Financial Implications of National Government Policies and Legislations: A Case for Additional Resource Allocation to Counties for Implementation

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Abstract

The fundamental problem identified and discussed in this article is the challenge created by national government policies and legislations which create additional financial obligations for county governments without making provision for the additional resources required by counties for implementation. The problem is discussed within the context of the Universal Health Coverage (UHC) reforms in the health sector that are anchored in the Kenya Kwanza Manifesto and the four UHC Acts enacted in October 2023. These policies and legislations do not make provision for adequate resources for implementation of these reforms by county governments, yet they bear the primary responsibility of implementation given devolution of health. The article therefore examines the constitutional process of adoption and enactment of such policies and laws and the obligations it imposes, in order to determine what may be the problem that leads to the failure to provide for the additional finances and what needs to be done about it.

Keywords: National government policies resources allocation, policy, legislation Kenya Law Reform.

1. Introduction

The 2010 Constitution of Kenya adopted a devolved system of government with health being one of the major devolved sectors.[1] The Constitution assigns

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1 The Constitution establishes two levels of government—the national and county, to which functions

the greater part of service delivery in the health sector to county governments;[2] while the national government is assigned national referral health facilities, health policy, and capacity building and technical assistance to the counties.[3] Because of this there have been generation and enactment of many national government policies and legislations which county governments are required to implement. This article identifies for discussion the fundamental problem of national government policies and legislations that create additional financial obligations for county governments without making provision for the additional resources required for implementation. This problem is discussed within the context of the Universal Health Coverage (UHC) reforms in the health sector that are anchored in the Kenya Kwanza Manifesto and the four UHC Acts enacted in October 2023.[4]

The big question which the article seeks to answer is whether these policies and legislations make provision for adequate resources for implementation of these reforms by county governments, which bear the primary responsibility of implementation given devolution of health. To address the fundamental problem and answer the big question raised above, the article is organized in various sections that consider the following issues: What the Constitution provides in respect of policies and laws that have financial implications; the narrow interpretation of the constitutional provisions; the broader purposive interpretation of the objectives of the constitutional provisions; the implications of these constitutional provisions for policy and legislation making; disclosure obligations to Cabinet through a Cabinet Memo, if any; disclosure obligations to Parliament through the Memorandum of Objectives and reasons, if any; responsibilities of Parliament in enactment of money Bills; what the Standing Orders of the National Assembly require in respect of such financial implications; whether it is constitutional for the Standing Orders to exempt Government sponsored Bills from the process prescribed by the Constitution in respect of money Bills; the new dimensions of money Bills introduced by devolution, if any; what the Kenya Kwanza Manifesto said in respect of the financial implications of the health reforms it promised; whether Parliament enacted the four UHC Acts

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and powers are assigned.

2 See Item 2 of Part 2 of the Fourth Schedule to the Constitution on distribution of functions between the national government and county governments.

3 See Items 23, 28 and 32 of Part 1 of the Fourth Schedule to the Constitution on distribution of functions between the national government and county governments.

4 In October 2023, Parliament enacted the following four Acts which have become known as the UHC laws: (i) the Primary Health Care Act of 2023. (ii) the Digital Health Act of 2023. (iii) The Social Health Insurance Act of 2023. (iv) The Facilities Improvement Financing Act of 2023.

as money Bills; the stark reality that the Manifesto and UHC Acts have serious financial implications for not only county governments but also the national government and citizens; and finally, whether the successful implementation of the UHC policies and laws will stand or fall on the availability or lack of financial resources.

2. Nexus between policy and legislation making and financial implications for implementation

One reason why the implementation of policies and laws fails is the failure to audit the policies and laws for financial implications and provide for an appropriate implementation budget. This normally leads to a failure to realize the objectives of the policies and laws. Uwizeyimana identifies lack of resources as one of the major reasons why public policy implementation fails in Africa.[5] In an OECD publication on budgeting and policy making[6] an important nexus between policy making and budgeting is identified and emphasized in order to avoid the "potential of downstream expenditure surprises"[7] that policies may cause if their making is not linked to budgeting to ensure their sustainability and implementation. Likewise in a USAID policy capacity development resource guide on policy implementation barriers, "inadequate human and financial resources" are identified among the policy implementation barriers in the following manner:

> Developing a policy is just the first step; for policies to contribute to the successful delivery of health services, they must be effectively implemented. Challenges to implementation are referred to as "implementation barriers." They can be rooted in a variety of causes, including opposition from key stakeholders, inadequate human or financial resources, lack of clarity on operational guidelines or roles and responsibilities for implementation, conflicts with other existing policies, lack of coordination and collaboration between parties responsible for implementation, or lack of motivation or political will.[8]

5 Uwizeyimana, DE. "Why Public Policy Implementation Fail in Africa?" (2024) *Kurdish Studies* Vol. 12 No. 2 pp 627-644.

6 Organization for Economic Co-operation and Development (OECD), *Budgeting and Policy Making* Sigma Papers No. 8 https: dx.doi.org/10.1787/5kml6gwccq0-en.

7 Organization for Economic Co-operation and Development (OECD), *Budgeting and Policy Making* Sigma Papers No. 8 https: dx.doi.org/10.1787/5kml6gwccq0-en at p 45.

8 United States Agency for International Development (USAID), *Capacity Development Resource Guide: Implementation Barriers* (July 2014) at p. 1.

