



REPUBLIC OF KENYA

TWELFTH PARLIAMENT- (SIXTH SESSION)

THE NATIONAL ASSEMBLY

COMMUNICATION FROM THE CHAIR
(No. 37 of 2022)

ON
THE CONSTITUTIONAL PROPRIETY OF THE UNIVERSITIES
(AMENDMENT) BILL, 2021 AND THE PLACE OF THE WINNOWING
PROCESS OF AMENDMENTS PROPOSED TO THE BILL

Honourable Members,

You will recall that, during the afternoon Sitting of the House on Wednesday, 8th June, 2022, the Member for Kikuyu Constituency, the 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 Hon. 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 on *National Values and Principles of Governance*; Article 43 providing for *Economic and Social Rights*; and Article 201 of the Constitution 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, **Honourable Members**, 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) & (e) of the Constitution which require that public money has to be spent in a prudent and responsible way; and responsible financial management and clear fiscal reporting, 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. The 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 fee 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 Hon. 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 does conduct a winnowing process to harmonize the proposals made by Members on the subject.

Honourable Members, According to the Member and others who spoke after him, the winnowing process neither met the requirements of Standing Order No. 131 (*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 the key stakeholders in the education sector that stands to be affected by the passage of the Bill. It was argued that the Departmental Committee on Education and Research devoted majority of the time committed to the public participation exercise to private universities, their representatives and the affiliated bodies to the disadvantage of public universities.

Hon. Members, In the ensuing debate, several Members were in support of the point raised by the 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 Hon. Leader of the Majority Party, 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 the equal treatment of all students by the government.

Hon. Members, 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 harmonization of the proposed amendments to the Universities (Amendment) Bill, 2021 was conducted in terms of Standing Order 131.

Hon. Members, while I note that I reserved the foregoing issues raised by Hon. 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 issue touching on the constitutionality of the Bill. This is in light of the scheduled adjournment of the House to proceed on *sine die* recess after today's sittings. In the circumstances, Hon. Members, and for the convenience of the House, I have consciously decided to provide an *interim guidance* for purposes of continuity of Business of the House.

Hon. Members, I am fully cognizant of previous rulings that I have issued pursuant to Standing Order 47 where I have noted that an issue touching on the constitutionality of any business before the House may be raised at any time during the consideration of the affected business. The Hon. Members were therefore perfectly in order to raise the matters covered under the points of order.

Hon. Members, 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 utilization of public funds directed towards private universities. Indeed, Hon. Members, no provision in the Bill addresses how the 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 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 actualized 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 for 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, whereas I note that the Member for Kikuyu Constituency and the Member for *Seme* Constituency 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 an amendment by a Member is 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 causing the appropriation of funds to such entities, 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 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 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 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 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 myself 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 emphasized 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 Reports of the Departmental Committee on Education and Research on the Bill seem 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 the 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, 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 themselves. 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 harmonization of amendments proposed to the Bill was properly executed***, I do note that Standing Order 131 is a device that assists Committees to harmonize amendments in effect assisting the House and Members to avoid unnecessary objections during the Committee of the whole House. I however note that a number of Members who joined issue with the Honourable Ichung'wah noted that they proposed amendments to the Bill but their efforts to have their issues addressed during the harmonization process envisaged under the Standing Orders were less than fruitful. From the foregoing, this indicates that the harmonization or winnowing process under Standing Order 131 by the Committee on Education and Research did not meet the dictates of Standing Order 131.

Hon. Members, Whereas I note that lack of the harmonization process does not in any way impede a Member from proceeding with their amendments in the House and indeed, as ably noted by the 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 harmonization process under Standing Order 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 131.

Hon. Members, 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?** I do note from the outset 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 rethink of the Bill by its proponents. Insisting on the 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 schedule to adjourn *sine die* today in view of the forthcoming General elections, I do 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 on 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 **Hon. Members**, should I order expunging the three clauses from the Bill, this will also require me to also order expunging 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 utilization 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 republished 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 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 regularization. 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.

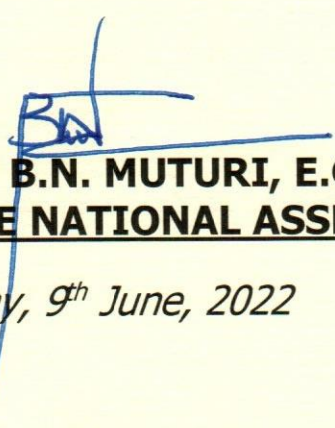
Hon. Members, I thank you for raising this matter and for all your contributions on the ensuing debate for valuable insights that undoubtedly shall enrich future interrogation of Bills before this House. In summary, it is therefore my considered finding—

- (1) THAT, in the interim and pending further interrogation of the constitutionality of the Universities (Amendment) Bill, 2021, the Bill fails to fully actualize the provisions of Articles 201 and 229(5) of the Constitution on the need for reporting and audit of the utilization 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 actualize these two provisions. The only proposal close to actualizing 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 on 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 harmonization of the amendments proposed to the Bill by the Committee did not meet the dictates of Standing Order 131; and,**
- (6) THAT, the Universities (Amendment) Bill, 2021 be and is hereby ordered to be republished 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 Hon. Members!



THE HON. JUSTIN B.N. MUTURI, E.G.H., MP
SPEAKER OF THE NATIONAL ASSEMBLY

Thursday, 9th June, 2022