

REPUBLIC OF KENYA



ELEVENTH PARLIAMENT- (THIRD SESSION) THE NATIONAL ASSEMBLY

COMMUNICATION FROM THE CHAIR

CONSIDERATION AND SCOPE OF PRESIDENTIAL RESERVATIONS PURSUANT TO ARTICLE 115 OF THE CONSTITUTION- REFERRAL OF BILLS TO PARLIAMENT FOR RECONSIDERATION

Honourable Members, you may recall that, on Thursday, 25th June, 2015, the Member for Rarieda, The Hon. (Eng.) Nicholas Gumbo rose on a point of order and sought guidance from the Speaker on the following matters relating to Presidential referral of Bills to Parliament for reconsideration -

- (i) whether, in expressing his reservations and sending a Bill back to Parliament for reconsideration upon refusal to assent under Article 115 of the Constitution, the President can make specific proposals for amendment to the particular Bill;
- (ii) whether the specific proposals for amendment made by the President should go through the entire law-making process of consideration by the relevant committee, including pre-publication scrutiny, public hearings, and First, Second and Third Readings;
- (iii) whether accepting of the text proposed by the President and which has not been subjected to the ordinary law-making process as outlined in (b) above should require a two-thirds majority; and,
- (iv) whether, the House would be properly constituted if, at the time of putting the question on the President's reservations or

recommendations, there are less than two-thirds of all the Members present in the House.

Honourable Members, The main substance of the concerns raised by the Member for Rarieda was that , by making specific proposals for amendment to a Bill, the President was encroaching on the legislative mandate of the House and thereby contravening the principle of separation of powers. The matter was similarly canvassed by several other Members who rose on that point of order to make their contributions. I am indeed grateful to all those who spoke on that day and submitted your views on these very weighty matters. You are aware that, on a number of occasions during the term of this 11th Parliament, the President has referred back Bills to this House for reconsideration, with memoranda outlining his reservations on those Bills and giving his recommendations thereon. Whenever that happens, the recommendations contained in the memoranda are subjected to the Committee of the Whole House for consideration and concurrence. It is this procedure, among other issues, which is now being contested by the Hon. Gumbo and several other of his colleagues.

Honourable Members, I will address the matters raised by the Hon. Gumbo and canvassed by several other Members under the following four broad subjects: the First one is the ***Form of Presidential reservation to a Bill***, the second one is ***the Procedure for consideration of Presidential reservations***, the third subject is ***the Voting threshold in consideration of Presidential reservations*** and lastly, ***How Presidential reservations relate to the principle of separation of powers***. Let me begin with the first subject, which is the Form of President's Reservations to a Bill. Honourable Members, in most jurisdictions, the legislative process provides for assent to Bills by the President as the head of the Executive arm of Government. Indeed, our own system, through the provisions of Article 115 of the Constitution requires that all legislations by Parliament should be presented to the President for assent.

Allow me to visit upon some relevant jurisdiction. In the Constitution of the United States of America, Article I requires every Bill passed by the Congress of the United States to be presented to the President of the United States for his approval. When the President is presented with the Bill, he can either sign it into law, return the Bill to the originating House with his **objections** to the Bill - *I put emphasis on the word objections*. Section 7 of the Article provides as follows-

“Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States: If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law”

Honourable Members, The United States experience is such that the veto power does not give the President the power **to amend or alter the content of legislation but rather the ability to accept or reject a Bill passed by Congress.** The President returns the unsigned Bill to the originating House of Congress within a ten day period usually with a memorandum of disapproval or a “veto message.” In this case, the Congress can override a veto by passing the Bill by a two-thirds vote in both the House and the Senate . It is argued that this legislative override prevents the President from blocking a Bill when significant support for it exists. By practice, it can be observed that the two-third requirement is a high standard to meet and therefore broad support for Bill is needed to reach this threshold. Therefore, the President’s veto power in the legislative process is significant since the Congress rarely overrides vetoes. Statistics show that as at May 2015, out of 2,566 vetoes by various Presidents of the USA, the Congress has only managed to override 110 of them.