The Kenya Law Reform Commission in its Guide to the Legislative Process in Kenya, includes among the factors to consider in the policy making process the following two factors:

1. How the proposed policy will be managed and resourced from formulation to the point of implementation. This includes the personnel and specialized resources necessary for the full implementation of the policy.
2. Pay attention to the model and process of devolved government as a requirement of policy initiatives.[9]

Eliud Moyi in his *Guidelines for Public Policy Development and Review* sets out the different parts of the policy as including the financial implication's part, which, if the subject matter has financial implications, he says should include the cost, the period and phasing of expenditure, and arrangements for new sources of funds (where the proposals involve new expenditure).[10] He then notes that the content in this section of the policy must be discussed and agreed with the National Treasury unless the financial implications relate to expenditure which falls within the provided budget.[11]

2.1 Constitutional provisions on policies and legislation with financial implications

Article 114 of the Kenyan Constitution of 2010 recognizes and seeks to address the above-discussed challenge to policy implementation through the concept of Money Bills which in terms of article 114(3) are Bills that contain provisions that deal with—

(*a*) taxes;

(*b*) the imposition of charges on a public fund or the variation or repeal of any of those charges;

(*c*) the appropriation, receipt, custody, investment or issue of public money;

(*d*) the raising or guaranteeing of any loan or its repayment; and

(*e*) matters incidental to any of those matters.

9 Law Reform Commission, *A Guide to the Legislative Process in Kenya* (2015) at page 33.

10 Eliud Moyi, *Guidelines for Public Policy Development and Review* (2020) Kenya Institute for Public Policy Research and Analysis, Policy Paper Series Number 20 of 2020 at page 15.

11 Eliud Moyi, *Guidelines for Public Policy Development and Review* (2020) Kenya Institute for Public Policy Research and Analysis, Policy Paper Series Number 20 of 2020 at page 15.

The Constitution seeks to address the challenge, first, by prescribing that "a money Bill may not deal with any other matter other than those listed in the definition of money bills"[12] set out in article 114(3) of the Constitution. Secondly, by setting out a special procedure for dealing with money Bills, the constitution provides in this respect the following:

> If, in the opinion of the Speaker of the National Assembly, a motion makes provision for a matter listed in the definition of "a money Bill", the Assembly may proceed only in accordance with the recommendation of the relevant Committee of the Assembly after taking into account the views of the Cabinet Secretary responsible for finance".[13]

2.2 Parliament's narrow interpretation of the constitutional provisions

In the past twelve years of implementation of the 2010 Constitution and the devolved system of government which it introduces, the two Houses of Parliament have taken a very narrow approach to the interpretation of the constitutional concept of money bills. The debates and disputes between the National Assembly and the Senate have tended to restrict themselves to the question of whether or not a money bill can originate in the Senate. For instance, in *Senate of the Republic of Kenya and others v Speaker of the National Assembly and another; Attorney General and others* (Interested Parties)[14] a major dispute brought before the High Court for determination was the fact that the National Assembly had declined to consider several Bills originating from the Senate on the pretext that those Bills were what the Constitution characterizes as 'Money Bills' which, according to article 109(5) as read with article 114 of the Constitution, can only originate from the National Assembly.[15] This narrow approach inhibits the two Houses of Parliament from seeing the broader objective and mischief which the constitutional provisions on money bills sought to address. These objectives are discussed in the next section.

The case mentioned above snaked its way through the Court of Appeal and ended up in the Supreme Court which, in its judgment delivered on 21 March 2025 took a more extreme narrow approach and found that the Constitution

12 Article 114(1) of the Constitution.

13 Article 114(2) of the Constitution.

14 [2020] eKLR.

15 [2020] eKLR at para 28.

excludes the Senate from the consideration and enactment of money Bills without taking into consideration the broader objective of the concept of money Bills.[16] The Supreme Court stated the following in this regard:

> What emerges from a holistic consideration of these provisions, is that the Constitution excludes the Senate from the consideration and enactment of money Bills. The exclusion of article 114 from the scope of article 96(2) clarifies that the Senate does not participate in the enactment of money Bills. When a Bill falls within the category of a money Bill, it removes the power of the Senate to introduce and consider such a Bill.[17]

In light of this decision, it remains to be seen how the Supreme Court Judges will respond when the issue of the broader objective of money Bills will eventually be presented before them for a decision.

2.3 The broader purposive interpretation of the objectives of the constitutional provisions

A broader purposive interpretation of these constitutional provisions discloses that the provisions sought to protect three distinct entities from financial implications of policies and laws. First, the provisions sought to protect Kenyan citizens who are the taxpayers and payers of charges for services. The essence of the constitutional provisions is to ensure that policies and laws that impose or increase taxes and charges are not enacted without consideration being given to these consequences for citizens and consumers of services on which charges may be imposed or increased. Secondly, the constitutional provisions sought to protect the national government by ensuring that no law whose enactment will occasion expenditure of public money by the national government is enacted without consideration being given to the budgetary implications of the laws. Thirdly, the constitutional provisions protect county governments by ensuring that no law whose enactment will occasion expenditure of public money by county governments is enacted without consideration being given to the budgetary implications of the laws for county governments. The essence of this is the fact that it is the two levels of government which are assigned constitutional responsibility to govern and provide services which

16 *The Senate and others v The Speaker of the National Assembly and others* SC Petition No. 19 (E027) of 2021.

17 *The Senate and others v The Speaker of the National Assembly and others* SC Petition No. 19 (E027) of 2021 para 83.

require availability of financial resources. County governments must also be protected from national government policies and laws which require additional budgetary allocations, becoming operational in the midst of a financial year whose budget did not envisage and include the additional costs. Within the context of devolution based on the principle of funds must match and follow functions, the provisions similarly seek to protect county governments from national government policies and laws creating additional unfunded obligations for county governments or shifting national government mandates to county governments without providing the required funds for implementation.

3. Implications of the constitutional provisions for policy and legislation making

These constitutional provisions on money Bills have important implications for development and enactment of legislation in various ways: First, the implications of article 114(2) are that no bill should be considered in the National Assembly before the Speaker considers it and forms an opinion on whether it qualifies as a money Bill. In this regard all bills coming to the National Assembly must be subjected to a form of scrutiny or financial impact or implications assessment by the Speaker who must form an opinion about their classification. Available evidence indicates that such scrutiny in respect of private members bills is undertaken by the Budget office of the National Assembly which prepares a report on behalf of the Speaker.

