi Metropolitan area, as contemplated under Article 189(2) of the Constitution. He pointed out that the Government, by Gazette Notice

No. 1093 of 20th February 2015, had established a steering committee that brought together key technical stakeholders for all the five counties involved in the understanding. Indeed, the Chairperson acknowledged that during the public participation phase of the proposed legislation, his Committee received and deliberated on the same claims of *sub judice* as well as unconstitutionality of the Bill and found them to be misplaced.

Hon. Members, from the submissions of the Member for Mathare, I have deduced two areas that require guidance emanating from the matters raised as follows:

1) Whether the provision of Standing Order No. 89 relating to matters *sub judice* will limit the House from considering and passing the Nairobi Metropolitan Area Transport Authority Bill 2017; and,

2) Whether the Nairobi Metropolitan Area Transport Authority Bill No. 41 of 2017 is unconstitutional.

At the outset, I wish to inform the House that my reading of the Long Title of the Bill reveals that the principal object of the Nairobi Metropolitan Area Transport Authority Bill National Assembly Bill No. 41 of 2017 is to give effect to Article 189(2) of the Constitution. This will be by establishing the Nairobi Metropolitan Area Transport Authority and provide for an integrated and sustainable public transport system within the Nairobi Metropolitan Area that consists of the counties of Nairobi, Kiambu, Machakos, Kajiado and Murang'a.

Hon. Members, as a matter of fact, the documents laid by the Member for Mathare Constituency relate to a matter in the High Court by one Wanjiru Gikonyo, the petitioner, as aforementioned, challenging the constitutional validity of Legal Notice No. 18 of 2017. The legal notice created the Nairobi Area Authority by way of an Executive Order issued by His Excellency the President in exercise of his powers under Section 3 (1) of the State Corporations Act Cap. 446 and made several appointments thereto. This Petition does not, in any way touch on the Bill before this House.

Further, you will agree that the *sub judice* rule does not, in any circumstances, apply to the legislative authority of the House as provided for under Articles 94, 95 and 109 of the Constitution.

Moreover, Erskine May, the celebrated authority in Parliamentary Practice and Procedure, on page 396 of the 24th Edition of his book speaking to this matter of *sub judice*, states:

"The House has expressly resolved that the sub judice rule is qualified by the right of the House to legislate on any matter."

In light of the foregoing and particularly in consideration of the fact that the aforementioned High Court Petition, relates to a different matter separate from this particular Bill, it is my view and conclusion that the Standing Order No. 89 relating to matters *sub judice* does not apply to this Bill currently before the House. This, therefore, settles the first question raised by Hon. Oluoch.

Hon. Members, as regards the second question concerning constitutionality of the Nairobi Metropolitan Area Transport Authority Bill, I wish to remind the House that I have previously ruled that a question on the constitutionality of a Bill may be raised by Members at any stage of the Bill. Members may wish to refer to my earlier ruling on the admissibility of the National Police Service and the National Police Service Commission Bills of 25th September 2013 and the constitutionality of the National Police Service Commission (Amendment) Bill of 13th November 2013.

In the matter at hand, the Member for Mathare has neither cited nor indicated which particular clause of the Bill is likely to offend any provision of the Constitution, should the Bill be passed by this House. If the Member was to convince me and, indeed, this House, that any clause of the Bill contravenes any provision of the Constitution, I would, without hesitation, order the specific clause or clauses to be struck off from the Bill during the Committee of the whole House stage.

However, Hon. Members, it will be actually inconceivable that the entire Bill, from its title all through to its 46 clauses and its schedules would offend all the 206 articles of our Constitution and all its six schedules. In the circumstances, I, therefore, do not see anything unconstitutional with the Nairobi Metropolitan Area Transport Authority Bill (National Assembly Bill No. 41 of 2017) as published and is before the House. I, therefore, reject the contention or argument by Hon. Oluoch and order that the Bill proceeds through its remaining stages in accordance with the Standing Orders of this House. The Member and, indeed, the House stands accordingly guided.

I thank you."

CONSIDERATION OF LEGAL NOTICE RELATING TO PROVISIONAL COLLECTION OF TAXES AND DUTIES ORDER, 2018

Wednesday, 27th June 2018

Context:
Manner of consideration of the Provisional Collection of Taxes and Duties Order, 201 (Legal Notice No. 128 of 21st June 2018) with regard to the Finance Bill 2018, and the relevant Committee to consider the Order.

Decision of the Speaker:
The Speaker referred the Legal Notice to the Departmental Committee on Finance and National Planning for consideration and not Committee on Delegated Legislation which is the Committee mandated by the Statutory Instruments Act and National Assembly Standing Orders to scrutinise statutory instruments. This is because the matters referred to in the Legal Notice as published were matters of 'ways and means'.

"Honourable Members, this Communication relates to guidance regarding consideration of Legal Notice No. 128 of 21st June 2018 relating to the Provisional Collection of Taxes and Duties Order, 2018.

Legal Notice No. 128 of 21st June 2018, which has been tabled by the Leader of the Majority Party, relates to the Provisional Collection of Taxes and Duties Order in respect to the Finance Bill, 2018 and was published in the Gazette on 19th June 2018.

Article 210(1) of the Constitution provides that no tax or licensing fee may be imposed, waived or varied except as provided by legislation. Further, Section 2 of the Provisional Collection of Taxes and Duties Act regarding provisional orders provides that:

> *"If a Bill is published in the Gazette whereby, if such Bill were passed into law, any tax or duty, or any rate, allowance or administrative or general provision in respect thereof, would be imposed, created, altered or removed, the Cabinet Secretary may, subject to this Act and notwithstanding the provisions of any other written law relating to taxes and duties, make an order that all or any specified provisions of the Bill relating to taxes or duties shall have effect as if the Bill were passed into law".*

Hon. Members, you recall that under the Statutory Instruments Act and National Assembly Standing Orders, all Orders are statutory instruments and therefore require approval of the House. Provisional Collection of Taxes and Duties Order, in respect of the Finance Bill, 2018, is a ways and means matter. I will, therefore, refer the Legal Notice to the Departmental Committee on Finance and National Planning for consideration and not Committee on Delegated Legislation which is the Committee mandated by the Statutory Instruments Act and Standing Orders to scrutinise statutory instruments. This is because the matters in the Gazette Notice as published relate to matters dealing with finance.

Hon. Members, the Committee is required to scrutinise the Order and submit its report on or before – and this is important – Wednesday, 4th July 2018.

I thank you. "

INVESTIGATORY MANDATE OF COMMITTEES AND CONDUCT OF MEMBERS IN COMMITTEES

Thursday, 26th July 2018

Context:

The Speaker was requested to guide the House on investigatory functions of committees vis a vis investigative agencies, and alleged impropriety, conflict of interest, contact with witnesses, premature disclosure of committee proceedings, attendance by members of the National Executive, interference from non-committee Members while carrying out investigations in committees.

Decision of the Speaker:

1) *Each Committee to decide and resolve on the urgency of the inquiry they propose to undertake if an investigative agency is conducting a parallel investigation. Where prosecution has preferred charges on individuals of interest to a Committee on matters similar or substantially similar to those before it, the inquiry before the Committee should be suspended, but not stopped. Any further inquiry may only proceed with the leave of the Speaker.*

2) *Prior to the commencement of every meeting, every Chairperson must require that Members declare their interest in any matter under consideration.*

3) *Members to relate with persons appearing as witnesses before Committees at "arms-length". While appearing before a Committee, witnesses should be ushered in and escorted out by the secretariat or the Serjeant-at-Arms. Members to also endeavour to avoid making any contacts with witnesses prior to or during hearings.*

4) *As a rule, the House shall cater for all expenses relating to a matter under inquiry by a committee. Any proposal by any organisation to co-fund a committee activity should be treated with caution. If such co-funding or funding shall be considered necessary, requests should be directed to the Office of the Clerk for review and approval on a case-by-case basis.*

5) *The Clerk of the National Assembly immediately puts in place administrative measures to reserve marked sitting places for each committee member at any meeting of a committee.*

6) *It shall be upon the Chairperson of a Committee to determine the number of non-Committee members, the so called "friends", to allow to participate in a Committee sitting at any given time, taking into account the available sitting space and convenience of the Committee.*

7) *A Chairperson of a Committee shall give priority to Committee members in the asking of questions in a Committee sitting. In this regard, a non-Committee member may only speak with the permission of the Chairperson. That is after the Chairperson has determined that the members of the Committee may not be desirous of asking further questions.*

8) *A Chairperson shall report to the Speaker any incident where a non-Committee member grossly misconducts himself or herself during a Committee sitting for disciplinary action in the House.*

9) *Forthwith, contravention of Standing Order No. 86 that prohibits premature reference to proceedings before Committees constitutes an act of gross disorderly conduct pursuant to Standing Order No. 107A(1)(i); attracting suspension or discharge from a Committee. This includes taking of photographs and posting them on various social media sites through WhatsApp and such-like platforms.*

10) *Committees should consider allowing either the Principal Secretary or a senior officer of a ministry to attend and respond to queries where the personal attendance of a Cabinet Secretary can be excused, save for examination of matters before the audit Committees; the Public Accounts Committee, the Public Investments Committee and the Special Funds Accounts Committee where accounting officers must appear in person to respond to audit queries as required by law.*

"Honourable Members, you will recall that on Tuesday, 12th June 2018, the Member for Igembe North Constituency, Hon. Maoka Maore, stood on a point of order pursuant to Standing Order No. 83, and sought the guidance of the Speaker on the scope of investigatory functions of the committees of the House. In particular, the Hon. Member invited the Speaker to pronounce himself on whether the power to investigate, as enshrined in our Standing Orders, contemplates the Committees of the House undertaking parallel investigations of matters under investigation by investigative agencies of the State such as the Directorate of Criminal Investigation (DCI), the Ethics and Anti-Corruption Commission (EACC) and the Directorate of Public Prosecutions (DPP).

In his submission, the Member for Igembe North was concerned that Committees of this august House are in his words: "*of late seemingly engaged in chasing newspaper headlines*". This means that the committees may be reactively basing the subject of their inquiries on media reports rather than proactive work plans or reports of specialised offices such as that of the Auditor-General, the Controller of Budget and other offices established by law, and which submit statutory reports to the National Assembly, especially with regard to cases of alleged misuse of public funds.

Further, Hon. Maoka Maore was concerned that audit Committees were seemingly deviating from their mandates of considering reports by the Auditor-General and instead undertaking preliminary inquiries which fall within the purview of the Office of the Auditor-General. He sought direction from the Speaker on whether the undertaking of parallel investigations by the House committees amount to duplication, noting that the end results of investigations by the committee would be recommendations that the relevant investigatory agencies proceed to investigate the same matters.

Hon. Members, as you may recall, the Leader of the Majority Party, Hon. Aden Duale; Hon. Olago Aluoch, Hon. (Dr.) Eseli Simiyu, Hon. Kimani Ichung'wah and Hon. Opiyo Wandayi ventilated at length in reaction to the matter upon which I undertook to issue a considered ruling. You will also recall that on Wednesday, 4th July 2018 during the afternoon Sitting, the Leader of the Majority Party similarly rose on a point of order and sought the Speaker's guidance on the conduct of Members in committees. In his submission, the Leader of the Majority Party highlighted various instances where, in his opinion, the conduct of Members with regard to commenting on matters which are active before court, attendance and submission in meetings as friends of committees and cosying with witnesses portray the House in bad light. He concluded by seeking the Speaker's guidance to the House on how Members should conduct themselves while participating in activities of the House and committees, in accordance with the Constitution and Standing Orders.

Hon. Members, from the ensuing debate, Members, including the Leader of the Minority Party; Hon. John Mbadi, Hon. Olago Aluoch, Hon. Mark Nyamita and Hon. Charles Kilonzo contributed in support of the point of order raised by the Leader of the Majority Party and raised further issues for the guidance of the Speaker, which I summarise as follows:

1) the issue raised by Hon. Maore over the apparent reactive nature of House committees basing their work on media reports instead of generating their own business;

2) the manner of interrogating and questioning witnesses appearing before committees;

3) the repeated failure by Members to declare their interests in matters under consideration by committees as required by the Parliamentary Powers and Privileges Act and the Standing Orders;

4) the apparent failure by Members to relate at arm's length with witnesses who appear before the committees before they enter meetings, during interrogation and in the course of their exit from meetings;

5) the repeated and unreported failure by Members to attend committee meetings;

6) the apparent conflict of interest and alleged compromise of committees where committee activities are partly or wholly funded by State or private entities; and,

7) the attendance and indecorous participation by non-committee members in committee meetings as friends of the said committees.

Hon. Members, at the close of debate on the point of order raised by the Leader of the Majority Party, I undertook to give a comprehensive Communication to guide the House on the conduct of Members in committees. I shall proceed to dispose of the points by the Leader of the Majority Party and Hon. Maore in this Communication.

Hon. Members, on the question as to whether the investigatory work of the committees of the House may lead to unnecessary duplication and result in futile recommendations, I wish to note that the House has an inherent investigatory mandate given to it. This mandate is discharged through committees which, as Hon. Maore rightly contend, are the turbines which move the House. The manner in which the House and its committees carry out investigations is fundamentally different from the manner in which agencies such as the Directorate of Criminal Investigations (DCI) and the Ethics and Anti-Corruption Commission (EACC) conduct their investigations. Indeed, a probe by the House in the public interest may unearth more information than an investigation by either of the two agencies, in which a witness may be wary of self-incrimination. The House can investigate by seeking primary evidence or rely on secondary evidence through the Special Funds Accounts Committee (SFAC), the Public Investment Committee (PIC) and the Public Accounts Committee (PAC) with regard to audited reports submitted by the Office of the Auditor-General.

The investigatory power of the House is drawn directly from the authority granted by the people who have equivocally entrusted it with the role of appropriating public revenues, approving revenue raising measures and exercising oversight over public expenditure. As a guardian of the public purse, it will be inimical of Parliament to turn a blind eye to the manner in which public monies that it voted are utilised by constitutional commissions, independent offices, and the Executive and its agencies. Indeed, a legislature which assumes the role of a bystander waiting to consume reports from other quotas before taking action will, to say the least, be dancing on brick sand.

Hon. Members, the Standing Orders are clear on the investigatory mandate of the House and its committees. With respect to PAC, Standing Order No. 205(1) and (2) provide the follows:

> *"The PAC shall be responsible for the examination of the accounts showing the appropriation of sums voted by the House to meet the public expenditure and of such other accounts laid before the House as the Committee may think fit."*

I put emphasis on the words *"accounts"* and *"laid before the House"*.

For the newly created SFAC, Standing Order No. 205(A)(2) states as follows:

> *"The Committee shall be responsible for the examination of the accounts of the Equalisation Fund, the Political Parties Fund, the Judiciary Fund, the National Government Constituencies Development Fund (NG-CDF) and other such other Funds established by law as the Speaker may direct."*

Finally, Standing Order No. 206(2) relating to the PIC provides as follows:

> *"The PIC shall be responsible for the examination of the working of the public investments on the basis of their audited reports and accounts."*

Here, the emphasis is on the expression, *"On the basis of their audited reports and accounts."*

Hon. Members, a close reading of the said Standing Orders suggest that the primary source of information for the work of audit is the Office of the Auditor-General. Hence, the three audit-related Committees may only commence an inquiry into alleged misuse of public revenue upon receipt of an audit report on the accounts from the Auditor-General or other specially appointed auditors on the accounts from which funds are alleged to have been misused.

Hon. Members, as you are aware, the Auditor-General submits reports to the House on an annual basis and those reports are always laid before the Table of the House by the Leader of the Majority Party or a person deputed by him in that regard. Nevertheless, audit committees like the SFAC, PAC and PIC are not precluded from requesting the Auditor-General to undertake a special audit when the need arises to examine the accounts of a public entity to ascertain whether or not monies are being managed according to sound financial principles. Indeed, through the PAC, previous Parliaments effectively investigated allegations of misuse of public funds that came to life in the course of their work or examination of issues; and, upon guided preliminary inquiries, the PAC requested the Auditor-General to undertake a special audit. However, it is a special audit that ultimately became the basis of subsequent in-depth investigations. In my considered opinion, there exists no justification for deviating from this established practice.

Hon. Members, in the Standing Orders, the departmental committees have been granted latitude to investigate specified matters concerning State departments and agencies falling within their mandate at any time. Standing Order No. 216 (5) provides that:

> *The functions of departmental committees shall be:*
>
> a. *Investigate, inquire into and report on all matters relating to the mandate, management activities, administration, operations and estimates on the assigned ministries and departments.*

This House has, therefore, charged the departmental committees with the duty of conscientiously to inquire into and report on the administration, operations, management activities and,

indeed, the estimates to the assigned line ministries and departments and/or agencies. Accordingly, Standing Order No. 216(5) does not contemplate departmental committees inquiring into accounts of line ministries, departments and agencies. But the programmes and policy objectives of the line ministries/departments and agencies and the effectiveness of the implementation as part of their routine oversight function on behalf of Parliament.

Hon. Members, allow me to share with the House the conclusions of a study carried out by two parliamentary scholars, Brazier and Ram in 2006, which are instructive in this matter. The two scholars observed that the Government is accountable to the people through Parliament for raising and using public funds. They also noted that the concept of financial accountability as Parliament and since the 13th Century, the raising and use of public funds has been subject to Parliament. Finally, the two scholars emphasised that, in modern times, one of the important functions of Parliament is to hold the Government accountable for its spending of public money.

Indeed, it is a general public expectation that Parliament should keep an eye on the Government expenditure. Consequently, Parliament, through its Committees, is obligated to look for instances of misuse of public money and prescribe the necessary remedies. But that responsibility must be dispensed in accordance with the rules set out in our Standing Orders which assign different responsibilities to the various Committees of the House.

The Parliamentary Service Commission has assigned qualified and competent staff to support committees for effective and efficient running of committee affairs in line with their oversight mandates. Where this is found to be inadequate, the Parliamentary Service Commission is always amenable to suggestions for improvement. This is more so to inquiries. In addition, some committees consume the services of other agencies that are attached to Parliament, including the Office of the Auditor-General, the Controller of Budget and the Inspectorate of State Corporations. For the effective conduct of inquiries, Chairpersons and Members are expected to accord those officers the opportunity to render their advice before the commencement. During committee hearings, committees may hold preparatory meetings in this regard in order to structure their engagement with witnesses and efficiently utilise their time. This is crucial in effective interrogation and questioning of witnesses.

The existence of parallel investigations does not preclude the Committees of the House from discharging their constitutional mandate. Further, Committees have no way of dictating time lines applicable to investigations outside Parliament. This House has had an occasion to conduct various inquiries in the public interest, which culminated in evidence-based recommendations and formed the basis for prosecution of cited perpetrators. It rests upon each Committee to decide and resolve on the urgency of the inquiry they propose to undertake. But where persons who are being investigated are charged in courts of law and prosecution commences on the same matters that are substantially as the same as those before the Committee, I see no use in the particular Committee proceeding with the matter unless there is new information different from those being prosecuted in courts of law.

With regard to chasing of headlines, (this is what Hon. Maoka Maore referred to), I note that the mandate of debating and resolving issues of concern to the people is provided for in Article 95 (1) of the Constitution. It ultimately calls upon the House to be both proactive and reactive. As highlighted to Members during the comprehensive induction programme, both the House and individual committee levels, the major issues of the business of the House are transacted before committees. The Standing Orders clearly outline the mandates of each Committee. Members have been sensitised on the need to formulate committee work plans covering their mandate for the optimal use of the time afforded by the calendar of the House. Nevertheless, a work plan cannot predict when an accident, tragedy or emergency will occur

or when a whistle blower decides to come forward. Formulation of a proper work plan assists a Committee to discharge its mandate effectively in ordinary times. Since a Committee is also expected to discharge its mandate in extraordinary times, the true test of the discharge of its mandate is how well it adjusts its existing work plan to effectively navigate any matters that may be of an urgent nature. The administrative mechanisms systems that the House has put in place have rationalised committee operations. Any inquiry that a Committee undertakes is instructed with refined reporting timelines, including requirements for submission of progress reports.

In his contribution on the point raised by the Leader of the Majority Party, Hon. Olago Aluoch touched on the apparent lack of interrogatory skills by some Members during committee meetings. While I may not entirely agree with Hon. Olago Aluoch, I do note that the art of effective interrogation is a skill acquired over time. There is no harm in Members studying how ranking Members of the House, senior legal practitioners, judges of superior courts and, indeed, their colleagues in other parliaments effectively interrogate witnesses. Members have to remember at all times that the aim of an interrogation is to bring out or reveal information relevant to the matter under consideration by the Committee. Coercion, intimidation and embracing of witnesses rarely aids in this objective.

I need not reiterate the rules relating to declaration of interests. As you will recall, upon assuming office by dint of Paragraph 10 of the Fourth Schedule to the Parliamentary Powers and Privileges Act, 2017, each one of you was deemed to have signed the code of conduct for Members contained in that Fourth Schedule of the said Act upon taking oath of office. Indeed, paragraph 6 of the code provides that:

"Members of the House shall:

(a) *Register with the relevant Speaker all financial and non-financial interests that may reasonably influence their parliamentary actions.*

(b) *Before contributing to debates in the House or its Committees or communicating with State officers or public servants, declare any relevant interest in the context of parliamentary debate or the matter under discussion.*

(c) *Observe any rules agreed of the House in respect of financial support for Members or the facilities of the House."*

Further, Standing Order 90 states, and I quote:

"(1) A Member who wishes to speak on any matter in which the Member has a personal interest shall first declare that interest.

(2) Personal interests include pecuniary interest, proprietary interest, personal relationships and business relationships."

Hon. Members, these rules are self-explanatory. It is, therefore, incumbent upon every chairperson of a committee to ensure that, prior to the commencement of every meeting, that Members declare their interest in any matter falling with the agenda items of that particular sitting. At no time may you be seen as advancing a personal interest. Failure to disclose an interest creates a presumption that any contribution made to a matter under consideration by the House or a committee, however relevant, advances your personal interest as a Member.

Article 73 of the Constitution outlines the nature and responsibilities of leadership. It states, and I quote:

"(1) Authority assigned to a State officer—

(a) *is a public trust to be exercised in a manner that—*

(i) *is consistent with the purposes and objects of this Constitution;*

(ii) *demonstrates respect for the people;*

(iii) *brings honour to the nation and dignity to the office;*

(iv) *promotes public confidence in the integrity of the office; and,*

(b) *vests in the State officer the responsibility to serve the people, rather than the power to rule them.*

(2) The guiding principles of leadership and integrity include—

(a) *selection on the basis of personal integrity, competence and suitability, or election in free and fair elections;*

(b) *objectivity and impartiality in decision-making, and in ensuring that decisions are not influenced by nepotism, favoritism, other improper motives or corrupt practices;*

(c) *selfless service based solely on the public interest, demonstrated by—*

(i) *honesty in the execution of public duties; and,*

(ii) *the declaration of any personal interest that may conflict with public duties."*

Hon. Members, the authority granted to you by the people of Kenya is a public trust. The manner in which you exercise this authority must reflect the dignity of the office that you hold and the people have called upon you to perform. Consequently, Members must relate with persons appearing as witnesses before the Committees at an "*arms-length*." The advent of participation of the public in the processes of the House pursuant to Article 118 of the Constitution has thrust the conduct of Members in the full glare of the public like never before and, more so, when proceedings are streamed live online, or broadcast live by the various TV stations. Members must conduct themselves with utmost respect while interacting with witnesses. In this regard, while appearing before committees, witnesses should be ushered in and escorted out by the secretariat or the Serjeant-at-Arms. Chairpersons are reminded of this responsibility to be observed at all times. Not Members escorting witnesses.

Hon. Members, as you are aware, Committees are an extension of the House whose creation is mandated by Article 124 of the Constitution. Just as failure to attend eight sittings of the House may lead to the vacation of a Member's seat, the House thought it fit to sanction the discharge of a Member who fails to attend four consecutive sittings of a Committee without permission or sufficient reason. The Clerk of the National Assembly has put in place mechanisms for the recording and reporting of the attendance of Committee Meetings. In this regard, I am in receipt of a current report and shall request the Liaison Committee and the House leadership to review it and take action on any errant members as appropriate. Cases abound of members barely sitting through a public hearing. It is time we confronted this reality and choose to enforce order and decorum in committees.

During the ensuing debate on the point raised by the Leader of the Majority Party, the Hon. Mark Nyamita and the Hon. Charles Kilonzo queried the propriety of State or private entities funding Committee activities and whether such funding may conflict or compromise the inquiry process. As you are aware, the Parliamentary Service Commission is allocated adequate funds to facilitate the two Houses and their organs to discharge their respective mandates as provided for under the Constitution. Each Committee of the House is allocated adequate funds to enable it carry out its programmes. This is meant to insulate Parliament from external direction or control. The Office of the Clerk receives and processes requests for facilitation of Committee activities in line with the adopted work plans and budgets. Any engagement with committees outside their planned activities should be channelled through the Office of the Clerk who will review the nature of the engagement and any details related to the welfare of Members. As a rule, the House caters for all expenses relating to a matter under inquiry by a Committee to dispel any perception of undue influence, conflict of interest or bias. Nevertheless, you will recall that the work of the House and its Committees is not limited to inquiry. The Executive may, on its own motion, wish to engage the House or its Committees in consultation on matters of policy or review ongoing programmes and activities. In this regard, co-funding such an engagement is permissible as long as the relationship is maintained at "*arms-length*". My Office and that of the Clerk shall consider any such requests from the Executive and private entities and use our discretion, on a case-by-case basis.

Hon. Members, of late, some Committees seem to have many non-committee Members, commonly referred to as '*friends of committee'*. Indeed, in some instances as alluded to by the Leader of the Majority Party and other Members, these '*friends*' have adopted the behaviour of the proverbial camel. The camel begged and received permission to insert only its nose into a traveller's tent, but proceeded to insert its entire body and subsequently evict the traveller from his lodging. There is no bar to non-committee Members attending the proceedings of a Committee. Indeed, Standing Order 195 allows this, only barring non-committee Members from voting. Members would refrain from attending the meetings of other Committees in previous Parliaments despite this permission. The scenes recently witnessed where Committee Members are outnumbered by their 'friends' to the extent that they lack sitting space and adequate time allocation to prosecute their mandate are unfortunate and unacceptable. This is an abuse of the spirit of Standing Order 195 and has cast the House in very negative light with regard to the seriousness and decorum of Committee proceedings. Consequently, to remedy this, I, therefore, direct that the Clerk of the National Assembly immediately puts in place administrative measures to reserve marked sitting places for each committee member at any meeting properly convened. It shall be upon each chairperson to determine the number of non-committee members to participate in a committee sitting at any given time, taking into account the available sitting space.

In light of the fact that all Members have the opportunity to discuss any matter reported to the House by a Committee, Chairpersons of Committees shall give priority to Committee Members in examination of matters before the Committee, including asking questions and a non-committee Member may only speak with the permission of the Chairperson and may be ordered to withdraw from the committee sitting for disorderly conduct. Further, a non-committee Member is not permitted to sit in the Committee during the internal sittings of the Committee, including the pre-inquiry sittings, confirmation of minutes or report writing meetings.

It has come to my attention also that some Committees are insistent on Cabinet Secretaries appearing before them in person to answer queries directed to the ministry. I am fully cognisant of the provisions of Article 153(3) and (4)(b) of the Constitution which oblige a Cabinet Secretary to attend before a committee of the National Assembly when required by

the Committee and, answer any question concerning a matter for which the Cabinet Secretary is responsible and provide Parliament with full and regular reports concerning matters under their control, respectively. Nevertheless, Hon. Members, Committees ought to be alive to the possibility that awaiting the eventual appearance of a Cabinet Secretary to answer all queries in person may prejudice the effective discharge of their mandate. In this regard, I urge Committees, on a case-by-case basis, to consider allowing either the Principal Secretary or any senior officer of a ministry, to attend and answer queries where the personal attendance of the Cabinet Secretary can be excused. Indeed, technical officers are the best placed to respond to issues of technical nature. However, this is not a blanket excuse to Cabinet Secretary's' appearance before Committees when required to appear.

As I conclude, the House is reminded that the Constitution places strict obligations on the conduct of Members in the discharge of their role as leaders. Parliament is under constant scrutiny. Committee meetings are open to the public and proceedings are now streamed live online and on television sets. The actions, comments, body language, gestures and even grooming of Members is under constant evaluation by the people of Kenya. The partial or indecorous conduct of an individual Member or a Committee of the House is deemed, by extension, as the conduct of the House. Let us strive to do better and uphold the dignity of the House.

In summary, I direct the following:

One, it rests upon each Committee to decide and resolve on the urgency of the inquiry they propose to undertake if an investigative agency is conducting a parallel investigation. Where prosecution has preferred charges on individuals of interest to a Committee on matters similar or substantially similar to those before it, the inquiry before the Committee should be suspended, but not stopped. Any further inquiry may only proceed with the leave of the Speaker.

Two, prior to the commencement of every meeting, every Chairperson must require that Members declare their interest in any matter under consideration.

Three, Members should relate with persons appearing as witnesses before Committees at "arms-length". In this regard, while appearing before a Committee, witnesses should be ushered in and escorted out by the secretariat or the Serjeant-at-Arms. Members should also endeavour to avoid making any contacts with witnesses prior to or during hearings.

Four, as a rule, the House shall cater for all expenses relating to a matter under inquiry by a committee. Any proposal by any organisation to co-fund a committee activity should be treated with caution. If such co-funding or funding shall be considered necessary, requests should be directed to the Office of the Clerk for review and approval on a case-by-case basis.

Five, the Clerk of the National Assembly immediately puts in place administrative measures to reserve marked sitting places for each committee member at any meeting of a committee.

Six, it shall be upon the Chairperson of a Committee to determine the number of non-Committee members, the so called "friends", to allow to participate in a Committee sitting at any given time, taking into account the available sitting space and convenience of the Committee.

Seven, a Chairperson of a Committee shall give priority to Committee members in the asking of questions in a Committee sitting. In this regard, a non-Committee member may only speak with the permission of the Chairperson. That is after the Chairperson has determined that the members of the Committee may not be desirous of asking further questions.

Eight, a Chairperson shall report to the Speaker any incident where a non-Committee member

grossly misconducts himself or herself during a Committee sitting for disciplinary action in the House.

Nine, forthwith, contravention of Standing Order No. 86 that prohibits premature reference to proceedings before Committees constitutes an act of gross disorderly conduct pursuant to Standing Order No. 107A(1)(i); attracting suspension or discharge from a Committee. This includes taking of photographs and posting them on various social media sites through WhatsApp and such-like platforms.

Ten, Committees should consider allowing either the Principal Secretary or a senior officer of a ministry to attend and respond to queries where the personal attendance of a Cabinet Secretary can be excused, save for examination of matters before the audit Committees; the Public Accounts Committee, the Public Investments Committee and the Special Funds Accounts Committee where accounting officers must appear in person to respond to audit queries as required by law.

The House is so guided.

I thank you."

GUIDING DEBATE ON THE REPORT OF THE INQUIRY INTO ALLEGED IMPORTATION OF ILLEGAL AND CONTAMINATED SUGAR IN THE COUNTRY

Thursday, 9th August 2018

Context:

Determination on the authenticity of the Report tabled by the Joint Committee on Agriculture, Livestock and Cooperatives, Trade and Industry on Inquiry into Alleged Importation of Illegal and Contaminated Sugar in the Country, and whether the Joint Committee missed any procedural steps in compiling its Report.

Decision of the Speaker:

1) *Pursuant to the provisions of Standing Order 199, the Report before the House was authentic as it met the requirements of the Standing Orders.*

2) *Pursuant to the provisions Standing Order 199, the Members of the Joint Committee who may have had dissenting opinion from the majority of Members who adopted the Report ought to have considered recording, as part of the Report, their dissenting views, but in absence of such record in the Report, the House should proceed to consider the Report as tabled and ignore those purported minority views.*

"Honourable Members, I have a Communication to make which will guide the debate on the Report of the Inquiry into Alleged Importation of Illegal and Contaminated Sugar in the Country. Hon. Members, before we proceed with this Order relating to consideration of the Report of the Joint Departmental Committees on Agriculture and Livestock and Trade, Industry and Cooperatives on the inquiry into the alleged importation of illegal and contaminated sugar in the country, I wish to make a Communication, which is aimed at facilitating the business of the House, in view of certain matters that have arisen relating to part of the contents of the Report.

Hon. Members, you will recall that on Wednesday, 1st August 2018, I interrupted the business of the House to allow the chairpersons of the Joint Committees on Agriculture, Livestock and Cooperatives, Trade and Industry to table the aforementioned Report, long after the Order on Papers, under which the laying of reports would ordinarily take place, had been dispensed with. My decision was informed by the importance of the task undertaken by the two committees, the sensitivity of the matters that were under investigation and the public interest in the questions sought to be addressed.

Hon. Members, even though the House Business Committee (HBC) had neither sat nor scheduled the matter as part of the business for consideration that afternoon as is the practice, I did instruct that the highly-anticipated Report be laid on the Table of the House and the matter, nevertheless, be considered the following day so as to cushion against speculations associated with any inordinate delay on such a sensitive matter. My decision was also informed by the fact that this House has the responsibility of deliberating and resolving issues of concern to the people, a function conferred upon each one of you by Article 95(2) of the Constitution. Suffice

it to say, the issue of the alleged presence of contraband, and probably contaminated, sugar in the country is one that has been and is still of huge concern to the people of Kenya and they are looking up to this House, through the two committees, to get to the bottom of it.

Hon. Members, moving on, upon the Report being laid I received representations from a host of Members, including some of the Members of the Joint Committee regarding some of the recommendations contained in the reports. Indeed, the following day after the Report had been tabled, I received more representations from Members, including those of the HBC, to defer discussions in order to afford all Members an opportunity to read the Report. Requests were also made to defer the Report so as to allow sufficient time for those wishing to propose amendments to the Report to observe the timelines set out under Standing Order 55 relating to issuance of notices of amendments. Hon. Members, as you may be aware, that Standing Order requires the proposer of an amendment to a Motion to hand the proposed amendments in writing to the Clerk of the House at least two hours before the Order is read.

Hon. Members, you will recall that I forthwith ordered for the re-organisation of the business that afternoon and deferred the particular Order relating to the Report to the next soonest date agreed to by the HBC. Permit me to also bring to the attention of this House the fact that I have in the past few days received further representations from Members of the Joint Committee who have expressed concern that some of the recommendations as worded may not fully represent the spirit of the resolutions of the committees. Conscious of the gravity of the matter, I have certainly also engaged in discourse with the two Chairpersons of the Committees with a view to establishing the actual position.

Hon. Members, before I proceed, I wish to state that I am dismayed that the questions relating to the accuracy or otherwise of certain parts, including findings of the Report were canvassed more in the media than before this House. Without belabouring the point, Hon. Members, you will also recall that I recently guided the House on the investigatory mandate of committees. I urged that committees, and indeed its Members, refrain from anticipating debate on a Motion of which notice has been given contrary to provisions of Standing Order 85.
Of concern is the equally disappointing manner in which Members have conducted themselves in canvassing the issues in the media. No sooner had the Chairperson of the Departmental Committee on Trade and Industry tabled the Report than the media reports became awash with information that some Members of the Joint Committee had disowned the contents of the Report. While Hon. Members may not have had the intention to besmirch the Committee, the accusatory tone of some comments in the media reports has yielded premature and undesired reactions from the public even before the Report is debated. This was indeed conduct unbecoming of the concerned Hon. Members as it is expected that any concerns relating to contents of a report should be addressed through appropriate parliamentary channels more so, bearing in mind the provisions of Standing Order 85, which prohibit Members from anticipating debate.

Ventilating on a matter before the House outside the domain of the debating Chamber goes against the long-held view that Parliament is an august House. Indeed, on 9th July 1971, the then Speaker Hon. Mati, ruled that it was improper to carry on a debate in the newspapers on a matter that is active in the House. I quote:

> *"Hon. Members, my attention has been drawn to a report in one newspaper, the DailyNation, where it is reported that one Hon. Member made a statement on the Trade Disputes (Amendment) Bill to the Press. I would like to remind hon. Members that this is completely out of order. It is not done once a matter is before this House, it is debated here and we do not carry on the debate in newspapers of Bills or Motions, which*

are presented to the House. I hope the Hon. Member did not intend to offend these rules. It is improper for any Hon. Member to carry on a debate in the Papers on something that is going on here in the House."

Again, on 15th July 1971, he ruled that:

"It is all right to make general statements, perhaps, when an organisation does not agree with something, but when you go as far as giving the details on the things which you either said here or could have said here, then, that is going too far and it makes the work of the House almost useless."

Hon. Members**,** it is paramount to remind ourselves of our constitutional duties and obligations as Members of Parliament as conferred by the Constitution and more importantly on the duty we owe to our people, that is, to provide clarity where there is confusion; to provide direction where there is none; to provide reassurance where there is anxiety; to provide peace where there is dispute; and to give hope where there is despair. This, Hon. Members, should be our marking scheme, our guiding principle and the light that guides how we execute our duties even in our respective committees.

Hon. Members, having said that, allow me now to interrogate the following two questions that have arisen concerning the Report before this House:

1) First, what is the authenticity of the Report before this House?

2) Secondly, did the Committees miss any procedural steps in compiling the final Report?

Hon. Members, in order to address the first question on the authenticity of the Report before this House, allow me to state that I am guided by the provisions of Standing Order No. 199 which provide as follows, and I quote:

1) The Report of a Select Committee shall be prepared and kept in the same form as the Votes and Proceedings of a Committee of the whole House and in such other form as may be prescribed in the Committee manual.

2) The report of a Select Committee having been adopted by a majority of the Members, shall be signed by the Chairperson on behalf of the Committee.

3) A Select Committee shall adopt its report in a meeting attended by a majority of its members.

Hon. Members, in light of the foregoing, as your Speaker, I am now compelled to answer the following questions which set out the procedural parameters of authenticating a Committee Report:

1) Is the Report properly before this House? The answer is yes, having been properly laid by the Joint Chairperson last week;

2) Are there votes and proceedings of the Report in form of minutes appended? The answer is yes;

3) Has the Report been adopted by a majority of the Members? The minutes attest that the answer is yes;

4) Has the Report been signed by the Chairperson of the Committee? Page No. 62 of the Report indicated that the answer is also yes; and

5) Was the Report adopted in a meeting attended by a majority of its Members? The minutes of the 24th Sitting of the Joint Committee held on 1st August 2018 and in which 28 Members were present attest that the answer is also in the affirmative.

In this regard, Hon. Members, and in accordance with the provisions of Standing Order No. 199, the Report before this House is, therefore, authentic as it complies with the requirements of that Standing Order.

Hon. Members, moving on to the last question on whether the Joint Committee overlooked or missed any steps in arriving at the final Report, I am further guided by the provisions of Standing Order No. 199(5) and (6) which provide that:

"5. A report having been adopted by a majority of Members, a minority or dissenting report may be appended to the report by the members of the Committee.

6. A report of a select committee including any minority report together with the minutes of the proceedings of the committee shall be laid by the Chairperson of the Committee within fourteen days of conclusion of its proceedings."

Hon. Members pursuant to the provisions of Standing Order No. 199(5) and (6) and considering the representations I have received from various Members of the Joint Committee, I am persuaded that the Joint Committee may have missed an important step while considering and preparing a final report on this matter, that is, the opportunity to also have a divergent view or views or a minority report recorded as contemplated under Standing Order No. 199 (5) and (6), if the conduct of some of the Members following the tabling of the Report is anything to go by.

Permit me, Hon. Members, to remind this House of the Communication I issued on 30th July 2014 (On the Place of Minority Reports and Admissibility of Committee Report on the Removal of IEBC Commissioners). Due to the importance of the matter at hand, I will quote a number of the findings in that Communication. The House was guided thus:

"There is a universally accepted principle of democracy that "the majority shall have their way, but the minority shall also have their say".

This principle does not decree that the majority ought to emasculate the voices of the minority, nor does it give the minority a blanket cheque to say anything under the sun. To the contrary, this principle encourages the majority in any group to recognise and take into account the views of the minority in that group… In parliamentary parlance, the application of this principle is not new... The Chairperson rules on relevance. The indication of a minority report is a mechanism to allow the House to be acquainted with the completeness of the issues about which there has been disagreement, before the House can make a resolution.

Hon. Members, the reading of these rules (Standing Order 199 (5) and (6) indicate that, as an advance of our previous practice, those with minority views have been accorded the higher privilege as they are allowed to have their views recorded substantially, and not just a mere mention and, in a rare occasion, have a dissenting report appended to the main report. This is in keeping with the spirit of our new Constitution to protect the rights of both the majority and the minority. However, should a committee not reach consensus, this does not imply that there should be two reports of a committee or a separate report compiled by the minority. The rule of thumb is that there can only be one report of a committee. That is the report that has

been supported by the majority of the membership of the committee, which may contain, as part of it, a minority report."

Hon. Members, it is my considered view that some Members of the Joint Committee who had a contrary view to that held by the majority, lost an opportunity to prepare a minority report that would have, in my view, also enriched debate in the House by informing the House on the substance of the divergent views that may have been held by them. It lowers the dignity of the House when we fail to observe our own rules on anticipation of debate and taking it outside the House, and more importantly by not utilising avenues available to express our divergent views.

Hon. Members, having disposed of the questions of authenticity of the Report and the probability of the missed steps, allow me now to inform the House that, pursuant to the provisions of Standing Order No. 55, the Office of the Clerk did receive proposed amendments to the Report from three Hon. Members. These are the Majority Party Whip, Hon. Benjamin Washiali; the Member for Homa Bay, Hon. Gladys Wanga, and Nominated Member, Hon. Geoffrey Osotsi. As you may have noticed by now, those amendments are published in the Order Paper for this sitting, save for those proposed by the Majority Party Whip, which failed to meet the standard test of admissible amendments.

For the information of the House, the Majority Party Whip was proposing to introduce new annexures and recommendations, whose basis was new evidence that he was proposing to introduce in the Report, by amending the Observations part of the Report. You will all agree with me that allowing such would have been procedurally untenable. Should the Member have intended to have that evidence considered, he should have tabled it either in the House when the matter was canvassed or in the Joint Committee sittings during the evidence taking sessions. Introducing new evidence at this penultimate stage will definitely present legal and procedural absurdity to the ordinary process of evidence taking as we know it!

Hon. Members, I, indeed, found myself in a very awkward position that requires me to adjudicate on the content of a Report whose conceptualisation, evidence taking, and drafting I did not participate in. In summary therefore, I rule as follows:

> That, pursuant to the provisions of Standing Order 199 the Report before this House is authentic as it meets the requirements of the Standing Orders; and,
>
> That, pursuant to the provisions Standing Order 199, the Members of the Joint Committee who may have had dissenting opinion from the majority of Members who adopted the Report ought to have considered recording, as part of the Report, their dissenting views, but in absence of such record in the Report, the House should proceed to consider the Report as tabled and ignore those purported minority views.

The House is, therefore, accordingly guided.

I thank you."

GUIDANCE ON APPROVAL OF NOMINEES FOR APPOINTMENT TO PUBLIC OFFICES

Thursday 23rd August 2018

Context:

Whether a decision on Special Motion for approval of nominees would be undertaken collectively or individually with respect to each nominee.

Decision of the Speaker:

1) *THAT, any given nominee is appointed to public office as an individual and not as a collective appointee;*

2) *That, any decision or resolution of the House ought to be a true and accurate reflection of the wishes of the House irrespective of the methodology used to execute any given Motion;*

3) *THAT, the procedural and technical aspects of a Motion should not overshadow or take pre-eminence over the true will of Members by this august House;*

4) *THAT, in line with the Commonwealth tenet propositioned by Speaker William Lenthall on 4th January 1642 when he declared that "I have neither eyes to see, nor tongue to speak in this place, but as the house is pleased to direct me, whose servant I am here", the Speaker does not impose upon Members the methodology through which to execute a Motion, but grants them leeway in determining the most appropriate approach;*

5) *THAT, Members of the august House are at liberty, on a case-by-case basis, through a Procedural Motion, to determine the most appropriate methodology of executing Special Motions; that is, the option of collective approval of all nominees or singular/ separate approval of each nominee with the sole objective of obtaining a true and accurate reflection of the will of the Members of this House;*

6) *THAT, the only limitation that Members have in consideration of Special Motions is that no additional name or names may be proposed to be added to a Special Motion, but proposals to delete a particular name or names from a Special Motion are tenable/ admissible but Members need to be cautious as to whether a deletion of a particular name is equivalent to rejection; and,*

7) *On this particular Special Motion, therefore, and arising from the concerns of Members, I will proceed to put the Question on each individual nominee separately.*

"Hon. Members, this further communication is by way of guidance on the methodology of approving nominees for appointment to public offices.

Hon. Members will recall that on Wednesday 22nd August 2018, during debate on the Special Motion for Approval of Nominees for Appointment as Chairperson and Members of the Independent Policing Oversight Authority (IPOA), the Member for Rarieda Constituency, Hon. Otiende Amollo, rose on a point of order under Standing Order 45 seeking clarification as to

whether the approval of the eight nominees would be undertaken collectively or individually. In his submission, Hon. Amollo stated that it would be wrong for Members to oppose an entire Motion on account of one or two nominees that they may not approve of, or similarly support an entire Motion despite having issues with some of the nominees.

Hon. Members, You may further recall that several Members made their contributions on the matter, including the Leader of the Minority Party, Hon. John Mbadi, who premised that any given nominee is appointed to public office as an individual and not as a collective appointee. He further observed that the fact that one nominee qualifies for appointment does not necessarily make other nominees qualify for the same appointment. On their part, however, the Member for Kibwezi West, Hon. Patrick Musimba and the Member for Samburu County, Hon. Maison Leshoomo, were of the view that all nominees vetted and approved by Committees of the House ought to be approved together and not separately.

Hon. Members, In view of the clarification sought by the Hon. Member for Rarieda Constituency, the Chair undertook to guide the House on the matter before the Question on the Special Motion is put. This august House has witnessed instances where Questions for approval of nominees to public offices have been put separately for each nominee, particularly in appointments involving commissioners of constitutional commissions, cabinet secretaries, high commissioners and ambassadors. You will also recall that on 14th December 2017, during the initial consideration of the nominees to the Parliamentary Service Commission, the Hon. Speaker guided the House that Members would vote for the proposed commissioners separately, and not collectively. However, when the Motion was finally considered by the House on 22nd February 2018, the House resolved to dispense with the Motion as a whole.

Hon. Members, I wish to remind the Hon. Members that:

1. *Every Motion that comes before the House is brought so that the House can express itself in one way or another – in support of or in opposition and thereafter, the House makes a decision or resolution. Such decision, however, should be a true and accurate reflection of the wishes of the House or of the wishes of the majority present and voting in the House and should thus not in any way be constrained or hamstrung by the methodology used to execute the Motion, be it a collective methodology or a singular/individual methodology; and,*

2. *Section 9 of the Public Appointments (Parliamentary Approval) Act, 2011, requires Parliament to either approve or reject nomination of a candidate and if Parliament does make a decision on a nominee, the candidate shall be deemed to have been approved.*

Hon. Members, in consideration of the aforementioned, I wish to guide the House as follows:

1. THAT, any given nominee is appointed to public office as an individual and not as a collective appointee;

2. THAT, any decision or resolution of the House ought to be a true and accurate reflection of the wishes of the House irrespective of the methodology used to execute any given Motion;

3. THAT, the procedural and technical aspects of a Motion should not overshadow or take pre-eminence over the true will of Members by this august House;

4. THAT, in line with the Commonwealth tenet propositioned by Speaker William

Lenthall on 4th January 1642 when he declared that *"I have neither eyes to see, nor tongue to speak in this place, but as the house is pleased to direct me, whose servant I am here",* the Speaker does not impose upon Members the methodology through which to execute a Motion, but grants them leeway in determining the most appropriate approach;

5. THAT, the Members of this august House are at liberty, on a case by case basis, through a Procedural Motion, to determine the most appropriate methodology of executing Special Motions; that is, the option of collective approval of all nominees or singular/separate approval of each nominee with the sole objective of obtaining a true and accurate reflection of the will of the Members of this House;

6. THAT, the only limitation that Members have in consideration of Special Motions is that no additional name or names may be proposed to be added to a Special Motion, but proposals to delete a particular name or names from a Special Motion are tenable/admissible but Members need to be cautious as to whether a deletion of a particular name is equivalent to rejection; and,

7. On this particular Special Motion, therefore, and arising from the concerns of Members, I will proceed to put the Question on each individual nominee separately.

The House is, therefore, accordingly guided."

RESCISSION OF HOUSE DECISIONS

Thursday, 30th August 2018

Context:

Whether a decision of the House with respect to the Report by Joint Committee on Agriculture, Livestock and Cooperatives, Trade and Industry on Inquiry into Alleged Importation of Illegal and Contaminated Sugar in the Country could be rescinded.

Decision of the Speaker:

1) *Motion to rescind the decision of the House made on Thursday, 9th August 2018 on the Report of the Joint Departmental Committee on Agriculture and Livestock and Departmental Committee on Trade, Industry and Cooperatives on the inquiry into alleged importation of illegal and contaminated sugar into the country was disallowed as doing so would offend the provisions of Standing Order No. 49.*

2) *The Member for Kimilili Constituency, Hon. (Capt. Rtd.) Didmus Wekesa Barasa, and the Member for Muhoroni Constituency, Hon. Onyango Oyoo were to recuse themselves from the sittings of the Committee until the Committee concluded the inquiry on the allegations of possible bribery, since they would be invited by the Committee to adduce evidence in the matter; and,*

3) *Members to refrain from making utterances or canvassing inaccurate information and hearsay on the matter in the media. Instead, those desirous of commenting on the subject could approach the Committee on Powers and Privileges and volunteer any information in their possession that would be beneficial to the Committee as it investigates the allegations of bribery by Members of the House. The Committee on Powers and Privileges was to hold a meeting on 5th September 2018.*

"Honourable Members, this is Communication No. 44 of 2018. It deals with the question of rescission of a decision of the House relating to the Joint Report on Alleged Importation of Illegal and Contaminated Sugar into the Country.

As you would recall, on Thursday, 9th August 2018, this House rejected the Report of the Joint Committee on Agriculture and Livestock and Trade, Industry and Co-operatives on the inquiry into alleged importation of illegal and contaminated sugar into the country. Soon thereafter, there arose allegations and counter allegations that a section of Members of this august House had allegedly been influenced to vote in a particular manner on the said Report. This has since prompted some Members to seek my leave to approve a Motion to rescind that decision with a view to either allowing the House to reconsider the matter or establish a select committee to undertake a fresh inquiry.

For clarity, I will address the two issues separately, that is, the request to rescind the decision of the House on the relevant Report and the question of alleged bribery of Members of this House.

On 14th August 2018, my Office received a letter from the Member for Mathare, Hon. Anthony Oluoch, certified as '*very urgent'*, on a notice of intention to request leave of the Speaker to allow for fresh inquiry into alleged importation of illegal and contaminated sugar into the country. The letter was premised on the provisions of Standing Order 49 of the National Assembly Standing Orders. For avoidance of doubt, the said Standing Order reads:

> *49. (1) No Motion may be moved which is the same in substance as any question which has been resolved (either in the affirmative or in the negative) during the preceding six months in the same Session.*
>
> *(2) Despite paragraph (1) –*
>
> *a) a Motion to rescind the decision on such a question may be moved with the permission of the Speaker.*
>
> *b) a Motion to rescind the decision on a question on a Special Motion shall not be allowed.*

Hon. Oluoch's letter raised the following issues requiring the Speaker's guidance:

1) Whether question has same meaning as Motion in terms of the Standing Orders.

2) Whether the window provided in Standing Order 49(2)(a) may be applied on a decision on a report of a committee of the House. And if yes, whether the parameters of the contents of the report may be varied.

3) Whether the said six months' restriction of Standing Order 49(1) is applicable to a petition filed by an aggrieved member of the public.

Other Members, particularly the Member for Saboti, Hon. Caleb Luyayi Amisi, the Member for Kanduyi, Hon. Wafula Wamunyinyi, and the Member for Homa Bay Town, Hon. Peter Kaluma, also weighed in on the matter vide letters addressed to my office on 14th and 15th August 2018. The requests by Hon. Wafula Wamunyinyi and Hon. Kaluma are of similar import as that by Hon. Anthony Oluoch. On his part, Hon. Amisi sought leave to introduce a Motion to establish a select committee to relook into matters relating to the sugar sector.

Before I proceed to guide the House, let me first explain the concept of reversal of decisions of the House. As you would expect, the concept of rescission may be traced to the practice and tradition of the Parliament of the United Kingdom, along which Kenya's Parliament was modeled. Much of these practices and traditions have been chronicled in various editions of Erskine May's *A Treatise on the Law, Privileges, Proceedings and Usage of Parliament*.

Erskine May contemplates three ways of reversal of decisions already made by a House of Parliament. The first is through a discharge of an order. Secondly, a decision may be reversed through a declaration of an order that proceedings be null and void. Finally, there is rescission, which is the subject of my Communication, particularly so because of the three forms of reversal of House decisions, rescission is entrenched in the National Assembly Standing Orders and practice.

It ought to be understood at the earliest opportunity that, in principle, a hallowed Chamber of Parliament was expected to take a decision on a matter, having conscientiously applied itself to the substance of the matter and consequence on a decision it makes, one way or the other. That is why, as recorded by Erskine May's *A Treatise on the Law, Privileges, Proceedings and Usage of Parliament,* 24th Edition, on Page 426:

"A question, being once made and carried in the affirmative or negative, cannot be questioned again, but must stand as a judgment of the House.'

The question that would arise would be: If the decision once carried were to remain as a judgment and could not be questioned again, what was the wisdom behind permitting reversal?

Erskine May points out that the flexibility of Parliament to create a window for reversing decisions already made was necessitated by the practical inconvenience of that rigid rule, especially where the House as a whole wished to change its opinion. With that rule, it proved too inhibitive for a legislative body that is confronted with the ever-changing problems of Government. Hence, a rule prohibiting reconsideration of a decided question had come to be interpreted very narrowly, so as not to prevent open rescission when it is decided that it is desirable.

What is interesting to note from the United Kingdom's experience is that even though the latitude to reverse a House decision was eventually granted, it was not in form of a blank cheque. In the Parliament of the United Kingdom, exercise of the power of rescission has been restrictively invoked. Indeed, the power of rescission has been exercised only in the case of a resolution resulting from a substantive Motion and, even then, sparingly.

Hon. Members, making your way, please, come in quickly, otherwise, you will stand for a very long time. The element of finality of actions of a House of Parliament, evidenced in the Parliament of the United Kingdom, is also replicated in the Congress of the United States of America. According to Mason's *Manual of Legislative Procedure*, a decision of the House on a substantive Motion or question has an element of finality that ought not to be questioned by the same House. In essence, this self-restraint is important for the House to make progress and is only invoked as a matter of procedure and not to allow revisiting decisions on substantive Motions.

From my reading of Mason's Manual, I also gather that, while appreciating the necessity to permit changing actions already taken by the House, Mason cautions that it is common practice to restrict the right to reconsider, as in many cases this is essential to the progress of the institution. Consequently, Section 65 of the Manual provides that:

"It is necessary that it be possible to put to an end a debate on controversial questions, otherwise, a minority could continue to make Motions concerning the matter and keep it under consideration to the exclusion of other matters and to the point that progress of the body would be seriously impeded."

The practice in Parliament of Australia is not far from that of the UK and USA in so far as rescission is provided for. However, it is a rare occurrence. Interestingly, in the rare occasions on which that power to rescind a decision of Parliament is resorted to, it is only carried if it garners the support of absolute majority of the House. It is my view that the high threshold set for rescinding a decision of the House implies that just like is the case in the UK and the USA, the Australian Parliament treats its actions with finality and would not wish to re-consider a substantive matter to which a vote was already taken.

In principle, the power of rescission allows a House of Parliament to reconsider and perhaps deviate from its earlier decision on a question. However, it is worth noting that rescission of a decision of the House is invoked only to the extent that it allows the House to proceed from a situation of uncertainty and not to necessarily revert a matter to the House or committee.

Hon. Members, let me now turn my focus to the experience of the Parliament of Kenya on rescission of House decisions. The practice in Kenya mirrors that of the House of Commons of

the UK and the Congress of the USA to the extent that there exists a restriction on reconsideration of decisions taken by the House '*during the preceding six months in the same session*'.

Nonetheless, Standing Order 49(2)(a) provides the House with a window to review its decision with immediacy, with the exclusion of decisions made on special Motions.

It states thus:

> *2 (a) a Motion to rescind the decision on such a question may be moved with the permission of the Hon. Speaker.*

Hon. Members, allow me to refresh your mind by sharing with the House, and, indeed, the general public, incidences where the House invoked or attempted to invoke the power to rescind its decision.

In the first incidence of 14th February 2017, the 11th Parliament passed a Motion to rescind its decision on agreement with the Committee of the whole House on the Privatization (Amendment) Bill, 2016, having been sought by the Leader of the Majority Party. The aim of this rescission was to allow re-committal of Clause 3 that had been inadvertently passed with granting the power to approve Members of the Privatization Commission to the relevant committee of the House instead of the National Assembly.

Secondly, the clause made usage of the term '*Parliament*' as construed before bicameralism hence necessitating correction of the error to specifically refer to the National Assembly as the House responsible for approving the said appointments.

Earlier, on 9th March 2016, the House rescinded the decision on rejection of appointment of Members to the Budget and Appropriations Committee after being moved by the Leader of the Majority Party. The purpose of the rescission was to allow a fresh appointment of the committee within six months following rejection of the Motion thereby extricating the House from a procedural limbo that would have left the budget making and budget-related oversight functions of the House unattended for six months.

In the third incidence, on 21st October 2015, the House rescinded the decision on agreement with the Committee of the whole House on the Parliamentary Powers and Privileges Bill, 2014 to allow re-committal of clauses 34 and 37 of the Bill. The purpose of the rescission was to disentangle the House from having inadvertently made erroneous decisions and allow it to revisit the matter.

Much earlier, on 31st March 2004, the House rescinded rejection of appointment of Members to the House Business Committee. The object of the rescission was to allow re-establishment of the committee without which the House would have been in limbo and without business for six months.

Finally, on 15th December 1999, in the Eighth Parliament, the House rescinded a decision through which the House had negatived an amendment by the then Member for Kitutu Masaba Constituency, the late Hon. George Moseti Anyona, to a Motion by the then Member for Lang'ata Constituency, Rt. Hon. Raila Odinga. Hon. Anyona's amendment sought to expand the scope of Hon. Raila's Motion by inserting a provision for establishment of a select committee to lead and coordinate the Constitution of Kenya review process following a stalemate in the appointment of commissioners to the Constitution of Kenya Review Commission (CKRC). The aim of the rescission was to enable the House to constitute a select committee that would spearhead discussions on the Constitution review process and unlock the then prevailing standoff that arose from the inability of the Attorney-General to convene a meeting following

disagreement on nomination of Members of the CKRC which had condemned the process to abeyance.

Hon Members, the foregoing instances of rescinding actions of the House in the history of the Parliament of Kenya suggest that rescission has been invoked on matters of procedure, particularly to allow the House to proceed unimpeded or where it was established that the House had erroneously made a decision.

Further, I have deduced that the power to reverse an action of the House has been sparingly invoked in the Parliament of Kenya just as in the jurisdictions earlier mentioned in this Communication.

For clarity, I have singled out the following observations:

1) That the exercise of the authority to rescind a decision of the House has only been invoked by the House to extricate itself from an imminent limbo that would otherwise obtain should the rescission not be permitted. Put otherwise, rescission has been sought as an avenue for finding procedural resolutions or other such decisions that aided the House to rescue itself from abeyance.

2) That there is no evidence of the Hon. Speaker having granted leave for a Motion to rescind an action of the House for the mere purpose of allowing the House to reconsider or reverse a position it already took on a question.

3) That no rescission has so far been sought and granted on a resolution relating to a report of a committee.

Hon. Members, from the foregoing particularly under paragraph (3), the questions raised and request sought by Hon. Oluoch and echoed by Hon. Kaluma and Hon. Amisi present a unique question on the procedure and application of Standing Order No. 49(2) in respect to a negatived report of a committee.

The closest necessity to rescind a negative decision of the House on a report of a committee was on 28th March 2006 just before the tabling of a Report of the Public Accounts Committee (PAC) on a Special Audit on the Procurement of Passport Issuing Equipment by the Department of Immigration, Office of the Vice-President and Ministry of Home Affairs then. The then Assistant Minister, Hon. Mirugi Kariuki, rose on a point of order challenging the tabling of the report and its admissibility thereof. Among other grounds for his objection, Hon. Kariuki claimed that pursuant to the then Standing Order No. 42, the report was not properly before the House noting that the House had previously rejected a report of the committee on the same matter. He averred that the House could only reconsider the Report upon an affirmative consideration of a Motion to rescind the action by which the previous report had been rejected.

Hon. Members, the Speaker was being invited to make a finding that the inquiry leading to the second report by the PAC on a similar matter as had previously rejected was in contravention of the six-month restriction imposed under the then Standing Order No. 42, which is our current Standing Order No.49, hence could not be proceeded with unless the decision rejecting the previous report was rescinded. Consequently, the then Speaker was required to either:

1) Rule that the report was inadmissible to the extent that it contravened the then Standing Order No. 42; or,

2) grant leave for the moving of a Motion to rescind the rejection of the first report and pave way for admission of the second report.

From the ensuing debate, both the Members and, indeed, my predecessor, Speaker Francis ole Kaparo, did admit that that was an unprecedented incidence. The Speaker did pronounce himself that that was the first time in the history of Parliament of Kenya that the House was being called upon to exercise the power to rescind its decision on a report of a committee. I have reviewed the Hansard of the proceedings containing the debate of 28th March 2006 and the Speaker's ruling of 30th March 2006 and established that the then Speaker observed:

1) The recommendations of the Special Audit Report by the Public Accounts Committee were rejected by the House during the Third Session on 3rd November 2004, and not during the Fourth Session;

2) the rejection of the PAC Report on the Special Audit in its totality during the Third Session was, as far as I can establish, the first time this has ever happened in the history of this House. Ordinarily, such reports have been adopted either in whole or as amended;

3) this is the first time that the tabling of a Paper containing the report of PAC has ever been challenged in this House; and,

4) because of the unprecedented action on the part of the House, this is also the first-time PAC has, on its own Motion, and in conjunction with the Controller and Auditor-General, revisited an issue on receipt of new evidence. This new evidence was not presented to the Committee when it was still on the issue. I may hasten to add here that the new evidence came to the attention of the Committee in a very public manner in the form of what has since been dubbed "*The Githongo Dossier*."

Hon. Members, on account of the aforementioned observations, the then Speaker Kaparo proceeded to rule that, on the necessity to rescind the decision of the House on the First Report of PAC, that:

> *"The Report of the Special Audit was resolved in the negative on 3rd November, 2004 and not during the Fifth Session. The Fifth Session is now. This is a new session. Clearly, the Hon. Assistant Minister did not consider the provisions of Standing Order No. 42 when he raised his objection. In light of the provisions of Standing Order No. 42, that argument fails."*

Consequently, the Speaker did not grant leave to rescind the previous decision as the said decision had been carried in a different session. Therefore, Standing Order 42 did not bind its re-introduction to the House.

Hon. Members, the question one would ask is: What action did the Speaker take thereafter? The argument for rescission having failed, the Speaker did observe that PAC had embarked on a fresh inquiry, notwithstanding the rejection of its earlier report on the basis of emergence of new evidence in the public domain contained in the so called "*Githongo Dossier*." He went ahead and ruled that:

> *"…new evidence emerged in public domain in the said "Githongo Dossier" and the Committee somehow seized the opportunity and sought to receive and did receive the new evidence… It is for this greater public interest… that I am inclined to admit this Report for consideration by this House."*

Clearly, the Speaker allowed tabling and subsequent consideration of the Report for reconsideration by the House on the basis of new evidence and not to merely accord the House a second chance to review its decision on a Report with similar contents.

Hon. Members, let me now relate the analogies I have drawn to the questions raised by Hon. Anthony Oluoch, MP, with regard to the application of Standing Order 49 and wish to provide the following guidance:

1) On the first question as to whether the usage of the terms "*Question*" and "*Motion*" as used in Standing Order Nos. 49(1) and (2) has same meaning in the terms of the Standing Orders, indeed, the two are used interchangeably. The understanding is that any substantive matter before a House of Parliament is considered through a Motion, which is then decided by way of a question at the conclusion of deliberations. Therefore, the usage of the term "Question" in Standing Order No. 49(1) is implicit of a Motion.

2) As to whether the window to rescind a decision of the House on a Motion under Standing Order No. 49(2) is applicable to a decision on a report of a committee of the House, the answer is in the negative. I have taken this position on the strength of the arguments that:

   a) The review of incidences of rescission of House decisions demonstrate that the power to rescind has been construed as an action meant to facilitate the House to remove itself from situation of uncertainty and not as a window to reconsider the action taken. It is more of a question of procedure than reversal of an action or change of mind.

   b) According to section 481(1) of Mason's Manual of Legislative Procedure, "*a legislative body can rescind an action previously taken as long as no vested interests have arisen from the original action*." I am persuaded that the accusations and counter accusations of alleged external influence that may be attributed to the rejection of the Report in question are suggestive that there may have been vested interests then and that there is no certainty of those interests have fizzled out. I am, therefore, afraid that the requests to rescind the decision of the House of 9th August 2018 on the relevant Report are devoid of evidence that there is new evidence which may alter the substance of the rejected Report and therefore increase the prospect of the House taking a different decision.

   c) In terms of Erskine May's *Treatise on The Law, Privileges, Proceedings and Usage of Parliament,* 24th Edition published in 2011, the power of rescission cannot be exercised merely to override a vote of the House, such as a negative vote. Proposing a negatived question a second time for the decision of the House would be contrary to the established practice of Parliament.

Hon. Members, when a rejected Question has to be reconsidered, sufficient variation would have to be made, not only from the form, but also from the substance of the rejected question, so as to make the second question a new question. None of the claims submitted to my Office by the Members who sought leave to rescind the decision in question suggested the possibility of new evidence that would alter the substance of the negatived Report and qualify it for reconsideration in a new form. Having found no basis to grant leave to rescind the said decision, the argument of whether the parameters of a rejected Question may be varied after being rescinded does not, therefore, arise.

Hon. Members, as I mentioned earlier, the Member for Saboti Constituency had also placed a request to establish a select committee to inquire into the spent matter of alleged importation of contaminated sugar. The question one would ask is: What would the proposed select committee alter in terms of substance of the rejected Report that would move the House to vote differently? As I indicated earlier, I have no information as to whether there has emerged new evidence that, if considered by a Committee of this House, would vary the substance of the earlier Report.

1. Regarding the third question on whether the gag imposed under Standing Order No. 49(1) debars a member of the public from submitting a petition to the House, praying that the House reconsiders a report that it had previously negatived in the preceding six months, the answer is yes, although secondarily. Even though the right to petition Parliament as granted under Article 119 of the Constitution is inalienable, the admissibility of public petitions and consideration thereof is bound by the procedure and practice developed pursuant to Article 124 of the Constitution. Hence, a public petition of the nature contemplated by Hon. Oluoch may not be referred to a committee or committees of the House on the basis of the restraint imposed by Standing Order No. 49(1).

Hon. Members, as I conclude on this matter, I must emphasise it is a principle of law, which is also applicable to Parliament, in the carrying out its quasi-judicial function, that once a House rejects a report of a committee, that decision effectively renders the relevant committee or committees *functus officio* upon the report being rejected by the House. Consequently, it would be an exercise in futility to attempt to re-introduce the same matter, be it through the same committee, a select committee or by way of a public petition, as long the parameters remain similar to those of the rejected report.

One would wonder, what options does the House have in light of the prevailing circumstances? You will recall that I did refer to a precedent that was set in the 9th Parliament when PAC, upon learning of emergence of fresh evidence contained in the famous "*Githongo Dossier*" a matter it had investigated and a report thereof rejected by the House, the Committee commenced a fresh inquiry *suo moto*.

In light of this precedent, my guidance does not preclude the relevant committee or any Member of this House from attempting to move the House to revisit the matter of the alleged importation of illegal and contaminated sugar into the country, as long as that attempt is made in strict compliance with Standing Order No. 49(1). I hasten to state that in this case, the provisions of Standing Order No. 49(2) do not arise. This settles the first issue on the decision of the House on the Report on alleged importation of illegal and contaminated sugar into the country.

Hon. Members, I will now proceed to the second issue which relates to the claims and counter-claims of alleged bribery that have been awash in both print and electronic media in the aftermath of the rejection of the Report on importation of alleged illegal and contaminated sugar into the country by this House. As you may recall, on 31st August 2017, you took an oath or affirmation of office to, among other things, faithfully and conscientiously discharge the duties of a Member of Parliament. In so doing, you are constantly invited to make decisions on matters of varied nature during the entire term of your Membership to this House. Indeed, as part of the prayer for this House, which we do now and then, it states that you have been called to the performance of important trusts in this Republic.

I am persuaded to reaffirm these solemn words in the National Assembly prayer book because as a hallowed Chamber, your decisions would be looked at with disfavour if you act in a manner that causes the public to believe that you have betrayed their trust in you. Hon. Members, I must emphasise, in no uncertain terms, that the oversight function of this House as carried out through committees elevates it to a status akin to that of the High Court. The exercise of this unique quasi-judicial function is expected to strictly adhere to and apply the principles of natural justice and fair hearing. Every process or action taken by the House or its committees must be seen by all to be above board, taking into account the fact that decisions of this House bear the element of finality. Therefore, I implore you, in the wisdom of the late Justice Robert Houghwout Jackson, a former Associate Justice of the Supreme Court of the United States of America (USA), that we must act with integrity that borders infallibility. Justice

Jackson rightly observed: "*We are not final because we are infallible, but we are infallible only because we are final*."

Hon. Members, in the wake of alleged bribery by a section of Members of this House, I directed the National Assembly Committee on Powers and Privileges to investigate the claims and report its findings, including any recommendations it may deem fit, to this House. Other than media reports, a number of Members of this House have publicly alluded to having witnessed incidences of bribery of their peers before the House took a vote on the Report in question. In this regard, a number of Members are or may be required to appear before the Committee on Powers and Privileges as whistle-blowers to assist the Committee to get to the bottom of those grave allegations of bribery in the House.

Among the Members who will be of interest to the Committee in its inquiry into this matter is the Member for Kimilili Constituency, Hon. (Capt. Rtd.) Didmus Wekesa Barasa, and the Member for Muhoroni Constituency, Hon. Onyango Oyoo. I have singled out the two Members because they are Members of the Committee on Powers and Privileges that forms the jury that will hear and determine claims of bribery. As a principle of law, you cannot wear the hat of a judge on a matter in which you are appearing in the hat of a witness.

Hon. Members, I have also received complaints and alibis from a number of Members against some media houses for vilified publication of their names as having allegedly partaken of the bribes to vote in one way or the other on the Report on alleged importation of illegal and contaminated sugar into the country, and yet they were not in attendance when the matter was decided. I have referred their complaints to the Committee on Powers and Privileges for review.

Therefore, it is my considered ruling that:

1) As your Speaker, I will not allow any Motion which asks the House to rescind its decision of Thursday, 9th August 2018 on the Report of the Joint Departmental Committee on Agriculture and Livestock and Departmental Committee on Trade, Industry and Cooperatives on the inquiry into alleged importation of illegal and contaminated sugar into the country as doing so, I will offend the provisions of Standing Order No.49 since the discretion of the Speaker to grant leave on such Motions does not extend to a report of a committee which has been adopted or rejected by way of a conscious vote.

2) The Member for Kimilili Constituency, Hon. (Capt. Rtd.) Didmus Wekesa Barasa, and the Member for Muhoroni Constituency, Hon. Onyango Oyoo, who are Members of the Committee on Powers and Privileges of the National Assembly are reported to have made allegations of bribery. They will recuse themselves from the sittings of the Committee until the Committee has concluded the inquiry on the allegations of possible bribery, since they will be invited by the Committee to adduce evidence in the matter; and,

3) I encourage Members to refrain from making utterances or canvassing inaccurate information and hearsay on the matter in the media. Instead, those desirous of commenting on the subject can approach the Committee on Powers and Privileges and volunteer any information in their possession that would be beneficial to the Committee as it investigates the allegations of bribery by Members of this august House. The Committee on Powers and Privileges has been called for a meeting on 5th September 2018.

The House is accordingly guided."

RECONSIDERATION OF A HOUSE RESOLUTION

Thursday, 30th August 2018

Context:

Reconsideration of a matter that had been considered by two Departmental Committees, and whose resolutions had been approved by the House, where the Committee had failed to accord the opportunity to an adversely-mentioned entity to appear and make its representation.

Decision of the Speaker:

The matter be dealt with by the Committee on Implementation which was to act as an appellate forum for the Petitioners to present their prayers, and in evaluating the claims made by the petitioner, the Committee was to limit itself to:

1) *Only receiving submissions from the Petitioner on the resolution made by the House from the recommendation contained at Paragraph 108 of Page 50 of the Report;*

2) *considering the submissions from the Petitioner; and,*

3) *reporting its findings to the House within thirty (30) days.*

"Honourable Members, this is the second Communication. I wish to bring to the attention of the House that my office has been petitioned vide a letter dated 22nd August 2018 from the firm of Omogeni and Company Advocates on behalf of their client, M/s. Kenafric Industries Limited, in relation to a resolution by this House with regard to the Report of the Departmental Committee on Agriculture and Livestock and the Departmental Committee on Trade, Industry and Co-operatives on the crisis which face the sugar industry in Kenya which was adopted in the 11th Parliament. In their letter, M/s Omogeni and Company Advocates note that the Petitioner, M/s. Kenafric Limited, was adversely mentioned in the Report which recommended the cancellation of their import licences. The firm of advocates further notes that during the hearings held by the Departmental Committee on Agriculture and Livestock and the Departmental Committee on Trade, Industry and Cooperatives, their client was not afforded an opportunity to be heard, despite her attempts to be heard before the preparation and tabling of the Report of the Committee. Consequent to the tabling and adoption of the Report, the Sugar Directorate of the Agriculture, Fisheries and Food Authority (AFFA) has since delayed the processing of their import permit.

As you are aware, Standing Order No. 209 establishes the Committee on Implementation whose mandate is to scrutinise the resolutions of the House and examine whether or not they have been implemented, and the extent to which legislation passed by the House has been operationalised. Indeed, and in the discharge of its mandate, the Committee on Implementation invited the Sugar Directorate to update the House on the status of the implementation of the resolutions made in the last Parliament with regard to the crisis in the sugar sector. It is in the implementation of a resolution of this House that the Sugar Directorate has delayed the processing of import permits for companies which were mentioned adversely in the Report.

Since the receipt of the letter, I have scrutinized the text of the Report tabled and adopted by the House and I confirm that the minutes attached to the Report show that the said company Kenafric Limited, who is a Petitioner in this matter, sought audience before the Committee in

writing to respond to allegations made by the Kenya Sugar Board prior to the conclusion of the writing and tabling of the Report. The minutes record thus:

1) "*The Committee deliberated on the issue and resolved that it was in a position to hear more witnesses since the Report was long overdue.*

2) If the complaint feels aggrieved, he could seek recourse after the Report is tabled in the House."

Owing to delay in processing the import permit, the Petitioner is presently in court to seek legal redress arising from the alleged condemnation by the House without having being given an opportunity to present their case.

Hon. Members, the on-going court case notwithstanding, I am of the considered view that turning a blind eye to the issues raised in the letter by the law firm would not serve the best interests of the House. As a House of procedure guided by the Constitution and our Standing Orders, we cannot be seen as establishing a precedent of condoning the condemnation of persons without affording them an opportunity to be heard. The right to a fair hearing, as one of the twin principles of natural justice, is entrenched in Article 50 of our Constitution which precludes individuals from being penalized by decisions affecting their rights or legitimate expectations unless they have been given prior notice of the case, a fair opportunity to answer it, and the opportunity to present their own case.

In addition to this, Article 47 of the Constitution provides for the right to fair administrative action which is expeditious, efficient, lawful, reasonable, and procedurally fair. Indeed, this House enacted the Fair Administrative Action Act in 2015 to operationalise Article 47 in order to further guide the conduct of administrative actions and other proceedings adversely affecting the rights of individuals.

Affording persons the right to present their case is in line with guiding principles of parliamentary practice as noted in the updated version of the Benchmarks for Democratic Legislatures issued by the Commonwealth Parliamentary Association (CPA), of which Members of this House are members. As a safeguard against the abuse of the freedom of speech granted to the Legislature, Benchmark 1.4.4 states, and I quote, "*The Legislature shall have mechanisms for persons to respond to adverse references made to them in the course of the Legislature's proceedings*."

In conducting hearings, preparing and tabling its Report and recommendations, the Departmental Committee on Agriculture, Livestock and Cooperatives was under an obligation to apply and be seen to have applied a standard, methodical, open and fair process in its deliberations. It is only in applying such a process that the decisions of this House may stand the test of whichever challenge is made outside Parliament. Any compromise of such a process exposes the House to ridicule and reduces the confidence of the public in the procedures of the House and its role as a forum for the deliberation and resolution of issues of concern to the people. The House cannot on one hand pass the Fair Administrative Action Act, 2015 and on the other blatantly flout the basic requirement of according adversely mentioned persons the fundamental right to be heard.

Noting the glaring omission highlighted by the Petitioner and, indeed, on admission of the Committee itself that the Petitioner was not afforded an opportunity to rebut the allegations, it, therefore, behooves this House to revisit its resolution made when adopting the Report of the Departmental Committee on Agriculture, Livestock and Co-operatives. This will necessarily entail affording the Petitioner a chance to present its case for consideration by the House.

As the concern raised does not constitute new evidence, there exists no jurisdiction to reopen and reconsider the entire subject matter of the Report. The appropriate Committee, therefore, to undertake this exercise is the Committee on Implementation currently seized of the implementation of the resolutions made from the Report to act as an appellate forum for the Petitioners to present their prayers. Indeed, such forum will examine the claims made by the Petitioners and also safeguard the authority of the House on matters for which it has inquired into and arrived at a resolution, before any other authority steps in.

I am fully cognizant of the provisions of Standing Order 89 on matters *sub judice* or secret. It is, however, my considered view that reference to this matter by the Committee on Implementation shall not in any way prejudice the fair determination of the on-going court proceedings. Both the House and the aggrieved party would be best served by the urgent rectification of this glaring omission. For the avoidance of doubt as to the nature of the exercise to be undertaken by the Committee on Implementation, I direct that the Committee is to limit itself to:

1) Only receiving submissions from the Petitioner on the resolution made by the House from the recommendation contained at Paragraph 108 of Page 50 of the Report;

2) considering the submissions from the Petitioner; and,

3) reporting its findings to the House within thirty (30) days.

I need not add that the Committee must observe the rules of natural justice in this exercise. In the meantime, the implementation of the resolution on this matter will stand suspended until such a time as the House makes a further resolution informed by the report of the Committee on Implementation.

The House is accordingly so guided.

Thank you."

SECOND READING OF THE CONSTITUTION OF KENYA (AMENDMENT) (NO. 2) BILL (NATIONAL ASSEMBLY BILL NO. 5 OF 2018) SPONSORED BY THE HON. CHRIS WAMALWA

Thursday, October 11, 2018

Context:

Upon conclusion of Second Reading of the Constitution of Kenya Amendment (No. 2), (National Assembly Bill No. 5 of 2018), the mover raised issues that necessitated clarification on:

1) *Responsibility of raising the requisite two-thirds threshold for putting a Question for the Second Reading of a Constitution of Kenya (Amendment) Bill;*

2) *Responsibility to determine whether a Bill to amend the Constitution requires approval by a referendum or not in terms of Article 255(1) of the Constitution.*

Decision of the Speaker:

1) *The obligation to ensure that any Bill obtains the requisite two-thirds voting threshold lies squarely with the Mover of the Bill.*

2) *Should the Motion for Second Reading of the Bill fail to obtain the required numbers in support and the results of the vote satisfy the requirements of Standing Order No. 62(2), I will avail a further and last opportunity for the vote to take place at a later sitting.*

3) *The responsibility to determine whether a Bill to amend the Constitution requires approval by a referendum or not falls within the jurisdiction and powers of the President in terms of Article 256(5)(a) of the Constitution. The role of the Houses of Parliament is to exercise their legislative authority in terms of passing a Bill to amend the Constitution.*

"Hon. Members, As you would recall, last week on Wednesday 3rd October 2018, the House concluded debate on the Second Reading of the Constitution of Kenya (Amendment) Bill (No. 2), (National Assembly Bill No. 5 of 2018) moved by the Hon. Member for Kiminini Constituency, the Hon. Chrisantus Wamalwa. During the debate, the Mover requested the Speaker to delay putting the Question for Second Reading under Standing Order 53(3) until such time when not less than 233 Members, being two-thirds of all the Members of the National Assembly, will be available as required under Article 256(1)(d) of the Constitution.

Hon. Members, Indeed, the provisions of Article 256(1)(d) of the Constitution provide that a Bill to amend the Constitution shall be passed by the House if it is supported by not less than two-thirds of all the Members of that House at the Second and Third Readings. In the request, the Member seemed to vest the obligation of availing the Members required to vote on the Speaker. Further, during the sitting, the Hon. Chrisantus Wamalwa claimed that the Speaker had already determined that the particular Bill does not require to be approved by a referendum in terms of Article 255 of the Constitution.

Hon. Members, As you are aware, the Bill by Hon. Wamalwa seeks to amend the Constitution to change the election date from second Tuesday in August in every fifth year to Monday in

December of every fifth year. During debate on the Bill, some Members expressed concern that the Bill requires approval by a referendum as changing the election date from August to December would in effect also touch on the term of office of the President in terms of extending the term of that office.

Hon. Members, Article 256 of the Constitution prescribes the procedure for considering Bills to amend the Constitution by parliamentary initiative. In particular, Article 256(5) of the Constitution provides that if a Bill to amend the Constitution proposes an amendment relating to a matter specified in Article 255(1) of the Constitution, the President shall, before assenting to the Bill, request the Independent Electoral and Boundaries Commission (IEBC) to conduct, within ninety days, a national referendum for approval of the Bill. In this regard, from a plain reading of Article 256(5) of the Constitution, it is clear that the responsibility of determining whether a Bill to amend the Constitution requires approval by a referendum or not does not lie with the Speaker of the National Assembly or, indeed, this House. The role of the Houses of Parliament is to exercise their legislative authority in terms of passing a Bill to amend the Constitution. Once passed in both Houses and forwarded to the President for assent, it is upon the presidency to determine whether such a Bill relates to matters under Article 255.

Hon. Members, Therefore, contrary to the claim by the Member for Kiminini, neither the Speaker nor the Office of the Clerk have the powers to determine whether a Bill requires approval by a referendum or not. This falls within the jurisdiction and powers of the President in terms of Article 256(5)(a) of the Constitution. To interpret the provisions otherwise would be contrary to the provisions of Article 256 of the Constitution. It is analogous and tantamount to putting the hat of the President on the person of Speaker.

Hon. Members, In view of the above and following the request by Hon. Chris Wamalwa to delay putting of the Question for Second Reading, I wish to guide as follows:

1. That, the obligation to ensure that any Bill obtains the requisite voting threshold lies squarely with the Mover of the Bill. Additionally, the Hon. Member needs to be conscious of the dictates of Standing Order No. 141 on lapsing of Bills that may be occasioned by inordinate delay in putting of the Question for Second Reading. In this regard, I wish to notify the Member and the House that the Question for Second Reading of that particular Bill shall be put on Wednesday 17th October 2018 during the afternoon sitting;

2. That, it is expected that the Member for Kiminini who is also the Deputy Whip of the Minority Party will lobby all Members to be present and to participate in electronic or roll-call voting on that day. Should 233 Members vote in support of the Motion for Second Reading of the Bill, the House Business Committee will thereafter schedule the Bill for consideration in Committee of the whole House and Third Reading which will be undertaken at later sittings of the House, and;

3. That, should the Motion for Second Reading of the Bill fail to obtain the required numbers in support and the results of the vote satisfy the requirements of Standing Order No. 62(2), I will avail a further and last opportunity for the vote to take place at a later sitting. It is worth noting that, a last voting opportunity ought to take place within five sitting days from the day of the initial vote.

I thank you."

SECOND READING OF THE CONSTITUTION OF KENYA (AMENDMENT) (NO.2) BILL (NATIONAL ASSEMBLY BILL NO. 5 OF 2018) SPONSORED BY THE HON. CHRIS WAMALWA

Wednesday 17th October 2018

Context:

Procedure of voting on Question for the Second Reading of the Constitution of Kenya (Amendment) (No. 2) Bill the Bill.

Decision of the Speaker:

The Speaker guided the House that the steps to be followed when voting on the Bill would be as follows:

1. *The first step is to ascertain whether the number of Members present in the House is not less than 233 Members after ringing the Division Bell before proceeding to vote;*

2. *The second step is the actual voting, which will only take place if not less than 233 Members are present in the House after the ringing of the Division Bell.*

3. *The final step is declaration of the result of the voting.*

"Hon. Members, as you are all aware, this afternoon the House will be taking a vote on the Question for the Second Reading of the Constitution of Kenya (Amendment) (No.2) Bill (National Assembly Bill No.5 of 2018) as required by the dictates of Article 256 of the Constitution. That Article provides that a Bill to amend the Constitution shall be passed by the House if it is supported by not less than two-thirds of all Members of the House at the Second Reading. At the outset, allow me to explain the procedure of voting for the Bill, which should not be confused with the recent vote taken by this House in relation to the President's Reservations on the Finance Bill, 2018.

Hon. Members, Indeed, the procedure for considering the President's Reservations is clearly set out in Article 115 of the Constitution and National Assembly Standing Order 154. Without going into so much detail, the provisions of Article 115 of the Constitution require the House to have a majority of the Members present and voting, as provided for in Article 122 of the Constitution, where the House agrees with the reservations of the President, so long as there is quorum present. In this case, in the least, the permissible number in support of a majority vote is 26 Members, being half of the quorum of the House plus one member, assuming that only a number equal to quorum is present and voting. It is important to note that questions for decision of the House are put in the positive as I have explained before in a number of rulings. Our default voting procedure on questions for determination by simple majority is also by voice votes as required by Standing Order 69 which, as you all know, is a collection of the voices of the "Ayes" and "Nays", howsoever the voices may be collected. At the first instance, therefore, voting on the President's reservations is by way of voice votes and two-thirds of the Members need not be present so long as there is quorum of 50 Members present in the House. This is how this House voted on 20th September 2018 during the consideration of the President's reservations on the Finance Bill, 2018.

However, as you further know, where Members of the House seek to negate the President's reservations, the provisions of Article 115 require 233 to vote against the reservations. As you would recall, during the consideration of the President's reservations, this played out well in this House, but it seemed that either a sizeable number of Members did not understand the procedure or, having known the procedure, just chose to ignore it. I have taken the liberty to explain this process so that you do not confuse it with the procedure we are about to engage at the Second Reading of this Bill and demand a voice vote today.