Honourable Members, a study of yet another comparable legislative jurisdiction, that is the Philippines, offers a similar scenario with regard to Presidential assent to Bills. Section 27 of Article VI of the 1987 Philippines Constitution provides as follows-

“Every Bill passed by the Congress shall, before it becomes a law, be presented to the President. If he approves the same, he shall sign it; otherwise, he shall veto it and return the same with his objections to the House where it originated, which shall enter the objections at large in its Journal and proceed to reconsider it. If, after such reconsideration, two-thirds of all the Members of such House shall agree to pass the Bill, it shall be sent, together with the objections, to the other House by which it shall likewise be reconsidered, and if approved by two-thirds of all the Members of that House, it shall become a law.

Further, in Philippines, the President is empowered to veto any particular item or items in an appropriation, revenue, or tariff bill, but the veto does not affect the item or items to which he does not object.

Honourable Members, an important observation in the practices in the United States of America and Philippines is that the President only expresses reservations to a Bill and there is no constitutional requirement for the President to give specific recommendations on a Bill. Further, the power to veto the Legislature is expressed **in the same terms as it exists in Article 115 of our Constitution**. The Presidents participation in the law making process can therefore be said to be a constitutional dispensation both in the United States and in the Philippines. The Legislature however has the final say in both jurisdictions just as is the case in the Kenyan situation.

Honourable Members, the situation is however slightly different in India and South Africa where their Constitutions bear greater semblance to the Kenyan context. For instance, in India, assent to Bills is governed by Article 111 of their Constitution which provides as follows-

“When a Bill has been passed by the Houses of Parliament, it shall be presented to the President, and the President shall declare either that he assents to the Bill, or that he withholds assent therefrom: Provided that the President may, as soon as possible after the presentation to him of a Bill for assent, return the Bill if it is not a Money Bill to the Houses with a message requesting that they will reconsider the Bill or any specified provisions thereof and, in particular, will consider the desirability of introducing any such amendments as he may recommend in his message, and when a Bill is so returned, the Houses shall reconsider the Bill accordingly, and if the Bill is passed again by the Houses with or without amendment and presented to the President for assent, the President shall not withhold assent therefrom”

This provision of the Constitution of India bears great semblance to the provisions of section 46 of the Constitution of Kenya that was repealed by the Constitution of Kenya 2010. The said section provided as follows-

(3) The President shall, within twenty-one days after the Bill has been presented to him for assent, signify to the Speaker that he assents to the Bill or refuses to assent to the Bill.

(4) Where the President refuses to assent to a Bill he shall, within fourteen days of the refusal, submit a memorandum to the Speaker indicating the specific provisions of the Bill which in his opinion should be reconsidered by the National Assembly including his recommendation for amendments .

(5) In reconsidering a Bill referred to it by the President, the National Assembly was expected to take into account the comments of the President and either (a) approve the recommendations proposed by the President with or without

amendment and resubmit the Bill to the President for assent; or (b) refuse to accept the recommendations and approve the Bill in its original form by a resolution supported by a vote of not less than sixty-five per cent of all the Members of the National Assembly (excluding *ex officio* Members) in which case the President shall assent to the Bill within fourteen days of the passing of the resolution.

At this juncture **Honourable members**, it is important for me to observe that the practice of our successive Parliaments has for the past been largely informed by the provisions of section 46 of the repealed Constitution. The point of order raised by Hon Gumbo therefore gives this House an opportunity to examine its practice and see how this practice corresponds to the provisions of the new Constitution.