Secondly, if the scrutiny leads to the Speaker's opinion that the bill qualifies as a money Bill, then article 114(2) requires that it be considered by the National Assembly after the relevant Committee of the Assembly in this case, the Budget and Appropriation Committee, and the Cabinet Secretary for finance have audited the bill for financial implications. The implications are that one, the bill must be referred to the Budget and Appropriations Committee for audit for financial implications and making of recommendations to the National Assembly. Two, the bill must be referred to the Cabinet Secretary for Finance for audit for financial implications and giving of his views.

Thirdly, article 114(2) prescribes that the bill will then be considered by the National Assembly, only in accordance with the recommendations of the Budget and Appropriations Committee, taking into account the views of the Cabinet Secretary for Finance.

3.1 Disclosure to Cabinet obligation through a Cabinet Memo

An important implication of the constitutional provisions on this matter is that ministries which originate draft policies and draft Bills have an obligation to disclose to Cabinet through the Cabinet Memo, the financial implications of the policy or Bill. The disclosure may even require thorough financial feasibility study to be carried out leading to a detailed budget for the implementation of the policy or bill that should be attached to the Cabinet Memo. The disclosure is necessary as it will enable the Cabinet to require the Cabinet Secretary for finance to audit the policy or bill and report on several issues such as—one, the extent of the financial implications for implementation of the policy or Bill if enacted into law; two, availability of money in the budgets of both the national and county governments to implement the policy or legislation; three, whether the required finances or costs are included in or envisaged by the Medium Term Expenditure Frameworks (MTEF) of both the national and county governments; and four, whether the policy or legislation should be implemented immediately, or it should await future plans and budgets.

The Kenya Law Reform Commission in its Guide to the Legislative Process in Kenya, has guided that the Constitution requires all State entities to undertake a cost-benefit analysis of draft policies and draft Bills to ensure financial prudence and administrations and utilization of public funds in a sustainable manner which takes into account the needs of future generations.[18] In this regard, the Guide emphatically states the following:

> It is therefore prudent to conduct a cost-benefit analysis of a proposed piece of legislation. This involves estimating the net economic value of a given policy, law or regulation to see if the benefits outweigh the costs. Where the balance favours public benefit, it may be feasible to legislate on the matter and if otherwise it would be advisable to consider other means or measures of solving the policy problem or challenge.
>
> Further, there is need to make budgetary considerations while seeking to legislate in order not to legislate a law that has an onerous monetary implication that its implementation becomes unsustainable. This is because the efficacy of legislation and the success of the overall legislative agenda depend on the implementation of the legislation that comes off each circle of sittings. If the legislative initiative is beyond the budgetary possibilities, the remedy may lie outside the legislature.[19]

18 Law Reform Commission, *A Guide to the Legislative Process in Kenya* (2015) at page 29.

19 Law Reform Commission, *A Guide to the Legislative Process in Kenya* (2015) at page 29.

When setting out and discussing the various stages in the policy making process, the Kenya Law Reform Commission in its Guide to the Legislative Process in Kenya, under the Cabinet and County Executive Committee approval guides as follows:

> The Cabinet Secretary or County Executive Committee Member must ensure that fiscal, constitutional and other possible implications of the policy are clearly brought out to enable the Cabinet or the County Executive Committee make an informed decision.[20]

3.2 Disclosure to Parliament obligation through the Memorandum of objectives and reasons

Another important implication of the constitutional provisions on this matter is that ministries which originate draft policies and draft Bills have an obligation to disclose to Parliament through the Memorandum of Objectives and reasons of the Bill, the financial implications of the policy or Bill, if enacted into law. Standing Order number 117 of the National Assembly Standing Orders requires every Bill to be accompanied by a memorandum of objectives and reasons of the bill containing among other things, "a statement of its financial implication and if the expenditure of public moneys will be involved should the Bill be enacted, an estimate, where possible, of such expenditure."[21]

3.3 Parliament's responsibility in enactment of money Bills

The constitutional provisions on money Bills create the following responsibilities on the part of Parliament in the process of enactment of money Bills. First, there is an obligation on the part of the Speaker of the National Assembly to audit every bill introduced in the house and form an opinion whether it has financial implications and is therefore a money Bill.[22] Secondly, if it is a money bill, there is an obligation on the part of the National Assembly to seek the views of the Cabinet Secretary for Finance on the financial implications of the Bill.[23] Thirdly, there is an obligation on the part of the National Assembly to give an opportunity to the Commission on Revenue Allocation (CRA) to consider the

20 Law Reform Commission, *A Guide to the Legislative Process in Kenya* (2015) at page 39.

21 See the Standing Orders of the National Assembly.

22 See article 114(2) of the Constitution.

23 See article 114(2) of the Constitution.

financial implications for county governments and make recommendations.[24] The constitution expressly provides the following in this regard:

> When a Bill that includes provisions dealing with the sharing of revenue, or any financial matter concerning county governments is published, the Commission on Revenue Allocation shall consider those provisions and may make recommendations to the National Assembly and the Senate.[25]

Fourthly, there is an obligation on the part of the Speaker of the National Assembly to table in Parliament any recommendations made by CRA for consideration by each of the two houses of Parliament before each house votes on the Bill.[26] Fifthly, there is an obligation on the part of the National Assembly to refer the money Bill to the Budget and Appropriations Committee as the relevant committee of the house, for recommendations.[27] Sixthly, there is an obligation on the part of the National Assembly to consider the Bill only in accordance with the recommendations of the Budget and Appropriations Committee taking into account the views of the Cabinet Secretary for finance in terms of article 114(2) of the Constitution.

4. Requirements of the National Assembly Standing Orders on money bills

The National Assembly Standing Orders draw a distinction between private members' Bills which are subject to Standing Order Number 114 and Government sponsored Bills which in terms of Standing Order Number 114A may be exempted by the Speaker from the application of Standing Order Number 114.

