



REPUBLIC OF KENYA

THIRTEENTH PARLIAMENT– (THIRD SESSION)

THE NATIONAL ASSEMBLY

COMMUNICATION FROM THE CHAIR

_____ (No. 013 of 2024) _____

ON

CLAIMS OF UNCONSTITUTIONALITY OF CERTAIN PROVISIONS OF THE NATIONAL GOVERNMENT ADMINISTRATION LAWS (AMENDMENT) BILL (NATIONAL ASSEMBLY BILL NO. 73 OF 2023)

Honourable Members,

1. You will recall that during the Afternoon Sitting of yesterday, Tuesday 19th March 2024, during the Second Reading of the National Government Administration Laws (Amendment) Bill, 2023 the Leader of the Minority Party (Hon. Opiyo Wandayi, EGH, MP) rose on a Point of Order under Standing Order 47(3)(b). The Hon. Leader of the Minority Party sought the Speaker's ruling on the constitutionality of some specific aspects of the Bill.
2. In his submission, the Leader of the Minority Party claimed that there were constitutional issues that touched on the substratum of the said Bill, hence requiring determination of the Speaker, before debate on the Bill could resume.

- 3. Honourable Members,** the Leader of the Minority Party singled out the proposed amendments to the provisions relating to the National Government Coordination Act, 2013, whose import is to create the Office of the Chief Administrative Secretary and that of the Head of Public Service. He argued that the amendments, if passed in the manner contained in the Bill, would be unconstitutional.
- 4. Honourable Members,** the matter elicited interest from several other Members including the Hon. Caroli Omondi, the Hon. Jared Okello, the Hon. (Dr.) James Nyikal, the Hon. Samuel Chepkonga, the Hon. (Dr.) Ojiambo Oundo, the Hon. Gitonga Murugara and the Hon. Owen Baya.
- 5. Honourable Members,** having listened to the concerns raised by the Leader of the Minority Party as well as the arguments and counter-arguments by several other Members, I have distilled the following FIVE questions as requiring my determination. These are –
- (i) Whether a state office may be created through a national legislation;**
 - (ii) Whether the offices of the Chief Administrative Secretary and the Head of Public Service as proposed in the Bill are public or state offices;**
 - (iii) Whether the establishment of the offices of Chief Administrative Secretary and the Head of Public Service in the form proposed in the Bill, is unconstitutional;**
 - (iv) What is the value of a report of a Committee on a Bill to the House during debate at Second Reading of the Bill and at Committee of the whole House; and**

(v) Whether the amendments proposed by the Departmental Committee on Justice and Legal Affairs would cure any offensive provisions in the Bill.

- 6. Honourable Members,** the first issue is *whether a state office may be established through national legislation*. On this question, the Leader of the Minority Party opined that the two offices were unconstitutional to the extent that they were not contemplated under the definition of "state office" under Article 260 of the Constitution.
- 7. The Honourable Members** who expressed divergent views from those of the Leader of the Minority Party relied on the fact that the Departmental Committee on Justice and Legal Affairs has, in its Report on the Bill, recommended certain proposed amendments intended to address the concerns raised by the Leader of the Minority Party. They also argued that the Constitution grants latitude to the House to exercise its legislative power to create offices in the public service through national legislation.
- 8. Honourable Members,** Article 260 of the Constitution defines a public office as **"an office in the national government, a county government or the public service, if the remuneration and benefits of the office are payable directly from the Consolidated Fund or directly out of money provided by Parliament."** The same Article also defines the term "state office" to include the various offices therein enumerated at paragraphs (a) to (q).

Most relevant to this matter is paragraph (q) which provides that a state office could also be **an office established and designated as such by national legislation.**

9. Honourable Members, it is, in fact, instructive to note that Article 260 of the Constitution is not couched in an exhaustive manner. Paragraph (q) of the said Article donates power to Parliament to further legislate on the subject by providing that a state office also include an office established and designated as such by national legislation.

10. Honourable Members, the Courts have also interpreted the question of whether state offices may be created by national legislation. In the case of ***Matindi & 3 others v The National Assembly of Kenya & others [2023] KEHC 19534 (KLR)***, the High Court was satisfied that a state office can be created by national legislation. The Court held as follows—

"...whereas HE the President can establish a state office within the ranks of the public service, it requires approval by the National Assembly. Such approval may be achieved by enactment of a statute, which provides for the same and further provide an appropriate framework for a cap on the number of CASs if necessary."

The High Court was satisfied that a state office may be created by statute.

11. Honourable Members, this settles the first issue on establishment of a public or state office by national legislation.

12. Honourable Members, the second issue for determination is *whether the offices of the Chief Administrative Secretary and the Head of Public Service as proposed in the Bill are public or state offices.*

13. Honourable Members, you will recall that the Office of the Chief Administrative Secretary has been subject of litigation before the High Court.

14. Honourable Members, in the case of *Okoti & another v Public Service Commission others [2021] KEHC 464 (KLR)* the Court held that there were no processes laid down in legislation for establishing the office of Chief Administrative Secretary hence the finding of unconstitutionality.