Honourable Members, the said section 46 of the previous Constitution was replaced by the current Article 115 of the Constitution which provides as follows-

- (1) **Within fourteen days after receipt of a Bill, the President shall—**
 - (a) assent to the Bill; or
 - (b) refer the Bill back to Parliament for reconsideration by Parliament, noting any reservations that the President has concerning the Bill.
- (2) **If the President refers a Bill back for reconsideration, Parliament may, following the appropriate procedures under this Part—**
 - (a) amend the Bill in light of the President's reservations; or
 - (b) pass the Bill a second time without amendment.
- (3) **If Parliament amends the Bill fully accommodating the President's reservations, the appropriate Speaker shall re-submit it to the President for assent.**
- (4) **Parliament, after considering the President's reservations, may pass the Bill a second time, without amendment, or with amendments that do not fully accommodate the President's reservations, by a vote supported—**
 - (a) by two-thirds of members of the National Assembly; and
 - (b) two-thirds of the delegations in the Senate, if it is a Bill that requires the approval of the Senate.
- (5) **If Parliament has passed a Bill under clause (4)—**
 - (a) the appropriate Speaker shall within seven days re-submit it to the President; and

(b) the President shall within seven days assent to the Bill.
(6) If the President does not assent to a Bill or refer it back within the period prescribed in clause (1), or assent to it under (5) (b), the Bill shall be taken to have been assented to on the expiry of that period.”

A comparison of the two provisions reveals that, whereas section 46 of the repealed Constitution contained express provision empowering the President to return a Bill back to the National Assembly by submitting a memorandum to the Speaker indicating the specific provisions of the Bill which in his opinion should be reconsidered by the National Assembly including his recommendation for amendments, Article 115 of the current Constitution omits this express requirement for submission of recommendations and empowers the President to refer the Bill back to Parliament for reconsideration by Parliament, noting any reservations that the President has concerning the Bill.

However, **Honourable Members**, despite the lack of an express provision in Article 115 requiring the President to submit his recommendations on a Bill, the Constitution does not prohibit this practice either. **Indeed, it is a cardinal principle of interpretation of law that whatever is not prohibited by the Constitution or any law is presumed to be allowed by the same.** A keen reading of Article 115 reveals that the President, in referring a Bill back to Parliament, is at a mandatory obligation to note his reservations but may choose to include or not to include specific recommendations on how to deal with the reservation.

Honourable Members, in light of this finding, the real issue for clarification is how to deal with a situation where the President expresses his reservations to a Bill and makes specific recommendations in that regard and the threshold of voting in such instances. To this extent, I must emphasize that where the President chooses to make specific recommendations to the House, the House is not bound to accept the specific recommendations in the form submitted by the President. That is why the Constitution at Article 115(2) contemplates Parliament to put into place **appropriate procedures** for this kind of scenario. However, in the absence of such procedures in our Standing Orders, I am convinced, pursuant to the discretion conferred upon me by Standing Order 1(2) that any committee or member of the House is free to propose alternative amendments to the Presidential recommendations so long as such amendments have the effect of **fully accommodating** the Presidents reservations- I put emphasis on the words “*fully accommodating*”. The voting threshold for the passage of such alternative

recommendations or proposals made by the President is a simple majority as contemplated by Article 121 of the Constitution. However, where a committee or member of the House proposes an alternative amendment that **does not** fully accommodate the reservations of the President, the provisions of Article 115(4) will apply and the amendments will only be passed if supported by two thirds of the Members of the House.

Honourable Members, an issue arising consequential to the foregoing finding is the question of who determines whether or not an alternative amendment proposed by a committee or a member has the effect of fully accommodating the Presidents reservations. The Kenyan Constitution is silent on this issue. In South Africa's legislative practice, this power is vested in the House in the first instance, in the Presidency in the second instance and finally in the Courts in the ultimate instance. It is also noteworthy that in South Africa, unlike in our case, the power of the President to express reservations to a Bill passed by Parliament is restricted only to the constitutionality of the Bill.

The relevant provisions of the South African Constitution is Article 79 which provide as follows-

(1) The President must either assent to or sign a Bill passed in terms of this Chapter or, if the President has reservations about the constitutionality of the Bill, refer it back to the National Assembly for reconsideration.