4.1 Private Members Bills subject to Standing Order 114

In respect of private members' bills, Standing Order 114 requires the Speaker of the National Assembly to refer any legislative proposal, and the accompanying Memorandum, introduced by a private member or members,[28] to the Clerk who shall consider the proposal, and draft it in proper form before submitting to the Speaker with comments on various issues including "whether the legislative

24 See article 205(1) of the Constitution.

25 Article 205(1) of the Constitution.

26 Article 205(2) of the Constitution.

27 See article 114(2) of the Constitution.

28 Standing Order No. 114(1) of the National Assembly Standing Orders.

proposal is a draft money Bill in terms of article 114 of the Constitution".[29] The Standing Orders require that where the Speaker forms the opinion that the proposal is a money Bill, he shall direct that it be referred to the Budget and Appropriations Committee; and be proceeded with only in accordance with the recommendations of the Budget and Appropriations Committee after taking into account the views of the Cabinet Secretary responsible for finance.[30] The Budget and Appropriations Committee is required to "consider only the money-bill or financial aspects of the proposal and submit a report to the Speaker within thirty (30) days of receipt of the proposal".[31] The Budget and Appropriations Committee is required to ensure that its report to the Speaker contains the following matters:

(*a*) The views of the Cabinet Secretary responsible for finance, if any.

(*b*) A detailed examination of the manner in which the legislative proposal affects the current and future budgets and may include implications on tax measures.

(*c*) A recommendation on whether or not the proposal should be proceeded with.

(*d*) Any other appropriate recommendation relating to money-bill aspects of the proposal.[32]

Evidence from Parliament indicates that in the discharge of his responsibility, the Speaker is assisted by the Budget office of the National Assembly which does the scrutiny of private members bills on his behalf.

Although there is no express provision of the Standing Orders detailing matters on which the Cabinet Secretary for Finance should give his views, it is submitted that the views of the Cabinet Secretary regarding the money Bill ought to provide information on one, the implications of the Bill on the current and future budgets of the national government including implications on tax measures; two, estimates of the expenditure of public money required to implement the Bill whether by the national or county governments; and three, given the new dimensions introduced by devolution, details of the financial implications for county governments. Obviously, this will require the Cabinet Secretary to consult with county governments.

29 Standing Order No.. 114(2) of the National Assembly Standing Orders.

30 Standing Order No. 114(3)(b) of the National Assembly Standing Orders.

31 Standing Order No. 114(4) of the National Assembly Standing Orders.

32 Standing Order No. 114(5) of the National Assembly Standing Orders.

4.2 Government sponsored Bills that may be exempted from Standing Order 114

Standing Order 114A empowers the Speaker to exempt certain legislative proposals from the provisions of Standing Order 114.[33] The exemption may be granted if the proposals originate from—(i) the party forming the National Government;[34] or (ii) a constitutional Commission or Independent Office and relate to the mandate of the Commission or Independent Office;[35] or (iii) are bills which seek to implement a resolution of the House or a recommendation of the Public Petitions Committee to enact, amend or repeal any legislation.[36] These exempted Bills are basically government sponsored Bills. However, the Standing Orders set certain pre-conditions that must be met before an exemption may be granted. First, the exemption must be accompanied by "a copy of the relevant Cabinet approval, if the legislative proposal originates from the party forming the National Government".[37] Secondly, the exemption must be accompanied by "the policy underpinning of the legislative proposal and evidence of stakeholder consultations conducted, if the proposal originates from a Commission or Independent Office".[38]

Given the constitutional requirement that all money Bills and policies be processed in the manner prescribed by article 114 of the Constitution, it is submitted that Standing Order No. 114A allowing exemption from the requirements of Standing Order number 114 is unconstitutional since the said Standing Order seeks to give effect to the requirements of article 114 of the Constitution. While Parliament is empowered to regulate its own procedures through Standing Orders, it is not allowed to make Standing Orders that are unconstitutional.

5. New dimensions of money Bills introduced by devolution

The constitutional and Standing Orders provisions on the financial implications of national government policies and legislations appear to have drawn from the experiences under the replaced constitution. However, in the context of the 2010 Constitution which introduced a devolved system of government,

33 Standing Order No. 114A(1) of the National Assembly.

34 Standing Order No. 114A(1)(*a*)(i) of the National Assembly.

35 Standing Order No. 114A(1)(*a*)(ii) of the National Assembly.

36 Standing Order No. 114A(1)(*b*) of the National Assembly.

37 Standing Order No. 114A(2)(*a*) of the National Assembly.

38 Standing Order No. 114A(2)(*b*) of the National Assembly.

consideration must be given to the fact that devolution has introduced new dimensions in respect of money Bills that raise fundamental questions which ought to be considered. These include the need to consult county governments since national government policies and legislations affect them. The Law Reform Commission's guide on the legislative process in Kenya when discussing the need for consultation with affected state entities and actors has stated that:

> Consultation in the process of policy making is critical. The idea here is that problems to be addressed or opportunities to be embraced may be interrelated thus requiring solutions and input of various State and non-State actors. To this end, the Government and its entities must work as a whole. Consultation ensures that all affected entities or persons likely to be affected by the policy contribute to the process in its formative and influential stages for value addition and to avert possible delay, fiscal and other implementation constraints. That the Constitution underscores this principle of consultation cannot be overemphasized.[39]

A major question is, how best should the interests of county governments be protected in the process of enacting such policies and legislation which have financial implications for counties? This fundamental question is answered through consideration of several other related questions.