Hon. Members, As provided for in the Standing Orders, which I need not reiterate, voting in Division is done either by electronic or roll call voting and the procedures are well explained in Standing Orders 70 and 73, respectively. To jog your mind, I am sure you recall that during the consideration of the President's reservations, some Members declined to take a vote either electronically or through roll call voting hence the voice vote carried the day.

Consequently, Hon. Members, the process of voting on the President's reservations is so distinct and different from the process of voting on Bills to amend the Constitution and the two should never even be compared. Since many Members are going to engage in electronic voting for the first time today, may I, therefore, explain the process of electronic voting. The process has two steps, the first one being, confirmation of process of not less than 233 Members in the House and the second step is the actual voting, which will only take place if not less than 233 Members are present in the House after the ringing of the Division Bell.

To ascertain the Members present, the following will happen:

1. I will call the Division Bell to be rung for 10 minutes. Hon. Members, this is provided for in the Standing Orders.

2. At the end of ten minutes, the doors shall be locked and the Bar drawn. No Member shall enter or leave the House after this stage.

3. I will then request all Members present in the Chamber to log out of the system.

4. During this log out step, I will require Members without their cards or those with difficulties being identified electronically, to stand by the public servants' benches to be recorded manually by the Clerks-at-the-Table and continue staying there until the end of the voting process.

5. Members with their cards will have 60 seconds to log into the system.

6. Members without cards will be recorded manually.

7. The number of Members present shall be displayed on the screens, while the number of Members recorded manually will be tallied by the Clerks-at-the-Table.

8. Both the total Members present as displayed on the screens and Members recorded manually will be tallied.

9. If not less than 233 Members are in the House, the House shall proceed with the voting. If less than 233 Members are present, voting shall not proceed.

Hon. Members, to vote electronically, the following will happen:

1. I will request all Members to log out of the system.

2. I will thereafter request Members to log into the system. In this case, Members will have 60 seconds to do so.

3. Members without their cards standing by the public servants' benches shall have their votes recorded manually by the Clerks-at-the-Table by stating whether they are 'in favour of' or 'against' or 'abstain' from the Question, and continue staying there until the end of the voting process.

4. Members who have cards will have 60 seconds to vote.

5. I will thereafter put the Question for the Second Reading of the Constitution of Kenya (Amendment) (No.2) Bill (National Assembly Bill No.5 of 2018) sponsored by the Member for Kiminini, Hon. Chrisantus Wamalwa.

6. All Members shall cast their votes by pressing either the "Yes", "No" or "Abstain" buttons. No Member shall fail to vote either of the two options or record their abstention as failure to do so is gross misconduct.

7. As voting is going on, the results of the electronic vote will be displayed on the screens and shown with a positive (+) being "Yes", a negative (-) being "No" and a zero being "Abstention".

8. Results of electronic votes as appearing on the screens and votes recorded manually shall be tallied.

9. Finally, I shall forthwith announce the results and guide on the next course of action, depending with the result of the vote taken.

So, Hon. Members, including those ones who are at the door, be advised accordingly."

POST FACTO APPROVAL OF WITHDRAWAL OF MONEY FROM THE CONTINGENCIES FUND

Tuesday, 13th November 2018

Context:

Request by the National Treasury for a post facto approval of withdrawal of Kshs. 1.05 billion from the Contingencies Fund.

Decision of the Speaker:

1) *The Cabinet Secretary had complied with Section 22(2) of the Public Finance Management Act of 2012, in seeking approval of the said payment by the House; and*

2) *The Leader of the Majority Party to table the Report after which it was committed to the Budget and Appropriations Committee for consideration.*

"Honourable Members, I wish to make the following Communication which relates to a request for *post facto* approval of withdrawal of money from the Contingencies Fund of the Republic, and I quote:

> *"(a) The amount appropriated for any purpose under the Appropriation Act is insufficient or a need has arisen for expenditure for a purpose for which no amount has been appropriated in that Act; or*
>
> *(b) money has been withdrawn from the Contingencies Fund."*

Further, Section 22(1) of the Public Finance Management Act of 2012 provides that not later than two months after making advances from the Contingencies Fund, the Cabinet Secretary responsible for Finance shall submit to Parliament for approval, a detailed report in respect of the said payment.

The Act also sets out the specific information that ought to be included in the Report.

Hon. Members, in this regard, by a letter dated 30th October 2018 the Cabinet Secretary for the National Treasury has submitted to my office, by way of a statement, a report on approval of payment from the Contingencies Fund. The payment amounting to Kshs. 1.05 billion was extended to the victims of the recent flood incidences in the country. The summary of the expenditure is in respect of the following three items:

Broad Area of Expenditure	**Amount in Kshs.**
(i) Transfer to the Kenya Red Cross Society towards response to flood incidences countrywide	1,000,000,000
(ii) Support to the families who lost loved ones through floods across the country	18,070,000
(iii)Support to the families affected by landslides	31,930,000
Total	**1,050,000,000**

The Cabinet Secretary, having complied with Section 22(2) of the Public Finance Management Act of 2012, is seeking approval of the said payment by this House. The approval will enable the National Treasury to cause an appropriation of the money paid and replenish the Contingencies Fund.

I will therefore allow the Leader of the Majority Party to table the Report under Order No. 5 after which it shall stand committed to the Budget and Appropriations Committee for consideration. I urge the Committee to pay particular attention to the Report with a view to guiding the House on how to proceed with the request for approval.

I thank you."

MANDATES OF BUDGET AND APPROPRIATIONS COMMITTEE AND DEPARTMENTAL COMMITTEE ON FINANCE AND NATIONAL PLANNING

Tuesday, 6th December 2018

Context:

A Member had sought the Speaker's guidance on the mandate of the Budget and Appropriations Committee vis-à-vis that of the Departmental Committee on Finance and National Planning and aspects of shared mandate, with particular reference to coordination and processing of key aspects of the Budget and budget-related legislations.

Decision of the Speaker:

1. *It is not advisable to attempt to segment aspects of taxation or revenue that are shared between the Budget and Appropriations Committee and Departmental Committee on Finance and National Planning. In the meantime, however, the Budget and Appropriations Committee ought to confine itself to evaluating the overall Estimates of Revenue and Expenditure whereas the Departmental Committee on Finance and National Planning ought to focus on the revenue raising measures portfolio.*

2. *The responsibility of assessing the implications of Members' proposed amendments to the Finance Bill, is under the purview of the Departmental Committee on Finance and National Planning.*

3. *On whether there was a distinction between tax policy and tax revenue raising measures in the Finance Bill, it was the Speaker's considered view that the two issues are invariably and inextricably intertwined. They cannot be separated, whether for legislative or implementation purposes.*

4. *On which Committee is charged with the responsibility of addressing tax policy and tax revenue raising measures, the Departmental Committee on Finance and National Planning retains this mandate based on the reasons highlighted herein.*

"Hon. Members, this third Communication relates to the mandates of the Budget and Appropriations Committee and the Departmental Committee on Finance and Planning.

Hon. Members, you may recall that on Tuesday, 4th December 2018, the Member for Kitui Central Constituency, Hon. Makali Mulu, rose on a point of order seeking my guidance on the mandate of the Budget and Appropriations Committee and that of the Departmental Committee on Finance and National Planning, with particular reference to coordination and processing of key aspects of the Budget.

Hon. Members, In his submission, Hon. Makali referred to various Articles of the Constitution, the Public Finance Management Act (No. 18 of 2012), and in particular, Section 39 of the said Act, and the National Assembly Standing Order 207 and 216. He postulated that the guidance given to the House by the Budget and Appropriations Committee in scrutinizing and approving the Government's fiscal framework includes the purview of projected revenue and revenue-raising measures such as taxation, loans and grants that are introduced through the Finance Bill. Consequently, he observed that any additional revenue raising measures or tax incentives introduced after the passage of the Appropriations Bill should be deemed as having

a distorting effect on the fiscal framework already approved by the House through the Budget and Appropriations Committee.

Hon. Members, It is in this regard, and on account of these concerns, that the Member for Kitui Central Constituency sought guidance and clarification on the following three broad areas:

1. What aspects of taxation and revenue are shared between the Budget and Appropriations Committee and the Departmental Committee on Finance and National Planning? How can those shared aspects be processed in an efficient, effective and amicable manner to ensure that the fiscal framework represents the true facts?

2. Which of the two Committees is charged with the responsibility of assessing the implications of Members' proposed amendments to the Finance Bill?

3. Is there a distinction between tax policy and tax revenue raising measures in the Finance Bill? If so, which Committee is charged with the responsibility of addressing them?

Hon. Members, I undertook to issue a Communication to guide the Member and the House on the matters raised by Hon. Makali Mulu, which I hereby do. This is not the first time that this august House has had to address matters of the mandate of Committees. Those among you who served in the 11th Parliament may recall that in December 2013, several Members sought guidance on the apparent conflict of mandates between the Public Accounts Committee and the Public Investments Committee on one hand and the Departmental Committees on the other. Additionally, it is not the first time either that the mandate of the Budget and Appropriations Committee has come into focus in this House.

You may, in this regard, recall that in May 2015, the then Member for Gem, the Hon. Jakoyo Midiwo, rose on a point of order and raised several issues regarding the place of the recommendations of Departmental Committees regarding Budget Estimates for line Ministries and Departments in the Report of the Budget and Appropriations Committee. The ruling made by the Chair in both instances helped in addressing the issues raised at the time.

Hon. Members, As you are all aware, this august House relies primarily on the existing legal framework and established practice in addressing issues of this nature in a bid to ensure that the eventual solution is practical and sustainable. I therefore wish to commence my Communication today by highlighting the mandate and responsibilities of the two Committees regarding what Hon. Makali Mulu sought guidance on.

To begin with, the mandate of the Budget and Appropriations Committee as provided for in Standing Order 207 entails the following:

1. to investigate, inquire into and report on all matters related to coordination, control and monitoring of the national budget;

2. to discuss and review the estimates and make recommendations to the House;

3. to examine the Budget Policy Statement presented to the House;

4. to examine Bills related to the national budget, including Appropriations Bills; and

5. to evaluate tax estimates, economic and budgetary policies and programmes with direct budget outlays.

Based on these areas of mandate, the Budget and Appropriations Committee has been identified by this House as the 'relevant Committee of the Assembly' referred to in Article 114 of the Constitution. Thus, the Budget and Appropriations Committee is further mandated by the Constitution:

1. under Article 114(2) to guide the Speaker in determining the action to be taken on a Motion that makes provision for a matter listed in the definition of a 'Money Bill'; and

2. Under Article 221(4) to discuss and review Estimates of Revenue and Expenditure of the national Government and make its recommendations to the National Assembly. These recommendations, upon approval by the House, become the basis of the Appropriations Bill. This role is also provided for in Section 39(2) of the Public Finance Management Act, 2012. Further, Clause 6 of the same Article 221 provides, and I quote, "when the estimates of national government expenditure, and the estimates of expenditure for the Judiciary and Parliament have been approved by the National Assembly, they shall be included in an Appropriation Bill, which shall be introduced into the National Assembly to authorise the withdrawal from the Consolidated Fund of the money needed for the expenditure, and for the appropriation of that money for the purposes mentioned in the Bill"

Hon. Members, on the other hand, the mandate of the Departmental Committee on Finance and National Planning as provided for by the National Assembly Standing Order 216, and to single out subjects related to matters raised by the Hon. Makali Mulu, include, but not limited to investigating, inquiring into, and reporting on all matters relating to the mandate, management, activities, administration, operations and estimates of the assigned Ministries and departments; studying the programme and policy objectives of Ministries and departments and the effectiveness of the implementation; and, making reports and recommendations to the House as often as possible, including recommendation of proposed legislation. Consequently, the Second Schedule of the same Standing Orders further provides on the mandate encompassing the following:

1. Public finance and monetary policies;
2. Public debt;
3. Financial institutions (excluding those in securities exchange);
4. Investment and divestiture policies;
5. Pricing policies;
6. Banking;
7. Insurance;
8. Population;
9. Revenue policies including taxation;
10. National planning and development.

Further, Standing Order 245 mandates the Departmental Committee on Finance and National Planning to introduce to the National Assembly the Finance Bill in the form submitted as a

legislative proposal by the Cabinet Secretary, together with the report of the Committee on the Bill.

Hon. Members, Having highlighted the mandates of the two Committees, I now wish to observe as follows:

First, you will recall that the Sessional Committee on Fiscal Analysis and Appropriation was established by a resolution of this House in 2005, which was by itself a historic resolve that eventually led to the establishment of the Budget Committee through the Fiscal Management Act of 2009 and finally the re-establishment of the Budget and Appropriations Committee by the Public Finance Management (PFM) Act of 2012. It is thus observed that the Budget and Appropriations Committee is the only Committee having additional functions through legislation. The Budget and Appropriations Committee has a wider mandate when it comes to budget matters as follows:

(a) **Providing general direction on budget matters:**

The Budget and Appropriations Committee as provided for in the PFM Act 2012 as well as the Standing Orders of National Assembly is required to provide recommendation on the overall macro-economic framework expected to guide the annual Budget as well as in the medium term. The Committee is expected to do this through a review of the Budget Policy Statement (BPS) and the medium-term Debt Strategy Papers which are laid in this House annually. In doing so, the Committee enables the Assembly to set ceilings on the overall fiscal framework as well as ceilings on expenditure. Departmental Committees, on their part, review the BPS pertaining to their respective line Ministries and Departments, and submit their recommendations to the Budget and Appropriations Committee for review and consolidation.

(b) **Providing direction on the vertical and horizontal distribution of nationally-raised resources:**

The PFM Act 2012 and the National Assembly Standing Orders mandate the Budget and Appropriations Committee to review the Division of Revenue Bill as well as the County Allocation of Revenue Bill, and propose to the House the level of resources to allocate horizontally (that is, at the national level) and vertically (that is, between the two levels of government). The intent and spirit of designating this role to the Budget and Appropriations Committee is premised on the fact that as the Committee gives recommendation on the overall direction of the budget, it also resolves and guides on the overall resource envelope that is to be raised both domestically as well as externally.

(c) **Examining Bills related to the National Budget including Appropriation Bills:**

The function to examine bills related to the National Budget including Appropriation Bills is provided for in National Assembly Standing Order 207(3)(d). The Budget and Appropriations Committee has always reviewed Appropriation Bills. However, other budget related bills are reviewed and scrutinized by the Departmental Committee on Finance and National Planning. This includes the Finance Bill that is introduced in the National Assembly every year.

(d) **Evaluating tax estimates, economic and budgetary policies and programmes with direct budgetary outlays:**

The Budget and Appropriations Committee is expected to review the overall resource envelope that is expected to identify total revenues as per each category of sources. Hence, upon the submission of the BPS by the Cabinet Secretary for National Treasury, the Budget and Appropriations Committee reviews the macro framework especially the financing proposals

and policies that are expected to underpin the realization of all the resources. The Committee is also expected to review the Estimates of Revenue that are submitted within the overall Estimates and propose any necessary amendments.

It is important to note that this is not a review of the individual measures but a review of the Estimates, that is, the total absolute amounts. This is a major departure between the role of the Budget and Appropriations Committee regarding revenues and that of the Finance and National Planning Committee. While the former looks at the absolute overall amounts, the latter looks at each and every measure; that is, proposals to tax and not to tax.

(e) **Examining Estimates of Expenditure and carry out monitoring of overall expenditure:**

The review of Estimates of Expenditure is a function that the Budget and Appropriations Committee performs annually. The review is done in consultation with other Departmental Committees, and culminates in recommendation to the House by way of reports. The Committee also reviews the in-year reports on budgets and if necessary, submits recommendations, which in turn forms the basis of Supplementary Estimates.

Hon. Members, As earlier alluded, the role and mandate of the Departmental Committee on Finance and National Planning is outlined in the Second Schedule of the National Assembly Standing Orders. The Committee of Finance and National Planning performs several roles as listed earlier in this Communication. The specific roles that seem to have issues related to the roles of the Budget and Appropriations Committee are as follows:

(i) Revenue policies, including taxation:

Specific Bills related to the Budget, such as the Appropriations Bills and Supplementary Appropriations Bills, are by statute expected to be reviewed by the Budget and Appropriations Committee.

(ii) Public finance, monetary policies, banking, insurance and public debt

National Assembly Standing Order 232 (6) mandates the Budget and Appropriations Committee with the task of consideration of the debt management strategy. This is a matter which has a bearing on the role of the Departmental Committee on Finance and Planning concerning public debt.

Hon. Members, in consideration of the foregoing, I wish to correspond to the three issues of inquiry from Hon. Dr. Makali Muli as follows:

1. Regarding the inquiry as to what aspects of taxation and revenue are shared between the Budget and Appropriations Committee, and the Departmental Committee on Finance and National Planning, it is not advisable to attempt to segment taxation or revenue into different categories for purposes of legislation since taxation and revenue matters are extensively broad and intrinsically linked. Consequently, the question as to which aspects of taxation and revenue are shared by the two Committees can only be addressed by future comprehensive revenues of the Standing Orders, following intensive consultations and research. In the meantime, however, the Budget and Appropriations Committee ought to confine itself to evaluating the overall Estimates of Revenue and Expenditure whereas the Departmental Committee on Finance and National Planning ought to focus on the revenue raising measures portfolio.

2. Regarding the inquiry on which of the two Committees is charged with the responsibility of assessing the implications of Members' proposed amendments to the Finance Bill,

the Departmental Committee on Finance and National Planning is mandated, under Standing Order 245 (1), to introduce to the House the Finance Bill in the form in which the Bill was submitted as a legislative proposal by the Cabinet Secretary for the National Treasury, together with the report of the Committee on the Bill as a Departmental Committee would be expected to do. By practice, a Committee to which a Bill is charged, or which introduces a Bill, and which additionally reports on the Bill, is typically expected to be the same Committee that handles any amendments to the same Bill. Consequently, amendments to the Finance Bill are under the purview of the Departmental Committee on Finance and National Planning.

However, this arrangement notwithstanding, Standing Order 245(2) requires the Departmental Committee on Finance and Planning to ensure that its recommendations to the Finance Bill and, by interpretation, any proposed amendment by Members on revenue matters on the Finance Bill or any other Bill are in such a manner that the total amount of revenue raised is consistent with the approved fiscal framework.

The Departmental Committee on Finance and National Planning is, therefore, obligated to ensure that any amendment to the taxation proposals and revenue matters in the Finance Bill do not negatively impact the macro-economic and fiscal framework. It might thus be necessary for the Finance Committee to ensure that any amendment to the Finance Bill is accompanied by a statement on the financial implications of the amendments before it can be considered by the House.

3. Regarding the third and final inquiry on whether there is a distinction between tax policy and tax revenue raising measures in the Finance Bill, it is my considered view that the two issues are invariably and inextricably intertwined. They cannot be separated, whether for legislative or implementation purposes. Regarding the second part of this inquiry, namely, which Committee is charged with the responsibility of addressing tax policy and tax revenue raising measures, the Departmental Committee on Finance and National Planning retains this mandate based on the reasons highlighted herein.

Hon. Members, in conclusion, it may be argued that there are valid concerns when it comes to the specific differentiation of the mandate of the Budget and Appropriations Committee vis-à-vis the Departmental Committee on Finance and National Planning. In particular, the key areas of apparent overlap involve the evaluation of Budget-related Bills and the analysis of public debt.

Nevertheless, the minor areas of apparent overlap should not constitute a reason for inability, delay or inefficiency of either of the two Committees in carrying out its respective roles and responsibilities. Should the issues recur or worsen with time, as it could happen, it might then become imperative for this august House to consider reviewing the Standing Orders to define and segregate in order to address all areas of concern regarding the mandates of these two Committees, based on what obtains in other jurisdictions and more particularly, in the United States of America, the American Congress and the Germany's Bundestag. Such a review, however, should be undertaken only after a comprehensive and extensive research and consultations amongst all key stakeholders. The Member and, indeed, the House, are accordingly guided."

Third Session

(12th February 2019 to 12th February 2020)

APPROPRIATE DRESS CODE FOR MEMBERS IN PARLIAMENT

Wednesday, 13th March 2019

Context:

Determination of what constitutes an appropriate/proper dress code for Members while in the Chamber or Committee.

Decision of the Speaker:

1) *All Members, without exception, must observe Rule 8 of the Speaker's Rules (Revised) 2017 regarding dress code for Members while in the Chamber, Lounges, Dining Room or committee rooms at all times;*

2) *Where, for very good reasons, a presiding officer or chairperson of a committee is approached by a Member to exempt the application of the rule on dress code, necessary discretion may be exercised.*

3) *With respect to the attire of lady Members, presiding officers and chairpersons should exercise due discretion without compromising sartorial standards;*

4) *With regard to permitting diverse cultural regalia, the Procedure and House Rules Committee to explore what could be considered as acceptable 'African' or 'national dress';*

5) *As to whether the prescription of a dress code was an affront on the freedom of conscience, religion and belief of Members, the rules emanate from what is considered acceptable standards agreed on by the House;*

6) *As to when the House may choose to depart from traditionally prescribed dress code that it has remained accustomed to for decades while preserving the dignity and sartorial standards the House sets, the Speaker shall proceed as the House shall determine.*

"Honourable Members, you will recall that during the afternoon sitting on Wednesday, 20th February 2019, the Member for Kisumu West Constituency, Hon. John Olago Aluoch, rising on a point of order, sought the guidance and direction of the Chair on the matter of appropriate dress code for Members in the Chamber. The Hon. Olago drew the attention of the Chair to the dress code of the Member for Rarieda, the Hon. (Dr.) Otiende Amollo, who was dressed in a collarless shirt and a matching jacket and, without a tie as prescribed in our rules.

Other Honourable Members, including the Deputy Speaker, the Hon. Moses Cheboi, the Leader of the Majority Party, the Hon. Aden Duale; the Leader of the Minority Party, the Hon. John Mbadi; the Hon. Chris Wamalwa; the Hon. Sakwa Bunyasi; the Hon. Abdulswamad Nassir; the Hon. Kubai Iringo; the Hon. Mohamed Mohamud, the Hon. (Dr.) Robert Pukose; the Hon. Kimani Ichung'wah; and the Hon. (Dr.) Makali Mulu weighed in to give their input or to seek further clarification on the matter.

I have perused the HANSARD Report of the day's proceedings so as to appreciate the issues raised by Hon. Olago and the issues canvassed by other Members on this subject, and I have identified the following key issues for consideration:

1) What constitutes a proper dress code for Members of the National Assembly while in the Chamber?

2) Can there be exceptions to the rule and, if so, under what circumstances?

3) What is a decent attire/wear in respect of Honourable Lady Members?

4) Whether our diverse cultural regalia should be permitted to form part of the dress code for the Chamber and in committees of the House;

5) Whether the prescription of a dress code is an affront on the freedom of conscience, religion and belief of Members of this august House; and

6) Whether, in fact, it is time to depart from the traditionally prescribed dress code that the House has been accustomed to for decades and which has been used for preserving the dignity and sartorial standards of this House.

The debate as to what constitutes appropriate dress code is not new to this House. History is replete with instances where the Chair has been invited to determine whether or not a Member is properly dressed. Indeed, it is a matter that is not unique to the Parliament of Kenya or, perhaps, the National Assembly. It has and shall continue to dominate discourse across parliaments the world over. This is because a House of Parliament without basic agreed standards of dress and manners can subject itself to dishonour.

In addressing the issues raised by Hon. Olago Aluoch and fellow Members as to what constitutes an appropriate dress code, I am, at the outset, bound to address three issues; namely:

1) What is the rule governing the manner of dress while attending plenary and committee sittings in the National Assembly?

2) What has the practice and application of the said rule been and how does it sit with practices and precedents in comparable jurisdictions?

3) Should we or should we not in fact have an absolutely determinate rule governing dress code?

As you may all be aware, Article 117(2) of the Constitution gives Parliament the authority, for the purpose of the orderly and effective discharge of its business, to provide for its powers, privileges and immunities. In furtherance of the said constitutional principle, Section 37 of the Parliamentary Powers and Privileges Act, 2017 provides that:

> *" (1) The Speaker of either House of Parliament may, from time to time, issue such orders as may be necessary or expedient for the better carrying out of the purposes of this Act.*
>
> *(2) Without prejudice to the generality of the foregoing, the orders may provide for—*
>
> *(a) the admittance of members of the public to the precincts of Parliament;*
>
> *(b) the deduction of any monies due to a member in respect of refreshments or other facilities made available to members within the precincts of Parliament; and*
>
> *(c) the appropriate dress code for members."*

Accordingly, my predecessors did prescribe the '*appropriate dress code*' for Members of the National Assembly in previous Speaker's Rules. I also did affirm the same in the current Speaker's Rules, 2017 (Revised). Rule No. 8 of the Speaker's Rules (Dress Code for Members, Media Representatives and Guests) states that:

> "*Members, members of the press and guests shall not enter the Chamber, Lounges, Dining Room or Committee Rooms without being properly dressed. For the purposes of these Rules, proper dress means –*
>
> *(a) a coat, collar, tie, long-sleeved shirt, long trousers, socks, and shoes or service uniform for men; and,*
>
> *(b) decent formal/business wear for women*"

Honourable Members may recall that the Clerk did provide a copy of the Speaker's Rules issued by myself to every Member in keeping with Section 37(4) of the Parliamentary Powers and Privileges Act, 2017.

It is instructive to note that a prescription of an '*appropriate dress code*' is not codified in our Standing Orders. In its wisdom, the House has, like in many comparable jurisdictions, left it to the discretion of the Speaker to make orders as may from time to time be necessary and as exigencies call for. It is also important to note that most legislatures in comparable jurisdictions have, for good reasons, refrained from codifying '*appropriate dress code*' in their Standing Orders.

This takes us to the second question, which is: What has been the practice and application of the said rule and how does it sit with practice and precedent in comparable jurisdictions? A review of instances of alleged improper dressing in the House reveals that Speakers have always exercised due discretion while enforcing the rule. But, as the Hon. Olago Aluoch did admit, the matter of dress code is evolving fast. Consequently, a practice has developed whereby in cases where the claimed dressing is at variance with what is prescribed in the Rules, the determination of what constitutes "an appropriate dress code" has been left to the discretion of the Speaker.

In 1968, Speaker Humphrey Slade, was invited to determine whether or not the then Member for Embu North, Hon. Mbogoh, was properly dressed. Speaker Slade ruled thus:

> *"As I have said on other occasions, we have no Standing Orders concerning dress, which I can enforce. It rests on the collective opinion of the House as to what is or is not proper dress. If Hon Mbogoh does not meet with the approval of Hon. Members, he will doubtless hear about that."*

I am persuaded to agree with Speaker Slade that, where it is not clear whether a Member's dress is proper or not, discretion has been left to the Speaker to make a determination on the matter, taking into account the collective opinion of the House as to what is or is not proper dress.

Hon. Members, on 10th July 2003, Speaker Francis Kaparo was confronted with a similar situation. The then Member for Gatundu North, the Hon. Patrick Muiruri had risen on a point of order contesting that the then Member for Kisumu Town East, the Hon. Gor Sungu, was not properly dressed. My review of the HANSARD reveals no description of how Hon. Sungu was dressed then but when called upon by the Speaker to rise in his place, the HANSARD records that the House chanted "*Shame! Shame!*" indicating that the House was nearly of the unanimous view that Hon. Gor Sungu was improperly dressed.

Before ordering Hon. Sungu to withdraw from the Chamber, the Speaker is on record stating as follows:

> "*Order! Mr. Sungu, you can hear the displeasure of the House. I obey the command of the House. If your sight displeases the House, it is my duty to remove your sight out of the House…" The Chair goes by the will of the House. Once the House disapproves, I have no choice. I am a servant of the House*."

On the question of a Muslim *kanzu*, my predecessors have ruled that being a universally recognised formal, albeit religious dress, the *kanzu* is acceptable within the rules governing dress in this House, provided that a Member wearing a *kanzu* also wears a coat as an outer garment. I have no intention of revisiting this established practice and tradition.

As to the question of admissibility of African male attire, those who have served in previous Parliaments would recall that the matter has come up several times. I have isolated a case involving the then Member for Subukia, Hon. Koigi wa Wamwere. On 10th July 2003, Hon. Wamwere entered the House dressed in smart African attire. This prompted the then Member for North Horr, the late Hon. (Dr.) Bonaya Godana, to seek the interpretation of the Chair as to whether Hon. Wamwere was properly dressed. The Speaker determined that decent as he may have been, the Member was not properly dressed.

May I also remind the House that the Chair is not oblivious of the progressive attempts that the Ministry of Culture made in 2004 to have Kenya's national dress with an African theme that epitomises the country's cultural dressing diversity. As facts stand now, the envisioned Kenyan national dress remains work in progress.

Much as Hon. Otiende Amollo alluded to inalienability of the right to conscience, religion and culture under Chapter Four of the Constitution of Kenya, it ought not to be lost that for the case of Parliament, these entitlements must be construed to preserve our sartorial standards and ensure decency in the House. I am, therefore, constrained from granting latitude to male Members to dress in what they would consider to be African or national dress.

The Leader of the Majority Party seemed to be inviting the Chair to make a finding that nominated Member Hon. David Sankok's manner of dressing, particularly his choice to don national colours, is outside the ambit of Rule 8 of the Speaker's Rules. However, the Member still dons a coat, long-sleeved shirt, a tie, long trousers and shoes. I do not intend to belabour to prescribe the colour, shape and design of suits won by Members. That is a matter of personal choice and taste. But that notwithstanding, should the Chair establish that the nature and colour of the said dress is intended to crusade or advertise a certain course, he would not hesitate to make a determination.

Allow me to briefly share with the House the application of rules relating to dress code in selected jurisdictions. First, in the United Kingdom's House of Commons, from where the practice in Kenya was heavily borrowed, Rule 23 on dress provides that:

> "*As with the language you use, the way in which you dress should also demonstrate respect for the House and for its central position in the life of the nation. There is no exact dress code. Convention has been that for men, a jacket and a tie is expected. For women, the equivalent level of formality should be observed*."

However, in June 2017, the House of Commons did revisit the matter of dress code for male Members of Parliament where my counterpart, Speaker John Bercow, did guide that Members have to be dressed in "*business-like attire*" but that ties are no longer essential. I have since checked and found out that a cross-section of the British society seems to be expressing

fears that Parliament's sartorial standards will decline, while others think that the House of Commons is finally entering the 21st Century. The question that begs is: Has the time for a fashion revolution come or is it time to allow fashion to permeate tradition?

In Australia, the dress code is not firmly anchored in the rules. In 1999, Speaker Andrew Neil observed that it was widely accepted throughout the Australian Parliament community that the standards of dressing should include good trousers, a jacket, collar and tie for men, and a similar standard of formality for women. In 2005, Speaker David Hawker echoed Speaker Andrew's position, observing that it was not in keeping with the dignity of the House for Members to arrive in casual or sportswear.

Closer home in Zambia, the official dress code for Members of the National Assembly is codified in Standing Order 165, which provides as follows:

> *"The official dress for male Members of Parliament shall be a formal suit, a pair of long trousers, a shirt, a tie and jacket, toga or safari suit with long or short sleeves and a scarf or tie. The official dress for female Members of Parliament shall be a formal dress, dress suit or skirt suit, chitenge dress or suit, short or long sleeved and below the knee, or formal executive trouser suit."*

Order Members. Emphasis is "*below the knee*".

In New Zealand, the Speaker's Rules require both male and female Members to dress in "*business attire*". In terms of application, it is observed that most Speakers have interpreted that rule to mean ties and jackets for men.

Our counterparts in Uganda are expected to dress in a dignified manner. Rules governing dress code prescribe suits, pairs of trousers, jackets/coats, shirts and ties or *kanzus* or safari suits for men and blouses and skirts or dresses and jackets for lady Members. By virtue of the composition of Parliament, military Members wear their uniform. The rules further require Members to wear acceptable shoes, save for cases where a Member of Parliament could, with the Speaker's permission, wear what might not necessarily be the norm.

Hon. Members, let me address myself to the manner of dressing of the Member for Rarieda, Hon. (Dr.) Otiende Amollo. Hon. Amollo seems to have a particular taste for collarless shirts. Indeed, as I have ruled before in 2014, *kaunda* suits and even, for lack of a better term, the Mao Zedong coats, worn without a tie, are admissible as part of proper dressing in the House. I have relooked at the manner in which Hon. Otiende Amollo was dressed on Wednesday, 20th February, 2019 in the context of the definition of proper dress under Rule 8. Unlike the collarless coats that I have just described, Hon. Otiende Amollo's coat on that particular day was collared and, therefore, does not pass to be worn without a tie. I, therefore, find that the Member was not properly dressed on that day.

As I conclude, I must emphasise that it is in the interest of Members that whenever they appear in the House or its committees to transact business, they do so in decorous attire befitting their stature as legislators and that of Parliament as an institution. The same does apply to Members while in the Lounge and Dining Room. I hasten to restate that whenever the House shall find a Member to be improperly dressed, the Chair will not hesitate to enforce strict adherence to proper dressing. Members who incessantly dress improperly will be deemed to be disorderly and may be subject to applicable sanctions.

In conclusion Hon. Members, I will now address the question of what constitutes an appropriate dress code for the National Assembly. In doing so, I start by reiterating that Rule 8 of the Speaker's Rules (Revised) 2017 still applies, and for the avoidance of doubt, I quote:

"*Members, members of the press and guests shall not enter the Chamber, Lounges, Dining Room or Committee Rooms without being properly dressed. For the purposes of these Rules, proper dress means:*

(a) a coat, collar, tie, long-sleeved shirt, long trousers, socks, and shoes or service uniform for men; and,

(b) decent formal/business wear for women"

Consequently Hon. Members, in summary, it is my considered ruling that all Members, without exception, must observe Rule 8 of the Speaker's Rules (Revised) 2017 regarding dress code for Members while in the Chamber, Lounges, Dining Room or committee rooms at all times.

That, where for very good reasons a presiding officer or chairperson of a committee is approached by a member to exempt the application of the rule, necessary discretion shall be exercised by the presiding officer or chairperson of a committee.

That, with regard to what is decent attire in respect of our lady colleagues, again, presiding officers and chairpersons should exercise due discretion without compromising our sartorial standards. Lady colleagues are, therefore, duly advised to dress appropriately.

That, as to whether our diverse cultural regalia should be permitted to form part of appropriate dress code in the House and in committees of the House, I wish to state that, so as to ensure we do not compromise on our sartorial standards, to avoid confusion, and in order that we do not end up in utter disorder, the Committee on Procedure and House Rules shall, in future, explore what could be considered as acceptable '*African*' or '*national dress*'.

That, as to whether the prescription of a dress code is an affront on the freedom of conscience, religion and belief of Members of this august House, I am of the considered opinion that the beauty with our rules is that they emanate from what we consider to be accepted standards; standards agreed on by this very House and when this House agrees, so it shall be.

That, as to whether in fact it is time to depart from the traditionally prescribed dress code that the House has been accustomed to for decades even while at the same time preserving the dignity and sartorial standards the House sets, I guide as your servant, that when the time comes for the House to review its sartorial standards and to break with tradition, we shall proceed as the House shall determine.

The House is accordingly guided."

REPORT ON ALLEGED IRREGULAR SPECIALIST RECOGNITION OF DR. SAMIRA SONI BY THE KENYA MEDICAL PRACTITIONERS AND DENTISTS BOARD

Wednesday, 13th March 2019

Context:

Determination of whether it was within the mandate of the House to discuss the matter of recognition of a specialist by a professional body and how the Departmental Committee on Health got seized of the matter.

Decision of the Speaker:

1) *The House does not impose upon committees on matters they should inquire into and therefore, the decision to inquire into any particular matter is entirely that of a committee so long as it falls within the particular Committee's mandate; and,*

2) *The Report by the Departmental Committee on Health on Alleged Irregular Specialist Recognition of Dr. Samira Soni by the Kenya Medical Practitioners and Dentists Board was properly before the House and the motion for adoption is in order and debate on the same could be resumed at the appropriate time.*

"Honourable Members, you will recall that yesterday, Tuesday, 12th March 2019, during debate on the Motion for Adoption of the Report of the Departmental Committee on Health on Alleged Irregular Specialist Recognition of Dr. Samira Soni by the Kenya Medical Practitioners and Dentists Board, the Member for Suba North, Hon. Millie Odhiambo-Mabona, rose on a point of order seeking clarification as to whether it was within the mandate of the House to discuss the subject matter of the Report regarding the recognition as a specialist by a professional body.

In her submission, Hon. Millie Odhiambo-Mabona stated that the statutory body that is mandated to determine whether a person is or is not qualified to be recognised as a medical specialist is the Kenya Medical Practitioners and Dentists Board (KMPDB) through its laid down procedures and regulations. She added that, where the board makes the decision on a case, and either approves or rejects an application, there exist mechanisms in place for appeal in case of a rejection.

Hon. Members, you may further recall that several other Members made their contributions on the matter, including the Member for Kathiani, Hon. Robert Mbui, Member for Dadaab, Hon. Mohammed Duale, Nominated Member, Hon. David ole Sankok, the Member for Seme, Hon. (Dr.) James Nyikal, the Member for West Mugirango, Hon. Vincent Kemosi and the Mover of the Motion and Member for Murang'a County, Hon. (Ms.) Sabina Chege who weighed in to give their inputs or to seek further clarification on the matter. Consequently, I did order adjournment of debate on the Motion and undertook to guide the House today.

Hon. Members, from the issues raised by Hon. Millie Odhiambo and the issues canvassed by other Members, the following are the issues for my consideration:

1) Whether the House is within its mandate to discuss a report of a committee such as the one by the Departmental Committee on Health on the Alleged Irregular Specialist Recognition of Dr. Samira Soni by the Kenya Medical Practitioners and Dentists Board.

2) How the Committee got seized of the matter and what prompted the Committee to conduct the inquiry.

Hon. Members, first, I wish to remind you that Standing Order 216(5) mandates Departmental Committees to, among other functions, investigate, inquire into and report on all matters relating to the mandate, management, activities, administration, operations and estimates of the assigned ministries and departments. Once a Committee has inquired into a matter and reported to the House, the House considers the report, and makes a decision on it, guided by the Standing Orders. The decision to inquire into any particular matter is therefore entirely that of a Committee, so long as the subject is within its mandate. In this particular case, the Committee on Health clearly indicated that the matter was first brought to its attention by the Member for Kisumu Town East, Hon. Shakeel Shabbir in the Eleventh Parliament through letters dated 19th November 2014 and 17th February 2016, respectively. The Report also indicates that Hon. Shakeel asked the Committee to look into the matter again through a letter dated 14th March 2018.

Hon. Members, it is my considered finding that the House is therefore within its mandate to discuss the Report of the Departmental Committee on Health on Alleged Irregular Specialist Recognition of Dr. Samira Soni by the Kenya Medical Practitioners and Dentists Board. Indeed, at the end of the debate, the House will be expected to make a decision in one way or the other.

Further, Hon. Members, yesterday, there were concerns regarding the nature of the Report in question with some Members intimating that it was a report on a petition and therefore, did not merit debate as per our Standing Order 227. In this regard, may I set the record straight. From my findings, the Report before the House is a Report on an inquiry within the confines of Standing Order 216 (5) on functions of departmental committees and not a report on a petition.

Hon. Members, before I conclude, may I report that it has come to my attention that there were two versions of the Report; one being the Report tabled on 17th October 2018 which I had approved and another one being a report allegedly tabled on 19th February 2019 - also shown to have been brought to me for approval. It has since been clarified to me that, at the time of renewing the Notice of Motion by the Committee on 19th February 2019 following the commencement of the Third Session, the second version, which was a working draft, was erroneously circulated. It important to note that this working draft does not meet the minimum requirements for a report to be tabled as, among other things, it was not signed by the Chairperson and did not contain minutes of the Committee as is required by the Standing Orders. Therefore, the authentic Report is the one tabled on 17th October 2018, and which is referred to in the Motion.

Hon. Members, I therefore wish to guide the House as follows:

1) That, the House does not impose upon committees on matters they should inquire into and therefore, the decision to inquire into any particular matter is entirely that of a committee so long as it falls within the particular Committee's mandate; and,

2) That, the Report by the Departmental Committee on Health on Alleged Irregular Specialist Recognition of Dr. Samira Soni by the Kenya Medical Practitioners and Dentists Board,

laid on the Table of the House on Wednesday, 17th October 2018, is properly before the House and the motion for adoption is in order and debate on the same may now resume at the appropriate time.

The House is guided accordingly".

ADMISSIBILITY OF RECOMMENDATIONS OF THE REPORT OF THE PUBLIC ACCOUNTS COMMITTEE ON ITS EXAMINATION OF THE REPORT OF THE AUDITOR GENERAL ON THE FINANCIAL STATEMENTS OF THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION

Thursday, 14th March 2019

Context:

The constitutionality and admissibility of certain recommendations of the Public Accounts Committee in its Report on the Examination of the Report of the Auditor-General on the Financial Statements for the Independent Electoral and Boundaries Commission (IEBC) for the year ended 30th June 2017 on account that the Committee had exceeded its mandate.

Decision of the Speaker:

1) *Question on the constitutionality or otherwise of business ought not to be left to a vote by the House or addressed by an amendment which is also subject to a vote, but should be addressed by the Speaker once raised at any point;*

2) *The mandate of the House to review the conduct in office of a member of a constitutional commission or a holder of an independent office may only be exercised in accordance with Article 251 of the Constitution when it considers a petition duly filed for the removal of the affected State officer;*

3) *Finding or recommendation by the Committee in the Report tabled before the House which expressly falls outside the mandate of the Committee, or one that offends the provisions of Articles 47 or 251 and Section 10 of the IEBC Act, 2011, would be inadmissible;*

4) *The words "To that end, the Commissioners, Chief Executive Officer and the Directors who were involved in the unlawful procurement should vacate office immediately upon adoption of this Report to allow for much needed reforms to be effected to restore public confidence in the Independent Electoral and Boundaries Commission" in General Recommendation No.3 appearing on pages 4 and 127 of the Report, in so far as it related to the IEBC commissioners, wee inadmissible. This was because the text was recommending a mode of removal from office of constitutional office holders in a manner that was not contemplated by the Constitution;*

5) *Sections 4.0 and 34.0 of the Report relating to "Basis for Committee Recommendations for Vacation of Office" appearing on pages 6, 7, 129 and 130 of the Report, in so far as it related to the IEBC commissioners, were also inadmissible;*

6) *The second sub-paragraph of paragraph 3 of the General Recommendation No.3, appearing on Page 4, which stated: "To that end, the….., Chief Executive Officer and the Directors (emphasis on staff) who were involved in the unlawful procurement should vacate office immediately upon adoption of this Report to allow for much needed reforms to be effected to restore public confidence in the IEBC" was also inadmissible. This was because, while this section was supported by admissible observations of the Committee, the recommendation proposed the removal from office of staff of a constitutional commission in a manner that was neither contemplated by the Constitution nor supported by the*

relevant statute providing for the manner of vacation of office of such staff and governing their discipline;

7) *The observations and findings of the Committee with respect to the staff of the Commission having been found to be admissible, the Chairperson of the Committee to take into account this Communication and move the Motion for the adoption of the Report in an appropriately amended form pursuant to Standing Order No. 48 dealing with Amendment of Notice of Motion;*

8) *The cited text of General Recommendation No. 3 and Sections 4.0 and 34.0 of the Report, having been found to be offensive to the Constitution and, therefore, inadmissible for debate by the House, were forthwith expunged from the Report. The House would make no reference to either text in its consideration of the Report; and*

9) *Expunction of offensive parts of the Report was not to mean that the entire Report was discredited. The rest of the Report remained admissible and would proceed for consideration by the House.*

"Honourable Members, this Communication relates to the question of admissibility of the recommendations of the Report of the Public Accounts Committee on its examination of the Report of the Auditor-General on the Financial Statements for the Independent Electoral and Boundaries Commission (IEBC) for the year ended 30th June 2017.

Hon. Members, you will recall that on Thursday, 7th March 2019 and before debate on the Motion for the adoption of the Report of the Public Accounts Committee (PAC) on its examination of the Report of the Auditor-General on the Financial Statements of the Independent Electoral and Boundaries Commission (IEBC) for the year ended 30th June 2017, the Leader of the Majority Party, Hon. Aden Duale, rose on a point of order seeking direction from the Speaker on the admissibility of one of the recommendations in the Report. His point of order relates to the General Recommendation No. 3 of the Report, and for clarity, I quote:

> *"To that end, the commissioners, Chief Executive Officer and the directors who were involved in the unlawful procurement should vacate office immediately upon adoption of this Report to allow for much needed reforms to be effected to restore public confidence in the Independent Electoral and Boundaries Commission"*

Hon. Members, according to the Leader of the Majority Party, since the recommendation seeks the removal from office of the IEBC commissioners and staff, it expressly flouts the provisions of Article 251 of the Constitution of Kenya on the procedure for the removal of a member of a Constitutional commission and Article 236 of the Constitution, which guarantees public officers protection in the exercise of their duties. It was, therefore, his view that the House should not proceed to make a determination on the impugned recommendation.

Hon. Members, at the time the matter was raised by the Member, you will also recall that no less than 19 interventions from other Members of the House both in support or opposition to the points raised by the Leader of the Majority Party were recorded. In the ensuing debate, the Leader of the Minority Party, Hon. John Mbadi, the Minority Party Whip, Hon. Junet Mohamed, the Chairperson of the PAC, Hon. Opiyo Wandayi, the Chairperson of the Justice and Legal Affairs Committee, Hon. William Cheptumo, Hon. Otiende Amollo, Hon. Adan Keynan, Hon. (Dr.) Chrisantus Wamalwa, Hon. Ngunjiri Wambugu, Hon. Jeremiah Kioni, Hon. William Kamket, Hon. Jared Okello, Hon. Dido Rasso, Hon. Bashir Sheikh, Hon. (Dr.) James Nyikal, Hon. Kangogo Bowen, Hon. Kimani Kuria, Hon. Peter Kaluma and Hon. Jimmy

Nuru Ang'wenyi canvassed various points of view.

Hon. Members, at the close of the debate, I undertook to give a considered ruling on the matter raised and to guide the House on the important question of the consideration of the Report containing the said recommendation. From the point raised by the Leader of the Majority Party and the ensuing debate, I have isolated the following issues as requiring determination:

1) The extent of the mandate of PAC under Standing Order 205 of the National Assembly Standing Orders as read together with Standing Order 197 on the limitation of the mandate of committees.

2) Whether a question on the constitutionality of a recommendation of the House should be left for determination by the House through a vote or potential amendment.

3) The extent of the mandate of the House to review the conduct in office of a State officer and initiate their removal from office under Article 95 of the Constitution *vis-à-vis* the removal procedure under Article 251 of the Constitution.

4) The extent to which the House or its committees may delve into disciplinary matters of staff of a constitutional commission or an independent office.

5) Whether the findings and recommendations contained in the Report by PAC concerning the Auditor-General's Examination of the Financial Statements for the Independent Electoral and Boundaries Commission are admissible.

Hon. Members, on the first issue, the Public Audit Act of 2015 and the Standing Orders provide adequate guidance on the scope of the mandate of PAC and the limits of its exercise of such mandate. Standing Order 205(2) states, and I quote:

> *"(2) The Public Accounts Committee shall be responsible for the examination of the accounts showing the appropriations of the sum voted by the House to meet the public expenditure and of such other accounts laid before the House as the Committee may think fit."*

A clear reading of the Standing Order and the Public Audit Act reveals that the primary role of PAC is that of interrogating the accounts of expenditure of public funds appropriated by the House. The examination of public accounts by the Committee is informed by reports tabled by the Office of the Auditor-General on the use of public funds. Necessarily, the work of the Committee, therefore, includes holding to account any public officer, and in particular, to ensure prudent use of funds appropriated by Parliament, and to clarify any queries raised by the Office of the Auditor-General pertaining to such use or otherwise. Where the Committee, after affording all concerned parties an opportunity to be heard, is of the view that the queries raised by the Auditor General have not been explained to its satisfaction, it recommends to the House appropriate remedial measures in accordance with the law.

Hon. Members, Standing Order 197 limits the deliberations of a committee of the House to only the matters falling under its mandate, unless the mandate is extended by a resolution of the House. The Standing Order provides, and I quote:

> *"(1) The deliberations of a select committee shall be confined to the mandate of the committee and any extension or limitation of that mandate as may be directed by the Assembly and, in the case of a select committee on a Bill, to the Bill committed to it and relevant amendments.*

(2) In the exercise of its functions, a select committee may not consider any matter that is not contemplated within the mandate of the National Assembly under the Constitution."

The import of Standing Order 197 is not to curtail the deliberation of any matters of concern noted by a committee. The essence of this rule is to prevent a committee from misdirecting its efforts to the detriment of its core work. In relation to the work of PAC, consideration of the day-to-day administration of public bodies would clearly be a misdirection of effort. The key test in determining whether the findings and recommendations of the Committee in the instant case fall within the mandate of the Committee would be the extent to which they address or seek to address any unresolved audit queries raised by the Office of the Attorney-General in accordance with the law.

In this regard, and addressing myself to the point raised by the Leader of the Majority Party, a finding or recommendation by PAC in the Report tabled before the House which expressly falls outside the mandate of the Committee would be inadmissible. This dispenses with the first issue.

Hon. Members, in prosecuting his point of order, the Leader of the Majority Party, while urging the Chair to determine the admissibility of the recommendations of the Motion on the Report before the House could proceed to debate it, did refer to the provisions of Standing Order No.47(3). 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;*

(c) *is too long;*

(d) *is framed in terms which are inconsistent with the dignity of the House;*

(e) *contains or implies allegations which the Speaker is not satisfied that the Mover can substantiate; or*

(f) *calls for the commitment of public funds for which no provision is made in the Annual Estimates as adopted by the National Assembly, the Speaker may direct either that, the Motion is inadmissible, or that notice of it cannot be given without such alteration as the Speaker may approve or that the motion be referred to the relevant committee of the Assembly, pursuant to Article 114(2) of the Constitution*."

Hon. Members, ideally, therefore, before any business comes to the House, it is approved by the Speaker on the basis of its constitutionality, among the other criteria for admissibility. Standing Order No. 47(3) is an extension of the requirement placed on the Speaker under Articles 3 and 10 of the Constitution to respect, uphold and defend the Constitution.

Hon. Members, the question that arises now is whether the Motion by the Chairperson of PAC, Hon. Opiyo Wandayi, having been approved and the Report of the Committee having been tabled, the Chair can consider the issue of the constitutionality of the findings and

recommendations of the Report. You will recall that I have previously guided the House that notwithstanding the approval of any business by the Chair under the Standing Orders, the issue of constitutionality can be raised by a Member at any stage of consideration of any business by the House. The only condition such a request would have to meet is that it must be specific in order to capacitate the Chair to revisit the issue with precision and to cure a procedural or constitutional anomaly. In this respect, the Chair has had the occasion to re-look at the arguments advanced by the Leader of the Majority Party and noted that he, indeed, raises a constitutional issue which should, ideally, be dispensed with before the House proceeds with the consideration of a Report with the risk of making a resolution in vain.

Hon. Members, you will also recall that following the request, various Members of the House urged that the Report be allowed to proceed to debate and that any anomaly or otherwise be left for the House to decide. I am fully cognisant of the fact that the decisions of this House are expressed with the endorsement of the votes of a majority of the Members. Whereas I hold no vote, the Constitution and the Standing Orders of this House oblige me to address any questions of unconstitutionality at any time and not fold my arms and preside over deliberations.

I agree that the possibility exists of the required majority of Members voting against the recommendation in issue or a Member proposing an amendment to expunge the recommendation with the support of the required majority. But what if neither of the two events come to pass? I think the House would stand indicted not just because of the untenable recommendation being adopted, but also for the failure on my part to act to arrest a patently incongruous outcome. It is therefore, my considered opinion that a question on the constitutionality or otherwise of business ought not be left to a vote by the House or potential amendment, but should be resolved by the Speaker once raised.

Hon. Members, the point raised by the Leader of the Majority Party and the interventions by other Members thereafter crystallised the third issue of the mandate of the House with regard to the removal from office of State and public officers under the Constitution pursuant to the provisions of Articles 95 and 251 of the Constitution. Article 95 of the Constitution outlines the role of the National Assembly with regard to the issue at hand as follows, and I quote:

"(2) The National Assembly deliberates on and resolves issues of concern to the people.

(5) The National Assembly—

(a) reviews the conduct in office of the President, the Deputy President and other State officers and initiates the process of removing them from office; and

(b) exercises oversight of State organs."

On its part, Article 251 of the Constitution provides a specific procedure for the removal from office of a member of a constitutional commission or the holder of an independent office. The Article provides in Clauses (2) and (3), and I quote:

"(2) A person desiring the removal of a member of a commission or of a holder of an independent office on any ground specified in clause (1) may present a petition to the National Assembly setting out the alleged facts constituting that ground.

(3) The National Assembly shall consider the petition and, if it is satisfied that it discloses a ground under clause (1), shall send the petition to the President."

Hon. Members, the bone of contention, as discerned from the submissions made by Members with regard to the point raised by the Leader of the Majority Party is whether the removal of a member of a constitutional commission, in this case the IEBC, can be legally initiated through a resolution of the House. On this matter, I am constrained to agree with the view that the only procedure that the Constitution envisages for the initiation of the removal of a member of a constitutional commission or holder of an independent office is through a petition to the House in accordance with Article 251 of the Constitution. As ably noted in the submissions by Hon. Kaluma, the provisions of Article 95(5) are couched in general terms whereas those of Article 251 are specific to a particular class of State officers. Indeed, as Members are aware, the House only initiates the removal from office of the President, the Deputy President and a Cabinet Secretary through a Motion filed by any Member under the specific provisions of Articles 144 and 145 through to Article 150 and Article 152 of the Constitution, respectively.

Hon. Members, conversely, specific provisions of the Constitution provide removal procedures peculiar to other State officers. Members will note that the Constitution provides specific methods of removal from office of other State officers as follows:

1) Members of Parliament may only vacate office in specific circumstances including recall under Article103 and upon determination by court by declaring the seat vacant under Article 105(1)(b) of the Constitution.

2) Judges and magistrates may only be removed from office via a petition lodged with the Judicial Service Commission under Articles 168 and 172(1)(c) of the Constitution.

3) The Secretary to the Cabinet is appointed with the approval of Parliament, but may only be dismissed by the President under Article 154 of the Constitution.

4) The Director of Public Prosecutions is appointed with the approval of Parliament, but his or her removal may only be initiated via a petition lodged with the Public Service Commission under Article 158 of the Constitution.

5) A county governor may only be removed from office in line with a procedure prescribed by legislation enacted pursuant to Article 181 of the Constitution.

Hon. Members, if the House were to be persuaded by the argument that it does rely on Article 95(5) generally to initiate the removal of IEBC commissioners, the House must also convince itself that the same argument would hold in the event any committee of this House were to table a report recommending the removal of the President, the Deputy President, Cabinet Minister, Judge, Member of Parliament, governor or the Director of Public Prosecutions in similar fashion.

This would clearly be illogical and procedurally untenable. In addition, Section 10 of the Independent Electoral and Boundaries Commission Act, 2011 provides the procedure for the removal of the Chief Executive Officer, which can only be done by the Commission on, among other grounds, gross misconduct by the officer. Section 31 of the same law gives power to the Commission to prescribe regulations for termination of appointment of officers of the Commission. The employment of such officers may also be governed by the relevant employment laws including the Employment Act on dismissal of employees. In this regard, the Committee's recommendation relating to the removal of staff offends the provisions of Sections 10 and 35 of the IEBC Act and the relevant regulations in respect of other senior staff of the IEBC.

The argument that Article 95(5) provides an avenue for the initiation of the removal of a member of a constitutional commission also patently fails with regard to the procedural safeguards

afforded to State and public officers in the exercise of their public duties. As was noted in the ensuing debate on the point raised by the Leader of the Majority Party, the procedure set out under Article 251 of the Constitution grants the House a specific role to play in the process of the removal of a member of a constitutional commission or holder of an independent office. Under Article 251 (3), the House must determine whether a petition discloses any ground for removal before transmitting the petition to the President recommending the establishment of a tribunal to investigate the facts. The role of the House in the processing of a petition for removal, therefore, does not result in a final determination of the matter.

All the specific methods of removal from office outlined in the Constitution grant a fair hearing to the affected State officers who are given prior notice of the case for their removal, a fair opportunity to answer it, and the opportunity to present their own case. This mirrors the rights to fair administrative action and fair hearing as set out in Articles 47 and 50 of the Constitution and the protection of public officers as outlined in Article 236 of the Constitution. It is, therefore, my considered opinion that the mandate of the House to review the conduct in office of a member of a constitutional commission or a holder of an independent office may only be done in accordance with Article 251 of the Constitution when it considers a petition filed for the removal of the affected State officer, specifically stating the grounds upon which it is proposed the holder of the office be removed.

I commend the work of the Committee in their interrogation and presentation of grave allegations attributable to the commissioners and staff of the IEBC. However, the Committee has proceeded to utilise that information to propose the removal from office of the Commissioners and staff in an entirely untenable manner.

I shall now address myself to the admissibility of the findings and recommendations in the Report tabled by the Public Accounts Committee. As you will recall, the point raised by the Leader of the Majority Party, though directed at one of the recommendations of the Report, in essence sought that I declare the findings and recommendations on pages 7 and 130 of the Report as inadmissible in their entirety. As I have noted in this Communication, a finding or recommendation would only be inadmissible if it addresses itself to a matter outside the mandate of the Committee or if it offends the provisions of Standing Order No. 47(3).

I have perused the Report of the Committee at the cited pages. From the perusal, I note that the second paragraph of General Recommendation No. 3 accords with the concern raised by the Leader of the Majority Party that the Report recommends the removal of the members and staff of a constitutional commission in manner not contemplated by the Constitution. Apart from a portion of this recommendation and the section of the Report titled "*Basis for Committee Recommendations for Vacation of Office*" which, on the face of it, is intended to explain the thinking behind the recommendation, a cursory glance at the other recommendations of the Report does not reveal any relation to the concern raised by the Leader of the Majority Party and several other Members. I note that the General Recommendations and Section 4.0 of the Report on the "*Basis for Committee Recommendations for Vacation of Office*" are replicated both at the beginning and at the end of the Report.

Hon. Members, in summary, it is, therefore, my considered finding:

1) THAT, a question on the constitutionality or otherwise of business ought not to be left to a vote by the House or addressed by an amendment which is also subject to a vote, but should be addressed by the Speaker once raised at any point.

2) THAT, the mandate of the House to review the conduct in office of a member of a constitutional commission or a holder of an independent office may only be exercised in

accordance with Article 251 of the Constitution when it considers a petition duly filed for the removal of the affected State officer.

3) THAT, a finding or recommendation by the Public Accounts Committee in the Report tabled before the House which expressly falls outside the mandate of the Committee, or one that offends the provisions of Articles 47 or 251 and Section 10 of the IEBC Act, 2011, would be inadmissible.

4) THAT, the words "*To that end, the Commissioners, Chief Executive Officer and the Directors who were involved in the unlawful procurement should vacate office immediately upon adoption of this Report to allow for much needed reforms to be effected to restore public confidence in the Independent Electoral and Boundaries Commission*" in General Recommendation No. 3 appearing on pages 4 and 127 of the Report, in so far as it relates to the IEBC commissioners, are inadmissible**.** This is because the text is recommending a mode of removal from office of constitutional office holders in a manner that is not contemplated by the Constitution;

5) THAT, Sections 4.0 and 34.0 of the Report relating to "*Basis for Committee Recommendations for Vacation of Office*" appearing on pages 6, 7, 129 and 130 of the Report, in so far as it relates to the IEBC commissioners, are also inadmissible.

6) THAT, the second sub-paragraph of paragraph 3 of the General Recommendation No. 3, appearing on Page 4, which states: "*To that end, the….., Chief Executive Officer and the Directors (emphasis on staff) who were involved in the unlawful procurement should vacate office immediately upon adoption of this Report to allow for much needed reforms to be effected to restore public confidence in the IEBC*" is also inadmissible. This is because, while this section is supported by admissible observations of the Committee, the recommendation proposes the removal from office of staff of a constitutional commission in a manner that is neither contemplated by the Constitution nor supported by the relevant statute providing for the manner of vacation of office of such staff and governing their discipline.

7) THAT, the observations and findings of the Committee with respect to the staff of the Commission having been found to be admissible, I will now expect the Chairperson of the Public Accounts Committee to take into account this Communication and move the Motion for the adoption of the Report in an appropriately amended form pursuant to Standing Order No.48 dealing with Amendment of Notice of Motion.

8) THAT, the cited text of General Recommendation No. 3 and Sections 4.0 and 34.0 of the Report, having been found to be offensive to the Constitution and, therefore, inadmissible for debate by the House, are forthwith expunged from the Report. The House shall make no reference to either text in its consideration of the Report.

As I conclude, may I clarify that expunging the offensive parts of the Report is not to mean that the entire Report is discredited. As a matter of fact, the rest of the Report is admissible and will proceed to consideration by the House upon re-scheduling by the House Business Committee. The Committee has duly executed its mandate and carried out the task of taking evidence and compiling their Report. That is an accomplishment worth of credit by this House. The House is there accordingly guided.

Thank you."

MANDATE OF AUDIT COMMITTEE VIS-À-VIS THAT OF DEPARTMENTAL COMMITTEES AND THE PLACE OF PROGRESS REPORTS IN INQUIRY PROCESS

Thursday, 21st March 2019

Context:

Conflict of mandate between the Public Investments Committee and the Departmental Committee on Transport and Public Works with regard to the inquiry into the proposed takeover of Jomo Kenyatta International Airport (JKIA) by Kenya Airways (KQ), and the place of the progress report of the Public Investments Committee.

Decision of the Speaker:

1) *The commercial arrangement between the Kenya Airports Authority and Kenya Airways regarding the Jomo Kenyatta International Airport was a privately initiated investment proposal under the Public Private Partnership Act, 2013 which was still at the initiation stage. Hence, the House would exercise restraint at the initial stages, so as not to become prejudiced should the legislative intervention stage become inevitable.*

2) *The Leader of the Majority Party or another Member designated by the House Business Committee (HBC) could lay the Report of the Auditor- General titled "Special Audit Report on the Proposed Privately Initiated Proposal (PIIP) between KAA and KQ", which, upon tabling, the Report would stand referred to the PIC which would, in its examination of the matters contained therein, confine itself to the financial and expenditure aspects of the reservations of the Auditor-General, as well as omissions and/ or commissions on the part of the KAA.*

3) *The Departmental Committee on Transport, Public Works and Housing, was at liberty to proceed with its inquiry while confining itself to matters of policy, human resource, compliance with due process and the law, benefits to the society and the nation and generally addressing any issues of concern to the people of Kenya as contemplated under Article 95(2) of the Constitution;*

4) *Henceforth, any Committee of the House which was desirous of benefiting from the specialised expertise of the Office of the Auditor-General by way of requests for special audits would have to:*

   (a) *indicate how the matter came before the Committee. This is to be supported by, amongst others, the agenda and the minutes of the Committee;*

   (b) *indicate any preliminary information or evidence adduced before the Committee on the matter to justify the request and outline the compelling issues that have necessitated request for a special audit;*

   (c) *indicate whether the Committee has confirmed the absence of any other audit report on the same matter and absence of an ongoing one;*

   (d) *state the nature of the audit requested, e.g. compliance audit, financial or value for money audit, operational audit, ordinary investigative audit;*

   (e) *state the specific matters to be covered in the audit requested. The Committee is*

to be specific and accurate where there are names of people, places, projects or programmes; and finally,

(f) *state the preferred timeline within which the report is required by the Committee.*

5) *Notwithstanding the earlier approval of the Notice of Motion in respect of the Adoption of the progress Report of the PIC on The Inquiry into the Proposed Takeover of JKIA by KQ, laid on the table of the House by the Chairperson on Wednesday, 27th February 2019, the Speaker was constrained not to allow the Motion to proceed but instead allowed the Chairperson of the Committee to present his Report to the House by way of a Statement on the progress of the matter before the Committee as contemplated under Standing Order 44.*

6) *A progress report cannot be amended because it is intended solely for information and to elicit comments without resolution. Thus, the amendment by the Chairperson of the Departmental Committee on Transport, Public Works and Housing to the progress report was inadmissible.*

"Honourable Members, you will recall that on Thursday, 7th March 2019, the Leader of the Majority Party rose on a point of order citing Standing Order Nos. 83, 206 and 216 and sought guidance of the Speaker on alleged conflict of mandate between the Public Investments Committee and those of Departmental Committees. He also sought guidance on the role of the Auditor-General is so far as special audits are concerned and the place of the progress report of the Public Investments Committee on the inquiry into the proposed takeover of Jomo Kenyatta International Airport (JKIA) by Kenya Airways (KQ) which was laid on the Table of the House by the Chairperson on Wednesday, 27th February 2019. In particular, the Leader of the Majority Party invited the Speaker to pronounce himself on two key issues:

1) whether it will be procedural for a Committee of the House to order stay of progress, or indeed to recommend stay of progress on ongoing government-initiated policy or project which is at infancy stage citing an ongoing inquiry by the House; and,

2) whether the Auditor-General could carry out an *ex-ante* or anticipatory investigations into a matter to establish adherence to the law and Government policy.

Hon. Members, in his submission, the Leader of the Majority Party observed that the matter of the ongoing arrangements between Kenya Airways and the Kenya Airports Authority is a matter of Government policy and does not fall within the remit of the Public Investments Committee and by extension the Auditor-General.

He further contended that the Constitution gives functions of the Auditor-General as amongst other things, the examination of accounts of the national and county governments; accounts of all funds and authorities, accounts of all courts and the accounts of the National Assembly and the Senate. The Leader of the Majority Party and indeed a section of other Members who spoke, pointed out that the nature of the Auditor-General's work is to great extent post-mortem, that is, limited to expenditure already incurred and that that the Auditor-General should not audit a Government policy particularly at conceptualisation stage.

Hon. Members, you will, indeed, recall that these very weighty procedural issues raised by the Leader of the Majority Party elicited reactions from the Floor, with very valuable input from the Chairperson of Public Investments Committee, the Hon. Abdullswamad Sherriff Nassir; the Chairperson of the Departmental Committee on Transport, Public Works and Housing,

the Hon. David Pkosing; the Majority Party Whip, the Hon. Benjamin Washiali; the Minority Party Whip, the Hon. Junet Mohamed, amongst others, who advanced varying positions on the matter.

The Minority Party Whip expressed concern that formulation and implementation of public policy is a function of the Executive arm of the Government and the House has no role, nor does it participate in the formulation and implementation of Government policy. In his view, the involvement of the House at this stage would amount to pre-emption, interference and abuse of the doctrine of separation of powers. A section of the House supported the need for the House and its committees to get to the bottom of the matter, irrespective of the stage at which the policy is.

Hon. Members, may I also, at this point, inform the House that the Chairpersons of the Departmental Committee on Transport, Public Works and Housing and the Departmental Committee on Finance and National Planning had also separately written to the Speaker on 20th and 21st February 2019, respectively, claiming exclusive jurisdiction of their respective committees to examine the same matter. In this regard, my Office did respond to the letter from the Chairperson of the Departmental Committee on Transport, Public Works and Housing, outlining broadly the issues in question which I will similarly address shortly.

Hon. Members, having reviewed the content and substance of the submissions by the Leader of the Majority Party and the procedural arguments by other Members who spoke to the Point of Order on 7th March, 2019, I have identified the following as the primary issues to address myself to and provide guidance to the House:

1) what is the nature and at what stage is the arrangement between Kenya Airports Authority (KAA) and Kenya Airways (KQ) regarding the management of the Jomo Kenyatta International Airport, and what is the applicable legal framework to the proposed management of the Airport by Kenya Airways?

2) whether the proposed commercial arrangement between Kenya Airports Authority and Kenya Airways regarding the management of the Jomo Kenyatta International Airport is a matter falling under the mandate of the Public Investments Committee or the relevant Departmental Committee;

3) whether the Auditor General can audit the merits or demerits of a Government policy;

4) the procedure for requesting a special Audit of a Government project;

5) whether the Committee could submit a progress report to the House and, if so, what the House is expected to do with such a report; and

6) in view of the motion for adoption of the Progress Report of the Public Investments Committee on the Inquiry into the Proposed Takeover of Jomo Kenyatta International Airport by Kenya Airways, laid on the Table of the House on Wednesday, 27th February, 2019, whether it would be procedurally in order for a motion on an interim report to be moved in the House and for the House to proceed to debate it.

Hon. Members, the first issue that calls for my determination is the question of what is the nature and at what stage is the arrangement between Kenya Airports Authority and Kenya Airways, regarding the management of the Jomo Kenyatta International Airport? What is the applicable legal framework to the proposed management of Jomo Kenyatta International Airport by Kenya Airways?

To address this question, it is important to first determine whether the House is properly seized of the said Policy or issues. Obviously, the actual Policy itself is not before the House or its committees. Indeed, it is clear that the House is seized of the matter only in so far as the parallel inquiries of the Public Investments Committee and the Departmental Committee on Transport, Public Works and Housing are concerned. You will note that the two Committees, separately and rightly under the authority vested in them by the law and the Standing Orders, instituted inquiries on their own motions, which inquiries I will be addressing later in this Communication.

Hon. Members**,** as your Speaker, if I am called upon to answer the question of "*what is the nature of the commercial arrangement between the Kenya Airports Authority and Kenya Airways*?", I may not be able to respond appropriately. This is because I am not privy to contents of the commercial arrangement between the two entities. However, based on information presented in my chambers by the Chairperson of the Departmental Committee on Transport, Public Works and Housing and the Chairperson of the Public Investment Committee and having read the Special Audit Report of the Auditor-General on the matter, which I will be speaking to at a later stage in this Communication, I am guided that the commercial arrangement between the Kenya Airports Authority and Kenya Airways is a proposed Privately Initiated Investment Proposal (PIIP) within the ambit of the Public Private Partnership Act, 2013.

Hon. Members, a clear reading of section 2 of the Public Private Partnership Act, 2013 defines a "*privately initiated investment proposal*" as "*a proposal that is originated by a private party without the involvement of a contracting authority and may include information that enables a complete evaluation of the proposal as if it were a bid*." This definition, in itself, demonstrates the inappropriateness of the application of the term "*take over*" as used by the two Committees and, indeed, by a section of Members who spoke in the House on the matter.

Consequently, committees and, indeed, this House should restrict themselves to terms used in the evidence adduced so far and the expressions used in the relevant laws. This is in keeping with our Standing Order No. 91 on responsibility for statement of facts, which behoves all Members to speak with accuracy based on facts.

Hon. Members, permit me at this point, to refresh your memory on the policy-making process and the nexus between the Executive and the Legislature in this process. By practice, a policy of this magnitude and importance, like many others before or after it, would have to obtain Cabinet consideration. The relevant Cabinet Secretary would then undertake other preliminary processes with the relevant bodies and, at the appropriate stage, submit to the House a Sessional Paper. It then follows that the people's elected representatives would at this point exercise their oversight function by giving their views in considering the particular Sessional Paper. In noting the Paper, the House may make reservations, comments or acquiesce to it unconditionally.

As regards the legal framework that underlies the proposed management of JKIA operations by the Kenya Airways, the question that now begs is as follows: "*Is the proposed commercial arrangement an arrangement under the Public Private Partnerships Act, No. 15 of 2013, or the Privatisation Act, No. 2 of 2005*?"

Hon. Members, the proposed commercial arrangement is to be governed by the Public Private Partnerships Act, No. 15 of 2013. The Act provides for the procedure for entering into a public private partnership agreement. It contemplates an elaborate process, including preparation of the privately initiated investment proposal, consideration by the target public entity, submission of the initiative to the public private-partnership unit established in the National Treasury and

approval for the parties to enter into negotiations. The law also contemplates that the said unit shall submit a project report, a financial risk assessment report, and its recommendations to the Public Private Partnership Committee for consideration.

Section 54(3) of the Act provides that the Cabinet Secretary for Finance and the Cabinet Secretary in the State Department responsible for the implementation of the project shall prepare a joint cabinet memorandum based on the recommendations of the Public Private Partnership Committee and submit the memorandum to the Cabinet for approval before any execution.

Section 55 of the Act provides for the only instance in which parliamentary approval may be sought in respect of public-private partnerships, and that is where the partnership is for the exploitation of natural resources under Article 71 of the Constitution. This approval would be made through a ratification process. Parliament, in its wisdom, during the legislative process leading up to the enactment of the Public Private Partnerships Act, No. 15 of 2013, removed itself from the requirement of parliamentary approval of public private partnerships.

Hon. Members, irrespective of the absence of the requirement of parliamentary approval in the Act, as your Speaker I ask myself: "*Is it possible for the Kenya Airways Privately Initiated Investment Proposal to be complete without Parliament's knowledge*?" In my view, the realistic implementation of the proposal, if and when approved by the Cabinet, would require various legislative interventions, including amendments to various statutes. Ultimately, there may be need to amend different statutes, including the Kenya Airports Authority Act (No. 3 of 1991), the Labour Relations Act (No. 14 of 2007), the Air Passenger Service Charge Act (Cap. 475) and possibly taxation-related laws amongst others. As you are all aware, an amendment to any of these statutes is a matter which squarely falls within the legislative mandate of Parliament.

It is important to note that Article 95(2) of the Constitution provides that one of the roles of the National Assembly is to deliberate on and resolve issues of concern to the people. Whereas the Kenya Airports Authority is a state corporation fully owned by the Government of Kenya, the Kenya Airways is a company in which the Government of Kenya has a 48.9% stake in terms of shareholding. Kenya Airways is, therefore, a company in which the government has substantial shareholding both for strategic and national interest.

Hon. Members, you will also agree with me that, Kenya Airways, being a listed company at the Nairobi Securities Exchange, cannot be devoid of public scrutiny in as far as its operations are concerned. Any major restructuring or re-organisation of the Kenya Airways will, therefore, attract deserved attention of the people of Kenya, particularly through their representatives.

On the other hand, Hon. Members, should the Kenya Airways proposal fall under the purview of the Privatization Act, No. 2 of 2005, Section 23(3) of the Act provides:

i. *"The Cabinet Secretary shall submit a report in form of a Sessional Paper on a privatization proposal approved by the Cabinet to the National Assembly for consideration.*

ii. *Upon laying before the National Assembly, a report under subsection (3) shall stand referred to the relevant committee*".

It is clear from the foregoing that Parliament's involvement in the conclusion of the Kenya Airways proposal cannot be overlooked, irrespective of the nature of the commercial arrangement.

It is, therefore, not a matter of "*if Parliament will be involved*"; rather it is: When is the right stage for Parliament to be involved? It is inconceivable, in parliamentary parlance that the House or its Committees would become part of policy execution, as that may prejudice the oversight function of the House as enshrined in Article 95(5)(b) of our Constitution. It is for this reason that I found it inappropriate for the Departmental Committee on Transport, Housing and Public Works to attempt to undertake what it termed as "*public participation*" of the Privately Initiated Investment Proposal between KQ and KAA at this infancy stage.

At this stage, that exercise is an obligation of the Kenya Airports Authority and/or the relevant state department, which are expected to thereafter apprise the House on the progress of the initiative through the said Departmental Committee.

Hon, Members, let me now turn my focus to the second issue requiring my determination, namely, whether or not the proposed PIIP between the Kenya Airports Authority and Kenya Airways is a matter under the purview of Public Investments Committee or Departmental Committees. In doing so, permit me to refer the House to the ruling made by the Speaker on 5th December 2013. Then, as now, the question arose, in similar framing, as to the delineation of the mandates of the watchdog committees of the House, namely the Public Investments and the Public Accounts Committees on the one hand, and Departmental Committees on the other. In total, the Speaker then guided that, indeed, the mandates of Departmental Committees were clearly distinct from those of the Public Accounts Committee and the Public Investments Committee. As a matter of fact, PAC or PIC ought not to delve into such matters as review of legislation, vetting of appointments and matters of administration of ministries or State corporations. This finding was on the basis of Standing Orders 205 and 206, which preclude the Public Investments Committee from examining matters of day-to-day administration of State corporations.

In the same vein, the Speaker did then caution Departmental Committees from veering into the province of the Public Accounts Committee and the Public Investments Committee, save for the manner contemplated under Standing Order 216. Hon. Members, for avoidance of doubt, the said Standing Order No. 216 under Paragraph (5) provides that the functions of a Departmental Committee shall be to:

1) Investigate, inquire into, and report on all matters relating to the mandate, management, activities, administration, operations and estimates of the assigned ministries and departments.

2) Study the programme and policy objectives of ministries and departments and the effectiveness of the implementation.

3) Investigate and inquire into all matters relating to the assigned ministries and departments as they may deem necessary, and as may be referred to them by the House.

On the other hand, Standing Order 206(2) provides that "*the Public Investments Committee shall be responsible for the examination of the working of the public investments on the basis of their audited reports and accounts*."

Hon. Members, additional functions of the Public Investments Committee as highlighted under Standing Order 206(6), include:

1) to examine the reports and accounts of the public investments;

2) to examine the reports, if any, of the Auditor-General on the public investments; and

3) to examine, in the context of the autonomy and efficiency of the public investments, whether the affairs of the public investments, are being managed in accordance with sound financial or business principles and prudent commercial practices.

Under Standing Order 206(7), the Public Investments Committee is prohibited from examining any of the following:

1) matters of major Government policy as distinct from business or commercial functions of the public investments.

2) matters of day-to-day administration; and,

3) matters for the consideration of which machinery is established by any special statute under which a particular public investment is established.

Hon. Members, in this regard, I find that, when examined in totality, the matter in question at this point falls into two categories. On one hand, the Kenya Airports Authority is a State corporation that is 100 percent owned by the Government. The PIC, is therefore, at liberty to procedurally invoke the provisions of Standing Order 206(6)(c) and examine whether the affairs of the Public Investments Committee made or being made by the KAA and whether they are being managed in accordance with sound financial, business principles and prudent commercial practices.

However, in doing so, the Committee ought to follow the usual procedure, particularly as guided in my Communication of 5th December 2013. In that Communication, I did guide that, and I quote: "*Should the Committee intend to examine matters of procurement, I would expect them to order a special audit by the Auditor-General after being satisfied that the matter requires a special audit*". This means that, whenever the Committee requests for a special audit, the examination of the matters before the Committee is discontinued, until the special audit is undertaken and tabled in the House. This is informed by the universal dictum that, when a party asks another party to carry out forensic inspection or any other specialised task, then the work of the first party becomes *functus officio*. This means that, any further examination or even debate in the Committee on the same matters for which a special audit has been requested may vitiate or injure the process of the special audit.

In addition, it would be important to note that the PIC may also examine this matter if it was an audit issue or query arising from the examination of audited reports and accounts of the KAA or a special audit.

The second aspect of this matter regards the contention that, the policy aspects of the inquiry fall within the mandate of the Departmental Committee on Transport, Public Works and Housing. In view of the provisions of Standing Order 216(5) as enumerated earlier, the Departmental Committee on Transport, Public Works and Housing is at liberty to proceed and inquire into the policy aspects of the commercial arrangement between KAA and KQ.

Hon. Members, may I, at this juncture, inform the House that the Auditor-General has since submitted to me a report titled "*Special Audit Report on the Proposed Privately Initiated Proposal (PIIP) Between Kenya Airports Authority (KAA) and Kenya Airways (KQ)*". The particular report was received in my office on 14th March 2019, and I will be asking the Leader of the Majority Party to lay that Report on the Table of the House later during this sitting in keeping with the requirements of sections 39 and 49 of the Public Audit Act, 2015. Having perused the Report, it is evident that this matter is still at infancy.

However, the Auditor-General has raised several operational and policy audit issues as well as two financial audit issues. Upon tabling of the Report, the PIC will be at liberty to resume its inquiry on the matter, but the Committee must confine itself to the financial and expenditure aspects of the reservations of the Auditor-General as well as omissions and or commissions on the part of the Kenya Airports Authority. As for the Departmental Committee on Transport, Public Works and Housing, the Committee is also at liberty to proceed with its inquiry. The Departmental Committee must confine itself to matters of policy, human resource, compliance with due process of law and generally addressing any issues of concern to the people as contemplated under Article 95 of the Constitution.

Hon. Members, the third matter requiring my determination is whether the Auditor-General can audit the merits of policy issues of Government. Those who were in the 11th Parliament may recall that, this matter was a subject of heated debate during consideration of the Public Audit Bill, 2014 in both Houses, which is today the Public Audit Act (No. 34 of 2015). Indeed, when passing the Bill, Parliament did include section 42, which provided that, and I quote:

> *s.42. "Notwithstanding the provisions of this Act, in an examination under this Act, the Auditor-General shall not question the merits of a policy objective of the National Government or county government or any other public entity."*

The foregoing was the prevailing position in law until 16th February, 2018, when the High Court did make a pronouncement in so far as the application of that section was concerned.

Hon. Members, in Petition No. 388 of 2016 (Transparency International Kenya vs The Attorney-General and Two others) the learned Judge, Hon. E. Chacha Mwita, in his judgment held that, a statute could not impose conditions on the performance of the Auditor-General's functions where the Constitution did not impose them. Section 42 of the Public Audit Act, 2015 was, therefore, declared a violation of Article 10 of the Constitution which provides for national values and principles of governance which include integrity, transparency and accountability and also Article 201 of the Constitution which provides for financial openness. This decision has implication on the business of the House and its Committees, in so far as the scope of requests for special audit is concerned.

In this regard, based on this finding by the Hon. Judge, I need not dwell on the question as to "*whether the Auditor-General is excluded by law from examining a government policy*" any further. I nonetheless remind the House that, in the last two years, the Auditor-General has submitted several audit reports to this House touching on performance and policy issues.

These reports include the following:

1) Performance Audit Report from the Office of the Auditor-General on the provision of Mental Healthcare Services in Kenya for the period December 2017.

2) Performance Audit Report on the implementation of the National School Upgrading Programme by the Ministry of Education, Science and Technology for the period, March 2018.

3) Performance Audit Report on Effectiveness of Measures put in place by Kenya Wildlife Services in Protecting Wildlife by the Ministry of Tourism and Wildlife for the period, June 2018, and;

4) Performance Audit Report on Provision of Housing to Prison Officers in Kenya.

These reports, having been tabled, are now before the respective Departmental Committees for examination and consideration by the House. It, therefore, means that the Auditor-General is not precluded from dealing with matters of policy.

Hon. Members, I will now turn to the fourth issue of my consideration, which regards the procedure for requesting for a special audit from the Auditor-General. To address this issue, it is important that we revisit the core mandate of the Public Investments Committee as enumerated under Standing Order 206(6)(b), which is to examine the reports, if any, of the Auditor-General on public investments. As we all know, the Auditor-General invariably submits audit reports on an annual basis. These reports are mostly post-mortem reports on a range of subject areas under which public funds have been spent. Nonetheless, Committees are not precluded from requesting the Auditor-General to undertake a special audit and submit reports thereof to the committees, as and when need arises. Indeed, the Public Investments Committees of successive Parliaments have always been alive to this reality and have carefully navigated the path of getting seized of investigation into allegations of misuse of public funds before the release of the reports on audited accounts.

Hon. Members, the established practice of the House is that a Committee may resolve to request the Auditor General to carry out a special audit and furnish a report to the Committee before the said Committee carries out further examination. Indeed, I have had the benefit of perusing the confirmed minutes of the 6th sitting of the PIC, which was held on 19th February, 2019, during which the Committee resolved as follows:

> *"The Office of the Auditor-General should conduct a special audit on the proposed concession arrangement with a view to establishing adherence to the relevant laws, the risks that KAA and the public face, if the takeover is implemented and the procurement process for the services of the transaction advisor"*.

Hon. Members, it is evident from the foregoing that the Committee did fairly follow the procedure in requesting for the special audit. However, whereas we applaud the PIC for bringing this matter to the attention of the House by way of a progress report, it is important that I also address the basis of any future requests for special audits, going forward.

Hon. Members, as you are aware, Article 229 of the Constitution establishes the Office of the Auditor-General as an independent office subject only to the Constitution and law and not subject to direction or control by any person or authority. In light of this Article, as read together with Article 249(2) as well as the reasoning of the court in declaring Section 42 of the Public Audit Act 2015 unconstitutional, whenever Committees desire to benefit from the specialised expertise of the Auditor-General by way of special audits, they must be conscious that they cannot order or compel the Auditor-General to do so. What steps, therefore, should a committee follow to seek for a special audit from the Auditor General? In absence of parameters in the Public Audit Act, 2015 and our Standings Orders, as your Speaker, I will resort to invoking the provisions of Standing Order No.1, which provides as follows:

> *"In all cases where matters are not expressly provided for by these Standing Orders or by other orders of the House, any procedural question shall be decided by the Speaker."*

Hon. Members, I therefore give the following guidance with respect to the manner of requesting for special audits:

A committee wishing to request for special audits from the Auditor-General shall:

1) indicate how the matter came before the Committee. This is to be supported by, amongst others, the agenda and the minutes of the Committee;

2) indicate any preliminary information or evidence adduced before the Committee on the matter to justify the request and outline the compelling issues that have necessitated request for a special audit;

3) indicate whether the Committee has confirmed the absence of any other audit report on the same matter and absence of an ongoing one;

4) state the nature of the audit requested, e.g. compliance audit, financial or value for money audit, operational audit, ordinary investigative audit;

5) state the specific matters to be covered in the audit requested. The Committee is to be specific and accurate where there are names of people, places, projects or programmes; and finally,

6) state the preferred timeline within which the report is required by the Committee.

Hon. Members, in keeping with the provisions of Standing Order 206(7)(c), a special audit shall not be sought on any matter for which machinery is established by any special statute. Further, it is inconceivable that the attention of the Speaker on a special audit by a Committee of the House would only be drawn at the point of tabling of its report. The Clerk is henceforth required to satisfy himself without exception that any request for a special audit complies with these guidelines before conveying the request to the Auditor-General. Thereafter, the particular Committee shall not be properly seized of the matter until the special audit is tabled before the House, unless the House is in recess, in which case the Speaker may refer the report to the Committee and inform the House upon resumption. May I hasten to add that, the nature of the final report of the Auditor-General shall determine the Committee to which the report is to be referred to, notwithstanding that a particular committee made the request. These guidelines take effect immediately.

Hon. Members, the fifth matter requiring my determination is whether the Committee is at fault to make a progress report to the House and what is the House expected to do with such a report. I will address this issue together with the question requiring my attention, which is whether it would be procedurally in order for the House to be moved on a motion to debate the particular Progress Report of the PIC as laid on the Table of the House on Wednesday, February 27, 2019, given that the report is interim.

Hon. Members, the progress report of the PIC on inquiry into the proposed takeover of Jomo Kenyatta International Airport (JKIA) by Kenya Airways (KQ), which was laid on the Table of the House by the Chairperson on Wednesday, 27th February 2019 was meant to inform the House that, among other issues, the Committee was seized of the matter and that it had requested for a special audit. The widely held meaning of a progress report is "*an interim report on progress made to date on a job, project, etc*".

Indeed, a progress report is an information report, usually prepared for several purposes, amongst them being to inform the House on salient issues awaiting completion of an inquiry and to keep the public updated on what is before a committee or schedule of activities so as

to avoid speculation on a matter. Can we fault the Committee for informing the House at this stage? Certainly not.

