

**COMMUNICATION FROM THE CHAIR ON THE PROCESSING OF THE
PHYSICAL PLANNING BILL, 2015, NATIONAL ASSEMBLY BILLS NO. 46
OF 2015**

1. Honourable Senators, as you will recall, at the sitting of the Senate held on 16th February, 2016, I issued a Communication delivering a Message from the National Assembly regarding the passage of the Physical Planning Bill, National Assembly Bills No. 46 of 2015, by the National Assembly. In the Communication, I informed Honourable Senators that the Speaker of the National Assembly did not seek the concurrence of the Senate as contemplated under Article 110(3) of the Constitution on whether the Physical Planning Bill concerns counties and if it does, whether it is a special or ordinary Bill.
2. Honourable Senators, Article 110(3) of the Constitution provides that *“before either House considers a Bill, the Speakers of the National Assembly and the 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”*.
3. Upon delivering the Communication, the Senate Majority Leader, Senator Moses Wetangula, rose on a Point of Order and sought the guidance of the Chair on the effect of Article 110(3) of the Constitution and, in particular, whether this provision could apply retrospectively where a Bill, for which concurrence was not sought, is processed in one House and submitted to the other House for processing. Senator Wetangula argued that if this was allowed, and in particular, if the Physical Planning Bill was allowed to proceed despite the violation of Article 110(3) of the Constitution, the Senate would undermine its own authority and that of the Speaker of the Senate. The Senator therefore took the view that the provision could not apply retrospectively.

4. A number of Honourable Senators rose on Points of Order to speak to this matter including Senator Ong'era, Senator (Prof.) Lonyangapuo, Senator Njoroge, Senator (Dr.) Machage, Senator Mong'are, Senator Khaniri, Senator (Dr.) Zani, Senator Mutula Kilonzo Jr., Senator Ongoro, Senator Abdirahman, Senator Orengo and Senator Elachi. In their submissions, all the Senators took the view that Article 110(3) of the Constitution ought to be adhered to and concluded before a Bill is proceeded with in either House. Consequently, in respect of the Physical Planning Bill, some Senators urged the Speaker to find that the Bill could not be proceeded with until corrective measures were taken.
5. Having heard the submissions of the Honourable Senators, on account of the gravity of the issues raised, I undertook to deliver a ruling on the matter before the Bill is scheduled for Second Reading.
6. Honourable Senators, the issues arising requiring the direction of the Chair are as follows –
 - (a) whether or not Article 110(3) of the Constitution can be applied retrospectively; and
 - (b) the manner in which a House should proceed with a Bill in respect of which Article 110(3) of the Constitution was not complied with.
7. Honourable Senators, these issues have continued to recur in respect of the processing of legislation as between the two Houses in our bicameral Parliament. These questions have however not been restricted to the Legislature. It is important that I state that the compliance or otherwise by Parliament, and in

particular the National Assembly, with Article 110(3) of the Constitution has arisen in various cases before the Courts.

8. It has therefore become necessary that the Speaker of the Senate gives guidance on these matters for the general guidance of the Senate of the Eleventh Parliament and for posterity. Posterity will judge the Office of the Speaker of the Senate and the Senate as a whole harshly if these matters are not put on record at this early stage in the life of the Senate.
9. Honourable Senators, the first issue relates to “*whether or not Article 110(3) of the Constitution can be applied retrospectively*”. This, Honourable Senators, is a straight forward matter. Article 110(3) of the Constitution is required to precede the introduction of a Bill in either House of Parliament. It must therefore, for all Bills, be complied with before a Bill is read a First Time in either House. It is not an optional or discretionary provision. The Supreme Court in Supreme Court Advisory Opinion No. 2 of 2013 had opportunity to pronounce itself on this matter as follows –

the requirement for a joint resolution of the question whether a Bill is one concerning counties, is a mandatory one; and the legislative path is well laid out: it starts with a determination of the question by either Speaker – depending on the origin of the Bill; such a determination is communicated to the other Speaker, with a view to obtaining concurrence; failing a concurrence, the two Speakers are to jointly resolve the question...the legislative path thus laid out should apply to each and every Bill coming up before either Chamber of Parliament; and it is the constitutional task of the

two Speakers to jointly determine the route to be followed by legislative proposals.