5.1 Financial implications for both national and county governments

The first fundamental question to ask is, should national government draft policies and Bills be audited for financial implications for national government and its entities only or also for county governments and their entities? Given that the design of the Kenyan devolved system under the Constitution, especially in the area of health, has assigned to the national government the health policy and legislative functions,[40] which result in national government policies and legislation that are implemented by county governments and or set norms and standards that must be followed by county governments in the delivery of health services, national government policies and legislations ought to be audited for their financial implications for county governments. This is underscored by the fact that the Kenyan devolved system is founded upon the principle that resources must match and follow functions. Consequently, the principles of devolved government set out by the Constitution include

39 Law Reform Commission, *A Guide to the Legislative Process in Kenya* (2015) at page 32.

40 See Item 28 of the Fourth Schedule to the Constitution which assigns health policy to the National Government.

the principle that "county governments shall have reliable sources of revenue to enable them to govern and deliver services effectively".[41] Furthermore, the constitutional criteria for determination of the equitable sharing of revenue raised nationally among the two levels of government includes consideration of "the need to ensure that county governments are able to perform the functions allocated to them".[42]

5.2 The need to involve the county government CECs for Finance and the county Assembly Budget and Appropriations Committees

The second fundamental question to ask is, should the National Assembly refer the draft policy and Bill to the Cabinet Secretary for Finance and the Budget and Appropriations Committee of the National Assembly only, or also to the County Executive Committee Members for Finance and the Budget and Appropriations Committees of County Assemblies? The 2010 Constitution of Kenya establishes a cooperative devolved system of government with two levels of government that are distinct and inter-dependent and are required to conduct their mutual relations on the basis of consultation and cooperation.[43] Because of this, article 189 of the Constitution expressly requires the two levels of government to "assist, support and consult and, as appropriate implement the legislation of the other level of government";[44] and to "liaise with government at the other level for the purpose of exchanging information, coordinating policies and administration and enhancing capacity".[45] The Constitution is also explicit that "government at each level, and different governments at the county level, shall co-operate in the performance of functions and exercise of powers and, for that purpose, may set up joint committees and joint authorities".[46] Clearly, these constitutional provisions make it imperative that for purposes of determining the financial implications of national government policies and legislations, the national government should cooperate with and consult the county governments to determine the financial implications for county governments.

41 Article 175(*b*) of the Constitution.

42 Article 203(1)(*d*) of the Constitution.

43 Article 6(2) of the Constitution.

44 Article 189(1)(*b*) of the Constitution.

45 Article 189(1)(*c*) of the Constitution.

46 Article 189(2) of the Constitution.

5.3 The need for the Cabinet Secretary for Finance to consult county governments

The third fundamental question to ask is, should the Cabinet Secretary in giving his views consult county governments? The Cabinet Secretary for Finance, being responsible for the implementation of the Public Finance Management Act, is expected to know that county governments cannot be expected to spend on new financial obligations introduced by national government policies and legislation if these are not included in their respective County Medium Term Expenditure Frameworks and annual budgets. This is more so when the new policies and legislation become operational during the course of a financial year. If they do, they are likely to run into problems with the Controller of Budget and the Auditor General. The need for the Cabinet Secretary to consult county governments on this matter is therefore obvious.

5.4 The need to consult with the Commission on Revenue Allocation

The fourth fundamental question to ask is, should the Commission on Revenue Allocation be consulted in the process of the consideration of money Bills? A purposive interpretation of the Constitution which considers the historical context of Kenya will lead to the conclusion that a major problem which Kenya sought to address through the adoption of the devolved system of government was to reduce the executive's control through the Treasury, over the financial power of the state. It was believed that this would address the problems of the skewed and inequitable distribution of resources and development of the country, synonymous with the centralized system Kenya had before the adoption of the Constitution. For this reason, the principle of equity runs through the design of the Kenya devolved system of government. For instance, a major object and principle of the devolved system of government was identified as being "to ensure equitable sharing of national and local resources throughout Kenya".[47] This objective was to be realized through the devolution of some of the financial power of the state, which includes a huge spending power, from exclusive control by the Executive to the peripheries of the country through county governments. Consequently, the design of finances under the Kenyan devolved system assigned more revenue raising powers to the national government but required that the revenue raised nationally be equitably

47 Article 174(*g*) of the Constitution.

shared between national government and county governments. Article 201, which establishes the principles of public finance lay great emphasis on the need for equity in not only the distribution of financial resources but also the development of the country. The principles prescribe that "the public finance system shall promote an equitable society"[48] that ensures that (i) the burden of taxation is shared fairly;[49] (ii) revenue raised nationally is shared equitably among national and county governments;[50] and (iii) expenditure promotes the equitable development of the country, including making provision for marginalized groups and areas.[51] These principles also prescribe that "the burdens and benefits of the use of resources and public borrowing shall be shared equitably between present and future generations".[52]

To realize these broad objectives of the Kenyan devolved system, the framers of the Constitution sought to remove political patronage from the system of sharing resources, especially revenue raised nationally, and replace it with objective criteria which is set out in article 203 of the Constitution. The framers of the Constitution, therefore, assigned the responsibility of examining the objective criteria and applying it to the continuously changing circumstances in the country, to inform the sharing of resources, to an independent Commission known as the Commission on Revenue Allocation which is composed of technical experts who should make recommendations on financial matters in a dispassionate manner. In addition to making recommendations on the equitable sharing of the revenue raised nationally, the Constitution requires the Commission on Revenue Allocation to consider any Bill that includes provisions that deal with "any financial matters concerning county governments" and make recommendations to the National Assembly and the Senate. The Constitution provides in this regard, the following:

> When a Bill that includes provisions dealing with the sharing of revenue, or any financial matter concerning county governments is published, the Commission on Revenue Allocation shall consider those provisions and may make recommendations to the National Assembly and the Senate.[53]

The Constitution also prescribes that "any recommendations made by the Commission shall be tabled in Parliament, and each House shall consider

48 Article 201(*b*) of the Constitution.

49 Article 201(*b*)(i) of the Constitution.

50 Article 201(*b*)(ii) of the Constitution.

51 Article 201(*b*)(iii) of the Constitution.

52 Article 201(*c*) of the Constitution.

53 Article 205(1) of the Constitution.

the recommendations before voting on the Bill".[54] These provisions provide constitutional anchorage for the need to involve the CRA in the audit of national government policies and Bills that have financial implications for county governments. The CRA should be consulted and allowed to consider the provisions in such Bills which have financial implications for counties and make recommendations before the Bills are enacted into law.