According to Rule 177 of The Rules of Procedure and Conduct of Business of the Legislative Assembly of National Capital Territory of Delhi, "*A Committee may, if it thinks fit, make a special report to the House on any matter that arises or comes to light in the course of its working, which it may consider necessary to bring to the notice of the Speaker or the House, notwithstanding that such matter is not directly connected with, or does not fall within or is not incidental to, its terms of reference*." This authority is further amplified by David McGee in the Third Edition of the Parliamentary Practice in New Zealand, which provides that "*a committee has used a special report to the House to announce that it had initiated a major inquiry*". What is the House then supposed to do with such a progress report? Hon. Members, in discussing interim or progress reports, the Fifth Edition of the Australia House of Representatives Practice notes the following:

> *"This procedure – of interim report – provides a cost and time-effective way for a committee's views to be placed before Parliament, but should be used with care, as the committee could leave itself open to criticism that some community, government, or interest groups have been excluded from the process. In addition, the committee runs the risk that its conclusions and recommendations could be based on incomplete or incorrect information."*

Hon. Members, further, Robert's Rules of Order, an authority in Parliamentary Procedure applied in State Assemblies in the United States of America (USA) states the following with respect to a report containing only information which is essentially a progress report:

> *"Even if a report contains only an account of work done or a statement of facts or opinion for the assembly's information, it should be in writing. However, apart from filing such report, no action on it is necessary and usually none should be taken."*

In addition, the Canadian House of Commons Procedure and Practice notes that:

> "*Since the early 1990s, a number of take-note Motions have been debated in the House or in Committee of the Whole. These debates solicit the views of Members on some aspect of government policy and allow Members to participate in policy development, making their views known before the government makes a decision*."

In our case, take-note Motions are similar to the usual Motions for noting.

Hon. Members, you will indeed recall that last year on 5th July 2018, I allowed the Departmental Committees on Trade, Industry and Cooperatives and that of Agriculture and Livestock to present a progress or interim report on their Inquiry into the Alleged Importation of Illegal and Contaminated Sugar in the Country.

However, that particular progress report was made through a Statement to the House- and rightly so. The progress report was not debated by the House. Nonetheless, I allowed a few Members to make comments on it and thereafter allowed the Committee to resume its work with an extended deadline. In the same vein, the Public Investments Committee (PIC) will automatically be granted Committee leave to resume its sittings and consideration of the subject matter, once the special audit report of the Auditor-General is tabled in the House as directed by the Majority Whip.

As cited from the three legislative authorities, a progress report is seldom discussed. If so, it has to be debated without calling the House to make a resolution, give orders or directions. A resolution based on an interim report may certainly prejudice the outcome of the actual inquiry. Moreover, it should not be lost to the House that, a Motion governed by Part XII of our Standing Orders and which seeks a resolution of the House ultimately ends with a question being put, the result of which may be that "*Ayes*" or the "*Nays*" have it. This begs the question: What would be the procedural implication if the "*Nays*" had it (for instance), meaning that the progress report is rejected? Obviously, such a decision, which is probable in a parliamentary set up would render worthless the incomplete work of the Committee and any related special audit. It is for these reasons that most Commonwealth legislatures have resorted to only allowing comments on progress reports or statements, instead of debate upon a Motion. Allowing comments is meant to accord the Committee an opportunity to inform the House on the progress of the inquiry before it, while cushioning the remaining work from possible criticism, prejudices and binding directive that would arise, if the House was to debate the report by way of an ordinary Motion.

In summary, Hon. Members, I wish to guide the House as follows:

1) That, I have established that the commercial arrangement between the Kenya Airports Authority and Kenya Airways regarding the Jomo Kenyatta International Airport is a privately initiated investment proposal under the Public Private Partnership Act, 2013 which is still at the initiation stage. This is evidenced from the information provided by the Chairpersons of the PIC and Departmental Committee on Transport, Public Works and Housing, as well as the Report of the Auditor-General submitted to my office on 14th March, 2019.

2) That, the Leader of the Majority Party or another Member designated by the House Business Committee (HBC) may hereupon proceed to lay the Report of the Auditor- General titled "*Special Audit Report on the Proposed Privately Initiated Proposal (PIIP) between KAA and KQ*", which was submitted to my office on 14th March, 2019. Upon tabling, the Report will stand referred to the PIC which shall, in its examination of the matters contained therein, confine itself to the financial and expenditure aspects of the reservations of the Auditor-General, as well as omissions and/ or commissions on the part of the KAA.

3) That, as for the Departmental Committee on Transport, Public Works and Housing, it is at liberty to proceed with its inquiry. However, the Committee will confine itself to matters of policy, human resource, compliance with due process and the law, benefits to the society and the nation and generally addressing any issues of concern to the people of Kenya as contemplated under Article 95(2) of the Constitution. The Committee is expected to offer oversight on the stages of implementation contemplated to complete the process and be apprising the House on the progress of the matter, should it proceed as initiated. This is also in tandem with my letter on 21st February 2019 to the Chairperson of the Committee;

4) That, since the investment proposal is at its infancy, it may in due course, become inevitable for Parliament to be involved, particularly if there are any legislative interventions required as part of the process. In this regard, the House ought to exercise restraint at the current initial stages, so as not to become prejudiced should the legislative intervention stage become inevitable.

5) That, henceforth, any Committee of the House which is desirous of benefiting from the specialised expertise of the Office of the Auditor-General by way of requests for special audits must comply with the parameters contained in this Communication. The Auditor-General, in considering the request, may accede to the request, based on his reasoned

judgment and inform the Committee through the established channels.

6) That, notwithstanding my earlier approval of the Notice of Motion in respect of the Adoption of the progress Report of the PIC on The Inquiry into the Proposed Takeover of JKIA by KQ, laid on the table of the House by the Chairperson on Wednesday, 27th February 2019 I am constrained not to allow the Motion to proceed. This is because, by doing so, the House will be offending its own established practice and indeed the practice in many other comparative jurisdictions regarding treatment of progress reports. I will however allow the Chairperson of the Committee to present his Report to the House by way of a Statement as contemplated under Standing Order 44. In so doing, he is expected to speak to the progress of the matter before the Committee, which is essentially the substance of the said Report.

7) That, following the Statement of the Chairperson of the PIC, I will allow other Members of the House to make comments on the progress Report. This is in keeping with the precedent set by the House on Thursday, 5th July 2018, when the Chairperson of the Departmental Committee on Agriculture and Livestock and the Chairperson of the Departmental Committee on Trade, Industry and Cooperatives presented a joint progress Report on the Inquiry into Alleged Importation of Illegal and Contaminated Sugar in the Country, which was an active matter before the joint Committee. This practice is, however, distinct from the procedure contemplated under Standing Order200 providing for the half-yearly progress reports which are to be submitted to the Liaison Committee and thereafter tabled in the House.

8) Since a progress report is intended for information and to elicit comments without resolution, and may not be amended, the proposed amendment by the Chairperson of the Departmental Committee on Transport, Public Works and Housing to the subject progress report is also inadmissible.

Finally, I wish to laud the Public Investments Committee for bringing the matter to the attention of the House and the country. Nevertheless, even as the two Committees resume the examination and the House makes comments on the progress report, may I caution the two Committees and the House that in examining this investment proposal, you must be conscious that it is at its infancy stage. All of us must uphold high standards, be mindful of the strategic interests of the nation and the welfare of the present and future generations. It behoves all of us to exercise sobriety, patriotism, and reasonable confidentiality as servant who have been called to the performance trust in this Republic.

The House is accordingly guided.

Thank you, Hon. Members."

DECLARATION OF MEMBERS' INTEREST

Thursday 9th May 2019

Context:

A Member had sought the speaker's interpretation of Standing Order 90 (Declaration of Interest) and its enforcement, particularly on whether a Member who declares possible conflict of interest should be allowed to participate fully in the ensuing discussion of the committee or should excuse himself or herself from the committee deliberations and whether a Member who declares a possible conflict of interest should take part in the vetting of a nominee for appointment to a public office.

Decision of the Speaker:

(1) *THAT, as required under our Standing Order 90, any Member desiring to speak on a matter in the House, for which he or she has interest, must declare that interest. Further, in accordance with Article 122(3) of the Constitution, such a Member shall not take part in the decision-making on that matter, whether by voice vote or any other form of voting. Chairpersons of committees ought to enforce these provisions in their respective committees.*

(2) *THAT, as to whether a Member who has declared interest in a matter should continue to sit and take part in the ensuring deliberations before the particular committee or the House, I will leave that aspect to the sincere conscience of the particular Member and the instantaneous directive of the Speaker or the chairperson of the committee, as they may deem appropriate, on a case by case basis.*

(3) *THAT, where the interest declared is of personal or business relationships with the candidate undergoing vetting before a committee or the House, such a Member should not only be disallowed from voting on the approval process in the committee and the House, but should also recuse himself or herself during the vetting hearings and approval debate in the particular committee and in the House.*

(4) *THAT, with respect to the Members of Parliament nominated under Article 97(1) of the Constitution, that is, those representing special interests including the interests of the youth, persons with disabilities and workers, they are not exempted from the application of the provisions of Article 122(3) of the Constitution and Standing Order 90.*

"Hon. Members, I had indicated that I have this Communication to make. You will recall that during the afternoon sitting of Thursday, 28th March, 2019, the Chairperson of the Departmental Committee on Education and Research, Hon. Julius Melly rose on a point of order seeking the guidance of Hon. Speaker on the very important question of declaration of interest during committee sittings in compliance with Standing Order 90, *(providing for declaration of interest)*. The Hon. Melly noted that, during a meeting of the Departmental Committee on Education and Research with officials from the Kenya National Union of Teachers (KNUT) and the Kenya Union of Post Primary Education Teachers (KUPPET) on 26th March 2019, three honourable Members of the Committee declared that they had interest in matters before the Committee by virtue of being members of both KNUT and KUPPET. Hon. Melly further reported that, during the course of the meeting, he had to severally interrupt two of the three Members and remind them of their cardinal role as Members of the Committee, apart from

being representatives of the unions where they held membership or office positions.

He, therefore, sought the guidance of the Speaker regarding the following issues:

1. *the need for a clear interpretation of Standing Order No.90 and what it entails and how it can be reinforced;*

2. *whether a Member who declares possible conflict of interest should be allowed to participate fully in the ensuing discussion of the committee or whether the Member should excuse himself or herself from the committee deliberations; and,*

3. *whether a Member who declares a possible conflict of interest should take part in the vetting of a nominee for appointment to a public office.*

Hon. Members, You will also recall that the Leader of the Majority Party rose in support of the point raised by Hon. Melly and noted that the issue of conflict of interest in committees is still prevalent despite previous guidance from the Speaker on 26th July, 2018 cautioning that *failure to disclose an interest before the commencement of deliberations creates a presumption that any contribution made to a matter under consideration by the House or a committee, however relevant, advances one's personal interest as a Member*. The Leader of the Majority Party further noted that on account of the continued breach of Standing Order 90 by the Members, the House may have to reconsider the effectiveness of the Order. He gave an example of a unique circumstance relating to Hon. Wilson Sossion, MP, who is a Member of the Departmental Committees on Education and Research, and Labour and Social Welfare while still serving as the Secretary General of KNUT, a trade union. He further noted that Hon. Omboko Milemba, a former Chairperson of KUPPET, and a trade unionist in his own right, is also a Member of both Committees. The Leader of the Majority Party sought the guidance of the Speaker as to:

(i) the interpretation of Standing Order 90 including the manner in which Members are to declare interest and in what form the declaration should be made; and,

(ii) whether a Member who declares conflict of interest should be allowed to participate fully in the ensuing proceedings of the committee or whether the said Member should recuse himself or herself from the committee deliberations.

Hon. Members, you will also recall that the Leader of the Minority Party, Hon. John Mbadi, Hon. Millie Odhiambo, Hon. Kimani Ichung'wah, Hon. (Dr.) Chris Wamalwa, Hon. David Pkosing, Hon. Vincent Kemosi, Hon. Jeremiah Kioni, Hon. Omboko Milemba and Hon. T.J. Kajwang' had all and at length weighed in on the ensuing debate wherefore, I undertook to give a considered ruling on the matter.

Hon. Members, from the point of order raised by Hon. Melly and the debate that followed, I have isolated for determination the import of Standing Order No.90 and the obligations it places on the conduct of Members of Parliament. Standing Order 90 on declaration of interest, provides the following, and I quote:

(1) *A Member who wishes to speak on any matter in which the Member has a personal interest shall first declare that interest.*

(2) *Personal interests include pecuniary interest, proprietary interest, personal relationships and business relationships."*

From the outset, I must note that the Standing Order reminds this House and its Members of the unique responsibilities delegated by the people in the exercise of their sovereignty as provided for in Article 1. Article 73 of the Constitution, under Chapter Six on Leadership and Integrity, states the following:

"(2) The guiding principles of leadership and integrity include—

(a) ……;

(b) *objectivity and impartiality in decision making, and in ensuring that decisions are not influenced by nepotism, favouritism, other improper motives or corrupt practices;*

(c) *selfless service based solely on the public interest, demonstrated by —*
   (i) *honesty in the execution of public duties; and*
   (ii) ***the declaration of any personal interest that may conflict with public duties;***

(d) *accountability to the public for decisions and actions; and*

(e) *Discipline and commitment in service to the people."*

Hon. Members, Chapter Six of the Constitution provides clear guidance on and prescribes principles of leadership and integrity which apply to the conduct of Members as State Officers. Article 73(2)(c) outlines the declaration of any personal interest that may conflict with public duties as a key principle of leadership and integrity. The practice of declaring and registering interests held by Members is not unique to the Kenyan Parliament and it is couched on the rationale that the public expects to know whether, in making decisions on their behalf, the actions of their elected representatives are motivated by personal or private influence.

Hon. Members, To put the requirement for declaration of interests into further context, the Constitution, the Leadership and Integrity Act, 2012 and the Parliamentary Powers and Privileges Act, 2017, prescribe instances where the failure to appreciate the obligations imposed on a State officer and to serve in the interests of the public may lead to adverse action, including removal from office. Article 75(1) of the Constitution requires the conduct of a State officer to always accord to the office which an officer holds. It states, and I quote:

"75(1) A State officer, shall behave, whether in public and official life, in private life, or in association with other persons, in a manner that avoids—

(a) ***any conflict between personal interests and public or official duties."***

The requirements of Article 75 of the Constitution on a State officer highlight the primacy that the Constitution attributes to the non-advancement of private or personal interest while holding a public office.

Hon. Members, as ably noted by the Leader of the Majority Party, Article 122(3) of the Constitution precludes a Member of Parliament from voting on a matter in which the Member has a pecuniary interest. This express prohibition is qualified by Article 116 of the Constitution in two ways. First, Article 116(3) allows Members of Parliament to enact a legislation which grants them a collective pecuniary benefit, but defers the coming into force of such legislation until the term of the Members comes to an end. On its part, Article 116(4) allows Members to enact a legislation which grants them a general pecuniary benefit that may accrue to them as members of the public. Hon. Members, an example is like Members voting to have a road constructed in a particular area.

Hon. Members, taking a leaf from the example provided in the Constitution under Article 116(3) and (4), one will note that having a personal or private interest in a particular matter is not, in itself, prohibited. Indeed, as mentioned by Hon. Millie Odhiambo, her interest in matters relating to the welfare of children having previously worked with a child welfare organisation, ranks equal with the personal interest of Members of this House who are also parents. On face value, it may, therefore, be argued that one needs to have a personal interest in a matter for it to be properly prosecuted. However, what is prohibited is the failure to declare interest and the consequent influence of the declared or undeclared interest on debate and decisions of the House or its committees.

Hon. Members, As you are aware, this House enacted the Leadership and Integrity Act, 2012 and the Parliamentary Powers and Privileges Act, 2017 to implement Chapter Six and Article 117 of the Constitution. Section 12 of the Public Officer Ethics Act, 2003, which was enacted before the promulgation of the new Constitution provides guidance as to what constitutes a conflict of interest and the various obligations imposed on public officers generally. It says:

> *"12. (1) A public officer shall use his best efforts to avoid being in a position in which his personal interests conflict with his official duties.*
>
> *(2) Without limiting the generality of subsection (1), a public officer shall not hold shares or have any other interest in a corporation, partnership of other body, directly or through another person, if holding those shares or having that interest would result in the public officer's personal interests conflicting with his official duties.*
>
> *(3) A public officer whose personal interests' conflict with his official duties shall-*
>
> *(a) declare the personal interests to his superior or other appropriate body and comply with any directions to avoid the conflict; and*
>
> *(**b) refrain from participating in any deliberations with respect to the matter."** (I put emphasis on this paragraph)*

Part (6) states:

> *"(6) In this section, "personal interest" includes the interest of a spouse, relative or business associate."*

Quite similarly, Hon. Members, Section 16 of the Leadership and Integrity Act, 2012, provides particular guidance as to what circumstances constitute a conflict of interest and the various obligations that the House saw fit to impose upon its Members and other State officers. It states, and I quote:

> (1) *" .....*
>
> (2) *Without limiting the generality of subsection (1), a State officer or a*
>
> *public officer shall not hold shares or have any other interest in a corporation, partnership or other body, directly or through another person, if holding those shares or having that interest would result in a conflict of the State officer's or public officer's personal interests and the officer's official duties.*

(3) *A State officer or a public officer whose personal interests conflict with their official duties shall declare the personal interests to the public entity or the Commission.*

(4) *The Commission or a public entity may give direction on the appropriate action to be taken by the State officer or public officer to avoid the conflict of interest and the State officer or public officer shall—*

(a) *comply with the directions; and,*

(b) ***refrain from participating in any deliberations with respect to the matter."*** Again, I put emphasis on this paragraph, which states:

(5) ……..

(6) *In this section, "personal interest" includes the interest of a spouse, child, business associate or agent or any other matter in which the State officer or public officer has a direct or indirect pecuniary or non-pecuniary interest.*

(7) *Where a State officer or a public officer is present at a meeting, where an issue which is likely to result in a conflict of interest is to be discussed, the State officer or public officer shall declare the interest at the beginning of the meeting or before the issue is deliberated upon.*

(8) ***A declaration of a conflict of interest under subsection (7) shall be recorded in the minutes of that meeting.***

(9) *Subject to Article 116(3) and (4) of the Constitution, a Member of Parliament or a member of a county assembly (MCA) shall declare any direct pecuniary interest or benefit of whatever nature in any—*

(a) *debate or proceeding of the body of which he or she is a member;*

(b) *debate or proceeding in any committee of that body; and*

(c) *transaction or communication which the State officer may have with other members of the body, State officers, public officers or government officers."*

Hon. Members, Section 16 of the Leadership and Integrity Act further requires every public entity, and for the avoidance of doubt that includes this House, to maintain a public register of interests in which State officers are to register the particulars of various interests that are outlined in the Second Schedule to the Act. These include directorships of companies, ownerships of shares, contracts for supply of goods or services, funded trips, future expectations of employment, land and property, sponsorships, direct and indirect gifts, benefits or hospitality, pending civil and criminal cases touching on a State officer, business associate or firm and the possession of dual citizenship. Under the Act, each State officer is obliged to update any change in the status of the interests registered with a public entity within one month of such change.

Hon. Members, in addition, this House went a step further and enacted the Parliamentary Powers and Privileges Act, 2017. Section 16(c) of the Act provides that the Committee on Powers and Privilege may find a Member to be in breach of privilege if the Member wilfully

fails or refuses to obey any rule of Parliament. A Member who, therefore, decides to wilfully disregard the provisions of Standing Order 90 on declaration of interests may, therefore, be in breach of privilege and subject to disciplinary action as envisaged under Section 17(3) of the same Act. It is also noteworthy that the Act also incorporates in the Third Schedule a Code of Conduct applicable to Members of Parliament.

As Hon. Members will recall, the Code of Conduct, which each Member in this House swore to abide by, provides in Paragraph 4, that Members shall, in the conduct of their parliamentary duties, act in the public interest and resolve any conflict between their personal interest and the public interest in favour of the public interest. Further, Paragraph 6 of the Code of Conduct further provides as follows:

"(1) Members of the House shall—

(a) register with the relevant speaker all financial and non-financial interests that may reasonably influence their parliamentary actions;

(b) before contributing to debate in the House or its Committees, or communicating with State Officers or other public servants, declare any relevant interest in the context of parliamentary debate or the matter under discussion; and,

(c) observe any rules agreed by the House in respect of financial support for Members or the facilities of the House.

(2) A relevant interest is an interest that may be seen by a reasonable member of the public to influence the way in which a Member discharges his or her parliamentary duties.

(3) Members shall ensure that registered interests are accurate and updated within one month of any change in particulars."

Hon. Members, Standing Order 90 does not preclude Members who have procedurally declared their interest in a matter from participating in the debate on the matter in the committee or the House. The only express prohibition to the exercise of a Member's constitutional role is with regard to voting on a matter in which the Member has a direct pecuniary interest under Article 122 of the Constitution as qualified by Article 116(3) of the Constitution, as I have noted above. The obligations that the Constitution, the Leadership and Integrity Act, and the Parliamentary Powers and Privileges Act, outline are placed on each Member individually. The responsibilities relate to the discipline of each Member and the House, the Committee of Powers and Privileges and other committees. It is expected that the respective chairpersons of committees shall always protect the dignity of the House in committee and the privileges enjoyed by the Members.

Hon. Members, permit me to refer the House to the ruling made by the Speaker on Wednesday, 24th July, 2014. Then, as now, the question arose, in similar framing, as to what is the effect of failure to declare interest in a matter under consideration, and what ensues after a Member declares a possible conflict of interest on a matter. The Speaker then guided that it was the responsibility of Members to declare any interest that they may have in any matter before the House or a committee.

Hon. Members, Let me now turn to comparable jurisdictions. In the Parliament of the United Kingdom, the regime for declaration of interests is wider than registration of Members' interests. It covers not just direct and current interests, but indirect interests, past interests and

expected future interests. In the same jurisdiction, interests must be declared not only when speaking, but when giving written notices, including when filing Questions. It also extends to correspondences and meetings with ministers, public officials and other members. Paid advocacy is prohibited. Members are not allowed to engage in any parliamentary proceedings or to seek to influence others in such a way as to benefit exclusively a body outside Parliament in which they have pecuniary interest. Formal lobbying is also attracting the attention of the UK Houses of Parliament.

Erskine May's Parliamentary Practice, an authority on parliamentary practice and procedure, notes in the 24th Edition with regard to the House of Commons:

> *"The House has two distinct, but related methods for the disclosure of the personal financial interests of its Members: registration of interests in a register which is publicly available, and declaration of interest in the course of debate and in other contexts. The main purpose of the register is to give public notification on a continuous basis of those financial interests held by Members which might be thought to influence their parliamentary conduct or actions. The main purpose of the declaration is to ensure that fellow Members of the House and the public are made aware, at the appropriate time when a Member is participating in the proceedings of the House, of any past, present or expected future financial interest which might reasonably be thought to be relevant to those proceedings… (p.76) In addition, in the interests of transparency, in certain circumstances, Members are encouraged to declare non-financial interests as well. (p. 80)"*

Hon. Members, the US Congress has also very robust laws governing declaration of interests by Members of the US Congress. The rules of the House of Representatives spell out a Code of Conduct for Members of the House of Representatives as contained in Rule XXIII of the 116th Congress. According to the Code, Members of the House of Representatives are required to adhere to the rules in performance of their duties as Members of the House of Representatives. It is noteworthy that the Ethics in Government Act of 1978 also contains rules on disclosure of financial interests by Members of the Congress. It is said that the late Senator, John McCain, whom you would all recall, who was also a presidential candidate, was such a strict follower of rules of declaration of interests that he recused himself from voting on alcohol related legislation even though he ran no risk of being reprimanded by the Ethics Committee. In the 1980s and 1990s, he is said to have recused himself from voting on Bills requiring producers to provide Government warning labels on bottles because in his view, his wife having been one of the owners of the main alcohol distributing company in the country, posed potential conflict of his interests in the matter. On matters declaration of interest, it is said his conscience led him.

Hon. Members, looking at the Parliament of Australia, in particular the House of Representatives, matters of pecuniary interests of Members are governed by Sections 44 and 45 of their Constitution and Standing Orders 134 and 231, which prohibit Members of the House of Representatives from participating in matters in which they have pecuniary interests. The consequences are so dire that it can lead even to occurrence of a vacancy in the office of a Member of the House of Representatives. Further, it is noteworthy that, in terms of voting, Standing Order No. 134(a) of the House of Representatives of Australia's Parliament provides that a Member may not vote on a question on a matter in which he or she has a particular direct pecuniary interest other than public policy. The rule allows other Members to challenge another Member's vote on the grounds of pecuniary interest.

Hon. Members, having established the general law and practice on the declaration of interests by Members and examined comparative jurisdictions rules on conflict of interests, permit me

to attempt to answer the questions which I had earlier on isolated for guidance. I will start with the first issue, namely, what is the scope of Standing Order 90 and how it can be enforced. Standing Order No. 90 should be interpreted to mean that when a Member who wishes to speak on any matter, be it in the House or before a committee, for which he has a personal interest which includes pecuniary interest, proprietary interest, personal relationships and business relationships, he or she should declare it first and failure to declare interest amounts to misconduct and abuse of privilege. It, therefore, follows that any Member or Members with interest on a matter under consideration should declare the interest before the commencement of the meeting or at any other time during debate, whenever the particular matter arises, and recuse themselves from the ensuing deliberations as may be directed.

Hon. Members, this now takes me to the second matter requiring my determination, namely, after declaring interest, what next? Should a Member who has declared interest be allowed to participate fully in the ensuing deliberations before the committee? The answer to this Question lies in Article 122(3) of the Constitution which is that: "A Member shall not vote on any question in which the Member has a pecuniary interest." This does not give a Member the leeway to simply declare interest, proceed to participate fully in the ensuing debate and only recuse himself or herself during voting. Each case ought to be considered on its own merit. In this regard, following a declaration of interest, the chairperson of a committee or the Speaker, as the case may be, may require the particular Member to recuse himself or herself during debate on the matter, in addition to barring such Member from actual voting on the matter in question.

Hon. Members, I will now turn to the third issue requiring my response which is: Whether a Member who declares conflict of interest that directly touches on a nominee for appointment into a public office can take part in the process of vetting before the relevant committee or the House. You may wish to note that one of the roles of the National Assembly is to oversee State organs. It is, therefore, my finding that such Members should rely on their conscience, and may participate during the vetting hearing, but he or she should not take part in voting, pursuant to the provisions of Article 122(3) of the Constitution. What if the interest declared includes personal or business relationships with the candidate undergoing vetting in a committee? In such a case, it is my finding that such a Member should not only be disallowed from voting in the committee and the House, but should also recuse himself or herself during the vetting hearings and approval debate in the particular committee and in the House.

Hon. Members, Let me now address the issue of the Members of Parliament nominated under Article 97(1) of the Constitution – that is those represent special interests, including the interests of the youth, persons living with disabilities and workers. The framers of our Constitution consciously incorporated this provision in our Constitution, perhaps to ensure that the special interest of the categories of those persons is taken into the proceedings and decision-making aspects of the National Assembly. However, we must admit that, the Members nominated under the said provision are not exempted from the application of Article 122(3) of the Constitution regarding voting in the House and our Standing Order 90 on declaration of interest. Whereas their expertise and experience in the particular special interests is expected to guide the proceedings in the committee and the House so as to make informed decisions, they must, however, navigate cautiously to ensure that, *"They are not seen by a reasonable member of the public in the streets to influence the way in which they discharge their parliamentary duties."*

In addition, even as they bring to the fore the issues of the categories of the said special interests, they do not offend the code of conduct under the Parliamentary Powers and Privileges Act, 2017. It follows, therefore, that it is not an offence to belong to a trade union. However, it is gross misconduct and out of order to wear the hat of a trade unionist or a workers'

representative and at the same time purport to also wear the hat of a Member of Parliament in the same sitting of a committee or the House. Similarly, it would be gross misconduct on the part of such a Member to use the information obtained through the committee to the advantage of or to advance the interests of those groups outside the committee or Parliament before the matter under consideration is concluded.

Hon. Members, with respect to the matter touching on Hon. Sossion, I wish to remind the House that Article 95 of the Constitution obliges this House and its committees to deliberate on and resolve issues of concern to the people. Such issues are deliberated upon and resolved in the public interest, but not to serve personal interests. Ideally, once a Member declares a personal interest in a matter, he or she has two options. That is to either contribute to deliberations in a manner that does not lead to their interest conflicting with the public interest or where the Member so elects or feels that they cannot resolve their conflict of interest in the appropriate manner, refrain from contributing to the deliberations or recuse oneself. Any other conduct would amount to courting disorder in the House and its committees and should attract the specified sanctions under the Standing Orders. In this regard, if as alleged, Hon. Sossion declared his interest and thereafter conducted himself in a manner that exhibited a clear conflict, the Chairperson of the Committee was adequately empowered by the Standing Orders to take the appropriate action.

Hon. Members, In conclusion, I must stress that to an extent, Standing Order 90 is deliberately crafted to require Members to introspect each time they seek to contribute to debate. As guided in the Communication issued on 26th July, 2018 on the investigatory mandate of House committees and the conduct of Members in committees, which I reiterate and I quote*: "That, prior to the commencement of every meeting, every chairperson must require that Members declare their interest in any matter under consideration."* In this regard, it is incumbent upon every chairperson to ensure, prior to the commencement of every meeting, to ensure that Members declare their interest in any matter falling within the agenda items of that particular sitting. Any Member joining a meeting midstream ought to declare any interest before contributing on matters under consideration, and this should similarly apply to any matter proposed as additional business after the conclusion of the main agenda of the meeting.

In summary, Hon. Members, I wish to guide as follows:

(1) THAT, as required under our Standing Order No.90, any Member desiring to speak on a matter in the House, for which he or she has interest, must declare that interest. Further, in accordance with Article 122(3) of the Constitution, such a Member shall not take part in the decision-making on that matter, whether by voice vote or any other form of voting. Chairpersons of committees ought to enforce these provisions in their respective committees.

(2) THAT, as to whether a Member who has declared interest in a matter should continue to sit and take part in the ensuring deliberations before the particular committee or the House, the Speaker will leave that aspect to the sincere conscience of the particular Member and the instantaneous directive of the Speaker or the chairperson of the committee, as they may deem appropriate, on a case by case basis.

(3) THAT, where the interest declared is of personal or business relationships with the candidate undergoing vetting before a committee or the House, such a Member should not only be disallowed from voting on the approval process in the committee and the House, but should also recuse himself or herself during the vetting hearings and approval debate in the particular committee and in the House.

(4) THAT, with respect to the Members of Parliament nominated under Article 97(1) of the Constitution, that is, those representing special interests including the interests of the youth, persons with disabilities and workers, they are not exempted from the application of the provisions of Article 122(3) of the Constitution and Standing Order No.90. We hope that the House is now guided accordingly.

I thank you, Hon. Members."

DETERMINATION OF THE CONSTITUTIONALITY OF A DIVISION OF REVENUE BILL ORIGINATED BY SENATE

Thursday, 8th August 2019

Context:

Constitutionality of the Division of Revenue Bill (Senate Bill No. 13 of 2019) in terms of Article 95(4)(a) of the Constitution by virtue of the Bill having been originated by the Senate and the options that would be available to unlock any stalemate between Houses of Parliament with respect to a Division of Revenue Bill, if mediation process on the Bill failed.

Decision of the Speaker:

1) *The Division of Revenue Bill (Senate Bill No. 13 of 2019) offends not only the spirit of the Constitution, but also the customs and traditions of the House and other comparable parliamentary jurisdictions which Standing Order 1(2) obligated the Speaker to abide by, in making any decision in respect of a matter that is not expressly provided for in the Standing Orders.*

2) *The motion for Second Reading of the Division of Revenue Bill (Senate Bill No. 13 of 2019) was improperly before the House.*

3) *Direction on various constitutional matters was made in order to remove ambiguity and conflict arising out of the attempted parallel legislative process by this House and the Senate, and also to expedite the timely conclusion of the Annual Division of Revenue Bill through one process as contemplated by the Constitution.*

"Honourable Members, as you would recall, during the afternoon sitting on Thursday, 1st August 2019, upon reading the Order for Second Reading of the Division of Revenue Bill (Senate Bill No. 13 of 2019), the Mover of the Motion, Hon. Kimani Ichung'wah, MP, Chairperson of the Budget and Appropriations Committee commenced by stating that: "*Even as I beg to move thus, I will be requesting you, Hon. Speaker and the House, to give us direction on certain pertinent constitutional matters*."

As the Speaker, my attention, and as I rightly supposed, that of the House, was captured by explicit reluctance in the opening statement made by the Mover of the Motion. Indeed, the Chairperson proceeded to pose a question as to whether the Division of Revenue Bill (Senate Bill No. 13 of 2019) was constitutionally before the House, having emanated from the Senate. He also sought the guidance of the Speaker on whether the action of the Senate was an affront on the exclusive province of the National Assembly under Article 95(4)(a) of the Constitution of Kenya, which provides that the National Assembly "*determines the allocation of national revenue between the levels of government, as provided in Part IV of Chapter Twelve*."

Hon. Members, before the Chairperson of the Budget and Appropriations Committee could conclude moving the Motion for Second Reading of the Bill, the Leader of the Majority Party, Hon. Aden Duale EGH, MP, rising on a point of order, sought the Speaker's guidance on the same, and a finding that the Second Reading of the Division of Revenue Bill (Senate Bill No.13 of 2019) should not be proceeded with on grounds of constitutionality as it ought not to originate in the Senate, hence, it was improperly before the House.

The following other Members also ventilated on the matter: The Member for Kitui Central, Hon. (Dr.) Makali Mulu, MP; the Member for Kipipiri, Hon. Amos Kimunya EGH, MP; the Minority Whip, Hon. Junet Nuh CBS, MP; the Chairperson of the Departmental Committee on Finance and National Planning, Hon. Joseph Limo, MP; the Deputy Minority Party Whip, Hon. (Dr.) Chrisanthus Wamalwa, CBS, MP and the Chairperson of the Public Investments Committee, Hon. Abdullswamad Nassir, MP. The ensuing debate raised weighty issues touching on the provisions of Chapter 12 of the Constitution on public finance and Standing Order 233 of the National Assembly on the consideration of the Division of Revenue Bill. Accordingly, and pursuant to Standing Order 83(3), I undertook to render a considered ruling on the matter.

Hon. Members, before I proceed, permit me to first deal with two preliminary issues. The first issue is the point at which a Member may raise any question of constitutionality or otherwise of a Bill already before the House. The second issue is the competence of the Speaker to determine and decide on any question of constitutionality or otherwise of a Bill, without reference to the House.

On the first issue, it is public notoriety that ordinarily, a question of constitutionality or otherwise of any Bill before the House, should be resolved before it is introduced for consideration by the House. Indeed, the Standing Orders do not contain an explicit provision upon which a Member may rise on a point of order to raise a question of this nature during consideration of a Bill. As a matter of fact, in a bicameral set up like the one we have in Kenya, save for matters falling within the province of Article 114(2) of the Constitution, it is inconceivable for the Speaker of a House, by a decision made within the walls of the Speaker's Chambers, to curtail a Bill from the other House from being introduced in the receiving House on the basis of it being unconstitutional.

Even in the absence of clear provisions in the Standing Orders, Standing Order 1 grants latitude to the Speaker to decide any procedural question on matters not expressly provided for by the Standing Orders or other orders of the House based on, among other considerations, precedents.

Hon. Members, a precedent was already set by my predecessors and, indeed, myself, which precedent has been applied on various occasions when the Speaker has been invited to guide the House on questions of constitutionality of a Bill under consideration. For avoidance of doubt, I will enumerate a few instances. First, on 28th April 2009, my predecessor, the Hon. Kenneth Marende, EGH, MP, when confronted with a similar question of whether he should adjudicate a question of constitutionality of a matter that he, as the Speaker, had previously approved, he made the following determination, and I quote:

> *"... the view that since the Speaker had not raised the issue about the legality of the situation, he is prevented from adjudicating on it when it is raised by any Hon. Member, is therefore, not tenable… I rule that any Member can, at any time, raise a question on the constitutionality of any action or set of circumstances in this House and it is always open to the Chair to entertain and rule on the merits of such a question."*

Hon. Members, I have not deviated from this precedent set by my predecessor. You may recall that, in the 11th Parliament, I was called upon to rule on the admissibility of the National Police Service (Amendment) Bill, 2013 and the National Police Service Commission (Amendment) Bill, 2013. On 25th September 2013, upholding the precedent set by my predecessors, I did rule in the following manner, and I quote:

> *"...my predecessors have previously ruled on numerous other occasions in the past, but notwithstanding the approval of any business by the Chair under the Standing Orders, the*

issue of constitutionality can be raised by any Member at any stage of consideration of any business by the House."

I further ruled on 17th February 2016 in the matter of a question of constitutionality of the Money Bill implication of the Military Veterans Bill (National Assembly Bill No. 34 of 2013) that:

"…the question of constitutionality of a Bill can be entertained at any stage before the passage of a Bill."

It is, therefore, clear that any question of constitutionality or otherwise of a Bill already before the House cannot be curtailed as long as a Bill is still under consideration. This settles the first preliminary issue.

Hon. Members, on the second preliminary issue on the competence of the Speaker to decide any question of constitutionality of a Bill under consideration without reference to the House, the answer is in the affirmative. Suffice it to say, that it is the duty of the Speaker to defend and protect the Constitution and should the Speaker be invited to apply his or her mind on a question of constitutionality or otherwise of a Bill or a Motion already seized by House, the Chair would not hesitate to do so.

Indeed, on 25th September 2013, during the consideration of the National Police Service (Amendment) Bill, 2013 and the National Police Service Commission (Amendment) Bill, 2013, I did find that:

"…a question of constitutionality of a proposal before the House cannot be subjected to a vote, but to the conscious decision of the Speaker."

Hon. Members, having cleared the preliminary matters, I will now proceed to apply my conscious consideration and decision to the three questions relating to the constitutionality of the Division of Revenue Bill (Senate Bill No. 13 of 2019), which I have summarised as follows:

1) whether the Senate can originate a Division of Revenue Bill;

2) if my finding is that the Senate can originate a Division of Revenue Bill, would that also imply that any Member of this House is also at liberty to introduce a County Allocation of Revenue Bill or even an Appropriations Bill; and,

3) what options are available to unlock any stalemate between Houses of Parliament with respect to a Division of Revenue Bill, if mediation fails?

With regard to the first question on whether the Senate can originate a Division of Revenue Bill, I will revisit the roles of the respective Houses of Parliament as provided in the Constitution. Article 93 of the Constitution establishes the Parliament of Kenya as constitutive of both the National Assembly and the Senate. This Article also provides that both Houses shall perform their respective functions in accordance with the Constitution. Article 95 of the Constitution provides for the roles of the National Assembly. Specifically, Clause (4)(a) of this Article expressly provides that the National Assembly determines the allocation of national revenue between the levels of government as provided in Part 4 of Chapter 12 of the Constitution. On the other hand, Article 96 provides for the role of the Senate. Clause (3) expressly stipulates that the Senate determines the allocation of national revenue among counties, as provided in Article 217, and exercises oversight over national revenue allocated to the county governments.

Hon. Members, a question would then arise as to what constitutes the term "*determination of the allocation of revenue*" as provided in Articles 95(4)(a) and 96(3). These Articles must be interpreted conjointly with Article 218. A prudent interpretation of the Constitution therefore means that the National Assembly performs its function of determining the allocation of national revenue between the levels of government by introducing a Division of Revenue Bill. Similarly, the Senate performs its function of determining the allocation of revenue among counties by introducing a County Allocation of Revenue Bill.

Indeed, Article 110(2) categorises the County Allocation of Revenue Bill as a special Bill concerning county governments, which is considered in accordance with Article 111. Under Article 111, the National Assembly requires a two-thirds majority to change or reject a County Allocation of Revenue Bill passed by the Senate. In originating the County Allocation of Revenue Bill, the Senate will be living up to its constitutional mandate as enshrined in Article 96(1) of the Constitution, which provides that the Senate represents the counties and serves to protect the interests of the counties and their governments.

Hon. Members, a question would then arise as to what constitutes the term "*determination of the allocation of revenue*" as provided in Articles 95(4)(a) and 96(3). These Articles must be interpreted conjointly with Article 218. A prudent interpretation of the Constitution, therefore, means that the National Assembly performs its function of determining the allocation of national revenue between the levels of government by introducing a Division of Revenue Bill. Similarly, the Senate performs its function of determining the allocation of revenue among counties by introducing a County Allocation of Revenue Bill.

Indeed, Article 110(2) categorises the County Allocation of Revenue Bill as a special Bill concerning county governments, which is considered in accordance with Article 111. Under Article 111, the National Assembly requires a two-thirds majority to change or reject a County Allocation of Revenue Bill passed by the Senate. In originating the County Allocation of Revenue Bill, the Senate will be living up to its constitutional mandate as enshrined in Article 96(1) of the Constitution, which provides that the Senate represents the counties, and serves to protect the interests of the counties and their governments.

Hon. Members, you will agree with me that no single provision in the Constitution can be read or interpreted in isolation. Indeed, Article 259 provides that the Constitution must be interpreted in a manner that, among others, promotes its purposes, values and principles; advances the rule of law; and permits the development of the law. In as much as Article 218(1) calls for the introduction in Parliament of a Division of Revenue Bill and the County Allocation of Revenue Bill, this Article cannot be read in isolation. If this isolated reading of the Constitution was to be adopted, it would then mean that the Senate would be permitted to violate the provisions of Article 95(4)(a) of the Constitution by introducing a legislation to determine the allocation of national revenue between the levels of government; or the National Assembly would be permitted to violate the provisions of Article 96(3) by introducing a legislation to determine the basis for allocating among the counties the share of national revenue that is annually allocated to the county level of government.

Therefore, it goes without saying that the interpretation of the Constitution must be done in a holistic manner. Parliament must lend credence to the doctrine of interpretation that the law is always speaking. The framers of the Constitution did not envisage a situation where the various Articles of the Constitution would be construed in the form of a staccato speech, consisting of several disjointed provisions. Rather, the manner of speech contemplated by the Constitution is that of a logical sequence, with a smooth ebb and flow.

Having said that, it is inconceivable that a House of Parliament would attempt to apply the provisions of Article 218 of the Constitution in wanton disregard of the provisions of Articles 93(2), 95(4), 96(3) and 217 of the same Constitution. Parliament must be at the forefront in demonstrating respect for the rule of law. As the institution in which legislative authority is vested, Parliament has a higher threshold with regard to the obligation to respect, uphold and defend the Constitution.

The architecture of the Constitution with regard to Public Finance Management, gives specific roles to the two Houses of Parliament. The thread that runs straight through Chapter 12 of the Constitution on Public Finance is the centrality of the National Assembly in the budget process, appropriation of public funds for the expenditure of the national government and national State organs and revenue raising measures by the national government.

Article 221 of the Constitution exclusively vests in the National Assembly the role of considering and approving the budget estimates of the revenue and expenditure of the national government and the estimates of expenditure submitted by the Parliamentary Service Commission and the Chief Registrar of the Judiciary. Drawing from the approved estimates, the National Assembly is further exclusively mandated to introduce an Appropriation Bill to appropriate the approved estimates for disbursement from the Consolidated Fund.

In addition, to finance the approved budget estimates and the expenditure for which public funds are appropriated, this House also exclusively legislates the proposals by the National Treasury to raise the revenue required to finance both levels of government. Article 209 of the Constitution empowers the national Government to exclusively impose income tax, value added tax, customs duties and other duties on import and export goods and excise tax as well as any other tax or duty, except property rates and entertainment taxes which are a preserve of the county governments. Every year a Finance Bill is introduced, considered and passed exclusively by this House, the National Assembly, with regard to the Government's proposed revenue-raising measures.

Hon. Members, in settling on the equitable share of the national revenue to be allocated to the counties, this House is required under Article 203 of the Constitution to allocate, at least, 15 percent of all national revenue collected by the national Government, based on the most recent audited accounts approved by the National Assembly. Again, Hon. Members, Article 203 outlines another critical function vested solely in the National Assembly, which is approving audits of the expenditure of all revenue received and spent by the national Government.

A clear reading of Article 218 of the Constitution together with Article 95(4)(a) and 96(3) points to a number of inescapable conclusions. First, Hon. Members, the framers of the Constitution were very deliberate in their assignment of the roles and functions of the two Houses of Parliament with regard to public finance, both at the national and county levels of government. The Constitution clearly establishes one House as representing the people, overseeing the budget process for the national Government and national State organs, appropriating monies for the national Government and national State organs, overseeing the process of revenue-raising through legislation, determining the allocation of the revenue collected between the two levels of government and auditing the collection and expenditure of revenue by the national Government and national State organs.

Conversely, Hon. Members, the Constitution mandates the other House of Parliament to represent and protect the interests of the counties, as geographic regions, and their county governments, participate in the making of certain laws as guided by Part 2 of the Fourth Schedule to the Constitution, determine the allocation of national revenue among counties and exercise oversight over that revenue.

With this background in mind, interrogating the provisions of Article 218(1) of the Constitution so as to know the House in which the annual Division of Revenue Bill and County Allocation of Revenue Bill are to be originated, ought not to be a question to belabour.

Hon. Members, in implementing Chapter 12 of the Constitution, this House enacted the Public Finance Management Act, 2012. The provisions of the Act outline in detail the procedures relating to the budget process. Section 38 of the Act expounds on the exclusive role of the National Assembly in initiating and determining division of revenue between the national and county governments. Under Section 38 of the Act, the CS for the National Treasury is required to submit Budget documents to the National Assembly. The National Assembly then considers the Budget Estimates in line with Section 39 of the Act. In addition, Section 40 of the Act requires that the Cabinet Secretary for the National Treasury submit the Budget Policy Highlights and Finance Bill to the National Assembly for consideration.

As I had stated earlier, Article 259(1)(a) of the Constitution obligates a person interpreting the Constitution to do so in a manner that "*promotes its purposes, values and principles*." With this edict in mind, I personally would not ascribe to the argument that the Constitution can exclude one House of Parliament from budgeting, collecting, sharing between the levels of government and auditing the national revenue, and still allows such House to originate a Bill that takes into account majority of those processes. Several questions would arise with regard to the basis of all the Senate proposals in a Division of Revenue Bill, key among which would be the basis on which the figures contained in such a proposal have been arrived at.

As part of its general oversight function under Article 95(5)(b) of the Constitution, this House, through the Budget and Appropriations Committee, is exclusively and constantly in communication with the National Treasury over the finances of the country. The Senate does not bear the burden of passing taxation legislation to raise revenue required to support any allocation made by the Division of Revenue Bill. The question that arises then is: Which revenue collection forecast would the Senate rely on to reach the figures proposed? Further, a Division of Revenue Bill contains additional grants to be financed by the revenue share of the national government. On which authority is the additional grants contained in the Division of Revenue Bill originated by the Senate made? Consequently, a clear reading of the Constitution only supports the Division of Revenue Bill being originated by the National Assembly, as it has a ready answer to all those particular questions. On the same breath, I would not expect any Member of this House to imagine that he or she can introduce a Division of Revenue Bill, an Appropriations Bill or even a financial Bill in form of an individual Member Bill, previously referred to as "*Private Member Bills*". Similarly, as your Speaker, I would not approve publication of any proposals made by a Member of this House to introduce a County Allocation of Revenue Bill. The same logic applies.

Articles 96 and 217 of the Constitution mandate the Senate to determine the basis for revenue allocation among counties, the counties' share of the national revenue that is annually allocated to the county level of government. In addition, the Senate is mandated to audit the use of those funds allocated to counties. To change or reject a resolution of the Senate on the basis of allocating funds to the counties or, indeed, the County Allocation of Revenue Bill, the National Assembly is required to muster a two-thirds majority. That special "*legislative protection*" accorded to a County Allocation of Revenue Bill implies that there is no constitutional basis for the origination of the County Allocation of Revenue Bill in the National Assembly and further that, it was not meant to go through the vagaries of mediation process that other ordinary Bills are subjected to, with the possibility of failure. In my considered opinion, the Constitution went to great lengths to segregate two Bills to the Houses in line with their exclusive roles and functions.

Since the inception of the bicameral Parliament in March 2013, both Houses of Parliament have respected their exclusive mandates with regard to originating the Division of Revenue Bill and the County Allocation of Revenue Bill. The National Assembly has originated the Division of Revenue Bill in each of the six years. Even where the Division of Revenue Bill has been lost at mediation, it has been republished and reintroduced in the National Assembly.

The decision by the Senate to publish its own version of the Division of Revenue Bill is, therefore, unprecedented in the practice of bicameral Parliament. No excuse, therefore, justifies this inconceivable departure by the Senate from the established practice. Our Parliament operates within and is guided by usages, forms, precedents, customs, procedures, traditions and practices from comparable jurisdictions within the community of nations.

An analysis of the practice in comparative jurisdictions indicates that any legislation with regard to the sharing of revenue between two or more levels of government is originated in the House of Parliament charged with the responsibility of approving revenue-raising measures. Over and above, some of the jurisdictions present insights on available avenues of extricating the Houses of Parliament from any limitless disagreements or ping-pong on Bills.

Section 73(2)(b) of the Constitution of the Republic of South Africa provides that any Bill may be introduced in the National Assembly, but a Bill under Section 214 of the said Constitution, containing provisions on equitable share and allocation of revenue among national, provincial and local spheres of government, may only be introduced by the Cabinet Member responsible for national financial matters and only in the National Assembly. The National Assembly of South Africa is the House tasked with approving the budget and any revenue-raising measures proposed by the national government. Indeed, Section 9 of the South Africa's Money Bills Amendment Procedure and Related Matters Act of 2009 provides as follows:

1) After the adoption of the fiscal framework, the Division of Revenue Bill must be referred to the Committee on Appropriations of the National Assembly for consideration and report; and,

2) After the Bill is referred to the National Council of Provinces, the Bill must be referred to the Committee on Appropriations of the Council for consideration and report.

Hon. Members, there are two pickings from the above quoted provisions from the Parliament of South Africa. First, there is an inviolable link between the revenue Bills and the budget fiscal framework, which in the case of Kenya is the Budget Policy Statement. It is therefore instructive that the formulation and introduction of a revenue Bill must be derived from and based on the fiscal framework.

Secondly, and most importantly, a revenue Bill is strictly introduced in the Committee on Appropriations of the National Assembly. The justification for introducing the revenue Bill in the National Assembly of South Africa, through the Committee on Appropriations, is based on the indisputable fact that it is the Committee and, indeed, the House which scrutinises and approves the fiscal framework, which is the bedrock for a revenue Bill.

Hon. Members, even with the lack of clarity in Article 218 of the Constitution, drawing from the above-cited pickings from South Africa, I would expect that there would be no contestation on which House of Parliament in Kenya reserves the original jurisdiction to originate the Division of Revenue Bill. Indeed, being the House in which the country's fiscal framework is considered, the National Assembly is the House that should originate the Division of Revenue Bill.

With respect to the National Diet of Japan, Section 60 of their Constitution provides that:

> *"The budget must, first, be submitted to the House of Representatives. Upon consideration of the budget, when the House of Councillors makes a decision different from the House of Representatives, and when no agreement can be reached even through a joint committee of both Houses, provided for by law, or in the case of failure by the House of Councillors to take final action within 30 days, the period of recess excluded, after the receipt of the budget passed by the House of Representatives, the decision of the House of Representatives shall be the decision of the National Diet (Parliament)".*

Hon. Members, I am inclined to believe that, in the context of Kenya, the Division of Revenue Bill is the legislation upon which the Houses of Parliament conclude vertical budget akin to what is provided for in Section 60 of the Constitution of Japan. I am further inclined to believe that the wisdom for granting the House of Representatives power to veto different decisions by the House of Councillors is premised on the understanding that the House of Representatives is best placed to translate the aspirations of the people in the budget process.

Further, a look at similar matters in the Commonwealth of Australia presents another insightful perspective for extricating the country from possible stalemate on such a Bill. Section 57 of the Constitution of Australia prescribes the procedure for resolving any irreconcilable disagreement between the two Houses. That procedure essentially involves the dissolution of both Houses of Parliament by the Governor-General, in what is commonly known as "*double dissolution*" in the event that the disagreement persists. This is followed by fresh elections for both the House of Representatives and the Senate.

Upon constitution of a new House of Representatives and the Senate, the Bill which led to the dissolution is re-considered and should the disagreement recur, the Governor-General may convene a joint sitting of the two Houses to consider and vote on the Bill. It is important to note that the Governor-General grants a double dissolution if he/she is satisfied that there is really a deadlock, and regard has been put to the importance of the Bill in question and the workability of Parliament (House of Representatives Practice, Australia, Fifth Edition, Page 454 to 455).

Hon. Members, regarding decision-making at a joint sitting, the said section 57 provides as follows:

> *"The members present at the joint sitting may deliberate and shall vote together upon the proposed law as proposed by the House of Representatives, and upon amendments, if any, which have been made therein by one House and not agreed to by the other, and any such amendments which are affirmed by an absolute majority of the total number of Members of the Senate and House of Representatives shall be taken to have been carried, and if the proposed law, with the amendments, if any, so carried is affirmed by an absolute majority of the total number of the members of the Senate and House of Representatives, it shall be taken to have been duly passed by both Houses of the Parliament, and shall be presented to the Governor-General for the Queen's assent."*

From the foregoing, it is a constitutional principle in Section 57 of the Australian Constitution that, in all cases of disagreement between the House of Representatives and the Senate, it is the position of the House of Representatives that shall prevail.

Hon. Members, like Kenya's devolved governance structure, the architecture of the Federal Government of Germany has various tiers of government. Moreover, the budget process in the Parliament of Germany closely mirrors that of the Parliament of Kenya in that it has a

Division of Revenue Bill and a mediation process. In terms of mediation, it is important to point out that, whenever the *Bundestag*, the equivalent of the National Assembly, approves a compromise proposal of a Bill developed by the mediation committee, the *Bundesrat,* may raise an objection to the proposal only with absolute majority or even a double qualified majority.

It is important to note that even in cases where the *Bundesrat* musters an absolute majority to object to a compromise proposal on a Bill approved by the *Bundestag*, if the *Bundestag* rejects the objection with a similar threshold, the Bill is passed and can become law (The German *Bundestag* Functions and Procedures: 17th Electoral Term, page 121 to 122). As such, the procedure allows for unlocking of a deadlock that may arise from a mediation process by granting veto power to the *Bundestag*, the equivalent to Kenya's National Assembly.

Hon. Members, as you may have noticed, the practice in Japan, Australia and Germany, does not contemplate a limitless ping-pong in the bicameral consideration of such important money bills, particularly critical bills relating to the budget process. The matter must come to rest, and the manner of resting it is through veto vested in the House of Parliament that represents the people. In our case, that House is the National Assembly. This scenario addresses the third question.

Hon. Members, while these practices are not explicitly provided for in the Constitution of Kenya, it ought not to be lost that the Constitution is a living document and its growth is catalysed when certain provisions therein are tested, as is the case now. It is perhaps the opportune time to re-examine specific provisions of our Constitution relating to financial procedures, especially the Division of Revenue Bill and likely stalemate on the Bill.

A reading of Article 113 of the Constitution reveals its terminal nature on a Bill, whose passage requires both Houses, and what has been referred to in Australia as "*deadlock clause*". Indeed, this provision exposes legislation to a potentially limitless mediation cycle that sounds a death knell to any Bill whose bicameral consideration results in a disagreement between the Houses on certain provisions therein. Whereas this would not be seriously injurious on ordinary Bills whose enactment may be delayed, up to and including being re-introduced in a succeeding Parliament, it is perilous to subject a critical Bill like the Division of Revenue Bill to a limitless cycle of disagreement between the Houses of Parliament. This constitutional anomaly needs to be addressed, particularly so with regards to the Division of Revenue Bill.

Hon. Members**,** an avenue for concluding the legislative process of the County Allocation of Revenue Bill, which is a special Bill pursuant to Article 110(2)(a)(ii) of the Constitution, has been provided in that the National Assembly may only amend or veto it by a resolution supported by at least two thirds of the Members of the National Assembly. If the National Assembly is unable to muster this threshold, then the County Allocation of Revenue Bill as passed by the Senate becomes law.

Whereas the drafters of the Constitution ensured that the County Allocation of Revenue Bill is not deadlocked by a mediation process, the Constitution has not granted similar constitutional safeguard on how to unlock the Division of Revenue Bill from the shackles of a mediation process that has resulted in the defeat of the Bill.

It can, therefore, be reasonably argued that the drafters of the Constitution, in providing under Article 95(4)(a) of the Constitution that the National Assembly determines the allocation of national revenue between the levels of government without a proviso of overriding Senate's decision on it, they contemplated that the Division of Revenue Bill as passed by the National Assembly is the law.

As I conclude, Hon. Members, with respect to the county governments, the Constitution provides avenues through which the current delay in the enactment of the Division of Revenue Bill can be mitigated. Firstly, outside the Division of Revenue Act, county governments have recourse to the revenue generated by themselves and deposited in their respective County Revenue Funds pursuant to Article 207(1) of the Constitution. Secondly, county governments have recourse to re-appropriate and utilise revenue of the previous years, which is retained in the County Revenue Fund at the close of the preceding financial year.

Thirdly, and more importantly, Article 203(2) of the Constitution guarantees county governments an equitable allocation of a minimum of 15 percent of all national revenue based on the most recent audited accounts of national revenue received as approved by the National Assembly. This amount ought to be readily available to county governments as it is already charged, allocated and granted by the Constitution. It ought not to be subjected to the bicameral legislative process between the two Houses of Parliament with the possibility of protracted disagreements, mediation and even defeat within the framework of Article 113(4) of the Constitution. As this is a direct charge on the Constitution, Article 206(2)(c) empowers the Controller of Budget to authorise the withdrawal of this amount from the Consolidated Fund.

I urge the Houses to consider making appropriate amendments to the Public Finance Management Act in order to provide a comprehensive mechanism to enable county governments to access preliminary funding from the three options at their disposal. This will ensure that county governments sustain their operations in the event of any future protracted enactment of the Division of Revenue Bill.

Hon. Members, as your Speaker, I am enjoined to uphold and protect the Constitution and the Standing Orders of the House. This calls for ensuring that any proposed legislation for consideration by the House accords with the requirements of the Constitution. I am persuaded that the Division of Revenue Bill (Senate Bill No. 13 of 2019) offends not only the spirit of the Constitution, but also the customs and traditions of this House and other comparable parliamentary jurisdictions which Standing Order 1(2) obligates me to abide by, in making any decision in respect of a matter that is not expressly provided for in our Standing Orders.

Hon. Members, it is the duty of the Speaker to guide the House with respect to business before it. Having addressed the question of origination of a Division of Revenue Bill, it is, therefore, my finding that the motion for Second Reading of the Division of Revenue Bill (Senate Bill No. 13 of 2019) was, indeed, improperly before the House.

I make this direction in order to remove ambiguity and conflict arising out of the attempted parallel legislative process by this House and the Senate, and also to expedite the timely conclusion of the Annual Division of Revenue Bill through one process as contemplated by the Constitution.

The House is according guided and I thank you."

VARIANCE IN THE REPORT OF THE MEDIATION FOMMITTEE ON THE MEDIATED VERSION OF THE DIVISION OF REVENUE (NO. 2) BILL, 2019 TABLED IN THE HOUSES OF PARLIAMENT

12th September 2019

Context:

Variance in the mediated version of the Division of Revenue Bill (No. 2) (National Assembly Bill No. 59 of 2019) tabled in the Senate from the version agreed by the Mediation Committee.

Decision of the Speaker:

The version of the Division of Revenue Bill, (National Assembly Bill No. 59 of 2019), as published by the Clerk of the National Assembly in Notice No.1 in the Order Paper for that day, 12th September 2019 was the true impression of the version of the Bill agreed on by the Mediation Committee and proposed to the Houses of Parliament.

"Hon. Members, as you are all aware, the Report of the Mediation Committee on the Division of Revenue Bill (No. 2) (National Assembly Bill No. 59 of 2019) was tabled yesterday, 11th September 2019 during the afternoon sitting by the Chairperson of the Mediation Committee, Hon. Kimani Ichung'wah, who also serves as the Chairperson of the Budget and Appropriations Committee of this House.

Thereafter, while moving the Motion for adoption of the Report and approval of the mediated version of the Division of Revenue Bill earlier this afternoon, the Chairperson of the Mediation Committee brought to the attention of the House that his Senate counterparts in the Mediation Committee had tabled on the same day, Wednesday, 11th September 2019, the same Report containing a Bill that had a slight variance to the version of the Bill agreed by the Mediation Committee. The said variance concerns Clause 1 of the Division of Revenue Bill (No. 2) of 2019 as agreed by the Mediation Committee. The Chairperson and part of the Members of the Mediation Committee drawn from this House, have this afternoon averred that the version of the Bill agreed to and proposed by the Committee contains Clause 1 which reads as follows:

"This Act may be cited as the Division of Revenue Act, 2019 and shall be deemed to have come into force on 1st July 2019".

According to the Chairperson, the said variance emanates from the fact that the version of the Bill that was tabled in the Senate ostensibly provides that the commencement date shall be upon publication of the Act in the Gazette after assent.

Hon. Members, Following the concerns that have been raised both by the Chairperson and the Members of the Mediation Committee that have spoken to this Bill and other communication made to me, I undertook to verify the matter from the official records available. In this regard, I have since confirmed what transpired in the Mediation Committee from the Hansard Report of the proceedings of the said Committee in the meeting that adopted the agreed version of the Division of Revenue Bill that they were tasked to propose to the Houses. Indeed, I have since confirmed also that as per the Hansard record of the said meeting of the Committee held in the morning of 11th September 2019, yesterday, Clause 1 providing for commencement was indeed amended.

Hon. Members, A few procedural questions arise from the foregoing. The first of which is whether or not the report of the Mediation Committee was altered. I have indeed confirmed that the annexure to the report of the Mediation Committee was slightly altered with respect to Clause 1 to a version of a Bill outside what was proposed by the Mediation Committee. I have also confirmed from the record of the papers laid that the Chairperson of the Mediation Committee quashed the alteration and by way of a handwritten text, referred them to the text as adopted by the said Committee. This is authenticated by his signature which is appended against the correction before tabling the report of the Mediation Committee in the House yesterday afternoon.

Hon. Members, in the absence of a clear record in the minutes and report of the Mediation Committee with regard to the text of Clause 1 of the Bill, as your Speaker, the question before me at the moment is twofold:

1. One, what avenue remains at the Speaker's disposal to ascertain the correct text of the said clause?

2. Two, what is the correct text of the said clause and what remedy is available at this penultimate stage?

Hon. Members, as you are without doubt aware, the Hansard Report, as defined by Erskine May and as applied within other Commonwealth jurisdictions, is the official record of the proceedings of the House in either plenary or in its committee sittings, mediation committee included. As such, the Hansard is a vital component of parliamentary records and is a sacrosanct document whose sanctity and infallibility ought to be continuously guarded and upheld at all times.

Secondly, Hon. Members, does the version of the Division of Revenue Bill 2019 before this House reflect what was agreed by the Mediation Committee and proposed to the Houses of Parliament in furtherance to the provisions of Article 113(2) of the Constitution? Based on the Hansard record of the meeting of the Mediation Committee and which is available for perusal and verification by any Member or person as laid by the Chairperson of the Committee when moving the Motion this afternoon; it is clear that the Bill before us today is the correct version that was agreed upon by the Mediation Committee.

Hon. Members, it is also my considered view that the pertinent issue before me this afternoon is not about which version of Clause 1 stands out as legally superior, but rather which version of Clause 1 was agreed to by the Mediation Committee that the Speaker of the Senate and I appointed pursuant to the provisions of Article 113(1) of the Constitution.

Therefore, Hon. Members, before I put the Question for adoption of the Report of the Mediation Committee on Division of Revenue Bill (No. 2) (National Assembly Bill No. 59 of 2019) and for the approval of the said Bill, I wish to confirm that the text of Clause 1 according to the correct and authenticated annexure to the Report as well as pages 7 and 8 of the HANSARD report reads as follows:

> *"Clause 1. This Act may be cited as the Division of Revenue Act, 2019 and shall be deemed to have come into force on 1st July 2019."*

I have no doubt, therefore, that this is the correct text as agreed by the Mediation Committee. Indeed, the correct text of the said clause is accurately captured in the version of the Division of Revenue Bill, 2019, as published by the Clerk of the National Assembly in Notice No.1 in today's Order Paper. Therefore, that is the copy and true impression of the version of the Bill agreed on by the Mediation Committee and proposed to the Houses of Parliament.

Finally, Hon. Members, we have a duty to protect the accuracy of our records and guarantee dependability of those employed to facilitate the work of this institution. In this regard, I call upon all officers facilitating various Committees of the House, including Mediation Committees, to always endeavour to guide Members accurately, from commencement to conclusion of all stages of Committees' deliberations and resolutions to guarantee coordination of law-making, representation and oversight responsibilities of Hon. Members.

The House is accordingly guided. I thank you, Hon. Members."

UNCONSTITUTIONALITY CLAIMS ON THE FINANCE BILL, 2019

Thursday, 19th September 2019

Context:

Determination on the scope of a Finance Bill; whether a Finance Bill was another form of a Statute Laws (Miscellaneous Amendments) Bill, and whether the Bill could be used to introduce proposals which were not incidental to taxation or revenue-raising measures; whether Clauses 50 and 51 of the Finance Bill 2019 which sought to amend the provisions of the Proceeds of Crime and Anti-Money Laundering Act 2009 to designate advocates, among other professionals, as reporting institutions of any suspicious transactions done by their clients offended the Constitution; if Clauses 50 and 51 of the Bill complied with the standard of disclosure set out in the Constitution, and how the inclusion and subsequent consideration by the House of provisions proposing to amend the Banking Act under Clause 43 of the Bill would affect the Banking (Amendment) Bill, 2019 that was already before the House.

Decision of the Speaker:

1) *Clauses 50 and 51 of the Finance Bill (National Assembly Bill No. 51 of 2019) failed to comply with the standard of disclosure set out by the Constitution and more specifically Article 24(2) and, therefore, were procedurally defective and were therefore excluded from Second Reading. The Bill would proceed as if the two clauses were not part of it. This determination was only related to the procedural defects in the manner in which the proposed amendments had been presented;*

2) *The Mover of the Bill or any other Member was at liberty to propose amendments in the appropriate format in a separate Bill for consideration by the House, and*

3) *With respect to Clause 43 of the Bill, which sought to amend the Banking Act, the provisions of Standing Order 49 on re-visiting a matter already decided by the House did not arise at that stage as the House had not made a determination on the matter one way or another.*

"Honourable Members, you will recall that yesterday, Wednesday, 18th September 2019, the Finance Bill (National Assembly Bill No. 51 of 2019) was listed as Order No. 12 in the Order Paper of the Afternoon Sitting for consideration at Second Reading. Upon the Order being called out and before the Motion for the Second Reading of the Bill was made, Hon. Gitonga Murugara George, the Member for Tharaka Constituency, rose on a point of order and sought the indulgence of the Chair not to allow the Bill to proceed to Second Reading. Hon. Murugara asserted that Clauses 50 and 51 of the Bill, which propose to amend the Proceeds of Crime and Anti-Money Laundering Act (No. 9 of 2009), are unconstitutional to the extent that they contain provisions limiting the right to privacy guaranteed under Article 31 of the Constitution and threaten to erode the settled principle of advocate-client confidentiality. That claim elicited interest from several other Members including the Leader of the Majority Party, Hon. (Dr.) Otiende Amollo, Hon. (Ms.) Jennifer Shamalla, Hon. John Mbadi - Leader of the Minority Party, Hon. Kirima Nguchine, Hon. Chrisantus Wamalwa, Hon. Mohamed Junet and Hon. Jude Njomo.

Another matter that arose relates to the propriety of including proposed amendments to the Proceeds of Crime and Anti-Money Laundering Act in the Finance Bill, 2019, and which some

Members felt were not incidental to the tax and other measures proposed in the Finance Bill.

As you may recall, the Member for Kiambu Constituency introduced a separate dimension to the point of order. His concern was that if the House went ahead and debated the provisions of Clause 43 of the Finance Bill relating to control of bank interest rates, any resolution of the House on the matter would sound a death knell to the proposals in the Banking (Amendment) Bill, 2019 moved by himself and currently under consideration by the House and which address the "*ambiguity*" issues of the capping of interest rates provision. The assertion by the Member for Kiambu Constituency was based on Standing Order 49(1), which provides that no Motion may be moved which is the same in substance as any question which has been resolved either in the affirmative or in the negative, during the preceding six months in the same session.

From the Members' contributions, there are four questions which arose that require determination by the Speaker:

1) What is the scope of a Finance Bill? Is the Finance Bill another form of a Statute Laws (Miscellaneous Amendments) Bill, and can the Bill be used to introduce proposals which are not incidental to taxation or revenue-raising measures?

2) Do Clauses 50 and 51 of the Finance Bill, 2019 offend the Constitution?

3) Do Clauses 50 and 51 of the Finance Bill, 2019 comply with the standard of disclosure set out in the Constitution?

4) How does the inclusion and subsequent consideration by the House of provisions proposing to amend the Banking Act under Clause 43 of the Finance Bill, 2019 affect the Banking (Amendment) Bill, 2019 currently before the House?

You will also recall that following the issues raised, I provided preliminary guidance to the House by allowing debate on the Bill at Second Reading to proceed and undertook to make a considered ruling on the matter today.

Hon. Members, at the outset, let me state that a Finance Bill has the nature and form similar to that of Bills commonly termed in parliamentary parlance as "*omnibus bills*". Although there exists no precise definition of the expression "*omnibus bill*", Audrey O'Brien and Marc Bosc, in *House of Commons (Canada) Practice and Procedure, 2nd Edition*, describe an omnibus bill as "*one that seeks to amend, repeal or enact several Acts, and is characterized by the fact that it is made up of a number of related but separate initiatives*." For all intent and purposes, a Finance Bill is usually intended to amend several separate but related statutes on taxation and revenue raising.

Hon. Members, in terms of history, the practice and usage of omnibus Bills dates as far back as 1850 in the United States Congress when Senator Henry Clay introduced a series of resolutions to seek a compromise and avert a crisis between North and South over the issue of slavery. The Compromise of 1850 covered five separate legislative subjects in terms of enactment, amendment and repeal, including partial abolition of the slave trade, entry of the State of California into the Union, creation of two territorial governments and settlement of a boundary dispute between the States of Texas and New Mexico. The practice in Canada dates back to as early as 1888 and also exists in the United Kingdom, Australia and New Zealand, save for differing procedural requirements as to what such Bills may or may not contain.

Hon. Members, the procedural propriety of introducing omnibus Bills is, therefore, an established practice, albeit exercised with caution. From the Canadian Parliamentary experience, O'Brien and Bosc had the following to say with regard to the propriety of omnibus Bills and I quote:

> "*It appears to be entirely proper, in procedural terms, for a bill to amend, repeal or enact more than one Act, provided that the requisite notice is given, that it is accompanied by a royal recommendation (where necessary), and that it follows the form required*."

Hon. Members, it is an indisputable fact that the Parliament of Kenya relies on the practices and precedents in the mentioned jurisdictions. Hence, it has become an established practice that bills of omnibus nature have been introduced and passed by Parliament and assented to by the President.

Indeed, Hon. Members, Article 94(1) of the Constitution clearly states that legislative authority of the Republic is derived from the people and, at the national level, is vested in and exercised by Parliament. Further, Article 109(1) provides that Parliament shall exercise its legislative power through Bills passed by Parliament and assented to by the President. It is worth noting that there exists no prescription as to the nature, limitation or form that Bills introduced in Parliament for passage ought to take. Guidance in this respect only exists in the Standing Orders. Of particular importance in this respect is Standing Order 114 providing for (the manner of) introduction of Bills, Standing Order 127 regarding public participation and Standing Order 133(5)(6) regarding scope of amendments which may be permitted at Committee of the whole House. With regard to Standing Order 114, there are three parameters set out for scrutiny before a Bill is published. That is, whether the proposal affects county governments; is a money Bill as outlined under Article 114 of the Constitution or conforms to the Constitution and the law and the format and style of the House.

Hon. Members, with regard to "*Bills emanating from the Executive*" which have by tradition been introduced in the House by the Leader of the Majority Party or the Chairperson of the relevant Departmental Committee, this House had occasion, during the review of its Standing Orders at the close of the Eleventh Parliament, to introduce a new Standing Order 114A. This Standing Order empowers the Speaker to exempt legislative proposals originating from the party forming the national Government from the detailed and rigorous pre-publication scrutiny on condition that the proposal is accompanied by a copy of the relevant Cabinet approval.

The Cabinet approval notwithstanding, any proposal so exempted is still interrogated by the Clerk in terms of its conformity to the Constitution and the law and the format and style of the House. The Finance Bill, 2019 is an example of such a proposal, having been introduced under the hand of the Chairperson of the Departmental Committee on Finance and National Planning.

Hon. Members it is, therefore, clear that the House has in place proper mechanisms to assess the propriety of a legislative proposal both in form and substance. Questions relating to the scope of omnibus Bills and proposed amendments thereof at the Committee of the whole House have arisen on few isolated cases in the Twelfth and preceding Parliaments. I will highlight two cases just to jog the memory of this House.

First, as you may recall, on 28th August 2018, the Member for Rarieda Constituency, Hon. (Dr.) Otiende Amollo, MP raised a point of order challenging the constitutionality of the Statute Law (Miscellaneous Amendments) Bill, 2018 (National Assembly Bill No. 12 of 2018) in its entirety. In respect of this matter, I did guide the House, in part, that:

> "*There is nothing unconstitutional about this Bill. The term "omnibus" does not refer to minor or trivial amendments. In fact, you could be talking about making minor amendments to existing law. But you may just insert one word; where it talks of "10 per cent" and make it 50 percent. That could be monumental. So, it is not the volume of the text that should be the issue to be considered. On this, the courts must also allow Parliament to do its legislative work. Let them deal with the interpretation of the constitutionality or otherwise of Bills that have been passed by the House. We cannot be held hostage by courts saying: "We think this is an omnibus law or, there are too many amendment Bills*".

A Finance Bill, for instance, is an omnibus Bill. It amends several laws to deal with revenue-raising measures or even repeals in entirety certain taxation provisions in law. Some of them have such great import that if one was to say the issue of substantive *vis-à-vis* the text, the two would not go hand in hand.

My view is that, since the issue of "*omnibus law*" is as old as the year 1850, the issue of "*omnibus*" is not one that offends the practice anywhere in the jurisdictions we compare ourselves with. We have traditions and customs. Our Constitution has not disallowed miscellaneous amendment Bills. I do not think whether we could say it is "*unprocedural*". My guide would be that we consider the Bills. Our requirement is under Article 10, among others; Articles 10(2)(a) and 118, which are on public participation. So, when a Bill is published, whether it contains proposals to amend two Acts of Parliament or 10 or 15, what our Constitution requires is that the public is involved. That is why we publicise those Bills in the newspapers. So, I think it is within the power of the House to legislate in terms of Articles 94 and 95. When we are legislating, we should not look over our shoulders save to consider what the letter and spirit of the Constitution and its substance are. There has never been a precedent that says: "*Do not use miscellaneous amendment processes*".

As you can clearly tell, the practice of omnibus Bills in our Parliament is established and this House has, with technical support of officers of the House, devised innovative strategies of navigating the complexity of omnibus Bills based on the experiences with different Bills of this kind.

Hon. Members, in the Tenth Parliament, a question of similar import arose as to whether or not some amendments proposed on certain statutes in the Finance Bill, 2011 were within the scope and ambit of a Finance Bill. In addressing the question, my predecessor, Speaker Kenneth Marende, observed as follows:

> "*Hon. Members, the practice that is emerging where amendments covering diverse subject matters are introduced to a Finance Bill is one that requires to be reconsidered. Some of the amendments that have been proposed to Finance Bill in recent times, and in the present case, are over matters that rightfully fall within the mandates of ministries other than that Ministry responsible for Finance, and consequently the mandates of various Departmental Committees. Introducing such amendments to a Finance Bill denies the relevant Ministries and Committee of the House, stakeholders and the general public the opportunity to reflect and deliberate on the proposed amendment*."

Hon. Members, the question at hand that I have been invited to rule on closely mirrors the situation that my predecessor dealt with above. But, be that as it may, and as earlier stated, the omnibus nature of a Finance Bill ought to be taken into account when resolving any question of the scope and principal object of a Finance Bill. Erskine May Parliamentary Practice (24th Edition), an authority on parliamentary practice and procedure provides as follows at page 780 and I quote:

"*The scope of a Finance Bill is not limited to the imposition and alteration of taxes for the purpose of adjusting the revenue of a particular year. It is also not intended to be an annual Act in the same sense as an Appropriation Act, but normally includes many provisions of permanent character for the regulation of fiscal machinery and other purposes*."

I put emphasis to use of the words "*fiscal machinery*".

Hon. Members, the scope of a Finance Bill is not exclusively limited to imposition and alteration of taxation for the purpose of adjusting the revenue of a particular financial year, but also includes provisions of permanent character for the regulation of the fiscal machinery and other purposes. With regard to the inclusion of amendments to the Proceeds of Crime and Anti-Money Laundering Act, 2009 under Clauses 50 and 51 of the Finance Bill, 2019, though not reflected in the Long Title of the Bill, a correlation can be made between the proposed amendments with regard to reporting of suspicious transactions as a fiscal control on the loss of government revenue. It is my considered view that, as a House, we should not be seen to curtail our legislative mandate. The legislation passed by this House is measured as against the Constitution and the issues of concern to the people that it resolves. With this in mind, form is a secondary consideration.

Hon. Members, Standing Order 47(3) places a particular obligation on the Speaker to exclude a 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. Verbatim, 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(1) of the Constitution."

Hon. Members, in parliamentary practice, a House of Parliament considers any Bills by way of a Motion seeking agreement of the House either for the Bill to be read a Second Time, for amendments to the Bill to be considered and approved during the Committee of the whole House, or for the Bill to be read a Third Time. In relation to the consideration of a Bill, the role of the Speaker under Standing Order 47(3) is two-fold. On the one hand, the Speaker is under an obligation to exclude any Bill or part thereof from consideration by the House where such a Bill or part of it patently violates the Constitution, any written law or the Standing Orders, and the said violation is not curable through appropriate amendment or revision, prior to the consideration of the Bill.

On the other hand, the Speaker is under a further obligation to ensure that any Bill under consideration by the House is insulated from any amendment or revision that may place it at odds with either a constitutional or statutory provision or violate the procedural prescriptions of the Standing Orders.

Standing Order 47(3) effectively excludes the participation of the House in the decision to be made by the Speaker and, as I have previously ruled, obliges the Speaker not to fold his or her arms and preside over deliberations that may lead to an unconstitutional and absurd result. Clauses 50 and 51 of the Finance Bill 2019 seek to amend the provisions of the Proceeds of Crime and Anti-Money Laundering Act 2009 to designate advocates, among other professionals, as reporting institutions of any suspicious transactions done by their clients. I understand the concern of Hon. Murugara and all other lawyers in this House in trying to tie the attorney-client confidentiality, the right to privacy and the right of access to information under Articles 31 and 35 of the Constitution, respectively. However, as Members are aware, the Constitution is very clear on the rights and freedoms that may not be limited under any circumstances.

Hon. Members, Article 25 of the Constitution provides as follows, and I quote:

> *"25. 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 clear reading of Article 25 of the Constitution mandates 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 50 and 51 of the Finance Bill, 2019 ought to be excluded from consideration by this House on account of limiting constitutional rights seems not to hold any water in my view.

Hon. Members, Article 24 of the Constitution prescribes the manner in which the rights and fundamental freedoms guaranteed by the Constitution may be limited. Clauses (1) and (2) of the Article are instructive insofar as they state, 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."

Hon. Members, Article 24(2) of the Constitution requires that 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. I am cognizant of the fact that the Proceeds of Crime and Anti-Money Laundering Act was enacted in 2009. To the extent that the Finance Bill 2019 proposes amendments to 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.

Clauses 50 and 51 of the Finance Bill are not 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 seeks to designate as reporting institutions under the Proceeds of Crime and Anti-Money Laundering Act, 2009. To this end, the two proposed provisions fail to comply with the standard of disclosure set out by the Constitution in Article 24 (2) above and, therefore, are procedurally defective.

To this end, given the clear provisions of Standing Order 47(3)(b) which imposes an obligation on me to satisfy myself with regard to certain procedural and constitutional standards, I am constrained to order that these two provisions be excluded from consideration by this House during the Second Reading of the Bill.

Also, I hasten to add that this determination is only related to the procedural defects in the manner in which the proposed amendments have been presented. Nothing stops the Mover of the Bill or any other Member from proposing the amendments in the appropriate format in a separate Bill for consideration by the House. At this stage, the question as to whether the two clauses would offend the Constitution if they were to comply with the standard of disclosure set in the Constitution and introduced as a separate Bill does not arise.

Hon. Members, before I conclude, let me also allay the fears expressed by Hon. Jude Njomo on the inclusion and subsequent consideration by the House of Clause 43 of the Finance Bill 2019, which seeks to amend the Banking Act, and the manner in which it affects his Banking (Amendment) Bill, 2019. As I stated in my preliminary directions to the House yesterday, the House has not yet expressed itself on the said Bill sponsored by Hon. Njomo, hence the provisions of Standing Order 49 on re-visiting a matter already decided by the House does not arise. But, for the benefit of the Member, the House and perhaps the general public and stakeholders who may be keenly tracking proceedings relating to that Bill, there are three likely scenarios that may result.

First, if Clause 43 of the Finance Bill, 2019 is amended by this House to include provisions extracted from Hon. Njomo's Bill, 2019 and the Finance Bill 2019 is assented to by the President without any reservations, the object of the Member will have been realised, hence

there would be no need to proceed with further consideration of Hon. Jude Njomo's Bill.

Second, if the House negatives Clause 43 of the Finance Bill as presented or an amendment to delete the said proposal is carried, the House would have resolved the matter. This scenario will trigger the application of the provisions of Standing Order 49 and the matter may only be re-introduced after six months, in accordance with the same Standing Order.

In the third scenario, the same fate as that in scenario two would arise in the event that this House passes the Finance Bill 2019 with Clause 43, but the President expresses reservation to that Clause, and the House fails to muster the threshold required to override the President's reservations.

As to what the second and third scenarios would portend to the likely lapse of the 12 months that the court, through a ruling made on 14th March 2019, granted the National Assembly to rectify the anomalies that were in that law, the matter is outside the purview of the Speaker at the moment.

In summary, therefore, it is my finding:

1) THAT, Clauses 50 and 51 of the Finance Bill (National Assembly Bill No.51 of 2019) fail to comply with the standard of disclosure set out by the Constitution and more specifically Article 24(2) and, therefore, are procedurally defective and are hereby excluded from Second Reading. The Bill will proceed as if the two clauses were not part of it;

2) THAT, this determination is only related to the procedural defects in the manner in which the proposed amendments have been presented;

3) THAT, nothing stops the Mover of the Bill or any other Member from proposing the amendments in the appropriate format in a separate Bill for consideration of the House; and

4) THAT, with respect to Clause 43 of the Finance Bill 2019, which seeks to amend the Banking Act, the provisions of Standing Order 49 on re-visiting a matter already decided by the House does not arise at this stage as the House has not made a determination on the matter one way or another.

Hon. Members, the House is accordingly guided."

ACCOUNTABILITY OF THE EXECUTIVE TO PARLIAMENT AND THE PLACE OF THE CHIEF ADMINISTRATIVE SECRETARIES IN RESPONDING TO QUESTIONS IN THE NATIONAL ASSEMBLY

17th October 2019

Context:
A Member had sought guidance of the Speaker on the admissibility of answers to Parliamentary Questions from the Executive given by the Chief Administrative Secretary in the place of the substantive Cabinet Secretary who is required under the provisions of Article 153(3) and (4) of the Constitution to be accountable to Parliament.

Decision of the Speaker:

1. *THAT, as a first and cardinal responsibility, pursuant to the provisions of Article 153(3) and (4) of the Constitution, Cabinet Secretaries are expected to and must appear before committees of the House as and when required to do so to answer questions and to examine other matters before committees;*

2. *THAT, at the same time, Chief Administrative Secretaries remain admitted to committees of this House for purposes of transacting the business contemplated under Part IX of the Standing Orders, which is Questions, as long as they are able to commit their respective State departments to the undertakings, commitments and assurances they may have to make in the course of responding to Questions before committees;*

3. *THAT, Committees remain at liberty to determine, on case by case basis, whether it is the Cabinet Secretary or the Chief Administrative Secretary or, indeed, the Principal Secretary who is to appear before the Committee to answer Questions and how often they may do so. This should take into account the weight of the matters contained in the Questions before the Committee. Essentially, a committee should be able to determine the weight of the Question and whether those other people, other than the CS, will be able to respond.*

4. *THAT, whenever a Cabinet Secretary authorises a Chief Administrative Secretary to respond to Questions before Committees, the Cabinet Secretary shall take full responsibility of responses transmitted to the National Assembly. In this regard, the written responses ought to be signed by the particular Cabinet Secretary to denote the authorization and taking of responsibility.*

"Hon. Members, you will recall that on Tuesday, 8th October, 2019, during the Statement Hour, Hon. Didmus Barasa, the Member for Kimilili, rose in his place on a point of order seeking the direction of the Chair on the admissibility of answers to Parliamentary Questions from the Executive given by the Chief Administrative Secretary.

For clarity, the Member for Kimilili stated as follows in part:

> *"…today morning, I appeared before the Departmental Committee on Health to get a reply to a Question I had asked. I refused the reply because it was coming from a Chief Administrative Secretary, a person who is not in the Constitution!"*

According to the Member for Kimilili, a Chief Administrative Secretary, popularly known as

CAS, is unknown to both the Constitution and the Standing Orders of this House. By this argument, the Member for Kimilili was advancing that accountability of the Executive to Parliament, particularly with respect to answering any questions relating to matters under the jurisdiction of any of the line ministries, could only be enforced if appearances before the committees of the House is restricted to the responsible Cabinet Secretaries and Principal Secretaries.

Hon. Members, the issue raised by the Member attracted immense interest from other Members who sought to canvass on the matter. I was inclined to permit a few of you to ventilate on the matter. This included the Leader of the Majority Party, the Leader of the Minority Party, the Minority Whip, Hon. William Cheptumo, Hon. David Ochieng, Hon. Kimani Ichung'wah, Hon. (Prof.) Jacqueline Oduol, Hon. Amos Kimunya, Hon. Katoo ole Metito, Hon. David ole Sankok, Hon. Martin Owino and Hon. David Pkosing.

Having considered the various views of the Members who spoke on the matter, I undertook to give a comprehensive direction on the matter and also guide the House on the way forward. In this regard, I have isolated the following two issues as requiring my determination:

1. Whether accountability of the Executive to the National Assembly with regard to responding to any questions before a committee of the House in terms of Article 153(3) of the Constitution and Part IXA of the Standing Orders is an exclusive function of Cabinet Secretaries or may be delegated to Chief Administrative Secretaries or other officials in line ministries; and,

2. whether the establishment of the offices of Chief Administrative Secretaries and subsequent appointment of holders of those offices offend the Constitution or in any way affects the transaction of business of the House in our committees.