10. Honourable Senators, despite the express provisions of Article 110(3) of the Constitution and the pronouncement of the Supreme Court, the National Assembly has, on almost every occasion, failed to observe Article 110(3) of the Constitution.
11. The upshot of all this, Honourable Senators, is that Article 110(3) of the Constitution cannot be applied retrospectively, if it must be conclusively observed before a Bill is introduced in either House of Parliament
12. Honourable Senators, the second issue requiring my direction is "*the manner in which a House should proceed with a Bill in respect of which Article 110(3) of the Constitution was not complied with*". In order to comprehensively address this issue, it is important that I set out various scenarios that have confronted the Senate with respect to the processing of Bills and the manner in which the Senate has and should proceed in each of the scenarios.
13. **The first scenario is where, in respect of a Bill originating in the Senate, the Speaker of the Senate, in terms of Article 110(3) of the Constitution seeks the concurrence of the Speaker of the National Assembly on the nature of the Bill and the Speaker of the National Assembly concurs with the Speaker of the Senate.**
14. In this case, the legislative process would proceed as anticipated in Part 4 of Chapter Eight of the Constitution.

15. **The second scenario which has also presented itself is where, in respect of a Bill originating in the Senate, the Speaker of the Senate, in terms of Article 110(3) of the Constitution seeks the concurrence of the Speaker of the National Assembly on the nature of the Bill and the Speaker of the National Assembly fails to respond within a period of seven days as contemplated under standing order 118(4) of the Senate Standing Orders.**
16. Standing order 118(4) of the Senate Standing Orders provides that *“where, upon the expiry of seven days from the day of the communication under paragraph (1) or such further time as the Speaker of the Senate may in any particular case determine, no communication has been received from the Speaker of the National Assembly as to either concur or differ that the Bill is a Bill concerning counties and, if it is, whether it is a special or an ordinary Bill, the Speaker of the Senate shall direct that the Bill may be Read a First time in accordance with these Standing Orders”*.
17. Consequently, in accordance with this standing order, the Senate would proceed to process the Bill in accordance with Part 4 of Chapter Eight of the Constitution, and the Speakers of the Houses and the Houses themselves would be estopped from subsequently raising any question regarding the nature of the Bill in terms of Article 110(3) of the Constitution.
18. **The third scenario is where, in respect of a Bill originating in the Senate, the Speaker of the Senate, in terms of Article 110(3) of the Constitution seeks the concurrence of the Speaker of the National Assembly on the nature of the Bill and the Speaker of the National Assembly does not concur with the Speaker of the Senate on the nature of the Bill.**

19. Although Article 110(3) of the Constitution requires the Speakers of the Houses of Parliament to jointly resolve any question on the nature of a Bill, standing order 126(1) of the Senate Standing Orders provides an additional mechanism by which *“for the purpose of making a determination whether or not a Bill concerns county government, the Speakers may appoint a joint committee to advise them in resolving any question on such a Bill”*.

20. The Supreme Court also further stated as follows, with respect to the formation of a joint committee –

“It is clear to us, from a broad purposive view of the Constitution, that the intent of the drafters, as regards the exercise of legislative powers, was that any disagreement as to the nature of a Bill should be harmoniously settled through mediation. An obligation is thus placed on the two Speakers, where they cannot agree between themselves, to engage the mediation mechanism. They would each be required to appoint an equal number of members, who would deliberate upon the question, and file their report within a specified period of time. It is also possible for the two Chambers to establish a standing mediation committee, to deliberate upon and to resolve any disputes regarding the path of legislation to be adopted for different subject-matter. Had such an approach to the dispute been adopted, it is our opinion, this Court would probably not have been asked to give an Advisory Opinion, as a fitting solution would most likely have been found.”

21. Where, as has been the case, all efforts are made by the Senate towards the establishment of the joint committee with no action or response from the National Assembly, standing order 118(4) of the Senate Standing Orders would then apply

and the Senate would be entitled to proceed with the processing of the Bill in accordance with Part 4 of Chapter Eight of the Constitution. Thereafter, neither the Houses nor the Speakers can raise an issue regarding the nature of the Bill.