5.5 Is there a role for the Senate in the enactment of money Bills?

The fifth fundamental question to ask is, should the Senate play any role in the enactment of money Bills? The answer to this question depends on how one interprets article 110(3) of the Constitution which provides for determination of whether a Bill concerns counties or not in the following manner:

> 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.

Whether the Senate should play any role in money Bills depends on whether the above article is interpreted as requiring all Bills, including money Bills to be considered to determine whether they concern counties or not, or whether the provision should be interpreted as excluding money Bills from the process of determining whether Bills concern counties or not. If the correct interpretation is that money Bills must be subjected to the process of determining whether a Bill concerns counties, then it follows that money Bills which are found to be Bills that concern counties must be considered by the Senate, even though they cannot originate in the Senate. This therefore means that article 109(3) of the Constitution only excludes the Senate from originating money Bills but does not exclude it from considering, debating and passing money Bills that concern counties.

The three Superior Courts have thrown the country into confusion over this matter. While the High Court in *Senate of the Republic of Kenya & 4 others v Speaker of the National Assembly and another; Attorney-General and others* (Interested Parties)[55] correctly found and held that article 110(3) of the Constitution requires all Bills including money Bills must be considered to determine whether or not they concern counties; the Supreme Court in a

54 Article 205(1) of the Constitution.

55 [2020] eKLR.

judgment delivered on 21 March 2025 held that money Bills cannot be subject to that process since article 109(4) of the Constitution excludes the Senate from both origination and consideration of money Bills.

To arrive at its decision, the High Court at paragraph 116 of its judgement heavily relied on the Supreme Court's findings and statements in its Advisory opinion *Reference No. 2 of 2013,* in which the Supreme Court stated the following at paragraphs 141 to 145:

> [141] It is quite clear, though some of the counsel appearing before us appeared to overlook this, that the business of considering and passing of any Bill is not to be embarked upon and concluded before the two Chambers, acting through their Speakers, address and find an answer for a certain particular question: What is the nature of the Bill in question? The two Speakers, in answering that question, must settle three sub-questions – before a Bill that has been published, goes through the motions of debate, passage, and final assent by the President. The sub-questions are:
>
> (*a*) is this Bill concerning county government? And if it is, is it a special or an ordinary bill>
>
> (*b*) is this a bill not concerning county government"
>
> (*c*) is this a money Bill?
>
> [142] How do the two Speakers proceed, in answering those questions or sub-questions> They must consider the content of the Bill. They must reflect upon the objectives of the Bill. This, by the Constitution, is not a unilateral exercise. And on this principle, it is obvious that the Speaker of the National Assembly by abandoning all engagement or consultation with the Speaker of the Senate, and proceeding as he did in the matter before this Court, had acted contrary to the Constitution and its fundamental principles regarding the harmonious motion of State institutions.
>
> [143] Neither Speaker may, to the exclusion of the other, "determine the nature of a Bill": for that would inevitably result in usurpations of jurisdiction, to the prejudice of the constitutional principle of the harmonious interplay of State institutions.
>
> [144] It is evident that the Senate, though entrusted with a less expansive legislative role than the National Assembly, stands as the Constitution's safeguard for the principle of devolved government. This purpose would be negated if the Senate were not to participate

in the enactment of legislation pertaining to the devolved units, the counties [Article 96(1), (2) and (3)].

[145] 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.

In an appeal arising out of this judgement of the High Court which went all the way to the Supreme Court, the Judges of the Supreme Court took the position that money Bills do not have to be considered for determination on whether or not they are Bills that concern counties.[56] Because of this the Supreme Court judges held that the Senate does not have any role in the enactment of money Bills since article 109(4) excludes it from money Bills:

> What emerges from a holistic consideration of these provisions, is that the Constitution excludes the Senate from the consideration and enactment of money Bills. The exclusion of article 114 from the scope of article 96(2) clarifies that the Senate does not participate in the enactment of money Bills. When a Bill falls within the category of a money Bill, it removes the power of the Senate to introduce and consider such a Bill.[57]

It is the considered opinion of this author that the Supreme Court was wrong not only on this matter but also on the finding that the joint concurrence of the two Speakers is not a condition precedent for all Bills but that it only arises when a question as to whether a Bill concerns counties has arisen. The conclusion, therefore, is that the decision of the High Court is the correct purposive interpretation of articles 110(3) and 109(4) of the Constitution.

56 *The Senate and others v The Speaker of the National Assembly and others,* SC Petition No. 19 (E027) of 2021 para 83.

57 *The Senate and others v The Speaker of the National Assembly and others,* SC Petition No. 19 (E027) of 2021 para 83.

6. Kenya Kwanza Manifesto on financial implications of the proposed health reforms

As the country prepared for the 2022 Presidential and General Elections, different political parties published their manifestos setting out the agenda of the reforms they intended to introduce if elected to form government. A major policy document that forms the foundation of the UHC reforms and laws which were enacted by the Kenya Kwanza administration in October 2023 is the Kenya Kwanza Manifesto.[58] This Manifesto promised reforms in various sectors including health and made several commitments for reforms in the health sector. To realize the constitutional right to health in the shortest time possible by delivering a Universal Health Coverage (UHC) system, the Manifesto promised to build on three pillars as follows:

(i) Fully publicly financed primary healthcare (preventive, promotive, outpatient & basic diagnostic services), that gives patients choice between public, faith-based and private providers, based on a regulated tariff.

(ii) Universal seamless health insurance system comprising a mandatory national insurance (NHIF) and private insurance as complementary covers, with NHIF as the primary and private as secondary cover.