(2) The joint rules and orders must provide for the procedure for the reconsideration of a Bill by the National Assembly and the participation of the National Council of Provinces in the process.

(3) The National Council of Provinces must participate in the reconsideration of a Bill that the President has referred back to the National Assembly if –

- (a) the President's reservations about the constitutionality of the Bill relate to a procedural matter that involves the Council; or**
- (b) section 74(1), (2) or (3)(b) or 76 was applicable in the passing of the Bill.**

(4) If, after reconsideration, a Bill fully accommodates the President's reservations, the President must assent to and sign the Bill; if not, the President must either –

- (a) assent to and sign the Bill; or**
- (b) refer it to the Constitutional Court for a decision on its constitutionality.**

(5) If the Constitutional Court decides that the Bill is constitutional, the President must assent to and sign it.

Honourable Members, it follows therefore that in the absence of a similar provision in our Constitution as to the avenue for determination of whether an alternative amendment passed by the House fully accommodates the reservation of the President in the manner contemplated under Article 115(4) of our Constitution, it is incumbent upon the Speaker to make this determination in the first instance pursuant to Standing Order 1(2) and the President to make a similar determination upon return of the Bill to him for assent pursuant to Article 115(3). If the President feels that the alternative amendments made by the House do not fully accommodate his reservations, then he will refer the Bill back to the House and the provisions of Article 115(4) will apply where the House will require two thirds majority to resubmit the Bill back to the President for Assent, this time for a second round.

Honorable Members, having said that, you will recall that the House recently considered the President's reservations and recommendations on the Public Procurement and Disposal Bill, 2015 and the Public Audit Bill, 2015. To the extent that the House has made a decision on the President's Reservations to these two Bills, I do not intend to permit the House re-open debate or revisit those decisions. It is for this reason that the Membership of the National Assembly in the Joint Committee formed on request of the Senate is required to convey and uphold that decision. I also remind the Membership of the National Assembly in the Joint Committee that the Committee's period of consideration of the two items referred to it is not limitless, especially recalling that the two are laws that initially ought to have been passed by August 27th, 2014.

Honourable Members, I will now focus on the second subject, which is the ***Procedure for Consideration of Presidential Reservations***. In seeking to answer the question as to whether a reservation or recommendation by the President should be subjected to a process similar to that obtains in the consideration of a Bill, one needs to be alive to the express provisions of the Constitution: Firstly, the sequence of Part 4 of Chapter Eight of the Constitution of Kenya which sets out the procedures for enacting legislation is such that Article 115 of the Constitution appears after the sequence of events contemplated in Articles 109 (*Exercise of legislative powers*), Article 110 (*Bills concerning county government*), Article 111 (*Special Bills concerning county governments*), Article 112 (*Ordinary Bills concerning county governments*), Article 113. (*Mediation committees*), Article 114 (*Money Bills*). Indeed, that is why Article 115 on *Presidential assent and referral* is sequentially

arranged to come before Article 116. (*Coming into force of laws*).

Secondly, the provisions of Article 115 seem to be self contained as regards to the procedures to be adopted by Parliament in considering the Presidents reservations. To this extent, the provisions of Article 115(3) and (4) do not contemplate Parliament going back to the entire process of enactment but only contemplate Parliament passing the Bill a second time. This second passage does not in any way negate the fact that the Bill was passed by House a first time after going through the entire sequence that culminates in passage that is to say publication, First Reading, Second Reading and Third Reading. The resubmission of a Bill by the President under Article 115 does not in any way negate these stages unless if the President decided to submit a totally new Bill outside the scope of what the House has passed, which would be uncharacteristic of the conventional legislative limits.