22. **The fourth scenario is where, in respect of a Bill originating in the National Assembly, the Speaker of the National Assembly, in terms of Article 110(3) of the Constitution, seeks the concurrence of the Speaker of the Senate on the nature of the Bill and the Speaker of the Senate concurs with the Speaker of the National Assembly on the nature of the Bill.**
23. In this case, no further issue arises as to concurrence and the legislative process would proceed as anticipated in Part 4 of Chapter Eight of the Constitution.
24. **The fifth scenario is where, in respect of a Bill originating in the National Assembly, the Speaker of the National Assembly, in terms of Article 110(3) of the Constitution, seeks the concurrence of the Speaker of the Senate on the nature of the Bill, the Speaker of the Senate does not concur with the Speaker of the National Assembly on the nature of the Bill but the National Assembly nonetheless, without further reference to the Senate, proceeds to consider the Bill only in the National Assembly and to process it for assent.**
25. There is no doubt, Honourable Senators, that such process contravenes Article 110(3) of the Constitution. You will recall that the Senate was, in November, 2014, confronted with this issue with respect to forty-six Acts of Parliament that had been processed and assented to otherwise than in accordance with Article 110(3) of the Constitution. The Senators, by a resolution adopted by this House on 11th November, 2014, resolved to seek an advisory opinion from the Supreme Court on, among other matters, *“the constitutional status of Acts of Parliament*

which have been passed by one House of Parliament and assented to in contravention of Article 110(3) of the Constitution”.

26. In accordance with that resolution, for every Bill processed by the National Assembly in violation of Article 110(3) of the Constitution, the Senate reserves the right to challenge the legislation on account of such violation.
27. **The sixth scenario is where, in respect of a Bill originating in the National Assembly, the Speaker of the National Assembly does not seek the concurrence of the Speaker of the Senate in terms of Article 110(3) of the Constitution and the National Assembly proceeds to consider the Bill only in the National Assembly and subsequently processes it for assent.**
28. This clearly violates Article 110(3) of the Constitution. As is the case in the fifth scenario, it would be open to the Senate to challenge the legislation on account of such violation.
29. **The seventh scenario is where, in respect of a Bill originating in the National Assembly, the Speaker of the National Assembly, in terms of Article 110(3) of the Constitution, seeks the concurrence of the Speaker of the Senate on the nature of the Bill, the Speaker of the Senate does not concur with the Speaker of the National Assembly on the nature of the Bill but, despite this, the National Assembly proceeds to consider the Bill and subsequently refers it to the Senate for consideration.**
30. This, Honourable Senators, has happened in a number of instances and has presented challenges on the manner in which the Senate is to proceed. The first and perhaps more natural option would be to do nothing on the legislation, to

take no action whatsoever, on account of the legislation having been processed in violation of Article 110(3) of the Constitution, thus leading to a deadlock. In the process, key legislation, including legislation required for the implementation and strengthening of devolution and for the implementation of the Constitution, which is time bound, would stall. Taking into account the Senate's role under Article 96 of the Constitution relating to the protection of the counties and their interests, this would not augur well.

31. The Senate has therefore, in light of the fact that the legislation forwarded by the National Assembly nonetheless concerned counties and required to be processed through the Senate, chosen the route of mitigation of the harm that would otherwise be caused if the legislative process were to stall on such crucial legislation.
32. As your Speaker, I have however, in all such instances, put on record, our reservations concerning the lack of compliance with Article 110(3) of the Constitution while noting that despite the mitigating actions taken by the Senate, the legislation may still be challenged on account of its constitutionality.
33. **The eighth scenario is where, in respect of a Bill originating in the National Assembly, the Speaker of the National Assembly does not seek the concurrence of the Speaker of the Senate in terms of Article 110(3) of the Constitution and the National Assembly proceeds to consider the Bill and subsequently, despite the lack of observance of Article 110(3) of the Constitution, proceeds to refer the Bill to the Senate for consideration.**
33. Honourable Senators, the action to be taken by the Senate would be the same as that in the previous scenario.

34. Honourable Senators, having set out the different scenarios, it is important that I give directions on the manner in which we shall proceed with the Physical Planning Bill, 2015.
35. As I indicated in the last communication on this matter, the National Assembly did not observe the concurrence process under Article 110(3) of the Constitution before the introduction of the Bill in the National Assembly. The National Assembly has, however, found it fit to forward the Bill to the Senate.
36. In light of the matters that I have set out in this Communication, the Senate shall proceed with the consideration of the Physical Planning Bill, 2015 at the Second Reading of the Bill at the appropriate time.

I thank you.

SEN. EKWEE ETHURO, EGH, EBS, MP

SPEAKER OF THE SENATE

24TH MARCH, 2015