(iii) National fund for chronic and catastrophic illness and injury costs not covered (or with very restrictive cover) by insurance (cancer, diabetes, strokes & accident rehabilitation, pandemics) to be funded by combination of insurance levy and Government.[59]

As part of the promised health reforms, the Manifesto promised to leverage on health information technology by procuring "as soon as practically possible a state-of-the-art health integrated information management system that will enable every Kenyan to own and control access to their health records and provide them with all the information they need to access health services on their phones".[60]

The genesis of the problem in the implementation of the Kenya Kwanza government reforms in the health sector stems from the fact that after making all the above-mentioned commitments, on the issues of financial the commitment for implementation of these reforms, the Manifesto declares that the reforms

58 The Kenya Kwanza Plan: Bottom-up Economic Transformation Agenda 2022—2027.

59 The Kenya Kwanza Plan: Bottom-up Economic Transformation Agenda 2022—2027 at page 22.

60 The Kenya Kwanza Plan: Bottom-up Economic Transformation Agenda 2022—2027 at page 23.

are "Budget neutral", which means that the reforms have no additional financial implications beyond the existing health budget.[61] But was this declaration in the Kenya Kwanza Manifesto true? When the parliamentary Budget Office did an assessment of the Manifesto and published a report in November 2022, it arrived at the conclusion that this declaration was not true. The report in its executive summary clearly points out that:

> The plan is extremely conscious of the fiscal constraints the country is operating under and has adopted a cautious revenue projection path, limited growth in expenditures, and budget neutrality as the key guiding principles for many of the proposed policy interventions. However, some of the components will outrightly require significant amount of resources to implement.[62]

On the specific issue of the promised reforms in the health sector, the report points out that:

> It is also noteworthy that although some of the interventions have been indicated as budget neutral, they will outrightly require a significant amount of resources to implement. For instance, the proposed interventions under health are indicated as budget neutral but have a cost implication. This may have a bearing on the proposed fiscal consolidation path.[63]

In the section that is dedicated to the reforms in the health sector, the report becomes even more candid and provides some estimates of the required costs to implement the promised reforms. It points out that "whereas the Bottom-up plan considers that interventions in health are largely budget neutral, a critical review indicates that financial resources will be required, approximately KShs 258.98 billion, for these interventions to be fully implemented".[64] The report then lists several key costing assumptions with the amounts required for the government to implement certain interventions. It is important to note that the estimates provided in this paragraph are not all the costs that the country will require to implement UHC reforms. In a section dealing with emerging issues, the report on the issue of Universal Health Care arrives at the following conclusion:

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61 The Kenya Kwanza Plan: Bottom-up Economic Transformation Agenda 2022—2027 at page 23.

62 The Kenya Kwanza Plan: Bottom-up Economic Transformation Agenda 2022—2027 at page iii and page 2 at para 9.

63 The Kenya Kwanza Plan: Bottom-up Economic Transformation Agenda 2022—2027 at page 2 para 11.

64 The Kenya Kwanza Plan: Bottom-up Economic Transformation Agenda 2022—2027 at page 16 para 39.

The cost of providing UHC has not been factored in the cost estimates. Such costing is usually complex and it involves deeper analysis of supply factors such as available health facilities, level of technology, protocols and demand factors such as demography, epidemiology amongst others. However, according to the World Health Organization, a low-income country would need to spend $ 60 per capita to ensure health system capable of providing current and emerging health care needs.[65]

7. Did Parliament enact the four UHC Acts as money Bills?

It has already been observed that article 114 of the Constitution on money Bills imposes on the ministry that originates a draft Bill a disclosure obligation. This obligation is underscored by Standing Order number 117 which imposes an obligation on the ministries that originate draft Bills to disclose to Parliament through the Memorandum of objects and reasons the financial implications of the Bill and if the expenditure of public moneys will be involved should the Bill be enacted into law, and an estimate, where possible, of such expenditure.[66]

The Social Health Insurance Bill, 2023 and the Digital Health Bill, 2023 which were received in the National Assembly on 12 September 2023 disclosed that the Bills were money Bills within the meaning of article 114 of the Constitution since their enactment will occasion additional expenditure of public funds. They were, however, not processed in the National Assembly as money Bills, presumably because they were exempted by the Speaker from the requirements of Standing Order number 114 of the Standing Orders as is unconstitutionally permitted by Standing Order 114A. From this perspective, it is submitted that the Social Health Insurance Act of 2023 and the Digital Health Act of 2023 are unconstitutional for having been enacted without following the requirements of article 114 of the Constitution and yet they were money Bills.

The Primary Health Care Bill, 2023 and the Facilities Improvement Financing Bill, 2023 which were first introduced in the Senate on the 15 September stated and were wrongly categorized as not being money Bills within the meaning of Article 114 of the Constitution. The possible reason for this wrong categorization may be presumed to have been the hurry in which Parliament was to process and enact the four laws. A decision must

65 The Kenya Kwanza Plan: Bottom-up Economic Transformation Agenda 2022—2027 at page 31 paragraph 89.

66 Standing Order No. 117(*d*) of the National Assembly Standing Orders.

have been taken that while the Social Health Insurance Bill should originate in the National Assembly; the Primary Health Care Bill and the Facilities Improvement Financing Bill should originate in the Senate so that both Houses could simultaneously process the Bills to save on the time. However, since the National Assembly has always taken the position that money Bills cannot originate in the Senate, the Bills had to be categorized as not being money Bills even when it was obvious that they were money Bills.

What should worry Kenyans more is the fact that the two Houses of Parliament enacted these laws in the manner discussed in the preceding paragraphs in 2023, at a time when the Parliamentary Budget Office had already developed and released its report of November 2022 on the Assessment of the Kenya Kwanza Manifesto discussed above. Does this mean that Parliament as a policy and legislative body does not care about the technical input of the Parliamentary Budget Office?

