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**REPUBLIC OF KENYA**

**ELEVENTH PARLIAMENT**

**(FIRST SESSION)**

**THE NATIONAL ASSEMBLY**

**COMMUNICATIONS FROM THE CHAIR**

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**COMMUNICATION ON THE STATUS OF BILLS AS RELATES  
TO ARTICLE 110 OF THE CONSTITUTION**

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**“Honourable Members,**

You will recall that, on May 22, this year, I made a communication regarding the Division of Revenue Bill, 2013, which has since become part of our laws. In that communication, I guided that I will be giving further guidance, as and when need arises, on matters relating to marshaling of business between the two Houses. Indeed, several Members have since sought my further guidance in my chamber on matters related to the subject of marshalling businesses between the two Houses. This Communication therefore is predicated on these premises.

**“Honourable Members,**

You will recall that in the course of last week and early this week, the following Bills have been read a First Time in the House-

1. The Supplementary Appropriation Bill, 2013 read a First Time on 25<sup>th</sup> June, 2013;
2. The Appropriation Bill, 2013 read a First Time on 26<sup>th</sup> June, 2013;
3. The Kenya Deposit Insurance (Amendment) Bill, 2013 read a First Time on 27<sup>th</sup> June, 2013;

4. The Micro-Finance (Amendment) Bill, 2013 read a First Time on 27<sup>th</sup> June,2013;
5. The Insurance (Motor-Vehicle Third-Party Risks)(Amendment) Bill,2013 read a First Time on 27<sup>th</sup> June,2013;
6. The Tax Appeals Tribunal Bill ,2013 read a First Time on 27<sup>th</sup> June,2013;
7. The Capital Markets (Amendment) Bill, 2013 read a First Time on 27<sup>th</sup> June,2013;
8. The Insurance (Amendment) Bill, 2013 read a First Time on 27<sup>th</sup> June,2013;
9. The Finance Bill,2013 read a First time on 2<sup>nd</sup> July,2013; and
10. The Value Added Tax Bill read a First Time on 2<sup>nd</sup> July 2013.

**“Honourable Members,**

Some of these Bills notably, the Supplementary Appropriation Bill, 2013 and the Appropriation Bill, 2013 have already been passed by this House and assented to by His Excellency the President and are now part of our laws. As you are aware, Standing Order 122, provides that upon publication of a Bill and before First Reading, the Speaker shall determine whether-

- (a) it is a Bill concerning county governments and, if it is, whether it is a special or ordinary Bill: or
- (b) it is not a Bill concerning county governments.

This Standing Order was meant to operationalize the provisions of Article 110(3) of the Constitution which provide that-

- (3) 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.

**“Honourable Members,**

In order to properly deduce the meaning of Article 110(3), regard must be paid to the other provisions of the Constitution notably Article 259 which requires that the Constitution be interpreted in a manner that best promotes its purposes, values and principles and further that every provision of the Constitution must be construed according to the doctrine of interpretation that the law is always speaking and “not dead”. This calls for a wholistic and not segregatory look at the provisions of Articles 110 of the Constitution.

To argue that no House can proceed on a Bill without the joint resolution of the two Speakers is tantamount to arguing that one House can decide to sabotage the constitutional obligations of the other House and therefore precipitate a constitutional stalemate in the performance of the legislative role of Parliament. It is tantamount to contending that the provisions relating to the roles of the two Houses as set out in Part 1 of Chapter 8 of the Constitution and the procedure for the exercise of legislative power set out in Article 109 (2), (3) and (5) were provisions written into the Constitution but with desire that these provisions should have no legal effect. Indeed, it is tantamount to contending that Article 259 of the Constitution has no effect and that certain Articles of the Constitution can be assumed to be “dead” and without life and that an interpretation that favours that the law is not speaking is allowed by the Constitution.

**Honourable Members,** it is my considered opinion that Article 110(3) of the Constitution only contemplates a joint resolution of the two Speakers **only when a question arises** as to whether it is a Bill concerning counties and if it is, whether it is a special or ordinary Bill. Where there is no question arising, there is indeed no requirement for a joint resolution.

The big question in the eyes of the Constitution is how then does a question arise?

Honourable Members, the issue of how the question arises is a matter of law rather than fact. The Constitution has, in its wisdom categorized Governments into two levels; the National Government which is served by the national legislature (Parliament) and the County Government which is served by the county legislatures

(County Assemblies). The Constitution contemplates a different procedure for enactment of legislation relating to both levels of Government.

Article 109(3) of the Constitution provides that 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.

Article 109 (4) of the Constitution on the other hand provides that 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

Article 110 (1) defines “a Bill concerning county government” to mean—

- (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.

What then is a Bill concerning county government in the real sense of the Article?

**“Honourable Members,**

Firstly, it is important to note the use of the word “**and**” at the end of paragraph (b) of Article 110(1) is not accidental. **I put emphasis on the word “and”**. It therefore follows that for a Bill to meet the criteria to be qualified as a Bill concerning county government, that Bill must meet the three ingredients specified in paragraphs (a), (b), and (c) of Article 110(1) at the same time.

Secondly and more importantly, Article 110(1) (a) requires that the Bill must have provisions affecting the functions and powers of the County Governments set out in the Fourth Schedule to the Constitution.

In order to fully appreciate the import of this sub article, it is important to internalize the categorization of functions within the Fourth Schedule to the Constitution.