Thirdly, **Honourable Members**, we must not lose sight of the fact that, in whatever form the President expresses a reservation, what the President is seeking is essentially an amendment to the Bill in question. The President is merely seeking to avail himself of an opportunity similar to that enjoyed by Members of this House, namely, to participate in the law making process as expressly contemplated by Article 115. You are all aware that when Members are proposing amendments during Committee Stage, those amendments are only considered during that stage and are not subjected to other processes that a Bill goes through prior to that stage. Reservations or recommendations by the President should therefore not be treated differently, and should only be considered at the Committee Stage. This is indeed the practice on many comparable legislative jurisdictions within and outside the commonwealth.

Honourable Members, having settled the second subject, let me now focus on the Third item, which is the question of ***Voting Threshold during Consideration of Presidential Reservations***. In doing so, I wish to draw the attention of Members to the provisions of Article 121 of the Constitution. This provisions clearly indicates that, for purposes of the National Assembly, the quorum required for transaction of any business in the House is fifty Members. Article 115(4)(a) on its part provides that for the House to override or amend reservations by the President, a vote to that effect must be supported by at least two-thirds of the Members. On the flipside, and in the absence of a similar provision giving a specific threshold, the House requires a simple majority to concur with those reservations or recommendations.

Honourable Members, a distinction need to be made between the threshold required in transacting business in the House and the one required in taking a decision on a particular matter or motion. For purposes of the former, the requisite quorum is the one prescribed by Article 121; for purposes of the latter, majority of the members present and voting will suffice save for instances when a particular threshold is prescribed, as in the case of Article 115(4)(a). Indeed, the requirement for specific thresholds to pass a certain decision is not unique to Article 115. For instance, there are three different thresholds essential in the deliberative process of removal of a Cabinet Secretary from Office under Article 152(6) to (10). Members are at liberty to choose to be absent when the question is being put if the intention is to cause the motion to be defeated. The presence of a minimum of fifty members in the House therefore suffices for purposes of considering a Presidential Memorandum, but when voting to override or vary the reservations, two-thirds majority of the Members must be present in the House so as to vote to override the reservation, or to vary the reservation in a manner that has the effect of not fully agreeing with the President. **The absence of at least two-thirds majority at the time of putting the question does not in any way imply that the House is improperly constituted.** However, should the number of those present when voting amount to at least two thirds, but after the results, the number of those voting to negate the president's recommendation result in a majority, which is however less than two-thirds, while those voting to agree with the President number less than a third of all the Members of the House, the Speaker is at liberty to direct that another vote be taken in another day pursuant to the provisions of Standing Order 62(2). The effect of that provision, which is seldom applied, is to give the House a second opportunity to attempt to raise the required constitutional threshold, but which should be applied very sparingly.

Honourable Members, this now brings me to the Fourth and final subject which is **Consideration of Presidential Reservations as relates to the Principle of Separation of Powers.** Members are aware that in most jurisdictions, the legislative process provides for assent to Bills by the President as the head of the Executive arm of Government. Indeed, our own system, through the provisions of Article 115 of the Constitution requires that all legislations by Parliament should be presented to the President for assent.

Different reasons have been advanced on the need for a Presidential assent, given the principles of *separation of powers* between the arms of Government. They include

the need to prevent hasty and ill-considered legislation by the Parliament and to prevent legislation which may be unconstitutional.

Honourable Members, In its basic form, the concept of separation of powers divides the institutions of government into three branches, to wit, legislative, executive and judiciary: the legislature makes the law; the executive puts the law into operation; and the judiciary interprets the law. The powers and functions of each are separate and carried out by separate personnel. No single agency is able to exercise complete authority, each being interdependent on the other. The doctrine enables the three branches to act as checks and balances on each other. Each branch's interdependence helps keep the others from exceeding their power, thus ensuring the rule of law and protecting individual rights.

Honourable Members, the doctrine of separation of powers presupposes the following forms of separation-

- (a) a separation of institutions; and
- (b) a separation of functions, where each institution exercises the function for which it is designed.