8. The stark reality of financial implications of the Manifesto and UHC Acts

Despite the assertion by the Kenya Kwanza Manifesto that the reforms in the health sector will be budget neutral and considering the fact that the four UHC laws were not processed in Parliament as money Bills, the stark reality is that the reforms in the health sector have financial implications for the citizens of Kenya, the County governments and even the national government.

8.1 The reality of financial implications for the citizens

Article 114(3) of the Constitution identifies money Bills as including Bills that have provisions dealing with taxes and the imposition of charges on a public fund or variation or repeal of any of these charges.[67] Imposition of taxes and imposition or variation of charges normally have financial implications for citizens who pay the taxes and the charges. The Social Health Insurance Act varied the premiums payable by salaried Kenyans from the maximum of Ksh 1,700 previously paid under the National Health Insurance Fund (NHIF) to 2.75% of their monthly gross income. This variation in the insurance premium payment percentage makes very fundamental changes for citizens in real financial terms. While those whose salaries range from KShs 15,000 to 60,000 will gain as a result of this variation and end up paying less than the KShs 1,700

67 Article 114(3)(*a*) and (*b*) of the Constitution.

they previously paid under NHIF; those whose salaries range from KShs 75,000 to 1,000,000 will end up paying far more because of the variation. The Act also makes Social Health Insurance mandatory for all Kenyans whether in salaried employment or in the non-salaried informal sector. Those in the informal sector will be expected to also pay a premium of 2.75 % of their income, which will be determined through a means testing tool.

8.2 The reality of financial implications for county governments

Article 114(3) of the Constitution identifies money Bills as including Bills that have provisions dealing with the appropriation, receipt, custody, investment or issue of public money.[68] Clearly, these are Bills whose implementation will require investment of public money. The four UHC laws have financial implications for county governments since they will require county governments to appropriate, invest and issue public money for the implementation of these laws. For instance, the Primary Health Care Act requires investment of money in the establishment of Primary Healthcare Networks and the payment of Community Health Promoters. The Facilities Improvement Financing Act clearly deals with charges of fees for health care services at levels 1 to 5 which county health facilities are allowed to retain and use as Appropriation-In-Aid. The Digital Health Act has financial implications that will require very heavy financial investment by county governments in the following activities:

1. Establishment of health facility digitization readiness and implementation of the system at all levels 2, 3, 4, and 5.
2. Certification of the digital health solutions implemented or proposed within the counties.
3. On-boarding of respective health facility digital health solutions into the Health Information Exchange.
4. Updating of relevant registries including the facility registry by ensuring updated regulatory compliance.
5. Capacity building and Change management of HRH for digital health including digital literacy for all staff within the value chain.
6. Acquisition of ICT equipment such as computers, power banks, and supportive infrastructure such as generators.

68 Article 114(3)(*c*) of the Constitution.

The Social Health Insurance Act has financial implications that will require very heavy financial investment by county governments in—inspection, registration and licensing of all health facilities, mobilization of residents for registration against county health facilities, sensitization of the residents and county government officials about the system, capacity building of staff on how to lodge e-claims and payment of premiums for indigents.

8.3. The reality of financial implications for the national government

Like the county governments, the national government will be required to appropriate, invest and issue public money to enable implementation of some of the four UHC laws. The Social Health Insurance Act establishes three funds—(i) the Primary Health Care Fund, (ii) the Social Health Insurance Fund, and (iii) the Emergency, Chronic and Critical Illnesses Fund. While the Social Health Insurance Fund is contributory; the Primary Healthcare Fund and the Emergency, Chronic and Critical Illnesses Fund are non-contributory and will be funded by allocations from the national government exchequer. This will have heavy financial implications for the national government which will be required to allocate money to these funds. The Act also requires the national government to pay premiums for people in lawful custody and the indigents. If Kenya has a poverty rate of 36.8% against a population of 54 million then 19.8 million Kenyans may qualify as indigent which translates into 5 million households. If the government pays for each of them the bare minimum premium of KES.300x12=3,600x5,000,000= 18 billion.

9. Conclusion and recommendations

This article has demonstrated that there is a close nexus between policy and legislative making, and the planning and budgeting process to ensure full implementation of the policies and legislation. Failure to audit draft policies and legislation for their financial implications undermines the implementation efforts. The article has also demonstrated that the concept of money Bills has broader objectives aimed at avoiding downstream budget surprises in the implementation of the policies and legislation. In the Kenyan devolved system of government, national government policies and legislation may have financial implications for county governments which ought to be considered using the concept of money Bills. These fundamentally change those obligations placed upon both Cabinet and Parliament when processing money Bills. These

obligations include the need to involve and consult county governments and the Commission on Revenue Allocation to determine the financial implications for county governments. Furthermore, the obligations include the manner in which Bills are assessed for purposes of determining whether they concern counties or not. From this perspective, even money Bills must be considered in the process of determining whether they are Bills that concern counties or not. The article has demonstrated that both Parliament and the Supreme Court have taken a very narrow view of the objectives of the concept of money Bills, which ought to be corrected for purposes of giving the Constitution full implementation.

As a way forward it is recommended that the President be engaged through the Submit on the need to require Ministries that originate draft policies and laws to disclose to Cabinet the financial obligations of the policies and legislations for county governments. Likewise, it is recommended that the Council of Governors and the President engage the Speaker of the National Assembly on the need to revise and amend the Standing Orders to align them to article 114 of the Constitution on money Bills to take into account the new dimensions introduced by devolution and to remove the unconstitutional exemption of Government sponsored Bills from the special procedure for money Bills. This matter is so critical that it requires the review of the Standing Orders of both the National Assembly and the Senate to agree on how best the interests of county governments can be protected when national government policies and legislation are being processed. Finally, the Council of Governors and county governments ought to reconsider their approach to review of draft policies and bills to include their audit for financial implications for county governments.