Article 186 of the Constitution identifies four categories of functions within the Fourth Schedule-

Firstly, there are those functions which are exclusively vested in the National Government to the exclusion of the County Governments pursuant to Article 186(1) of the Constitution. Examples of these functions include foreign affairs, foreign policy, international trade, the use of international waters and water resources, immigration and citizenship, courts, national economic policy and planning, monetary policy, currency, banking(including central banking), the incorporation and regulation of banking, insurance and financial corporations. All the Bills currently under consideration by the House fall in this category and it is expected that the bulk of the proposed national legislation to be considered by the National Assembly will always be within this category

Secondly, there are those functions which are exclusively vested in the County Government to the exclusion of the National Government pursuant to Article 186(1) of the Constitution. Examples of these functions include pre-primary education, village polytechnics, home craft centres and childcare facilities, firefighting services, animal control and welfare including licensing of dogs and facilities for the accommodation, care and burial of animals, amongst others.

Thirdly, there are those functions that are vested in the concurrent jurisdiction of both the National Government and the County Government by virtue of Article 186(2) of the Constitution. These functions include disaster management, agriculture and health policies where they touch on the county function of agriculture and county health.

Fourthly, there are those functions that are not directly mentioned by name in the Fourth Schedule and Article 186(3) contemplates that these functions are exclusively vested in the National government to the exclusion of the County Government.

**Honourable Members**, it is clear from the wording of Article 186 as read together with Article 185(2) of the Constitution that the national legislature consisting of the National Assembly and the Senate cannot and should not, except in exceptional circumstances contemplated by Article 186(4), legislate on any of the functions that are exclusively

vested in the County Governments. Legislation in these areas is a preserve of the County Assemblies under Article 185(2) of the Constitution.

The national legislature can therefore only proceed to legislate in four areas-

- (a) Where the function is exclusively vested in the National Government pursuant to Article 186(1) of the Constitution;
- (b) Where the function is concurrently vested in the National Government and the County government pursuant to Article 186(2) of the Constitution;
- (c) Where the function is not mentioned in the Fourth Schedule as it remains an exclusive function of the National Government pursuant to Article 186(3) of the Constitution; and
- (d) Where the function is exclusively vested in the County Government but the National Government wants to invoke the provisions of the Article 186(4) of the Constitution to legislate on this function.

Where the national legislature proceeds to legislate in furtherance of paragraphs (a) and (c), Article 109(3) of the Constitution contemplates that process to be an exclusive preserve of the National Assembly.

Where the national legislature proceeds to legislate in furtherance of paragraph (b), Article 110 contemplates that process to be a preserve of both the National Assembly and the Senate.

Where the national legislature proceeds to legislate pursuant to Article 186(4) and thereby legislating on functions exclusively assigned to County Governments to the exclusion of the National Government, the process is a preserve of both the National Assembly and the Senate. It is my view, that given the nature of our Bicameralism, only a handful of laws would fall in this category. When such a law is proposed, as your Speaker, I will not hesitate to forward such Bill to the Senate.

**Honourable Members**, the question contemplated under Article 110(3) of the Constitution therefore only arises if the Bill before the Assembly relates to matters within

the Fourth Schedule falling within the concurrent jurisdiction of both the National and County Government or within the exclusive jurisdiction of the County Government.

The framers of the Constitution did not give us a constitutional dispensation that is akin to that of the United States of America where the Senate has full legislative powers in a system of Government that is fully federalist or the United Kingdom for that matter where the House of Lords enjoys full legislative powers. Articles 109 as read together with Part 1 of Chapter 8 of the Constitution clearly demarcates the legislative boundaries of the Houses of Parliament in the Kenyan Parliament. This is a fact that we must all be alive to at all times- **That our bicameralism is unique to the Kenyan context!**

This House must therefore resist any attempt to stretch the meaning of Article 110(1) of the Constitution to imply that everything that is done at the national level affects the functions and powers of the county governments in their corporate aspect and therefore that the exclusive functions of the National Government must be subjected to the considerations of the county governments rather than the wishes of the people as manifested in their national representatives. Indeed, this line of reasoning makes a mockery of the framers of the Fourth Schedule to the Constitution to the extent that it implies that the categorization of functions between the National and County Government pursuant to Article 186 is a fallacy that does not exist in practical terms. A distinction must be drawn between affecting people living in the counties and affecting the functions and powers of the County Governments. Indeed, any national legislation will affect the people living in the counties because these same people are the citizens of the Nation. Article 110(1) does not talk about citizens but talks about county governments as a corporate entity.

**“Honourable Members,**

Honourable Members, the ten Bills which have proceeded to First Reading before this House all fall within the jurisdiction of matters exclusively vested in the National Government by the Fourth Schedule to the Constitution.

Arising out of this determination, no question arises under Article 110(3) of the Constitution that would warrant a joint resolution of the two Speakers as contemplated under Standing Order 122. Indeed, I have previously ruled in the case of the Division of Revenue Bill that the House should proceed to make the necessary amendments to the Standing Orders so as to bring them in tandem with the Constitution. I therefore direct

the Procedure and House Rules Committee to proceed expeditiously in this regard during the forthcoming August recess.

**Thank you!**

**THE HON. JUSTIN B.N. MUTURI, MP**  
**SPEAKER OF THE NATIONAL ASSEMBLY**  
**July 3, 2013**