Hon. Members, before I guide the House on those questions, it is important to appreciate that these questions are arising in a phase of governance different from which preceded the promulgation of the Constitution of Kenya on 27th August 2010. As you may be aware, the constitutional dispensation birthed in 2010 was a shift in the architecture of governance and the nature of the operations of the Legislature and its relationship with the other two arms of Government. This shift especially affected the composition and relationship between the Legislature and the Executive, as for the first time in the country's history, no Member of the Executive partakes in the affairs of either House of Parliament through membership to Parliament.

Hon. Members, as the "Father of the House", Hon. Jimmy Angwenyi, who was also a Member of the 8th and 9th Parliaments, and other ranking Members of this House who served in the 10th and preceding Parliaments would attest, the presence of the Executive in the Legislature was a unique hallmark of accountability in Parliaments preceding the promulgation of the new Constitution. Article 95 (2) of the current Constitution provides:

"The National Assembly deliberates on and resolves issues of concern to the people." Under this Article, the House is mandated to hold the Executive to account. Among other avenues, this oversight role ordinarily relies on questions raised by Members, both in their individual and representative capacities, as well as on the basis of matters arising from undertakings and assurances made by the Executive to the House.

Across Parliaments, Parliamentary Questions enable Parliament to access relevant, timely and actionable answers or information from the Executive to enable it to effectively discharge its mandate. Question Time under the previous dispensation was an active process on the Floor

of the House, where both the questioners and the responsible ministers were present in the House and supplementary questions could be raised and either be answered promptly or appropriate assurances and undertakings made during that sitting.

Hon. Members, Question Time was not only popular to Members but also to the general citizenry, who could watch and hear as their representatives put their Government to task over issues of concern to them and receive prompt pertinent responses and undertakings on the record. This changed at the commencement of the 11th Parliament, the first under the new constitutional dispensation.

Hon. Members, the introduction of a presidential system of governance in which members of the Cabinet are no longer Members of Parliament resulted into the absence of the representatives of the Executive in the Houses of Parliament, and, therefore, effectively crippling the idea behind Question Time. As a result, various attempts to revitalise Question Time under the new constitutional dispensation were made by the 11th and this 12th Parliaments, culminating in the insertion of Part IX of the National Assembly Standing Orders relating to Questions. Those of you who served in the 11th Parliament would recall that the first attempt was a temporary substitution of Question Time with "Statements" directed to Chairpersons of relevant Committees for a response, as a way of attempting to align the new constitutional dispensation with the processes of Parliament and, more particularly, in receiving answers to Questions.

In this new arrangement, Questions asked by Members were responded to in writing by the relevant Cabinet Secretaries and the responses would be read out on the Floor of the House by the Chairpersons of the relevant departmental committees. Unfortunately, supplementary questions would never receive any responses or even adequate responses from the Chairpersons since they were not the authors of the statements that they read out.

Hon. Members, whereas this arrangement worked with difficulties in the interim, it will be recalled that chairpersons of committees faced challenges as they could not comprehensively speak or make undertakings on behalf of the Executive, which they are constitutionally expected to oversee. In 2014, upon recommendations of the Procedure and House Rules Committee, the House considered the provisions of Article 153 of the Constitution which provides for the decisions, responsibility and accountability of the Cabinet with a view to engendering proper accountability by the Executive to Parliament.

For avoidance of doubt and for clarity, Article 153(3) and (4) of the Constitution provides:

> *"(3) A Cabinet Secretary shall attend before a Committee of the National Assembly, or the Senate, when required by the Committee, and answer any question concerning a matter for which the Cabinet Secretary is responsible.*
>
> (1) *Cabinet Secretaries shall—*
>
> (a) *act in accordance with this Constitution; and,*
>
> (b) *provide Parliament with full and regular reports concerning matters under their control."*

Hon. Members, in another attempt to actualise the requirements of Article 153 of the Constitution and address the challenges faced through the temporary "Statements" procedure, the House yet again amended its Standing Orders to establish a Committee on General Oversight and introduce Cabinet Secretaries Reporting Time. Cabinet Secretaries' Reporting Time was intended to allow a Cabinet Secretary to make a report to the House on any matter under his or her charge. On the other hand, the Committee on General Oversight was intended

to enable the attendance of Cabinet Secretaries before a Committee of the whole House chaired by the Speaker or the Deputy Speaker, to respond to Questions raised by Members and whose notice had been given.

Hon. Members, as you may recall, on the basis of the doctrine of separation of powers and functions among the arms of Government, the arrangement for Cabinet Secretaries to be accountable to Parliament through the Committee on General Oversight was argued to be untenable by a section of the society who perceived the Committee on General Oversight as another sitting of a full House of Parliament. In view of the foregoing, I issued a ruling on 21st October 2014 staying the provisions of the Standing Orders relating to the Committee on General Oversight and its operations. In that Communication, I also directed the Procedure and House Rules Committee to spearhead consultations with a view to creating a mechanism providing for the accountability of the Executive to the House while upholding the doctrine of separation of powers. That ruling, however, did not preclude Cabinet Secretaries from the obligation to appear before Committees of this House and respond to Questions by Members every Tuesday morning.

Hon. Members, Consequently, in the 12th Parliament, the Procedure and House Rules Committee recommended amendments to the Standing Orders to re-introduce Questions in a manner that is not only consistent with the Constitution, but also able to link the process to the public affected by issues raised in those Questions. The proposals culminated in the introduction of Part IX titled "Questions" in the 4th Edition of the National Assembly Standing Orders. Under this Part, a Member now reads his or her Question on the Floor of the House for the Question to be recorded in the Hansard and the responsible Cabinet Secretary is required to appear and respond to the Question before the relevant departmental committee. It is worth noting that under Standing Order 42A(5), the appointment of the date when the Cabinet Secretary responsible for a Question to be responded to will appear before the relevant Committee to answer the Question is done and communicated to the House by the Leader of the Majority Party. I do hope that this background suffices to explain the milestones leading to the subsisting procedure on handling Parliamentary Questions before this House.

Hon. Members, let me now address the first issue for determination, which is whether the accountability of the Executive to the National Assembly with regard to responding to any questions before a committee of the House in terms of Article 153(3) of the Constitution is an exclusive function of Cabinet Secretaries or may be donated to Chief Administrative Secretaries. The central issue of concern to Hon. Didmus Barasa, and, indeed, the House, is a question of accountability of the Executive to the House and the person through which such accountability is to be projected in the House. In addressing this issue, I will re-state the provisions of Article 153(3) of the Constitution as read together with Standing Order 42A(5), which domesticated Article 153(3) in the National Assembly Standing Orders.

Article 153(3) and (4) of the Constitution provides that:

> *"(3) A Cabinet Secretary shall attend before a Committee of the National Assembly, or the Senate, when required by the Committee, and answer any question concerning a matter for which the Cabinet Secretary is responsible.*

Standing Order 42A(5), which gives effect to these provisions, provides as follows:

> *"42A (5) A member shall ask his or her Question on the day it is scheduled in the Order Paper and the Leader of the Majority Party, at an appointed date, will inform the House of the date and time when a Cabinet Secretary shall be required to appear before a Committee to reply to a Question, subject to paragraph (6)."*

Hon. Members, the wording of the stated provisions of the Constitution and the Standing Orders leaves no doubt as to the expectations of the House in terms of who is accountable to the House. In substance, Article 153(3) of the Constitution is couched in mandatory terms that vests direct constitutional obligation on a Cabinet Secretary, with little or no latitude to a Cabinet Secretary delegating that authority with regard to appearing and answering Questions relating to their duties when required to do so by the House. A Cabinet Secretary is, therefore, under obligation to appear before a Committee of Parliament and to answer any Question concerning a matter for which he or she is responsible. Additionally, as provided for in Article 153(4) of the Constitution, a Cabinet Secretary must provide Parliament with full and regular reports concerning matters under his or her control. Here, I note that we have not been receiving any reports regularly or even otherwise from many of the Cabinet Secretaries, if not all. The House can, therefore, proceed to deal with them in accordance with the Constitution.

Submission of Reports

Hon. Members, I, therefore, agree with the position held by the Hon. Member for Kimilili that the Constitution envisages Cabinet Secretaries as the principal link between the Executive and the legislature. This is borne out of their responsibility to attend Committees of Parliament and regularly report to Parliament on matters that they are responsible for, as well as the fact that this House approves their appointment to various dockets and initiates the process of their removal from office under Article 152 of the Constitution.

Hon. Members, over and above construing the provisions of Article 153(3) and (4) of the Constitution in the context of their substance, there is the second limb to it – that is the process of achieving the intended goals, which process is determined by the House, pursuant to the provisions of Article 124 of the Constitution. That is the Article that gives the House the responsibility to come up with its own rules. This now begs another question for me, which is: Does Article 153(3) and (4) also imply that the obligation by a Cabinet Secretary to provide full and regular reports to Parliament cannot be achieved unless the Cabinet Secretary appears in person before Parliament or its Committees?

Hon. Members, In attempting to answer this question for purposes of the business of the House, it is worth noting that other than Cabinet Secretaries, Article 155 of the Constitution establishes the positions of Principal Secretaries tasked with administering State Departments under their dockets. Principal Secretaries are essentially the accounting officers of the Ministries. They offer primary responses to any audit queries under consideration by the Public Accounts Committee in the scrutiny of national expenditure by Parliament. Invariably, responses provided by Cabinet Secretaries on a matter raised by the House rely on information collated by the Principal Secretaries from either their departments or the various agencies falling under such departments. Indeed, and as Members will recollect, a Cabinet Secretary is often accompanied to committee meetings by the relevant Principal Secretary and technical officers drawn from the Ministry and state agencies, who assist the Cabinet Secretary to provide relevant and actionable information to the Committees.

Hon. Members, the practice in other Commonwealth parliamentary jurisdictions supports the link between membership of the Cabinet and accountability to Parliament. In the House of Commons of the United Kingdom, only Ministers are allowed to answer Questions on the Floor of the House despite there being Parliamentary Secretaries, who are effectively Assistant Ministers; and Parliamentary Under-Secretaries, who assist them in the discharge of their duties. In the Parliament of New Zealand, in addition to addressing Questions to a Minister, a Member may address a question to an Associate Minister within the limits of any responsibilities formally delegated by a Minister. Additionally, Members of Parliament designated as Parliamentary Under-Secretaries are mandated to respond to a Question on

behalf of an absent Minister. However, a question cannot be addressed to a Parliamentary Under-Secretary. The fundamental difference between our Legislature and those two Westminster-style legislatures is that, in our case, the Cabinet comprises of persons who are not Members of Parliament.

Hon. Members, in the case of our legislative setup, the eventual aim of the House is to have responses to Questions made by competent, legitimate and authorised persons in an accurate, timely and authoritative manner so as to assist the House to attempt to resolve issues of concern to the people and discharge its oversight role over the Executive, pursuant to Articles 95 and 153(3) of the Constitution. In this regard, it ought not to be lost that the 'Cabinet Secretary' is an office rather than a person. Hence, it is arguable that an authorised representative of the Cabinet Secretaries (CSs) may, acting on delegated powers, respond to a matter before a Committee, as long as he or she takes full responsibility for the answers and undertakings given by the Executive to the committee of the House.

This is in tandem with the established practice whereby some Questions are responded to through oral replies by the responsible CS appearing in person, some through a written reply signed by the responsible CS and submitted to the committee. Other questions are responded to through oral submissions made by representatives of CSs, who presents the responses signed by the responsible Cabinet Secretary.

Hon. Members, the practice I have just mentioned is a product of this House. Members will note that even though the current text of Standing Orders 42A to 42F envisage a CSs as the person to whom all Questions are addressed and from whom all responses are expected, a review of the Hansard Report during consideration of the amendments to the Standing Orders to re-introduce Questions suggests that Members contended with the fact that, on some occasions, Reponses to Questions may be made by persons other than CSs.

While moving the Second Report of the Procedure and House rules Committee on the said amendments, the Deputy Speaker, Hon. Moses Cheboi said:

> *"I urge the House to adopt these amendments as contained in the Second Report of the Procedure and House Rules Committee. It is my considered opinion that in operationalising these amendments, the House and its committees will need to strike a fair balance with regard to appearance in person of CSs to answer questions in committees. I understand that CSs and Principal Secretaries (PSs) can be very busy. Between PS and CS, the CS can respond to questions. Anybody who is above the rank of PS can appear to answer questions. For example, if the Chief Administrative Secretaries (CASs) are above the rank of PS, they can respond to questions."*

The Deputy Speaker's position was supported by the Majority Party Whip, the Hon. Benjamin Washiali who, while contributing to the debate, stated as follows:

> *"To me, the question of CSs being too busy to attend to questions is neither here nor there because, with the introduction of the CASs, when CSs are busy dealing with other issues of development, the CASs can stand in for them so that the aspect of answering questions is not deferred."*

Hon. Members, despite this particular observation not being included in the text of the Standing Orders, it currently guides the procedure of committees with regard to the consideration of Questions. Further, from the Report of the Committee and the debate that ensued in the House during the adoption of Standing Order 42(a)(b)(c)(d)(e) and (f), there is no doubt that the House intended to permit CASs to also appear before Committees to respond to questions on behalf

of the Cabinet Secretaries.

Hon. Members, having said that, you may agree with me that to hold CSs as the only persons who may engage with or appear before Parliament or its Committees will create unnecessary impediment to the conduct of the business of the House. The House has established Committees in which majority of its work is now conducted. The fact that an increasing amount of work is committed to Committees whose operations run concurrently has created a need for constant interaction with the Executive. The duty to attend and answer questions before Committees and to regularly report to Parliament if enforced in the strictest sense of the substance of Article 153, will, therefore, mean that some Committees will have to await the availability of a Cabinet Secretary before considering relevant matters placed before them. The wait could not only be indefinite, if one were to take into account the official duties of the affected Cabinet Secretaries but also, imply that a lot of business would lapse without the requisite reply being provided by the substantive Cabinet Secretary.

Hon. Members, the prerogative of Parliament to hold the Executive to account ought to be exercised in a manner that enables it to effectively discharge its mandate as given by the people. I am cognizant of the fact that vide Executive Order No.1 of 2018 on the Organization of Government, the President communicated to Parliament the manner in which he had decided to re-organize his Government. The Executive Order, additionally, identified the principal persons charged with the overall direction of the various ministries. Apart from the CS charged with overseeing the various ministries, a key feature was the inclusion of Principal Secretaries and the CASs. As it is now, an Executive Order, under the hand and seal of the President, has communicated to the House that a CAS is one of three ranking officials in the Executive.

Hon. Members, any person to whom the power to govern is entrusted, is subject to constant oversight by this House. As your Speaker, I am obligated to ensure that this House stretches its oversight capabilities to such person(s) to whom the Constitution, statute or lawfully issued orders, such as Executive Order No.1 of 2018 is assigned authority to govern. My opinion is in harmony with that of my predecessor, at the early years of our Independence, Speaker Humphrey Slade, who on 3rd July 1963, observed:

> *"The Chair remains in a unique position to safeguard, in a singular form, the right of Members to bring the Ministers to account and the Executive in general for their actions. Parliamentary Questions, therefore, serve as a true parliamentary mechanism to bring the Executive and, indeed, those who govern to be accountable to those being governed."*

Hon. Members, I am, therefore, of the considered opinion that in holding the Executive to account, the House must take into account its prevailing structure as communicated by the President. In this regard, I am persuaded that, for purposes of facilitating the conduct of business of the House, apart from treating the Cabinet Secretary as the officer primarily accountable to Parliament, a room does exist for our committees to permit the conveyance of timely and actionable responses to Questions before Committees through the Principal Secretaries and/or the Chief Administrative Secretary.

Hon. Members, in summary, without excusing Cabinet Secretaries from their constitutional responsibility, the House must, therefore, consider a workable alternative that allows it to obtain relevant, timely and actionable information from Ministries to enable it discharge its mandate. Such information may be presented either by the Cabinet Secretary in person, or in exceptional circumstances and for good reason, presented on his or her behalf by a person of suitable rank expressly mandated to do so in writing. This, in my opinion, should settle the first issue for determination. Therefore, Cabinet Secretaries who are not able to attend must, in

writing, designate the persons, not below the rank of Principal Secretaries, the responsibility to represent them before committees.

Responsibility to committees

Hon. Members, the second issue that the Member for Kimilili invited the Speaker to guide on is: *"Whether the establishment of the Offices of Chief Administrative Secretaries and subsequent appointment of holder of those Offices offends the Constitution or in any way affects the transaction of business of the House in our committees."* On this matter, I hasten to draw the attention of the House that, following the creation of the position of Chief Administrative Secretaries, two petitions were filed with the High Court challenging the creation of those positions on constitutional grounds. These are the Nairobi High Court Constitutional Petition No.33 of 2018 as consolidated with Petition No. 42 of 2018, *Okiya Omtatah Okoiti and Kenya Human Rights Commission vs Speaker of the National Assembly and 74 others*.

The petitions are pending full hearing and determination before the High Court. There is also another related matter filed at the Nairobi High Court as Constitutional Petition No. 67 of 2018, Marilyn Muthoni Kamuru & 2 Others v Speaker of the National Assembly and Others, which is also yet to be determined.

I, therefore, find the question of constitutionality or otherwise of the position of Chief Administrative Secretaries to be sub-judice in terms of Standing Order 89. In this regard, I decline to render any guidance on that matter, except to observe that, as your Speaker, I have a duty to ensure that the transaction of the business of the House is facilitated as necessary to proceed.

Hon. Members, in summary, I wish to guide the House as follows:

1. THAT, as a first and cardinal responsibility, pursuant to the provisions of Article 153(3) and (4) of the Constitution, Cabinet Secretaries are expected to and must appear before committees of the House as and when required to do so to answer questions and to examine other matters before committees;

2. THAT, at the same time, Chief Administrative Secretaries remain admitted to committees of this House for purposes of transacting the business contemplated under Part IX of the Standing Orders, which is Questions, as long as they are able to commit their respective State departments to the undertakings, commitments and assurances they may have to make in the course of responding to Questions before committees;

3. THAT, Committees remain at liberty to determine, on case by case basis, whether it is the Cabinet Secretary or the Chief Administrative Secretary or, indeed, the Principal Secretary who is to appear before the Committee to answer Questions and how often they may do so. This should take into account the weight of the matters contained in the Questions before the Committee. Essentially, a committee should be able to determine the weight of the Question and whether those other people, other than the CS, will be able to respond.

4. THAT, whenever a Cabinet Secretary authorises a Chief Administrative Secretary to respond to Questions before Committees, the Cabinet Secretary shall take full responsibility of responses transmitted to the National Assembly. In this regard, the written responses ought to be signed by the particular Cabinet Secretary to denote the authorization and taking of responsibility.

Hon. Members, this guidance serves as an avenue for allowing the conveyance of a written and signed response to a matter raised by this House or a Question by a person authorized by a particular Cabinet Secretary. The guidance is not a *carte blanche* for Cabinet Secretaries to disregard their constitutional responsibility of accounting to the people's representatives for their actions in the performance of their constitutional duties.

The House is accordingly guided. Thank you."

SUBMISSION OF FINANCIAL STATEMENTS BY THE CENTRAL BANK OF KENYA

Tuesday, 5th November 2019

Context:

The Cabinet Secretary for the National Treasury and Planning had written to the House, through the Speaker, seeking extension of the time limit for the Central Bank of Kenya (CBK) to submit certified financial statements for the Financial Year 2018/2019 and publish the 2018/2019 Annual Report, given that the office of the Auditor-General was vacant thereby causing delay.

Decision of the Speaker:

The Public Investments Committee to expeditiously consider the matter and submit its report to the House on 20th November 2019 to enable the House to consider the request by the Cabinet Secretary for the National Treasury and Planning for extension of the time limit for the CBK to submit certified financial statements for the Financial Year 2018/2019 and publish the 2018/2019 Annual Report.

"Honourable Members, I wish to inform the House that my office is in receipt of a letter dated 24th October 2019 from the Cabinet Secretary (CS) of the National Treasury and Planning regarding the statutory requirements for the submission of financial statements by the Central Bank of Kenya (CBK). In his letter, the CS wishes to bring to the attention of the House to the following:

1) That, the Bank has concluded the audit process for the Financial Year 2018/2019 in all aspects, except for the signing of the audit report as required under Section 54 of the CBK Act;

2) That, due to the vacancy in the Office of the Auditor-General, and in line with the provisions of Section 54 of the CBK Act, the Bank is unable to submit certified financial statements for the Financial Year 2018/2019; and

3) That, consequently the Bank is unable to publish the 2018/2019 Annual Report, pursuant to the provisions of Section 55 of the said Act.

Section 81 of the Public Finance Management Act, 2012 requires the accounting officer of a national Government entity to, not later than three months after the end of each financial year, submit the financial statements to the Auditor-General; amongst other constitutional offices and publicise the financial statements. In the case of the CBK, the Cabinet Secretary for National Treasury is thereafter required to submit the financial statement to the National Assembly.

As you are all aware, the position of the Auditor-General is currently vacant, with the term of the former Auditor-General having come to an end in August 2019. Given the foregoing fact, the CS is requesting the National Assembly to extend the time limit for submission of the report on the Bank's operations, pursuant to the provisions of Section 90 of the Public Finance Management Act 2012, which states as follows:

"Any house of Parliament may by resolution, extend the time limit, other than a time limit set in the Constitution for submitting a statement or other documents required to be submitted to it under this Act."

This is a precedent setting request. I, hereby, refer the request to the Public Investments Committee for consideration. The Committee should expeditiously consider the matter and submit its report to the House on 20th November 2019, to enable the House to consider the request by the CS for the National Treasury and Planning for extension of the time limit for the CBK to submit certified financial statements for the Financial Year 2018/2019 and publish the 2018/2019 Annual Report.

I thank you."

RESOLUTIONS OF COUNTY ASSEMBLIES ON THE DRAFT PUNGUZA MIZIGO (CONSTITUTION AMENDMENT) BILL, 2019

5th November 2019

Context:

The deadline of 28th October, 2019 by which the last county assembly to have received the Draft Punguza Mizigo (Constitution Amendment) Bill, 2019 ought to have made a resolution after its consideration of the draft Bill pursuant to the provisions of Article 257(5) of the Constitution had lapsed and only twenty six (26) out of forty seven (47) county assemblies had submitted certificates of approval or rejection of the Draft Bill. This prompted the Speaker to report to the House status of delivery of resolutions by county assemblies to Parliament and give guidelines on the fate of the Bill.

Decision of the Speaker:

1. *Given that only three county assemblies have so far approved the Draft Bill, and noting that with the number of county assemblies that have rejected the Bill currently at 23 and the number of county assemblies yet to indicate their resolutions on the Bill currently standing at 21, a final determination by the Speakers of the Houses of Parliament as to whether the threshold of 24 county assemblies required under Article 257(7) of the Constitution to cause the introduction of the Bill in Parliament has been met would be premature;*

2. *the Clerk to submit to the Independent Electoral and Boundaries Commission and also publish the following information in at least two newspapers of national circulation:*

   (a) *the list of county assemblies that have submitted the draft Bill and the certificate approving the Bill jointly to the Speakers of the Houses of Parliament;*

   (b) *The list of the county assemblies that have submitted the draft Bill and the certificate rejecting the Bill jointly to the Speakers of the Houses of Parliament; and,*

   (c) *The list of county assemblies that have not yet submitted the draft Bill and the certificate.*

3. *It is hoped that the remaining county assemblies will submit their respective returns to Parliament in good time to enable us to make a conclusive formal determination as to whether the threshold contemplated under Article 257(7) of the Constitution regarding the introduction of a draft Bill to Parliament has been ultimately met.*

"Hon. Members, I wish to make the following Communication regarding the status of delivery by the county assemblies to the Speakers of the two Houses of Parliament their decisions on the *Draft Punguza Mizigo (Constitution Amendment) Bill, 2019*.

Hon. Members, you will recall that on 28th February this year, the promoters of the *Punguza Mizigo (Constitution Amendment) Bill* delivered a draft Bill to amend the Constitution by popular initiative and signatures of persons in support of the initiative to the Independent Electoral and Boundaries Commission (IEBC) for verification. Consequently, and pursuant to the provisions of Article 257 (4) of the Constitution, the IEBC submitted the draft Bill to the

47 county assemblies for consideration after verification of the signatures in support of the initiative.

Hon. Members, Article 257 (6) of the Constitution affords the respective assemblies the period of three months after receipt of a draft Bill to amend the Constitution by popular initiative within which to approve the Bill. Thereafter, the respective Speakers of the county assemblies are required to communicate the resolution of approval or disapproval of the respective assemblies by delivering a copy of the draft Bill jointly to the Speakers of the two Houses of Parliament, with a certificate indicating the resolution of the respective county assemblies.

Hon. Members, at the time the *Punguza Mizigo (Constitution Amendment) Bill* was submitted to the county assemblies, the Speaker of the Senate and I noted several procedural difficulties that would potentially affect the process of the delivery of resolutions by the county assemblies to the two Houses. These included delivery of the draft Bill to the county assemblies on different dates, therefore, occasioning different delivery timelines of the county assemblies; failure by the county assemblies to communicate any resolution on the draft Bill and lack of definite timelines on the delivery of a resolution by the Speaker of a county assembly after its passage by the county assembly.

Hon. Members, In light of these procedural difficulties, the Speaker of the Senate and I agreed to jointly develop and issue *Standard Guidelines for delivery by the county assemblies to the Speakers of the two Houses of Parliament of a draft Bill for the amendment of the Constitution by popular initiative* to inform the process. Those Guidelines have since been published in the *Kenya Gazette as Legal Notice No. 175 dated 18th November, 2019*.

Hon. Members, Paragraphs (5) and (6) of the *Guidelines* provides as follows, and I quote:

> *"(5) Upon the expiry of the period specified under Article 257(5) of the Constitution for the consideration of a draft Bill by a County Assembly, the Speakers of the two Houses of Parliament shall—*
>
> (a) *report to their respective House of Parliament—*
>
> (i) *the county assemblies that have submitted the draft Bill and the certificate approving the Bill;*
>
> (ii) *the county assemblies that have submitted the draft Bill and the certificate rejecting the Bill;*
>
> (iii) *the county assemblies that did not submit the draft Bill and the certificate;*
>
> (iv) *whether or not the threshold required under Article 257(7) of the Constitution has been met;*
>
> (v) *such other information as the Speakers of the two Houses of Parliament may consider necessary; and,*
>
> (b) *submit to the Independent Electoral and Boundaries Commission and publish, by notice in the Gazette, the information specified under subparagraph (a)."*
>
> *"(6) The Speakers of the two Houses of Parliament shall not receive any draft Bill and certificate where the Bill was considered by the county assembly after the expiry of the*

period specified under Article 257(6) of the Constitution."

Hon. Members, in furtherance to requirements of Paragraph 5 of the said Guidelines, the statistics of the submissions which have been formally delivered by the respective Speakers of the County Assemblies as at today, December 5, 2019 are as follows:

(a) Twenty six (26) county assemblies have delivered the draft Bill with a certificate indicating their respective decisions on the Bill;

(b) Out of the twenty-six, three (3) county assemblies, that is, Machakos, Turkana and Uasin Gishu have approved the Bill;

(c) Out of the same number, Twenty-three (23) county assemblies have rejected the draft Bill. These are: Kwale, Kilifi, Tana River, Wajir, Mandera, Marsabit, Isiolo, Meru, Tharaka-Nithi, Kitui, Makueni, Nyeri, Murang'a, Samburu, Trans Nzoia, Nandi, Laikipia, Narok, Kajiado, Kericho, Bomet, Bungoma and Busia.

Hon. Members, a simple calculation reveals that twenty-one (21) other county assemblies are yet to deliver the draft Bill to the Speakers of the Houses of Parliament with a certificate indicating either their approval or rejection of the Bill. Those are the county assemblies of Mombasa, Lamu, Taita/Taveta, Garissa, Embu, Nyandarua, Kirinyaga, Kiambu, West Pokot, Elgeyo/Marakwet, Baringo, Nakuru, Kakamega, Vihiga, Siaya, Kisumu, Homa Bay, Migori, Kisii, Nyamira and Nairobi. The Speaker of the Senate and I did publish this information in the *Kenya Gazette* as *Gazette Notice No. 11013 dated 22nd November, 2019* for the information of the public.

Hon. Members, as I had indicated earlier, one of the key procedural difficulties that the Speakers jointly identified was the delivery of the draft Bill to the county assemblies on varying dates and the lack of a definite timeline within which the county assemblies are to submit their resolutions to the Speakers of the two Houses of Parliament. The other procedural gap is that the Constitution does not obligate the county assemblies which have rejected such a draft Bill to file any return to the Speakers. Further, each county assembly having considered the draft Bill within the required three months, there seems to be no express limitation on the period within which the Speakers of county assemblies ought to deliver the decisions of their respective county assemblies jointly to the Speakers thereafter.

Hon. Members, correspondences received from the IEBC indicated that the first set of county assemblies to receive the draft Bill was on the 19th of July 2019, while Kajiado County Assembly received the draft Bill last, having received it on 29th July, 2019, ten days after the first set of county assemblies had received it. Consequently, the last date by which Kajiado County Assembly ought to have made a resolution after its consideration of the draft Bill pursuant to the provisions of Article 257(5) of the Constitution was, therefore, the 28th October, 2019. It would, therefore, be logically expected that by now, all county assemblies ought to have delivered a copy of the draft Bill jointly to the Speakers of the two Houses of Parliament, with a certificate indicating their decision on the Bill.

Hon. Members, from the statistics I have just read, only three county assemblies have so far approved the Draft Bill, far below the threshold of 24 county assemblies required under Article 257(7) of the Constitution to cause the introduction of the Bill in Parliament. However, Hon. Members will note that with the number of county assemblies that have rejected the Bill currently at 23 and the number of county assemblies yet to indicate their resolutions on the Bill currently standing at 21, a final determination by the Speakers of the Houses of Parliament

as to whether the threshold has been met would be premature. To the extent that Article 257(5) of the Constitution does not give a definite timeline within which the county assemblies must submit their decisions on the draft Bill, the two Speakers of Parliament do not have any particular avenue of knowing whether the remaining 21 county assemblies considered the draft Bill within the prescribed three months period and the nature of the resolution that they passed. The two Speakers can only rely on and verify information formally transmitted to them by the county assemblies. Until and unless the remaining 21 county assemblies indicate their respective decisions on the draft Bill, the hands of the two Speakers remain tied with respect to the rest of the process contemplated under sections (7) to (11) of Article 257 of the Constitution. For the time being, Hon. Members, the threshold required under Article 257(7) of the Constitution for introduction of the Bill in Parliament has not been met.

Hon. Members, Article 257 of the Constitution was not crafted in vain. It is a provision which allows any citizen to originate a proposal to amend the Constitution and to garner popular support for the proposal with a view of having the proposal considered by Parliament upon gaining the support of the majority county assemblies. Originating and steering such a process obviously involves a significant investment of personal time and resources.

Hon. Members, It is, therefore, a capricious turn of events for the promoters of the *Punguza Mizigo (Constitution Amendment) Bill* to be denied a definite endorsement or rejection of their proposals by the mere act of certain county assemblies either failing to discharge their constitutional mandate or failing to communicate their resolution.

Hon. Members, it would, therefore, only be fair at this point in time to bring this information on the resolution of county assemblies on the *Punguza Mizigo (Constitution Amendment) Bil*l to the attention of its promoters, the general public and the county assemblies that are yet to deliver their resolutions as required by the Constitution. In this regard, I hereby direct the Clerk to submit to the Independent Electoral and Boundaries Commission and also publish the following information in at least two newspapers of national circulation:

(b) the list of county assemblies that have submitted the draft Bill and the certificate approving the Bill jointly to the Speakers of the Houses of Parliament;

(d) The list of the county assemblies that have submitted the draft Bill and the certificate rejecting the Bill jointly to the Speakers of the Houses of Parliament; and,

(e) The list of county assemblies that have not yet submitted the draft Bill and the certificate.

As Speakers of the Houses of Parliament, it is our hope that once this information is published, the remaining county assemblies will submit their respective returns to us in good time to enable us to make a conclusive formal determination as to whether the threshold contemplated under Article 257(7) of the Constitution regarding the introduction of a draft Bill to Parliament has been ultimately met. The House is, therefore, accordingly informed as it breaks for the Christmas festivities. I thank you."

RECONSIDERATION OF A HOUSE RESOLUTION BY THE COMMITTEE ON IMPLEMENTATION

5th December 2019

Context:

The Speaker had received a complaint from Shree Sai Industries seeking review of an adverse recommendation that had been made against it by the House without having been invited to make submissions on the matter when it was being investigated. The Resolution had causes the Company to be denied import trading licence on account of its alleged impropriety relating to the importation of sugar into the country.

Decision of the Speaker:

1. *The Speaker referred the petition to the Committee on Implementation for consideration. In considering the Petition, the Committee on Implementation shall confine itself to:*

    a. *Only receiving submissions from the Petitioner M/s Shree Sai Industries on the Resolution made by the House from the recommendations contained in paragraph 90(e) on page 46 of the Report.*

    b. *Consider the submissions from the Petitioner.*

    c. *Report its findings to the House.*

2. *in the meantime, the implementation of the Resolution on the matter stood suspended until such a time as the House makes a further resolution that has been informed by the Report of the Committee on Implementation.*

"Hon. Members, I wish to report to the House that my Office has received a Petition by one Ms. Bina R. Patel of Shree Sai Industries, P.O. Box 49796—00100, Nairobi. The Petitioner contends that the Petition of M/s Shree Sai Industries has suffered irreparable damage due to adverse recommendations contained in the Report of the Departmental Committee on Agriculture, Livestock and Co-operatives on the crisis facing the sugar industry, which was adopted by the House in 2015 during the 11th Parliament. The Petitioner notes that following the adverse findings and recommendations contained in the Report, the company has been denied import licence for the year 2019.

Hon. Members, the Petitioner avers that M/s Shree Sai Industries has been undertaking lawful importation of sugar into the country since 2012, but was denied a trading licence for the year 2019 on account that in item No.90, paragraph (e), appearing on page 46 of its Report, the Committee listed the firm as one of the companies that had been allowed to import sugar into the country by the KRA in the period 2013-2014 without the requisite permit from the Kenya Sugar Board. The company avers further that during the 2013-2014 period, the company never imported any sugar as claimed in the report.

Following the adverse report, M/s Shree Sai Industries wrote to the KRA on 18th December 2018 seeking clarification why the company was listed in the Report. In its response dated 21st January 2019, the KRA confirmed that it had reviewed its records and established that the Petitioner's company had only imported sugar into the country in 2012 and 2016, but not during the period 2013-2014.

Hon. Members, since the receipt of the Petition, I have scrutinised the text of the Report tabled and adopted by the House in 2015. I do confirm that paragraph 90 of the Report mentions the Petitioner's company as one of those that imported sugar without the requisite permit. I have also perused a letter from the KRA dated 21st January 2019 that states that M/s Shree Sai Industries, the Petitioner, did not import sugar into the country in the period 2013-2014. Further, I have scrutinised the minutes of the Committee and could not find evidence of the proprietors of M/s Shree Sai Industries having been invited to make submissions on the matter prior to being adversely mentioned for impropriety relating to the importation of sugar into the country.

Hon. Members, you may recall that, on 30th August 2018, I communicated to this House a similar complaint by M/s Kenafric Limited, claiming that the Sugar Directorate had delayed processing and issuing of an import permit since the company had been adversely mentioned in a Report of the House. The company also lamented that it was not accorded an opportunity to be heard on the matter even after formally requesting to appear before the Committee.

In addressing the concerns raised by M/s Kenafric Limited, I referred the matter to the Committee on Implementation, which is currently seized of the implementation of the resolutions made from the Report to act as an appellate forum for the petitioners to present their prayers. Indeed, the Committee considered the matter and recommended that this House expunge the name of M/s Kenafric Limited from the list of companies adversely mentioned in the report on the crisis facing the sugar industry for alleged unlawful importation of sugar into the country.

Hon. Members, in the same breath, I refer this petition to the Committee on Implementation for consideration. Just as I stated on the matter of M/s Kenafric Limited, I also direct that in considering the Petition, the Committee on Implementation shall confine itself to:

1. Only receiving submissions from the Petitioner M/s Shree Sai Industries on the Resolution made by the House from the recommendations contained in paragraph 90(e) on page 46 of the Report.

2. Consider the submissions from the Petitioner.

3. Report its findings to the House.

I also hasten to clarify that in the meantime, the implementation of the Resolution on this matter will stand suspended until such a time as the House makes a further resolution that has been informed by the Report of the Committee on Implementation.

Hon. Members, I now commit this Petition to the Committee on Implementation, with the knowledge that today, Thursday, 5th December 2019; the House will be proceeding on a long recess to resume on Tuesday, 11th February 2020 for the Fourth Session. In this regard, I direct the Committee to review the matter and table its report within two weeks upon the commencement of the Fourth Session.

The House is accordingly guided."

Fourth Session

(13th February 2020 to 8th February 2021)

SUBMISSION OF FINANCIAL STATEMENTS AND ANNUAL REPORTS OF PUBLIC ENTITIES

Thursday, 20th February 2020

Context:

Meeting the statutory requirement of Article 229 of the Constitution that requires the Auditor-General to audit and report to Parliament the financial statements of all public entities within six months after the end of each financial year.

Decision of the Speaker:

The PAC/PIC Committees were to expeditiously consider the matter jointly and submit their report to the House by 11th March 2020 to enable the House to consider the request by the Cabinet Secretary for National Treasury and Planning. In their report, the joint committees would apprise the House on the progress of the process of the appointment of the Auditor-General among other related matters that the Committees desired to consider.

"Honourable Members, I wish to inform you that my office is in receipt of a letter dated 24th December 2019, from the Cabinet Secretary (CS) of the National Treasury and Planning regarding the statutory requirement for the submission of the financial statements and annual reports of all public entities within six months after the end of each financial year.

In his letter, the CS wishes to bring to the attention of the House, the provisions of Article 229 of the Constitution that requires the Auditor-General to audit and report to Parliament the financial statements of all public entities within six months after the end of each financial year. Given that the Office of the Auditor-General is currently vacant and the process of appointment is ongoing, the National Treasury is, therefore, seeking extension of the time limit for submission of the audited financial statements for the 2018/2019 Financial Year of public entities until such a time as the Auditor-General is appointed.

Section 81 of the Public Finance Management Act, 2012, requires the accounting officer of a national Government entity to, not later than three months after the end of each financial year, submit the financial statements to the Auditor-General, amongst other constitutional offices, and publish the said financial statements. In the case of a State corporation, the accounting officer is required to submit the corporation's financial statements to the CS responsible for matters relating to that corporation who should, upon approving it, submit a copy to the Auditor-General.

As you are aware, the position of the Auditor-General is currently vacant with the term of the former Auditor-General having come to an end on 22nd August 2019. Given the foregoing fact, the CS is requesting the National Assembly to extend the time limit for submission of audited financial statements by public entities until such a time the Auditor-General shall be appointed pursuant to the provisions of Section 90 of the Public Finance Management Act, 2012 which states as follows:

> "*Any House of Parliament may by resolution extend the time limit other than the time limit set in the Constitution for submitting a statement or other document required to be*

submitted to wit under this Act."

Hon. Members, this is the second time that a similar request has been made with the first one being the request for extension of the time limit for the Central Bank of Kenya (CBK) to submit and publish certified financial statements for the 2018/2019 Financial Year - a request made and approved during the Third Session of the current Parliament.

In view of the foregoing, I refer the request to the Public Investments Committee, the Public Accounts Committee and the Special Funds Account Committee for joint consideration with the Public Investments Committee, which examines the highest number of audited reports and accounts of public entities, being the lead committee. The referral informed by the fact that financial statements in reference relate to accounts of the national Government, State corporations and Special Funds whose examinations fall within the mandate of these committees.

The Committees should expeditiously consider this matter jointly and submit their report to the House by 11th March 2020 to enable the House to consider the said request by the CS for the National Treasury and Planning. In their report, the joint committees should apprise the House on the progress of the ongoing process of the appointment of the Auditor-General among other related matters that the committees may desire to consider.

There will be another Communication that will come later.

I thank you."

CONFLICT OF MANDATE BETWEEN DEPARTMENTAL COMMITTEES

Thursday, 20th February 2020

Context:

The conflict of mandate between two departmental committees on the subject of irrigation and on the appropriate Committee mandated to consider items relating to "Irrigation" in the Budget Policy Statement for the financial year 2020/2021 in light of the reorganisation of the National Government as outlined by the H. E. the President in Executive Order No. 6 of 2019 and related matters.

Decision of the Speaker:

1) *All subjects relating to "Irrigation" in the Budget Policy Statement for the financial year 2020/2021 would henceforth be considered by the Departmental Committee on Environment and Natural Resources;*

2) *The Committee was mandated to henceforth also consider all matters relating to the subject of "irrigation" in terms of the following provisions of the Standing Orders-*

    a) Standing Order 45 relating to committal of public appointments to Committees;

    b) Standing Order 114(7) relating to prepublication scrutiny of proposed legislation;

    c) Standing Order 227 relating to Committal of Bills to Committees and public participation;

    d) Standing Order 216(5) relating to the general functions of a Departmental Committee in respect of investigations, inquiries and consideration of legislation;

    e) Standing Order 227 relating to petitions committed to a Departmental Committee;

    f) Standing Order 232(5) relating to Committal of the Budget Policy Statement to Departmental Committees); and

    g) Standing Order 235(4) in respect of Presentation of Budget Estimates and Committal to Committees.

3) *The guidance would subsist so long as no substantive Department was assigned the "Irrigation" function with a separate Accounting Officer and separate vote head. In the event such an assignment was undertaken, it stood without question that the Department and its Accounting Officer would fall under the oversight mandate of the Agriculture and Livestock Committee.*

"Honourable Members, this Communication relates to conflict of mandate between two departmental committees on the subject of irrigation. I wish to report to the House that

my office is in receipt of a letter from the Chairperson of the Departmental Committee on Environment and Natural Resources dated February 18th, 2020. In the letter, the Hon. Member for Maara Constituency seeks guidance of the Speaker on the appropriate Committee mandated to consider items relating to "*Irrigation*" in the Budget Policy Statement for the financial year 2020/2021 in light of the reorganisation of the National Government as outlined by the H. E. the President in Executive Order No. 6 of 2019 and related matters.

Hon. Members, in his letter the Chairperson notes that, as per the provisions of the National Assembly Standing Orders, the Second Schedule lists "*irrigation*" as a subject falling within the mandate of the Departmental Committee on Agriculture and Livestock. Conversely, as per Executive Order No. 6 of 2019 the State Department of Irrigation was merged with the State Department of Water and Sanitation in the Ministry of Water, Sanitation and Irrigation. Currently, the Standing Orders mandate the Departmental Committee on Environment and Natural Resources to handle all matters relating to the subject of "*water resource management*".

This, on close inspection, reveals a conflict between the mandates of the two Committees on the subject of "*irrigation*". The issues raised by the Hon. Chairperson are very material and merits my considered guidance.

Honourable Members, the immediate question that arise in the prevailing circumstances relates to which Committee, between the Departmental Committee on Environment & Natural Resources and the Departmental Committee on Agriculture & Livestock, ought to exercise the delegated functions of Departmental Committee as contemplated in the Standing Orders in respect of the Irrigation aspects. This includes the exercise of the functions falling under the following provisions of the Standing Orders:

1) Standing Order 45 (*vetting of appointments by Committees*)

2) Standing Order 114 *(pre-publication security of proposed legislation)*

3) Standing Order 127*(committal of Bills to Committees and public participation)*

4) Standing Order 216(5) *(functions of Departmental Committees)*

5) Standing Order 227 *(Committal of Petitions)*

6) Standing Order 232(5) *(Committal of the Budget Policy Statement to Departmental Committees);* and,

7) Standing Order 235(4) *(Presentation of Budget Estimates and Committal to Committees),* amongst others.

Hon. Members, in seeking clarity on this matter, the following further issues arise:

1) Is the establishment of Departmental Committees of the House based on the structure of the National Government in terms of Ministries/Departments?

2) Since August 2019 was not the first time reorganisation of the Structure of Government took place, what has been the practice of the House with regard to this issue?

3) Is there a difference between the August 2019 reorganisation and the previous ones?

4) Is it prudent for officials of a State Department under a Ministry whose oversight is assigned to a particular Departmental Committee to also be appearing before another Departmental Committee?

5) More so, should the House require a Ministry with one Vote and one Accounting Officer to be splitting its representation and responses regarding the annual Budget-related items between the Departmental Committees, merely on account of disparity in the subject mandates of two or more Committees? What should be the prudent situation in this case and what should follow if the particular Ministry has more than one Vote and more than one Accounting Officer?

Hon. Members, I will attempt to address these questions in a consolidated manner. From the onset, the oversight role of the House over the Executive through Committees must be clear and consistent.

The Standing Orders attempt to instill clarity and consistency by outlining the functions that may be discharged by Departmental Committees in their interaction with the Executive. You will note that the mandate of the Departmental Committees of the House is subject-based and does not necessarily mirror the structure of the Executive and whereas other Parliaments structure their sectoral committees in line with the structure of the Executive, the National Assembly has preferred a subject-based approach for oversight by its Committees. This approach, which is not unique to our Parliament but is replicated in various other jurisdictions, is informed by the fact that the structure of Executive is likely to change from time to time.

If the intention was to appear and sign, then we can proceed with business. Further, as Hon. Members are aware, our current budgeting system is programme-based and budgetary allocations are guided by the nature of the activities performed within a programme. Consequently, basing the mandate of Committees on subject-matter certainly enhances the exercise of oversight by the House and ensures consistency.

Hon. Members, reorganisation of the structure of the Executive should not continuously necessitate a variation of the mandate of the Committees of the House. Indeed, during the 11th Parliament, the International Trade function was moved from the then Ministry of East African Community and Regional Development to the Ministry of Foreign Affairs. Despite the move to the Ministry of Foreign Affairs, the State Department for International Trade was still subject to oversight by the then Departmental Committee on Finance, Planning and Trade and not the Departmental Committee on Defence and Foreign Relations. Similarly, Hon. Members, you will recall that despite the reorganisation of the Ministry of Public Service, Youth and Gender, all matters relating to the Youth and Gender, including the vetting of its Principal Secretary, continue to be considered by the Departmental Committee on Labour and Social Welfare, as opposed to the Departmental Committee on Administration and National Security which exercises oversight over all other affairs of the Ministry.

Hon. Members, the experiences from the 11th Parliament would, ordinarily, apply to any reorganisation of the structure of the Executive. However, the concern raised by the Hon. Chairperson of the Committee on Departmental Committee on Environment and Natural Resources presents a slightly unique scenario.

Members will note that, before the reorganisation of the structure of the Executive in August 2019, the State Department for Irrigation was domiciled in the Ministry of Agriculture, Livestock, Fisheries and Irrigation with its own dedicated Principal Secretary. The Executive Order essentially merged the State Department for Irrigation with the State Department of Water and Sanitation in the new Ministry of Water, Sanitation and Irrigation under one Cabinet Secretary and, most significantly, one Principal Secretary. This implies that, all accounting matters fall under one accounting officer.

Hon. Members, the question that this scenario poses with regard to oversight is the reporting line for this sole Principal Secretary in the new Ministry which is assigned functions that straddle the mandate of two Departmental Committees. At present, the Ministry of Water, Sanitation and Irrigation is assigned the functions of:

1) Water and Sewerage Infrastructure Development

2) Water Resource Management

3) Water Storage and Flood Control

4) Land Reclamation, and

5) Water Harvesting for irrigation.

Hon. Members, The Second Schedule to the Standing Orders outlines "*Agriculture, livestock, irrigation, fisheries development, production and marketing*" as the core mandate of the Agriculture and Livestock Committee. Conversely, the Schedule outlines "*Matters relating to climate change, environment management and conservation, forestry, water resource management, wildlife, mining and natural resources, pollution and waste management*" as the core mandate of the Environment and Natural Resources Committee.

This effectively makes the Ministry of Water, Sanitation and Irrigation answerable to the two Committees on the subjects of Irrigation, and Water and Sanitation, respectively. Ideally, Hon. Members, this would not present a conflict of oversight. With two or more Principal Secretaries assigned to designated State Departments, each would report to the relevant Committee charged with its oversight seamlessly. However, with only one Principal Secretary assigned all these functions, a conflict arises as to which Committee he or she would be required to answer to for purposes of efficiency and consistency in oversight.

Hon. Members, A perusal of the Budget Policy Statement for the financial year 2020/2021 reveals that, with regard to the programmes of the Ministry, the programme of Irrigation and Land Reclamation and that of Water Harvesting and Storage are assigned to the Ministry's single vote. This adds to the conundrum of the manner in which the Principal Secretary, as the Accounting Officer, would be required to make representations on the Ministry's budget and other oversight matters before the two Committees of the House. Even though a split of the functions may be contemplated, requiring the Principal Secretary to continually "*dove-tail*" between the two Committees remains an untidy option as it exposes the officer to concurrent summons of the two Committees and may render the particular oversight function of the House to appear vague and inefficient.

Hon. Members, The Standing Orders contemplated a scenario where a conflict of oversight would occur and the need for a process to resolve such conflict. Standing Order 217 establishes the Liaison Committee and mandates it to, and I quote:

> " *(f) determine, whenever necessary, the committee or committees to deliberate on any matter; and,*
>
> *(g) give such advice relating to the work and mandate of select committees as it may consider necessary*."

In the present case, however, the ongoing consideration of the Budget Policy Statement is subject to timelines governed by the Constitution and the Standing Orders. The strict timelines necessitate an urgent resolution of the conflict highlighted by the Committee. It is with this in

mind that, Hon. Members, I give the following guidance:

1) THAT, all subjects relating to "*Irrigation*" in the Budget Policy Statement for the financial year 2020/2021 shall henceforth be considered by the Departmental Committee on Environment and Natural Resources

2) THAT, the Departmental Committee on Environment and Natural Resources is similarly henceforth mandated to also consider all matters relating to the subject of "*irrigation*" in terms of the following provisions of the Standing Orders:

    a) Standing Order 45 relating to committal of public appointments to Committees;

    b) Standing Order 114(7) relating to prepublication scrutiny of proposed legislation;

    c) Standing Order 227 relating to Committal of Bills to Committees and public participation;

    d) Standing Order 216(5) relating to the general functions of a Departmental Committee in respect of investigations, inquiries and consideration of legislation;

    e) Standing Order 227 relating to petitions committed to a Departmental Committee;

    f) Standing Order 232(5) relating to Committal of the Budget Policy Statement to Departmental Committees); and

    g) Standing Order 235(4) in respect of Presentation of Budget Estimates and Committal to Committees.

3) THAT, this guidance shall subsist so long as no substantive Department is assigned the "*Irrigation*" function with a separate Accounting Officer and separate vote head. In the event such an assignment is undertaken, it stands without question that the Department and its Accounting Officer would fall under the oversight mandate of the Agriculture and Livestock Committee.

Hon. Members, I have given this guidance noting the unique circumstances currently obtaining in the Ministry of Water, Sanitation and Irrigation which has only one Principal Secretary charged with functions straddling the oversight mandate of two Committees of the House. The guidance is also premised on the notion that majority of the functions of the Ministry, and indeed, its planned programmes and budget, fall under the oversight mandate of the Committee on Environment and Natural Resources.

Thank you, Hon. Members."

PRIVATE VISIT TO SOMALIA BY A SECTION OF MEMBERS OF PARLIAMENT

Tuesday, 3rd March 2020

Context:

A section of Members of the National Assembly had visited the Republic of Somalia without formal processing of the delegation by the National Assembly or notification to the Speaker.

Decision of the Speaker:

1) *Whereas there are no sanctions against Members who fail to inform the Speaker whenever they travel out of the country, Members were urged to live up to the spirit of Chapter Six of the Constitution, particularly Article 75 relating to conduct of State Officers whether in public or official life, in private life or in association with other persons and to live up to the spirit of the oath of office that they all took.*

2) *All Members were reminded to always abide by the provisions of Standing Order No.260, requiring Members travelling outside Kenya in official or private capacity to always notify the Office of the Speaker for the reasons stated above.*

"Honourable Members**,** my attention has been drawn to reports relating to a discreet visit made to the Republic of Somalia on Saturday, 29th February 2020, by about 11 Members of this House, majorly representing constituencies in the former North Eastern Province of the Republic of Kenya. The sensitivity of the matter, the public interest and the inquires that have been made to my office on the matter have invited me to address the following questions relating to alleged private visit:

1) What are the responsibilities of a State officer with regard to engagements with foreign governments?

2) What constitutes a parliamentary delegation?

3) Are Members travelling out of the country required to notify the Speaker and why?

Hon. Members, on the first question, permit me to remind this House that, under the Constitution, the office of a Member of Parliament is a State Office in the Republic of Kenya. As such, there are responsibilities expected of Members of Parliament as State officers. Article 10(2) of the Constitution spells out the national values and principles of governance that, among other things, bind State officers.

These values, which are binding to all State officers, include patriotism, transparency, and accountability. These values are also emphasised in Section 3 of the Leadership and Integrity Act, 2012 and Section 2 of the Fourth Schedule to the Parliamentary Powers and Privileges Act, 2017. I hasten to add that at all times, any action by a state officer – be it in their private or official capacity – ought to take into consideration the need to remain patriotic, transparent and accountable to the nation.

Hon. Members, you may recall that, pursuant to Article 74 of the Constitution, each one of you ascribed to an Oath or Affirmation of Member of Parliament before you assumed the office

you hold as such Members. The Oath or Affirmation as prescribed in the Third Schedule to the Constitution reads in part, that:

> *"… I shall bear true faith and allegiance to the people and the Republic of Kenya; that I will obey, respect, uphold, preserve, protect and defend the Constitution of the Republic of Kenya; and that I will faithfully and conscientiously discharge the duties of a Member of Parliament…"*

Section 8 of the Leadership and Integrity Act, 2012 provides thus:

> *"(8) State office is a position of public trust and the authority and responsibility vested in a State officer shall be exercised by the State officer in the best interest of the people of Kenya."*

Hon. Members, these words are not a mere cosmetic decoration of the Constitution, statutes or indeed the Standing Orders of the House. They speak to and epitomise the true spirit of statesmanship behoving of State and public officers and serve as a constant reminder that a State office is a high calling to serve the interests of the State and its people over and above individual or private interests.

Hon. Members, as reported, the alleged visit was made by a group of legislators from this House. This may have created the impression that the said Members travelled as a delegation of this House. I wish to confirm that, parliamentary delegations to foreign nations must always meet certain parliamentary parameters. First, a parliamentary delegation is formally constituted and officially communicated to the foreign country which is scheduled to be visited through my office or that of the Clerk of the National Assembly. Secondly, parliamentary delegations are either fully or partially funded by the National Assembly. Further, in terms of composition, a parliamentary delegation is constituted in a manner that reflects the different shades of political parties in the House, gender and regional balance, among other considerations. In this regard, the alleged visit by the said group of Members of this House to the Republic of Somalia was not a parliamentary delegation.

Hon. Members, I will now address the issue of whether it is mandatory for Members travelling out of the country to inform the Speaker of their intended travel and why. There has always been a requirement to this effect in Standing Order No. 260, which reiterates this point by providing as follows:

> *"(1) A Member intending to travel outside Kenya, whether in an official or private capacity, shall give to the Speaker a written notice to that effect, indicating:*
>
> *a) the destination intended to be visited.*
>
> *b) the dates of intended travel and period of absence from Kenya, and*
>
> *c) the email, telephone contact, postal or physical address of the Member during the period of absence from Kenya."*

Hon. Members, as you have clearly heard, these provisions are couched in mandatory terms although they are not meant to punish or put in suspension any Member. The requirement to notify the Speaker of any intended travel outside Kenya is provided for in the Standing Orders as a matter of civility, good order and to ensure that the Office of the Speaker can, at all times, account for the whereabouts of any Member of this House who is out of the country.

For avoidance of doubt, there is no requirement compelling Members of this House to seek consent to undertake private travels. Similarly, there is no requirement for official

parliamentary delegations to obtain consent of other offices, save for that of the Speaker, to undertake official travels. Nonetheless, parliamentary diplomacy ought not be handled casually or in an uncoordinated manner. Indeed, this was one of the reasons that necessitated the 11th Parliament to insert new Standing Order 259A in the Rules of Procedure to provide for recognition of parliamentary caucuses and friendship groups. As a matter of fact, there are a number of instances where Members who have travelled out of Kenya in private capacities have found themselves in circumstances that required urgent official intervention or assistance from my office, the Office of the Clerk, our embassies in foreign countries or indeed the specialised intervention of more than one State Department of the Executive branch of the Government.

I invite you, Hon. Members, to ponder, in the event that a Member or Members of this House who have travelled out of the country incognito require assistance of these offices, how would assistance be availed? I must acknowledge that majority of Members have always notified the Speaker of their intended travels outside Kenya, whether in their public or private capacities. As a matter of fact, the register in the custody of the Clerk indicates that there have been over 700 such notifications in the last three years between September 2017 to date.

Allow me, Hon. Members to single out particular cases of certain Members notably, the Hon. Esther Passaris, Hon. (Dr.) Swarrup Mishra, Hon. Shakeel Shabbir, Hon. (Dr.) James Nyikal, Hon. Paul Ongili Owino and Hon. Paul Koinange, who consistently notify the Office of the Speaker whenever they travel outside Kenya in their respective private capacities. I congratulate them.

Hon. Members, whereas there are no sanctions against Members who fail to inform the Speaker whenever they travel out of the country, I urge you to live up to the spirit of Chapter Six of the Constitution, particularly Article 75 relating to conduct of State Officers whether in public or official life, in private life or in association with other persons. I also urge you to live up to the spirit of the oath of office that you all took. However, all Members are reminded to always abide by the provisions of Standing Order No. 260, requiring Members travelling outside Kenya in official or private capacity to always notify the Office of the Speaker for the reasons stated above.

As I conclude, Hon. members, I would like to implore upon the concerned Members and indeed the entire membership of this House in paraphrasing the words commonly used in the House by the Member for Kisumu Town West, Hon. Olago Aluoch that "*to whom much has been given, much is expected; and to whom much is entrusted, of him all the more will be asked*".

The House is so guided.

Thank you."

RESOLUTIONS OF COUNTY ASSEMBLIES ON DRAFT PUNGUZA MIZIGO (CONSTITUTION AMENDMENT) BILL

Thursday, 5th March 2020

Context:

Status of delivery of decisions on the draft Punguza Mizigo (Constitution Amendment) Bill, 2019 by the county assemblies to the Speakers of the two Houses of Parliament.

Decision of the Speaker:

The Speaker directed the Clerk to submit the information to the IEBC and also publish it in the Gazette as required under Paragraph 5(b) of the guidelines published on 22nd November 2019.

"Honourable Members, you will recall that on 5th December 2019, I made a Communication to the House regarding the status of delivery of decisions on the draft *Punguza Mizigo* (Constitution Amendment) Bill, 2019 by the county assemblies to the Speakers of the two Houses of Parliament.

In the Communication, I also informed the House that the Speaker of the Senate and I had jointly developed and published standard guidelines for delivery by county assemblies to the Speakers of the Houses of Parliament of a draft Bill for the amendment of the Constitution by popular initiative to inform the process. The guidelines were published in the *Kenya Gazette* as Legal Notice No.175 of 22nd November 2019.

Hon. Members, Paragraphs 5 and 6 of the guidelines provide as follows:

"(5) Upon the expiry of the period specified under Article 257(5) of the Constitution for the consideration of a draft Bill by a county assembly, the Speakers of the two Houses of Parliament shall:

a) Report to the respective Houses of Parliament:

i. the county assemblies that have submitted the draft Bill and the certificate approving the Bill.

ii. the county assemblies that have submitted the draft Bill and the certificate rejecting the Bill.

iii. the county assemblies that did not submit the draft Bill and the certificate.

iv. whether or not the threshold required under Article 257(7) of the Constitution has been met, and

v. such other information as the Speakers of the two Houses of Parliament may consider necessary.

b) Submit to the Independent Electoral and Boundaries Commission (IEBC) and publish by notice in the Gazette information specified under sub-paragraph (a).

(6) The Speakers of the Houses of Parliament shall not receive any draft Bill and certificate where the Bill was considered by the county assembly after the expiry of the period specified under Article 257(6) of the Constitution".

Hon. Members, in furtherance to requirements of Paragraph 5 of the said guidelines in respect of the draft *Punguza Mizigo* (Constitution Amendment) Bill 2019, I reported to the House the statistics of the submissions which had been formally delivered by the respective Speakers of the county assemblies as at 5th December 2019. In that Communication, I informed the House that:

1) Twenty-six (26) county assemblies had delivered the draft Bill with a certificate indicating their respective decisions on the Bill.

2) Out of the 26, three county assemblies, that is, Machakos, Turkana and Uasin Gishu, had approved the Bill.

3) Out of the same number, 23 county assemblies had rejected the draft Bill. These were Kwale, Kilifi, Tana River, Wajir, Mandera, Marsabit, Isiolo, Meru, Tharaka Nithi, Kitui, Makueni, Nyeri, Murang'a, Samburu, Trans Nzoia, Nandi, Laikipia, Narok, Kajiado, Kericho, Bomet, Bungoma and Busia.

4) Twenty-one (21) other county assemblies were yet to deliver decisions of the draft Bill to the Speakers of the Houses of Parliament with a certificate indicating either their approval or rejection of the Bill. These were the county assemblies of Mombasa, Lamu, Taita Taveta, Garissa, Embu, Nyandarua, Kirinyaga, Kiambu, West Pokot, Elgeyo Marakwet, Baringo, Nakuru, Kakamega, Vihiga, Siaya, Kisumu, Homa Bay, Migori, Kisii, Nyamira and Nairobi.

The Speaker of the Senate and I published this information in the *Kenya Gazette* under Gazette Notice No. 11013 dated 22nd November 2019 for the information of the general public.

The County Assembly of Machakos initially submitted their certificate on 24th October 2019. Whereas the certificate indicated the County Assembly had rejected the draft Bill, the forwarding letter indicated the opposite. We have since received clarification to the effect that the County Assembly of Machakos did not actually approve the *Punguza Mizigo* (Constitution Amendment) Bill 2019.

In addition, we have also received a certificate indicating the rejection of the said Bill by the County Assembly of Vihiga. This was one of the 21 county assemblies which had not submitted their certificates to the two Speakers of Parliament. Given the fact that there is no timeline within which a county assembly has to submit its feedback to Parliament after having considered the draft Bill under Article 257 of the Constitution within the stipulated 90 days, the Speaker of the Senate and I found it difficult to disallow the submission by the said county assembly even though it was submitted more than two months after the county assembly had considered and made its decision on the draft Bill. This *lacuna* is one of the several gaps that have been identified with respect to the process of amending the Constitution through popular initiative under Article 257 of our Constitution which, in our view, may require to be addressed in law or through other legislative instruments.

As Speakers of the two Houses of Parliament, the experience of the *Punguza Mizigo* (Constitution Amendment) Bill, 2019 has caused us to reflect on a number of questions. For instance, since the Constitution obligates only the county assemblies which have approved such a Bill to send their certificates to the Speakers of the Houses of Parliament, are we to assume that those county assemblies whose certificates have not been received considered and rejected the Bill?

Further, since the three-month timeline under Article 257(5) and (6) of the Constitution relates to the period of consideration of the Bill by county assemblies and no timeline is prescribed for the conveyance of the certificates to Parliament, for how long should the Speakers of the Houses of Parliament wait for the speakers of county assemblies to submit the approval certificates before pronouncing the fate of the particular Bill? It is clearly evident that there are gaps in the Constitution that ought to be addressed.

Nevertheless, the new decisions now bring the total number of county assemblies that rejected the draft Bill to 25 and those that approved the Bill within the 90-day period to two. Article 257(7) provides that if a draft Bill to amend the Constitution by popular initiative has been approved by a majority of county assemblies, it shall be introduced in Parliament without delay. The statistics I have just read confirm that the *Punguza Mizigo* (Constitution Amendment) Bill, 2019 did not meet the threshold to be introduced in Parliament and hence stands lost. It must remain where it was.

In this regard, I hereby direct the Clerk to submit this information to the IEBC and also publish the same in the Gazette as required under Paragraph 5(b) of the guidelines published on 22nd November 2019.

Thank you, Hon. Members."

COMMITTAL OF A BILL TO A COMMITTEE OTHER THAN A DEPARTMENTAL COMMITTEE

Tuesday, 10th March 2020

Context:

Determination of the suitable Committee to consider the Kenya National Commission on Human Rights (KNCHR) (Amendment) Bill (National Assembly Bill No.1 of 2020)

Decision of the Speaker:

The Bill was committed to the Constitutional Implementation Oversight Committee

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"Hon. Members, the Kenya National Commission on Human Rights (KNCHR) (Amendment) Bill (National Assembly Bill No.1 of 2020) was read the First Time on 27th February 2020. Standing Order 127(1) provides that a Bill, having been read a First Time, shall stand committed to the relevant departmental committee without Question put. Despite the said provisions, Standing Order 127(6)(a) provides that the Speaker may direct that a particular Bill be committed to such other committee as the Speaker may determine.

Hon. Members, I have since received a request to determine the suitable committee to consider the KNCHR (Amendment) Bill (National Assembly Bill No.1 of 2020). The Bill seeks to amend the KNCHR Bill No.14 of 2011 in order to merge the KNCHR and the National Gender and Equality Commission (NGEC). Part 5 of Chapter 5 of the Constitution, particularly Article 59 (4) provides as hereunder:

> *"Parliament shall enact legislation to give effect to this part, and any such legislation may restructure the commission into two or more separate commissions."*

Hon. Members, this particular Bill is published following lessons learnt and challenges experienced during the implementation of the Constitution. You will recall that the Kenya National Human Rights and Equality Commission established under Part 5 of the Constitution pursuant to the provisions of Article 59(4) was expected to create three independent offices, that is the KNCHR, NGEC and the Commission on Administrative Justice (CAJ).

As you are aware, the Constitutional Implementation Oversight Committee established under the Sixth Schedule to the Constitution is responsible for overseeing the implementation of the Constitution. Given this background, the Constitutional Implementation Oversight Committee will be valuable in reviewing the lessons so far learned in the journey to implement the Constitution.

Hon. Members, I therefore, direct that the Bill stands committed to the Constitutional Implementation Oversight Committee to discharge the functions specified under Standing Order 127(3) and Section 3(a) relating to public participation. It is so directed."

THE IMPLICATION OF REJECTION, BY THE HOUSE OF A SPECIAL MOTION PROPOSING REJECTION OF NOMINEES FOR APPOINTMENT TO THE TEACHERS SERVICE COMMISSION

Wednesday April 22, 2020

Context:

The House had rejected a Special Motion which was couched in the negative, asking the House to reject persons nominated for appointment of as members of the Teachers Service Commission (TSC) and the Speaker had to guide on the implication of the decision of the House.

Decision of the Speaker:

1. *An approval of appointment as contemplated by the Constitution and statutes is an affirmative and unequivocal approval by the House and cannot be deduced from the rejection of a committee report;*

2. *The onus is on the relevant Committee or any other Member of this House to give notice of a Motion to that effect, phrased in positive terms and should that Motion be carried or negatived, the decision of the House would be construed unequivocally.*

"Hon. Members, you may recall that earlier today, the House rejected a Motion under Order No.10 on the Order Paper for today's Morning Sitting. The Motion, which was moved by the Departmental Committee on Education and Research, was asking the House to reject the appointment of Mr. Mbage Njuguna Ng'ang'a and Ms. Leila Abdi Ali as members of the Teachers Service Commission (TSC).

Hon. Members, the question now before the Speaker is, "What is the implication of the House rejecting the Special Motion, which is coached in the negative?" Sadly, it cannot be that the House has approved the nominees because a decision of the House to that effect ought to be unequivocal. In the same vein, it cannot be that the House has rejected the appointment of the said nominees. Hon. Members, This is not the first time the House is confronted with a scenario of the nature presented by the four stated questions. In answering the question, I am, therefore, informed by my predecessor in the 10th Parliament whereupon a Motion asking the House to reject proposed appointment of one Mr. Mumo Matemu, as the Chairperson of the Ethics and Anti-Corruption Commission (EACC), was rejected by the House. At that time, in 2011, my predecessor, Hon. Ken Marende, did observe that in such circumstances, the nominees stand, implying that the nominees still remained before the House considering that the nominee had neither been approved by the House nor rejected. The then Speaker did add that it was incumbent on the Mover of the business in question or any Member of the House to determine whether or not to move a positive Motion for the approval of the nominee by the House.

Hon. Members, I hasten to state that I am not about to deviate from that precedent set by my predecessor. In fact, I agree with him that an approval of the appointment as contemplated by the Constitution and statutes is an affirmative and unequivocal approval by the House and cannot be deduced from the rejection of a committee report. In such circumstances, the onus is on the relevant Committee or any other Member of this House to give notice of a Motion to that effect, phrased in positive terms.

Hon. Members, I wish to inform the House that I have already received and approved a Notice of Motion from the Leader of the Majority party, Hon. Aden Duale, asking the House to approve the appointment of Mr. Mbage Njuguna Ng'ang'a and Ms. Leila Abdi Ali as members of the TSC. Should that Motion be carried, then the decision of the House will be construed unequivocally. Similarly, should the positive Motion be negatived by the House, the decision of the House will have been, again, made unequivocally. I, therefore, guide the House accordingly."

THE NATURE OF EQUALISATION FUND BILL, (NATIONAL ASSEMBLY BILL NO. 43 OF 2019)

Wednesday May 6, 2020

Context:

Whether the Equalisation Fund Bill, 2019 was a Bill concerning county governments, even though the Memorandum of Objects and Reasons to the Bill stated that the Bill does not concern county governments.

Decision of the Speaker:

The administration of the Equalisation Fund affects the functions and powers of county governments in terms of Article 110 (1) (a) of the Constitution, hence the Bill concerns county governments and participation of the Senate in its passage is mandatory.

"Hon. Members, you will recall that during the morning sitting of Wednesday, 13th November 2019, the Minority Party Deputy Whip, Hon. Chrisanthus Wamalwa, sought direction of Speaker on the nature of the Equalisation Fund Bill, 2019. At the time, the House was considering the Motion for Second Reading of the Bill which is sponsored by the Member for Tiaty, Hon. William Kassait Kamket.

In his request, he sought guidance on whether, after the passage of the Bill by this House, the Bill would be forwarded to the Senate for consideration. It was the contention of the Member that whereas the Memorandum of Objects and Reasons to the Bill states that the Bill does not concern county governments, the administration of the Equalisation Fund as proposed under the Bill affects the powers and functions of county governments. In this regard, he was of the view that the passage of the Bill would require the participation of the Senate. When debate on the Second Reading of the Bill resumed on Wednesday, 20th November 2019, the Chair undertook to provide guidance in due course, after the Bill is considered at the Third Reading.

Hon. Members, noting that the Bill proceeded for consideration in Committee of the whole House and was read a Third Time today afternoon, I will hereby proceed to give my guidance, as follows:

1. First, the provisions of Article 204(3) (b) of the Constitution empowers the National Government to utilize the Equalization Fund "either directly, or indirectly through conditional grants to counties in which marginalised communities exist". The Equalisation Fund Bill, 2019 seeks to operationalise the said provision. Clause 3 of the Bill outlines that its provisions apply to the direct use of the Fund by the National Government to provide the various services required under Article 204 of the Constitution. The rest of the Bill establishes a framework through which the services are to be provided to the marginalised areas determined by the Commission on Revenue Allocation in their report prepared pursuant to Article 216 of the Constitution;

2. Second, the Bill further proposes the establishment of local committees in each ward within the marginalised areas tasked with identifying projects for funding in consultation with local communities. The Bill also establishes a board to oversee the administration of the Fund.

3. Article 110 (1) of the Constitution defines a Bill concerning county governments as, and I quote:

   (a) *a Bill containing provisions affecting the functions and powers of county governments set out in the Fourth Schedule;*

   (b) *a Bill relating to the election of members of a county assembly or a county executive; and,*

   (c) *a Bill referred to in Chapter Twelve affecting the finances of county governments*.

4. The provisions of the Equalisation Fund Bill, 2019 seek to operationalise Article 204 of the Constitution by outlining the mode of administering the Fund when used directly by the National Government. I note that it touches on the following functions and powers which are concurrently exercised by both levels of government:

(a) Provision of water, which is function exercised by both levels of government pursuant to Paragraph 22 (c) of Part 1 and Paragraph 11(b) of Part 2 of the Fourth Schedule to the Constitution, respectively;

(b) Provision of roads, which is also a function exercised by both levels of government pursuant to Paragraph 18 (b) and (c) of Part 1 and Paragraph 5(a) of Part 2 of the Fourth Schedule to the Constitution, respectively;

(c) Provision of and regulation of health facilities, which is a function exercised by both levels of government pursuant to Paragraph 23 of Part 1 and Paragraph 2 (a) of Part 2 of the Fourth Schedule to the Constitution, respectively; and,

(d) Provision of and planning for electricity, which is also a function exercised by both levels of government pursuant to Paragraph 31 of Part 1 and Paragraph 8 (e) of Part 2 of the Fourth Schedule to the Constitution, respectively.

5. Article 110(3) requires the Speaker of the Senate and I to jointly resolve any question as to whether a Bill concerns county governments, and if it does, whether it is a special or an ordinary Bill. Standing Order 121(3) provides that the Speakers may agree on an appropriate framework to actualise that provision.

Having said that Hon. Members, with respect to the question before the Speaker, there is no doubt that the administration of the Equalisation Fund affects the functions and powers of county governments in terms of Article 110 (1) (a) of the Constitution. In this regard, the Equalisation Fund Bill, (National Assembly Bill No. 43 of 2019) sponsored by the Member for Tiaty and which was passed by the House today afternoon, clearly concerns county governments and the participation of the Senate in its passage is therefore mandatory.

Hon. Members, that is the Speaker's considered opinion which he undertakes to also share with the Speaker of the Senate in furtherance to the provisions of Standing Order 121(3), when forwarding the Bill to the Senate, now that it has been passed and read a Third Time today afternoon. The House is accordingly guided."

CONSIDERATION OF MEDIATED VERSIONS OF THE COUNTY GOVERNMENTS (AMENDMENT) BILL (SENATE BILL NO. 11 OF 2017) AND THE COUNTY GOVERNMENTS (AMENDMENT) (NO.2) BILL (SENATE BILL NO. 7 OF 2017)

Thursday, June 4, 2020

Context:

Question had arisen on the propriety of mediated versions of the two Bills before the National Assembly on account that the Senate's approval of the two Bills by voting through a procedure he referred to as "proxy voting contravened the provisions of Article 123 of the Constitution".

Decision of the Speaker:

1. *Communication under the hand of the Speaker of the Senate transmitting a Bill that has been passed or signifying that a mediated version of a Bill has been approved by the Senate constitutes a guarantee that the procedures of the Senate and the requirements of the Constitution have been observed;*

2. *Should the National Assembly approve the mediated versions of either or both Bills, the Speaker would engage the Speaker of the Senate to endorse the vellums in respect of each of the two Bills, thereby seeking his authentication on the propriety of the Bills with regard to the decisions of the Senate, before he presents them to the President for assent under Article 113(3) of the Constitution.*

"Hon. Members, you will recall that during the Morning Sitting of the House on Wednesday, 6th May 2020, the Leader of the Majority Party rose on a point of order before the Motion for consideration of the mediated versions of the County Governments (Amendment) Bill (Senate Bill No.11 of 2017) and the County Governments (Amendment) (No.2) Bill (Senate Bill No.7 of 2017) was moved. He was seeking the direction of the Speaker on whether it was appropriate for the House to proceed with the consideration of the mediated versions of the two Bills. In his view, the manner in which the Senate approved the two Bills contravened the provisions of Article 123 of the Constitution regarding decisions of the Senate. To buttress his point, the Leader of the Majority Party tabled a copy of the Hansard Report of the Senate proceedings for the afternoon of Tuesday, 21st April 2020 and alluded to a portion of the proceedings where the Senate approved the mediated versions of the two Bills through a procedure he referred to as "proxy voting". It was, therefore, his contention that the procedure adopted by the Senate violated the Constitution and, as such, the House ought not to proceed and endorse such action by approving the mediated versions of the two Bills.

Hon. Members, The point raised by the Leader of the Majority Party elicited divergent views from Members, including the Leader of the Minority Party, the Whip of the Minority Party, the Deputy Whip of the Minority Party, Hon. Peter Kaluma, Hon. Amos Kimunya and Hon. Daniel Tuitoek. The main issue arising from the point of order and the ensuing debate was twofold:

1. whether the House ought to interrogate the procedure applied by the Senate in its passage of a Bill concerning county governments and such Bill having been

referred to this House for consideration or and whether the procedure applied by the Senate in its approval of a mediated version of any Bill has any implication on the consideration of that version of the Bill in this House; and,

2. what remedy would be available to this House should it be claimed that the procedure applied by the Senate to pass a Bill concerning county governments or the procedure applied to approve a mediated version of a Bill is in contravention of the Constitution.

Hon. Members, at the outset, I wish to interrogate the provisions of Standing Order 87 (5), which was alluded to during the debate on the matter and its effect on the issue raised by the Leader of the Majority Party. The Standing Order states as follows:

> *"87(5) It shall be out of order for a Member to criticise or call to question the proceedings in the Senate or the Speaker's ruling in the Senate, but any debate may be allowed on the structures and roles of the Senate or Parliament."*

This Standing Order is replicated word for word in Standing Order No.96 of the Senate Standing Orders. This rule of procedure seeks to safeguard parliamentary proceedings and decisions of the Speakers from possible indictment in either House of Parliament. Indeed, it was urged by some Members of this House that the point raised by the Leader of the Majority Party ran afoul of this Standing Order by calling into question proceedings that transpired in the Senate.

As you may recall, from the Order Paper of that particular day, the Motion on one of the Bills which elicited the issues referred for my consideration read as follows:

> *"THAT, pursuant to the provisions of Article 113(2) of the Constitution and Standing Order 150, this House adopts the Report of the Mediation Committee on the County Governments (Amendment) Bill (Senate Bill No.11 of 2017) laid on the Table of the House on Wednesday, April 22, 2020, and approves the Mediated Version of the County Governments (Amendment) Bill (Senate Bill No.11 of 2017).*

I put emphasis to the phrase "and approves the mediated version". At face value, Hon. Members, the Motion appears quite straightforward. However, when considered together with the point raised by the Leader of the Majority Party, it calls for the guidance of the Speaker on whether Standing Order No.87(5) insulates any business arrived at through a mediation process or transmitted from the Senate from question or scrutiny on the basis of its constitutionality.

Hon. Members, Standing Order 47(3)(b) obligates the Speaker to exclude a Motion from being debated or to direct an appropriate amendment of the Motion where the Speaker finds that the Motion offends the Constitution or an Act of Parliament. For avoidance of doubt and for clarity, it states as follows, and I quote:

> *"(3) If the Speaker is of the opinion that any proposed Motion -*
>
> *(a) …….*
>
> *(b) is contrary to the Constitution or an Act of Parliament, without expressly proposing appropriate amendment to the Constitution or the Act of Parliament;*

(c) …….;

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

Hon. Members, as I have previously upheld, Standing Order 47(3)(b) is an extension of the requirement placed on the Speaker under Article 3 and Article 10 of the Constitution to respect, uphold and defend the Constitution. Before any business is brought before the House, it is approved by the Speaker on the basis of its constitutionality - on the face of it - among other considerations outlined either in statute or in the Standing Orders. I have also previously guided this House that a question or claim of unconstitutionality of a matter before the House may be raised by a Member at any stage, before and during or immediately after consideration of business by the House despite its initial approval. I am, therefore, of the considered opinion that Standing Order 47(3)(b) requires the Speaker to address any constitutional issues raised with regard to any business relating to the Senate which requires consideration by this House. Indeed, it would be irresponsible to expect the Speaker to simply fold his or her arms where his or her attention has been drawn to a matter before the House, whose consideration may lead to an unconstitutional or an absurd result, if it is proceeded with in an unguided manner.

That said, interrogation of the concern raised has to be circumspect. It has to be limited to any constitutional issues raised or provisions of the Constitution relating to the business affected. Additionally, any interrogation of the concern raised has to be faithful to the spirit of Standing Order 87(5) and refrain from impeaching the proceedings of another House of Parliament or the decision of the Speaker of the other House.

Hon. Members, The Constitution clearly outlines the procedure applicable to Bills that are processed by both Houses, such as the County Governments (Amendment) Bill, No.11 of 2017. The Article provides, and I quote:

(1) *If a Bill is referred to a Mediation Committee under Article 112, the Speakers of both Houses shall appoint a Mediation Committee consisting of equal numbers of Members of each House to attempt to develop a version of the Bill that both Houses will pass;*

(2) *If the Mediation Committee agrees on a version of the Bill, each House shall vote to approve or reject that version of the Bill;*

(3) *If both Houses approve the version of the Bill proposed by the Mediation Committee, the Speaker of the National Assembly shall refer the Bill to the President within seven days for assent; and,*

(4) *If the Mediation Committee fails to agree on a version of the Bill within thirty days, or if a version proposed by the Committee is rejected by either House, the Bill is defeated."*

Hon. Members, May I remind the House, on the part of the legislative journey of these two Bills, thus far, the County Governments (Amendment) (No. 2) Bill, 2017 (Senate Bill No.7 of 2017), seeks to amend the County Governments Act (No.17 of 2012) to provide for the completeness of the procedure for the disposal of a report of a commission of inquiry, established under Article 192(2) of the Constitution regarding suspension of a County Government. On the

other hand, the County Governments (Amendment) Bill, 2017 (Senate Bill No.11 of 2017), seeks to amend the County Governments Act to clarify on commencement and sitting of a County Assembly; seeks to put in place a legal framework for the establishment of the office of a deputy speaker of a county assembly; to clarify on the procedure for removal of a speaker of a county assembly; to clarify on the recall of a member of a county assembly; to put clarity on the powers of a governor to appoint and dismiss a member of the county executive committee; to put in place a mechanism for the assumption of office of governor by the deputy governor and the appointment of a new deputy governor, amongst other provisions.

Upon its passage by the Senate, the County Governments (Amendment) Bill, 2017 (Senate Bill No.11 of 2017) was considered by this House and passed with amendments on 6th March, 2019. Similarly, the County Governments (Amendment) (No.2) Bill, 2017 (Senate Bill No.7 of 2017) was considered by this House and passed with amendments on 19th March, 2019. The Senate rejected amendments passed by the National Assembly to both Bills and precipitated the mediation process contemplated under Article 113 of the Constitution. It is the mediated versions of the two Bills, as proposed by the two Mediation Committees that were subsequently formed that are presently before this House for approval.

Hon. Members, This begs the question: What then is required of this House? It is my view that, what is required of this House by Article 113 of the Constitution is only the approval or otherwise of the mediated version of the two Bills. As such, in applying Standing Order 47(3)(b), only questions on the constitutionality or legality of an action relating to the mediation process preceding it or the comparison of the version of the Bill before the Houses may be raised. The points raised by the Leader of the Majority Party do not question the process in which the Mediation Committee on the Bills was established or the manner in which or time within which the Committee arrived at its mediated version of the Bill, or the comparison of the version of the Bills presented to either Houses.

Instead, the Leader of the Majority Party called into question a voting procedure applied by the Senate in approving the mediated versions, which is a separate matter at this penultimate stage. As a matter of fact, I agree with the Members who opined that, unlike a Bill which is referred from one House to the other in a sequential manner, the process of approval or otherwise of a mediated version of a Bill by the two Houses is a parallel process. As such, the process does not have to start or end in any of the two Houses in a chronological manner. Actually, a mediated version of a Bill may be considered by the two Houses at the same time. Indeed, provided that the version of the Bill presented to both Houses is the same, the completeness of the approval process of a mediated version of a Bill converges at the stage of comparing the results of the parallel processes in the Houses, in the form of approval or rejection, in which case, unlike the case of a fresh Bill, the onus of verifying how each House voted lies in that House.

Hon. Members, to the extent that Article 113(3) of the Constitution requires the Speaker of the National Assembly to refer the mediated version of a Bill that has been approved by both Houses to the President for assent, I appreciate the concern of the Leader of the Majority Party that the House may be enjoined in the unconstitutional passage of legislation. As Members are aware, the Constitution prescribes strict requirements on quorum and voting procedures for both Houses of Parliament. By allowing the two Houses to prescribe Standing Orders for the orderly conduct of parliamentary business, the Constitution expects each House to craft procedures that respect and accord with the thresholds of voting at any stage.

In this regard, and pursuant to Standing Order 87(5), I am expected to accord the procedures of the Senate the same respect that I would expect the Speaker of the Senate to accord the procedures of this House.

As such, communication under the hand of the Speaker of the Senate transmitting a Bill that has been passed or signifying that a mediated version of a Bill has been approved by the Senate constitutes a guarantee that the procedures of the Senate and the requirements of the Constitution have been observed. In the event this House approves the mediated versions of the two Bills, I will engage the Speaker of the Senate to endorse the Bills before I present them to the President for assent as required under Article 110(5) of the Constitution, thereby causing the Speaker of the Senate to authenticate the propriety of the Bills with regard to the decisions of the Senate. I believe this will allay the fears raised by the Leader of the Majority Party on the propriety of the procedures adopted by the Senate. This also settles the initial questions on *whether the House ought to interrogate the procedure applied by the Senate in its approval of a mediated version of a Bill, whether the procedure applied by the Senate has any implication on the progression of that version of the Bill in the National Assembly, and what remedy would be available to the House in that case*.

Hon. Members, As I turn to the last part of the question, I am also constrained to address the issue of whether the point raised by the Leader of the Majority Party affects a Bill passed by the Senate which is referred to this House for consideration. The question that arises is whether the voting procedure adopted by the Senate in the passage of a Bill is a material issue for discussion in light of Standing Order 87(5). The Constitution outlines strict voting thresholds with regard to the passage of Bills by the Senate. Specifically, Article 123 of the Constitution provides:

> *(2) When the Senate is to vote on any matter other than a Bill, the Speaker shall rule on whether the matter affects or does not affect counties*.
>
> *(3) When the Senate votes on a matter that does not affect counties, each senator has one vote*.
>
> *(4) Except as provided otherwise in this Constitution, in any matter in the Senate affecting counties—*
>
> > *(a) each county delegation shall have one vote to be cast on behalf of the county by the head of the county delegation or, in the absence of the head of the delegation, by another member of the delegation designated by the head of the delegation;*
> >
> > *(b) the person who votes on behalf of a delegation shall determine whether or not to vote in support of, or against, the matter, after consulting the other members of the delegation; and*
> >
> > *(c) the matter is carried only if it is supported by a majority of all the delegations*.

Hon. Members, The practice in our bicameral set-up is to presume that, unless proven otherwise, a Bill passed by one House and transmitted to the other House for consideration has been passed in accordance with the provisions of the Constitution. In the unlikely event that the proceedings in one House of Parliament leading to the passage of a Bill reflect a departure from the strict requirements of the Constitution, consideration of the Bill by the other House would be an exercise in futility. If the Leader of the Majority Party had, for example, raised his point with regard to a Bill transmitted from the Senate for consideration by this House, I would be duty-bound to interrogate, at any stage, whether its passage met the requirements of Article 123 of the Constitution, if the question arose. In such instance, legislative comity

would require me to formally reach out to the Speaker of the Senate to seek his verification or clarification on the issue before the Bill or other business progresses to a vote. Consequently, if the clarification was to reveal a procedural failure on the part of the Senate in passing the Bill, or such other business, I would be under obligation to preclude the House from considering the Bill until the failure by the Senate was remedied. That now settles the last questions with respect to *whether the House ought to interrogate the procedure applied by the Senate in its passage of a Bill concerning county governments, such Bill having being referred to this House for consideration; and what remedy would be available to the House should it be claimed that the procedure applied by Senate to pass a Bill concerning county governments was in contravention of the Constitution*.