The findings in this case were reaffirmed in the latter case of *Matindi and 3 others v The National Assembly of Kenya & others [2023] KEHC 19534 (KLR)* in which the Court affirmed that *the offices of Chief Administrative Secretaries were State offices which could only be lawfully established and designated as State offices by national legislation.*

15. Honourable Members, in summary, the Court in both instances emphasized on the need for legislation in order to constitutionalise the establishment of those offices. **Differently put, the Court in both instances would probably have arrived at a different finding, had the establishment of those offices been done by national legislation.**

- 16.** In this context, it appears therefore that the Bill being contested by the Leader of the Minority party in actual fact intends to fill the lacunae in law as identified by the Courts in the aforesaid cases.
- 17. Honourable Members,** whereas the Bill as published does not expressly designate the two offices as either public or state offices, it follows without question that the remuneration and benefits of the offices established are payable directly out of monies to be provided by Parliament. To that extent, the offices established are public offices within the meaning of Article 260 of the Constitution.
- 18. Honourable Members,** this disposition settles the second issue. It also settles the third issue on whether the establishment of the two offices in the form proposed in the Bill is constitutional.
- 19. Honourable Members,** permit me now to address the fourth issue concerning the value of a report of a Committee on a Bill to the House during debate at Second Reading of the Bill and at Committee of the whole House.
- 20. Honourable Members,** you may recall that, while speaking to the matter, the Member for Funyula (Hon. (Dr.) Ojiambo Oundo) argued that whenever a Bill is listed in the Order Paper for Second Reading, the said Bill is exclusively what should be before the House for debate and not the Report of the relevant Committee on the Bill.
- 21.** According to Hon. Oundo, a report of a Committee of this House on a Bill is inconsequential to the legislative processes, to the extent that what is ordinarily debated is the Bill and not the report.

22. Honourable Members, I take it that the Hon. Oundo advanced the said argument oblivious of the fact that committees interface the House with the public, hence actualizing the provisions of Article 118 of the Constitution on public participation. It is for this purpose that Standing Order 127 is couched in mandatory terms, as follows –

*"127(3) The Departmental Committee to which a Bill is committed **shall** facilitate public participation on the Bill through an appropriate mechanism, including—*

(a) inviting submission of memoranda;

(b) holding public hearings;

(c) consulting relevant stakeholders in a sector; and

(d) consulting experts on technical subjects.

*(3A) The Departmental Committee **shall** take into account the views and recommendations of the public under paragraph (3) **in its report to the House.**"*

23. Honourable Members, in compliance with Standing Order 127, the Departmental Committee on Justice and Legal Affairs undertook public participation on the Bill and tabled a report thereof. Further, the Committee tabled an Addendum to the Report that addresses emergent issues relating to certain provisions of the Bill. For greater certainty, the initial Report and the Addendum should be read together.

24. Indeed, **Honourable Members**, in the 12th Parliament, on 7th July 2021, when addressing the fate of individual Members' Bills that were pending before various committee of the House, my immediate predecessor did observe as follows, and I quote –

"...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)."

25. From the foregoing, **Honourable Members** and in the face of the express dictates of Standing Order 127 it is generally part of our practice that committee reports on Bills are integral and imperative to the legislative process and the contents therein cannot be wished away as suggested by the Hon. Member for Funyula.

26. Honourable Members, this determination leads me to the fifth question, which is ***whether the amendments proposed by the Departmental Committee on Justice and Legal Affairs would cure any offensive provisions of the Bill.***

27. Honourable Members, you will note that, based on the views of the public and stakeholders, the Committee has recommended a raft of amendments in its Report.

I have perused the Report and **I am satisfied that the Committee's proposed amendments, if passed by the House, will remedy the inadequacies, if any, contained in the Bill.** I therefore urge the House to consider the amendments proposed by the Departmental Committee on Justice and Legal Affairs.

28. Honourable Members, the purpose of Standing Order 47(3)(b) cited by the Honourable Leader of Minority Party is to avoid an absurd situation, where the House debates, votes on and possibly passes an unconstitutional motion. The House may therefore cure any issues of unconstitutionality at Committee of the Whole House, if any.

29. Honourable Members, the ruling of my predecessor on the question of unconstitutionality claims on the Finance Bill, 2019 delivered on 19th September 2019 has been extensively referenced by Hon. Opiyo Wandayi. In my view, that question may be distinguished from the present one. This is because the impugned clauses of the Finance Bill, 2019 were procedurally defective as they sought to limit the right to privacy without any additional provision stating the intention to limit that right and the nature and extent of the limitation.

30. It is therefore my view that the application of Standing Order 47(3)(b) is reserved for matters that are outrightly unconstitutional, whether procedurally or substantively. It is my considered view that the issues raised by the Hon. Opiyo Wandayi do not fall within that category and may therefore be canvassed by the House, noting that the report of the Justice and Legal Affairs Committee and the addendum thereof proposes amendments to the Bill.


31. Honourable Members, I am inclined to the view that the plea by the Leader of Minority Party for the Speaker to find specific provisions of the Bill unconstitutional is premature. Doing so well aware that the House can still cure any offensive provisions in the Bill through amendments at the Committee of the whole House is **akin to throwing the baby out with the bathwater.**

32. In this regard, Honourable Members, having settled the claim of unconstitutionality in relation to the Bill, and bearing in mind that there are amendments proposed by the Departmental Committee on Justice and Legal Affairs and other Members, my finding is as follows:

- 1) THAT, the National Government Administration Laws (Amendment) Bill, 2023 is properly before the House;**
- 2) THAT, since debate for Second Reading was concluded yesterday, and the mover did reply, I will hereafter proceed to put the Question for Second Reading;**
- 3) THAT, the Bill may thereafter proceed to the Committee of the whole House and Third Reading as scheduled by the House Business Committee.**

33. The House is accordingly guided.

I thank you!


THE HON. (DR.) MOSES F.M. WETANGULA, EGH, MP
SPEAKER OF THE NATIONAL ASSEMBLY

Wednesday, 20th March 2024