In reality, however, these are not mutually exclusive options. Any system of separation of powers must involve at least a measure of both. In their book, *Constitutional and Administrative Law*, O. Hood Phillips and Paul Jackson state as follows:

"A complete separation of powers, in the sense of a distribution of the three functions of government among three independent sets of organs with no overlapping or co-ordination, would (even if theoretically possible) bring government to a standstill. What the doctrine must be taken to advocate is the prevention of tyranny by the conferment of too much power on any one person or body, and the check of one power by another."

Hon. Members, Separation of powers therefore seeks to achieve the following objectives-

- (a) Prevention of abuse of public power through concentration of power. In *Federalist No. 47*, James Madison stated as follows:

"The accumulation of all powers, legislative, executive and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed or elective, may justly be pronounced the very definition of tyranny."

Power thus divided should prevent absolutism (as in monarchies or dictatorships where all branches are concentrated in a single authority) or corruption arising from the opportunities that unchecked power offers.

- (b) Enhancing efficiency of government. Separation of powers in this respect recognizes that each of the branches is peculiarly well equipped to exercise the particular functions assigned to it.

Honourable Members, in the Constitution of Kenya, 2010, the concept of separation of powers is given effect and is apparent in the way the various functions of Government have been apportioned among the three branches of Government. However, as indicated above, separation of powers does not connote complete independence of one branch from the other. There is no better way to illustrate instances where the powers of one branch overlap with the powers of the other than in the appointment of various state officers under the Constitution. Under Article 130 of the Constitution, the national executive consists of the President, the Deputy President and the Cabinet. Article 132(2) provides for the appointment of various state officers by the President, with the approval of the National Assembly. By taking part in the appointment process, the National Assembly, which is the legislative arm of government, is clearly taking part in what is clearly a function of the executive arm of the government.

Honourable Members, in view of the foregoing, it is apparent that, by sending a Bill back to Parliament with his reservations for reconsideration pursuant to Article 115 of the Constitution, the President cannot be deemed to contravene the doctrine of separation of powers, as no branch of government is completely independent of the other. He is merely exercising the limited legislative function conferred on his office under Article 115 of the Constitution.

As I conclude **Honourable Members**, I wish to observe that by making this considered Communication, I am conscious that my findings will have implication on the manner in which the National Assembly relates with the Presidency, the Office of the Attorney-General and indeed the Senate on the expected form and content of the President's Reservations on a Bill, and the procedure for considering those reservations under Article 115 of the Constitution. The summary of my Communication is therefore as follows-

- (i) **That**, in submitting his reservations on a Bill to the House, the President is not prohibited from including his preferred text of the particular clause, section, subsection or paragraph of the Bill;
- (ii) **That**, just like amendments to Bills, the text proposed by the President on a Bill need **NOT** be subjected to the other stages subjected to a Bill upon publication, - that is, publication, First Reading, Second Reading and Third Reading;
- (iii) **That**, any committee or member of the House is free to propose further amendments to the Presidential recommendations. So long as such amendments have the effect of **fully accommodating** the Presidents reservations, the voting threshold for the passage of such amendment or, indeed the proposals made by the President, is a simple majority as contemplated by Article 121 of the Constitution. Any other proposed amendment, that does not **fully accommodate** the reservations, or indeed a total override of the Presidents reservation, including his proposed text, would attract the two-third requirement;
- (iv) **That**, pursuant to the provisions of Standing Order 1(2), the determination of whether a proposed amendment by a Member or a Committee to the President's reservations would have the effect of **"fully accommodating"** those reservations shall be made by the Speaker on case by case basis; and,
- (v) **That**, the absence of at least two-thirds majority at the time of putting the question does not in any way imply that the House is improperly constituted.

The House is hereby accordingly guided.

I thank you.

HON. JUSTIN B. N. MUTURI, EGH, M.P.
SPEAKER OF THE NATIONAL ASSEMBLY

28th July, 2015