Ho. Members, Having said that, it should not be lost that standing down a Bill referred from the other House on account of a procedural failure is an extreme action, especially where such failure may be detected and arrested beforehand. It would, additionally, not promote cordial relations between the two Houses and the inter-Houses comity as expected of bicameralism. To my mind, any failure of procedure in a House of Parliament casts the entire institution of Parliament in negative light. Cognisant of the provisions of Standing Order 87(5), it therefore rests on each Speaker and the Clerk of each House to prevent any such failure in the first instance, or seek to urgently remedy it upon detection without resorting to the Floor of the Houses. In this way, the procedures of each House are protected from fractious debate that is entirely avoidable. Going forward, my office shall, as practicably as possible, seek to ensure that any question on a Bill touching on any procedure of the other House is arrested and conclusively resolved with the Speaker of the Senate prior to the transaction of any business relating to such Bill.

In this regard, I thank the Leader of the Majority Party and other Members for raising these issues in the House for my guidance. My considered findings, therefore, are as follows:

1. THAT, the claims raised by the Leader of the Majority Party and the other Members regarding the procedure which the Senate may have applied to take a vote on the mediated versions of the two Bills do not in any way impede the admissibility or consideration of the two Bills by the National Assembly since the processes in the two Houses are not sequential but parallel, provided that the versions of the two Bills presented in both Houses are the same;

2. THAT, contrary to the claims, by proceeding to consider the mediated versions of the two Bills, the National Assembly would not, in any way, offend the Constitution;

3. THAT, the House Business Committee may proceed to prioritise the mediated versions of the two Bills, that is, the County Governments (Amendment) Bill, 2017 (Senate Bill No. 11 of 2017) and the County Governments (Amendment) (No.2) Bill (Senate Bill No.7 of 2017), for consideration by this House, soonest; and,

4. THAT, should this House approve the mediated versions of either or both Bills, I will engage the Speaker of the Senate to endorse the vellums in respect of each of the two Bills, thereby seeking his authentication on the propriety of the Bills with regard to the decisions of the Senate, before I present them to the President for assent under Article 113(3) of the Constitution.

The House is accordingly guided. I thank you, Hon. Members"

DISCHARGE OF A MEMBER FROM SELECT COMMITTEES BY PARLIAMENTARY PARTIES

Tuesday, 9th June 2020

Context:

The Member for Ugenya (Hon. David Ochieng') was discharged from a select committee by the Minority Party yet he was elected on a party not in coalition with the Minority Party. He therefore sought guidance on whether a Member belonging to a party other than a parliamentary party may be discharged from a Committee of the House by any parliamentary party.

Decision of the Speaker:

1) *The exercise of the discharge powers of a party under Standing Orders No. 176 was restricted to Members belonging to the particular parliamentary party and those from other smaller parties who had entered into formal coalition agreements;*

2) *No parliamentary party was to exercise the discharge powers of a party under Standing Orders No. 176 to remove a Member who was not a member of the particular parliamentary party from any Committee of the House, even on the basis of having granted the Member the nomination to the particular Committee, as that conception is based on misapplication of the Standing Orders;*

3) *Since the Member for Ugenya Constituency, the Hon. David Ochieng, MP, neither belonged to any parliamentary party nor had his Movement for Democracy and Growth Party entered into a coalition with any of the parliamentary parties, the notice given by the Minority Party Whip to discharge him from the Departmental Committee on Health was erroneous ab initio and, therefore, invalid;*

4) *The Committee on Selection, in consultation with the Procedure and House Rules Committee, was to devise criteria for nomination of Members to Committees that guarantees that Members who belong to parties other than Parliamentary parties and Independent Members also get their rightful share of the 622 slots available for sharing in Committees. This could include proposals for registration of desired committee(s) and the use of lots as a means of determining how to place such Members in their entitled slots, few as they may be;*

5) *The Procedure and House Rules Committee to initiate the process of proposing amendments to the Standing Orders so as to expressly provide for the said criteria. The Committee could also propose the manner of ordinary reallocations of the slots in committees, corporately reserved for Independent Members and parties other than parliamentary parties amongst the Independent Members and those belonging to the small parties that do not constitute parliamentary parties.*

"Honourable Members, as you will recall, on Tuesday, 2nd June 2020, the Member for Ugenya, Hon. David Ochieng', MP, rose on a point of order under Standing Order Nos.172, 173 and 176 requesting for my considered guidance on six issues. The crux of his issues was whether a Member belonging to a party other than a parliamentary party may be discharged from a

Committee of the House by any parliamentary party. To this end, the Member did inform the House that he had received a letter from the Minority Party Whip notifying him of the Party's intention to discharge him from the Departmental Committee on Health pursuant to the provisions of Standing Order No. 176. I also wish to inform the House that the Member also wrote to the Speaker listing the six issues for which he sought my guidance.

Hon. Members, having reviewed the issues raised by the Member for Ugenya and others canvassed by the Leader of the Majority Party, the Leader of the Minority Party and other Members who spoke on the issue, I have isolated the following five matters as the ones requiring my guidance:

1) whether it is the intention of the Constitution and the Standing Orders that all slots in select committees are to be assigned only to parliamentary parties;

2) whether it is the intention of the Constitution that the exercise of the roles of the National Assembly under Article 95 of the Constitution in committees is exclusive to Members belonging to parliamentary parties to the exclusion of Independent Members and Members belonging to parties other than parliamentary parties;

3) whether the Constitution envisages that the inclusion of Independent Members and Members belonging to parties other than parliamentary parties to serve on Committees of the House ought to be the remit of parliamentary parties;

4) whether a parliamentary party may exercise the discharge powers of a party under Standing Order No.176 to remove a Member who is not a Member of the particular parliamentary party or coalition of parties from a committee on the basis of having granted the Member the nomination to the Committee; and,

5) whether there is any lacuna or misapplication of the Standing Orders with respect to nomination into and discharge of Members from Committees, and if so, what is the appropriate remedy.

Hon. Members, the issues for which the Member sought my guidance are fundamental to the functioning of the House as they relate to the mode of inclusion and exclusion of a Member from the Committees of the House. Before I proceed to address the issues for determination, permit me to remind the House that this is not the first time that the Speaker has been invited to guide on questions of membership to select committees and discharge there from. Certainly, this is an illustration that one cannot perfectly delink parliamentary politics from the legislature and that the decision to discipline Members is primarily vested in the political parties, but it always finds its way into the legislature. Indeed, allow me to refer to an expository by a Finnish Professor of Political Science, Dr. Kari Palonen in his write-up titled "*Parliamentary Procedure as an Inventory of Disputes: A Comparison between Jeremy Bentham and Thomas Erskine May*". In that write-up, the Professor opines and I quote:

> *"Parliamentary politics is inherently procedural…Parliamentary politics is not just politics that takes place in Parliament, but politics conducted in a parliamentary manner, in accordance with the rules and practices of parliamentary procedure."*

Indeed, in the 11th Parliament, I was invited by the Leader of the Majority Party to guide on the application of Standing Order No. 176 relating to discharge of Members from Committees. This was after the then Coalition for Reforms and Democracy (CORD) discharged the Member for Lungalunga, the Hon. Khatib Mwashetani, MP, and others from several Committees. In a Considered Ruling that I rendered to the House on 30th November 2016, I addressed the following three Questions:

1) whether and to what extent Standing Order No. 176, as then framed, could be employed as a mechanism for enforcing party discipline for breaches outside the proceedings of the House or its Committees;

2) whether the provisions of Standing Order No. 176, as then framed were to be applied against Members of the House by instigation of or order of persons other than Members of the House; and,

3) whether Standing Order No.176 as then framed, adequately protected the rights of Members in the performance of their functions in the House (particularly with respect to discharge without an opportunity to be heard).

Hon. Members, I am not about to restate the details of that Ruling but for the benefit of the House, I hasten to underscore the fact the guidance then and taking into account the dictates of our Constitution on fair administrative action, I hitherto put a temporary embargo on further discharge of Members from Committees by parliamentary parties until the House amended Standing Order No.176 to provide for a mechanism of giving the affected Member adequate notice and an opportunity to be heard by the Party before effecting the discharge. This was later actualised by amending Standing Order No. 176 as reflected now in the 4th Edition of the National Assembly Standing Orders. I have intentionally chosen to underscore that particular ruling because it addressed the issue of rights of Members, which is also part of the subject of guidance this afternoon.

Hon. Members, the practice of placing political parties at the centre of running parliamentary business has a history. This prompts me to perhaps briefly enlighten the House on the history of parliamentary parties as vehicles for constituting House Committees hence the setting of a threshold of what constitutes a parliamentary party. You will recall that way back in 1991, the National Assembly repealed Section 2A of the then Constitution and re-introduced multiparty democracy that saw the emergence of many political parties. As a result, political parties took centre stage in the running of the affairs of the House, including composition of the then very few committees that were in place at the time.

Indeed, the focus of the legislative and oversight functions of the House shifted from the plenary of the House to the committees. At that time, the rules of procedure which had been amended just before the 1992 elections only contemplated two factions in the House, that is, the Ruling Party and the Official Opposition Party. As a matter of fact, Standing Order No. 2 of the Seventh Parliament (1992 to 1997) defined Official Opposition Party as the party consisting not less than 30 members. Due to the high number of parties in the House at the time, most of which were neither in the Ruling Party nor the Official Opposition Party, there was a desire to set minimum thresholds to be met by the rest of the political parties represented in the House to qualify to sit at the bargaining table as it was then called to claim any parliamentary opportunity or decide on parliamentary matters.

Hon. Members, times have changed and indeed they do change and so does the scope of democracy. You may agree with me that, when society transforms its ways of handling its political affairs through various epochs, it is inevitable that the rules that govern conduct of those affairs will change.

Between the 7th and the current 12th Parliament, Standing Order No. 2 has been amended severally, including at one time, amendments to increase the threshold for a party to be recognized as Official Opposition, introduction of an Opposition Caucus and the current definition of a parliamentary party, which means a party or a coalition of parties consisting of not less than 5 per cent of the membership of the National Assembly.

Hon. Members, may I now address the five matters that I had isolated at the onset as requiring my guidance. First, you will note that Standing Order No. 173 provides that the Committee on Selection shall, in consultation with parliamentary parties, nominate Members who shall serve on a select committee. As earlier stated, Standing Order No. 2 defines a parliamentary party as a party or coalition of parties consisting of not less than 5 per cent of the membership of the National Assembly, which is essentially 18 Members. We are alive to the fact that not all parties represented in the House met the threshold for being recognized as parliamentary parties under Standing Order No. 2. Indeed, looking at the current representation of this House *vis-a-vis* the definition of what constitutes a parliamentary party, permit me to note the following eight facts, which are of significance to me:

1) The total membership of the National Assembly currently stands at 348 Members, noting the vacancy with respect to Msambweni Constituency.

2) In terms of political parties, there are 21 parties with representation in the House, out of which, only three meet the threshold of parliamentary parties.

3) Standing Order No. 2 recognizes coalitions and as such, several other political parties represented in the House qualify as parliamentary parties courtesy of their pre and post-election coalition agreements. In this regard, out of the 21 parties represented in the House, the Jubilee Coalition — now comprising of the Jubilee Party, which has 172 Members, the Kenya African National Union (KANU), which has 10 Members, and the Party for Development and Reform (PDR), which has four Members — has a combined total of 186 Members.

4) The National Super Alliance (NASA) Coalition, has a total of 126 Members made up of the Orange Democratic Movement's (ODM) 73 Members, Wiper Democratic Movement Kenya's (WDM–K) 23 Members, Amani National Congress' (ANC) 14 Members, Ford - Kenya's 13 Members, Chama Cha Mashinani's (CCM) two Members and the Chama Cha Uzalendo Party with one Member.

5) There are 12 other parties with representation in the House according to the records availed to my office by the Registrar of Political Parties vide a letter dated 8th June 2020, which was yesterday. The 12 parties do not belong to any coalition. These are the Economic Freedom Party (EFP) with five Members in the National Assembly, the Maendeleo Chap Party (MCCP) with four Members, the Kenya National Congress Party (KNC), the People's Democratic Party (PDP) and the Kenya Patriots Party each with two Members; the Democratic Party of Kenya (DP), the Party of National Unity (PNU), Frontier Alliance Party (FAP), the National Agenda Party of Kenya (NAPK), the New Democrats (ND) and the Muungano Party, each with one Member in the National Assembly and the Movement for Democracy and Growth Party (MDG) to which the Member for Ugenya belongs. In terms of total membership, these parties, which do not fall within the definition of parliamentary parties, have a total membership of 22 Members.

6) There are 14 elected independent Members in the House. Since each of them ought to be independent from the other and are not political parties, none of them would sit at the bargaining table — as was the practice in the 7th Parliament — reserved for parliamentary parties, even if they were to number more than 18 cumulatively.

7) Adding the number of Members belonging to parties which are neither parliamentary parties nor in coalition with any parliamentary party, together with the number of independent Members, they total 36 Members.

8) Save for 20 slots reserved by the Standing Orders for parliamentary office holders, there are currently 622 committee slots in the committee system of this House, which ideally, ought to have been shared amongst the membership in a fair and transparent criteria in keeping with the full expectations of the constitution and the provisions of Standing Order No. 174.

Hon. Members, with these facts in mind, the questions that confront the Speaker are, how should the 36 Members, get to sit in committees? If they are already members of committees, is Standing Order No. 176 available to a parliamentary party for the party to exercise the discharge powers therein, and discharge any of the 36 Members from the committees?

Hon. Members, Article 1 of the Constitution provides for the sovereignty of the people of Kenya, and spells out the manner in which the people of Kenya can exercise their sovereign power. In particular, Article 1(2) provides that the people may exercise their sovereign power either directly or through their democratically elected representatives. It, therefore, follows that each elected representative in this House, whether elected through a parliamentary party, a party other than a parliamentary party, or indeed, an independent Member exercises the sovereign power of the people the Member represents in the House. This is also why Part 3 of Chapter 7 of the Constitution — on the representation of the people, which is a whole part with various provisions on political parties — does not distinguish between parliamentary parties and other parties.

It deliberately refers to all political parties. To interpret, therefore, that the Members from parties other than parliamentary political parties, should be disfranchised due to their few numbers in the House, is to introduce a criteria that is not contemplated in the Constitution. Moreover, Article 85 of the Constitution recognizes and permits any person to stand as an independent candidate for election if the person is not a Member of a political party. It cannot, thereafter, be that independent Members who are also democratically elected representatives of the people for purposes of Article 1 of the Constitution, should be excluded from sitting in committees or the business that they do not belong to a parliamentary party. Suffice to say, no rule or interpretation can be used to take away, disadvantage, limit, stifle, or restrict that which the Constitution has laid out in plain and clear terms as being permitted. To do so would be an attempt to rewrite the Constitution without amending it.

Hon. Members, Article 95 of the Constitution is also clear on the role of a Member of Parliament in the National Assembly, which includes representation, legislation, oversight, budget making and vetting of public appointees among other key roles. Undoubtedly, this is one of the architectural features and designs of a Presidential system of governance, where every representation counts and every Member in the House counts. If a Member of Parliament (MP) is to discharge these duties through committees, would it hold that, a Member should be denied the right to exercise these functions on the basis that he or she belongs to a party other than a parliamentary political party or is an independent Member? If that were the case, would this also imply that the people of the constituencies represented by such Members ought to be disenfranchised by being excluded from having a fair chance to participate in the parliamentary aspects that take place in Committees? This definitely cannot be the case and to argue otherwise would severely negate the principle of participation of the people through their democratically elected representatives, which is enshrined in our Constitution.

In addition, while appreciating that Kenya is a multiparty democratic State as spelt out in Article 4 of the Constitution, you will agree that in so far as representation is concerned, it is not the intention of this provision to inhibit the participation of any Member of the House from undertaking the collective roles and functions of Parliament and the National Assembly in particular, as provided for under Articles 94 and 95 of the Constitution, on account of

the medium under which the Member was elected or nominated into the House. Further, my reading of Article 85 does not, in any way, imply that Members elected as Independent candidates are less important legislators.

It is also notable that Standing Order No. 174 (2) provides as follows:

> "*(2) Despite paragraph (1), a Member belonging to a party other than a parliamentary party or Independent Member may be nominated to serve in a Select Committee and the allocation of membership of Select Committees shall be as nearly as practicable proportional to the number of Members belonging to such parties and Independent Members*."

It is, therefore, clear that a Member belonging to a party other than a parliamentary party is equally entitled to serve in a Committee of the House. That provision in our Standing Orders even contemplated a situation where a substantial number of Members of the House would belong to small parties or would be Independent Members. The manner in which Standing Order No. 174 (2) is couched also finds its footing from other comparable Commonwealth jurisdictions and according to the latest Commonwealth Parliamentary Association Recommended Benchmarks for Democratic Legislatures on Committees Organisation allow me to quote: "*The Legislature's assignment of Committee Members on each Committee shall include both majority and minority party Members and reflect the political composition of the legislature*."

I wish to emphasise the words "*reflect the political composition of the Legislature*" because this is what Standing Order No. 174 (2) tries to achieve by recognising that a Member belonging to a party other than a parliamentary party is equally entitled to serve on a Committee of the House. Otherwise, Committees without such Members cannot be said to be reflective of the political composition of the Legislature.

Undoubtedly, we must be alive to the fact that this House has composition not just from the parliamentary parties but from other parties and Independents. This must be reflected in our committees. It is one which cannot be wished away because even looking at the statistics from the 11th Parliament to date, the composition of the membership of this House has seen more Members from small parties and Independents being elected to the House. Certainly, this may arguably continue to grow exponentially in an upward trajectory even in the future. It is, therefore, obviously erroneous to advance the idea that the Constitution or the Standing Orders envisaged that Committees are a preserve of the parliamentary parties, to the exclusion of the Independent Members and Members belonging to small parties. This settles the first and second issues that required my determination.

In addressing the third issue, I reflected on the views advanced by the Leader of the Minority Party that Members belonging to parties other than parliamentary parties and Independent Members ought to choose and align themselves to the existing parliamentary parties so as to earn consideration for a slot in Committees. While in so arguing, the Leader of the Minority Party, Hon. John Mbadi, was perfectly within his right, it is my considered view that that position does not stand well with the provisions of Articles 94, 95 and 103 of the Constitution and Standing Order No. 174 (2).

It is instructive to point out that Article 103 of the Constitution provides, among other things, the ways by which a Member of this House vacates his or her seat. One of the ways being, if having been elected as an Independent, the Member joins a political party. It, therefore, would not hold that we force Independents to align themselves with any party. Ideally, a Member elected on a political party ticket is so elected based on a resolve to ascribe to the party's

philosophy, manifesto and ideals. Similarly, a Member elected as an independent candidate does so as a matter of principle due to political circumstances or for other reasons known to him or her. Therefore, to resort to coercing such Member to affiliate with a parliamentary party so as to earn a slot in Committees, notwithstanding that they possibly were competitors in the elections, is essentially to compel them to denounce their stand in exchange for the committee slot. The consequence of such a move may expose him or her to the sanctions contemplated under article 103 (1) (e) of the Constitution as read together with Section 14 of the Political Parties Act, 2012 which I have already indicated.

To advance the view of the Leader of the Minority Party that an Independent Member or one from a small party ought to be aligned to a parliamentary party to earn a slot in the Committee would amount to assuming that the three parliamentary parties have the authority to shut the door of this Chamber from any Member who is independent and is elected on a small party and admit such Member into the Plenary only if he or she undertook to align with the parliamentary parties.

Ideally, as is the practice in the Chamber and the Committee system of many other multiparty legislatures, the issue of lobbying and enticing the smaller parties comes in after they are already in the Committees as Members. It is, therefore, inconceivable that the Constitution and Standing Orders contemplated that an Independent Member or a Member belonging to a party other than a parliamentary party would get to sit in a Committee only if they are affiliated with a parliamentary party. Since Standing Order No.174 (2) is clear, I must assert, respectfully so, that I find the opinion that Members belonging to parties other than parliamentary parties and Independent Members ought to choose and align themselves to the existing parliamentary parties so as to earn consideration for a slot in Committees as being a perfect example of misapplication of the Constitution and Standing Orders.

Let me now turn to the fourth issue of whether a parliamentary party may exercise the discharge powers of a party under Standing Order No. 176 to remove a Member who is not a Member of the particular parliamentary party or coalition of parties from a Committee, on the basis of having granted the Member the nomination to the Committee. To address that question, I will refer to the provisions of Standing Order No.176 which provide for the discharge of members from committees. In particular, Standing Order No. 176 (1) provides:

> *"(1) A parliamentary party may discharge a Member from a Select Committee after according the Member an opportunity to be heard*."

A fair reading of the same Standing Order indicates that the responsibility of discharging Members from Committees is placed on parliamentary parties. From the outset, the question of who donated the position occupied by the Members belonging to parties other than parliamentary parties or Independent Members is no longer tenable. This is because, as I have already observed from the three preceding questions I have addressed and the plain reading of Standing Order No. 174 (2), all Members should have a fair chance to sit in at least one Committee, without appearing to entreat or beg any other party for a reasonable opportunity.

If that is not what actually transpired in the composition of the current committees, it is said that two wrongs do not make a right. As leaders, we ought to correct the wrongs whenever we encounter them. To this end, it is apparent that no parliamentary party may discharge a Member, unless the Member belongs to or formally affiliates with the parliamentary party, by way of a coalition agreement, as contemplated under the Political Parties Act. This is because the exercise of the discharge powers under Standing Order No. 176 ought to be exercised by a parliamentary party only on Members belonging to that party.

Hon. Members, in the case of the Member for Ugenya, it is a fact that he was elected on the platform of the Movement for Democracy and Growth (MDG) Party. He is the single Member who is elected in this House on that Party's ticket. To the best of my knowledge and from the information availed to my office by the Registrar of Political Parties yesterday, the MDG Party is not part of the parties which form the Majority Party or Minority Coalition in the House. It, therefore, follows that neither the Minority Party nor the Majority Party may exercise the discharge powers under Standing Order No. 176 on the Member for Ugenya at the moment.

On the secondary question of whether the Committee on Selection acted equitably in allocating the Member for Ugenya one committee, Standing Order No. 174 is clear on the criteria that is used by the Committee on Selection to nominate Members to serve in a select committee. This includes ensuring that the allocation of membership of select committees is as nearly as practicable proportional to the number of Members belonging to parties other than parliamentary parties and independent Members. However, it is notable that Standing Order No. 174(3) further provides:

> "*Except as the House may otherwise resolve, on the recommendation of the Committee on Selection for reasons to be stated—*
>
> (a) *no Member shall be appointed to serve in more than two Departmental Committees*."

It is, therefore, clear within the prerogative of the Committee on Selection to nominate Members to serve in at least one or more committees. It, therefore, follows that the jurisdiction to determine whether the Member should serve in one or two committees lies with the Committee on Selection and this House when approving the Motions for appointment of Members to respective committees.

Hon. Members, let me now address the final question of whether there is a lacuna or misapplication of the Standing Orders with respect to nomination to or discharge of Members from committees and what would be an appropriate remedy. As I have observed, it is incorrect to assume that the Constitution or Standing Orders envisaged that committees are a preserve of parliamentary parties, to the exclusion of the independent Members and Members belonging to small parties. In this regard, the primary formula of allocation of Members to serve in committees ought to have embraced a criterion where a proportion of total membership to committees would be allocated to parliamentary parties based on their relative majorities but at the same time also reserve a proportion of seats for independent Members and Members who belong to parties that are not parliamentary parties. To guarantee fairness, the criterion ought to look at the totality of slots available, isolate the slots that are to be shared by parliamentary parties and share out to the existing parliamentary parties in accordance with their numerical strength in the House as required under Standing Order No. 174(1) (a). When it comes to Members who belong to parties other than parliamentary parties and the independents, the criterion ought to ensure that such Members serve in at least one committee, as required under Standing Order No. 174 (2). This will correct the misapplication of the Standing Orders and the erroneous impression that such Members must first affiliate with parliamentary parties to serve in committees.

Having said that, I am inclined to observe that part of the terms in Standing Orders No. 173, 174 and 176 as currently couched do not guarantee fairness to independent Members and Members belonging to political parties other than parliamentary parties. For instance, Standing Order No. 173(1) on Nomination of Members of Select Committees provides as follows:

"(1) Unless otherwise provided by any written law or these Standing Orders, the Committee on Selection shall, in consultation with parliamentary parties, nominate Members who shall serve on a select committee."

As presently framed, the provision does not contemplate consultations with the independent Members or political parties that do not meet the threshold which is set out in the Standing Order No. 2 for recognition as parliamentary parties. Political parties may have to designate a spokesperson to advance their interests even when they do not qualify to be a parliamentary party. The case is worse for the independents because, as a matter of fact, each independent Member is independent of the other and no matter how many they could be in the House, they cannot be construed as a political formation. While parliamentary parties ordinarily consult with the Committee on Selection through their party Leaders and Whips, there is no mechanism in the Standing Orders for consultations with smaller political parties and independent Members when it comes to sharing of the slots in select committees.

Hon. Members, however, allow me to note that even with the shortcomings that are occasioned by the manner in which Standing Order No. 174(2) is couched, it envisaged a ratio in which the slots to committee membership would be shared taking into account the independent Members and Members belonging to parties other than the parliamentary parties. Therefore, it is obvious that at the commencement of this Parliament, there was a misapplication of the Standing Order in the criterion that was used to share committee slots. In the end, the criterion used did not ensure that the independent Members and Members who belong to parties other than parliamentary parties got their rightful share in committee membership.

Taking into consideration the 622 slots available for sharing out, a fair criterion that is in keeping with the provisions of Standing Order No. 174(2) ought to have been arrived at committees' distribution outcome which is approximately close to the following quotas:

1) The Jubilee Coalition with a combined total of 186 Members in the House is entitled to a total of 330 slots spread out in committees to be shared among the Members of the three Parties that form the Jubilee Coalition: Jubilee Party (JP), Kenya African National Union (KANU) and Party of Development and Reforms (PDR);

2) The National Super Alliance (NASA) Coalition which comprises the Orange Democratic Movement (ODM), Amani National Congress (ANC), Forum for the Restoration of Democracy-Kenya (FORD-Kenya), Chama Cha Mashinani Party (CCM) and Chama Cha Uzalendo (CCU) is entitled to a total of 226 slots in committees to be shared out amongst the 126 Members who make up that Coalition;

3) The Economic Freedom Party (EFP) is entitled to a total of eight slots in the committees to share out among its 5 members;

4) Maendeleo Chap Chap Party (MCCP) is entitled to seven slots in committees to share amongst its four Members;

5) The People's Democratic Party (PDP), Kenya Patriots Party (KPP) and Kenya National Congress (KNC) which have two Members each are entitled to four slots each in committees;

6) The Frontier Alliance Party (FAP), Party of National Unity (PNU), the Democratic Party (DP), the National Agenda Party of Kenya (NAPK), Muungano Party, New Democrats and the Movement for Democracy and Growth (MDG) which have one Member each in the House are entitled to two slots per party in our committees;

7) The 14 independent Members are cumulatively entitled to share out 25 slots amongst themselves in committees.

From the numbers that are enumerated, it can be seen that there are 36 Members who are either Independent Members or from small parties that do not meet the threshold of parliamentary parties pursuant to the Standing Orders and are not in any coalition. These Members are thus cumulatively entitled to approximately a total of 66 slots out of the 622 slots available in Committees.

Hon. Members, with regard to discharge of Members from select committees, it is clear that Standing Order 176(1) does not contain mechanisms for discharging Members belonging to political parties other than a parliamentary party and the Independents. For avoidance of doubt, Standing Order No. 176(1) provides:

> *"(1) A parliamentary party may discharge a Member from a Select Committee after according the Member an opportunity to be heard."*

As Members may be aware, this provision was added to the Standing Orders at the tail-end of the last Parliament. By not providing for de-whipping of Members from political parties other than a parliamentary party and the Independents, the Standing Order leaves room for unwarranted speculations that parliamentary parties may stretch their tentacles to also discharge such Members even as such Members are also subject to the disciplinary sanctions of their respective primary parties, however small. Needless to say, the smaller parties which are not considered parliamentary parties have no effective avenue for discharging members.

Nevertheless, the Committee on Selection ought to be at liberty to propose to the House, reallocation of committee memberships to ensure a balance as envisaged under Standing Order No. 174(2).

Hon. Members, allow me to contrast the foregoing comparative cases from the sister Parliament of Uganda, which has a total of 83 Independent Members of Parliament. From a reading of Standing Order No. 157 of the National Assembly of the Republic of Uganda, entitlement of slots in committees in the Parliament of Uganda with respect to members elected through political parties is pegged on parties represented in Parliament without any thresholds being set. For Independent Members, the Standing Orders have assigned the responsibility to the Speaker in mandatory terms. A practice has also emerged where Independent Members elect one of them as the "*Dean of Independents*" who liaises with the Speaker in allocating seats to Independent Members.

In terms of discharge from select committees, the Standing Orders of the Parliament of Uganda vest the power to discharge party-sponsored members in the sponsoring parties, provided that the Member so discharged is relocated to another committee. It is noteworthy that, just like those of the National Assembly of Kenya, the Standing Orders of the Parliament of Uganda are silent on the discharge procedure for Independent Members. It is also good to appreciate that there are lessons that this House may draw from the Parliament of Uganda, particularly on the matter of ensuring fairness and equity in access to slots in select committees for all Members, irrespective of them belonging to a parliamentary party, political party other than a parliamentary party or independently elected.

Hon. Members, in the House of Commons of the United Kingdom, the Members of a select committee, other than a chair elected by the House, are appointed by way of a Motion in the House. Motions in respect of most select committees are made on behalf of the Committee of Selection. The House of Commons has endorsed a principle that, in proposing nominations

for select committee membership for the Committee of Selection or the Government to put to the House, parties should elect members of select committees in a secret ballot or whichever other transparent and democratic method they choose.

On the other hand, in the House of Commons of Canada, it is the House, and the House alone, that appoints the members and associate members to its committees, as well as the members who will represent it on joint committees. The Speaker has ruled that this is a fundamental right of the House. The committees themselves have no powers at all in this regard. In the vast majority of cases, the House sets the number, or the maximum number, of Members of each committee.

The number of members to be selected from each of the recognized parties is subject to negotiation among the parties at the beginning of each Parliament. The resulting agreement is not set down in the Standing Orders, but reflected in the composition of each committee, which generally reflects the proportions of the various parties represented in the House.

In the National Assembly of Zambia, the mechanism for establishing select committees is anchored in Standing Order No. 135. In a radical departure from the practice here and across jurisdictions, selection of members to select committees is domiciled in the Office of the Speaker. Standing Order 135 provides that:

> *"(1) Unless otherwise directed by the Standing Orders Committee, the Speaker shall determine the number of, and nominate, the members to serve in a select committee."*

Hon. Members, let me be clear that I have no intention of moving this House to domicile nomination of Members to serve on select committees to the speakership. What I am deducing from the said provision and that of Parliament of Uganda is that the mechanism for selecting members to serve in select committees is designed in a manner to afford every Member a fair opportunity to discharge their constitutional roles through committees, just as they do in the plenary. I can only urge the House to embrace that spirit and propose a mechanism to actualize it.

Hon. Members, turning to the question of appropriate remedy, there is need to review part of our Standing Orders relating to criteria for nomination to select committees and discharge of Members from committees. The review should not weaken the grip – and mark my words – that parliamentary parties have on allocation of slots in committees to their Members and invocation of the discharge rule as a tool for enforcing party discipline, but should stretch the democratic space in the House with a view to incorporating fairness and inculcating the expectations of Articles 1, 94, 95, 97 and 103 of our Constitution in the criteria for sharing of Committee slots. This will guarantee the right of every Member of this House to execute their constitutional roles, particularly budget-making, scrutiny of legislation and vetting of appointments that are carried out in Committees, without any curtailment in the Standing Orders.

In conclusion, Hon. Members, you will now agree with me that it will be procedurally improper and a sanction of recurrence of a procedural error, if I were to permit the discharge from committees, of Members belonging to small political parties and the Independents by parliamentary parties which have not entered into formal coalition agreements with those small parties. To this end, it is my considered view that I rule as follows:

1) THAT, the exercise of the discharge powers of a party under Standing Orders No. 176 is restricted to Members belonging to the particular parliamentary party and those from other smaller parties who have entered into formal coalition agreements;

2) THAT, no parliamentary party is to exercise the discharge powers of a party under Standing Orders No. 176 to remove a Member who is not a member of the particular parliamentary party from any Committee of the House, even on the basis of having granted the Member the nomination to the particular Committee, as that conception is based on misapplication of the Standing Orders;

3) THAT, since the Member for Ugenya Constituency, the Hon. David Ochieng, MP, neither belongs to any parliamentary party nor has his Movement for Democracy and Growth Party entered into a coalition with any of the parliamentary parties, the notice given by the Minority Party Whip to discharge him from the Departmental Committee on Health was erroneous ab initio and, therefore, invalid;

4) THAT, in view of the continued misapplication of Standing Order 174 by assuming that all committees' slots are reserved for the exclusive distribution to the membership of parliamentary parties thereby alienating the Independent Members and Members belonging to parties other than parliamentary parties, soonest possible, the Committee on Selection, in consultation with the Procedure and House Rules Committee, does devise criteria for nomination of Members to Committees that guarantees that Members who belong to parties other than Parliamentary parties and Independent Members also get their rightful share of the 622 slots available for sharing in Committees. This may include proposals for registration of desired committee(s) and the use of lots as a means of determining how to place such Members in their entitled slots, few as they may be.

5) THAT, the Procedure and House Rules Committee does initiate the process of proposing amendments to the Standing Orders so as to expressly provide for the said criteria. The Committee may also propose the manner of ordinary reallocations of the slots in committees, corporately reserved for Independent Members and parties other than parliamentary parties amongst the Independent Members and those belonging to the small parties that do not constitute parliamentary parties; and,

6) THAT, in the meantime, I will not admit any requests to discharge any Member who is an Independent Member or belongs to a party other than a parliamentary party from a Committee until such a time as the criteria has been developed or the Standing Orders accordingly amended to entrench fairness and justice to all.

The House is accordingly guided.

I thank you, Hon. Members."

PROCEDURE FOR THE REVOCATION OF THE APPOINTMENT OF A MEMBER OF THE PARLIAMENTARY SERVICE COMMISSION

Tuesday, 16th June 2020

Context:

1) *Whether the procedure employed in the appointment of a Member of Parliament to the Office of a Member of the Parliamentary Service Commission should mirror the procedure that would be applied in removing the person from office; and*

2) *Whether the removal of a Member of Parliament or non-Member of Parliament from the Office of a Member of the Parliamentary Service Commission ought to be proceeded with in accordance with the provisions of Article 251 of the Constitution as read with Standing Order 230 or otherwise as provided for in Section 10 of the Parliamentary Service Act, 2019.*

Decision of the Speaker:

1) *The procedure for the removal of a member of the Parliamentary Service Commission was as provided for in Section 10 of the Parliamentary Service Act, 2019, which is by a Motion proposed by a Member of Parliament on any of the grounds specified;*

2) *The Motion for removal of a member of the Parliamentary Service Commission could be filed in either Houses of Parliament. However, for good order, a Motion for removal of a Commissioner ought to start from the House that the Commissioner serves in as a Member;*

3) *In addition to the process being initiated by a Member of Parliament, any other person may petition a Member of Parliament to initiate the process of removal of a member of the Parliamentary Service Commission as envisaged under Section 10 of the Parliamentary Service Act, 2019;*

4) *Initiating the revocation of the appointment of a Member of the Parliamentary Commission was not the sole prerogative of a parliamentary party or coalition of parties which nominated the member for appointment. Any Member of Parliament could initiate the Motion;*

5) *For purposes of admissibility, a Notice of Motion for the revocation of the appointment of a member of the Parliamentary Service Commission must meet the thresholds set by the Courts, the Standing Orders and precedents of this House as to what constitutes gross violation of the Constitution or gross misconduct under the Constitution. This would include the requirement for the Notice of Motion to:*

   (a) *indicate the grounds which the member of the Commission is in breach of;*

   (b) *state with a degree of precision the provisions of the Constitution or any other written law that have been alleged to be violated, where the specified grounds relate to violation of the Constitution or any other written law, and*

   (c) *indicate the nexus between the Member and the alleged grounds on which revocation or removal is sought.*

6) *The removal process under Section 10 of the Parliamentary Service Act must also be guided by the provisions of Article 47 of the Constitution and the Fair Administrative Action Act No. 4 of 2015.*

"Honourable Members, this second Communication relates to the procedure for revocation of the appointment of a Member of the Parliamentary Service Commission (PSC). Hon. Members, you will recall that during the afternoon Sitting of the House on Tuesday, 2nd June 2020, the Member for Rarieda, the Hon. (Dr.) Otiende Amollo, rose on a Point of Order seeking guidance of the Speaker on, among other things, the applicable constitutional provisions with regard to a Member of the PSC.

The Hon. (Dr.) Amollo averred that the question of the procedure for removal from office of a Member of the PSC is one that touches on the Constitution, the Parliamentary Service Act, 2019 and the Standing Orders of this House and, therefore, requires clear demarcation.

Specifically, the Member sought the guidance of the Speaker on whether the removal of a Member of Parliament, or the non-Member of Parliament from the Office of a Member of the PSC ought to be proceeded with in accordance with the provisions of Article 251 of the Constitution as read together with Standing Order 230 or, otherwise, as provided for in Section 10 of the Parliamentary Service Act, 2019.

Several other Members spoke on the matter, including the Leader of the Minority Party, the Hon. John Mbadi, EGH, MP; the Member for Ugenya, the Hon. David Ochieng, MP; nominated Members, the Hon. David Sankok, MP and the Hon. Dennitah Ghati; the Member for Mathare, the Hon. Tom Oluoch, MP and the Member for Saku, the Hon. Ali Rasso, MP.

Hon. Members, while seeking direction on the matters at hand, Hon. Dr. Otiende Amollo also alluded to an intention by his party to institute "*changes in the composition of the Parliamentary Service Commission*". Out of abundance of caution, he sought the Speaker's direction on the proper procedural management of the process. He stated, and I quote:

> "*Hon. Speaker, I seek your guidance on the matter proactively to avoid contention and acrimony. I invite your guidance accordingly…*"

Hon. Members, having listened to the deliberations on the matter, I have deduced the following two issues as requiring my guidance:

1) Whether the procedure employed in the appointment of a Member of Parliament to the Office of a Member of the Parliamentary Service Commission should mirror the procedure that would be applied in removing the person from office; and,

2) Whether the removal of a Member of Parliament or non-Member of Parliament from the Office of a Member of the Parliamentary Service Commission ought to be proceeded with in accordance with the provisions of Article 251 of the Constitution as read with Standing Order 230 or otherwise as provided for in Section 10 of the Parliamentary Service Act, 2019.

Hon. Members, before I embark on the issue of removal of a Member of the PSC, allow me to revisit the purpose the Commission serves and pose some questions which are fundamental to this considered guidance.

For what reason was the Commission established and who does it serve? Does it exist to take care of the interests of parties, or Members, staff and the public at large? I find that a clear background on this will help us all in discerning the Parliamentary Service Commission and its performance against the role that it is supposed to play.

Hon. Members, allow me to take the House down the memory lane. The journey for the autonomy of the administration of the Legislature in Kenya begun during the 2nd Parliament when, on 20th March 1970, a Motion for a Resolution to give Parliament autonomy was introduced in the House by the late Hon. Jean Marie Seroney, then a Member of Parliament for Tinderet. However, the autonomy that Hon. Seroney sought was never realised and was not to be realised until the Eighth Parliament.

Some of you may recall that before 1999, the National Assembly was a Department under the Office of the President. At that time, the Office of the President determined Parliament's budget, staffing, remuneration, calendar as well as other parliamentary affairs. Members of staff were pooled from the mainstream Civil Service with all human resource matters being administered from the then Directorate of Personnel Management, or the "*DPM*" as it was then popularly known. The Eighth Parliament took a definite step aimed at attaining an autonomous and independent status for the National Assembly then.

Indeed, the Deputy Leader of the Majority Party, the Hon. Jimmy Angwenyi, MP, and the Member for Igembe North, the Hon. Maoka Maore, MP, will remember that it took the passage of the Constitution of Kenya (Amendment) (No. 3) Bill of 1999 to establish the Parliamentary Service Commission through the introduction of Sections 45A & 45B of the then Constitution. This was a great stride towards entrenching the independence of Parliament, which was followed by the introduction and enactment of the Parliamentary Service Act a year later on 28th November 2000.

From the onset, the inaugural Commission was established, among other things, to:

1) provide such services and facilities as are necessary to ensure efficient and effective functioning of the Assembly;

2) direct and supervise the administration of the services and facilities provided by, and exercise budgetary control over, the Service;

3) determine the terms and conditions of service of persons holding or acting in the offices of the Service;

4) from time to time as necessity arises, appoint an independent body to review and make recommendations on the salaries and allowances of the members of the Assembly;

5) initiate, co-ordinate and harmonize policies and strategies relating to the development of the Service;

6) undertake, singly or jointly with other relevant authorities and organisations, such programmes as would promote the ideals of parliamentary democracy in Kenya; and,

7) to do such other things, including review of parliamentary powers and privileges, as may be necessary for the well-being of the Members and staff of the National Assembly and to exercise such other functions as may be prescribed by or under an Act of Parliament.

Hon. Members, it is worth noting that most of these roles were carried over in the current Constitution and mainly seek to cement the independence of the institution of Parliament

from external control. In the present day, Article 127(6) of the Constitution provides for the responsibility of the Parliamentary Service Commission as being:

1) providing services and facilities to ensure the efficient and effective functioning of Parliament;

2) constituting offices in the parliamentary service, and appointing and supervising office holders;

3) preparing annual estimates of expenditure of the parliamentary service and submitting them to the National Assembly for approval, and exercising budgetary control over the service;

4) undertaking, singly or jointly with other relevant organizations, programmes to promote the ideals of parliamentary democracy; and,

5) performing other functions necessary for the well-being of the Members and staff of Parliament; or prescribed by national legislation.

Hon. Members, comparatively, in the United Kingdom, the House of Commons Commission is responsible for the administration and services of the House of Commons, including the maintenance of the Palace of Westminster and the rest of the Parliamentary Estate. Annually, the Commission presents to the House for its approval the Budget Estimates for the House of Commons' Administration, covering spending on the administration and services of the House for the financial year. The Commission is responsible for:

1) "*Providing the non-executive governance of the House by Members, but it does not manage day to day operations;*

2) Setting the number and pay of House staff in line with the civil service;

3) Appointing staff of the House (excluding the Clerk of the House of Commons, Serjeant-at-Arms and Speaker's personal staff;

4) Preparing and laying before the House the Estimates for the House of Commons Service;

5) Allocating functions to House departments; and,

6) Reporting annually to the House on its actions and on financial estimates for the financial year."

Hon. Members, it is, therefore, evident that the main purpose of a Parliamentary Service Commission is to ensure provision of services and facilities for Members of Parliament to enable them perform their duties. Put differently, a parliamentary service commission is designed as an independent parliamentary corporate body to oversee administration and management of the institution of Parliament. This independence is closely linked to the doctrine of separation of power among the arms of government as a hallmark of democratic governance. Members of Parliament ought to be accorded all the necessary facilitation, free from control by external forces, in the performance of their constitutional responsibilities. In support of these principles, Section III of the Commonwealth (Latimer House) Principles on the Three Branches of Government state in part:

"Independence of Parliamentarians-

(a) Parliamentarians must be able to carry out their legislative and constitutional functions in accordance with the Constitution, free from unlawful interference."

Hon. Members, with this background, allow me now to address the first issue of whether the procedure employed in the appointment of a Member of Parliament to the Office of a Member of the Parliamentary Service Commission should mirror the procedure that would be applied in removing the person from office.

To respond to this question, let us ask ourselves: How do Members of Parliament and the other two non-MPs get appointed to the Office of a Member of the Parliamentary Service Commission? You may recall that the Special Motion for the appointment of the current Members of the Parliamentary Service Commission who are Members of Parliament was considered and passed by the National Assembly on 2nd February 2018. During that afternoon Sitting, the Member for Rarieda rose on a point of order seeking clarification on the term of office of the members of the Commission in view of the provisions of Article 250(6)(a) of the Constitution. For clarity, the provision states:

"(6) A member of a commission, or the holder of an independent office—

(a) unless ex officio, shall be appointed for a single term of six years and is not eligible for re-appointment;"

In the ensuing deliberations, it was noted that the Parliamentary Service Commission, by design, is different from other Commissions. With regard to the term of office, it was noted that whereas Commissioners of other Commissions serve for a single term of six years, the members of the Parliamentary Service Commission serve for the term of Parliament, which is five years. Similarly, whereas Article 250(1) of the Constitution provides that each commission shall consist of at least three and not more than nine members, the Parliamentary Service Commission consists of 10 Members. Indeed, the Judicial Service Commission, which is also listed there, consists of 11 members and so, are the Commission for Revenue Allocation (CRA) and the Salaries and Remuneration Commission (SRC). They have more members than the nine. It was also observed that the appointment procedure for the Parliamentary Service Commission is primarily different from that of other constitutional Commissions listed in Chapter 15 of the Constitution. Notably, whereas the appointing authority in the case of the Parliamentary Service Commission is Parliament itself, commissioners of the other commissions are appointed by the President with the approval of the National Assembly.

Hon. Members, Chapter 15 of the Constitution establishes 10 Commissions and the two independent offices of the Auditor-General and the Controller of Budget. Article 248(1) of the Constitution outlines the manner in which Chapter 15 is to apply. It provides, and I quote:

"248. (1) This Chapter applies to the commissions specified in clause (2) and the independent offices specified in clause (3), except to the extent that this Constitution provides otherwise."

I lay emphasis to the phrase "*except to the extent that this Constitution provides otherwise*" as it is central to the questions at hand. The subsequent provisions in Chapter 15 outline general provisions that are to apply to Commissions and independent offices with regard to objects, authority and funding; composition, appointment and terms of office; removal from office; general functions and powers; incorporation; and reporting to the President and Parliament. These general provisions are to apply unless another specific provision of the Constitution provides otherwise with regard to a matter that they affect. The appointment and the removal from office of a Member of the Parliamentary Service Commission are matters that are, to a

certain extent, removed from the general application of Chapter 15 of the Constitution. As the House will note, Article 127 of the Constitution is the substantive provision of the Constitution which governs the affairs of the Parliamentary Service Commission. The Article provides in part, and I quote:

1) "*There is established the Parliamentary Service Commission.*

2) The Commission consists of—

a) the Speaker of the National Assembly, as chairperson;

b) a vice-chairperson elected by the Commission from the members appointed under paragraph (c);

c) seven members appointed by Parliament from among its members of whom—

(i) four shall be nominated equally from both Houses by the party or coalition of parties forming the national government, of whom, at least, two shall be women; and,

(ii) three shall be nominated by the parties not forming the national government, at least, one of whom shall be nominated from each House and, at least, one of whom shall be a woman; and,

(iii) one man and one woman appointed by Parliament from among persons who are experienced in public affairs, but are not Members of Parliament.

3) The Clerk of the Senate shall be the Secretary to the Commission.

4) A member of the Commission shall vacate office—

a) *if the person is a member of Parliament—*

(i) *at the end of the term of the House of which the person is a member; or,*

(ii) *if the person ceases to be a member of Parliament; or,*

b) *if the person is an appointed member, on revocation of the person's appointment by Parliament.*

5) Despite clause (4), when the term of a House of Parliament ends, a member of the Commission appointed under clause (2)(c) shall continue in office until a new member has been appointed in the member's place by the next House."

Hon. Members, from a close reading of this Article, you will observe that, indeed, the Parliamentary Service Commission (PSC) is *sui generis* — which is Latin for "*of its own kind*" — in a number of ways and departs from the general provisions of Chapter 15 of the Constitution in various specific aspects, including the following:

1) With regard to the membership of the Commission, PSC comprises of 10 members whereas the general composition of other constitutional commissions — except the ones I have named — is a minimum of three and a maximum of nine.

2) While there is general rule on the process of appointment of all members of commissions and holders of independent offices is by advertisement, conduct of interviews, forwarding of recommendations for nomination and eventually, appointment by the President with the approval of the National Assembly alone, the appointment of members of the PSC starts and ends in Parliament with the appointment being made by the two Houses.

3) Whereas Article 251 of the Constitution prescribes a standard single year term for members of other constitutional commissions and holders of independent offices under general procedure for removal from office that may be initiated by any person, Article 127 of the Constitution ties the term of the office of a member of PSC to the term of Parliament unless either a person ceases to be a MP or upon the revocation of their appointment by Parliament for both the member and the non-members of Parliament.

4) Unlike other constitutional commissions, the membership of the PSC is largely drawn from MPs and, indeed, out of the ten members of the Commission, eight are MPs.

5) The PSC and the Commission on Revenue Allocation (CRA) are the only constitutional commissions in which political parties largely nominate the membership.

6) Whereas in the case of all other commissions, members are not eligible for re-appointment upon serving for a term of six years, in the case of PSC, once a term of an MP ends, if the Member is re-elected, such a Member is still eligible for re-appointment to the Commission subject to a fresh process of re-appointment being undertaken by the Houses. This was the case in respect of the Member for Eldas Constituency, Hon. Aden Keynan, who is now serving his third consecutive term in the Commission.

7) Unlike other commissions where the Secretary is also the Chief Executive Officer (CEO) under Article 250 (12) of the Constitution, in the case of the PSC under Article 127 (3), the authority of the Clerk of the Senate is limited to being the Secretary to the Commission.

8) Whereas all other constitutional commissions under Article 251 on the removal process applies to all members of a commission and does not distinguish between a member or a chairperson, the Constitution provides specific procedures for the removal of the Speaker of the National Assembly, who serves as the Chairperson of the PSC and the Chief Justice, who is the Chairperson of the Judicial Service Commission (JSC), at Articles 106 (2c) and 168, respectively.

Hon. Members, this analysis of the differences I have just outlined, leads to two inescapable conclusions. The first conclusion is that Article 127 of the Constitution governs the appointment of a person as a member of the PSC. The second conclusion is that the same Article of the Constitution also governs the vacation from office of a person appointed to the PSC by Parliament. Save for the specific question that I have alluded to — which was asked by the Member for Rarieda on 22nd February 2018 regarding re-appointment of a member to the PSC in a new House — and which I comprehensively addressed at that time, we have not had any other queries on the process of appointment of persons to the PSC. The Houses have construed and settled on the interpretation that all members of the Commission, save for the Chairperson, are appointed by the Houses of Parliament and that has been the precedence even after the enactment of the 2010 Constitution. The process of how one gets into the Commission is, therefore, straightforward.

Hon. Members, the next step now is to draw a nexus between the appointment and the process of removal. That is, how a member of the PSC comes into office and how he or she may be removed. A reading of the provisions of Article 127 (4) (b) of the Constitution reveals that, if the member came to office by way of appointment, then his or her removal is arrived at by way of revocation of the appointment.

What follows then is for me to answer to the question: What is revocation? According to the Black's Law Dictionary edited by Bryan A. Garner, the term "*revoke*" is defined as the act of rescinding a decision. Further, according to Section 482 of the *Mason's Manual on Legislative Procedure* at page 319, and I quote: "*A legislative body can rescind an action previously taken, so long as no vested rights have arisen from the original action. The motion to rescind may be made at any subsequent meeting, as long as no rights have intervened and is not limited to any specific or particular time during which the motion can be made*."

Hon. Members, as mentioned earlier, political parties nominate members for appointment to the Commission by the House. It is left to the House to either accept to appoint the nominees or reject a person proposed for appointment. The word "*nominate*" as used in the various provisions of the Constitution relating to constitutional commissions and independent offices is not among the terms defined under Article 260 of the Constitution. But the Black's Law Dictionary defines the term "*nominate*" as the act of proposing a person for election or appointment. Thus, I am inclined to agree with the Members who are of the opinion that the approach employed to appoint a person into a constitutional office ought to be mirrored as closely as possible, in the method employed to remove the person from the office, thus implying revocation of appointment.

Hon. Members, now this brings me to the second question, which is between the provisions of Article 251 of the Constitution, as read together with Standing Order 230 and Section 10 of the Parliamentary Service Act 2019, which are the applicable provisions to be applied in the removal of a Member of Parliament or a non-member of Parliament from the office of member of the PSC. This is not the first time the Speaker has been confronted with this question. Indeed, by way of a letter dated 20th June 2018, the Minority Whip, Hon. Junet Nuh, sought my guidance on the process of the removal of a Member of Parliament appointed as a Commissioner to the PSC. For the benefit of the House, the substantive part of my brief response to Hon. Junet Nuh is as follows:

> "*Pursuant to the provisions of Article 127 (2) of the Constitution as read together with Section 51 of the Interpretation and General Provisions Act Cap 2, the procedure for the removal of a commissioner under Article 127 (2) paragraph C (i) of the Constitution is through a Motion for removal of the commissioner to the House, for its consideration and passage in terms of Article 122 of the Constitution regarding voting*."

Hon. Members, there are two things to note with regards to the guidance I gave to Hon. Junet at the time. The first one is that in referring to Section 51 of the Interpretation and General Provisions Cap. 2, I took cognisance of the inherent power of the House to revoke the appointment of a member of the Parliamentary Service Commission (PSC) as it is the only body mandated to appoint such a commissioner in the first place. Secondly, as Members are aware, no other specific provision outlining the procedure for the removal of a commissioner of the PSC was in place at the time. Consequent to that guidance, this House passed the PSC Act, 2019 outlining specific provisions on the procedure to be followed by the House to revoke the appointment of a commissioner to the PSC.

Before I examine the procedure for the removal of a commissioner of the PSC as provided for in the PSC Act, 2019, allow me to examine the provisions of Article 251 of the Constitution which provides for the procedure of the removal of a member of a constitutional commission. Article 251 of the Constitution provides that the member of a commission (other than an *ex-officio* member) or the holder of an independent office may be removed from office only on grounds specified, which include serious violation of the Constitution and gross misconduct.

A person desiring the removal of a member of a commission or a holder of an independent office on any grounds specified may present a petition to the National Assembly setting out the alleged facts constituting that ground. The National Assembly is then required to consider the petition and, if it is satisfied that it discloses the ground of a violation, sends the petition to the President. Subsequently, the President is mandated to constitute and establish a tribunal to investigate the matter expeditiously, report on the facts and make a binding recommendation to the President. From the foregoing, it is clear that an interpretation that Article 251 of the Constitution applies to the removal of Member of the PSC will not just be a departure of already established procedures and practices by the two Houses, but it would be an affront to the provisions of Article 127 of the Constitution for the following reasons:

1) The appointment of the members of the PSC is by Parliament and not by the President as is the case for all other constitutional commissions. To involve the President in the removal process would ignore this distinctive feature and would be tantamount to conferring upon an office which was not part of the appointment process with the power to get involved in the revocation;

2) This argument would fall flat against Section 51 of the Interpretation and General Provisions Act which is an established rule of interpretation that a person having the power to make an appointment also has the power to remove from office;

3) It is also worth noting that Article 251 of the Constitution only provides for removal of members of constitutional commissions by the National Assembly to the exclusion of the Senate. The appointment of members of the PSC as provided for in Article 127 of the Constitution is, however, by both Houses of Parliament. Consequently, to interpret that Article 251 of the Constitution applies in the removal process of members of the PSC would ignore two facts. First, the seven Members of Parliament to the Commission are nominated by political parties from both Houses of Parliament. Secondly, the appointment of the members of the Commission is done by both Houses of Parliament;

4) It is also worth noting that the PSC, unlike other commissions, was established for the sole purpose of serving both Houses of Parliament through provision of services and facilities to the MPs and staff. Article 251 of the Constitution, if applied, would also ignore the constitutional architecture of the PSC as envisaged in Article 127 of the Constitution by excluding one House in the removal process of commissioners; and,

5) The establishment of a tribunal by the President consisting of, among other persons, a person who holds or has held office as a judge of a superior court who shall be the chairperson and, at least, two persons who are qualified to be appointed as high court judges to investigate matters raised in a petition for removal also departs from Article 127 (4) of the Constitution on the revocation of appointment of a member of the PSC by Parliament. It, therefore, follows that if revocation of appointment of a Member of the Commission is by Parliament, then the body responsible for investigating, if any grounds levelled against a Member have been disclosed, can only be a body in Parliament and, in this case, being a select committee established for that purpose.

In view of the foregoing, Article 251 of the Constitution does not apply in the removal of a member of the PSC. It is, therefore, my view that the right procedure is one that contemplates revocation of appointment by Parliament, but at the same time, taking into account the need for clearly defined grounds for removal from office and the requirements of fair administrative action. This is the essence behind Section 10 of the PSC Act 2019. Looking at the Report of the Departmental Committee on Justice and Legal Affairs on the Parliamentary Service Bill, 2018, now an Act of Parliament, the Committee observed as follows on the procedure of removal from office of a member of the PSC on pages 35 to 39:

> *"It is notable that the Commission is one of the constitutional commissions listed in Article 248 of the Constitution and it would appear from the face of it as if the provisions of Article 251 of the Constitution on the procedure of removal of a member of a constitutional commission would apply. However, it is notable that Article 248 (1) of the Constitution provides that the provisions of Chapter 15, including Article 251 of the Constitution, apply except to the extent the Constitution provides otherwise. Article 127 of the Constitution is one exception of the application of the provisions of Chapter 15 and, in particular, on the composition, mode of appointment and the removal process of the commissioners of the PSC, among others."*

In this regard, the procedure for removal of a commissioner as espoused in Article 251 of the Constitution does not apply to commissioners of the PSC. A close reading of Article 127 of the Constitution reveals that Article 127 does not provide for the procedure of the removal of a commissioner from the PSC, save for it providence for the manner in which an office of a member of the Commission might become vacant. Therefore, there is need to anchor in law a procedure for the removal of commissioners. As drafted, the Clause suggests that the procedure under Article 251 should apply to the commissioners of the PSC contrary to the aforementioned advice by the Speaker and the provisions of Article 248 (1) of the Constitution.

Based on the observations, the Committee proceeded to propose an amendment which is currently Section 10 of the PSC Act, 2019. Section 10 of the Act provides as follows with regard to the procedure for removal of a member of the PSC.

"10 (1) A Member of Parliament supported by, at least, one quarter of the Members of the respective House may propose a Motion for the removal of a member of the Commission only for:

(a) Serious violation of the Constitution or any other law, including a contravention of Chapter 6;

(b) Gross misconduct whether in the performance of the member's functions or otherwise;

(c) Physical or mental incapacity to perform the functions of the office;

(d) Incompetence; and,

(e) Bankruptcy.

(2) If a Motion presented under (1) is supported by, at least, one-third of the Members of the respective House:

(a) The respective House shall appoint a Select Committee comprising of 11 of its Members to investigate the matter.

(b) The Select Committee shall within 10 days, report to the respective House whether it finds the allegations against the Member of the Commission to be substantiated.

(3) Where the Select Committee finds that:

(a) The allegations against the member of the Commission have not been substantiated, there shall be no further proceedings on the matter.

(b) The allegations against the member of the Commission, having been substantiated and the Motion is supported by a majority of all the Members of the respective Houses:

(i) The Speaker of that House shall inform the Speaker of the other House of the resolution within seven days.

(ii) The member of the Commission shall continue to perform the functions of the office pending the outcome of the proceedings under this Section.

(iii) The procedure prescribed in sub-sections (i), (ii) and (iii) shall apply with the necessary modifications to the consolidation of the Motion for removal of a member of the Commission by the other House.

(iv) If both Houses pass the Motion in the same form, the Member of the Commission shall stand removed."

Hon. Members, the Section outlines the steps that a Member of this House and the Senate may take to initiate and consider the removal of a member of the Parliamentary Service Commission (PSC) for specifically stated reasons. You will note that Section 10 of the Act reasonably satisfies the requirements of Article 47 of our Constitution regarding fair administrative action, as it replicates the character of Article 251 of the Constitution in terms of reasonableness, expeditiousness, due process and providing for a forum for fair hearing.

Hon. Members, however, I claim that Section 10 of the PSC Act, 2019 does not seem to prescribe any process which a member of the public may take to initiate removal of a member of the Commission for any of the stated reasons. Indeed, this procedure is similar to the one for the removal of a Cabinet Secretary (CS). Article 152(6) of the Constitution provides that a Member of the National Assembly may propose a Motion for removal of a CS. However, Article 152 of the Constitution, just like Section 10 of the PSC Act, 2019, does not provide for the procedure for removal of a CS by instigation of any other person other than a Member of the National Assembly. This, therefore, implies that in the case of the PSC, just like in the case of a CS, no other person can initiate the process for removal of a commissioner other than a Member of Parliament.

Does Section 10 of the PSC Act, 2019 lock out or bar any other person other than a Member of Parliament from initiating the removal process of a member of the PSC? It is my considered opinion that this is not the case. Certainly, any person may request or petition a Member of Parliament to propose a Motion under Section 10 of the PSC Act. Hence, the Section does not lock out other persons other than Members of Parliament from initiating the removal process. Therefore, as it stands, a Member of Parliament may initiate the removal from office of a member of the PSC through a Motion in line with the provisions of Section 10 of the Act. Any person may also request or petition a Member of Parliament to propose the Motion under Section 10 of the PSC Act. This, therefore, settles the question of which of the two provisions

applies to the removal of a member of the PSC.

Hon. Members, let me now turn to a secondary issue that was tendered by the Member for Rarieda who, in my view, while referring to abundance of caution, invited me to make my considered guidance as comprehensive as possible so as to avoid contention and acrimony. In doing so, I will remind the House what parameters ought to be taken into consideration in the employment of the process under Section 10 of the PSC Act, 2019. In giving this guidance, I must note that it is not the sole prerogative of a parliamentary party or coalition of parties which nominated a person for appointment to the Commission to initiate the revocation of the person's appointment. It is any Member of Parliament.

Upon appointment by Parliament as a member of the PSC, a Member of Parliament ascribes to a constitutional office on which the Constitution places strict and weighty obligations. Apart from discharging his mandate under Article 127 of the Constitution, Article 249 of the Constitution requires the Commission and each Member of the Commission by extension to:

1) Protect the sovereignty of the people;

2) Secure the observance by all State organs of democratic values and principles;

3) Promote constitutionalism;

4) Be subject only to this Constitution and the law; and,

5) Be independent and not subject to direction or control by any person or authority.

Indeed, the courts have also ruled in a number of cases on the independence of constitutional commissions. In particular, inferring on the High Court Case Miscellaneous Application No. 18 of 2017 involving Mr. Edward Ouko Versus the National Assembly which I make reference to paragraphs No. 138, 140, 141, 150 and 151 of its determination, the court observed as follows:

1) The independent offices and constitutional commissions are peoples' watchdogs and to perform their roles effectively, they must operate without improper influences, fear or favour;

2) Proceedings seeking the removal of a member of a constitutional office ought not to be taken lightly and, unless such proceedings strictly adhere to the law, the independence of the holders of such offices would be compromised;

3) Constitutional institutions ought to be accorded their due respect and deference and to unjustifiably malign the institutions and the holders of the institutions can be explained on the basis of impunity;

4) Constitutional commissions and independent offices must operate in an environment devoid of subjection to direction or control by any person or authority;

5) Article 249(2) of the Constitution expressly provides that the commissions and independent offices are subject only to the Constitution and the law; and finally,

6) The courts are constitutionally bound to protect the same constitutional commissioners and holders of independent offices from unlawful intimidation and harassment by any person or authority.

It appears, therefore, that the reading of the obligations of a commissioner of the PSC is incompatible with any assertion that a commissioner should behold partisan interests in the execution of his or her duties. This view is also supported by the Constitution in the manner it provides for the appointment and removal from office of members of two other commissions, Commission on Revenue Allocation (CRA) and Salaries and Remuneration Commission (SRC), as I will explain shortly. Article 215 (1) of the Constitution establishes the CRA and contains provisions on the nomination of certain persons for appointment as members of the Commission by parliamentary parties in the National Assembly and the Senate.

Article 215(2) of the Constitution reads:

> "The Commission shall consist of the following persons appointed by the President-
>
> *a) A Chairperson who shall be nominated by the President and approved by the National Assembly;*
>
> *b) Two persons nominated by the political parties represented in the National Assembly according to their proportion of Members in the Assembly;*
>
> *c) Five persons nominated by the political parties represented in the Senate according to the proportion of Members in the Senate; and,*
>
> *d) The Principal Secretary in the Ministry responsible for finance*."

Similarly, Article 230 of the Constitution establishes the SRC and provides for the nomination of certain persons for appointment as members of the Commission by the PSC and the Senate. Clause 2 of the said Article of the Constitution reads:

"The SRC consists of the following persons appointed by the President-

a) A Chairperson;

b) One person each nominated by the following bodies from among persons who are not members or employees of those bodies-

i. The Parliamentary Service Commission;

ii. The Public Service Commission;

iii. The Judicial Service Commission;

iv. The Teachers Service Commission;

v. The National Police Service Commission;

vi. The Defence Council; and,

vii. The Senate on behalf of the county governments;

c) One person each nominated by-

i. An umbrella body representing trade unions;

ii. An umbrella body representing employers; and,

iii. A joint forum of professional bodies as provided by legislation;

d) One person each nominated by-

i. The CS responsible for finance;

ii. The Attorney-General; and,

e) One person who has experience in the management of human resources in the public service, nominated by the CS responsible for Public Service."

Hon. Members, though the Constitution reserves special rights to certain entities in the nomination of persons for appointment to the CRA and SRC, it does not reserve equivalent rights to those entities with regard to the vacation from office of the nominees upon their appointment. Presently, any person may petition this House for the removal of any member of the two commissions under Article 251 of the Constitution, which may lead to the formation of a tribunal by the President. As such, it cannot be said that the vacation from office of a person nominated for appointment by a parliamentary party or a House of Parliament to the Commission on Revenue Allocation (CRA) or the Salaries and Remuneration Commission (SRC) is either predicated on a whim or is the sole prerogative of the parliamentary party or the House of Parliament.

Hon. Members, noting the participation of parliamentary parties' mode of appointment of Members of Parliament to the Parliamentary Service Commission (PSC) is not unique. Are the Members appointed to the PSC after being nominated by parliamentary parties beholden to the interests of the parties? In accordance with the provisions of Article 259 of the Constitution, I now have the unenviable task of applying specific provisions of the Constitution whilst construing the Constitution as a whole. In this regard, it appears that, upon appointment by Parliament as a member of the PSC, there exists no real or imagined hold on the Member by the parliamentary party which nominated him or her for the appointment.

The membership of the Commission cannot be equated to membership to a committee of Parliament from which a Member may be de-whipped under Standing Order 176. With these references, the House will agree that a Commissioner of PSC ought not be beholden to any partisan interests in the execution of his or her duties, as doing so, would be an affront to the Constitution.

Hon. Members, moving on, the question of the manner in which the process of removal may be initiated is inextricably linked to the form in which either the Motion by a Member in the case of the PSC or the petition by a member of the public in the case of constitutional commissions and independent offices under Article 248 of the Constitution is proposed or submitted respectively. The inclusion of independent offices and commissions in our Constitution is linked to the desire for decentralization by the people of Kenya.

They are vital to ensuring limited government interference and to play an important role in the pursuit of good governance and democracy in the country. It is for this reason that the constitution set high qualifications for appointment and specific grounds and thresholds for removal from such offices.

Those of you who were in the House during the Eleventh Parliament may recall that on Thursday, 22nd October 2015, I issued a Communication regarding the "*Processing of Special Motions on Removal of State Officers*". In the Communication, I reiterated the high threshold set by the Constitution on the removal of State officers. The Communication observed that Articles 145, 150(2), 152(6) and 251(2)(a) & (b) of the Constitution require, as a ground for

removal from the Office of the President, the Deputy President, Cabinet Secretary or member of a constitutional commission or independent office, a threshold of either gross violation of the Constitution or other laws or gross misconduct. Drawing from the decision of the High Court in the case of *Martin Nyaga Wambora & 30 Others vs the County Assembly of Embu & four Others (Embu Constitutional Petition Nos. 7 & 8 of 2014*[2] for a matter to amount to gross violation as a ground for removal from office, the following parameters ought to be satisfied:

1) the allegation must be serious, substantial and weighty;

2) there must be a nexus between the office holder and the alleged gross violations of the Constitution or any other written law;

3) the charges framed against and their particulars must disclose a gross violation of the Constitution or any other written law; and,

4) the charges as framed must state with degree of precision the provisions of the Constitution or the provisions of any other written law that have been alleged to be grossly violated.

Hon. Members, as I did guide the House at the time, the question of determining what constitutes gross violation of the Constitution or gross misconduct is one that clings and hangs on the impeachable authority of the House and is exercisable in two instances under the Standing Orders: Firstly, at the point of the approval of the Motion for impeachment or dismissal and secondly, at the point of investigations conducted by the relevant select committee.

Therefore, as an initial guidance on the matter, it should be noted that the Constitution has placed certain thresholds for the removal of State Officers from office. In practicing those provisions, Standing Order No. 47 (3)(b) and (e) requires the Speaker to take into account constitutional and evidential requirements while determining the admissibility or otherwise of a Motion, including all Special Motions brought under Part XIII of the Standing Orders, which relates to Special Motions. For that reason, and in the first instance, the Speaker is obliged to exercise his or her responsibilities under Standing Order No. 47 (3) whenever such a motion is submitted for approval.

Indeed, at the close of the 11th Parliament, the House amended the Standing Orders to entrench the thresholds established by the court in Standing Order 230 on the procedure for the removal from office of a member of a commission or the holder of an independent office. This high threshold should not be viewed as a barrier to removal from office, but rather, as a safeguard from any unjustified witch-hunt on members of independent offices and constitutional commissions. As Members are aware, under the provisions of Article 75(3) of the Constitution, a person who has been dismissed or otherwise removed from office for misconduct in a State office is disqualified from holding any other State office.

Indeed, Members must also be cautious to note that removal processes are aimed at checking on the conduct and capacity of members of the constitutional commissions and, hence, should not be instigated where there are no defined grounds touching on the competence, capacity and integrity of a commissioner.

Further, allow me to refer to the *High Court Petition No. 518 of 2013* in the matter of the Independence of Constitutional Commissions and Independent Offices between the *Judicial Service Commission versus the Speaker of the National Assembly* where the court observed as follows in paragraph 204:

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"*204. In that light, removal can be said to be the ultimate sanction in the oversight process which is otherwise routine. The ultimate threat of the sanction of removal is in and of itself, a tool for regulating the conduct of commissioners and independent office holders while in office. It is intended as the ultimate check on the competence, capacity and integrity of such commissioners and office holders. It is the oversight tool of last resort. The process of removal touches personally upon, and is concerned with, the conduct or capacity of individual members of a commission*".

Hon. Members, may I also remind this House that based on the precedents set in this House and our courts, any removal proceedings are bound to and must adhere to the provisions of the Constitution as entrenched in Article 47 and further extrapolated in the Fair Administrative Action Act No. 4 of 2015. As Members may be aware, removal proceedings of members of constitutional commissions are *quasi-judicial* in nature. The Black's Law Dictionary defines the terms "*quasi-judicial process"* as *"a term applied to the action of bodies which are required to investigate or ascertain the existence of facts, hold hearings, weigh evidence and draw conclusions from them as a basis for their official action and to exercise discretion of judicial nature*".

Hon. Members, the question that therefore arises is this: What does the law require of any person exercising a *quasi-judicial* function? Such a person must adhere to the requirements of fair administrative action. Article 47 of the Constitution which entrenches the right to fair administrative action provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

It is also a fundamental right that any person that has been or is likely to be adversely affected by administrative action; the person has the right to be given written reasons for the action.

The courts have also been very specific and emphatic on the need for Parliament to adhere to the requirements of the Fair Administrative Action in conducting removal processes of members of constitutional commissions and independent offices. For instance, in the High Court Case, Miscellaneous Application No. 18 of 2017, the one of *Mr. Edward Ouko versus the National Assembly and others,* a suit which the Member for Rarieda, Hon. Otiende Amollo, is certainly familiar with having been the advocate on record for the applicant, the then Auditor-General, Mr. Edward Ouko, the Court held, amongst others, and I quote paragraph 164:

"*In the premises, whereas I do not have any quarrel with the Respondents (National Assembly) powers to conduct the subject proceedings, such proceedings must comply with Article 47 of the Constitution and Section 4 of the Fair Administrative Action Act. In other words, the due process must be adhered to in the conduct of the said proceedings*."

Hon. Members, it is noteworthy that the proceedings of one of the committees of this House to remove the then Auditor-General were subsequently set aside for failure to adhere to the requirements of the Fair Administrative Action. Additionally, you may also recall the High Court Petition No. 518 of 2013 in the matter of the independence of constitutional commissions and independent offices between the *Judicial Service Commission (JSC) versus the Speaker of the National Assembly*. The subject matter of the particular case was a Petition that had been filed in this House seeking the removal of six JSC Commissioners. In the Petition, the Court also held as follows, in paragraphs 140 and 143, in a decision of a five-judge bench:

Paragraph 140: "*In addition to the requirement to act judiciously, a body exercising a quasi-judicial function must accord the parties a fair hearing*."

Paragraph 143: "*The right to a hearing and fair administrative action is no longer just a rule*

of natural justice, but is now a constitutional principle which applies in equal measure to all proceedings, investigations and hearings, whether judicial, quasi-judicial or administrative. Article 47 guarantees to everyone administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. The right to fair hearing is guaranteed under Article 50."

Hon. Members, to this end, I am in effect expected to examine whether a Special Motion as presented contains and meets the threshold of the grounds envisaged under the relevant articles of the Constitution and specifically, whether the facts as stated in the Motion amount to alleged gross violation of the Constitution or gross misconduct. In doing so, I must, as a matter of jurisprudence, be guided by the interpretation precedent set by the courts of law. I am bound to admit any Motion which meets the minimum requirements set by the Constitution, written law, our Standing Orders and the precedents of this House. I shall, however, not admit any whimsical attempt that does not meet the constitutional thresholds as stated.

Hon. Members, finally, as I conclude, I hasten to remind the House that I have consistently evaluated previous Motions for the removal of Cabinet Secretaries (CSs) and petitions for the removal of members of commissions and holders of independent offices without fear or favour. As Members will recall, during the 11th Parliament, I admitted the first Petition for the removal of the Members of the JSC in 2015 to be presented to the House. The House subsequently recommended that the President form a tribunal in the matter.

In the same vein, I admitted a Motion for the dismissal of the then CS for Education, the Hon. (Prof.) Jacob Kaimenyi; the Petition for the removal of the Commissioners of the Ethics and Anti-Corruption Commission (EACC) in 2011; and the Petition for the removal of the Chairperson of the EACC in 2016, among others. During the said 11th Parliament, I also declined to admit the second Petition for the removal of the Commissioners of the JSC and a Motion for the dismissal of the then CS for Planning and Devolution, Ms. Anne Waiguru, to name a few.

Hon. Members, in summary, therefore, I guide as follows:

1) THAT, the procedure for the removal of a member of the Parliamentary Service Commission is as provided for in Section 10 of the Parliamentary Service Act, 2019, which is by a Motion proposed by a Member of Parliament on any of the grounds specified;

2) THAT, the Motion for removal of a member of the Parliamentary Service Commission can be filed in either Houses of Parliament. However, for good order, a Motion for removal of a Commissioner ought to start from the House that the Commissioner serves in as a Member. Such sequence, would neatly sit with the provisions of Standing Order No. 257 regarding the process of acquiescence to a request for appearance of a Member of one House before the other House or before a committee of the other House;

3) THAT, in addition to the process being initiated by a Member of Parliament, any other person may petition a Member of Parliament to initiate the process of removal of a member of the Parliamentary Service Commission as envisaged under Section 10 of the Parliamentary Service Act, 2019;

4) THAT, initiating the revocation of the appointment of a Member of the Parliamentary Commission is not the sole prerogative of a parliamentary party or coalition of parties which nominated the member for appointment. Any Member of Parliament can initiate the Motion;

5) THAT, for purposes of admissibility, a Notice of Motion for the revocation of the appointment of a member of the Parliamentary Service Commission must meet the thresholds set by the Courts, the Standing Orders and precedents of this House as to what

constitutes gross violation of the Constitution or gross misconduct under the Constitution. This includes the requirement for the Notice of Motion to:

a) indicate the grounds which the member of the Commission is in breach of;

b) state with a degree of precision the provisions of the Constitution or any other written law that have been alleged to be violated, where the specified grounds relate to violation of the Constitution or any other written law; and,

c) indicate the nexus between the Member and the alleged grounds on which revocation or removal is sought.

6) THAT, the removal process under Section 10 of the Parliamentary Service Act must also be guided by the provisions of Article 47 of the Constitution and the Fair Administrative Action Act No. 4 of 2015.

The House is accordingly guided.

I thank you, Hon. Members."

REMOVAL OF CABINET SECRETARY FOR TRANSPORT, INFRASTRUCTURE, URBAN DEVELOPMENT AND PUBLIC WORKS

Thursday, 23rd June 2020

Context:

Admissibility of a Special Motion for the removal of the Cabinet Secretary for Transport, Infrastructure, Urban Development and Public Works, Mr. James Macharia, EGH, from office, as well as withdrawal of signatures by Members from a Motion that they had supported.

Decision of the Speaker:

1) *The Motion had fulfilled the precondition of requisite support under Article 152(6) of the Constitution and Standing Order 66(1), having been supported by 90 Members who had appended their respective signatures alongside the Motion; and*

2) *Whereas the particulars under each ground had been specified the proposed Motion failed because it was not accompanied by necessary evidence, including annexures or sworn testimonies in respect of the allegations.*

3) *Standing Order 66 (4) provides that any signature appended to a Motion of such kind cannot be withdrawn.*

"Honourable Members, I wish to notify the House that, pursuant to the provisions of Standing Order 66(1), on the 17th of June, 2020, the Clerk of the National Assembly did receive a Notice of Motion from the Member for Nyali Constituency, the Hon. Mohamed Ali Mohamed, MP, notifying his intention to move a Special Motion for the removal of the Cabinet Secretary for Transport, Infrastructure, Urban Development and Public Works, Mr. James Macharia, EGH, in accordance with the provisions Article 152(6) of the Constitution and Standing Order Nos. 64(1A) and 66. The proposed Motion seeks the resolution of the House to require His Excellency the President to dismiss the said Cabinet Secretary from office on two grounds, which are:

1) Gross violation of Articles 10(1)(c) and 2(a) and 73 of the Constitution; and,

2) Gross misconduct contrary to Article 125 of the Constitution.

Hon. Members, from the outset, allow me to observe that I have previously guided this House on the processing of special motions for the removal of state officers, including on the thresholds that must be met and adhered to. Consequently, I will not attempt to restate my guidance.

Further, as you are aware, every Member has the right under Article 152(6) of the Constitution and Standing Order 66, to move the House to remove from office the Cabinet Secretary. The Standing Orders require that before giving notice of such a Motion, under Standing Order 66, in the House, the Member must deliver to the Clerk a copy of the proposed Motion in writing,

stating the grounds and particulars in terms of the said Article upon which the proposed Motion is made. The notice ought to be signed by the Member and signed in support by, at least, one quarter of all Members of the National Assembly, who are 88 Members of this House.

Hon. Members, Standing Order 47(3) and indeed, my previous communication on this matter, requires that upon receipt of the proposed notice of Motion, the Speaker is to make a determination on its admissibility and dispose of the Motion within three days. The criteria for admissibility is provided for under Standing Orders 64 (1A) and 66, and the precedents contained in my previous communication on Motions and procedure for removal of persons from constitutional offices.

In furtherance to the provisions of Article 259 (5) and (6) of the Constitution regarding the counting of time, today's Sitting provides the earliest opportunity for me to make the decision on the proposed Motion known to the House, since three days ended yesterday, which was not a sitting day.

In this regard, Hon. Members, I wish to observe as follows:

1) It is evident that the Motion proposed by the Hon. Member for Nyali Constituency has fulfilled the precondition of requisite support under Article 152(6) of the Constitution and Standing Order 66(1), having been supported by 90 Members who have appended their respective signatures alongside the Motion; and

2) Whereas the Hon. Member has specified the particulars under each ground and also cited Articles 10, 73 and 125 of the Constitution as the provisions that the Cabinet Secretary has allegedly violated, the proposed Motion fails on one important requirement. Standing Order 64(1A) requires that a proposed Motion be accompanied by necessary evidence, including annexures or sworn testimonies in respect of the allegations.

Indeed, the only way that the Speaker is able to make a determination as to whether the particulars provided under each ground may contain a gross violation of the Constitution or gross misconduct is by examining the evidence so provided in support of the allegations before approving the Motion. The Notice of Motion by the Member for Nyali Constituency lacks any annexures or sworn testimonies or any other evidence thereto. In the circumstances, I am unable to confirm whether the allegations contained in the Notice meet the threshold or, indeed, whether there is any nexus between the allegations and the role of the Cabinet Secretary as required by the Standing Orders.

Hon. Members, to admit a proposed Motion that is not supported by any evidence of how, for instance, the Cabinet Secretary has grossly violated the Constitution by failing to conduct public participation in implementing policy decisions at the Ministry or allegedly failed to deliver on key infrastructure, as alleged by the Hon. Member for Nyali or even the alleged loss of Kshs. 5.2 billion at the Ministry of Health, would not only be a violation of the Standing Orders, but would amount to enjoining the House to go on a wild goose chase.

Hon. Members, in view of the foregoing and pursuant to the provisions of Standing Order 47 (3) (a) and (e), it is therefore my determination that the proposed Motion by the Hon. Member for Nyali Constituency is inadmissible having failed to comply with the provisions of Standing Order 64 (1A)(c). Consequently, the Clerk is hereby directed to formally communicate this decision to the Hon. Member.

Hon. Members, it is also important to mention that I have received requests from a number of Members claiming to desire to withdraw their signatures from the Motion. The Hon. Members include Hon. John Paul Mwirigi, Hon. (Dr.) Makali Mulu, Hon. Charles Nguna, Hon. David

Mboni, Hon. Nimrod Mbai, Hon. (Ms.) Edith Nyenze, Hon. (Dr.) Irene Kasalu, Hon. Thuddeus Nzambia, Hon. Joshua Kivinda, Hon. Moses Kirima and Hon. (Ms.) Nasri Ibrahim. May I restate the provisions of Standing Order 66 (4), which provide that any signature appended to a Motion of this kind cannot be withdrawn.

It is expected that a Member of Parliament acclimatises himself or herself with the contents of a Motion or a notice thereof, before appending a signature. It may be remembered that the foundation of Standing Order 66(4), which is meant to provide a transparent process for actualising the provisions of Articles 144(1), 145(1) and 152(6) of the Constitution, was contained in my communication of 23rd October 2015 during the 11th Parliament.

The Hon. Members and the House are, therefore, accordingly guided and advised, as we continue to hold other State officers to account, never to append signatures to something that you do not understand. I thank you, Hon. Members."

CONCERNS REGARDING THE COUNTY ROADS, WALKWAYS AND PARKING BAYS BILL (SENATE BILL NO. 18 OF 2018)

Wednesday August 12, 2020

Context:

The Departmental Committee had objected to Second Reading of the County Roads, Walkways and Parking Bays Bill (Senate Bill No.18 of 2018) citing, among other defects, that the Bill sought to legislate on matters already provided for in law by various statutes and within the mandate of the national government.

Decision of the Speaker:

The Speaker ordered that further considerations of the County Roads, Walkways and Parking Bays Bill (Senate Bill No.18 of 2018) by the House be halted with immediate effect.

"Hon. Members, this second communication concerns issues raised regarding the County Roads, Walkways and Parking Bays Bill (Senate Bill No. 18 of 2018). As you will recall, Hon. Members, during Second Reading of the County Roads, Walkways and Parking Bays Bill (Senate Bill No. 18 of 2018) on 27th February 2020, several Members of this House, including the Chairperson of the Departmental Committee on Transport, Public Works and Housing, Hon. David Pkosing, whose committee is in charge of the Bill, raised various concerns regarding the said Bill. Specifically, the Chairperson informed the House that the Committee was opposed to do Second Reading of the Bill based on various considerations, as reflected in the Report of the Committee on the Bill.

For the information of the House, Hon. Members, the County Roads, Walkways and Parking Bays Bill (Senate Bill No. 18 of 2018) was published under Gazette Notice No. 81/2018 on 26th June 2018, in the name of Senator Ledama ole Kina, MP (Narok County) and was read a First Time in the National Assembly on 30th July 2019.

A technical review of the Bill was undertaken and concluded on 26th September 2019, following which the Bill was granted to go ahead for Second Reading. The Second Reading of the Bill commenced on Thursday 27th February 2020. I, thereafter, suspended debate on the Bill pending my determination on the various concerns raised by Members on the Floor of this House, on that day.

Hon. Members, the Bill's initial title was, *"The County Planning (Roads, Pavements and Parking Bays) Bill,"* but was renamed *"The County Roads, Walkways and Parking Bays Bill",* through an amendment in the Senate. As regards to its objectives, the Bill seeks to provide for the planning, construction and maintenance of county roads, streets, lanes, alleys, parking bays, drainage systems and walkways. It also seeks to provide for proper planning of access ways to commercial buildings along major roads, and further provides an outline of duties of the member of the county executive committee, responsible for matters relating to roads in each county.

Hon. Members, following the concerns raised regarding the Bill and following my analysis of the proposed piece of legislation, I have made the following observations:

1. The Bill provides for matters already provided for in law specifically in the following Statutes:

(a) The Physical Planning and Land Use Act, No. 13 of 2019;

(b) The Kenya Roads Act 2007;

(c) The Traffic Act Cap 403;

(d) The Public Roads and Roads of Access Act Cap 399;

(e) The Streets Adoption Act Cap 406;

(f) The Persons with Disabilities Act 2003; and

(g) The Urban Areas and Cities Act No. 13 of 2011.

2. The Bill does not propose to amend or repeal any of the aforementioned Acts of Parliament.

3. There is already in law, at the national level, the element of spatial planning before a road is constructed or a market centre is established and, hence, there is no need to legislate.

4. The Bill seeks to set standards for the construction of roadways, parkways and other public amenities, which is contrary to Paragraph 18 of Part 1 of the Fourth Schedule to the Constitution, which places the following areas under the mandate of the national Government:

(a) Roads traffic;

(b) The construction and operation of national trunk roads; and

(c) Standards for the construction and maintenance of other roads by counties.

5. The Bill further purports to address construction and maintenance, both of which are under the purview of the national Government.

6. The Bill is more administrative than legislative in its approach.

7. The Bill is materially defective, both constitutional and legal aspects.

Hon. Members, it is on the basis of these observations that I hereby rule that, further considerations of The County Roads, Walkways and Parking Bays Bill (Senate Bill No.18 of 2018) by this House be halted with immediate effect.

I thank you, Hon. Members."

APPROVAL OF RELEASE OF 50 PER CENT OF THE EQUITABLE SHARE OF THE NATIONAL REVENUE

Tuesday, 8th September 2020

Context:

Approval of the House for the release of 50% of the equitable share of the national revenue that was allocated to the county governments in the Division of Revenue Act 2020 to the forty-seven (47) county governments.

Decision of the Speaker:

1) *Replicating a "Vote-on-Account" procedure to allow disbursement of funds to the county governments pending the passage and assent of the County Allocation of Revenue Bill required legislative grounding in the Constitution or an Act of Parliament;*

2) *The Leader of the Majority Party and the Leader of the Minority Party to urgently engage the Senate Majority Leader and the Senate Minority Leader to fast-track the consideration and passage by the Senate of the Public Finance Management (Amendment) Bill, 2019 (National Assembly Bill No.63 of 2019) with appropriate amendments to entrench the procedure for the withdrawal from the Consolidated Fund in law in the event of any delays in the passage of the annual County Allocation of Revenue Act;*

3) *The House Business Committee and the Budget and Appropriations Committee prioritize the consideration of the Senate's Amendments, if any, to the Public Finance Management (Amendment) Bill, 2019 (National Assembly Bill No.63 of 2019) over any other business once the Schedule of the Senate's Amendments was conveyed to the House by the Senate; and,*

4) *In the unlikely event that there was inordinate delay in the consideration, amendment and passage of the Public Finance Management (Amendment) Bill, 2019 (National Assembly Bill No.63 of 2019) by the Senate, the Budget and Appropriations Committee urgently cause the publication and introduction of a Bill proposing amendments to the Public Finance Management Act, 2012 to cater for interim disbursements to the county governments pending the enactment of the County Allocation of Revenue Bill.*

"Honourable Members, I wish to inform the House that I am in receipt of a letter from the Cabinet Secretary (CS) for the National Treasury and Planning, seeking the approval of the House for the release of 50 per cent of the equitable share of the national revenue that was allocated to the county governments in the Division of Revenue Act 2020 to the 47 county governments.

In the letter, the CS notes that the request was based on a legal opinion from the Attorney-General. The letter advises that a proposal by the National Treasury to release 50 per cent of the equitable share of revenue allocated to county governments in the Division of Revenue Act 2020 may only be done with the express authority of the National Assembly, pending the passage of the annual County Allocation of Revenue Act. The same is a withdrawal of funds from the Consolidated Fund. The advice of the Attorney General is drawn largely from the advisory opinion of the Supreme Court in reference to No.3 of 2019, which guided both Houses of Parliament on the appropriate course of action in the event of an impasse over

the passage of a Division of Revenue Bill, as was the case during the last session of the 12th Parliament.

Hon. Members, it is notable that the advisory opinion of the Supreme Court was specific to the Division of Revenue Bill 2019, in which case the court allowed the National Assembly to authorise the disbursement of monies to the counties in specific circumstances; one being whenever there is an impasse over the passage of a Division of Revenue Bill. Consequently, as indeed observed by the Attorney-General, the guiding advisory opinion of the Supreme Court in reference to No. 3 of 2019 may not be applied to a scenario other than that which was contemplated by the court at the time.

Hon. Members, in view of this and the request by the CS, therefore, the question that arises is: "*What decisive steps can the National Assembly take to address the situation, noting that the delay in the passage of the County Allocation of Revenue Bill 2020, due to the stalemate on the third formula on allocation of revenue to counties, is likely to stifle the operations of the county governments?*". In answering this question, one must examine the law, in particular the Constitution, Public Finance Management Act of 2012, Public Finance Management (National Government Regulations) 2015, and the Supreme Court Advisory Reference No. 3 of 2019.

Article 206 (2) of the Constitution requires the express authorisation or withdrawals from the Consolidated Fund, either by the Constitution or by an Act of Parliament. It provides that, "*Money may be withdrawn from the Consolidated Fund only:*

1) In accordance with an appropriation by an Act of Parliament.

2) In accordance with Article 222 or 223 of the Constitution.

3) As a charge against the Fund as authorised by this Constitution or an act of Parliament".

Hon. Members, for clarity, on its part, Article 222 of the Constitution authorises the withdrawal of funds from the Consolidated Fund for the operations of the national Government in the event that an Appropriation Bill has not been assented or is not likely to be assented to before the commencement of a financial year. This is the process that is referred to as Vote-on-Account in parliamentary parlance. It is a direct authorisation and does not require the passage of any additional legislation to effect the withdrawal.

Article 222 of the Constitution is the basis for Standing Order No. 242 of the National Assembly Standing Orders which outlines the procedure for a vote-on-account. The Constitution, however, does not expressly provide a similar mechanism to intervene for the counties when faced by a similar predicament. The Speaker of the Senate and I have been deliberating on this matter and we have reached a common considered view that replicating the Vote-on-Account procedure for the county governments would, therefore, require appropriate legislative grounding in the Constitution or through an Act of Parliament.

Hon. Members, as you are aware, Parliament passed the Public Finance Management Act of 2012 to operationalise Chapter 12 of the Constitution by providing for the effective management of public finances by the national Government and county governments; the oversight responsibility of Parliament and county assemblies; and the different responsibilities of Government entities and other bodies. Section 17 (4) of the Act embodies the provisions of Article 206 of the Constitution by requiring that where a withdrawal from the Consolidated Fund is authorised under the Constitution or an Act of Parliament for the appropriation of money, the National Treasury must make a requisition for the withdrawal and submit it to the Controller of Budget for approval.

Further, Section 205 (1) of the Act empowers the Cabinet Secretary for the National Treasury to make regulations, not inconsistent with the Act, on any matter that is necessary or convenient to be prescribed under the Act or for the carrying out or giving effect to the Act. In exercise of these powers, the Cabinet Secretary made the Public Finance Management (National Government) Regulations, 2015.

Hon. Members, I am constrained to note that the rest of the provisions of Section 205 of the Public Finance Management Act, 2012 require the express approval of any regulations made under the Act by both Houses before their coming into force. Notably, subsections 4, 5 and 6 of the Section provide:

> *"(4) Regulations under subsection (1) shall not take effect unless approved by a resolution passed by Parliament.*
>
> *(5) Regulations approved under subsection (4) shall take effect on the day after the date on which both Houses approved them or, if a later date is specified in the regulations, on that later date.*
>
> *(6) If a House of Parliament does not make a resolution either approving or rejecting any regulations within 15 sitting days after submission to it for approval, the House shall be deemed to have approved those regulations."*

From the available records of the House, the *Hansard* of the afternoon sitting of Tuesday 31st March 2015, there are records that the Regulations were tabled before the House by the then Leader of the Majority Party and subsequently committed to the Committee on Delegated Legislation for scrutiny. I directed the Committee to consider the Regulations jointly with the Budget and Appropriations Committee and the then Departmental Committee on Finance and National Planning and make appropriate recommendations to the House. Thereafter, it appears that by attrition of time, the Regulations stood approved by dint of the provisions of Section 205 (6) of the Public Finance and Management Act, 2012.

Hon. Members, Regulation 134 of the said Regulations provides for the transfer of the equitable share of national revenue to the counties before the approval of A County Allocation of Revenue Bill. In particular, it provides:

> *"if the County Allocation of Revenue Bill submitted to Parliament for a financial year has not been approved by Parliament or is not likely to be approved by Parliament by the beginning of the financial year, the Controller of Budget may authorise the withdrawals of up to 50 per cent of the Consolidated Fund based on the last County Allocation of Revenue Act approved by Parliament for the purposes of meeting expenditure of the county governments of the financial year".*

At face value, it may be argued that this Regulation effectively allows the Controller of Budget to disburse 50 per cent of the equitable share to be allocated to the counties in the previous year's Division of Revenue Bill pending approval of a County Allocation of Revenue Bill. Conversely, it may also be argued that the Regulations are not the Act of Parliament necessary to authorise withdrawal of funds from the Consolidated Fund as contemplated by Article 206 (2) of the Constitution. In light of the request by the Cabinet Secretary for the National Treasury and the advice given by the Attorney General, the second argument seems to carry more weight. If the Regulations were indeed an adequate mechanism, the Cabinet Secretary and the Attorney General would not need recourse to Parliament and the National Treasury's request for approval would be with the House today.

Hon. Members, at around the same time as the Regulations were being tabled before the House in 2015 during the 11th Parliament, a Bill from the national Government which was prepared by the then Attorney-General at the request of the National Treasury, was introduced in this House by the then Leader of the Majority Party, seeking to insert a new Section 42A into the Public Finance Management Act, 2012. Clause 14 of the then Public Finance Management (Amendment) Bill 2015 (National Assembly Bill No. 4 of 2015) effectively sought to authorise the vote-on-account for county governments, in the event that a County Allocation of Revenue Bill is yet to be passed or assented to before the commencement of a financial year. Those proposed amendments clearly affirm the need for the express authorisation of withdrawals from the Consolidated Fund, either by the Constitution itself, or by an Act of Parliament. Though the Bill lapsed with the 11th Parliament, it is noteworthy that the Budget and Appropriations Committee had recommended the deletion of the proposal as contained in that particular Bill on account of its obscure nature and its failure to properly provide for the operative basis for the proposed disbursements to counties.

Hon. Members, at this stage, permit me to note that my Office is also in receipt of a Notice of Motion from the Leader of the Minority Party, Hon. John Mbadi, acting as an agent of necessity, seeking a resolution of the House for the disbursement of funds to the county governments amounting to 50 per cent of the monies allocated to the counties by the County Allocation of Revenue Bill, 2019. The Motion draws on the provisions of Regulation 134 of the Public Finance Management (National Government) Regulations, 2015 and effectively seeks to invoke the vote-on-account process for county governments. The concern which the Leader of the Minority Party seeks to resolve is extremely valid, but as I have noted in this Communication, a vote-on-account in respect of funds of county governments is not tenable at the moment.

Hon. Members, in guiding Parliament on how to cushion county governments while resolving any impasse for the passage of a Division of Revenue Bill, the Supreme Court also urged the Speakers of the two Houses of Parliament to entrench its decision in law by initiating appropriate legislative action. Fortunately, well before the determination of the Supreme Court in the Advisory Opinion Reference No. 3 of 2019 was issued, the Budget and Appropriations Committee of the National Assembly introduced the Public Finance (Amendment) Bill, 2019 (National Assembly Bill No. 63 of 2019) to put in place interim measures to allow county governments to access their minimum share of revenue to enable them to offer services to the public, pending enactment of a Division of Revenue Bill. The Bill was considered and passed by the National Assembly on 18th September 2019 and forwarded to the Senate for consideration. However, this Bill only sought to deal with a scenario where there is an impasse in the passage of the Division of Revenue Bill. Presently, of the two annual revenue bills, only the County Allocation of Revenue Bill is pending.

Hon. Members, in view of the strict requirements of the law and in order to put in place a credible mechanism to address the concerns of the county governments on the disbursement of funds, pending the passage of the County Allocation of Revenue Bill, both now and in the future; two options now present themselves to the House. On one hand, the Budget and Appropriations Committee may introduce a Bill proposing amendments to the Public Finance Management Act, 2012 to anchor in law the Vote-on-Account option for disbursement of funds to the county governments, in case of future delays in the passage of the County Allocation of Revenue Bill. Alternatively, having already deliberated on and passed an amendment to the Public Finance Management Act to cater for any delay in the passage of the Division of Revenue Bill, the House may opt to await the consideration, amendment and passage of the Public Finance Management (Amendment) Bill, 2019 (National Assembly Bill No. 63 of 2019) by the Senate and expedite its conclusion and presentation for presidential assent.

Hon. Members, noting that the proposed amendments to the Public Finance Management Act, 2012 shall require consideration and passage by the two Houses of Parliament, the second option offers a more convenient avenue of averting a financial crisis at the counties within a shorter timeframe. To this end, I have requested the Leader of the Majority Party and the Leader of the Minority Party to urgently engage the Senate Majority and Minority Leadership with a view of fast-tracking the consideration and passage by the Senate of the Public Finance Management (Amendment) Bill (National Assembly Bill No. 63 of 2019), with appropriate amendments providing in law the requisite withdrawals from the Consolidated Fund, in the event of any delays in the passage of the annual County Allocation of Revenue Act. This will ensure that the county governments continue to function whether or not there is a stalemate or delays in the passage of either of the two Annual Revenue Bills, both now and in the future.

Hon. Members, I remain confident that the Senate will rise to the occasion and dispense with the Bill with its usual diligence on matters integral to the protection of devolution. On the part of the National Assembly, the House Business Committee (HBC) and the Budget and Appropriations Committee are already seized of the matter. As the Chairperson of the House Business Committee, I undertake that the Committee will prioritise the consideration of the Senate's Amendments to the Bill, in accordance with Standing Orders 145 to 148, once the Schedule of the Senate's Amendments is received in this House. In the unlikely event that there is inordinate delay in the consideration and passage of the Bill by the Senate, the Budget and Appropriations Committee further stands directed to urgently cause the publication and introduction of a Bill proposing amendments to the Public Finance Management Act, 2012 to cater for interim disbursements to the county governments, pending the enactment of the County Allocation of Revenue Bill.

Hon. Members, in conclusion, I wish to thank the Leader of the Minority Party for his laudable effort in seeking to address an issue that certainly threatens to cripple the effective functioning of our devolved system of government. Though I note that his Motion, may indeed, be admissible in the event that the Public Finance Management (Amendment) Bill, 2019 (National Assembly Bill No. 63 of 2019) is passed with appropriate amendments and assented to, it is my considered view that the Money-Bill nature of such a Special Motion would call for it to be moved by the Budget and Appropriations Committee. Indeed, this is the current arrangement with regard to the Special Motion for a Vote-on-Account moved under Article 222 of the Constitution and Standing Order No. 242.

In summary, Hon. Members, my considered guidance is therefore as follows:

1) THAT, after consultation, the Speaker of the Senate and I have reached a common considered view that replicating a "Vote-on-Account" procedure to allow disbursement of funds to the county governments pending the passage and assent of the County Allocation of Revenue Bill requires legislative grounding in the Constitution or an Act of Parliament;

2) THAT, in the absence of a proper legislative grounding in the Constitution or an Act of Parliament, the intended notice of Motion by the Leader of the Minority Party, the Hon. John Mbadi, noble as it is, is premature at the moment;

3) THAT, the Leader of the Majority Party and the Leader of the Minority Party are hereby requested to urgently engage the Senate Majority Leader and the Senate Minority Leader to fast-track the consideration and passage by the Senate of the Public Finance Management (Amendment) Bill, 2019 (National Assembly Bill No. 63 of 2019) with appropriate amendments to entrench the procedure for the withdrawal from the Consolidated Fund in law in the event of any delays in the passage of the annual County Allocation of

Revenue Act;

4) THAT, the House Business Committee and the Budget and Appropriations Committee shall prioritize the consideration of the Senate's Amendments, if any, to the Public Finance Management (Amendment) Bill, 2019 (National Assembly Bill No. 63 of 2019) over any other business once the Schedule of the Senate's Amendments is conveyed to this House by the Senate; and,

5) THAT, in the unlikely event that there is inordinate delay in the consideration, amendment and passage of the Public Finance Management (Amendment) Bill, 2019 (National Assembly Bill No. 63 of 2019) by the Senate, the Budget and Appropriations Committee shall urgently cause the publication and introduction of a Bill proposing amendments to the Public Finance Management Act, 2012 to cater for interim disbursements to the county governments pending the enactment of the County Allocation of Revenue Bill.

Hon. Members, the House is accordingly guided."

DISCLOSURE OF COMMITTEES' RESOLUTIONS BEFORE ADOPTION BY THE HOUSE

Tuesday, 29th September 2020

Context:

1) *Manner of interaction of Members who represent special interest with the said interest in the House and its Committees;*

2) *Whether the recommendations or proposals of a Committee of the House can be implemented prior to being considered and adopted by the House; and,*

3) *Whether a Committee of the House ought to deal with matters that are active in court.*

Decision of the Speaker:

1) *Hon. Members who represent special interests should always declare their interest on any matter when considering the said interest in the House or in committees, in accordance with the requirements of Standing Order No. 90.*

2) *The recommendations of a committee of the House are not to be implemented prior to being considered and adopted by the House, unless the law or the Standing Order provides otherwise. However, at that stage, parties are at liberty to take counsel of the views of the Committee and the views largely represent the views of the people's representatives.*

3) *The Departmental Committee on Education and Research was to refrain from revisiting the ongoing disputes between the TSC and the KNUT in accordance with the requirement of Standing Order No. 89 noting that the disputes were subject of active court cases unless the parties involved formally opted out of the court processes in favour of a parliamentary process.*

"Honourable Members, this Communication relates to a matter in the Departmental Committee on Education and Research relating to the Teachers Service Commission (TSC) and the Kenya National Union of Teachers (KNUT) which has been brought to my attention as requiring immediate intervention.

Hon. Members, I wish to inform the House that on 8th September 2020, I received a letter from the Leader of the Majority Party seeking my guidance on a matter that had been brought to his attention by the Secretary and Chief Executive Officer (CEO) of the TSC. In the letter dated 4th September 2020, the CEO of the TSC submitted the Commission's concerns on the manner in which KNUT was approaching an ongoing labour-related issue in view of existing redress mechanisms.

Hon. Members, the reading and perusal of the documents that were attached to the letter of the Leader of the Majority Party as well as information available to me from the letter of the TSC to the Clerk of the National Assembly of 19th August 2020 reveal as follows:

1) On 11th August 2020, the Departmental Committee, in furtherance to the authority of parliamentary committees under Article 125 (1) of the Constitution, held a meeting attended by the leadership of the TSC as well as senior officials of both the KNUT and the Kenya Union of Post Primary Education Teachers (KUPPET). In that meeting, rafts of proposals were made as way forward on the ongoing impasse between TSC and KNUT;

2) Following the meeting, the KNUT strangely wrote to the TSC urging the commission to implement a raft of resolutions which KNUT claimed to have arisen from the aforementioned meeting. The resolutions titled "*Way forward*", which the KNUT asked the TSC to adhere to, were as follows:

    a) That the Code of Regulations for Teachers is a valid document used to manage teachers. The Code of Regulations does not capture Career Progression Guidelines.

    b) That the Committee of Education will spearhead the urgent and immediate review of the Code of Regulations for Teachers in readiness for the next CBA negotiations to avoid disputes and standoffs in future. All parties shall give their submissions via a public participation process.

    c) That all teachers to be paid their third and fourth CBA benefits notwithstanding union affiliations with immediate effect as per the law.

    d) That TSC immediately reverts to the Union Membership Register as it was in June 2019 and resume strict deductions of union dues to return normalcy to KNUT operations.

    e) That the Cabinet Secretary for Labour should urgently gazette agency fee in favour of KNUT to endure equal treatment of unions in the teaching service.

    f) That parties to immediately cease hostilities, compromise all matters in court and record consents of withdrawals and move out of courts and reset their relations to 2016.

    g) That TSC to develop Teacher Professional Development (TPD) guidelines and submit to the National Assembly for approval in compliance with the Statutory Instruments Act of 2013.

    h) In response, the Teachers Service Commission wrote to the Clerk of the National Assembly and later to the Leader of the Majority Party seeking guidance on the unusual sequence of events and voicing its reservations about its active participation in Parliament on a matter which is active in court.

Hon. Members, the occurrence of these events raises the following three key issues whose guidance I have been called upon to offer:

1) How should Members who represent special interest relate with the said interest in the House and its Committees?

2) Whether the recommendations or proposals of a Committee of the House can be implemented prior to being considered and adopted by the House; and,

3) Whether a Committee of this House ought to deal with matters that are active in court including what we said compromising them.

Hon. Members**,** before I address the first issue, it is notable that the KNUT did obtain the proceedings of a Departmental Committee of this House including its minutes. Indeed, a perusal of KNUT's letter to TSC dated 26th August 2020 reveals that the presumed recommendations that KNUT wanted TSC to implement are an extract of the Minutes of the Committee of 11th August 2020. It is therefore logical to conclude that proceedings of the Committee and part of its journal was deliberately and prematurely disclosed to KNUT in blatant and clear breach of the Standing Orders and the provisions of Sections 13 and 25 of the Parliamentary Powers and Privileges Act, 2017.

Hon. Members, you will recall that I have in the past reminded the House, including the Members nominated to represent the youth, persons with disabilities and workers of the need to avoid conflict of interest between their personal and public interests as required by Chapter Six of the Constitution, the Leadership and Integrity Act 2012, the Public Officer and Ethics Act 2003 and the Parliamentary Powers and Privileges Act, 2017. Additionally, I have guided before that Members must at all times declare their interest on any matter before the House or a Committee pursuant to the provisions of Standing Orders 90 (1) and 107 (1)(e). Indeed, you will recall that on 9th May 2019, I guided as follows with regard to an issue that, interestingly, is similar to the one before me today:

> "*THAT, with respect to the Members of Parliament nominated under Article 97 (1) (c) of the Constitution – that is those representing the special interests including the interests of the youth, persons with disabilities and workers – they are also not exempted from the application of the provisions of Article 122 (3) and Standing Order 90. Further, it is gross misconduct and out of order to wear the hat of a trade unionist or a workers' representative and at the same time purport to also wear the hat of a Member of Parliament, in the same sitting of a Committee or the House*."

That guidance should suffice with respect to the first question. I need not go beyond.

Hon. Members, the next question that one would probably ask is: What about the authority of the information that was irregularly obtained from the Committee? Hon. Members are aware that it is a violation of Standing Order 86 for any Member, staff or other person to divulge contents of a Committee's proceedings before such proceedings become the property of this august House. The said Standing Order states as follows:

> "*86. No Member shall refer to the substance of the proceedings of a Select Committee before the Committee has made its report to the House*."

Hon. Members, even as I settle the second question, it is a matter of public knowledge that Committees are organs and creatures of this House and consequently their resolutions have no binding effect and cannot be acted on unless adopted by the House in its plenary sitting. Indeed, a Committee has no authority except that which the House has delegated to it.

Under Standing Order 216 (5), one of the functions of Departmental Committees is to investigate, inquire into and report on - emphasis on report on - all matters relating to the mandate, management, activities, and operations of the assigned Ministries and Departments. The operative words are "*report on*." No Committee has powers to order, direct, or instruct, except as may be resolved by the House, having considered a report of a Committee on a particular matter. Permit me, Hon. Members, to refer to the Commonwealth Parliamentary Practice as codified in the 23rd Edition of Erskine May on page 142, which states thus:

> "*The publication or disclosure of debates or proceedings of a committee conducted with closed doors or in private or when the publication is expressly forbidden by the House*

or of a draft report of committees, before they have been reported to the House, will constitute a breach of privilege or contempt."

Hon. Members, the information quoted in the letter of KNUT to the TSC, constituted deliberations of the Departmental Committee on Education and Research, which are yet to be brought to the House in form of a report. While it is obvious that the KNUT and the TSC are free to exchange any correspondences between them, it is extremely out of order for KNUT, or indeed any other person to quote deliberations or proposals made in the Departmental Committee on Education and Research and use them as an authority in a bid to compel action from a third party.

In any case Hon. Members, even if the proposed recommendations had already been adopted by the House, the onus of communicating them to both the TSC and KNUT would have rested on the Clerk of the National Assembly and not on KNUT which is itself a party to the proceedings.

I, therefore, admonish the strange and the unprocedural manner in which KNUT appear to have behaved in this matter by not only purporting to use premature parliamentary information to its benefit, but also taking up the role of the Clerk of the National Assembly as the official conveyor of the decisions or resolutions of the House or its committees.

On the third issue of whether the Committee of the House ought to deal with matters that are active in court, which now introduces the issue of *sub-judice,* as indeed raised by the TSC, as you are aware, Standing Order No. 89 prohibits deliberation of matters that are active in a court of law. However, prohibition of discussion on active court matters is limited to the extent where such discussion is likely to prejudice the fair determination of the matters at hand. This is primarily the reason why Standing Order 89(5) grants the Hon. Speaker of the National Assembly power to allow reference to any matter before the House or a Committee, even if it is active in court.

Hon. Members, just to reiterate, I previously addressed this matter on several occasions both in 11th and the current Parliament. You may, for instance, recall the ruling that I delivered on 29th October 2013, upon request by the Member for Ugenya, the Hon. David Ochieng'. In that ruling I did state as follows:

"*A recommendation of a committee is not final until the report is considered by the House and a decision made in one way or the other. However, should the House adopt a report of a committee purporting to invalidate or nullify a matter determined by a court exercising its judicial powers, then it becomes very difficult for anyone to implement such a resolution. This is because our Parliament does not have appellate jurisdiction or judicial processes. As a matter of fact, the practice of parliamentary appellate jurisdictions was primarily practised in the United Kingdom Parliament, where the House of Lords also acted as a court of appeal. However, again this practice ended on 1st October 2009, when the appellate jurisdiction was transferred to the Supreme Court. In this regard, it will probably be more useful for Parliament to require that the aggrieved party makes an appeal before a higher court. It has been urged that if Parliament makes a resolution that is not implementable or one that purports to unduly reverse a court process or decision, then such resolution would be in vain. I am on record asking committees to refrain from making Parliament act in vain because that is not what the membership of the House was elected to do, certainly not to act in vain*."

Having said that Hon. Members, the information before me indicates that there are about eight active cases pending in various courts between the TSC and the KNUT part of which relate to the matters that the Departmental Committee on Education and Research was being invited to consider. As such, any intention by the Committee of this House to delve into these matters is likely to offend Standing Order 89.

Whereas the two entities; TSC and KNUT fall within the mandate of the Committee on oversight, it is only prudent that parties decide on the path they want to follow to settle their disputes. As of now, it does appear to me that they have chosen the court route. As a House, it is only fair that we allow them to exhaust that option which they have chosen on their own without inviting the House or its organs to be part of the dispute resolution process or to attempt to mediate, unless the parties formally opt out of the court process in favour of a parliamentary process. For abundance of caution, it is prudent that given that the matters are also active in court, it is proper that the Committee and indeed the House deals with the matter after litigation has been settled so that the House will not trespass into the judicial province.

However, it is noted that the principle of *sub-judice* cannot stand on the way of consideration of a matter vital to the public interest. Whereas under Article 95(2) and 5(b) of the Constitution the National Assembly is given the role to deliberate on and resolve issues of concern to the people and express oversight mandate over State organs, that mandate ought to be exercised outside the law, the Standing Orders and established precedent.

However, in the present case, I issue a precaution that it is not in the public interest that the Committee releases its long-standing suits between the TSC and KNUT until the matters therein are concluded by the courts of law. After all, there are various formal dispute resolution mechanisms recognised in law and these ones outside committees is not any one of them.

Hon. Members, in conclusion, having examined the three issues as identified, my considered guidance is as follows:

1) That the Hon. Members who represent special interests should always declare their interest on any matter when considering the said interest in the House or in committees, in accordance with the requirements of Standing Order No. 90.

2) That the recommendations of a committee of this House are not to be implemented prior to being considered and adopted by the House, unless the law or the Standing Order provides otherwise. However, at that stage, parties are at liberty to take counsel of the views of the Committee and the views largely represent the views of the people's representatives.

3) That the Departmental Committee on Education and Research does refrain from revisiting the current disputes between the TSC and the KNUT in accordance with the requirement of Standing Order No. 89 noting that the disputes are subject of active court cases unless the parties involved formally opt out of the court processes in favour of a parliamentary process. The House and the Committee are accordingly guided.

Thank you."

PROCESSING OF LEGISLATIVE PROPOSALS

Thursday, 15th October 2020

Context:

Unsatisfactory manner in which Members' legislative proposals were being processed and the apparent stifling of the legislative mandate of Members and the House by the Budget and Appropriations Committee and Departmental Committees which are required to scrutinise Members' legislative proposals and recommend to the Speaker whether the proposals should be proceeded with or published into Bills.

Decision of the Speaker:

1) *All departmental committees had until 3rd November 2020 to consider all legislative proposals before them, whose 21 days had expired and make their recommendations known to the Speaker on or before 3rd November, 2020.*

2) *Failure to comply with the above-mentioned directive would leave the House Business Committee with no other option but to follow the precedent set in 2019 by immediately seeking an order of the House for authorisation to have the Bills published as legislative proposals.*

3) *The Procedure and House Rules Committee to relook Standing Order No. 114 and related provisions of the Standing Orders in respect of the value especially with regard to the role of departmental committees in pre-publication scrutiny.*

4) *The Clerk to publish, at least once a week on the parliamentary website, the list of Members' legislative proposals which have been drafted and are awaiting the money-Bill recommendation or are undergoing pre-publication scrutiny in committees and brief the House Business Committee on regular basis on the same.*

"Honourable Members, you will recall that on Thursday, 8th October 2020, during the Afternoon Sitting, the Member for Mathare, Hon. Anthony Oluoch, rose on a point of order seeking my direction on a number of issues. The gist of his point of order revolved around the processing of legislative proposals originated by individual Members and their eventual consideration once published into Bills, if at all. The Member lamented on the slow manner in which Members' legislative proposals are processed and took issue with the apparent stifling of the legislative mandate of Members and the House by the Budget and Appropriations Committee and Departmental Committees which are required to scrutinise Members' legislative proposals and recommend to the Speaker whether the proposals should be proceeded with or published into Bills.

Hon. Members, having considered the substance of the issues raised by Hon. Oluoch, I have isolated three (3) key questions that would require my direction. These are:

1) Whether the House has authority in respect of a decision on whether or not to proceed with or publish a legislative proposal;

2) What value does money-Bill certification and authorisation stage and pre-publication scrutiny add to the legislative process and whether the Committee's decision on a legislative proposal upon pre-publication scrutiny is final; and,

3) Whether a Member may reintroduce a legislative proposal after a negative decision by a Committee of the House.

Hon. Members, before I respond to the issues raised, it should be noted that the process of drafting a Bill involves several stages. The first stage is the drafting stage which entails the legislative proposal being prepared by the Directorate of Legal Services and reviewed in consultation with the respective Member. It is here that the Member confirms the draft proposal *vis-à-vis* his or her initial idea. Once drafted, the legislative proposal is submitted to the Parliamentary Budget Office (PBO) for money-Bill certification. Proposals that are found to have money-Bill aspects are committed to the Budget and Appropriations Committee for its recommendation in accordance with Article 114 of the Constitution. Where the PBO certifies that a legislative proposal does not contain any money-Bill aspects, the proposal is committed to the relevant departmental committee for pre-publication scrutiny and relevant sectorial input. Ordinarily, the recommendation of the relevant committee is key in guiding the Speaker to make a determination on whether to publish a legislative proposal or not.

Hon. Members, statistics before me indicate that a total of 313 individual Members' legislative proposals have so far been proposed in the Twelfth Parliament. Of these, 91 are currently at the drafting stage while nine have been submitted to PBO for money-Bill certification.

A total of 42 legislative proposals which were determined to contain money-Bill aspects are currently pending before the Budget and Appropriations Committee. On the other hand, 69 legislative proposals are being considered before the relevant departmental committees after either being considered by the Budget and Appropriations Committee and recommended to be proceeded with or after having been determined as not containing any money-Bill aspects. In the course of considering the legislative proposals, the Budget and Appropriations Committee and the various departmental committees have recommended that 31 proposals should either not be proceeded with or published on the considered advice of the National Treasury or on account of relevant sectorial concerns.

Finally, 63 legislative proposals have so far either been recommended for publication, approved for publication by my office, or published as Bills that are now at different stages of consideration by the House. Eight of the proposals initially approved for processing have been withdrawn by the Members concerned. As you will note from the above statistics, Hon. Members, a total of 111 legislative proposals are before the Budget and Appropriations Committee and the various departmental committees. This represents nearly half of all the personal legislative outputs of individual Members to date.

Just for your information, Hon. Members, of the proposals that have been published into Bills, one has been assented to, two have been passed and are undergoing preparation for assent, four have been concluded by the House and are currently undergoing consideration in the Senate, five are awaiting Committee of the whole House, 45 are awaiting or undergoing Second Reading, four have been lost and two have been withdrawn by the Members who introduced them.

There has been some progress in consideration of Members' Bills, and the House Business Committee has resolved to continue prioritising them in coming weeks, and has gone as far as moving a Motion to allow that Thursday Morning Sittings during this part of the Session be reserved specifically for individual Members' business to clear the backlog.

On the first issue relating to whether the House has authority in respect of the process of a legislative proposal, Members will recall that before the 10th Parliament, Members wishing to introduce a Bill had to seek leave of the House by way of a Motion. The House would then

take a vote on whether the proposal was to be proceeded with or not. This procedure was done away with during the review of the Standing Orders in 2008. A new procedure was then introduced that gave the Speaker the power to determine whether a legislative proposal was to be proceeded with or not based on the recommendation of the Clerk as to conformity to format and style.

However, after several years in operation and the new Constitution coming into force, a need arose for the establishment of a mechanism to sieve legislative work before its consideration by the plenary of the House. This was especially with regard to the confirmation with the money-Bill aspects of legislative proposals, its constitutionality or otherwise, and its conformity with the drafting format and style of the House to ensure consistence in legislative outputs. The Standing Orders were accordingly reviewed and during the 11th Parliament, the current system of pre-publication scrutiny that I have described above was introduced.

Hon. Members, allow me now to respond to the second and third matters raised by Hon. Oluoch. To begin with, on whether the Committee's decision on a legislative proposal upon pre-publication scrutiny is final, I wish to categorically state that it is not. Why do I say so? First, where the attention of the House Business Committee is drawn to the fact that the Budget and Appropriations Committee has recommended that a significant number of legislative proposals to be proceeded with and the proposals remain stuck in departmental committees, the House Business Committee has always risen to the occasion and sought the resolution of the House to cause the proposals to be published. Members may recall that on 21st February 2019, the then Leader of the Majority Party, Hon. Aden Duale, moved a Motion, on behalf of the House Business Committee, that sought the resolution of the House for the publication of thirty (30) legislative proposals whose consideration was inordinately delayed by various departmental committees. The Motion was approved and saw the publication of the Bills, some of which have since been passed by the House. Therefore, the recommendation of departmental committees in respect of a legislative proposal is not final or binding as to the fate of a proposal.

Secondly, Hon. Members, a cursory reading of Standing Order No. 114 readily reveals the discretion that the House has granted the Speaker with regard to any recommendation made by a departmental committee on a legislative proposal. The Speaker has the discretion to agree or not to agree with the recommendations of the relevant committee. Indeed, on a few occasions, and for considered reasons, I have disagreed with the decision of a departmental committee on a legislative proposal. As an example, in the 11th Parliament, the then Member for Baringo County, Hon. Grace Kiptui, sought to amend the Basic Education Act of 2013 to provide for the distribution of free sanitary towels to every girl-child enrolled in a public basic education institution upon attaining puberty. Whereas the Budget and Appropriations Committee recommended that the legislative proposal be proceeded with, the Departmental Committee on Education, Research and Technology recommended that it should not be published. This was ostensibly on the basis that the Government had already established a sanitary towels programme in the country. Having considered the matter, I directed the publication of the proposal against the recommendation of the Committee. At the time, my determination was informed by, among other things, the fact that the proposal did not offend the Constitution or contradict or duplicate any existing law. It was also my view then, which view I still hold, that rejecting a proposal by a Member without relevant and weighty reasons amounts to curtailing the Member's constitutional right to legislate. The recommendation by the Departmental Committee on Education, Research and Technology to shelve the proposal on account of the Government's programme would only leave the matter at the mercies of Government policy which is unpredictable and can be terminated at any time as opposed to legislation. I felt that the Committee was becoming a roadblock as they had raised no constitutional or legal issues but rather, were making administrative arguments for the administration.

Similarly, during the 11th Parliament, it is on record that my determination on the fate of the Persons with Disabilities (Amendment) Bill, 2013, sponsored by the then Member for Nyandarua County, Hon. Wanjiku Muhia, the National Employment Authority Bill, 2015 sponsored by the then nominated Member, Hon. Johnson Sakaja, the Banking (Amendment) Bill sponsored by the Member for Kiambu Constituency, Hon. Jude Njomo and the Engineering Technologists and Technicians Bill sponsored by the then Member for Bomet County, Hon. Cecilia Ng'etich, countermanded the recommendations made by the respective departmental committees. All of these proposals were subsequently passed by the House and assented into law.

Hon. Members, the practice world over is that whenever Speakers are faced with a situation where they have to decide between a policy and a proposed legislation, they tend to rule in favour of legislation since it asserts the authority of the House. The above two scenarios exemplified by the actions of the House Business Committee and of the Speaker conform to a long held parliamentary tradition that, whenever the Speaker is confronted by a choice between the House, a Committee or an individual Member of the House, he always chooses the House for resolution.

Hon. Members, I hasten to caution that the discretion that the House has lent the Speaker ought not to be construed by Members as a convenient avenue of circumventing the carefully woven fabric of the committee system under the Standing Orders. Majority of the work of the House is conducted in committees which have at their disposal relevant sectorial experience and expertise in their respective mandates and the assistance of competent technical officers both from within and outside Parliament. Accordingly, a decision to countermand the recommendation from a Committee of the House should be viewed as an exception and not the rule.

Consequently, in the exceptional circumstance where a Member is genuinely aggrieved by the recommendation of a committee or the manner in which his or her legislative output is being processed by a committee, two secondary avenues for seeking direction or redress exist. First, and with regard to inordinate delays in the consideration or processing of a legislative proposal, the Member may move the House Business Committee to seek a resolution of the House for the advancement of its legislative mandate. Secondly, where a committee has made an adverse recommendation with regard to a legislative proposal, the Member may provide the Speaker with relevant information to inform his consideration of the Report and recommendation of the Departmental Committee.

From the foregoing, you will note that the discretion granted to the Speaker by Standing Order No. 114 is only with regard to the recommendation made by the departmental committees. Hon. Members, as you are aware, the pre-publication scrutiny in our current legislative process has two steps namely: money-Bill certification and consideration by the relevant committee. If a legislative proposal is determined to have money-Bill aspects contemplated under Article No. 114 of the Constitution, it is forwarded to the Budget and Appropriations Committee for consideration and recommendation in consultation with the Cabinet Secretary for the National Treasury. On the other hand, if the proposal is determined not to have any money-Bill aspects, the Standing Orders require the Speaker to forward it to the relevant committee for initial consideration. In considering a legislative proposal, the relevant committee checks on such issues as constitutionality, existing provisions in law or conflict with other existing law without proposed amendment or repeal.

As to whether that process adds value, I wish to state as follows: Firstly, Article 114 of the Constitution is a constitutional requirement. It is not a procedure or step that the House has a decision over as the House may proceed "*only in accordance with the recommendation of*

the Budget and Appropriations Committee after taking into account the views of the Cabinet Secretary for the National Treasury".

Therefore, there is no question as to whether the process is necessary or not. Indeed, Article 114 of the Constitution expressly requires the House to only proceed with the consideration of a money bill in line with the recommendation of a committee mandated with that task and after taking into account the views of the Cabinet Secretary responsible for finance. This House has, in its Standing Orders, mandated the Budget and Appropriations Committee as the relevant committee contemplated by the Constitution. Consequently, the Speaker has no discretion with regard to the recommendation made by the Budget and Appropriations Committee on a proposal that has been certified to contain money-Bill aspects.

Hon. Members, on the third question of whether a Member can reintroduce a legislative proposal after a negative decision by the relevant committee, I note that the Standing Orders do prohibit the reintroduction of a legislative proposal in the same or an enriched form. The United States of America (USA) Congress publishes approximately 2,000 bills every year.

The practice is conscious of the fact that not all the published Bills will be considered by the House, or be concluded if at all considered. However, it is the duty of the processes of any legislature to not only facilitate Members to undertake their duty, but to also facilitate the display of the performance of that very duty.

Undeniably, not all Bills that are published become law. Some Bills are published to cause an action, resolve issues of concern to the people or elicit national debate on the subject. For instance, in the Ninth Parliament, the then Member for Konoin, Hon. (Dr.) Julius Kones, sponsored the Tea (Amendment) Bill with the intention of causing the Executive to take certain actions in the tea sector. No sooner had the Bill been published than the Executive, not only went ahead to take administrative actions to address concerns in the tea sector at the time, but also introduced a concurrent Bill. No wonder, after Senator Cheruiyot published his Tea Bill and action started in both Houses, the Executive started pushing for changes in the tea sector.

Similarly, during the Eleventh Parliament, the then Member for Mukurweini, Hon. Kabando wa Kabando, proposed an amendment to the Central Bank Act to require the Central Bank of Kenya (CBK) to put in place mechanisms to enable the public to participate in Government securities through electronic means and in lower minimum denominations. Soon, thereafter, the CBK instituted measures that saw the reduction of the minimum investment in Government securities from Kshs. 50,000 to Kshs. 3,000 and the introduction of phone-based trading in those securities.

Therefore, I am convinced that we should make our processes less difficult and ensure that they are facilitative to Members. As the Speaker, I will not hesitate to disagree with a committee where it is being unnecessarily obstructive.

Hon. Members, whereas the Member has raised valid questions that have constitutional grounding particularly in respect to Articles 94 and 95 of the Constitution on the role of Parliament, the processes in question are ingrained in the Standing Orders and derived from constitutional requirements. At present, no catastrophic or terminal failure has revealed itself with regard to the functioning of the committee system and the pre-publication scrutiny procedure established by the House to sieve the legislative works submitted for consideration by the plenary.

Despite appreciating that the structure of the committee system is firm, I am constrained to admit that the statistics of the legislative work of individual Members pending before the

Budget and Appropriations Committee and the various departmental committees are worrying. If they are left unchecked, they may indeed disillusion the affected Members and discourage others from exercising their constitutional mandate to legislate. It is, therefore, my finding that some departmental committees are misapplying the provisions of Standing Order No. 114 on pre-publication scrutiny.

The intention was not for the departmental committees to curtail the legislative authority of the House or to stop Members from publishing Bills but, rather to facilitate them in this endeavour. I am, indeed, concerned by the high number of legislative proposals that have been lying in departmental committees for far too long. Some of them have been before committees for over a year. For instance, on 17th October 2019, the Committee deferred making a decision on a legislative proposal by Hon. George Kariuki, MP, titled: The Constitution of Kenya (Amendment) Bill, 2019. That decision is still pending one year down the line. This is a blatant abuse of the parliamentary process and should not be allowed.

In any case, should the Committee find difficulty in getting views of the Cabinet Secretary as required, the same should be reported to allow the House to make an appropriate resolution in the circumstances.

Hon. Members, to ensure the processing of these proposals one way or the other, and to safeguard the authority of the House, I hereby direct as follows:

1) THAT, all departmental committees have until 3rd November 2020 to consider all legislative proposals before them, whose 21 days have expired and make their recommendations known to me on or before 3rd November, 2020.

2) THAT, failure to comply with the above-mentioned directive will leave the House Business Committee with no other option but to follow the precedent set in 2019 by immediately seeking an order of the House for authorisation to have the Bills published as legislative proposals.

3) THAT, the Procedure and House Rules Committee relooks at the Standing Order No. 114 and related provisions of the Standing Orders in respect of the value especially with regard to the role of departmental committees in pre-publication scrutiny. This is bearing in mind that once published, the same Bills are still committed back to the same committees for consideration, including conducting public participation. In making its recommendations, the Procedure and House Rules Committee should consider providing for an appellate mechanism during the pre-publication stage and before a recommendation is made to the Speaker.

4) THAT, at least once a week, the Clerk to publish, on the parliamentary website, the list of Members' legislative proposals which have been drafted and are awaiting the money-Bill recommendation or are undergoing pre-publication scrutiny in committees and brief the House Business Committee on regular basis on the same.

I thank you, Hon. Members."

JUDGMENT OF THE HIGH COURT IN CONSTITUTIONAL PETITIONS

Tuesday, 3rd November 2020

Context:

Judgment of the High Court, in the Constitutional Petition No. 284 of 2019 as consolidated with the Constitutional Petition No. 353 of 2019, on cessation of consideration of all pending Bills in both Houses of Parliament until the requirements of Article 110(3) of the Constitution was first fulfilled.

Decision of the Speaker:

1) *The National Assembly appeals the decision of the High Court in Constitutional Petition No. 284 of 2019 as consolidated with Constitutional Petition No. 353 of 2019; and,*

2) *No legislative business would be undertaken by the House in the coming days, whether from the National Assembly or the Senate pending a way forward on the decision contained in the High Court's Judgment, while seeking stay or setting aside of the Judgment by the Court of Appeal.*

"Honourable Members, I indicated that I had a short Communication to make. As you may be aware, last week, specifically on 29th October 2020, the High Court, in the Constitutional Petition No. 284 of 2019 as consolidated with the Constitutional Petition No. 353 of 2019, issued amongst other orders, an order for cessation of consideration of all pending Bills in both Houses of Parliament until the requirements of Article 110(3) of the Constitution is first fulfilled. The Judgment also contains other related declaratory orders that shall have a direct implication on the legislative work of this House.

Honourable Members, consequently, on Friday, 30th October 2020, the House Business Committee met and deliberated on the matter of the judgment and took a firm view that the judgment is unconstitutional, erroneous and flawed in law. The House Business Committee, in particular, noted with grave concern that the court erred, misdirected and misapplied the Constitution on the following issues, amongst others:

1) The High Court failed to consider the architectural design of the bicameral Parliamentary system under our Constitution of 2010. The Constitution has clearly set out the mandate of the two Houses of Parliament. Article 109 of the Constitution mandates the National Assembly to enact Bills not concerning county governments without the participation of the Senate. The Senate is only mandated to participate in the enactment of laws concerning county governments.

2) The High Court's Judgment has effectively curtailed the National Assembly's mandate under Article 109(3) of the Constitution by requiring that any Bill not concerning county government must be considered by the Senate too.

3) The Judgment has also muted the provisions of Article 114 of the Constitution as read together with Article 109(5) of the Constitution regarding money Bills.

4) The effect of the High Court's judgment is that Members of Parliament and Committees in

either House of Parliament cannot introduce Bills in their respective Houses, without the concurrence of the two Speakers. This curtails Members' right to initiate legislations and their right to represent the people of the constituencies and special interests, particularly in the National Assembly.

5) The Judgment also attempts to set aside previous judgments of the High Court and the Court of Appeal which had validated some of the 23 laws like The Finance Act, 2018, The National Government Constituency Development Fund Act, The Computer Misuse and Cybercrimes Act, No. 5 of 2018, The Statute Law (Miscellaneous Amendments) Act, 2018 and The Statute Law (Miscellaneous Amendments) Act, 2018 and 2019, amongst others.

6) The Judgment has grave implications on the general presumption of constitutionality of a statute and the legislative sovereignty and will affect Government taxation measures, Government international commitments, reforms and policy decisions already taken in relation to various Acts of Parliament as enacted by this House.

Hon. Members, in view of the foregoing, I therefore wish to inform you that the House Business Committee resolved as follows in regard to the High Court judgment:

1) That, the National Assembly does appeal the decision of the High Court in Constitutional Petition No. 284 of 2019 as consolidated with Constitutional Petition No. 353 of 2019; and,

2) That, in the meantime, no legislative business will be undertaken by the House in the coming days, whether from the National Assembly or the Senate pending a way forward on the decision contained in the High Court's Judgment, while seeking stay or setting aside of the Judgment by the Court of Appeal.

Thank you, Hon. Members."

Fifth Session

(9th February 2021 to 24th January 2022)

RESOLUTIONS OF COUNTY ASSEMBLIES ON THE DRAFT CONSTITUTION OF KENYA (AMENDMENT) BILL

Thursday, 25th February 2021

Context:

The Building Bridges Initiative Steering Committee delivered a draft Bill to amend the Constitution by popular initiative in accordance to Article 257 of the Constitution of Kenya, accompanied by signatures of persons in support of the initiative to the Independent Electoral and Boundaries Commission (IEBC) for verification. Consequently, the IEBC, pursuant to the provisions of Article 257(4) of the Constitution, had submitted the draft Bill to the 47 County Assemblies for consideration after verification of the signatures in support of the initiative. Thereafter, the Speaker of the Senate and the Speaker of the National jointly developed and issued standard guidelines to inform the County Assemblies of the requirements during the submission of their decisions to Parliament. Some of the counties had not adhered to the guidelines which included submission of a copy of the draft Bill and a certificate that the county assembly has approved or rejected the draft Bill, thus necessitating the need for guidance from the Speaker on the matter.

Decision of the Speaker:

1) *Both Houses of Parliament to commence the process of consideration of the Bill without any delay by publishing the draft Bill to the Government Printer for publication.*

2) *The Speakers to guide the respective Houses on the rest of the processes after meetings of the respective House Business Committees.*

3) *The Bill to be considered in the Houses of Parliament in a concurrent manner and processed in accordance with the Standing Orders of the respective Houses.*

4) *The Clerks of the two Houses to publish, at the appropriate time, information on specific requirements in at least two newspapers of national circulation and in the Kenya Gazette.*

5) *The Clerk to communicate to county assemblies whose returns were incomplete or inconsistent for conclusive submission of proper records.*

"Honourable Members, I wish to make the following Communication regarding the status of delivery by the county assemblies to the Speakers of the two Houses of Parliament, their decisions on the Draft Constitution of Kenya (Amendment) Bill, 2020.

Hon. Members, it is in public domain that the Building Bridges Initiative Steering Committee delivered a draft Bill to amend the Constitution by popular initiative and signatures of persons in support of the initiative to the Independent Electoral and Boundaries Commission (IEBC) for verification. Consequently, the IEBC, pursuant to the provisions of Article 257(4) of the Constitution, submitted the draft Bill to the 47 County Assemblies for consideration after verification of the signatures in support of the initiative.

Hon. Members, Article 257(6) of the Constitution affords the respective county assemblies a period of three months after receipt of a draft Bill to amend the Constitution by popular initiative within which to approve the Bill. Thereafter, the respective Speakers of the county

assemblies are required to communicate the resolutions of the approval by the respective assemblies by delivering a copy of the draft Bill jointly to the Speakers of the two Houses of Parliament, with a certificate indicating such approval or rejection.

Hon. Members, you will recall that during the consideration of the *Punguza Mizigo* (Constitution Amendment) Bill, I had highlighted several procedural difficulties that Parliament encountered during the process of the delivery of resolutions by the county assemblies to the two Houses. You will also recall that in my Communication dated 5th December 2019, I informed the House that the Speaker of the Senate and I had agreed to jointly develop and issue standard guidelines for delivery by the county assemblies to the Speakers of the two Houses of Parliament of a draft Bill for the amendment of the Constitution by popular initiative to inform the process. Those guidelines were subsequently published in the *Kenya Gazette* as Legal Notice No. 175 dated 18th November, 2019. The guidelines have informed the current process before Parliament.

Hon. Members, at the current stage of the process, paragraphs (5) and (6) of the said guidelines require that the speakers of the two Houses of Parliament undertake the following:

(a) Report to their respective House of Parliament—

i. The county assemblies that have submitted the draft Bill and the certificate approving the Bill;

ii. The county assemblies that have submitted the draft Bill and the certificate rejecting the Bill;

iii. The county assemblies that did not submit the draft Bill and the certificate;

iv. Whether or not the threshold required under Article 257 (7) of the Constitution has been met;

v. Such other information as the Speakers of the two Houses of Parliament may consider necessary; and,

(b) Submit to the Independent Electoral and Boundaries Commission and publish, by notice in the Gazette, the information specified under sub-paragraph (a).

The guidelines do also provide that the Speakers of the two Houses of Parliament shall not receive any draft Bill and certificate where the Bill was considered by the county assembly after the expiry of the period specified under Article 257 (6) of the Constitution.

Hon. Members, in furtherance to requirements of paragraph 5 of the said guidelines, the statistics of the submissions which have been formally delivered by the respective speakers of the county assemblies as at 2.00 p.m. today, Thursday, 25th February 2021 are as follows:

1) Thirty county assemblies have delivered the draft Bill with a certificate indicating their approval of the Bill. They are: Siaya, Homa Bay, Kisumu, Trans Nzoia, Busia, Kajiado, West Pokot, Laikipia, Kisii, Nairobi, Garissa, Mombasa, Taita Taveta, Kakamega, Kitui, Vihiga, Murang'a, Narok, Makueni, Kirinyaga, Nyeri, Bungoma, Machakos, Nakuru, Meru, Tharaka-Nithi, Tana River, Embu, Nyandarua, Marsabit and Kericho.

2) One county assembly, which is Baringo County Assembly, rejected the draft Bill. However, I note that the county assembly only submitted a certificate of rejection and failed to submit a copy of the draft Bill as required under the guidelines. It may not be possible,

therefore, to know what they rejected.

3) Kwale County Assembly submitted a certificate of approval, but failed to submit a copy of the draft Bill that was considered by the Assembly, again, making it not possible for us to determine what they approved.

4) Nyamira County Assembly submitted a certificate of approval. It was, however, observed that the draft Bill submitted by the Assembly alongside the certificate had fundamental variances in many clauses compared to the draft Bill submitted to the County Assembly by the IEBC.

Hon. Members, at this point, I wish to reiterate the importance of paragraphs 1 and 2 of the guidelines, which provide that upon approval or rejection of a draft Bill to amend the Constitution, as the case may be, the speaker of the county assembly shall notify the Speakers of the two Houses of Parliament by delivering, during official working hours, the following documents:

1) A copy of the draft Bill; and,

2) A certificate as prescribed in the First and Second Schedules certifying that the county assembly has approved or rejected the draft Bill.

The provisions of paragraphs 1 and 2 of these guidelines are couched in mandatory terms and the premise of this is that, without such clear directives on the manner of issuance of returns, the process would be clothed in ambiguity, leading to inconsistency and discretion in the manner in which counties not only consider the draft Bill, but also subsequently submit returns to Parliament.

Hon. Members, indeed, you will agree that the provisions are essential in assisting the Speakers and the two Houses of Parliament to ascertain the exact decisions the counties have made and to confirm whether the draft Bill as considered by each county assembly was the exact version forwarded to the respective county assemblies by the IEBC.

Hon. Members, with respect to the deadlines, a simple calculation reveals that 14 other county assemblies are yet to deliver the draft Bill to the Speakers of the Houses of Parliament with a certificate indicating either their approval or rejection of the Bill. Correspondence received from the IEBC indicates that the delivery of the Draft Bill to the county assemblies was done on varying dates. The first set of county assemblies received the Draft Bill on 27th January 2021, while Elgeyo Marakwet County Assembly received the Draft Bill last, having received it on 2nd February 2021. Consequently, the last date by which Elgeyo Marakwet County Assembly ought to have made a resolution after its consideration of the Draft Bill pursuant to the provisions of Article 257(5) of the Constitution is, therefore, 3rd May 2021.

Hon. Members, from the statistics I have just read out, 30 county assemblies have so far approved the Draft Bill. Article 257 (5), read together with Paragraph 5 of the guidelines, provide that each county assembly shall consider the draft Bill within three months from the date it was submitted by the IEBC. Further, Article 257 (7) of the Constitution provides that if a draft Bill has been approved by a majority of county assemblies, it shall be introduced in Parliament without delay. Emphasis is on "*without delay*".

In this regard, it is clear that the draft Constitution of Kenya (Amendment) Bill, 2020, promoted by the Building Bridges Initiative (BBI), has met the threshold required under Article 257(7) of the Constitution for introduction in Parliament. Probably, the only question that would arise at this stage would be two-fold, being:

1) What then follows with respect to the parliamentary processes on the draft Bill?

2) What is the recourse with respect to the unreceived and/or incomplete or inconsistent returns from the county assemblies?

Having consulted the Speaker of the Senate, we have resolved to facilitate the Houses of Parliament to commence the process of consideration of the Bill without any delay, in accordance with the requirements of Article 257(7) of the Constitution. We have also agreed that the draft Bill will be forwarded to the Government Printer for publication tomorrow, 26th February 2021, on white paper, as a Bill for introduction in Parliament, so as to pave the way for its processing. Once this is done, we will guide the respective Houses on the rest of the processes after meetings of the respective House Business Committees. We have also resolved that in full recognition of the bicameral nature of our Parliament, and in order to comply with the provisions of Article 257(7) of the Constitution, the Bill will be considered in the Houses of Parliament in a concurrent manner and processed in accordance with the Standing Orders of the respective Houses. This implies that it will be introduced in both Houses at the same time and be processed in a parallel manner. My colleague and I will be updating each other and the respective Houses whenever necessary.

In compliance with paragraph 5 of the guidelines, the Speakers of the Houses of Parliament expect the Clerks of the two Houses to publish, at the appropriate time, the following information in, at least, two newspapers of national circulation and in the *Kenya Gazette* for general information of the public:

1) The list of county assemblies that have submitted the draft Bill and the certificate approving the Bill jointly to the Speakers of the Houses of Parliament.

2) The list of county assemblies that have submitted the draft Bill and the certificate rejecting the Bill jointly to the Speakers of the Houses of Parliament.

3) The list of county assemblies that have not submitted the draft Bill and the certificate.

With respect to the un-submitted or incomplete or inconsistent returns from the county assemblies, as Speakers of the Houses of Parliament, it is our hope that once this information is published, the remaining county assemblies will submit their respective returns within the stipulated timelines to enable us to conclusively submit to the IEBC the respective decisions of all the 47 county assemblies. Further, with respect to the county assemblies of Baringo and Kwale, I have directed the Clerk to communicate to the county assemblies for purposes of drawing their attention to Article 257(6) of the Constitution, the guidelines and attendant provisions requiring their compliance. At this point, it is not possible to determine if Nyamira County Assembly received the right document and amended it or if the Assembly passed a different document. Similarly, I have directed the Clerk of the National Assembly to seek clarification on the material discrepancies from Nyamira County Assembly and draw the attention of Kwale County Assembly on the requirements of the guidelines. In the meantime, the returns from the county assemblies of Nyamira and Kwale will not count for purposes of confirming if the process has met the threshold of the total number of county assemblies required to approve the draft Bill as submitted by the IEBC. The House is accordingly informed and guided.

I thank you, Hon. Members."

UPDATE ON THE STATUS ON RESOLUTIONS OF COUNTY ASSEMBLIES ON THE DRAFT CONSTITUTION OF KENYA (AMENDMENT) BILL, 2020

Tuesday, 2nd March 2021

Context:

Update to the House on certificates and draft Bills received from nine (9) other county assemblies, as well as direction on emerging matters.

Decision of the Speaker:

1) *The Bill would be introduced in the House in the form that it was presented to the 47 county assemblies by the Independent Electoral and Boundaries Commission (IEBC).*

2) *The Bill would not require a maturity period as all the processes that are done during the said period had been effected by the respective County Assemblies.*

"Honourable Members, further to the Communication I made on Thursday, 25th February 2021 regarding the status of returns by the county assemblies to the Speakers of the Houses of Parliament with respect to the Draft Constitution of Kenya (Amendment) Bill, 2020, I wish to give the following update.

Hon. Members, in my said Communication, I did list the thirty-three (33) county assemblies that had made returns to the Speakers of the Houses of Parliament. In addition to that number, we have since received respective certificates and draft Bills from the Speakers of the following other county assemblies: Wajir, Marsabit, Isiolo, Kiambu, Lamu, Turkana, Samburu, Nandi and Bomet. At the same time, the Speakers of the county assemblies of Kwale and Nyamira have since submitted copies of the Draft Bills which were debated and passed by their county assemblies.

Hon., Members, the certificates received from county assemblies I have mentioned, indicate that they approved the Draft Constitution of Kenya (Amendment) Bill, 2020 (popularly referred to as the Building Bridges Initiative (BBI) Bill), except the County Assembly of Nandi, which rejected the Bill. In summary, therefore, as at close of business yesterday, 1st March 2021, forty-two (42) county assemblies had submitted their decisions on the Draft Bill to the Speakers of the Houses of Parliament. The five (5) county assemblies that were yet to submit their decisions on the Draft Bill as at close of business yesterday, Monday, 1st March 2021 were Migori, Elgeyo Marakwet, Uasin Gishu, Mandera and Kilifi.

This notwithstanding, Hon. Members, it will be recalled that the Speaker of the Senate and I did communicate to our respective Houses that the Draft Constitution of Kenya (Amendment) Bill, 2020, popularly referred to as the BBI Bill, has met the threshold contemplated under Article 257(7) of the Constitution, having been approved by a majority of the county assemblies.

Hon. Members, having said that, there are two procedural questions that have been brought to my attention relating to the process of consideration in Parliament of a Bill under Article 257 of the Constitution. These two issues are:

1) Should the Bill be republished, and if so, what value would the republication add to the process; and,

2) Does Standing Order No. 120 regarding the 14 days' maturity period apply to such a Bill before its introduction in Parliament?

Hon. Members, you will recall that, during the period of admitting returns from the county assemblies with respect to the *Punguza Mizigo* Initiative, the Speaker of the Senate and I observed that our rules of procedure are deficient with respect to fully actualising the parliamentary process contemplated under Article 257 of the Constitution.

With respect to the fourteen (14) days maturity period before First Reading, the House is aware that the maturity period is a commonwealth parliamentary practice which is aimed at according the House, and indeed, the public, a notification period on the presence of a Bill before its formal introduction in the House by way of First Reading. This, however, applies to a Bill being introduced in a House for the first time. It does not apply to a Bill that has originated from another House. As such, Bills originating from the Senate are not subjected to this publication period.

However, Hon. Members, with respect to a Bill under Article 257 of Constitution, such notice period would serve little value. As Members will note, Article 257 of the Constitution contemplates expeditious processing of a Bill to amend the Constitution by popular initiative. Specifically, Clause 7 of the Article, which notes that such a Bill shall be introduced in Parliament without undue delay, is, in my view, instructive.

To my mind, the urgency implied by the provision seems to be drawn from the lengthy process attached to the consideration of the Bill in terms of collection of signatures in support, verification of said signatures, public participation by the various county assemblies and, ultimately, approval by the assemblies. I am of the considered opinion, therefore, that the House is under obligation to do everything necessary within its powers to expedite the introduction of the Bill for consideration.

Hon. Members, in our consultations over the processing of the Bill in the two Houses, the Speaker of the Senate and I were initially of the view that it should be republished before its introduction with minor changes to reflect the current year (2021) on its face and to include a footnote indicating its approval by a majority of the county assemblies pursuant to the provisions of Article 257(7) of the Constitution. Indeed, the Clerks of the Houses of Parliament who had been directed to republish the Bill had so requested the Government Printer to expedite the republication of the said Bill.

However, Hon. Members, you should note that should the Bill be republished with the said footnotes, it completely changes from being the Bill which has been approved and considered by the various county assemblies. Indeed, even to have the year 2021 on it would mean that it is a different Bill.

Hon. Members, in order to protect the integrity of the Bill as proposed by its promoters and presented to the county assemblies as well as the process contemplated under Article 257 of the Constitution, I am now of the opinion that republication of the Bill would serve no practical purpose, may lead to unnecessary delays in the introduction and consideration of the Bill and may create confusion as to the operative version of the Bill. Consequently, the House Business Committee, at its meeting held today, Tuesday, 2nd March 2021, has resolved that that Bill be introduced in the House for First Reading on Thursday, 4th March 2021, in the form that it was presented to the 47 county assemblies by the Independent Electoral and Boundaries Commission (IEBC).

In this regard, Hon. Members, and pursuant to Article 257 of the Constitution, I do direct as follows:

1) THAT, the draft Constitution of Kenya (Amendment) Bill, 2020, popularly referred to as the Building Bridges Initiative (BBI) Constitutional Amendment Bill, be introduced in the House for its First Reading on Thursday, 4th March 2021; and,

2) THAT, the Clerk of the National Assembly urgently obtains sufficient copies of the said Bill in the form that it was presented to the 47 county assemblies by the IEBC to enable its introduction into the House as directed.

Hon. Members, the House is accordingly guided, and I thank you."

DRAFT CONSTITUTION OF KENYA (AMENDMENT) BILL, 2020

Thursday, 4th March 2021

Context:

Determination on who would move the Second Reading of the Constitution of Kenya (Amendment) Bill and manner of limiting debate on a Bill whose promoters are neither Members or a Committee of the House.

Decision of the Speaker:

1) *The Motion for the Second and Third Readings of the Bill would be moved by the Departmental Committee on Justice and Legal Affairs.*

2) *The House Business Committee would propose a Motion for limitation of debate on the Bill before its Second Reading.*

"Honourable Members, you will recall that on Tuesday, 2nd March 2021, I made a Communication updating the House on the status of returns by the county assemblies to the Speakers of the Houses of Parliament with respect to the draft Constitution of Kenya (Amendment) Bill, 2020. In that Communication, I indicated that as at close of business on Monday, 1st March 2021, forty-two (42) county assemblies had submitted their resolutions on the draft Bill to the Speakers of the Houses of Parliament. So far, out of the forty-two (42), only two county assemblies had rejected the Bill.

Hon. Members, in addition to that number, we have also received certificates of approval and copies of the draft Bill from the respective Speakers of the county assemblies of Migori and Kilifi. This brings the total number of county assemblies that have approved the draft Constitution of Kenya (Amendment) Bill, 2020 to forty-two (42). Three county assemblies are yet to submit their resolutions on the draft Bill as at today, 4th March 2021, at 1.00 p.m. These are Elgeyo Marakwet, Uasin Gishu and Mandera county assemblies.

Hon. Members, you will also recall that in my previous Communication on this matter, I informed the House that the House Business Committee had resolved at its meeting held on Tuesday, 2nd March 2021, that the Bill be introduced for First Reading today, 4th March, 2021, in the form that it was presented to the 47 county assemblies by the Independent Electoral and Boundaries Commission (IEBC). You will note from today's Order Paper for this afternoon sitting that this resolution has been adhered to. In addition, the Clerk of the National Assembly informs me that he has obtained sufficient copies of the said Bill as directed, indeed, 600 copies to be precise, and that the Bill has also been uploaded to the chamber gadgets for ease of access by Members. As a precursor to the First Reading of the Bill, I have approved the Procedural Motion co-sponsored by the Leader of the Majority Party and the Leader of the Minority Party appearing as Order No.8 in today's Order Paper for this sitting. The objective of the Procedural Motion is to highlight the Bill's journey so far and to enable the House to take note of the parliamentary process.

Hon. Members, once the Bill is read a First Time today, it shall stand committed to the Departmental Committee on Justice and Legal Affairs. Having previously guided that the Bill will be considered by the two Houses of Parliament in a concurrent manner, the Speaker of the Senate and I have approved joint sittings of the committees between the Departmental Committee on Justice and Legal Affairs and the Senate's Standing Committee on Justice, Legal Affairs and Human Rights pursuant to the provisions of Standing Order No. 202A which provides for joint sittings of committees of Parliament. The two committees are at liberty to jointly undertake public participation on the Bill and are expected to expeditiously report back to the Houses of Parliament on or before Tuesday, 23rd March 2021. This is in keeping with Article 257(7) which provides that, "*if a draft Bill has been approved by a majority of county assemblies, it shall be introduced in Parliament without delay*."

Hon. Members, two pertinent issued have to be resolved because they are likely to arise. These are:

1) During Second Reading, who will move the Second Reading of the Bill; and,

2) whether, and how the Houses shall limit debate on a Bill whose promoters are neither Members or a Committee of the House.

It is the practice of this House and other Parliaments for the sponsor of a Motion or Bill to either move its consideration by the House or depute that responsibility to any other Member with the approval of the Speaker. This applies to all the stages of the consideration of Bills before the House. The rationale behind this is to allow the sponsor of the Bill to apprise the House fully on the contents of the Motion and to clarify on any pertinent issues raised by Members in the ensuing debate. As Members are aware, a Bill to amend the Constitution by popular initiative under Article 257 of the Constitution is not sponsored by the Leader of the Majority Party, the Leader of the Minority Party, a Committee of this House or a Member of this House. Its promoters would qualify to be rightly referred to in our language "*strangers to the House*".

Hon. Members, Article 257(7), (8), and (9) of the Constitution which govern the consideration of an amendment to the Constitution by popular initiative by Parliament do not, in themselves, identify the specific mover of the key processes of introduction and consideration. They provide, and I quote:

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

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

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

Hon. Members, to my mind, therefore, the Constitution tasks the collectivity of Parliament with the process of introduction and consideration of such a Bill. In this regard, and pursuant to Article 124 of the Constitution on the power to make Standing Orders for the orderly conduct of proceedings and business of the House, a procedure for these two processes ought to have been approved by the House. This obviously is not the case as it lacks in our Standing Orders.

The constitutional imperative to introduce and consider the Bill and the lack of an express procedure in the Standing Orders for the same informed my previous guidance on the manner and form in which the Bill is to be introduced in this House. By extension, and pursuant to Standing Order No.1, which allows the Speaker discretion to prescribe procedure where none

is applicable, I note that the work of the House is largely executed by its committees which recommend various actions to the House and inform debate on matters under its consideration. Members will note that the House has through the Second Schedule to the Standing Orders mandated the Departmental Committee on Justice and Legal Affairs to consider the following subjects:

> *"Constitutional affairs, the administration of law and justice, including the Judiciary, public prosecutions, elections, ethics, integrity and anti-corruption and human rights."*

In this regard, it is, therefore, my considered view that apart from facilitating public participation on the Bill, the Committee would also be best placed to move the various stages of the Bill on behalf of the House. In providing this guidance, I hasten to add that I do not in any way ascribe ownership of the Bill to the Departmental Committee on Justice and Legal Affairs of this House. I do also note that it would be unfair for Members to hold the Committee to the same standard that it would hold the mover of a Bill who is a Member of the House. In this regard, the Committee will be executing a constitutional imperative on behalf of the House, but will not assume ownership of the Bill. I would encourage the Committee, while conducting public participation, to extend an invitation to the promoters of the Bill for the promoters to exhaustively explain the philosophy behind the Bill and its various proposals as I do believe, as a matter of public notoriety, that they may not have had an opportunity to appear before various county assemblies to do so.

With regard to the second question on the limitation of debate during consideration of the Bill, you note that in my previous Communications on this matter I had indicated the rigorous process that the Constitution attaches to a Bill to amend the Constitution by popular initiative. Being the first time, this House is scheduled to consider such a Bill, I am cognisant of the fact that it shall elicit enormous interest from Members, who naturally will want to participate during its consideration by the House. In order to allow sufficient and meaningful debate on the Bill, there is need for the House to decide how speaking time will be allocated amongst its membership. Consequently, in due course, the House Business Committee will be proposing a Motion in this respect before the Second Reading of the Bill.

To conclude, I therefore, direct as follows:

1) Upon its First Reading, the Constitution of Kenya (Amendment) Bill, 2020, promoted by the Building Bridges Initiative, will stand committed to the Departmental Committee on Justice and Legal Affairs for consideration and facilitation of public participation. The Committee shall hold joint sittings with the Senate Standing Committee on Justice, Legal Affairs and Human Rights.

2) The Clerk of the National Assembly is directed to release an invitation for public participation on the Bill immediately and to note particularly the promoters of the Bill as key participants.

3) When the time comes, the Motion for the Second and Third Readings of the Bill shall be moved by the Departmental Committee on Justice and Legal Affairs.

4) At the appropriate time the House Business Committee will be proposing a Motion for limitation of debate on the Bill before its Second Reading.

The House is accordingly guided.

I thank you, Hon. Members."

PROCESSING OF CONSTITUTION OF KENYA (AMENDMENT) BILL (A BILL TO AMEND THE CONSTITUTION BY POPULAR INITIATIVE)

Tuesday, 4th May 2021

Context:

Guidance on the value of the public participation exercise conducted on the Constitution of Kenya (Amendment) Bill by the Departmental Committee on Justice and Legal Affairs and jointly with the Senate Standing Committee on Justice, Legal Affairs and Human Rights, the weight to be placed on the submissions received by the Committee, the effect of the pending court cases on the consideration of the Bill in Parliament; the attendant voting thresholds and the measures put in place to facilitate Members to participate in the consideration and voting of the Bill given the COVID-19 Pandemic and related inquiries regarding processing of the Bill.

Decision of the Speaker:

1) *The Constitution does not place any restriction with regard to the age, gender, tribe, profession or status of a promoter of a Bill to amend the Constitution.*

2) *The procedure prescribed under Article 257 of the Constitution was followed with regard to the origination and processing of the Constitution of Kenya (Amendment) Bill, 2020 promoted by the Building Bridges Initiative before its introduction in Parliament.*

3) *The errors highlighted in the Bills were not in a nature that affected the substance of the Bill and could be corrected by the Speaker before submission of the Bill for assent;*

4) *Any question as to the constitutionality of the Bill's provisions was premature.*

5) *A Bill to amend the Constitution by popular initiative may not be amended by the House as any amendment shall negate the popular will of the people in directly amending the Constitution.*

6) *Alterations to the text of such a Bill may only be allowed to correct errors of form or typographical errors before submission for assent.*

7) *Public participation on a Bill to amend the Constitution is mandatory and must be meaningful.*

8) *There was at the moment no court order directed at Parliament with regard to the consideration of the BBI Constitution of Kenya (Amendment) Bill, 2020.*

"Honourable Members, you will recall that during the Afternoon Sitting of the Special Sitting of the House on Wednesday, 28th April 2021, the Member for Garissa Township, Hon. Aden Duale, rose on a point of order during debate on the Second Reading of the Constitution of Kenya (Amendment) Bill, 2020, which seeks to amend the Constitution of Kenya by popular initiative. The Hon. Member sought the direction of the Speaker on a number of issues in relation to the Bill which he termed as "*grey areas*", including the value of the public participation exercise conducted on the Bill by the Departmental Committee on Justice and

Legal Affairs and jointly with the Senate Standing Committee on Justice, Legal Affairs and Human Rights, and the weight to be placed on the submissions received by the Committee, amongst other issues.

Hon. Members, the Member for Ugenya, Hon. David Ochieng', also sought direction on the role of the House in dealing with a Bill to amend the Constitution by popular initiative and whether, and the extent to which, the House may amend the Bill. Additionally, he sought guidance on whether the Bill before the House fell within the four corners of Article 257 of the Constitution or is what he referred to as an "*Executive initiative*" on account of the promoters seemingly being in Government and the moving of the Bill having been deputed to the Leader of the Majority Party by its promoters.

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

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

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

1) Whether the Constitution of Kenya (Amendment) Bill, 2020, which is promoted by the Building Bridges Initiative (BBI), is a popular initiative under Article 257 of the Constitution and whether the procedure outlined under that Article was followed by the county assemblies and the correct threshold met before the introduction of the Bill in Parliament;

2) Whether the Bill upsets the basic structure of the Constitution; and whether it contains unconstitutional constitutional amendments;

3) Whether a Bill to amend the Constitution by popular initiative can be amended and what is the value and intention of the public participation conducted by the Joint Committee;

4) What is the effect of the pending court cases on the consideration of the Bill currently before the House; and,

5) What is the procedure applicable to the consideration of a Bill to amend the Constitution by popular initiative in the House and the voting threshold.

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

I must also note that the process of amending the Constitution by popular initiative in terms of Article 257 of the Constitution is one which espouses the sovereign power of the people of Kenya under Article 1 of the Constitution. It is one which begins from the people who are allowed to propose amendments supported by at least one million registered voters. Fittingly, the process also ends in the hands of the people who approve the proposed amendments through a referendum, particularly in the event that a House of Parliament fails to pass it. This is a process that is people-driven where even this House or indeed its rules cannot stifle or bar the exercise of the sovereign power of the people.

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

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

First, was the amendment of the Constitution proposed by a popular initiative signed by at least one million registered voters as required under Article 257(1) of the Constitution? Hon. Members, you will recall that the Independent Electoral and Boundaries Commission (IEBC) confirmed to the country that this requirement was complied with.

Second, was the popular initiative for an amendment of the Constitution in the form of a general suggestion or a formulated Bill as required under Article 257(2) of the Constitution? As you are aware, the IEBC also confirmed to the whole world that it had received the popular initiative for an amendment of the Constitution in the form of a formulated Bill under Article 257(2) of the Constitution.

Third, did the promoters of the popular initiative deliver the draft Bill and the supporting signatures to the IEBC which verified that the initiative was supported by at least one million registered voters as required under Article 257(4) of the Constitution? As you are also aware, the IEBC confirmed that it had received the draft Bill and verified that the initiative was supported by at least one million registered voters.

Fourth, did the IEBC submit the draft Bill to each county assembly for consideration within three months of the date it was submitted by the Commission as required by Article 257(5) of the Constitution? Hon. Members, as you are further aware, the IEBC confirmed that it had submitted the draft Bill to each county assembly for consideration.

Lastly, did the Speakers of the two Houses of Parliament receive copies of the draft Bill from the county assemblies with a certificate that each county assembly had approved it in accordance with Article 257(6) of the Constitution? You will recall that I communicated to this House on Thursday, 25th February 2021, that the Speakers of Parliament had received returns from the county assemblies with 42 county assemblies having approved the draft Bill as at that date. Thereafter, the draft Bill was subsequently introduced in the House and read a First Time on Thursday, 4th March 2021. From an examination of the Bill against the questions that I have just highlighted, one cannot arrive at another definition or indeed confuse the nature of the Bill with any other Bill other than the one proposed under Article 257 of the Constitution.

The Members also raised the concern that some of the Members of Parliament may have been involved in collection of views of the public through the Building Bridges Taskforce or participated as promoters of the Bill. As you are indeed aware, the Member for Suna East, Hon. Junet Mohamed, is listed as one of the promoters of the Bill in the joint Report. Additionally, I am also aware that several Members of this House signed to support the popular initiative that was submitted to the IEBC. However, the question of whether the Bill before us is a popular initiative or an "*Executive initiative*" as some of the Members have decided to label it does not arise. Any registered voter, be it a Member of this House or even the President, is at liberty to sign and support a popular initiative in terms of Article 257(1) of the Constitution. There is no bar. The Constitution does not place any restriction with regard to the age, gender, tribe, profession or status of a promoter of a Bill to amend the Constitution by popular initiative, save that they must be registered voters. It is, therefore, my considered opinion that what determines whether a Bill is a Bill by popular initiative is whether the Bill takes the shape, form and follows the procedure under Article 257 of the Constitution.

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

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

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

> *"257. (5) If the Independent Electoral and Boundaries Commission is satisfied that the initiative meets the requirements of this Article, the Commission shall submit the draft Bill to each county assembly for consideration within three months after the date it was submitted by the Commission.*
>
> *(6) If a county assembly approves the draft Bill within three months after the date it was submitted by the Commission, the speaker of the county assembly shall deliver a copy of the draft Bill jointly to the Speakers of the two Houses of Parliament with a certificate that*

the county assembly has approved it."

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

Hon. Members, the question as to whether the threshold was met in the county assemblies relates to the reported passage of "*multiple*" versions of the Bill. Indeed, the Report of the Committee has extensively tackled the matter of the errors. I would, therefore, not wish to overstate the matter any further save to say that by way of Communication from the Chair issued between February and March 2021, I regularly updated the House on the progress of submissions of certificates of approval from county assemblies.

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

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

"83. Certified documents—

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

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

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

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

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

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

Hon. Members, a secondary issue did arise from the submission of the copies of the Bills by the county assemblies with regard to the operative version of the Bill in light of reported circulation of different versions and errors in the Bill. On the issue of the errors, errors noted during the joint consideration of the Bill by the two Committees of the Houses of Parliament,

I agree with the Committees' findings that although Parliament may, in exercise of legislative power under Article 94 of the Constitution, take steps to correct noted errors, this may pave way for new substantive insertions that may ultimately affect the form and substance of the Bill. We may then run the risk of eventually overriding the principal intentions of the promoters of the Bill and, therefore, offending the whole idea of an amendment of the Constitution by popular initiative. In any case, the errors have been observed to be inadvertent and mostly typographical or cross-referential and that the text of the Bill is sufficiently clear as to what it intends to amend. The errors were noted in Clauses 13 (b), 48, 51(a) and paragraph 1(1) of the Second Schedule.

With the public debate that has raged on regarding this matter, and the explanations given by the originators of the Bill, any person interested in the matter surely understands the intentions of the promoters notwithstanding the errors. The House will therefore continue to consider the Bill that was introduced and committed to the Justice and Legal Affairs Committee (JLAC) as submitted by the IEBC.

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

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

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

Hon. Members, when comparing our jurisdiction with the United States of America, it is notable that Article V of the Constitution of the United States of America provides as follow:

> *"The Congress, whenever two-thirds of both Houses deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two-thirds of several states, shall call a convention for proposing amendments which, in either case, shall be valid to all intents and purposes as part of this Constitution when ratified by legislatures of three-fourths of the several states, or by conventions in three-fourths thereof as one or the other mode of ratification may be proposed by the Congress; provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the First and Fourth Clauses in the Ninth Section of the First Article and that no state, without its consent shall be deprived of its equal suffrage in the Senate."*

From the foregoing, Hon. Members, it is notable that the US Congress can propose amendment on its own Motion or upon application by the legislatures of several states. It is also worth noting that the US Constitution may also have what is termed as basic structure of the Constitution that may not be amended. Indeed, Article V of the US Constitution provides that no amendment in any manner shall affect the First and Fourth Clauses in the Ninth Section of the First Article and that no, state without its consent, shall be deprived of its equal suffrage in the Senate. I am sure most Members will appreciate that it is two Members from each state.

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

"Bills amending the Constitution

74 *1) Section 1 and this subsection may be amended by a Bill passed by–*

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

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

2) Chapter Two may be amended by a Bill passed by–

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

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

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

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

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

i. relates to a matter that affects the Council;

ii. alters provincial boundaries, powers, functions or institutions; or

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Hon. Members, unlike our Constitution, Section 74 of the Constitution of the Republic of South Africa does not provide for amendment of the Constitution through any other procedure other than through its National Assembly and the National Council of Provinces. It also does not contain a provision for submission of the amendments to a referendum or amendment by popular initiative.

In my view, Article 255 (1) of the Constitution of Kenya expressly provides what constitutes its basic structure and provides a safeguard against arbitrary and whimsical amendment of the matters it lists without submission of the amendment to the people for approval. Indeed, the preamble to the Constitution speaks to matters listed under Article 255 (1) of the Constitution as it provides that:

"We, the people of Kenya…

RECOGNISING the aspirations of all Kenyans for a government based on essential values of human rights, equity, freedom, democracy, social justice and the rule of law: EXERCISING our sovereign and inalienable rights to determine the form of governance of our country and having participated fully in the making of this Constitution."

As such, I am of the considered opinion that a Bill may be introduced to amend any provision of the Constitution, and that such a Bill may be considered and passed by the House subject to its submission for approval by the people at a referendum, if it touches on any matter listed in Article 255 (1) of the Constitution.

As I have guided in the preceding portion of this Communication and as noted by the Report of the Committee, the Bill before the House does, indeed, touch on various matters listed under Article 255 (1) of the Constitution. This does not invalidate the proposals but merely subjects them to submission to a referendum.

The discussion on the basic structure of the Constitution leads us to the question of whether the Bill contains unconstitutional constitutional amendments. As you are aware, Article 3 of the Constitution (Defence of the Constitution) and Article 10 of the Constitution (National Values and Principles of Governance) place an abiding obligation on the Speaker to respect, uphold and defend the Constitution. As an extension of this constitutional imperative, Standing Order 47 (3) of the National Assembly Standing Orders requires the Speaker to, among other considerations, assess the constitutionality or otherwise of business proposed for introduction to the House. Standing Order No. 47 (3) provides:

"(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; and,

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

(a) ……. *;*

(b) …….. *;*

(c) …….. *; or*

(d) …… *;*

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

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

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

Hon. Members, apart from these two provisions expressly cited in the Report on account of their apparent unconstitutionality, several Members also raised concerns with the following clauses of the Bill questioning their constitutionality:

1) Clause 29 of the Bill which allows for the appointment of the Cabinet from Members of the National Assembly;

2) Clause 44 of the Bill on the establishment of the Office of the Judiciary Ombudsman and its effect on the independence of the Judiciary;

3) Clause 52 of the Bill which establishes the Constituencies Development Fund; and

4) Clause 61 of the Bill which reconstitutes the Salaries and Remuneration Commission; and Clauses 67 and 68 of the Bill which touch on the functions and powers of the National Police Service and the National Police Service Commission.

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

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

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

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

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

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

Hon. Members, the Standing Orders of the National Assembly prescribe, in detail, the procedure to be followed with regard to the initiation of legislative proposals, pre-publication scrutiny of the proposals, publication of Bills, introduction of the Bills in the House and their consideration, including amendment, passage and transmission to the Senate, where applicable. As Members will recall, I have previously applied Standing Order No. 47(3) during consideration of ordinary legislation and other business before the House to exclude specific portions of the legislation or other business found to offend the Constitution or existing laws from debate. The procedure applying to ordinary legislation and other business, however, does not extend to a Bill to amend the Constitution.

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

Hon. Members, I will go to Clause 7:

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

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

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

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

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

Hon. Members, Article 94 of the Constitution outlines the general role of Parliament with regard to the consideration and passage of amendments to the Constitution, among its other roles. Parliament is placed under an obligation of protecting the Constitution at all times and promoting the democratic governance of the Republic. This is provided for in Article 94(3) and (4):

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

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

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

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

2) introduction in Parliament without delay, where a majority of the county assemblies approve the draft Bill;

3) passage by a majority of the members of each House; and,

4) submission of the Bill to the President for assent, if Parliament passes the Bill.

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

Hon. Members, as I have noted, by dint of Articles 3 and 10 of the Constitution, and Standing Order No. 47(3), the Speaker's failure to arrest any business found to offend the Constitution or statute would amount to abdication of duty. I have previously ruled and guided Members where such instances have arisen on the specific provisions of the Constitution that the proposals have offended and additionally advised them to introduce amendments to the Constitution as an alternative. The Bill currently before the House seeks to amend the Constitution. Consequently, challenging portions of the Bill for ostensibly offending the same Constitution, the Bill seeks to amend would defy logic.

Hon. Members, in the Report of the Committee, the Second Schedule to the Bill is termed "*unconstitutional*" for seeking to delimit constituencies which is a function of the IEBC enumerated under Article 89(4) of the Constitution. According to the submissions made to the Committee and those made by Members on the issue, the perceived unconstitutionality of the Schedule would be cured if a direct amendment had been made to Article 89(4) of the Constitution. This position draws our attention to the history of the current Constitution and the mechanisms it puts in place through the Transitional and Consequential Provisions that are set out in its Sixth Schedule of the Constitution. Members will recall that drawing from the mandate outlined in the Sixth Schedule to the Constitution, this House functioned as both the National Assembly and the Senate for close to three years during the existence of the current Constitution.

Additionally, Hon. Members, we remember that my predecessor, the Hon. Speaker Kenneth Marende had occasion to rule that the nominations made by the then President Mwai Kibaki to the posts of Chief Justice and Attorney General had been forwarded to Parliament in contravention of the provisions of the Sixth Schedule which required consultations on the nominations with the then Prime Minister. The Executive at that time had decided to operate within the Constitution and not obey the requirements of the Sixth Schedule. The names were subsequently withdrawn and the nomination and appointment of Chief Justice Willy Mutunga strictly adhered to the provisions in the Sixth Schedule.

Tellingly, Hon. Members, with regard to the first boundary delimitation exercise, the provisions of Section 27(3) of the Sixth Schedule deferred the obligation placed upon the IEBC to complete delimitation at least 12 months before a general election provided for under Article 89(2) of the Constitution. Additionally, Section 27(4) of the Sixth Schedule protected all the constituencies existing at the time of the promulgation of the Constitution from being lost during the first boundary review conducted by the then Interim Independent Boundaries Commission, despite the existence of Article 89(4) in the main text of the Constitution. The existence of these constituencies has never been challenged and the provisions of the Sixth Schedule have remained perfectly valid despite deviating from the substantive provisions contained in the main text of the Constitution.

Similar competing arguments may also be advanced with regard to the issue raised in the Report on the constitutionality of the additional functions sought to be granted to the Judiciary with regard to the disciplining of judges. According to the Committee, in the event the Bill is assented to without submission to a referendum, the cited provisions would be unconstitutional. I, however, note that Paragraph 377 of the Report qualifies the findings of the Committee by acknowledging that "*an unconstitutional amendment becomes constitutional if it is approved by the people in a referendum*." Additionally, at Paragraph 506 of the Report, the Committee notes that "there are provisions in the Bill that touch on some of the matters provided for under Article 255(1) of the Constitution. Consequently, pursuant to Articles 255(3) and 257 (10) of the Constitution, the Bill is one for which a referendum is required.

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

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

1) Petition No. E282 of 2020: David Ndii & Others vs. Attorney General & Others.

2) Petition No. E397 of 2020: Kenya National Union of Nurses vs. Steering Committee of BBI & Others.

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

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

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

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

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

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

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

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

Hon. Members, in the Communication issued on 20th August 2015 on amendment of a Bill to amend the Constitution by the National Assembly, I guided the House that I would not allow any amendment to be proposed to a Bill to amend the Constitution. The reasons given then, which similarly apply now, are that a plain reading of the operative provisions on amending the Constitution, the sanctity of the Constitution, and previously adopted procedure on constitutional amendments, discourage such a practice.

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

"The customs and traditions of our democracy have been to restrict amendment Bills seeking to amend the Constitution. I see no reason to depart from this practice, as the Speaker cannot rely on allegory or allusion in guiding the House. You will note that the preamble to our Constitution highlights that the people of Kenya adopted, enacted and gave themselves and future generations of this Republic, the Constitution. The sanctity of the Constitution as a social contract between the people of Kenya and not a document belonging to the Houses of Parliament, nor any other organ for that matter, is to be jealously safeguarded at every turn. And any process of its amendment is delicate and can only be undertaken with reference to a definite procedure that deviates from the ordinary. Hon. Members, while Parliament has been given the power to amend the Constitution, we should be mindful that the Constitution belongs to the people of this Republic. Treating the process of its amendment as akin to an ordinary legislation would subvert the collective will of the people. In this regard, it is expected that any person intending to amend the Constitution, must be very clear and precise on what he or she is intending to alter, but not to change mind while in the process or midstream. It is my strong view that any proposal to amend the Constitution should be preceded by the meaningful and adequate consultations before such a Bill is published, a principle embodied in Article 256(2) of the Constitution. Bearing in mind that the legislative power is originally derived and consequently vested in the people, we ought to obtain the confidence of our fellow citizens even as we endeavour to amend the Constitution. The process of making or amending the Constitution, therefore, cannot be without consultations, precision and guarded restraint."

Hon. Members, in the same manner, I was minded in 2015, and I am still minded today, to disallow any attempt to amend the Bill currently before the House. Indeed, I would say I am actually more persuaded to disallow any amendment for the sole reason that this is a Bill to amend the Constitution by popular initiative. As noted in my opening remarks, once initiated, a Bill to amend the Constitution by popular initiative is irrepressible to any attempts to delay or derail it. I am of the considered opinion that any attempt to amend the provisions of the Bill directly negates the popular nature of the Bill and the exercise of the sovereign will of its promoters who have collected more than one million signatures of registered voters in its support and ostensibly convinced a majority of the county assemblies to approve without alteration.

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

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

1) The marginal note to Clause 48 of the Bill refers to Article 189 instead of Article 188 of the Constitution; and

2) Clause 51 (a) of the Bill does not refer with adequate precision to the specific part of Article 204 of the Constitution that it proposes to amend.

Hon. Members, you will also note from the Report that discrepancies have also been identified in the Bills received from the county assemblies in the returns submitted to the two Speakers of Parliament. Twelve county assemblies submitted Bills with similar errors to the ones noted in the Bill currently before the National Assembly. Thirty-four other county assemblies submitted

Bills which, apart from containing the errors noted in the Bill before the House, contained the following additional errors:

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

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

Hon. Members, you will agree with me that the errors highlighted in the Bill before the House and in the Bills received from the county assemblies are minor errors which do not affect the substance of the provisions of the Bill.

The errors are not material enough to impugn the entire Bill, its processing by the House and the intentions of its promoters. As rightly noted by the Committee at paragraph 365 of the Report, the legislative mandate of Parliament allows it to correct any errors of form or typographical errors that do not go to the substance of the Bill to bring drafting harmony to the Bill.

Both Houses of Parliament have, through their Standing Orders, donated the power to correct errors in a Bill to their Speakers before submission of a Bill to the President for assent. Standing Order No. 152 (3) of the National Assembly Standing Orders provides that:

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

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

Hon. Members, the determination that the Bill presently before the House may not be amended logically begs the question of the need and value of public participation to the consideration of the Bill. Article 118 of the Constitution as read with Standing Order No. 127 mandates this House to conduct public participation in its legislative business. This is a mandatory exercise that the House is enjoined to undertake when considering any legislative business. It is not discretional or optional as it is indeed also one of the national values and principles of governance provided for in Article 10 of the Constitution, which are binding on all state organs and State officers.

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

Hon. Members, having said this, it is also worth noting that the courts have further prescribed the threshold of what is meaningful public participation, a fact that was alluded to by the Member for Garissa Township, Hon. Aden Duale, in raising his point of order. The thresholds are intended to ensure that this House or, indeed, its Committees do not just engage in a ticking-the-box or cosmetic exercise in a bid to comply with the obligation as set out in

Article 118 of the Constitution and Standing Order No. 127. The process must, therefore, be qualitative rather than quantitative. In this regard, it is not the number of submissions that are made by stakeholders or, indeed, the number of stakeholders that participate in such an exercise that matter. A Committee must demonstrate that it did engage, consider and examine the submissions made by the public in arriving at its decision. This, Hon. Members, can only be ascertained by a look at the Report of the Joint Committees in an instant case.

Hon. Members, having said this, allow me to refer to a number of court decisions that have also made very imperative pronouncements on what is meaningful public participation. In Robert N. Gakuru and Another versus Governor of Kiambu County and three others, (2013) - as put in the Kenya Law Report (eKLR) - the court observed that:

> *"Public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfilment of the constitutional dictates."*

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

Hon. Members, looking at other jurisdictions like in South Africa, the same thresholds of public participation have been upheld. Indeed, referring to the famous case of Doctors for Life for International versus the Speaker of the National Assembly and Others 1 CCT2 of 2005, the court held as follows:

> *"What is intimately important is that the Legislature has taken steps to afford the public a reasonable opportunity to participate effectively in the law-making process. Thus, construed there are, at least, two aspects of the duty to facilitate public participation. The first is the duty to provide meaningful opportunities for public participation in the law-making process. The second is the duty to take measures to ensure that the people have the ability to take advantage of the opportunities provided".*

I also observe, from the Report, that the Joint Committee gave the public an opportunity to participate in its public hearings. It received extensive submissions from the public and considered, analysed and examined the submissions, as evidenced in its Report. I also note that the Joint Committees considered the submissions in arriving at its findings and recommendations as contained in the Report. To this end, one can observe that the Joint Committees conducted public participation as required by Article 118 of the Constitution and adhered to the standards and thresholds set by the courts on what is meaningful public participation. Having said this, and in answering the question raised by the Member for Garissa Township regarding the value of public participation on a Bill that may not be amended, it is notable that the submissions made by the public are intended to apprise the Members of this House and assist them to make informed decisions during the consideration of this Bill at Second Reading, Committee of the whole House and the Third Reading. Certainly, any Member of this House is at liberty to raise any of the issues submitted by the public as contained in the Joint Report in making submissions at Second Reading and, indeed, is expected to make an informed decision as to whether to pass or reject the Bill.

Hon. Members, the submissions of the public have been analysed in the Report and are also attached as annexes to the Report and Members may make reference to them. It is my considered opinion that the ventilation of the issues raised by the public during public participation also fall within the definition of meaningful public participation as espoused in Article 118 of the Constitution. This exercise shall, in the end, also assist the people to make

an informed decision on whether to approve or reject the Bill when the Bill is submitted to a referendum in terms of Article 257(10) of the Constitution.

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

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

It is also worth noting that the manner in which Article 257(7) of the Constitution is couched is in mandatory terms that a draft Bill having been approved by the county assemblies is required to be introduced in Parliament without delay for consideration. In this regard, in the event Standing Order No. 89 was to apply, it would not be used to oust the express constitutional and mandatory obligation placed on Parliament to introduce and consider a Bill to amend the Constitution by popular initiative. Indeed, such an interpretation would, in addition to being an affront to Article 257 of the Constitution, also offend Article 1 of the Constitution on the sovereign power of the people of Kenya to amend the Constitution as and when they see it fit. Standing Order 89 cannot curtail this sovereign power of the people which is guaranteed and protected by the Constitution itself.

Standing Order 89 provides the circumstances under which the *sub judice* rule would apply and gives power to the Speaker to interpret and apply the same in determining whether a matter is *sub judice* or not. Even in instances where the matter under consideration is deemed to be *sub judice*, the Speaker has discretion under Standing Order 89(5) to allow reference to the matter where necessary. Accordingly, I am of a strong opinion that the public interest on a Bill introduced by way of a popular initiative overrides the provisions of Standing Order No.89 on the *sub judice* principle.

Further, the courts have in the past also issued pronouncements guarding against interfering with ongoing legislative processes, in particular, in consideration of a Bill by the House. Interference with the processes of the House has been interpreted by the courts to be tantamount to stifling the legislative authority of Parliament as guaranteed under Article 94 of the Constitution. The courts have jurisdiction to interpret and consider Bills of this House once enacted into law as Acts of Parliament.

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

by the two Houses of Parliament. The order further provides that, should the President assent to the Bill, the amendments shall not come into force until the determination of the petitions challenging the process.

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

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

The fifth and final issue raised was with regard to the procedure applicable in the consideration in the House of a Bill to amend the Constitution by popular initiative. Article 109 of the Constitution vest the legislative power at the national level to Parliament. Article 109(1) is clear. It says that:

> *"Parliament shall exercise its legislative power through Bills passed by Parliament and assented to by the President."*

In exercise of its legislative power, the House has established rules and procedure for its operations as provided for in Article 124 of the Constitution. The National Assembly has established Standing Orders that guide the manner, in which the House and its committees introduce, consider and determine any business before the House. In the case of Bills, the Standing Orders prescribe the process to be followed with regard to the initiation of legislative proposals, pre-publication scrutiny of the proposals, publication of Bills, introduction of Bills in the House and their consideration, including amendments and transmission to the President for assent or to the Senate where applicable. The joint Report of the two Committees of the Houses of Parliament notes the absence of a clear procedure for consideration of a Bill to amend the Constitution by popular initiative. Indeed, at paragraph 464, the Report notes that:

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

Further, the Committees at paragraph 454 of their Report have cited the Supreme Court of India in the case of Shankari Prasad Sing Deo vs. the Union of India, A.I.R 1951 S.C 458. In the case, the court notes that in the passage of a Bill to amend the Constitution by each House, the term 'passed' would be construed to mean the legislative processes that follow in the exercise of legislative function of Parliament. The court found that such a Bill was "*to follow the procedure set out in the Rules of Procedure and the conduct of business in Parliament subject to requirements of the Constitution regarding the special majority required for passage and the requirement for assent by the President*."

Whereas there is no direct procedure provided for in the parliamentary consideration of a Bill seeking to amend the Constitution by popular initiative, Article 257 of the Constitution prescribes the procedures governing origination and general processing of such a Bill. Clauses 7 to 10 of the Article provide that:

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

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

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

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

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

This then brings me to the question of the thresholds applicable to the consideration of the Bill in view of the required votes I have alluded to as provided in Article 122, which provides about the majorities. In the case of a Bill to amend the Constitution by popular initiative, Article 257(8) provides a specific majority in each House. In this regard, a majority of all Members of the National Assembly means at least 176 members will be required to pass the Bill in its Second Reading and Third Reading. This number has been arrived at by ascertaining 50 per cent of all Members of this House and adding one to get a majority. Motions in committee of the whole House will be dispensed with in the usual manner.

Having said that, allow me now to respond to concerns raised by the Member for Kikuyu, Hon. Kimani Ichung'wah, regarding the measures taken to ensure Members participate in the voting in view of the public health restrictions owing to the COVID-19 pandemic. From the outset, I wish to reiterate that the House leadership thanks Members for their continued co-operation in the implementation of the existing protocols. As you are all aware, the Ministry of Health guidelines currently restrict the maximum number in the Chamber to 112. It is for this reason that I designated other areas as being part of the Chamber, including the Members' Lounge and the extended tent zones. This has allowed the attendance and participation of a greater number of Members in the business of the House. In view of prevailing circumstances, this arrangement will be upheld during the period of debate and voting on the Constitution of Kenya (Amendment) Bill, 2020 to ensure that all Members who wish to participate are facilitated to do so. With regard to actual voting, the House shall vote by roll call, pursuant to Standing Order 72(2).

For avoidance of doubt, Standing Order 72(2) provides that:

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

Given the exceptional circumstances occasioned by the COVID-19 pandemic, should it become necessary, I may invoke the provisions of Standing Order No. 265D and direct the Clerk to facilitate Members to take part in the vote virtually. In this regard, names of Members will be called out using the Division List, with those seated in the other designated areas being allowed to come into the Chamber to vote and thereafter immediately exit the main Chamber. The process will be carried out in strict compliance with the health protocols.

At this stage, you may wish to note that a decision on the Bill is one of the instances where the Constitution requires a fixed majority and, therefore subject to the provisions of Standing Order No. 62. You will also recall that on 28th August 2015, during the 11th Parliament, while the House was considering the Constitution of Kenya (Amendment) (No. 2) Bill, 2013 sponsored by the then Member for Samburu West, Hon. Lati Lelelit, I gave guidance on the process and rationale for the procedure under Standing Order No. 62. In a nutshell, the gist of my guidance was that the extended period provided in the Standing Order enables Members to reflect on a matter before the House and either reconsider or reconfirm their decision. This is premised on the fact that there are not many instances that require a fixed threshold for passage and the few that do are usually of a higher consequence in the operation of governance such as amendment of the Constitution. The second vote, therefore, affords the House an opportunity to actually express its desire. Indeed, during the above instance in 2015, the repeat vote saw a reconsideration of the decision and the Bill was passed by the House. We shall, therefore, proceed in a similar manner should the circumstances dictate.

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

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

Hon. Members, I wish to thank the Joint Committee for the invaluable contribution that their Report has made to this guidance and the contribution it shall make to the debate on this Bill. In summary, my considered guidance is, therefore, as follows:

1) THAT, on the question as to whether the Constitution of Kenya (Amendment) Bill 2020 promoted by the Building Bridges Initiative is a popular initiative under Article 257 of the Constitution and whether the procedure outlined under Article 257 was followed by the county assemblies and the correct threshold met before the introduction of the Bill in Parliament; the Bill currently before the House is a Bill to amend the Constitution by popular initiative as envisaged by Article 257 of the Constitution. Any registered voter is at liberty to sign and support a popular initiative in terms of Article 257 (1) of the Constitution. The Constitution does not place any restriction with regard to the age, gender, tribe, profession or status of a promoter of such a Bill. Further, the procedure prescribed under Article 257 of the Constitution was followed with regard to the origination and processing of the Constitution of Kenya (Amendment) Bill, 2020 promoted by the Building Bridges Initiative before its introduction in Parliament.

The certificates submitted by the county assemblies in their returns to the two Speakers of Parliament are conclusive evidence of the propriety of the procedures undertaken with regard to the Bill prior to its introduction in Parliament. The errors highlighted in the Bills currently before the two Houses are not in a nature that affects the substance of the Bill. The errors may be corrected by the Speaker before submission of the Bill for assent;

2) THAT, on the question as to whether the Bill upsets the basic structure of the Constitution and whether it contains unconstitutional constitutional amendments; the matters listed under Article 255(1) constitute the basic structure of the Constitution of Kenya as any amendment relating to them must be submitted for approval at a referendum. The Bill touches on various matters listed under Article 255 (1) of the Constitution and ought to be submitted for approval at a referendum. To the extent that the Bill currently before the House touches on various matters listed under Article 255 (1) of the Constitution, which the Constitution requires to be submitted to a referendum for approval, any question as to the constitutionality of its provisions is premature.

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

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

   I am also satisfied that adequate public participation has been undertaken in respect of the Bill, the Bill by its nature being a popular initiative and public participation having been undertaken by the two Committees jointly. An enabling environment and opportunity were given to the public to have their say on the matter.

4) THAT, on the question of the effect of pending court cases on the consideration of the Bill currently before the House; currently, there is no court order directed at Parliament with regard to the consideration of the BBI Constitution of Kenya (Amendment) Bill, 2020. Standing Order No.89 of the National Assembly Standing Orders cannot oust the obligation on Parliament to introduce and consider a Bill to amend the Constitution by popular initiative without delay; and

5) THAT, the procedure to be applied during the consideration of the Bill in the House shall be as follows:

   a. The Bill, having been read the First Time, shall undergo Second Reading, Committee of the whole House and Third Reading.

   b. The voting threshold applicable to the Second Reading and Third Reading of the Bill

shall be a minimum of 176 Members, being a majority of all Members of the House, to pass.

c. Voting shall be by roll-call. Members will be called out as per the Division List with those seated in the other designated areas being allowed entry into to the Chamber to cast their votes and, thereafter, immediately exit the Chamber. In light of the exceptional circumstances occasioned by the COVID-19 pandemic, should it become necessary, I will invoke the provisions of Standing Order No.265D and direct the Clerk to facilitate Members unable to attend the sittings of the House physically to take part in the vote virtually.

d. I may, if necessary, direct the holding of a further vote at the various stages of the consideration of the Bill, pursuant to Standing Order No.62 (2).

Hon. Members, as the House henceforth, proceeds with the consideration of the Bill with this guidance, may I end by stating that, as your Speaker, it is my considered finding that the Constitution of Kenya (Amendment) Bill, 2020 promoted by the Building Bridges Initiative is properly before this House.

Further, it is my considered view that, in the reading of the Constitution, no state organ or person to whom power is delegated by the people under Article 1 of the Constitution can stand in the way of the exercise of the sovereign power of the people of Kenya to chart the course of their future in any manner they deem fit within the provisions of the Constitution.

I, therefore, wish to urge Hon. Members that, while debating and deciding whether to pass the Bill or not, the House must always be mindful of the considerations that motivated the people of Kenya to make and reduce their current social contract into writing in the first place.

The last three paragraphs of the preamble to the Constitution of Kenya encompass these considerations where the people of Kenya, while RECOGNISING the aspirations of all Kenyans for a Government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law; and EXERCISING their sovereign and inalienable right to determine the form of governance of the country, and having participated fully in the making of the Constitution; ADOPTED, ENACTED and GAVE the Constitution to themselves and to their future generations. The centrality of the people to the making and amending of the text of the Constitution cannot, therefore, be gainsaid.

The House is accordingly guided.

I thank you."

NAMING OF MEMBERS FOR GATUNDU SOUTH, KIHARU AND NYALI

Thursday, 13th May 2021

Context:

Naming of Members accused of making false and disparaging remarks about the ethical conduct of Members of the House pursuant to Standing Order 108.

Decision of the Speaker:

Pursuant to the provisions of Standing Order No. 108, the Speaker proceeded to name Mr. Ndindi Nyoro and reprimand him for his conduct, following which the Member suspended for four days following the proposition and seconding of a motion to suspend him.

"Honourable Members, you will recall that on Tuesday, 11th May 2021 during the Afternoon Sitting, the Member for Kitui Central, Hon. (Dr.) Makali Mulu, rose on a point of order, pursuant to Standing Order No. 108, inviting me to name the Member for Gatundu South. In making the invitation, Hon. (Dr.) Makali Mulu claimed that the Member for Gatundu South had made false and disparaging remarks about the ethical conduct of Members of the House, in relation to the proceedings of Thursday, 6th May 2021 during the voting on the Second and Third Reading of the Constitution of Kenya (Amendment) Bill 2020. Other Members speaking in support invited the Speaker to also name the Member for Kiharu and the Member for Nyali for grossly disorderly conduct by using un-parliamentary language and bringing the dignity of the House to disrepute.

Hon. Members, having considered the matter, and observing the weighty nature of the issues raised, I deferred the decision on whether or not to name the Members and instead directed that they attend the Afternoon Sitting of today, Thursday, 13th May 2021 at 2.30 p.m. in order to afford them opportunity to respond to the issues raised by you Hon. Members. I am informed that the Clerk forwarded the Hansard record of the Sitting Day for their reference.

Therefore, I wish to know whether the three Members are present. Even as I do so, I wish to announce to the House that the Member for Nyali, Hon. Mohamed Ali, wrote to me a letter which I received this morning, indicating that he would be unavailable this afternoon on grounds that today is *Idd-ul-Fitr* and that he would be celebrating the same with his family and he may not therefore be available in the Chamber. He requests to appear any other time that the House will be sitting. Hon. Members, *Idd* is a religious observation. Therefore, I need to find out whether the Members for Gatundu South and Kiharu are in the House.

Hon. Members, I have already indicated the reasons why it was desirable that they be present. Therefore, perhaps, without having to require anybody to state the matter afresh because it will amount to contributing twice, I will give the first chance to the Member for Gatundu South to make his statement.

The Member for Gatundu South (Hon. Moses Kuria) asserted that his allegations were not made in the Chamber, while the Member for Kiharu (Hon. Ndindi Nyoro) admitted that he had made the disparaging remarks against Members in the chamber, that the Members were cowards, sell outs and traitors and in addition sycophants.

The Speaker held that he found the Member for Gatundu South was not guilty and the Member for Kiharu culpable of Gross Disorderly Conduct for the disparaging remarks he made.

Thereupon the Speaker proceeded to name the Member for Kiharu;

The Speaker, having been convinced that the Hon. Ndindi Nyoro has conducted himself in a manner that was not in keeping with the dignity of the House, proceeded to invoke the provisions of Standing Order 108 and named Mr. Ndindi Nyor, for reprimand for his conduct.

The Majority Whip (Hon. Emmanuel Wangwe, MP) moved that Mr. Ndindi Nyoro be now suspended from the House pursuant to Standing Order 108 (2) (a) and Standing Order 110, and was seconded by the Deputy Majority Whip (Hon. Maoka Maore, MP)

Question for the suspension was put and agreed to, and the Member for Kiharu was suspended under Standing Order 108 for four days."

FATE OF INDIVIDUAL MEMBERS' BILLS PENDING BEFORE COMMITTEES OF THE HOUSE

Wednesday, 7th July 2021

Context:

Delays by Departmental Committees in tabling reports in the House on consideration of individual Member Bills referred to them after being read a First Time. Affected Members had filed their concerns with the Speaker seeking indulgence to cause Committees to prioritize individual Member Bills in order for them to be considered at Second Reading and subsequent stages.

Decision of the Speaker:

1) *Committees to prioritise consideration of individual Members' Bills and any other Bills referred to them during the recess and table reports thereof as soon as the House resumes sittings.*

2) *In the case of several Bills seeking to amend similar laws, the House Business Committee to determine which of the Bills to schedule for Second Reading and subsequent stages, the import of which the other Bills might fall;*

3) *The Liaison Committee to regularly apprise the House on the status of business pending before all Committees by way of a Statement to be made in the House every last Thursday of each month whenever the House is in session.*

"Honourable Members, you will recall that in September 2020, I did update the House on the status of Bills sponsored by individual Members that were pending before various Committees of the House. At the time, forty-five (45) such Bills had been published and were at different stages of processing, with twenty-four (24) Bills having been considered by Committees and reports thereof tabled in the House.

Honourable Members, in the same breath, I wish to apprise the House that, as at today, sixty (60) individual Members' Bills are currently before the House at various stages of consideration. For clarity, the said Bills are at the following various stages:

1) Five (5) are awaiting Committee of the whole House;

2) Four (4) are currently undergoing Second Reading;

3) Fifty (50) are awaiting Second Reading; and,

4) One (1) is awaiting First Reading.

Honourable Members, of interest are the fifty-four (54) Bills that are awaiting Second Reading.

During its regular review of business pending before the House for purposes of prioritising consideration, the House Business Committee observed that out of the fifty-four (54) Bills awaiting Second Reading, Reports on consideration of Bills by the relevant committees pursuant to the provisions of Standing Order 127, in respect of twenty-eight (28) Bills were yet to be tabled in the House as here below:

1) Bills before the Departmental Committee on Communication, Information and Innovation:

   i. The Kenya Communication and Information (Amendment Bill) No. 2 (Bill No. 61 of 2019) by Hon. Malulu Injendi, MP which was read for the First Time on 2nd October 2019.

   ii. The Information Communication Technology Practitioners Bill (National Assembly Bill No. 38 of 2020) by Hon. Godfrey Osotsi, MP, which was read a First Time on 22nd December 2020; and,

   iii. The Computer Misuse and Cybercrimes (Amendment) Bill (National Assembly Bill No. 11 of 2021) by Hon. Aden Duale, EGH, MP, which was read a First Time on 9th June 2021.

2) Bills before the Departmental Committee on Education and Research. Hon. Members, each committee Chairperson should note the number of Bills that are pending before their Committee. Further, I will be making some several directions over this. In Education and Research the Bills are as follows:

   i. The Higher Education Loans Board (Amendment) Bill, (National Assembly Bill No. 29 of 2020) by Hon. Gideon Keter, MP, having been read a First Time on 8th October 2020 and,

   ii. The Higher Education Loans Board (Amendment) Bill, (National Assembly Bill No. 37 of 2020) by Hon. John Paul Mwirigi, MP, which was read a First Time on 9th June 2021.

3) Bills before the Departmental Committee on Finance and National Planning. Can I

   just indicate that they are 10 in total as follows:

   i. The Public Finance Management (Amendment) Bill, (National Assembly Bill No. 22 of 2019) by Hon. Kimani Ichung'wah, MP, which was read a First Time on 2nd May 2019;

   ii. The County Governments' Retirement Scheme Bill (National Assembly Bill No. 29 of 2019) by Hon. Chachu Ganya, MP, having been read a First Time on 8th May 2019;

   iii. The Parliamentary Pensions (Amendment) Bill, (National Assembly Bill No. 56 of 2019) by Hon. Wangari Mwaniki, MP, which was read a First Time on 24th July 2019;

   iv. The Pensions (Amendment) Bill (National Assembly Bill No. 26 of 2020) by Hon. Didmus Wekesa Barasa, MP, which was read a First Time on 10th September 2020;

   v. The Public Procurement and Asset Disposal (Amendment) Bill (National Assembly Bill No. 34 of 2020) by Hon. Richard Tongi, MP having been read a First Time on 22nd December 2020;

   vi. The Public Debt Management Authority Bill (National Assembly Bill No. 36 of 2020) by Hon. Sakwa J. Bunyasi, MP, which was read a First Time on 22nd December 2020;

vii. The Kenya Deposit Insurance (Amendment) Bill, (National Assembly Bill No. 43 of 2020) by Hon. Abdul Rahim Dawood, MP, which was read a First Time on 9th June 2021;

viii. The Central Bank of Kenya (Amendment) Bill, (National Assembly Bill No. 47 of 2020) by Hon. Gideon Keter, MP, having been read a First Time on 25th January 2021;

ix. The Public Procurement and Asset Disposal (Amendment) Bill, (National Assembly Bill No. 49 of 2020) by Hon. Benjamin Gathiru Mwangi, MP which was read a First Time on 9th June 2021; and

x. The Poverty Eradication Authority Bill (National Assembly Bill No. 13 of 2020) by Hon. John Waluke Koyi, MP, having been read a First Time on 11th June 2021.

4) Bills pending before the Departmental Committee on Health are a total of six in the following order:

i. The Kenya Food and Drugs Authority Bill (National Assembly Bill No. 31 of 2019) by Hon. (Dr.) Robert Pukose, MP, which was read a First Time on 2nd May 2019;

ii. The Radiographers Bill (National Assembly Bill No. 47 of 2019) by Hon. Sabina Chege, MP, which was read a First Time on 11th September 2019 and it is noted here that she is also the Chairperson of that Committee and therefore delaying her own Bill.

iii. The Health (Amendment) Bill (National Assembly Bill No. 28 of 2020) by Hon. Alice Wahome, MP, which was read a First Time on 8th October 2020;

iv. The Community Health Workers Bill (National Assembly Bill No. 30 of 2020) by Hon. Martin Peters Owino, MP, which was read a First Time on 22nd December 2020;

v. The Pharmacy and Poisons (Amendment) Bill, (National Assembly Bill No. 1 of 2021) by Hon. Alfred Kiptoo Keter, MP, which was read a First Time on 9th June 2021; and,

vi. The Health (Amendment) Bill, (National Assembly Bill No. 14 of 2021) by Hon. Mwambu Mabongah, MP, having been read a First Time on 9th June 2021.

5) Bills pending before the Departmental Committee on Justice and Legal Affairs in total are five. Hon. Kajwang' the Vice Chairman is not here.

i. The Constitution of Kenya (Amendment) Bill, (National Assembly Bill No. 76 of 2019) by Hon. Vincent Mogaka, MP, which was read a First Time on 4th December 2019;

ii. The Sexual Offences (Amendment) Bill, (National Assembly Bill No. 24 of 2020) by Hon. Gathoni Wamuchomba, MP, having been read a First Time on 10th September 2020;

iii. The Constitution of Kenya (Amendment) Bill, (National Assembly Bill No. 40 of 2020) by Hon. Jeremiah Kioni, MP, which was read a First Time on 22nd December 2020;

iv. The Criminal Procedure Code (Amendment) Bill, (National Assembly Bill No. 41 of 2020) by Hon. Nelson Koech, MP, which was read a First Time on 25th February 2021; and,

v. The Public Participation (No. 2) Bill, (National Assembly Bill No. 71 of 2019) by Hon. Chris Wamalwa, MP, which was read a First Time on 30th October 2019.

6) Bills pending before the Departmental Committee on Labour and Social Welfare are three in total as follows:

i. The Breastfeeding Mothers Bill (National Assembly Bill No. 74 of 2019) by Hon. Sabina W. Chege, MP, having been read a First Time on 6th November 2019;

ii. The Children (Amendment) Bill, (National Assembly Bill No. 46 of 2020) by Hon. George Peter Kaluma, MP, which was read a First Time on 22nd December 2020; and,

iii. The Institute of Social Work Professionals Bill (National Assembly Bill No. 31 of 2020) by Hon. Joshua Kivinda Kimilu, MP, which was read a First Time on 22nd December 2020.

7) With respect to the Departmental Committee on Transport, Public Works and Housing, records indicate that only one Individual Member's Bill is pending tabling of report. This is The National Construction Authority (Amendment) Bill, (National Assembly Bill No. 45 of 2020) sponsored by Hon. David Gikaria, MP, which was read a First Time on 9th June 2021.

Hon. Members, as you may have noticed, some Bills that have been pending before the respective Committees were introduced in the House during the Third Session; that is 2019. They have been pending for that long and now stand the risk of lapsing at the end of the Fifth Session pursuant to the provisions of Standing Order 141 (Lapsing and re-introduction of Bills) as read together with the resolution of the House of 3rd December 2020. This is regrettably unfortunate and might be construed by the sponsors of the affected Bill as a calculated attempt by Committees to stifle their constitutional mandate of legislating.

Hon. Members, let it not be lost to Committees that indeed, Standing Order 127 (4) obligates a committee to which a Bill is committed to report to the House within 21 calendar days of such committal.

Whereas the said Standing Order permits the House Business Committee to schedule Second Reading of a Bill after 21 days even if the relevant committee has not tabled a report on the Bill, the importance of having Committee reports on Bills before commencement of Second Reading needs not be over-emphasised.

For the information of Members, Committee reports on Bills not only inform and enrich debate on the Bill, but also most importantly, espouse the views and recommendations of the public, which legitimises the legislative process and cushions the House from judicial review for failing to comply with provisions under Article 118 of the Constitution (Public Access and Participation).

Hon. Members, I also hasten to remind Committees of the ramifications of Standing Order 127(5) regarding failure to table reports on Bills within the stipulated timeline. For clarity, the said Standing Order provides as follows:

"If for any reason, at commencement of Second Reading the report has not been presented, the Committee concerned shall report progress to the House, and the failure to present the report shall be noted by the Liaison Committee for necessary action".

I therefore encourage Committees to have fidelity on the dictates of Standing Order 127, which is intended to enrich the law-making process rather than mete punishment to Committees for non-compliance.

Hon. Members, the leadership of the House, through the House Business Committee, continues to play its part in ensuring that individual Members' legislative business is considered and concluded. You may be aware of the progressive measures that the leadership has consistently instituted to accelerate processing of individual Members' Bills and prioritise their consideration by the House. You may recall that in February 2019, upon a resolution of the House Business Committee, I ordered publication of 30 individual Members' legislative proposals that had over-stayed in Committees during pre-publication scrutiny. In that Session, the number of individual Members' Bills shot steeply.

On 8th June 2021, the House Business Committee moved this House to resolve to accord priority to individual Members' business during the Sittings of the House every Thursday Afternoon. Further, the House Business Committee has proposed to the House to alter its Calendar for Fifth Session so as to extend the upcoming recess from two to three weeks.

Hon. Members, the intention of the leadership is largely to avail more time to Committees to consider Bills pending before them, and submit reports to the House, having undertaken public participation as required under Article 118 of the Constitution as read together with Standing Order 127(3). I therefore encourage Chairpersons of the concerned Committees to endeavour to prioritise the listed Bills during the recess period and table their Reports in the House as soon as possible. This will enable the House Business Committee to also prioritise the Bills for consideration at Second Reading and subsequent stages by the House in good time.

Having said that, Hon. Members, it is important to take note that, some of the individual Members' Bills awaiting Second Reading have already been overtaken by events. They include, but may not necessarily be limited to the Independent Electoral and Boundaries Commission (Amendment) Bill, 2019 and the Excise Duty (Amendment) Bill, 2020, both sponsored by Hon. Jude Njomo, MP. Further, there may be Bills whose sponsors no longer have the interest to pursue for one reason or the other. Whereas it is the responsibility of the sponsor to cause the withdrawal, in accordance with Standing Order 140, the relevant Committees have a duty to report to the House such developments.

Hon. Members, from a review of individual Members' Bills awaiting Second Reading, the House Business Committee observed that certain Bills, such as the one to amend the Public Procurement and Asset Disposal Act and another to amend the Public Finance Management Act, are similar in nature.

As such, the Committee will take a decision on which Bills to schedule first, the import of which is that the other Bill might fall. With regard to individual Members' Bills seeking to amend the Constitution, I urge the Departmental Committee on Justice and Legal Affairs to take a deliberate decision on the said Bills and make appropriate recommendations to the House on how to proceed with those Bills, having undertaken public participation in cases where that has not been done.

Hon. Members, allow me to also speak to the Bills referred to the Budget and Appropriations Committee for determination of 'money Bill' implication in accordance with Article 114(2) of the Constitution and Standing Order 114(3)(b), before being referred to the relevant Departmental Committees for consideration. I urge the Committee to hasten the processing of such Bills and make appropriate recommendations to the House.

Further, and so as to keep the House abreast on business before Committees, I direct the Liaison Committee, which is responsible for coordinating the operations of all Committees, to provide regular reports of pending business before all Committees on Thursdays of every sitting week by way of a Statement. The Committee is further directed to impress upon Committees of the House to prioritise consideration of Bills pending before them.

In summary, Hon. Members, I wish to guide as follows:

1) THAT, all Committees should prioritise consideration of individual Members' Bills and any other Bills referred to them during the recess and table reports thereof as soon as the House resumes sittings from 3rd August 2021. Further, they are directed to prioritise consideration of Bills pending before them in their work plans for the Financial Year 2021/22 as a matter of principle;

2) THAT, in the case of several Bills seeking to amend similar laws, the House Business Committee shall determine which of the Bills to schedule for Second Reading and subsequent stages, the import of which the other Bills might fall; and,

3) THAT, the Liaison Committee is henceforth directed to be reporting to the House on the status of business pending before all Committees by way of a Statement to be made in the House every last Thursday of each month whenever the House is in session.

The Committees and indeed the House are accordingly guided.

I thank you, Hon. Members."

REVIEW OF THE NATIONAL ASSEMBLY STANDING ORDERS

Thursday 23rd September 2021

Context:

The Term of the 12th Parliament was approaching the end and in furtherance to Standing Order 264 requiring the Procedure and House Rules Committee to review the Standing Orders and recommend any amendments, at least, once every term of Parliament for consideration by the House, the Speaker notified and guided the House of commencement of the review process.

Decision of the Speaker:

The Speaker:

1. *Notified the House of the commencement of this important exercise being the end-of-term review of the rules of procedure of the House;*

2. *Invited all Hon. Members to make written submissions to the Committee on any areas they feel require review or repeal;*

3. *instructed the Procedure and House Rules Committee to arrange meetings with the leadership of the House, including committee leadership, to seek their views on areas requiring review in our rules of procedure; and,*

4. *directed the Clerk of the National Assembly to facilitate the process of seeking views of the public and other external stakeholders by way of invitations in the media.*

"Hon. Members, as you are aware, it is the practice of every House to undertake review of the rules of procedure towards the end of its term for use by subsequent Houses. The review process, which takes about a year and culminates with submission and adoption of a report by the House, is largely steered by senior parliamentary staff with the guidance of the Procedure and House Rules Committee chaired by the Speaker. Further, Standing Order No.264 requires the Procedure and House Rules Committee to review the Standing Orders and recommend any amendments, at least, once every term of Parliament for consideration by the House.

Hon. Members, this practice, principally adopted from other established Commonwealth jurisdictions, has been useful in affording Members an opportunity to enrich the rules of procedure based on their experiences and empirical interaction with the various provisions. The regular usage of the rules by Members, both in plenary and in committee, undoubtedly provides Members with first-hand experience on their applicability. It is on this basis that the review process becomes important for future Parliaments as it is premised on views of the actual users of the rules of procedure. Members are, therefore, best placed to highlight gaps which help in continually improving and making the rules more practical and responsive to the ever-evolving environment within the institution apart from learning from legislatures in comparable jurisdictions where individual Hon. Members and committees have visited, and how the rules of procedure remain anchored within our nascent constitutional framework.

Hon. Members, from the foregoing and in keeping with this practice, the Clerk of the National Assembly, in consultation with the Procedure and House Rules Committee, has constituted a technical team to commence the process of collation of views and any proposed amendments to the Standing Orders as part of the end-of-term review. In this regard, committees of the House, Members and staff are encouraged to proffer any proposed amendments they may

have on the current rules of procedure. Specifically, committees are called upon to candidly look into and review the workings of our committee system, including ensuring constitutional and statutory compliance, and to make proposals for improvement. Additionally, committees may consider the legislative oversight mechanisms currently in place and highlight any gaps or neglected areas that require improvement. Suffice to say that individual Hon. Members are free to propose amendments to any part of the Standing Orders for collation by the technical team and consideration by the Procedure and House Rules Committee.

The proposed amendments or general views should be channeled to the Committee through the Office of the Clerk of the National Assembly by way of written submissions. Additionally, views will also be sought from the public and other external stakeholders in keeping with the requirements of Article 118 of the Constitution. The Committee will thereafter report to the House, isolating any provisions it may recommend for amendment or repeal. It is envisaged that this process of collation will be concluded by 15th November 2021. You are therefore, encouraged to give your views before then.

Hon. Members, in considering the proposals from the various stakeholders, I implore the Procedure and House Rules Committee under the leadership of my very able deputy, Hon. Moses Cheboi, CBS, MP, not to shy away from genuinely relooking at all the provisions in our current Standing Orders, including:

1. The system of governance and bicameral nature of our legislature;

2. The subsisting committee system focusing on areas such as size, composition, operations, effectiveness and efficiency of our committees;

3. Areas of improvement in the general parliamentary oversight focusing on any aspects or areas that may not have received due attention, including but not limited to our budget processes and oversight mechanisms over the national debt;

4. The place of and mechanisms for consideration of the reports submitted to the House by Cabinet Secretaries under Article 153(4)(b) of the Constitution;

5. The place of constitutional commissions and independent offices and their place in our rules of procedure including the consideration of their reports submitted to the House pursuant to the provisions of Article 254 of the Constitution; and,

6. Consideration of the various Speaker's rulings, as well as judicial decisions that have a bearing on the procedures of the House.

Hon. Members, in this regard, as your Speaker and the Chairperson of the Procedure and House Rules Committee, I therefore:

1. Notify the House of the commencement of this important exercise being the end-of-term review of the rules of procedure of the House;

2. Invite all Hon. Members to make written submissions to the Committee on any areas they feel require review or repeal;

3. Require the Procedure and House Rules Committee to arrange meetings with the leadership of the House, including committee leadership, to seek their views on areas requiring review in our rules of procedure; and,

4. Require the Clerk of the National Assembly to facilitate the process of seeking views of the public and other external stakeholders by way of invitations in the media.

The House is accordingly guided. I thank you."

PETITION ON IMPLEMENTATION OF THE COMPETENCY BASED CURRICULUM

Thursday, 30th September 2021

Context:

Hon. Wilson Sossion had presented a public Petition on behalf of parents and education stakeholders seeking the Scrapping of the Implementation of the Competence Based Curriculum (CBC). Question arose as to whether the matters sought to be addressed by the Hon. Sossion were active in court thereby in contravention of Standing Order 89(3) or not.

Decision of the Speaker:

1) *The Petition presented by the Hon. Sossion on 23rd September 2021, on behalf of parents and education stakeholders seeking the scrapping of the Implementation of the Competence Based Curriculum had failed to disclose that it contained matters that are pending in court.*

2) *It would be impossible at this time for the House or its Committees to deliberate on any or all of the prayers sought in the Petition presented by the Hon. Sossion without touching on matters canvassed in the Petition before court.*

3) *The discussion in the House of the Petition presented by the Hon. Sossion was likely to prejudice the fair determination of the proceedings in the High Court Petition No. E371 of 2021 as the National Assembly is also a party in the case.*

"Honourable Members, you will recall that during the afternoon sitting of the House on Thursday, 23rd September, 2021, the Hon. Wilson Sossion presented a public Petition on behalf of parents and education stakeholders seeking the Scrapping of the Implementation of the Competence Based Curriculum (CBC). The Hon. Member, while noting that the matters forming the subject of the Petition were not pending before a court of law, prayed for the House, through the Departmental Committee on Education and Research, to:

1) consider scaling down changes in the education system from the extensive reforms being undertaken to a review to ensure sustainability and smooth implementation of the Kenya School Curriculum;

2) intervene with a view to scrapping the implementation of the CBC and, further, subjecting it to forensic audit and replacing it with the previously well versed and tested 8-4-4 Education Curriculum that has served this country for 36 years;

3) recommend for accountability and action to be taken against the State officers and individuals for their susceptible actions through investigation and prosecution for the current failure and mess of the curriculum; and,

4) make any other recommendations that may deem fit in the circumstances of this Petition.

You will also recall that an immediate question arose as to whether the matters sought to be addressed by the Hon. Sossion were active in court. Indeed, the Member for Rarieda, the Hon. Otiende Amollo, also rose on a point of order under Standing Order 89(3) (c) and informed the House of a pending Constitutional Petition before the High Court of Kenya dealing with matters substantively related to those canvassed in the Petition. The Hon. Otiende Amollo cited the High Court Case as number as No. E371, and sought the guidance of the Speaker on whether the Petition ought to be committed to a Committee of the House in light of the pending and active court proceedings.

The Leader of the Majority Party, Hon. Amos Kimunya, and the Leader of the Minority Party, Hon. John Mbadi also raised similar concerns, cautioning against the House being seen as unnecessarily interfering with the mandate of another arm of Government or engaging in a process that may be rendered futile, and therefore a waste of parliamentary time and resources in the event the courts were to render a judgment that varies from the resolution of the House. The Leader of the Majority Party additionally noted that this House had approved Sessional Paper No. 1 of 2019 on the Policy Framework for Reforming Education and Training for Sustainable Development in Kenya, effectively approving the policy on the Competence Based Curriculum. Consequently, I directed the Hon. Sossion to avail copies of the pleadings in the cited Petition No. E371 for comparison against the prayers sought in his Petition. I also undertook to guide the House on the fate of the Petition and how it should proceed.

Hon. Members, I wish to confirm that I have received copies of the pleadings in Petition No. E371 of 2021 parties being, *inter alia,* Esther Awuor Adero Ang'awa – Vs – The Cabinet Secretary responsible for matters concerning Basic Education & 7 Others filed at the High Court of Kenya in Nairobi. In the pleadings, the National Assembly is listed as a Respondent and various acts and omissions are attributed to the House in challenging the implementation of the Competency Based Curriculum.

Hon. Members, the petitioner claims that the National Assembly had abdicated its duty to enact legislation and regulations necessary to facilitate the development and approval of a curriculum for basic education and failed to oversee the Ministry of Education in the development and sustainability of an inclusive, equitable, quality, relevant and acceptable basic education curriculum. This, as stated in the Petition before the court, has resulted in the denial, violation or infringement, or threat to deny, violate or infringe various persons on provisions of the Constitution relating to the rights of children to education and free and compulsory basic education. Ms. Adero concludes by seeking an order of the High Court directed to the Cabinet Secretary and the Kenya Institute for Curriculum Development to formulate regulations in respect to policy and guidelines on curricula in accordance with Sections 73 and 74 of the Basic Education Act and Section 4 of the Kenya Institute of Curriculum Development Act respectively, and to table the same before the National Assembly for approval within ninety (90) days of the making of the order.

Hon. Members, I am further informed by the Clerk of the National Assembly, who was served on behalf of the House in the court matter, that the petitioner had sought various orders from the court pending the hearing and determination of the Petition to the effect that:

1) *The Petition raises substantial questions of law under Article 165(3)(b) and (d) and (4) of the Constitution of Kenya.*

2) *The Petition be referred to the Chief Justice for assignment of an uneven number of judges, being not less than five to hear it.*

3) An order of injunction restraining the respondents from further implementing the CBC curriculum; and,

4) A conservatory order staying further implementation of the CBC curriculum.

These orders were not granted and the matter is scheduled for the hearing of an application on the joinder of parties on 21st October 2021.

Hon. Members, from the summary of the matter before court that I have given and the various orders it seeks, you will agree with me that the concern raised by the Hon. Otiende Amollo on the application of the *Sub judice* Rule as contemplated under our Standing Order 89 is valid. For clarity, Standing Order 89 provides, and I quote:

"(1) Subject to paragraph (5), no Member shall refer to any particular matter which is sub judice or which, by the operation of any written law, is secret.

(2) A matter shall be considered to be sub judice when it refers to active criminal or civil proceedings and the discussion of such matter is likely to prejudice its fair determination.

(3) In determining whether a criminal or civil proceeding is active, the following shall apply—

a) criminal proceedings shall be deemed to be active when a charge has been made or a summons to appear has been issued;

b) criminal proceedings shall be deemed to have ceased to be active when they are concluded by a verdict, sentence or discontinuance.

c) civil proceedings shall be deemed to be active when arrangements for hearing such as setting down a case for trial have been made until the proceedings are guided by judgment or discontinuance.

d) appellant proceedings, whether criminal or civil, shall be deemed to be active from the time when they are commenced by the application for leave to appeal or by notice of appeal until the proceedings are ended by a judgement or discontinuance.

(4) A Member alleging that a matter is sub judice shall provide evidence to show that paragraphs 2 and 3 are applicable.

(5) Notwithstanding this Standing Order, the Speaker may allow reference to any matter before the House or a Committee."

The rule is premised on the constitutional principle of separation of powers in furtherance of which Parliament restrains itself from interfering in a matter that either falls under the purview of, or is actively under adjudication under a court by a court of law. The House voluntarily imposes *sub judice* rule on itself depending on the circumstances of each case.

As I see it, the following three questions must be answered in the affirmative for a matter to attract the application of Standing Order No. 89 to preclude itself or its Committees from considering a matter:

1) Does the matter refer to proceedings before the courts?

2) Are the proceedings before the court active?

   i. With regard to criminal proceedings, has a charge been made or summons to appear issued?

   ii. With regard to civil proceedings, have arrangements for hearing of the case been made?

3) Is the discussion of the matter by the House likely to prejudice the fair determination of proceedings before court?

Hon. Members, pursuant to the provisions of Standing Order No. 89(5), the Speaker thereafter will exercise his or her discretion on whether to allow debate to proceed in furtherance of the constitutional imperative imposed on the House by Article 95(2) of the Constitution to deliberate on and resolve issues of concern to the people. The framers of the provision were alive to the fact that a strict application of the rule had the capacity to hinder discharge of the mandate of the House by allowing a mischievous person to file frivolous and dilatory matter before court, obtain a hearing date and effectively stall any parliamentary processes seeking to address the matter for years.

Previous Speakers have guided as much. In fact, my predecessor, Hon. Kenneth Marende, is on record as having guided in his Communication on the Report of the Appointment of the Director of Kenya Anti-Corruption Commission on 10th September 2009 that, where the House begins to consider any matter before it that is the subject of litigation, the House will not give up jurisdiction of the matter unless for weighty reasons. Crucially, Hon. Marende proceeded to caution that:

> *"The discretion given to the Speaker or Chair [to allow reference to a matter actively before court] must be exercised with the utmost caution and must not be resorted to except where exceptional circumstances so require. In a matter of immense public interest where there is a doubt, unless sound grounds are advanced, a presumption should exist in favour of allowing debate in the House as opposed by application of the rule to suppress debate."*

Hon. Members, I am cognisant that I have had occasion to guide the House in the Communication on violation of the labour laws and tax evasion by BIDCO (Africa) Limited issued on 27th October 2016 that the discussion of a relief sought from the House that is similar to a prayer sought in an active court process is likely to prejudice the outcome of the court process. An Interrogation of the Petition before the House and matters before the High Court answers all the three questions formulated to test whether a matter attracts the application of Standing Order No. 89 in the affirmative as follows:

1) The Petition by Hon. Sossion does refer to proceedings before the court. Both the Petition before the House and Petition No. E371 of 2021 seek to either stay or stop of the implementation of the Competence Based Curriculum by the Ministry responsible for basic education as their substantive prayer.

2) The proceedings in Petition No. E371 of 2021 are active. As a matter of fact, Petition No. E371 of 2021 was filed on 17th September 2021. It is a civil matter and is slated for the hearing of an application on the joinder of parties in the case on 21st October 2021.

3) Would the discussion of the matter by the House likely prejudice the fair determination of the proceedings before the court? Since both processes seek a similar prayer and the National Assembly is listed as a respondent in Petition No. E371 of 2021 and has also been served with the relevant court pleadings, it would be impossible for the House or its Committees to deliberate on any or all the prayers sought in Hon. Sossion's Petition without referring to matters canvassed in the Petition before court.

What remains therefore, Hon. Members, is the question whether the Petition by Hon. Sossion should benefit from the discretion granted to the Speaker by Standing Order No. 89(5). In presenting his Petition to the House, Hon. Sossion noted and stated that he was doing so on behalf of parents "*parents and education stakeholders*". On their part the pleadings in Petition E371 of 2021 describe the petitioner as a parent. In terms of choice of forum, both Hon. Sossion (and the citizens on whose behalf he is acting) and the parent, who elected to seek orders from the court, are well within their constitutional rights. A fine balance must therefore be struck to allow the fair determination of a grievance that is common to the parties.

My considered opinion remains that the conduct of a parallel process in Parliament to consider a Petition in which the substantive prayer sought is similar to the prayer sought in a matter filed in court would definitely prejudice the outcome of the matter in court. The idea of sanctioning parallel proceedings becomes more unpalatable when one considers that the Petition before the court was filed earlier than the Petition before the House, and that the House is listed as a respondent and has been served with the pleadings.

Hon. Members, to my mind, the discretion given to the Speaker to determine the instances where Standing Order No. 89 applies is meant to shield the House from dilatory tactics adopted by a party intent on precluding a matter from being debated in the House for the simple reason that it is before the courts. Being a fresh matter filed by a public-spirited citizen and a fellow parent directly affected by a policy decision made by the Executive, the court process does not appear to be a frivolous or a dilatory attempt intended to stifle consideration of any business proposed or under consideration in this House. For those reasons, I am minded not to exercise the discretion granted under Standing Order No. 89(5).

In arriving at this decision, I wish to clearly distinguish the treatment of another Petition also before the House despite the existence of active court proceedings. You will recall that during the Afternoon Sitting of Tuesday, 21st September 2021, I reported to the House a Petition by a Mr. Antony Manyara and Mr. Joseph Wangai on the repeal of the Finance Act, 2018, to address increases in prices of petroleum products (The Fuel Prices Petition). I committed the Petition presented by the Hon. Stephen Mule on the same matter and various Questions and Statements related to the matter to the Departmental Committee on Finance and National Planning with specific instructions to table its Report within 14 days in view of the urgency of the matter of escalating fuel prices and to attach a draft Bill to its Report for meaningful consideration by the House in the exercise of its legislative mandate. Subsequently, a case was filed in court seeking the quashing of the provisions imposing the increased Value Added Tax on petroleum and petroleum products. The question that obviously arises is whether this scenario would invite the application of Standing Order 89 to preclude the House from proceeding with its consideration of the Petition.

Hon. Members, the circumstances of the petition on fuel prices differ significantly with those of the Petition presented by Hon. Sossion when one considers the ability of the House to resolve the prayers made with finality. The petition on fuel prices sought the repeal of a law passed by this House which the petitioners claim is the root of the escalating prices of fuel and petroleum products that has a seismic effect on the cost of living. The enactment, amendment, and repeal of laws is at the core of the mandate of this House to the exclusion of any other

organ. As such, the House is able, when properly moved, to address the concern to a high degree of finality.

The Constitution places legislation within the exclusive mandate of Parliament. Conversely, the Petition presented by the Member seeks to stay or stop the implementation of a policy adopted by the Executive on the manner in which it intends to fulfil its constitutional mandate of providing free and compulsory basic education. In this regard, the House may proceed and deliberate such a matter of extreme concern to the people, but its power to resolve the matter with finality is circumscribed by the inescapable fact that the House can only recommend to the Executive what to adopt as a policy decision or urge it to rectify the policy one way or the other. Where a dispute arises between the citizenry and the Executive as to the propriety of a policy decision or its effects, such a dispute may only be resolved with finality by the Judicial arm of Government, which may either agree with the direction taken by the Executive or quash the policy decision.

In summary, Hon. Members, it is my considered view that:

1) Contrary to the provisions of Standing Order 223(g), the Petition presented by the Hon. Sossion on 23rd September 2021, on behalf of parents and education stakeholders seeking the scrapping of the Implementation of the Competence Based Curriculum failed to disclose that it contains matters that are pending in court.

2) It would be impossible at this time for the House or its Committees to deliberate on any or all of the prayers sought in the Petition presented by the Hon. Sossion without touching on matters canvassed in the Petition before court.

3) The discussion in the House of the Petition presented by the Hon. Sossion is likely to prejudice the fair determination of the proceedings in the High Court Petition No. E371 of 2021 as the National Assembly is also a party in the case.

4) In this regard, the Petition presented by the Hon. Sossion attracts the application of the *sub judice* Rule as outlined in Standing Order 89 and cannot be proceeded with at this stage.

5) Whereas the Petition is a matter of public interest, it would be too early for the Speaker to invoke his discretion under Paragraph (5) of Standing Order 89. However, should circumstances change that warrant the Speaker to invoke that discretion, including inordinate delays in its resolution, I will rise to the occasion to do so, if properly moved.

Hon. Members, as I conclude, it is worth noting that the door is not entirely closed to the Hon. Member in seeking to resolve this matter. In the event circumstances arise indicating an inordinate delay in the resolution of the matter by the courts, the Member is at liberty to raise the matter for reconsideration by the Speaker. Additionally, as all Members are aware, any Member is at liberty to propose legislation prescribing the specific system of education he or she would want to apply to the country, or to require the approval by Parliament of any policy decision made by the Executive in that regard. Legislation presents Members with an option exclusively within their authority to resolve this matter of interest and grave concern to the people.

The House is, therefore, accordingly guided.

I thank you, Hon. Members."

THE CONSTITUTIONALITY AND ASPECT OF PUBLIC PARTICIPATION DURING CONSIDERATION OF THE HEALTH LAWS (AMENDMENT) BILL

Thursday, 21st October 2021

Context:

Deferment of the Second Reading of the Health Laws (Amendment) Bill (National Assembly Bill No. 2 of 2021 pending determination on the matter of the adequacy of public participation undertaken by the relevant Departmental Committee, as well as constitutionality of certain provisions therein.

Decision of the Speaker:

1) *The Constitution reserves the powers to determine the constitutionality or otherwise of a resolution made by the House to the High Court.*

2) *THAT, the Health Laws (Amendment) Bill, 2021 was in order as to the form and style of the House.*

3) *A Committee of the House to which a Bill is committed must first undertake and demonstrate the undertaking and consideration of public participation and its attendant submissions.*

4) *The conduct of public participation on the Bill did not meet the threshold required by Article 118 of the Constitution and Standing Order No. 127.*

"Honourable Members, you will recall that during the afternoon Sitting of the House on Tuesday, 5th October 2021, the Member for Garissa Township, the Hon. Aden Duale, EGH, MP, rose on a point of order seeking deferment of the Second Reading of the Health Laws (Amendment) Bill (National Assembly Bill No. 2 of 2021), which intends to amend various health sector related statutes so as to improve efficiency and for better service delivery.

The Hon. Duale indulged the Speaker to defer Second Reading of the Bill until the matter of the adequacy of public participation undertaken by the relevant Departmental Committee on the Bill, and the constitutionality of certain provisions contained in the Bill are determined. He claimed that barring the determination by the Speaker of the two cited fundamental issues concerning the Bill in question, would make the House to proceed with a legislative exercise that was likely to be successfully challenged in court for being unconstitutional, especially for want of adequate public participation.

Hon. Members, the concerns by Hon. Duale elicited a lot of interest. The Members who weighed in on the matter raised by the Member for Garissa Township were the Leader of the Majority Party, the Majority Whip, the Hon. (Dr.) Eseli Simiyu, the Hon. T. J. Kajwang', the Hon. John Mose, the Hon. (Dr.) Otiende Amollo, the Hon. Peter Kaluma, the Hon. (Dr.) Robert Pukose, the Hon. Stephen Mule, the Hon. (Dr.) James Nyikal, the Hon. John Kiarie, the Hon. Jared Okelo, and the Hon. Gideon Koske, among others. In their arguments, the Members claimed that the proposed amendments, if carried, would substantially alter the composition

of various statutory and regulatory boards and councils in the health sector and should, therefore, have been contained in separate Bills seeking to amend the relevant statutes, rather than being brought through an omnibus Bill as is the case now. It was further claimed that the Bill was ill-intended, particularly because it sought to domicile control of the regulatory or statutory boards and councils in the Executive by excluding stakeholders and professional bodies from membership. This, it was claimed, is contrary to the provisions of Article 10 of the Constitution which places public participation at the core of our national values and principles of governance.

Hon. Members, you will agree with me that the matters raised by the Hon. Duale and other Members are weighty and would have merited the direction of the Speaker before any further action is taken on the Bill. However, I did guide, in the interim, that debate on Second Reading of the Bill proceeds in the event that the Order under which the Bill was listed in the Order Paper for that day was to be reached. My decision was based on the principle that, as your Speaker, my role is largely facilitative and not obstructive. Hence, I should, as much as possible, allow the House to proceed to transact its business unimpeded, even when reservations have been raised, as long as a decision is not taken until a determination of any substantive question raised by a Member is made.

From my understanding of the issues raised by the Member for Garissa Township, I am being invited to find that to the extent that the Health Laws (Amendment) Bill, 2021 proposes to limit involvement of professional bodies and various sector stakeholders in statutory and regulatory boards in the health sector and domiciled their appointment within the ambit of the Executive, the amendments are unconstitutional and therefore untenable as they negate the realisation of the national values and principles of governance espoused by Article 10 of the Constitution.

Hon. Members, there is no contestation that Article 3 of the Constitution obligates me to respect, uphold and defend the Constitution. I would ordinarily, therefore, be required to forestall any affront to the Constitution by whichever manner, including legislation before this House, if indeed the concerns raised by the Member for Garissa Township are valid. Having said that, let me emphasise that the path for determining unconstitutionality or otherwise of the amendment under consideration of this House ought to be navigated with caution lest the House be unnecessarily gagged from exercising its constitutional mandate.

Hon. Members, as you are aware, I have previously hesitated to determine questions of constitutionality raised in this House. Even when I ruled on 19th September 2019 that clauses 50 and 51 be severed from the Finance Bill, 2019 for failure by the Cabinet Secretary (CS) to disclose in the accompanying memoranda that the two clauses would limit the right to privacy as required in Article 24 of the Constitution, I was categorical that the determination was only related to the procedural defects in the manner in which the proposed amendments had been presented. I also clarified that at that stage, the question as to whether the two clauses would offend the Constitution if they were to comply with the standard of disclosure set in the Constitution and introduced as a separate Bill did not arise.

Hon. Members, I do not wish to deviate from my previous decisions on questions of constitutionality. As a matter of fact, the Hon. Speaker's respect for upholding and defence of the Constitution is subject to the express provisions of Article 165 of the Constitution. For clarity, the said Article provides as follows, and I quote:

"165(3) Subject to clause (5), the High Court shall have –

(d) Jurisdiction to hear any question respecting the interpretation of this Constitution, including determination of –

(i) The question whether any law is inconsistent with or in contravention of this constitution;"

Clearly, Hon. Members, the question of construing and interpreting the Constitution, including the authority to make a definitive determination as to the constitutionality or otherwise of any law rests within the exclusive province of the High Court. I am inclined to believe that the framers of our Constitution had a good reason for couching Article 165 of the Constitution to only make reference to law and not Bills. We all appreciate that a Bill in itself is not law until it successfully goes through the stages of law making, including the Committee of the whole House, where it may be amended. It is my view that declaring a Bill unconstitutional while still undergoing consideration in the House is premature given that the House still has room to correct any potentially unconstitutional provisions, perceived or real, by way of amendments at the Committee of the whole House stage.

Hon. Members, I note that the Constitution grants the Members of this House an expansive legislative mandate, which should be jealously safeguarded. In this regard, I ought not to make decisions that would hinder or inhibit the House from executing its mandate. Instead, I am duty-bound to facilitate the continuity of legislative business of this House even in the face of concerns like the one expressed by the Member for Garissa Township, provided that the matter is still within the province of the House and the House still has legislative power to rectify the concerns through amendment and voting. My views are buttressed by the provisions of Section 72 of Mason's Manual of Legislative Procedure, (2010 Edition) which states as follows:

1) *"The propriety and wisdom of a statute are questions exclusively for the legislature. The wisdom, justice and expediency of an act of the legislature is not subject to review by the courts.*

2) *Before a statute can be declared unconstitutional, it must clearly and unavoidably appear to be beyond the power of the legislature. It is for the courts to decide whether there has been compliance with constitutional provisions and whether a Bill of the legislature has become law."*

Hon. Members, I am persuaded that the House still has power to apply itself on the matters canvassed by Hon. Duale by amending the Bill appropriately during the Committee of the whole House or making a conscientious decision on the Bill in one way or the other. Further, it is not enough to simply claim that "a Bill is unconstitutional" without particularising with specificity the basis of the claim. No Member stated with specificity any provision in the Bill which offends a particular provision of the Constitution. I am therefore hesitant to forestall consideration of the Health Laws (Amendment) Bill, 2021 on grounds of unconstitutionality. This may be construed on one hand as an attempt by the Hon. Speaker to unduly fetter the authority of the House and usurping the constitutional mandate of the High Court on the other hand. I believe, Hon. Members that this settles the second question.

Hon. Members, the second issue also relates to whether the amendments proposed in the Health Laws (Amendment) Bill, 2021 are of a substantive nature requiring the publication of a separate Bill for each affected statute instead of their publication in an omnibus format as presented in the House. The courts and, indeed, myself have had previous occasion to address the question of the nature and scope of omnibus Bills. What is clear is that the courts have left the determination of the form of Bill to the province of Parliament. The courts are also on record as having found difficulties in establishing provisions of a Bill that would constitute miscellaneous *vis-à-vis* substantive provisions so as to make a determination as to whether such provisions sit well in a stand-alone Bill or an omnibus Bill.

Hon. Members, this is not the first time that the House is considering a Bill presented in an omnibus format. As you may be aware, it is the practice of this House to publish and consider Bills, making amendments to various statutes in an omnibus format. Miscellaneous or various amendments to several disparate statutes have been published on an annual basis in a Statute Law (Miscellaneous Amendment) Bill. Where the amendments proposed relate to a defined sector or theme such as finance or health, omnibus Bills such as the Finance Bill or the Tax Laws (Amendment) Bill have been presented to this House. Indeed, and for the record, this House has considered and passed Bills similar in form to the Health Laws (Amendment) Bill, 2021.They include, the Finance Bills, the Tax Laws (Amendment) Bills, 2020, the Land Laws (Amendment) Bill, 2020, the Business Laws (Amendment) Bill, 2019, the Land Value Index Laws (Amendment) Bill, 2018, the Health Laws (Amendment) Bill, 2018, just to mention but a few. As a matter of fact Hon. Members, the Bill under contestation was published in accordance with the practice and procedures of this House and processed in accordance with Standing Orders 114 and 114 (A).

Hon. Members, you may also recall that I have previously ruled on questions as to whether proposed amendments contained in an omnibus Bill ought to be published as separate Bills. I remain of the considered view that any concerns over the substance of a Bill can only be addressed through the conduct of adequate public participation and exhaustive consideration of the proposals by the House. I have previously committed affected statutes in an omnibus Bill to their relevant Departmental Committees to facilitate public participation for this very reason. The test for the House is not the form of the Bill, but the manner in which it considers and interrogates the substance of the Bill before making any resolution. It is my finding that the Health Laws (Amendment) Bill, 2021 is in order as to the format and style of the House and the House proceed with it. This settles the second question.

Hon. Members, the third and final issue is the question as to whether the Departmental Committee on Health did conduct adequate public participation within the meaning and threshold envisaged under Article 118 of the Constitution and Standing Order No. 127(3). From the outset, Hon. Members, you are aware that I have previously guided this House that since the promulgation of the Constitution of Kenya 2010, public participation in legislative business is no longer optional. Article 118 of the Constitution is couched in mandatory terms and obligates Parliament, in this case the National Assembly, to facilitate public participation and involvement in legislative and other business of Parliament and committees. In my previous rulings on questions of public participation, I have repeatedly underscored that public participation ought to be undertaken in a qualitative manner and not a quantitative or cosmetic ritual of ticking the box to satisfy the requirements of Article 118 of the Constitution and Standing Order No. 127.

Hon. Members, as you may recall, I have previously referred a Bill back to the relevant Committee and ordered fresh public participation where I was not satisfied that the threshold of public participation within the meaning of Article 118 was met. This was the case when I directed the Departmental Committee on Transport, Public Works and Housing to undertake fresh public participation on the National Aviation Management Bill, 2020, (National Assembly Bill No.18 of 2020). Indeed, the courts have also affirmed the mandatory nature of public participation and emphasised on its qualitative aspects to distinguish it from a mere consultation or a public relations exercise without a meaningful purpose. In this regard, I need not revisit and belabour the meaning, scope and threshold of public participation.

Hon. Members, in arguing that the Departmental Committee on Health did not conduct adequate public participation within the meaning and threshold envisaged in Article 118 of the Constitution and Standing Order No. 127(3), Hon. Aden Duale claimed, and I quote:

"… despite several bodies in the health sector, including the Kenya Union of Clinical Officers (KUCO) and the Kenya Clinical Officers Association (KCOA) - the bodies that regulate medical doctors, pharmacists and nurses, among others, in this country - submitting memoranda to be considered by the Committee, they can confirm to this House that the Committee in its Report completely disregarded their submissions. In disregard of Article 118 of the Constitution, the Committee never considered one single memorandum, neither did it give some of those institutions and bodies an opportunity to appear before it to prosecute."

Hon. Members, I have perused the Report of the Committee on its consideration of the Health Laws (Amendment) Bill, 2021 and noted that, pursuant to Article 118 of the Constitution and Standing Order No. 127(3), the Committee rolled out the process of public participation by placing an advertisement in the print media on 11th March 2021, requesting for comments and memoranda from the public on the Bill within seven days. Hon. Members, page 25 of the Report of the Committee indicates that the Committee received a Joint Memorandum and individual memoranda from the following parties:

1) Parties to the Joint Memorandum

   a) The Ministry of Health

   b) The Pharmaceutical Society of Kenya

   c) The Kenya Medical Association

   d) The National Nurses Association of Kenya

   e) The Kenya Dental Association

   f) The Kenya Pharmaceutical Association

   g) Kenya Clinical Officers Association

   h) Association of Kenya Medical Laboratory Scientific Officers

   i) The Association of Medical Engineering of Kenya

   j) Kenya Association of Radiologists

   k) The Public Health Society of Kenya

   l) Environmental Public Health Association of Kenya

2) Individual Memoranda:

   a) The Peoples Health Movement of Kenya

   b) Christian Medical and Dental Association of Kenya

   c) Kenya Progressive Nurses Association

   d) Kenya Medical Association

e) Kenya Nutritionists and Dieticians Institute

f) Association of Medical Records Officers of Kenya

g) Health Records and Information Management Society

h) Health Systems Management Association

i) Society of Radiography in Kenya

j) Dr. Kahura Mundia

k) Dr. Magare Gikenyi

l) Ikacho Lokwee

m) Willis Okoth

n) Abraham Kimeli Kiplagat

o) William Komen

p) Rodgers Kwalera

q) Henry Cheruiyot

r) Faith Adhiambo

s) Japheth Ngeno

t) Milcah Koech

u) Rose Jepchirchir Bargoiyet

v) Nelly Jepngetich Tarus

w) Alice Jeruto Kimutai

x) Faith Cheruiyot

y) Mark Kiplimo Chepsiror

z) Kenneth Kibet Koech

aa) Jane Mochache

ab) Thomas Orwenyo.

Hon. Members, it is worth noting that in the letter dated 20th May 2021 submitting the Joint Memorandum to the Clerk, the Cabinet Secretary for Health is on record that the the Ministry had reviewed the Health Laws (Amendment) Bill, 2021 in consultations with stakeholders in the Health Sector. He added that the Ministry had reached a consensus with a majority of the stakeholders on regulatory councils/boards as contained in the Joint Memorandum.

Honourable Members, over and above the public advertisement placed in the print media inviting submission of memoranda, the Committee, by way of a letter dated 20th April 2021,

invited key stakeholders in the health sector for a virtual stakeholder engagement on 22nd April 2021. Having perused both the Report and the Minutes annexed to the Report, I can confirm that, far from the claims made by Hon. Duale, the Kenya Clinical Officers Association was party to the Joint Memoranda submitted by the Ministry of Health on behalf of the parties to it.

Further, minutes of the meeting of the Committee held on 22nd April 2021 also confirm that the said association was present and did participate in the proceedings. With regard to the Kenya Union of Clinical Officers, minutes of the foregoing meeting show that the Union was present at the meeting. While the Union is not listed in the Report as having submitted a separate memorandum, I am inclined to believe that by virtue of having been on record to have attended the hearings on 22nd April, 2021 it had the opportunity to canvas its views on the Bill.

I am also reliably informed that the Ministry of Health wrote to the Clerk of the National Assembly seeking to '*clarify and articulate the proposed amendments*'. The Committee and the Ministry held consultative meetings, physically on 17th August 2021 and virtually on 31st August, 2021 before adopting the Report. From the foregoing, it is apparent that the Committee engaged most stakeholders in the health sector and afforded them the opportunity to make their submissions on the Bill. What weight, if any, they gave to the submissions they received from the stakeholders, is what remains to be seen.

Hon. Members, the qualitative aspect of public participation as espoused in Article 118 of the Constitution requires the House to receive views from the public, to consider such views and also to demonstrate such consideration in its final output. Indeed, the High Court recently observed in Constitutional Petition No. E001 of 2021 EKLR, that, and I quote:

> *"All parties interested in legislation should feel that they have been given a real opportunity to have their say, that they are taken seriously as citizens and that their views matter and will receive due consideration at the moments when they could possibly influence decisions in a meaningful manner. The objective is both symbolical and practical. The persons concerned must be manifestly shown the respect due to their concerned citizens, and the legislators must have the benefit of all inputs that will enable them to produce the best possible laws."*

Members are specifically enjoined by Article 10 of the Constitution to ensure the participation of the people when enacting any legislation. This obligates a Committee of the House to which a Bill is committed to undertake and demonstrate the discharge of two distinct tasks in its report to the House on a Bill. The Committee must first invite the public to participate in its consideration of the Bill. Such invitation introduces the public to the general content of the Bill and directs them on where to obtain a copy to allow them to review and comment on the Bill either in person or through written memoranda. The substance of the Bill under consideration and the urgency at hand shall guide the Committee in prescribing the period within which submissions are to be made. Second, the Committee must consider any representations it receives from the public on a Bill. The Committee must deliberate on the submissions received, record its views on the submissions and indicate its decision or reasons (where possible) for either agreeing or disagreeing with the representations. This, ideally, is what would inform the recommendations it makes to the House.

Hon. Members, from a perusal of the Report tabled before the House, it is evident that though the Committee laudably applied itself to the tasks it was given by the House, it fell slightly short of the standards required. The Committee did invite the public to participate in its consideration of the Bill. The Committee gave notice for the public to submit memoranda and

thereafter invited the key stakeholders it had identified to a virtual meeting and other meetings. The Committee did receive submissions from key stakeholders affected by the proposals in the Bill as well as other interested members of the public. Reading through the Part III of the Report, Members will note that the Committee took great lengths to record the submissions received from the public and concluded its Report by recommending amendments to various provisions of the Bill. The only major gap that is apparent from the body of the Report is a commentary or a record noting how the Committee considered the submissions it received, its views on those submissions and reasons for either agreeing or disagreeing with the submissions. Unless this omission is remedied, the assumption by members of the public and non-members of the Committee shall remain that the public participation conducted by the Committee was a mere perfunctory exercise without any bearing on the final outcome of the Bill.

Hon. Members, the obligation to facilitate public participation in legislative processes can only be fully discharged if the public who take their time to either submit memoranda or make oral submissions receive adequate feedback from this House on such submissions. I do agree that not all submissions may be relevant. A submission may be outlandish. It may even not relate to the subject matter under consideration. It may propose expansion of a Bill in a manner that is prohibited under our Standing Orders. It may be untenable for the fact that it impacts on current or future budgets in a manner that cannot be supported in the short or medium term.

Nevertheless, Parliament, as a House of record, must ensure that all such submissions are received, recorded and afforded clear and proper feedback. The feedback must address the question of whether the submissions will affect the legislative process and give reasons on the position taken by a Committee. It is the duty of each Committee to meticulously sieve the cocktail of submissions it receives and note the manner in which that exercise informs the recommendations that it makes to the House.

Hon. Members, this House makes laws that directly affect the people, hence the participatory approach to law-making required by the Constitution. We cannot expect the public to look favourably at laws made by the House when their input is disregarded without them being given the courtesy of a proper reason. The Report of the Departmental Committee on Health on its Consideration of the Health Laws (Amendment) Bill, 2021 does not expressly indicate the manner in which it considered the submissions it received from the public or provide any reasons either in agreement or disagreement with the submissions. Consequently, it is my view that the conduct of public participation on the Bill is incomplete and wanting to that extent.

Hon. Members, before I conclude, you will recall that during debate on the matter that gave rise to this guidance, there arose the issue of whether a Minority report may be appended to a Committee Report on a Bill. This was alluded to by Hon. Simiyu Eseli. I would not expect the Member for Tongaren, who is serving his third term in this House, to be misled on this matter. For the avoidance of doubt, Standing Order No. 199(5) provides, and I quote— "*A report having been adopted by a majority of Members, a minority or dissenting report may be appended to the report by any Member(s) of the Committee*."

The Member, therefore, remains squarely within his rights as a Member of the Departmental Committee on Health to propose, cause drafting and have a minority report included in the Report of the Committee for attention of the House.

Hon. Members, in summary, my considered guidance is as follows:

1) THAT, the role of the Speaker in respecting, defending and upholding the Constitution is limited to the procedural aspects of the exercise of the mandate granted to the House by Article 95 the Constitution. The form, substance and manner in which the Health Laws

(Amendment) Bill, 2021 was introduced in the House accord with the provisions of the Constitution and the Standing Orders of the House. The House remains at liberty to effect any changes it deems fit to the Bill in exercise of its legislative mandate. The Constitution, however, reserves the powers to determine the constitutionality or otherwise of a resolution made by the House to the High Court.

2) THAT, the Health Laws (Amendment) Bill, 2021 which seeks to amend various health related statutes and is presented in an omnibus format is in order as to the form and style of the House.

3) THAT, in order to discharge the requirement to facilitate public participation under Article 118 of the Constitution and Standing Order No. 127, a Committee of the House to which a Bill is committed must first undertake and demonstrate the discharge of two distinct tasks in its report to the House as follows:

   a) The Committee must invite the public to participate in its consideration of the Bill and prescribe an adequate period of time within which submissions are to be made. The period may be determined with reference to the substance of the Bill and the urgency of the matter under consideration, and

   b) The Committee must consider any representations it receives from the public on a Bill by deliberating on each submission received, recording its view(s) on the submissions and providing reasons for either agreeing or disagreeing with the representations in its Report.

4) THAT, to the extent that the Report of the Departmental Committee on Health Laws (Amendment) Bill, 2021 does not expressly indicate the manner in which it considered the submissions it received from the public or provide any reasons either in agreement or disagreement with the submissions, the conduct of public participation on the Bill does not meet the threshold required by Article 118 of the Constitution and Standing Order No. 127.

5) THAT, the Report by the Departmental Committee on Health in its consideration of the Health Laws (Amendment) Bill, 2021 is hereby referred back to the Committee for regularisation along the terms of this guidance. The Committee is at liberty to seek further engagement with the public on the Bill if need be, and

6) THAT, the Committee should also address and attempt to resolve the concerns raised by part of its membership in the House with respect to the approach, value and actualisation of the output of the stakeholder engagement exercise.

Hon. Members, having given this guidance and conscious that this Bill is one that concerns County Governments in terms of Articles 110 and 112 of the Constitution, the House will now await the Committee to resubmit its report to the House after complying with this guidance before resuming with its consideration at Second Reading. However, the final decision on the Bill and the form in which it will be passed ultimately lies with the House.

The House is accordingly guided.

Thank you."

PETITION FOR REMOVAL FROM OFFICE OF THE ATTORNEY-GENERAL

Tuesday, 23rd November 2021

Context:

Guidance on a Petition seeking for the removal of the Attorney-General, Hon. Justice Paul Kihara Kariuki on account of his alleged conduct relating to the re-run of the 2017 Presidential Election.

Decision of the Speaker:

1) *The Departmental Committee on Justice and Legal Affairs to consider reviewing the Act to provide for the procedure for removal of the Attorney General.*

2) *The Clerk of the National Assembly to inform the Petitioner of the inadmissibility of the Petition to the extent that there was a lacuna in law on the removal of the Attorney-General.*

"Honourable Members, I wish to convey to the House that my Office is in receipt of two letters dated 13th September 2021 and 22nd October 2021 from Mr. Khelef Khalifa seeking the removal of the Attorney-General, Hon. Justice Paul Kihara Kariuki. In a letter dated 13th September 2021 titled "*Public Petition for the Removal of the Hon. Paul Kihara, Attorney-General*", Mr. Khalifa petitions this House to initiate the process of removing from office the current Attorney-General of the Republic of Kenya, Hon. (Rtd.) Justice Paul Kihara Kariuki, on account of his alleged conduct relating to the re-run of the 2017 Presidential Election.

In summary, his grounds for removal include claims of empanelling a three-judge bench of the Court of Appeal that overturned a High Court decision and allowed the 2017 Presidential Election re-run, the manner of selection of the bench that heard the matter and alleged disregard of the rule of law and administration of justice. You will recall that the 11th Parliament had an occasion to consider a petition for the removal from office of the then Attorney-General. At the time, the Law Society of Kenya had petitioned this House to consider initiating the process of removal of the then Attorney-General, Hon. (Prof.) Githu Muigai, from office. The Report of the Departmental Committee on Justice and Legal Affairs to which the Petition was committed is instructive. With regard to its findings, the Committee Report tabled before the House on Tuesday, 19th August 2014 states:

1) *The Office of the Attorney-General is not listed as either a constitutional commission or an independent office under Articles 248(2) and (3) of the Constitution;*

2) *The procedure for removal contemplated under Article 251 of the Constitution cannot be used for removal of the Attorney-General;*

3) *While the Attorney-General is a member of the Cabinet under Article 152(2) of the Constitution, he is not a Cabinet Secretary and, therefore, the process of removal of a Cabinet Secretary cannot apply in this case;*

4) *Whereas Article 132 of the Constitution gives the President power to dismiss the Attorney-General in accordance with Article 156, the same Article 156 does not have provisions on removal of the Attorney-General;*

5) *The Office of the Attorney-General Act has made provision for the grounds for removal, but does not set out the procedure for removal.*

6) *The power and discretion to remove the Attorney General is vested in the President vide Article 132(2)(b) of the Constitution.*

Consequently, the Committee proceeded to recommend that the Office of the Attorney-General Act, 2012 should be amended to provide for express provisions on the procedure for removal of the Attorney-General from office by way of an all-inclusive process. Thereafter, a Bill was published in the name of the Committee to actualise those findings in law. However, by the end of the 11th Parliament, the Bill had not been concluded and, therefore, lapsed.

In light of the previous inconclusive process undertaken on a petition to remove the Attorney-General, the Clerk of the National Assembly wrote to Mr. Khalifa on 6th October 2021 advising him of the inability of the House to process his request. The letter highlighted the lack of express provisions in the Constitution, ordinary legislation and the National Assembly Standing Orders on the manner in which the process of removing the Attorney-General from office may be initiated and how a binding recommendation for such removal may be made by any person or body.

In his letter dated 22nd October 2021, Mr. Khalifa did not agree that the body mandated by the Constitution to enact, amend and repeal laws can argue that it is unable to act on his request due to an existing gap in the law. You will recall that, as per the provisions of Article 109(4) of the Constitution, only a Member or a Committee of this House has the power to introduce legislation for consideration and debate. The Departmental Committee on Justice and Legal Affairs may wish to consider reviewing the Act to provide for the procedure for removal of the Attorney General. In the meantime, the Clerk of the National Assembly is hereby directed to inform the Petitioner on the progress of this matter and further inform him that, to the extent that there is a *lacuna* in law on the removal of the Attorney-General, the matter is not within the authority of the National Assembly to deal with.

Thank you, Hon. Members."

IMPORT OF THE COURT OF APPEAL JUDGMENT ON THE LEGISLATIVE FUNCTION OF THE NATIONAL ASSEMBLY

Tuesday, 23rd November 2021

Context:

The High Court had delivered a judgment that, among other things, purported to nullify 23 Acts of Parliament that had been passed by the House. The National Assembly appealed the High Court Judgment and the Court of Appeal delivered its judgment on our appeal and set aside the judgment of the High Court.

Decision of the Speaker:

1) *The Leader of the Majority Party, or the Departmental Committee on Trade, Industry and Co-operatives, was to re-introduce a Bill for an Act of Parliament to amend the Sacco Societies Act as contemplated in the Sacco Societies (Amendment) Act, No. 16 of 2018 which was declared unconstitutional by the Court of Appeal, for expeditious reconsideration by the House.*

2) *In respect of the amendments made to sections 3 and 4 of the Kenya Medical Supplies Authority Act as contained in the Health Laws (Amendment) Act, No. 5 of 2019, the Departmental Committee on Health was to consider proposing the amendments to the Health Laws (Amendment) Bill, 2021 at the Committee Stage for consideration by the House.*

3) *The Bills which, after passage by this House and referral to the Senate, were stopped from proceeding at the Senate were to be re-sent to the Senate for its consideration and decision in light of the interim orders given by the Appellate Court.*

4) *As part of the on-going end-term review of the Standing Orders, the Procedure and House Rules Committee was to undertake a review of Standing Order 121 and 143 with a view of aligning the provisions with the Constitution as guided by the Appellate Court.*

"Honourable Members, this Communication from the Chair, being No. 46 of 2021, relates to the import of the judgment of the Court of Appeal in Civil Appeal No. E084 of 2021 on the legislative functions of the National Assembly.

Hon. Members, you will recall that last year on 29th October 2020, the High Court delivered a judgment that, among other things, purported to nullify 23 Acts of Parliament that had been passed by this House. You will also recall that following the High Court Judgment, I did issue a Communication to this House to the effect that the National Assembly, being dissatisfied with that decision, would appeal the High Court Judgment.

Hon. Members, to this end, I wish to inform you that last week on Friday, 19th November 2021, the Court of Appeal sitting in Nairobi in Civil of Appeal No. E084 of 2021 delivered its judgment on our appeal and set aside the judgment of the High Court.

In particular, the Court of Appeal made several orders. Allow me to highlight part of the Orders of the Appellate Court, point by point, because they have a huge bearing on the legislative processes of this House. First, in its decision, the Court of Appeal declared 21 Acts

of Parliament out of the 23 which the High had declared as being unconstitutional for want of Senate participation to be constitutional and valid. It will be recalled that this House passed the said laws without Senate's participation on the strength that they did not concern county governments as they were dealing with the functions of the national Government under the Part I of the Fourth Schedule to the Constitution and/or were Money Bills that did not contain provisions affecting the county governments. The Court of Appeal in its judgment agreed with this interpretation of the National Assembly and consequently upheld the constitutionality and validity of the 21 Acts of Parliament. In brief, the laws that were declared to be constitutional are as follows:

1) The Public Trustee (Amendment) Act, No. 6 of 2018;

2) The Building Surveyors Act, No. 19 of 2018;

3) The Computer Misuse and Cybercrime Act, No. 5 of 2018; 4) The Statute Law (Miscellaneous Amendment Act), No. 4 of 2018;

5) The Kenya Coast Guard Service Act. No. 11 of 2018;

6) The Tax Laws (Amendments) Act, No. 9 of 2018;

7) The Statute Law (Miscellaneous Amendments) Act, No. 18 of 2018;

8) The Supplementary Appropriation Act, No. 2 of 2018;

9) The Finance Act, No. 10 of 2018;

10) The Appropriations Act, No. 7 of 2018;

11) The Capital Markets (Amendments) Act, No. 15 of 2018;

12) The National Youth Service Act, No. 17 of 2018;

13) The Supplementary Appropriations Act, No. 13 of 2018;

14) The Health Laws (Amendment) Act, No. of 5 of 2019, save for the amendments made to Sections 3 and 4 of the Kenya Medical Supplies Authority (KEMSA) Act. The Act made various amendments to health-related statutes on matters relating to health policy including the Pharmacy and Poisons Act, Cap. 244; the Medical Practitioners and Dentists Act, Cap. 253; the Nurses Act, Cap. 257; the Kenya Medical Training College Act, Cap. 261; and the Nutritionists and Dieticians Act, No. 18 of 2007, among others.

15) The Sports (Amendment) Act, No. 7 of 2019;

16) The National Government Constituencies Development Fund Act of 2015;

17) The National Cohesion and Integration (Amendment) Act of 2019;

18) The Statute Law (Miscellaneous Amendment) Act of 2019;

19) The Supplementary Appropriation Act, No. 9 of 2019:

20) The Appropriations Act of 2019; and

21) The Insurance (Amendment) Act, 2019.

Hon. Members, as stated earlier, the Court of Appeal declared 21 out of the 23 Acts constitutional and only two Acts, these being the Equalisation Fund Appropriation Act, No. 3 of 2018 and the Sacco Societies (Amendment) Act, No. 16 of 2018 were declared unconstitutional. In terms of the objects of the two Acts, the Equalisation Fund Appropriation Act, No. 3 of 2018 appropriated funds for expenditure by the national Government for the direct use of monies from the Equalisation Fund. It is, therefore, a "spent" law. The Sacco Societies (Amendment) Act, No. 16 of 2018 on the other hand sought to provide that the Sacco Societies Regulatory Authority may establish and operate an electronic filing system for purposes of electronic filing of the statutory returns and documents or other information required to be furnished to the Authority.

Hon. Members, the Court of Appeal further declared the amendments made to sections 3 and 4 of the Kenya Medical Supplies Authority Act contained in the Health Laws (Amendment) Act to have been unconstitutional. Only those two sections!

To this end, Hon. Members, in light of the Court of Appeal Judgment, a pertinent question that arises is how the House should proceed to re-enact the laws that have been nullified. With respect to the Equalisation Fund Appropriation Act No. 3 of 2018, the objectives of the long title of the law reads as follows:

> *"An ACT of Parliament to authorize the issue of a sum of money out of the Equalisation Fund and its application towards the service of the year ending 30th June, 2018, and to appropriate that sum for certain public basic services and for connected purposes"*

Hon. Members, you will agree with me that this particular Act, being an annual appropriations law, cannot be resuscitated as it is a "*spent*" law. The decision of the Court of Appeal will have to be adhered to by future Houses when enacting the annual Equalisation Fund Laws. It is, however, worth observing that under Article 204 of the Constitution, the Equalisation Fund was meant to be a 20-year measure to assist the marginalised areas caters for basic services such as water, roads, heath services and electricity connectivity. The sad fact is that, whereas more than half of the statutory period has now lapsed, the Fund has been largely moribund since every step to actualise it has been met with endless litigation.

Hon. Members, with respect to the Sacco Societies (Amendment) Act, 2018 No.16 of 2018, I direct that the Clerk moves with speed to facilitate the re-introduction of the Bill in the House in the exact text as it was originally passed by this House in 2018 for reconsideration in an expeditious manner and forwarding it to the Senate.

With respect to the amendments made to Sections 3 and 4 of the Kenya Medical Supplies Authority Act touching on the functions of the Authority as contained in the Health Laws (Amendment) Act, No. 5 of 2019, I note that there is presently a Health Laws (Amendment) Bill, 2021 at Second Reading. Consequently, the amendments may be proposed to the Health Laws (Amendment) Bill, 2021 for consideration by the House at the Committee Stage. Subsequently, upon passage, the Bill shall be forwarded to the Senate for consideration also. That way, this House will have discharged its legislative role on the two impugned laws in compliance with the findings and decision of the Appellate Court.

Hon. Members, moving on to the other Orders of the Court of Appeal, the Court also made a declaration that the concurrence process envisaged in Article 110(3), only applies to all Bills concerning counties within the meaning of Articles 109 to 114 of the Constitution. Indeed, as you are aware, Article 110(3) of the Constitution provides that before either House considers a Bill, the Speakers of the National Assembly and Senate shall jointly resolve a question as to whether the Bill is one concerning counties and, if it is, whether it is a special or ordinary

Bill. This has been a major point of departure between the two Houses and, as you are, indeed, aware, the High Court had made a declaration that all Bills must be subjected to the concurrence process, notwithstanding the distinct legislative mandates of both Houses and the asymmetrical nature of our bicameral Parliament in which each House has distinct mandate with the Senate having limited legislative mandate as, indeed, observed by the Court of Appeal in paragraphs 72 and 73 of its judgment**.** In their judgment, the distinguished judges held as follows, in paragraph 98:

> *"Therefore, it was an error by the High Court to find that it is a condition precedent that any Bill published by either House be subjected to the concurrence process".*

Hon. Members, the finding of the Court of Appeal on this matter is that only Bills concerning county governments as espoused in Article 110(1) of the Constitution would be subject to the concurrence process. The Court rightly held that Article 110(3) can only be interpreted in the context of the law-making roles and procedures of the Senate and National Assembly as specified in Articles 109 to 116 of the Constitution.

In this regard, the Court of Appeal has now settled that Article 110(3) of the Constitution shall not be applicable on any or every Bill that originates from the National Assembly but only on Bills that concern county governments within the meaning of Article 110(1) of the Constitution. We applaud the Court for upholding the provisions of Article 110(3) of the Constitution and the distinct roles of the Houses of Parliament.

Hon. Members, with respect to the constant insistence by part of the Senate that the Speakers of the Houses of Parliament should form a mediation Committee, akin to the one under Article 113 of the Constitution, to offer advisory on the question of Bills concerning county governments, the distinguished judges held as follows, in paragraph 102 of the Judgment:

> *"We, however, need to point out and clarify that our interpretation of Article 110(3) leads to a conclusion that the mediation process under Article 113 of the Constitution is not applicable to the concurrence process in Article 110(3). The provisions of Article 113 are clear that they only apply when there is deadlock in the consideration and passing of ordinary Bills concerning counties by the National Assembly and Senate. The mediation process therefore applies during the enactment process of a Bill, and not before consideration of a Bill, which is when the concurrence process in Article 110(3) is relevant. In our opinion, the concurrence process under Article 110(3) is one that is solely and exclusively within the mandate, powers and control of the Speakers of the two Houses of Parliament, who must resolve any question arising as to whether a Bill is one concerning counties or not, before its consideration".*

Hon. Members, further, the Court of Appeal also made Orders touching on the legislative procedures and rules of this House. Firstly, the Court ordered that any Bill or delegated legislation that provides for, or touches on the mandate or powers of the Parliamentary Service Commission, must be considered by the Senate as it directly affects the Senate's ability to undertake its constitutional mandate, including its ability to consider Bills that affect counties. In this regard, moving forward, in terms of the legislative procedures, any Bill that provides for, or touches on the mandate or powers of Parliamentary Service Commission, shall be forwarded to the Senate after passage for consideration.

Hon. Members, secondly, the Court also made Orders in regard to our legislative procedures relating to the rules of this House and I quote:

"…where the Speakers of the House concur that a Bill is one that concerns counties, pursuant to Article 109(4), the Bill must be passed in accordance with Articles 110 to 113, 122 and 123 of the Constitution and the Standing Orders of both Houses and is not subject to Article 114 of the Constitution."

Hon. Members, Article 114 of the Constitution is the provision on money Bills, and the finding of the Court is that where the Speakers of the Houses agree that a Bill is one that concerns county governments, then such a Bill shall not be subject to Article 114 of the Constitution. The Court of Appeal, however, observed the following in Paragraph 127 of the Judgment with respect to money Bills, and I wish to quote the distinguished Judges:

"…It is instructive that, unlike Article 109 (4) of the Constitution where application of Article 110(3) of the Constitution is expressly required, in the case of enactment of money Bills, the Constitution is silent on the involvement of the Senate. As such, it is safe to conclude that all money Bills pass through the Speaker of the National Assembly whether commenced by the Senate or in the National Assembly, for him or her to ascertain whether or not it is a money Bill, and all money Bills subjected to the Budgetary Committee, dependent upon their outcome, are passed by the National Assembly without reference to the Senate"

Hon. Members**,** I also note that the High Court in its Judgment had also declared the National Assembly Standing Order No. 143 which requires Bills originating from the Senate to be subjected to the money Bill determination as offending the Constitution. The Court of Appeal did not, however, make any determination on Standing Order No. 143 as it was not part of the items that were set for determination at the Appeal. Indeed, the Court of Appeal also observed in Paragraph 260 of its Judgment as follows, and allow me to quote:

"260. We note that there was no appeal in respect of Standing Order No. 143 (2) to (6) which was also declared unconstitutional by the High Court. This being the case, there was nothing for us to determine in this regard."

Hon. Members, in light of the foregoing, the High Court Judgment which declared the National Assembly Standing Order No. 143 unconstitutional still stands. Additionally, I also note that the Court of Appeal in its Orders also declared that the provisions of Standing Order No. 121(2) of the National Assembly Standing Orders, which provide for the procedure for consideration of Bills concerning county government, is inconsistent with Articles 109(4), 110 to 113 of the Constitution and is, therefore, null and void.

Hon. Members, to this end, it may be prudent that the Procedure and House Rules Committee, which is currently undertaking a review of the Standing Orders, does also undertake a review of Standing Order Nos. 121 and 143 with a view to aligning them with the Constitution as guided by the court decisions.

Hon. Members, finally, the Court of Appeal also made a determination on our Cross-Petition which we had filed in the High Court. You will, indeed, recall that the National Assembly had also filed a Cross-Petition in the High Court seeking among other things, the following declarations on a number of constitutional questions which are of concern to the Members of this House:

1) We had sought in the Cross-Petition a declaration that the Senate had a limited role of oversight of State and State organs, under Article 145 of the Constitution, limited to considering and determining any resolution to remove the President and the Deputy President.

2) A declaration that, to the extent that the Senate has established committees duplicating the mandate of the Committees of this House and purported to exercise oversight over matters that fall in the exclusive domain of this House, the Senate of Kenya is in violation of the Constitution.

3) We had also sought a declaration that the Senate purported action of establishing and facilitating and/or causing to be facilitated committees duplicating the mandate of the Committees of the National Assembly and county assemblies amounts to imprudent and irresponsible spending of public money, contrary to Article 201 of the Constitution.

4) A declaration that the National Assembly had the sole mandate of approving persons nominated by the President as State or public officers to serve in state office and public office in the National Government.

5) A declaration that Article 95(4) and (5) confers the National Assembly the exclusive mandate of oversight of State officers; and,

6) A declaration that establishment of the offices of the Senate Leaders of the Majority and Minority through Senate Standing Order Nos. 19 and 20 is contrary to Article 108 of the Constitution as the offices are not created or established anywhere in the Constitution.

Hon. Members, it is notable that the High Court converted the National Assembly's Cross-Petition into a response to the consolidated Petition and failed to consider the issues raised therein. In this regard, the Court of Appeal held that the Cross-Petition raised significant constitutional issues and the High Court ought to have given procedural guidance on dispensing with the issues. To this end, the Court of Appeal in its Judgment made the following Order and I quote:

> *"We hereby remit the Appellants' Cross Petition filed in Nairobi H.C. Constitutional Petition No.284 of 2019 back to the High Court for consideration and determination of Prayers Nos.7 to 22 of the Cross-Petition."*

In light of the foregoing, I will be giving directions to the Clerk of the National Assembly and our Legal Counsel on how to proceed with respect to implementing the Orders of the Court of Appeal in this regard.

Hon. Members, having highlighted the Orders of the Court of Appeal and even as we proceed as guided by the Court of Appeal, allow me to also note that there may be ensuing issues arising from the manner in which the Senate had applied the High Court Judgment which has since been set aside. One of the ensuing issues was the erroneous interpretation and application by the Senate of the High Court Judgment where it did proceed to republish Bills when this House was already seized of similar Senate Bills which were undergoing consideration at different stages by the Committees and the House.

Hon. Members, as I have guided this House before, I shall stand guided by the reports of the relevant committees considering similar versions of Senate Bills on their determination on which of the Bills should be proceeded with and accorded priority in the House.

The other ensuing issue arising from the erroneous application of the High Court Judgment is in respect to the National Assembly Bills in the Senate whose consideration the Speaker of the Senate had halted on grounds that no resolution had been made between the two Speakers in terms of Article 110(3) of the Constitution. To this end and in light of the Court of Appeal Judgment, I shall be consulting my distinguished colleague and counterpart in the Senate for reconsideration of his decision halting the consideration of the National Assembly Bills in the Senate.

In this regard, I have in mind the Kenya National Library Service Bill, 2020; the Parliamentary Pensions (Amendment) (No. 3) Bill, 2019; the Public Service (Values and Principles) (Amendment) Bill, 2019; the Cancer Prevention and Control (Amendment) Bill, 2020; and, the National Youth Council (Amendment) Bill, 2019, whose consideration was stopped in the Senate.

Hon. Members, from what I have just highlighted, you will agree with me that the legal dispute between the two Houses and the different interpretations of the High Court Judgment adopted by both Houses was threatening to frustrate the legislative business of Parliament, its committees, individual Members and the cordial relationship between the two Houses. It had also threatened to negate the legislative authority of the institution of Parliament as provided for in Articles 94, 95 and 96 of the Constitution.

Hon. Members, I must, therefore, commend the Judges of the Court of Appeal for settling all the pertinent constitutional issues and, more so, for upholding the Constitution and the High Court decision in the famous Pevans East Africa Case by applying the "pith and substance test" to establish whether a Bill concerns county governments. Please join me also in lauding the Members of this House who have been instrumental in offering counsel on the matter, the Clerk of the National Assembly, our internal and external counsel for their contributions and enriching submissions to the case which made it a success.

Hon. Members, I am, however, cognizant of the fact that the Judgment of the Court of Appeal does not call for celebrations as it is not a case of who has won or who has lost. It calls for sobriety. More so, it should be seen as a learning lesson for both Houses to live in comity and restrain from taking each other to court. Indeed, when we drag each other to court, it is the people of Kenya who lose and yet, they are the very reason that the two Houses were established.

Hon. Members, when legislative processes of either House stop, it only means that Parliament cannot use or exercise its legislative power to respond to the issues of concern to the people. I, therefore, call on both Houses to work together and collectively to serve our people, remembering that, in the end, whenever there is a court dispute between the Houses, it shall never be a question of which House won, but rather – how did *Wanjiku* lose?

Consequently, with the citizenry in mind, as Parliament, we must, therefore, always find ways of amicably settling our disputes outside the courts. To this end, I will continue engaging my distinguished colleague and counter-part in the Senate with a view of unlocking any impasse that may arise in the legislative processes.

Hon. Members, in summary, following the decision of the Court of Appeal, my guidance is as follows:

1) THAT, the Leader of the Majority Party, or the Departmental Committee on Trade, Industry and Co-operatives, re-introduces a Bill for an Act of Parliament to amend the Sacco Societies Act as contemplated in the Sacco Societies (Amendment) Act, No. 16 of 2018 which was declared unconstitutional by the Court of Appeal, for expeditious reconsideration by the House. To ensure expedited processing of the said Bill by the House, the re-published Bill is not to contain any matters outside the impugned Act.

2) THAT, in respect of the amendments made to sections 3 and 4 of the Kenya Medical Supplies Authority Act as contained in the Health Laws (Amendment)Act, No. 5 of 2019, the Departmental Committee on Health does consider proposing the amendments to the Health Laws (Amendment) Bill, 2021 at the Committee Stage for consideration by the House.

3) THAT, the Bills which, after passage by this House and referral to the Senate, were stopped from proceeding at the Senate be re-sent to the Senate for its consideration and decision in light of the interim orders given by the Appellate Court on 2nd February 2021 and the final orders given on 19th November 2021. This includes the Kenya National Library Service Bill, 2020, the Parliamentary Pensions (Amendment) (No. 3) Bill, 2019, the Public Service (Values and Principles) (Amendment) Bill, 2019, the Cancer Prevention and Control (Amendment) Bill, 2020, and the National Youth Council (Amendment) Bill, 2019.

4) THAT, as part of the on-going end-term review of the Standing Orders, the Procedure and House Rules Committee undertakes a review of Standing Order 121 and 143 with a view of aligning the provisions with the Constitution as guided by the Appellate Court. In the meantime, we will be guided by the text of the Judgment of the Appellate Court.

5) THAT, with respect to the Orders of the Court of Appeal regarding the Cross-Petition (No. 284 of 2019) by the National Assembly, in which the National Assembly sought about 16 Declaratory Orders against the Senate, I will be giving directions to the Clerk of the National Assembly and our Counsel on how to proceed to implement the Order of the Court of Appeal.

The House is accordingly informed and guided.

I thank you, Hon. Members."

WITHDRAWAL OF THE ADVOCATES (AMENDMENT) BILL

Thursday 2nd December 2021

Context:
The Chairperson, Departmental Committee on Justice and Legal Affairs had sought leave of the Speaker to withdraw the Advocates (Amendment) Bill, 2021 which it sponsored in the House following the Committee's acceptance of prayers contained in a public Petition considered by the Committee.

Decision of the Speaker:

1. *THAT, justice would demand that only a party seeking redress should be allowed to withdraw its request. Allowing the Committee to abruptly discontinue the process of actualising the petitioners' prayers without any reference to them negates the spirit of Article 119 of the Constitution;*

2. *THAT, the Chairperson of the Departmental Committee on Justice and Legal Affairs to reconsider his request to withdraw the Bill and, after taking into account the views of his Committee Members, should communicate the Committee's final decision on the matter to my office on or before 24th January 2022;*

3. *THAT, in order to adhere to the true intention of Article 119 of the Constitution as read together with the mandate of this House to deliberate on and resolve any issue of concern to the people, in default of the Chairperson sponsoring the Bill, any other Member may express interest to sponsor the Bill on the petitioners' behalf. Where a Member agrees to sponsor the Bill, it shall be republished at the earliest opportunity and introduced to the House for consideration; and,*

4. *THAT, any memoranda received with regard to the Advocates (Amendment) Bill (National Assembly Bill No. 43 of 2021) shall remain valid for consideration in the preparation of a report to this House either on the original Bill sponsored by the Chairperson of the Departmental Committee on Justice and Legal Affairs or a Bill sponsored by any other Member, pursuant to this direction.*

"Hon. Members, you will recall that during the Afternoon Sitting of the House on Thursday, 25th November 2021, the First Chairperson of Committees did report to this House that my office was in receipt of a letter from the Chairperson of the Departmental Committee on Justice and Legal Affairs seeking leave of the Speaker to withdraw the Advocates (Amendment) Bill (National Assembly Bill No.43 of 2021) pursuant to Standing Order 140.

In her guidance to the House, the First Chairperson of Committees did remind the House that the said Bill had been published and introduced in the House under the sponsorship of the Departmental Committee on Justice and Legal Affairs, following the admission of the prayers sought by Mr. George Njenga Mwaniki and 12 others, through Public Petition No.20 of 2021, which sought "amendment of the Advocates Act, Cap 16, to allow admission of law practitioners from the Republics of Rwanda and Burundi to the Roll of Advocates in Kenya."

Hon. Members, you may further recall that the First Chairperson did clarify to the House that the application of Standing Order 140 is subject to the discretion of the Speaker, who must weigh the merit or otherwise of a request for leave to withdraw a Bill. Accordingly, she deferred commencement of Second Reading of the Bill in question to await the Speaker's

determination of the request by the Chairperson of the Departmental Committee on Justice and Legal Affairs for leave to withdraw the Bill.

Hon. Members, I have reviewed the letter by the Chairperson of the Departmental Committee on Justice and Legal Affairs and established that the Chairperson cited two grounds for withdrawal of the Bill. These reasons are-

1. That, the matter being addressed falls within the doctrine of reciprocity among the community of nations, in this case being the member states of the East African Community (EAC) as captured in Paragraph (ix) on Page 19 of the Committee's Report, which emphasises that "…without mutual and equivalent harmonisation, there should be no reciprocity" with regard to the admission of persons from other East African States to the Roll of Advocates; and,

2. That, the Office of the Attorney-General and Department of Justice of the Republic of Kenya had, during its consideration of the Petition, submitted that it was in the process of formulating two Bills, namely, the Kenya School of Law (Amendment) Bill and the Council of Legal Education (Amendment) Bill which would, among others, address the concerns of the petitioners.

Hon. Members, before I guide the House with regard to the request at hand, I wish to report to the House that the petitioners have, by way of a letter dated 26th November 2021, appealed to my office, objecting to the withdrawal of the Bill by the Chairperson of the Departmental Committee on Justice and Legal Affairs. For the benefit of the House, I have summarised the grounds on which the petitioners' appeal is premised as follows:

1. That, the Committee's decision to legislate in the manner contained in the Bill signifies its acquiescence with their prayers and was arrived at after taking into account the views of the Attorney-General, the Judiciary and the Council of Legal Education, among other key stakeholders in the legal profession;

2. That, sections 12 and 13 of the Advocates Act had already been passed in the Statute Law (Miscellaneous Amendments) Act, 2012 but were, however, declared unconstitutional by the Court of Appeal in Civil Appeal No.96 of 2014 (Law Society of Kenya versus the Attorney-General and 2 Others) only for want of public participation; and,

3. That, the matter at hand is solely within the authority of Parliament, being the arm of Government with the exclusive power to legislate and that even in the instances when the courts applied themselves to the matter and granted certain orders in the affirmative, they still referred the petitioners to engage Parliament to legislate appropriately.

Consequently, withdrawal of the Bill from the House is prejudicial as it would leave them with no other recourse.

Hon. Members, in considering the request by the Chairperson of the Departmental Committee on Justice and Legal Affairs against the plea by the petitioners, the right to petition Parliament on any matter, its authority which is anchored in Article 119 of the Constitution is instructive. As stated before, the Advocates (Amendment) Bill (National Assembly Bill No.43 of 2021) was introduced in this House following its exhaustive consideration of a public petition. The Bill was not voluntarily introduced by the Committee on its own motion. Part of the argument by the petitioners was the fact that they had exhausted all options available to them and were left with this House as the competent body of last resort. It was, therefore, their legitimate

expectation that the House would address their prayers conclusively.

Hon. Members, with respect to public participation, I note that the Committee had invited the public to submit their views on the Bill between 11th and 23rd November 2021. It will be recalled that the courts have also affirmed the mandatory nature of public participation and emphasised the qualitative aspect of public participation and distinguishes it from a mere consultation or a public relations exercise without a meaningful purpose. As I have always stressed, public participation ought to be approached as a qualitative and not cosmetic exercise. Indeed, the High Court recently observed in Constitutional Petition No.E001/2021 with respect to public participation, that:

> *"All parties interested in legislation should feel that they have been given a real opportunity to have their say; that they are taken seriously as citizens and their views matter and will receive due consideration at the moment when they could possibly influence decisions in a meaningful decision. The objective is both symbolical and practical. The persons concerned must be manifestly shown respect due to their concern and the legislators must have the benefit of all inputs that will enable them to produce the best possible laws."*

Hon. Members, the question that arises then is who between the petitioners and the Committee is competent to withdraw a matter for which the intervention of this House has been sought? You will agree with me that justice would demand that only a party seeking redress should be allowed to withdraw its request. In my view, allowing the Committee to abruptly discontinue the process of actualising the petitioners' prayers without any reference to them negates the spirit of Article 119 of the Constitution. Notably, Hon. Members, I do observe that the recommendation of the Committee on Page 20 of its Report - that, Parliament amends the Advocates Act (Cap 16 Laws of Kenya - and its conscious decision to introduce the Bill in the House was made with the Committee having taken into account the submissions received from stakeholders, including the Attorney-General.

Hon. Members, in seeking to withdraw the said Bill, the Committee alluded to the fact that the Attorney-General and the Department of Justice of the Republic of Kenya were formulating two Bills, namely, the Kenya School of Law (Amendment) Bill and the Council of Legal Education (Amendment) Bill, which would encompass the proposals contained in the Advocates (Amendment) Bill, 2021. Perhaps the Committee would have noted the express provisions of Article 94(5) of the Constitution, which states as follows:

> *"94 (5) No person or body other than Parliament has the power to make provisions having the force of law in Kenya except under authority conferred by this Constitution or by legislation."*

Hon. Members, the petitioners approached this House well aware that no other body has power to anchor into law the prayers sought in their Petition. Clearly, the two draft Bills referred to in the letter by the Chair of the Departmental Committee on Justice and Legal Affairs have not been introduced in this House either under Standing Order 114 by a Member or under Standing Order 114A by the Leader of Majority Party. Consequently, the draft Bills referred to are unknown to this House and cannot be used as a reason to deny the petitioners the audience of the House as sought. Indeed, the claim is outside the prayers of the petitioners.

Hon. Members, majority of the work of a House is discharged through its various committees, which consider matters committed to them and recommend various actions for resolution by the House. At this point, the Committee is and remains an agent of the House and is not an end by itself in matters legislation. Hon. Members, the Committee, in the spirit of Article 119

of the Constitution, is required to respond conclusively to a legislative request from aggrieved members of the public. It had, by publishing the Bill, adhered to the first part of its legislative mandate in accordance with the recommendations of its own Report. The second part of its mandate would entail spearheading the processing of the Bill in the House through its various stages as if it originated the idea behind the Bill. However, it now seems that the Committee is either unable or unwilling to undertake this second part of its mandate.

Hon. Members, the Chairperson of the Departmental Committee on Justice and Legal Affairs has, through his letter, given formal indication that he is not desirous of prosecuting the Bill further. To my mind, exercising the discretion under Standing Order 140, to decline the request would place the petitioners in a rather precarious position. Would the petitioners, for example, trust that the Bill will be moved in a manner that properly communicates their true intention?

Hon. Members, in view of the foregoing, I would urge the Chairperson of the Departmental Committee to reconsider his request to withdraw the Bill. The Chairperson, after taking into account the views of his Committee Members, should communicate the Committee's final decision on the matter to my office before commencement of the next Session. Alternatively, the Speaker will allow any other Member willing to sponsor the Bill to have it republished in his or her name.

Hon. Members, with respect to public participation so far undertaken, I do note that the Committee had invited the public to submit their views on the Bill between 11th and 23rd November 2021. Any memoranda received with regard to the Bill shall remain valid for consideration in the preparation of a report to this House either on the original Bill sponsored by the Chairperson, if he elects to proceed with the Bill, or a Bill sponsored by a Member, pursuant to this direction.

In summary, I direct as follows:

1. That, the Chairperson of the Departmental Committee on Justice and Legal Affairs, after taking into account the views of his Committee Members, should communicate the Committee's final decision on the matter to my office on or before 24th January 2022;

2. That, in order to adhere to the true intention of Article 119 of the Constitution as read together with the mandate of this House to deliberate on and resolve any issue of concern to the people, in default of the Chairperson sponsoring the Bill, any other Member may express interest to sponsor the Bill on the petitioners' behalf. Where a Member agrees to sponsor the Bill, it shall be republished at the earliest opportunity and introduced to the House for consideration; and,

3. That, any memoranda received with regard to the Advocates (Amendment) Bill (National Assembly Bill No.43 of 2021) shall remain valid for consideration in the preparation of a report to this House either on the original Bill sponsored by the Chairperson of the Departmental Committee on Justice and Legal Affairs or a Bill sponsored by any other Member, pursuant to this direction.

The House is accordingly guided."

CONSTITUTIONALITY OF THE PROCEEDS OF CRIME AND ANTI-MONEY LAUNDERING (AMENDMENT) BILL

Tuesday, 21st December 2021

Context:

Guidance on the constitutionality of certain clauses of the Proceeds of Crime and Anti-Money Laundering (Amendment) Bill (National Assembly Bill No. 39 of 2021.

Decision of the Speaker:

1) *The Proceeds of Crime and Anti-Money Laundering (Amendment) Bill (National Assembly Bill No. 39 of 2021) was properly before the House*

2) *The proposals contained in the Bill seeking to limit certain fundamental rights and freedoms safeguarded under the Constitution did not render the Bill unconstitutional.*

3) *The Bill explicitly disclosed the intended limitations and the purpose and extent of the limitations as required by Article 24 of the Constitution.*

4) *The inclusion of advocates as reporting institutions for suspicious financial transactions in the manner proposed in the Bill did not erode legal principle of advocate-client confidentiality.*

"Honourable Members, you will recall that during the Afternoon Sitting on Thursday, 2nd December 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, Hon. George Gitonga Murugara, rose on a point of order seeking the Speaker's guidance on the constitutionality of certain clauses of the Bill. Hon. Murugara claimed that the Bill as published contains provisions that fail the test of constitutionality and, therefore, the House should not proceed with its consideration. 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: one, 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. Two, that requiring advocates under the law to report financial dealings of their clients would erode the settled legal principle of advocate-client confidentiality.

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

For the record, I wish to inform the House that before raising the matter at hand on the Floor of the House, 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 Chamber has been and shall remain the most appropriate place for the House to address matters of such importance to the populace as to 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 is rendered, which I hereby proceed to do.

Having reviewed the letter by Hon. Murugara and distilled the contributions made by other Members following the point of order raised in the House, I have isolated three 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.

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.

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 an 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.

Hon. Members, permit me to highlight a few such cases for the benefit of this House and the general public. Members who have served in the 11th Parliament will recall that the Speaker was invited to rule on the constitutionality of several Bills. First, on 23rd July 2013, the Member for Suba South, 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 the 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 that was raised then. As such, not having found any provisions that offended the Constitution, I directed that the two Bills proceed to the Second Reading.

Second, 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 a decision 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 the wishes and meet the obligation under Article 24 of the Constitution. Hon. Members who are standing there, can you please walk in because it might take a few more minutes.

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 materialised.

Hon. 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, 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. Hon. Aden Duale is on record as having wondered why the allegedly unconstitutional amendments contained in the Bill have been reintroduced 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.

Hon. 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 9th February 2017. 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:

> z*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."*

Hon. 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 amendment 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.

Hon. 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.

Hon. 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."*

Hon. 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.

Hon. 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 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 which 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 has 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 the 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 the propriety of the Bill before the House.

Hon. 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.

Hon. 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 this question of constitutionality, it is worth noting that as the Member for Homa Bay Town, 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.

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…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 discernible 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 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 the limitation of rights and fundamental freedoms, the Constitution provides in Article 24 (1) and (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."

Hon. 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 or 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 to privacy, the Bill expressly provides for this in keeping with the constitutional dictate.

Hon. Members, the long and short of it 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 rights. In my view, this constitutes sufficient disclosure in as far as the constitutional requirement in Article 24 of the Constitution is concerned.

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 for 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 communications 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 it with the Constitution. The question as to whether the justification provided for the limitation proposed is adequate is one that only this House, in exercise of its exclusive legislative mandate, can consider and either agree with, enhance where a gap is noted, or disagree with entirely.

Interestingly, just recently on 15th November 2021 - which is just a month ago - the High Court of 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.*

Hon. Members, in considering the proposal in the Bill against the claim of intrusion of privacy and other rights, the House is expected to weigh the claim 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, 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.

Hon. Members, with regard to the reasonability and justifiability of the nature and extent of the limitation of rights as contained in the Bill, as your Speaker I wish to state that the determination falls outside the remit of the Speaker. Therefore, I will 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 various enforcement bodies as provided in law. Article 165(3) of the Constitution provides for direct determination of such issues of infringement or violation of the Bill of Rights by the High Court whenever they arise.

The matter of alleged discrimination of advocates and accountants by the Bill also arises from 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:

> *"(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 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. 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 formation agents 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 any person.

You will agree with me 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 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. In fact, from my analysis of the contribution by the Member for Suba North, Hon. Millie Odhiambo-Mabona, 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, Hon. Millie had indicated her intention to propose amendments that would try to rectify the alleged discriminatory provisions, if indeed any exist. As I indicated, the determination of whether there will be any discrimination that will arise from the Bill can only be conclusively addressed by 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 shall and 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 constitutionality and propriety of the Bill.

Hon. Members, the final concern that was raised was 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:

Hon. Members, the final concern raised was 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 other statute thereof, rather, it is based on the legal practice.*

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.

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 the 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 as follows, and I quote:

The Clause's header reads: "*Client Advocate Relationship*"

(1) Notwithstanding the provisions of Section 17, that is, 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)."

So, in my view, Hon. Members, this 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 the debate on the Bill and allay the fears of the concerned 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 the 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 Speaker, only preside and I do not debate or vote on any question proposed for determination in the House.

In summary, therefore, I wish to 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 the 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.

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 by the Constitution. I wish to emphasize that the matters raised by the Member for Tharaka and, indeed, the contributions by other Members are very critical and contribute to the development of our parliamentary and legislative practice and 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."

Sixth Session

(25th January 2022 to 8th August 2022)

DISCHARGE OF MEMBERS FROM COMMITTEES

Wednesday, 2nd February 2022

Context:

Discharged of Members from specified Committees in which they were serving as Chairpersons.

Decision of the Speaker:

1) That elections be conducted to fill the resultant leadership vacancies.

2) That the Committee on Selection expeditiously submit names to fill the vacancies occasioned by the removal of the six Hon. Members from the respective Committees and nominate them for appointment to other Committees.

"Honourable Members, Standing Order 176 relates to discharge of a Member from a Committee and it provides as follows:

1) A parliamentary party may discharge a Member from a Select Committee after according the Member an opportunity to be heard.

2) The parliamentary party whip of the party that nominated a Member to a Select Committee shall give notice in writing to the Speaker of the intention to discharge a Member from a Select Committee.

3) The Speaker shall, within three days of receipt of the notice under paragraph (2), inform the Member of the notice.

In this regard, I wish to report to the House that my Office is in receipt of a letter dated 1st February 2022 from the Majority Party Whip, notifying that the Jubilee Party has discharged the following Members from membership of the specified Committees:

1) Hon. Catherine Waruguru has been discharged from the Departmental Committee on Agriculture and Livestock, where she also served as the Vice-Chairperson.

2) Hon. William Kipkemoi Kisang has been discharged from the Departmental Committee on Information, Communication and Technology, where he also served as the Chairperson.

3) Hon. Katoo Ole Metito Judah has been discharged from the Departmental Committee on Defence and Foreign Relations, where he also served as the Chairperson.

4) Hon. Japhet Kareke Mbiuki has been discharged from the Departmental Committee on Environment and Natural Resources, where he also served as the Chairperson.

5) Hon. David Gikaria has been discharged from the Departmental Committee on Energy, where he also served as the Chairperson.

6) Hon. Ali Wario has been discharged from the Select Committee on Regional Integration, where he also served as the Chairperson.

Having perused the documents through which the Jubilee Party transmitted the decision to discharge the said Members, I am satisfied that the process leading to the discharge met the requirements set out in Standing Order 176. This is because each of the six Members had been duly notified of the intended discharges by the Majority Party Whip through notices dated 17th January 2022 and accorded time to respond. Pursuant to the provisions of Standing Order 176(3), the affected Members are hereby accordingly informed. The discharges take effect today, 2nd February 2022. I direct the Clerk to transmit a copy of this Communication to each of the six Members.

Hon. Members, as you may be aware, hitherto this new development, the Members I have mentioned held leadership positions in the respective Committees. As such, by dint of Standing Order No. 174(3)(b), the discharged Members served in only one Committee. In order to adhere to the Standing Orders, my previous Communication of 9th June 2020 regarding membership to Committees and in order to ensure that the operations of the particular Committees continue uninterrupted, I hereby direct as follows:

THAT, the Clerk of the National Assembly expeditiously conducts elections to fill the resultant leadership vacancies in accordance with the procedure set out in Standing Order No. 179 relating to conduct of elections of Chairperson and Vice-Chairperson of a Committee; and,

THAT, pursuant to the provisions of Standing Order No. 173(3), the Committee on Selection should expeditiously submit names to fill the vacancies occasioned by the removal of the six Hon. Members from the respective Committees and nominate them for appointment to other Committees in compliance with my previous ruling that "every Member should have a fair chance to sit in at least one Committee without appearing to entreat or beg any other party for a reasonable opportunity. The House is accordingly informed.

I thank you".

RECALL OF CERTIFIED AUDITED ACCOUNTS AND FINANCIAL STATEMENTS OF TECHNICAL UNIVERSITY OF MOMBASA ENTERPRISES LIMITED

Tuesday, 15th February 2022

Context:

Recall of Certified Audited Accounts and Financial Statements of the Technical University of Mombasa Enterprises Limited by the Office of the Auditor-General due to an inadvertent error

Decision of the Speaker:

1) *The Public Accounts Committee ceases consideration of the financial statements, if the process had commenced, pending correction of errors by the Auditor-General.*

2) *Any publicisation of the Certified Audited Accounts and Financial Statements undertaken by the Clerk in accordance with the requirements of section 32 of the Public Audit Act, 2015 be revoked.*

"Honourable Members, Article 229 of the Constitution requires the Auditor-General to audit and report to Parliament, on the accounts of all public entities within six months after the end of each financial year. The respective reports once submitted are considered by Parliament and appropriate action recommended. In this regard, the Certified Audited Accounts and Financial Statements of the Technical University of Mombasa Enterprises Limited for the year ended 30th June 2020 were submitted to the National Assembly and laid on the Table of the House on Tuesday, 6th October 2021. They were subsequently committed to the Public Accounts Committee (PAC) for consideration and reporting.

However, Hon. Members, my office is in receipt of a letter dated 9th November 2021 from the Auditor-General recalling the report due to an inadvertent error. Having considered the request of the Auditor-General, and in order to ensure that only correct statements are reflected in the report, I hereby direct that the Public Accounts Committee ceases consideration of the financial statements for the Technical University of Mombasa Enterprises Limited for the year ended 30th June 2020, if the process has commenced, pending correction of errors by the Auditor-General. Further, any publicisation undertaken by the Clerk in accordance with the requirements of section 32 of the Public Audit Act, 2015 is revoked. The Committee, and indeed the House, is accordingly guided.

I thank you, Hon. Members."

PRIORITIZATION OF INDIVIDUAL MEMBERS' BILLS

Tuesday, 15th February 2022

Context:

Number of individual Members' Bills awaiting consideration at various stages in the House.

Decision of the Speaker:

1) *Individual Members' Bills be forthwith listed in the Order Paper in order of their respective publication dates.*

2) *In the event that a Member was not present when their Bill was listed on the Order Paper, the particular Bill would be placed at the bottom of the list of Individual Members' Bills scheduled for consideration in subsequent sittings.*

"Honourable Members, as you are aware, pursuant to the Calendar adopted by the National Assembly last week, the House is scheduled to hold a total of fifty-five (55) sittings during the current Sixth Session before the *sine die* recess which will commence on 10th June 2022.

In accordance with the provisions of Standing Order No. 40(3), Individual Members' business is largely considered on Wednesday Mornings. A simple calculation of the remaining days indicates that between today and the date of the *sine die* recess, there are about seventeen (17) Sitting Days reserved for consideration of Individual Members' business. Further, as at today, there are over forty (40) Individual Members' Bills that are awaiting consideration at various stages in the House. In this regard, the House Business Committee has resolved that all Individual Members' Bills shall be forthwith listed in the Order Paper in order of their respective publication dates. This will accord each of this category of business a fair opportunity of being considered by the House during this Session.

Hon. Members, it has been noted with concern that in the recent past, a number of Members have been absent whenever their Bills are called for consideration at either Second Reading or the Committee of the whole House stage. Consequently, the House Business Committee has resolved that, in the event that a Member is not present when his or her Bill is called out on Wednesday Morning, consideration of the particular Bill will stand deferred in that Sitting and shall not be accorded priority in the subsequent sittings. Moreover, the particular Bill shall be placed at the bottom of the list of Individual Members' Bills scheduled for consideration in subsequent sittings.

For purposes of Tomorrow Morning's Sitting, the Bills that have been prioritised for consideration include the National Disaster Management Authority Bill sponsored by Hon. Kimani Ichung'wah, MP; the Public Service Commission (Amendment) Bill sponsored by Hon. Benjamin Mwangi, MP; the Alcoholic Drinks Control (Amendment) Bill sponsored by Hon. Silvanus Osoro, MP which are scheduled for Committee of the whole House stage. Twenty-one (21) other Individual Members' Bills are also scheduled for Second Reading. In this regard, I call upon Members to pay special attention to the Notice Paper annexed to the Order Paper of this particular sitting, which contains the notification of the business scheduled

to be considered tomorrow Morning. I do hope that all Members are duly notified and guided and will adhere to the set regulation.

I thank you, Hon. Members."

STATUS OF THE COUNTY GOVERNMENT GRANTS BILL

Thursday, 3rd March 2022

Context:

Failure by the Mediation Committee on the County Governments Grants Bill (Senate Bill No. 35 of 2021) to hold meetings.

Decision of the Speaker:

1) *The Mediation Committee directed to meet within seven days from the date of the Communication from the Speaker.*

2) *Failure to hold the meeting as directed would compel the Speaker to ask the leadership of the House to nominate other Members to sit on the Mediation Committee.*

"Honourable Members, you will recall that the National Assembly passed the County Government Grants Bill (Senate Bill No. 35 of 2021) on Thursday, 2nd December 2021 with amendments. Subsequently, the Senate was informed of the decision of the House on Friday, 3rd December 2021.

Hon. Members, on 21st December 2021 the Clerk of the Senate communicated the decision of the Senate on the County Government Grants Bill, 2021 and appointed Members to a Mediation Committee. Consequently, on 23rd December 2021, I communicated to the Senate the progress made by the National Assembly with regard to the said Bill, that is, the appointment of the following Members to represent the National Assembly in the Mediation Committee on the Bill:

1) Hon. Kanini Kega, CBS, MP;

2) Hon. (Dr.) Kanyuithia Mutunga, MP;

3) Hon. Naisula Lesuuda, OGW, MP;

4) Hon. Millie Odhiambo-Mabona, CBS, MP, and

5) Hon. (Dr.) Makali Mulu, MP.

Hon. Members, to this end, the first meeting of the Mediation Committee was scheduled on Wednesday, 19th January 2022, at 9.30 a.m. at the Mini-Chambers, County Hall, at Parliament Buildings. However, the meeting did not take place and was postponed to Tuesday, 25th January 2022, at 10.00 a.m., which was further postponed on account of the Senate holding a Special Sitting on the appointed date to consider the Political Parties (Amendment) Bill, 2021.

The third meeting was called on 15th February 2022 in the Red Cross Building, Parliament Buildings at 11.00 a.m. However, it was postponed due to the fact that the four Members from the National Assembly were engaged in the Budget and Appropriations Committee retreat to consider the 2022 Budget Policy Statement.

With the foregoing, efforts to call for a subsequent meeting have not borne fruit on account that the National Assembly Budget and Appropriations Committee has been considering the 2022 Budget Policy Statement and the 2021/22 Financial Year Supplementary Estimates I. In this case, the Mediation Committee on the County Governments Grants Bill (Senate Bill No. 35 of 2021) has so far not held any meeting to deliberate on the Bill as required under Standing Order No. 149.

Once passed, the Bill will unlock the conditional grants for county governments and many stakeholders have been inquiring on its status. It is quite disturbing that the mediation process has not taken off.

In the circumstances, noting the importance of the said Bill, I direct the Chairperson of the Budget and Appropriations Committee and other Members of the Mediation Committee to avail themselves and attend the meeting of the Mediation Committee that will be called. In the event that the Members fail to meet within seven days from the date hereof, I will call upon the leadership of the House to nominate other Members to sit on the Mediation Committee.

Hon. (Dr.) Makali Mulu is in the House. The others are all busy in the field. When you are out there merely shouting in the field, you may think that you are doing a lot of work. You have been elected to come and serve here in the House. Those Hon. Members, namely, Hon. Naisula Lesuuda, Hon. (Dr.) Mutunga, and particularly Hon. Kanini Kega, this is where business is supposed to be transacted. You should avail yourselves. There is also Hon. Millie Odhiambo. If they do not, we will have to replace them.

I thank you."

CONSTITUTIONALITY OF THE FIRST SUPPLEMENTARY ESTIMATES FOR FY 2021/2022

Thursday, 31st March 2022

Context:

Constitutional propriety of the Supplementary Estimates for 2021/2022 Financial Year as presented to the House for approval by the Cabinet Secretary for the National Treasury and Planning owing to the failure to adhere to the strict timelines imposed under Article 223 of the Constitution.

Decision of the Speaker:

1) Administrative

a) The Clerk to maintain a specific register for noting any requests for approval made by the Cabinet Secretary for the National Treasury pursuant to Article 223 of the Constitution and facilitate the timely tabling of all such requests before the House.

b) Each request to be reported to the House by the Budget and Appropriations Committee which must confirm compliance of such requests with the timelines prescribed under Article 223 of the Constitution.

c) The House will be at liberty to consider the approval ahead of the Supplementary Estimates for the particular year and consolidate the first and second approval at the relevant legislative stage, including at the stage of publication of the attendant Supplementary Appropriation Bill.

d) The Procedure and House Rules Committee to recommend suitable text to codify the procedure for processing requests from the National Treasury, including the registration, noting and reporting of the requests to the House and the scrutiny of the compliance of the requests with prescribed timelines by the Budget and Appropriations Committee.

2) Form of presentation

a) The National Treasury to separate expenditures under Article 223 of the Constitution from any ordinary re-allocations and/or additions for each Vote, under separate Schedules.

b) With respect to spending under Article 223, the Schedules to indicate the amount and the purpose under each Vote and Item.

c) The Report of the Budget and Appropriations Committee on the examination of the same to separate these two, in addition to the Schedules of Financial and Policy Resolutions.

"Honourable Members, you will recall that during the afternoon Sitting of the House on Tuesday, 29th March 2022, the Member for Garissa Town, Hon. Aden Duale rose on a point of order and raised a number of questions of constitutional propriety of the First Supplementary

Estimates for 2021/2022 Financial Year as presented to the House for approval by the Cabinet Secretary for the National Treasury and Planning. Hon. Duale noted that, whereas Article 223 of the Constitution allows the Executive to utilise monies that are yet to be appropriated by the House, the same is subject to a maximum of 10 per cent of the approved Estimates of the particular financial year on each Vote and strict conditions on the timelines within which the Cabinet Secretary must seek the approval of the House. It was Hon. Duale's submission that the Supplementary Estimates presented by the Cabinet Secretary did not adhere to the strict timelines imposed under Article 223 of the Constitution.

Hon. Members, to buttress his claim, he contended that no approval of the monies used was sought either within two months of their first disbursement, or at least two weeks after the resumption of the House from a recess as contemplated under Article 223 of the Constitution. Hon. Duale also asked the House to note that Article 223(4) of the Constitution only allows the introduction of an Appropriation Bill for monies spent yet the request for approval from the Cabinet Secretary for the First Supplementary Estimates for 2021/2022 Financial Year includes the potential appropriation of monies yet to be spent. These, he disputed, essentially constitute new undertakings by the National Executive at an advanced stage of the financial year. The Member also contended that these actions of the Cabinet Secretary, and by extension, the National Executive did not accord to the letter and the spirit of the Constitution, Sections 43 and 44 of the Public Finance Management Act, 2012, which impose limitations on accounting officers to reallocate appropriated funds and the responsibilities of the national government in submitting a Supplementary Budget, respectively; and Regulation 40 of the Public Finance Management (National Government) Regulations, 2015 on the responsibilities of each Accounting Officer of the national Government when submitting items related to Supplementary Budget Estimates.

Hon. Members, in the ensuing debate, several Members were in support of the point raised by Hon. Duale including Hon. David Sankok, Hon. Ndindi Nyoro, Hon. Kimani Ichung'wah and Hon. George Murugara, who beseeched the Speaker to make a ruling on the matters before proceeding with debate on the Estimates.

On their part, the Leader of the Majority Party, the Chairperson of the Budget and Appropriations Committee and Hon. Mark Nyamita, MP, Member for Uriri, urged the Speaker to allow debate on the Motion for Approval of the First Supplementary Estimates for 2021/2022 Financial Year on the basis of the past practice and precedent of the House in dealing with Supplementary Estimates submitted to the House, noting that issues such as those raised by the Member for Garissa Township have either not been previously raised or have been unanimously overruled by the House when raised. Further, the Leader of the Majority Party offered an interpretation of Article 223(5) of the Constitution with respect to the scope and what constitutes the "*10 per cent*" limit imposed on the sum of expenditure under Supplementary Appropriation, an interpretation which I must admit is most persuasive, as opposed to the claim that the constitutional limit is imposed on each Vote.

Hon. Members, as I have previously held, and upheld the rulings of my able predecessors, a question of the constitutionality or otherwise of any matter under consideration by the House may be raised at any stage of its consideration as the Constitution obliges the Speaker to respect, uphold and defend the Constitution. This obligation is further expressly outlined in Standing Order 47(3) relating to instances which the Speaker may declare a Motion inadmissible for being unconstitutional. While allowing resumption of debate on the First Supplementary Estimates for the Financial Year 2021/2022, I did reserve the delivery of a ruling on the matter until today on account of the urgency of the business in question and bearing in mind that the approval of the Motion on Supplementary Estimates is not the end of the process. Indeed, as the House is aware, the approval of such a Motion is followed by consideration of the necessary Supplementary Appropriation Bill.

Hon. Members, I note, from the outset, that I have previously guided that, with regard to the constitutional propriety of matters before the House, the obligation of the Speaker is circumscribed to procedural aspects and facilitation of the proceedings of the House. Any attempts by a Speaker to address the substantive legal aspects of such business would, at the very least, be usurpation of a role reserved for the High Court under Article 165(3) of the Constitution.

Therefore, Hon. Members, in addressing the point raised by the Hon. Duale, I shall limit myself to the procedural aspects relating to the First Supplementary Estimates for the Financial Year 2021/2022 as presented by the National Treasury and the need to guide the House in its consideration of the Business relating to Supplementary Estimates.

Hon. Members, Article 223 of the Constitution provides as follows with regard to a Supplementary Appropriation, and I quote:

> *"(1) Subject to clauses (2) to (4), the national Government may spend money that has not been appropriated if—*
>
> (a) *the amount appropriated for any purpose under the Appropriation Act is insufficient or a need has arisen for expenditure for a purpose for which no amount has been appropriated by that Act; or*
>
> (b) *money has been withdrawn from the Contingencies Fund.*
>
> (1) *The approval of Parliament for any spending under this Article shall be sought within two months after the first withdrawal of the money, subject to clause (3).*
>
> (2) *If Parliament is not sitting during the time contemplated in clause (2), or is sitting but adjourns before the approval has been sought, the approval shall be sought within two weeks after it next sits.*
>
> (3) *When the National Assembly has approved spending under clause (2), an appropriation Bill shall be introduced for the appropriation of the money spent.*
>
> (4) *In any particular financial year, the national government may not spend under this Article more than ten per cent of the sum appropriated by Parliament for that financial year unless, in special circumstances, Parliament has approved a higher percentage*."

Hon. Members, you will agree with the Member for Garissa Township, that the provision is quite clear on the threshold to be met by the Cabinet Secretary for the National Treasury in making any submissions to the House, that may require the approval of a supplementary appropriation, over and above the sum appropriated by the House arising from the annual estimates. However, whereas Article 223 of the Constitution imposes strict conditions on how the national Government may spend money that has not been appropriated, it also prescribes timelines within which the approval of the House should be sought and caps the maximum amount that may be spent. It does not make any further provision with regard to what is expected of Parliament thereafter apart from noting that the House may, by resolution, increase the limit of additional spending allowed. The Article does not also set a limit within which the House is to grant or deny the approval.

Hon. Members, I further note that, in line with settled House practice, the First Supplementary Estimates for the Financial Year 2021/2022 were tabled in the House by the Leader of the

Majority Party on 1st February 2022. In keeping with the requirements of the Standing Orders, they were referred to the Budget and Appropriations Committee.

The Committee was expected to conduct public participation and engage the Departmental Committees and the National Treasury in order to make relevant recommendations to the House. A perusal of the Schedule to the First Supplementary Estimates for the 2021/2022 Financial Year incorporating the recommendations of the Committee indicate that the net sum contained is a request to the House to approve the expenditure of Kshs. 139,752,936,287. When compared to the sum of Kshs. 1.942 trillion approved in the Budget Estimates for the 2021/2022 Financial Year, the supplementary figure constitutes approximately seven per cent of the approved Estimates. At face value, this seems well within the 10 per cent threshold set by Article 223(5) of the Constitution.

Hon. Members, what, therefore, remains in contention is whether the submissions from the National Treasury adhered to the constitutional timelines relating to Supplementary Estimates, and whether the House should approve additional expenditure of monies on projects and undertakings not contained in the approved Estimates for the 2021/2022 Financial Year. While recommending approval of revised proposals by the National Treasury, the Report of the Committee does not delve into the issue of the contested timelines.

Though I note that with regard to previous Supplementary Estimates the National Treasury has invariably submitted most requests for approval of spending of monies not appropriated by the House pursuant to the limits under Article 223 of the Constitution, I have perused the records of the House and confirm that my office is not in receipt of any such request with regard to the First Supplementary Estimates for the 2021/2022 Financial Year.

The question before the Speaker at this stage is whether this anomaly should now vitiate the process already undertaken by the Budget and Appropriations Committee, the Departmental Committees and indeed change the entire course of the First Supplementary Estimates for the 2021/2022 Financial Year, which now awaits consideration of the Supplementary Appropriation Bill.

I am of the considered view that, whereas the Cabinet Secretary for the National Treasury has evidently failed to meet the prescribed timelines with respect to seeking approvals for the first and subsequent withdrawals, consideration of the propriety of the Supplementary items as submitted and the attendant legislation remains a task that this House cannot escape. Presently, the Standing Orders of this House do not guide on the form and manner in which the National Treasury seeks approval of expenditure in excess of the approved estimates and how several of such requests should be processed by the House, pending the submission of the consolidated Supplementary Estimates. Additionally, no procedure is currently in place on how a request made outside the timelines prescribed under Article 223 of the Constitution should be treated.

Noting the lack of an express procedure it would, therefore, be unfair for the Speaker to abrogate to himself the sole responsibility over a matter that is legislative in nature. You will recall that Article 124 of the Constitution requires the House to make rules for the orderly conduct of its proceedings. The Speaker may only refer to Standing Order No. 1 relating to matters not provided for, to provide guidance where no procedure is prescribed by the House.

Pursuant to Standing Order No. 1 I am, therefore, persuaded to allow the House to conclude the process of approval of the First Supplementary Estimates for the 2021/2022 Financial Year by way of consideration of the Supplementary Appropriation Bill, 2022, which is now before the House. I have chosen this option largely for three critical reasons. First, Article 259 (1)

(d) of the Constitution requires any person to interpret the provisions of the Constitution in a manner that contributes to good governance. Any determination made with regard to the matter before this House ought not to terminally imperil the financing of Government on account of administrative laxity or inaction.

Secondly, I am not aware whether the Cabinet Secretary has indeed been interrogated by the Committee on the failure to adhere to the timelines relating to the requests made to this House and whether the restricted timelines for considering the Estimates allow the House adequate opportunity to obtain the required information.

Thirdly, as a non-voting Member of this House, it would be imprudent on the Speaker to solely allow what is essentially a procedural technicality to override the important objectives intended to be achieved through consideration and approval of the Supplementary Estimates. The horse seems to have bolted at this stage and the House must resolve this matter, one way or the other. The ultimate authority on the matter lies with this House.

Hon. Members, my reading of Article 223 of the Constitution requires this House to make a decision on any requests made by the national Government that are outside the Estimates approved by the House and the monies appropriated to finance the operation of Government.

Hon. Members, you will recall that Article 206(2) of the Constitution grants the House the primary role of authorising the withdrawal of any monies from the Consolidated Fund through legislation. Any request for withdrawal of monies from the Consolidated Fund or approval of monies spent from the Fund without prior authorisation may also only be done by the House. Similarly, any authorisation given to the national Government or the manner it may request authorisation for spending squarely lies with the House.

Hon. Members, my direction that consideration of the Supplementary Estimates and the Supplementary Appropriation Bill continues does not excuse the failings noted with regard to the Supplementary Estimates presented to this House. The obligations imposed on the Cabinet Secretary in their interactions with the House should not be taken lightly. I do remind the Cabinet Secretary for the National Treasury to strictly adhere to the timelines affecting any Supplementary Estimates presented to this House. Administratively, and to prevent any future non-compliance, I direct that the Clerk maintains a specific register for noting any requests for approval made by the Cabinet Secretary for the National Treasury pursuant to Article 223 of the Constitution and facilitate the timely tabling of all such requests before the House. Each request must be reported to the House by the Budget and Appropriations Committee which must confirm compliance of such requests with the timelines prescribed under Article 223 of the Constitution. This administrative direction is to be referred to the Procedure and House Rules Committee to consider its inclusion during the revision of the Standing Orders.

Hon. Members, decisions of the House granting or denying approval sought under Article 223 should be specific and unequivocal. To aid the House to make such a decision, the National Treasury should separate expenditures under Article 223 of the Constitution from any ordinary re-allocations and/or additions for each Vote, under separate Schedules. With respect to spending under Article 223, the Schedules should also indicate the amount and the purpose under each Vote and Item. The Report of the Budget and Appropriations Committee on the examination of the same should also separate these two, in addition to the Schedules of Financial and Policy Resolutions.

Further, since the Constitution expects the National Treasury to seek approval of the House within two months after the first approval, in future, the House will be at liberty to consider the approval ahead of the Supplementary Estimates for the particular year and consolidate

the two at the relevant legislative stage, including at the stage of publication of the attendant Supplementary Appropriation Bill.

Hon. Members, with regard to the lacuna that is evident in the procedures of the House, as directed, I refer this matter to the Procedure and House Rules Committee. The Committee should recommend suitable text to codify the aforementioned procedure for processing requests from the National Treasury, including the registration, noting and reporting of the requests to the House and the scrutiny of the compliance of the requests with prescribed timelines by the Budget and Appropriations Committee.

I also thank the Member for Garissa Township for raising this matter and the Members who contributed to the ensuing debate for their valuable insights that undoubtedly shall enrich future interactions between the House and the Executive with regard to budgetary matters.

Hon. Members, in summary it is therefore my considered finding:

1) THAT, the request to the House to approve the additional expenditure of Kshs139,752,936,287.00 when compared to the sum of Kshs1.942 trillion approved in the Budget Estimates for Financial Year 2021/2022, constitutes approximately seven per cent of the approved Estimates which, at face value, is well within the 10 per cent threshold set by Article 223 (5) of the Constitution;

2) THAT, since Article 259(1)(d) of the Constitution requires any person interpreting the provisions of the Constitution to do so in a manner that contributes to good governance, it would be imprudent on the part of the Speaker to allow a procedural technicality to override the important objectives sought to be achieved through Supplementary Estimates. In this regard, pursuant to the provisions of Standing Order No. 1, the House shall continue with the process of approval of the First Supplementary Estimates for FY 2021/2022 by way of consideration of the Supplementary Appropriation Bill, 2022, which is now in its Second Reading;

3) THAT, the Cabinet Secretary for the National Treasury must, going forward, strictly adhere to the timelines required with respect to any future Supplementary Estimates submitted to the House;

4) THAT, in future, the decision of the House granting or denying approval sought under Article 223 must be specific and unequivocal. To aid the House to make such a decision, the National Treasury must separate expenditures under Article 223 of the Constitution from any ordinary re-allocations and/or additions for each Vote, under separate Schedules. With respect to expenditures under Article 223, the Schedules must also indicate the amount and the purpose under each Vote and Item; and when the first withdrawal of the said money was made. The Report of the Budget and Appropriations Committee on the examination of the same must also separate these two, in addition to the Schedules of Financial and Policy Resolutions;

5) THAT, since the Constitution expects the National Treasury to seek approval of the House within two months after the first approval, in future, the House will be at liberty to consider the approval way ahead of the Supplementary Estimates for the particular year and thereafter consolidate the two at the relevant legislative stage, including at the stage of publication of the attendant Supplementary Appropriation Bill;

6) THAT, to avoid any future non-compliance, the Clerk shall maintain a specific register for noting any requests for approvals made by the Cabinet Secretary for the National Treasury, pursuant to the provisions of Article 223 of the Constitution, and facilitate the timely

tabling of all such requests;

7) THAT, each request must be reported to the House by the Budget and Appropriations Committee which must confirm compliance of such requests within the timelines prescribed under Article 223 of the Constitution; and,

8) THAT, to address the lacuna in the procedures of the House, in its ongoing review of the Rules of Procedure of the House, the Procedure and House Rules Committee urgently interrogates the provisions of Article 223 of the Constitution and proposes relevant text for inclusion in the Standing Orders to codify the aforementioned procedure for processing requests from the National Treasury for approval of additional expenditure.

The House is accordingly guided."

PAPERS TABLED BY THE HON. FATUMA GEDI AND GROSS DISORDERLY CONDUCT BY THE HON. BABU OWINO

Tuesday, 10th May 2022

Context:

A Member had claimed that the Deputy President had grabbed land in various areas within the country during debate on a different matter. Standing Order 91 places the onus of responsibility for statement of fact on the Member, who may be required to substantiate any such facts instantly or when the Speaker shall determine. Another Member had declined to obey order to vacate the Chamber. The Speaker was to provide guidance on the two matters pursuant to Standing Order No.107A of the National Assembly Standing Orders.

Decision of the Speaker:

As regard to disorderly conduct by the ***Hon. Fatuma Gedi****:*

1) *The Speaker ruled that the Member had forfeited the opportunity to refer to the tabled documents since she had not confirmed their authenticity or admissibility, and as such, there would be no further substantiation by the Member or debate on the matter.*

2) *The Speaker directed the Clerk to return the documents consisting of newspaper prints outs, photographs, and uncertified court judgments to the Member because they did not relate to the claims made before the House, and as such, their content lacked a nexus with the claims she had made in the House.*

As regard to disorderly conduct by the ***Hon. Babu Owino***

3) *The Member for Embakasi East, Hon. Babu Owino Ongili, was to withdraw from the Chamber and from the precincts of the National Assembly for a period of five days on account of gross disorderly conduct pursuant to Standing Order No. 107A of the Standing Orders.*

"Honourable Members, as I welcome you back from the just concluded long Recess. It is my hope that you were able to spend valuable time with your families and constituents, notwithstanding the heightened activities that characterise an election year, and are now rejuvenated enough to proceed with the critical business scheduled for this last Part of the Sixth Session of the 12th Parliament before the House proceeds on *Sine Die* Recess.

Hon. Members, the second Communication, I wish to notify the House of two pending matters that were left in abeyance when I adjourned the House, under Standing Order No. 112, which relates to Grave disorder in the House, for the long Recess on Thursday, 14th April 2022. Ordinarily, a House of Parliament is typically calm and operates in a friendly atmosphere in the weeks leading to a *Sine Die* adjournment. I am certain most Hon. Members will recall the regrettable and chaotic scenes that were witnessed in this House on 14th April 2022 involving the Members of Wajir County and Embakasi East, the Hon. Fatuma Gedi, MP and the Hon. Babu Owino, MP, which were in complete contrast to the norm and expectation.

Hon. Members**,** in the case of the Member for Wajir County, the Hon. Fatuma Gedi, MP, my guidance was clear to the fact that all she was required to do at the time was to table documents regarding the allegations that she had made on the Floor of the House on 12th April 2022, in accordance with the requirements of Standing Order No. 91. You will also recall that during the said sitting, I also did guide the House on what is the established practice and procedure of the House in considering the admissibility and/or authenticity or otherwise of a document tabled in the House and made reference to the Speaker's guidelines in a number of cases that occurred in the 10th Parliament. In a nutshell, just to refresh the minds of the Members, in considering the admissibility and/or authenticity or otherwise of a document tabled in the House, the Speaker examines if the document:

1) Relates to the matter for which it has been tabled;

2) Is signed, and if it is a Government document, by the authorised person or persons;

3) Bears the emblem or logo of the institution/person from which it originated or coat of arms in the case of documents from Government agencies;

4) Clearly indicates the author and the person to whom it is addressed;

5) Discloses the origin or source of the document;

6) Bears certification where a document other than the original is being *tabled*;

7) If electronic, has been obtained from a source that does not permit alteration of contents, if it is the matter dealing with the rule of admission of electronic evidence):

8) Is related to a claim made before the House or a Committee and its content has a nexus with the claim; and

9) Is stamped and clearly indicates the person signing off the stamp.

Hon. Members, what I have just highlighted is what I would call the basic rules of determining the admissibility and/or authenticity or otherwise of a document tabled in the House. Any document tabled by a Member in this House as evidence for substantiation of any allegations made by the Member, under Standing Order No. 91, must hence pass the threshold set by the nine rules on admissibility.

Hon. Members, now moving to the issue of Hon. Gedi, you will recall that on the material day, that is, on 14th April 2022, the Hon. Gedi did table several documents and in particular attempted to make fresh and further claims and then sought to substantiate them, instead of simply tabling the documents as required. Ordinarily, the Standing Orders require a Member providing evidence in substantiation to a matter claimed in the House, to do so in the next sitting day. Given the seriousness of the claims that the Member for Wajir County had made on 12th April 2022, the Speaker was sufficiently magnanimous, having granted her two days to comply with the Standing Orders.

Whenever a Member is required to avail evidence to substantiate a claim already made, the sequence of events is that; he or she tables the evidence, the Speaker confirms authenticity and admissibility, before any Member proceeding to make further reference to the Paper laid or to use them as evidence. Indeed, this is also the same sequence in a judicial proceeding.

However, the Hon. Member failed to comply with this requirement. The Hon. Member therefore, forfeited the opportunity to do so, as set out by the Standing Orders. In view of the

foregoing, the matter is spent in terms of Standing Order No. 91 and there shall be no further substantiation by the Member or debate on it.

Hon. Members, with respect to the documents that were tabled by the Hon. Fatuma Gedi, I note that they consisted of newspaper prints outs, photographs, uncertified court judgments, a self-written Statement by the Hon. Member and other uncertified papers. In particular, I note that the court judgement did not bear any certification and the documents tabled did not also relate to the claims made before the House by Hon. Fatuma Gedi. Hence, their content lacks a nexus with the claims she had made in the House. Therefore, in this regard Hon. Members, I rule that the documents are inadmissible for failure to meet the threshold set by the rules of admissibility that I have outlined above.

Consequently, I direct that the documents tabled by the Hon. Member during the Sitting of the House on 14th April 2022, be expunged from the records of the House forthwith. I also direct the Clerk to return the documents that the Hon. Member purported to table, at an appropriate time. To this end, this matter is spent in terms of Standing Order No. 91 and there shall be no further substantiation by the Hon. Member or debate on it.

Hon. Members, allow me to however caution all Members against making claims or allegations in this House which the claimant cannot substantiate. You will indeed observe that Standing Order No. 91(2) provides that a Member who is unable to substantiate allegations made in the House within the next sitting day, is deemed to be disorderly within the meaning of Standing Order No. 107. Hence, it would be paramount for a Member to be responsible for the accuracy of the statements and any facts which a Member alleges or claims to be true.

Hon. Members, further allow me to also caution Members against making allegations which amount to discussing the conduct of a person whose removal from office requires a decision of this House without a substantive Motion. Indeed, you will recall that during the sitting of the House on 14th April 2022, the Member for Yatta, Hon. Charles Kilonzo did make reference to the provisions of Standing Order No. 87 and reminded the House of the need to propose a substantive Motion, if a Member intends to discuss the conduct of person whose conduct requires sanction by this House.

Hon. Members, for avoidance of doubt, Standing Order No. 87(1) requires that any Member who wishes to discuss and/or refer adversely to the conduct of a person whose removal from office requires a decision of this House should only do so through a specific substantive Motion of which at least three days' notice has been given. It is clear from this that, the direction the Hon. Fatuma Gedi was taking this House would circumvent the procedure laid out in Standing Order No. 87 by discussing the conduct of such a person, without a substantive Motion.

Hon. Members, now moving on to the case of the Member for Embakasi East, you will recall that, on the particular day, I ordered the Member to withdraw from the Chamber for the rest of the day, owing to his disorderly conduct. However, the Member declined. It was clear that the Member's conduct was gross and unbecoming. As you are aware, Standing Order No. 111 provides as follows:

> *"If any Member shall refuse to withdraw when required to do so, by or under these Standing Orders, the Speaker or the Chairperson of Committee as the case may be, having called the attention of the House or Committee to the fact that recourse to force is necessary in order to compel such Member to withdraw, shall order such Member to be removed and such Member shall thereupon without question put be suspended from the service of the House for a minimum of twenty-one days and a maximum of ninety days and shall during such suspension, forfeit the right of access to the precincts of Parliament and the Serjeant-at-Arms shall take necessary action to enforce the order."*

Hon. Members, despite calls from some of you for me to enforce this particular provision, I restrained myself from invoking Standing Order No. 111 on that day, and I intend, for purposes of good order, to restrain myself from invoking it even today.

However, it has not escaped the attention of this House that the Member for Embakasi East declined to leave the Chamber when he was ordered to do so by the Speaker. Due to the gross disorder that arose in this House thereafter, I deferred my ruling on the Member's conduct to today. In this regard, I hereby order that the Member for Embakasi East, Hon. Babu Owino Ongili, to withdraw from the Chamber and from the precincts of the National Assembly for a period of five days, inclusive of today, on account of gross disorderly conduct pursuant to Standing Order No. 107A of our Standing Orders.

The Serjeant-At-Arms is to enforce this order immediately and if the Member is not presently in the Chamber, the Member shall not be allowed access to the precincts of Parliament or attendance to any Committee meetings or parliamentary functions during the five days of the suspension. Any Committee meeting attended by the Member during the five days shall be invalid since the Member is now deemed to be a stranger. Further, the Member shall not attend Committee meetings as a member of the public.

The House is accordingly guided, and with regard to the Member for Embakasi East, the Serjeant-at-Arms are instructed to ensure the Member does not gain entry to Continental House, County Hall or into the precincts of this compound even using the Senate gate.

I thank you."

CONSTITUTIONAL PROPRIETY OF UNIVERSITIES (AMENDMENT) BILL, 2021

Thursday, June 9th 2022

Context:

Constitutional propriety of the Universities (Amendment) Bill, 2021.

Decision of the Speaker:

1) *The Bill failed to fully actualise the provisions of Articles 201 and 229(5) of the Constitution on the need for reporting and audit of the utilisation of public funds allocated to private universities.*

2) *The Departmental Committee on Education and Research failed to propose any remedy for action by the House to actualise the two provisions.*

3) *The Bill was likely to concern county governments within the meaning of Article 110(1)(a) of the Constitution.*

4) *The public participation exercise conducted by the Departmental Committee on Education and Research was not sufficient as it did not involve its primary stakeholders and persons directly affected by the proposed legislation by default. The Committee ought to have invited, heard and considered the views of the Vice-Chancellors of, at least, a reasonable fraction of all the 52 public and private chartered universities, the 12 institutions with letters of interim authority, the Commission of University Education and the Universities Fund Board, at the very least.*

5) *The harmonisation of the amendments proposed to the Bill by the Committee did not meet the dictates of Standing Order No. 131.*

6) *The Universities (Amendment) Bill, 2021 was to be re-published in order to take into account the concerns raised by Members and align it with the requirements of Articles 10, 43(1)(f), 201 and 229(5) of the Constitution.*

"Honourable Members, I have this Communication to make before we go to the next Order. You will recall that during the Afternoon Sitting of the House on Wednesday, 8th June, 2022, the Member for Kikuyu Constituency, Hon. Kimani Ichung'wah, rose on a point of order, and raised a number of questions on the constitutional propriety of the Universities (Amendment) Bill, 2021, that was scheduled for consideration at the Committee of the whole House stage during that Sitting. The Member referred to previous rulings and guidance by the Speaker allowing the challenge of any business before the House on the basis of its constitutionality at any stage. He then proceeded to challenge the Bill with reference to the provisions of Article 10 of the Constitution on national values and principles of governance; Article 43 providing for economic and social rights and Article 201 which provides for principles of public finance. According to the Member, by giving the Cabinet Secretary responsible for Education sweeping powers to appoint and replace Vice-Chancellors of public universities and members of university councils, Clauses 13 and 14 of the Bill violate the principles and values of governance expressly outlined in Article 10 of the Constitution.

Further, the Member for Kikuyu Constituency claimed that to the extent that Clause 18 of the Bill proposes to advance the existing practice of placing Government-sponsored students in private universities even in instances where there are existing vacancies in public universities, the Bill violates the provisions of Article 201(d) and (e) of the Constitution, which require that public money has to be spent in a prudent and responsible way; and financial management shall be responsible and fiscal reporting shall be clear, respectively. It was his submission that Clause 18 of the Bill automatically leads to allocation of public funds to private universities without subjecting private universities to the same stringent reporting and audit requirements that are applicable by law to public universities.

Hon. Ichung'wah also submitted that by forcibly placing Government-sponsored students in private universities despite their eligibility for placement in public universities and without due regard to their subjection to meeting a potentially higher fees requirement, the provisions of the Bill effectively curtail the right to education meant to be enjoyed by all Kenyans under Article 43(1)(f) of the Constitution. The Member further noted that the issues highlighted in his point of order had been raised at a very early stage, in conjunction with concerns from other Members, and had led to a directive from the Speaker that the Departmental Committee on Education and Research conducts a winnowing process to harmonise the proposals made by Members on the subject.

According to the Member and others who spoke after him, the winnowing process did not meet the requirements of Standing Order No. 131 dealing with referral of proposed amendments to Committee, as it did not see the concerned Members invited nor did it take into account the peculiar demands and circumstances of those who had expressed an interest in amending the Bill.

The nature, extent and quality of public participation over the Bill was also brought into question, with allegations made that the exercise was not representative of key stakeholders in the education sector that stand to be affected by the passage of the Bill. It was argued that the Departmental Committee on Education and Research devoted most of the time committed to the public participation exercise to private universities, their representatives and the affiliated bodies, to the disadvantage of public universities.

In the ensuing debate, several Members were in support of the points raised by Hon. Ichung'wah, including Hon. Gitonga Murugara, Hon. Owen Baya, Hon. (Dr.) Robert Pukose, Hon. John Kiarie and Hon. Joseph Limo, who requested the Speaker to make a ruling on the matters before proceeding with consideration of the Bill at the Committee of the whole House. The Leader of the Majority Party; the Member for Uriri, Hon. Mark Nyamita; Hon. Abel Ogutu and Hon. (Dr). Wilberforce Ojiambo Oundo noted the need for the Speaker to consider the continuity of public entities and equal treatment of all students by the Government.

From the general debate, I isolated the following issues for resolution with regard to the Universities (Amendment) Bill, 2021:

1) Whether the Bill violates Articles 10, 201, 229(5) and 43(1)(f) of the Constitution;

2) Whether the Bill concerns county governments;

3) Whether sufficient public participation was conducted on the Bill in terms of Article 118 of the Constitution with regard to the involvement of public universities; and,

4) Whether harmonisation of the proposed amendments to the Universities (Amendment) Bill, 2021 was conducted in terms of Standing Order No. 131.

While I note that I reserved the foregoing issues raised by Members for a considered ruling today, I must admit that the period between yesterday's Sitting and today's afternoon Sitting has not been sufficient for the exhaustive consideration of the issues touching on the constitutionality of the Bill. I will point out the following issues in light of the scheduled adjournment of the House to proceed on *sine die* recess after today's sittings:

In the circumstances, and for the convenience of the House, I have consciously decided to provide an interim guidance for purposes of continuity of the business of the House. I am fully cognisant of previous rulings that I have issued, pursuant to Standing Order No. 47, where I have noted that an issue touching on the constitutionality of any business before the House may be raised at any stage during the consideration of the affected business. The Hon. Members were, therefore, perfectly in order to raise the matters covered under their points of order.

Allow me to now examine the four issues that require my guidance this afternoon. Firstly, on the issue of whether the provisions of the Universities (Amendment) Bill, 2021, violate Articles 10, 43(1)(f) and 201 of the Constitution, I will note that from my perusal of the Bill, it does not seem to fully address the issue of the need for audit of the utilisation of public funds directed towards private universities. No provision in the Bill addresses how funds proposed to be directed to the tuition of students placed in private universities are to be audited to ensure that the expenditure of the funds is legally and prudently spent in accordance with the requirements of Articles 201(d) and 229(5) of the Constitution.

Indeed, Clause 18 of the Bill, which seeks to repeal section 54 of the Universities Act, 2012, has established the Universities Fund Board without providing the standard provisions on auditing and reporting normally found in legislation which have established Funds. I note that Articles 226 and 229 of the Constitution as read together with the Public Audit Act, 2015, require the Auditor-General to audit any entity that is funded from public funds.

The Bill ought to have expressly actualised these standard provisions in Clause 18 with specificity. Certainly, to have a Bill without audit provisions where public funds are to be advanced to private entities is tantamount to negating the provisions of Articles 201, 226 and 229 of the Constitution. Simply put, to establish a board or a fund without auditing provisions is certainly putting the cart before the horse.

Hon. Members, what troubles me is the fact that from the outset, this was not a consideration that informed the introduction of the Bill in the House. However, I note that the Members for Kikuyu and Seme constituencies have, in their proposed amendments to the Bill, provided for the requirement for the audit of the public funds directed to private universities.

I am quite uncomfortable to leave the inclusion of a provision seeking to reflect a constitutional principle to the vagaries of a vote of the House, which may go either way, or be withdrawn by the Mover. Indeed, the Speaker has no power to order that a proposed amendment by a Member be carried in the House to cure a constitutional deficiency. To this end, it is my considered view that any provisions in the Bill seeking to address any concerns raised with regard to its constitutionality, ought to have been addressed at its publication.

Any revision at this particular stage of the Bill through amendment fails to properly address the constitutional concerns raised, as the amendments may be defeated by a simple majority of the Members of the House present and voting, and lead to an absurd result. Though unable to pronounce myself with finality on the constitutionality of the cited provision at this stage, I am perfectly able to direct that the issues raised are valid and ought of have been addressed by the proponents of the Bill before its publication.

Hon. Members, whereas, it is notable that the Auditor-General has a constitutional obligation under Articles 226 and 229 of the Constitution to audit any entity funded by public funds, the auditing requirements ought to be included in legislation and the case presented by this Bill is not exceptional. I, therefore, urge the next House to ensure that public funds that may have been expended this year or indeed previously to entities under the Universities Act are held accountable, and the Auditor-General has certainly a constitutional obligation to audit and report on the accounts of such entities, separately.

Hon. Members, with respect to the constitutionality of the Bill with regard to Article 10 of the Constitution on the national values and principles in particular of good governance, I note that Clauses 13 and 14 of the Bill propose to give power to the Cabinet Secretary responsible for Education to appoint Vice-Chancellors of public universities, and to revoke the appointment of the chairperson and/or any member of the councils of the universities. Clause 13 further gives the Cabinet Secretary power to approve meetings of the councils of public universities where they propose to meet more than four times in a year.

Hon. Members, certainly clauses 13 and 14 of the Bill raise questions on whether the clauses, as couched in the Bill, would promote good governance; and it is an issue that the Committee on Education ought to have considered. Lastly, on the constitutionality of the Bill in respect to Article 43(1)(f) of the Constitution, I will restrain myself from guiding this House on the matter, as I note that it relates to a question of violation of the right to education as an economic and social right as contained in the Bill of Rights. As I have guided this House severally, a question on the violation of a right and fundamental freedoms falls within the exclusive jurisdiction of the High Court in terms of Article 165 of the Constitution. I do not intend to depart from my previous rulings on this matter.

Hon. Members, moving on to the second issue, which is with regard to the issue of whether the Bill concerns county governments, I do note that despite this issue falling squarely under the province of the two Speakers of Parliament in line with the provisions of Article 110 (3) of the Constitution, an argument may still be sustained in the event amendments proposed to the Bill affect its nature. A perusal of the Bill reveals that Clause 9 of the Bill as published seeks to repeal and replace Section 26 of the Universities Act to require the Commission on University Education to ensure accessibility of public universities by all counties.

Additionally, the amendments proposed to the Bill by various Members, including those proposing partnerships between universities and counties and the committal of public land held in trust for the public by counties, may result in a designation of the Bill as a Bill concerning county governments in terms of Article 110(1)(a) of the Constitution, as read together with Part 2 of the Fourth Schedule to the Constitution, if passed by the House. This now settles the second issue.

Hon. Members, on the third issue, I will not belabour on the question of the adequacy of public participation on the Bill. I have ruled on numerous occasions in this Parliament on the need for the procedures of the House to incorporate meaningful public participation, as directed severally by the courts. I have also, on numerous occasions, emphasised on the need for this House and its Committees to ensure that public participation is not a cosmetic process, but one of probative value. In this regard, I note that the Report of the Departmental Committee on Education and Research on the Bill seems not to meet the thresholds set by this House on the meaningful involvement of the public.

At face value, I am at pains to discern from the two reports tabled by the Committee any meaningful engagement with key stakeholders affected by the Bill. In the reports, there is no indication of whether the Committee, at the very least, invited the Vice-Chancellors of all the

52 chartered universities, 32 of which are public, and the 12 universities with letters of interim authority to make representations on the Bill.

There is no mention of whether the Committee invited and considered the crucial input of stakeholders such as the Commission on University Education and the existing Universities Fund Board, and whether it considered their views. If it did, there is no record of it in their Report to the House and the addendum to the Report. To my mind, a meaningful public participation exercise should mirror the current practice adopted by the Departmental Committee on Finance and National Planning, which invites its principal stakeholders to make submissions on any business appearing before them, even if they do not send any memoranda. This allows them a broad perspective over the issues under their consideration, whether or not such stakeholders opt to submit memoranda in response to a call for public participation.

The paucity of the Committee Report becomes more glaring when one takes into account the allegations made on the Floor of the House, that the response to the Committee's invitation for public participation drew rather partisan submissions, including submissions from a forum said to represent the Vice-Chancellors of universities, instead of the actual Vice-Chancellors. I am of the opinion that the exercise conducted by the Committee would have been sufficient if it involved its key stakeholders and persons directly affected by the Bill by default.

Hon. Members, finally on the fourth and last issue, which is whether the harmonisation of amendments proposed to the Bill was properly executed, I note that Standing Order No. 131 is a device that assists committees to harmonise amendments thus, in effect, assisting the House and Members to avoid unnecessary objections during the Committee of the whole House stage. I, however, note that a number of Members who joined issue with the Hon. Ichung'wah noted that they proposed amendments to the Bill, but their efforts to have their issues addressed during the harmonisation process envisaged under Standing Order No. 131 was less than fruitful. From the foregoing, this indicates that the harmonisation or the winnowing process under Standing Order No. 131 by the Committee on Education and Research did not meet the dictates of the said Standing Order.

Hon. Members, I note that lack of the harmonisation process does not in any way impede a Member from proceeding with their amendments in the House and, indeed, as ably noted by Hon. (Dr.) Wilberforce Ojiambo Oundo, the amendments proposed by the Members were included in the Order Paper for the Afternoon Sitting of the House yesterday, and are also included in the Order Paper for this particular Sitting.

A committee directed to conduct the harmonisation process under Standing Order No. 131 must demonstrate compliance with the Standing Order. It however appears – from the submissions made by the Members in yesterday's afternoon Sitting and the plethora of amendments contained in the Order Paper – that the winnowing process failed to meet the bare minimum of the expectations of Standing Order No. 131.

In light of the foregoing, what then is the prudent action to be taken at this stage of the Bill, in view of the concerns raised? At the outset, I note that in addition to the concerns raised by the various Hon. Members, the Bill has attracted numerous amendments, as may be seen from the Order Paper. This, in my view, is a pointer to the need for a re-think of the Bill by its proponents. Insisting on prosecution of the Bill in its current form, despite the objections, questions of constitutionality, concerns on the quality of public participation undertaken on the Bill, and the numerous proposals for amendments may only easily expose any resultant Act passed by this House to easy challenges in courts of law. Conscious of the fact that the House is scheduled to adjourn *sine die* today, in view of the forthcoming General elections, I note that if the Committee had taken time to address some of these issues when they were first raised

during Second Reading, we would be facing a different situation today.

Hon. Members, it is also notable that the issues raised by the Hon. Members touch on three main clauses, these being clauses 13 and 14 on the powers of the Cabinet Secretary in respect to the public universities and Clause 18 of the Bill with regard to the Universities Fund Board. These clauses form the crux, the flesh, the pith and substance of the Bill. Indeed, one may want to argue that the easy way to cure questions of constitutionality is to expunge the unconstitutional clauses in a Bill.

However, should I order the expunging of the three clauses from the Bill, this will also require me to order the expunging of other clauses and consequential amendments to the severance of the three clauses. From a perusal of the Bill, if you were to expunge clause 18 of the Bill, you may also need to expunge clauses 16, 17, 19 and 20, among other related clauses. This would leave a shell of a Bill with no clause to deliberate on. Suffice it to say, that severance of clause 18 of the Bill would also be an abdication of the watchdog and oversight role of this House of ensuring accountability on the utilisation of public funds.

In light of the foregoing, I am, therefore, of the considered opinion that it is prudent and advisable for the Bill to be re-published in order to align it with the Constitution, and take into account the concerns raised by Members on the issues of constitutionality, public audit, public participation, and the nature and extent of the discrimination in the policy that seeks to commit a student eligible to attend a cheaper public university to a private university with a higher fee requirement.

Hon. Members, as your Speaker, I have previously ruled that I cannot close my eyes even when faced with competing unpleasant scenarios. In the present case, the question as to whether I should let the House commit a constitutional requirement to a vote or to stand down a Bill that has attracted serious questions by Members of the House, I would prefer standing the Bill down to allow its regularisation. Any other decision would, in my view, be reckless and would establish a defective precedent. In light of the foregoing, the Bill cannot, in its present state and form, proceed for consideration in the Committee of the whole House.

Hon. Members, I thank you for raising this matter and for all your contributions on the ensuing debate for valuable insights that shall undoubtedly enrich future interrogation of Bills before this House. In summary, this is my finding:

1) THAT, in the interim and pending further interrogation of the constitutionality of the Universities (Amendment) Bill, 2021, the Bill fails to fully actualise the provisions of Articles 201 and 229(5) of the Constitution on the need for reporting and audit of the utilisation of public funds allocated to private universities;

2) THAT, the Departmental Committee on Education and Research failed to propose any remedy for action by the House to actualise these two provisions. The only proposal close to actualising one of these provisions is by the Member for Seme Constituency and the Member for Kikuyu Constituency. However, at this stage, leaving the inclusion of a provision seeking to reflect a constitutional principle to the vagaries of a vote of the House would be imprudent;

3) THAT, to the extent that the Bill makes provisions touching on county governments and that various amendments, if passed, would require an interaction between universities and the functions reserved for county governments, the Bill is likely to concern county governments within the meaning of Article 110(1)(a) of the Constitution;

4) THAT, the public participation exercise conducted by the Departmental Committee on Education and Research was not sufficient as it did not involve its primary stakeholders and persons directly affected by the proposed legislation by default. The Committee ought to have invited, heard and considered the views of the Vice-Chancellors of, at least, a reasonable fraction of all the 52 public and private chartered universities, the 12 institutions with letters of interim authority, the Commission of University Education and the Universities Fund Board, at the very least;

5) THAT, based on the submissions by the Members in the House and the plethora of amendments contained in the Order Paper for yesterday and today afternoon, the harmonisation of the amendments proposed to the Bill by the Committee did not meet the dictates of Standing Order No. 131; and,

6) THAT, the Universities (Amendment) Bill, 2021 be and is hereby, ordered to be re-published in order to take into account the concerns raised by Members and align it with the expectations of Articles 10, 43(1)(f), 201 and 229(5) of the Constitution.

The House is accordingly guided.

I thank you, Honourable Members."