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Rt. Hon. Speaker*
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J. M. Nyegenye, C.B.S.,
Clerk of the senate/secretary, PSC
Date: 09/05/24

09/05/2024
REPUBLIC OF KENYA

THIRTEENTH PARLIAMENT | THIRD SESSION

THE SENATE

STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND HUMAN RIGHTS

REPORT ON THE HOUSES OF PARLIAMENT (BICAMERAL RELATIONS) BILL, 2023 (NATIONAL ASSEMBLY BILLS NO. 44 OF 2023)

APPROVED
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PAPERS LAID	
DATE	14/05/2024
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Clerk's Chambers,
The Senate,
Parliament Buildings,
NAIROBI.

May, 2024

TABLE OF CONTENTS

List of Abbreviations and Acronyms	(ii)
Preliminaries	(iii)
Foreword by the Chairperson.....	(iv)
Adoption of the Report	(vii)
Chapter 1: Introduction	
Introduction.....	1
Background.....	1
Objects of the Bill	1
Overview of the Bill	2
Consequences of the Bill	6
Chapter 2: Consideration by the Committee	
Introduction.....	7
Determination of nature of bills.....	7
Bills concerning counties	9
Money Bills.....	17
Chapter 3: Committee Observations	
Committee Observations on the Bill.....	20
Chapter 4: Committee Recommendations	
Committee Recommendations on the Bill.....	24
Annexes	

LIST OF ABBREVIATIONS AND ACRONYMS

CoE – The Committee of Experts

eKLR – Electronic Kenya Law Reports

PRELIMINARIES

Establishment and Mandate of the Committee

The Standing Committee on Justice, Legal Affairs and Human Rights is established under standing order 228 of the Senate Standing Orders and is mandated *'to consider all matters relating to constitutional affairs, the organisation and administration of law and justice, elections, promotion of principles of leadership, ethics, and integrity; agreements, treaties and conventions; and implementation of the provisions of the Constitution on human rights'*.

Membership of the Committee

The Committee is comprised of –

- | | |
|--|--------------------|
| 1) Sen. Wakili Hillary Kiprotich Sigei, MP | - Chairperson |
| 2) Sen. Raphael Chimera Mwinzagu, MP | - Vice-Chairperson |
| 3) Sen. Fatuma Adan Dullo, CBS, MP | - Member |
| 4) Sen. William Cheptumo Kipkiror, CBS, MP | - Member |
| 5) Sen. Hamida Ali Kibwana, MP | - Member |
| 6) Sen. Catherine Muyeka Mumma, MP | - Member |
| 7) Sen. Veronica Maina, MP | - Member |
| 8) Sen. Karen Njeri Nyamu, MP | - Member |
| 9) Sen. Andrew Omtatah Okoiti, MP | - Member |

Minutes of the Committee in considering the Houses of Parliament (Bicameral Relations) Bill, 2023 (National Assembly Bills No. 44 of 2023) are attached to this Report as *Annex I*.

FOREWORD BY THE CHAIRPERSON

Honourable Speaker,

The Houses of Parliament (Bicameral Relations) Bill, 2023 (National Assembly Bills No. 44 of 2023) seeks to provide for how joint resolutions of questions relating to the nature of bills under Article 110(3) are to be made, as well as how disagreements arising between the two Houses of Parliament are to be dealt with. The Bill also deals with matters relating to co-sponsorship of Bills and conduct of joint proceedings, including joint sittings of the Houses, joint committees, and mediation committees. It is therefore a key legislation that affects the conduct of core legislative business in and relations between the two Houses of Parliament.

The subject Bill was published on 28th July, 2023 and introduced in the National Assembly on 17th August, 2023. It was considered by the National Assembly and passed, with amendments, on 21st March, 2024, following which it was referred to the Senate for its consideration. In the Senate, the Bill was read a First Time on 28th March, 2024, and stood committed to the Standing Committee on Justice, Legal Affairs and Human Rights.

Honourable Speaker,

Pursuant to the provisions of Article 118 of the Constitution and standing order 145 (5) of the Senate Standing Orders, the Committee proceeded to undertake public participation on the Bill. In this regard, the Committee published an advertisement in the *Daily Nation* and *Standard* Newspapers on Tuesday, 2nd April, 2024 inviting members of the public to submit written memoranda to the Committee on the Bill. The advertisement was also posted on the Parliament website and social media platforms. Following this call, the Committee did not receive any comments from stakeholders and members of the public.

Honourable Speaker,

The Committee proceeded to consider the Bill at length, which informed its observations and recommendation and set out at Chapters Three and Four, respectively, of this Report.

In summary, the Committee observed that –

- a) the Bill seeks to fundamentally restrict the legislative and representative mandate of the Senate as provided at Articles 94, 96, 109, 110, 112 and 114 of the Constitution;
- b) the Bill violates the Constitution by derogating from provisions of the Constitution and judicial pronouncements on the procedure for introduction and processing of legislation in the two Houses of Parliament;
- c) the Bill violates Article 118 of the Constitution by proposing that a Committee of the Second House of Parliament can elect not to conduct public participation on account

of public participation conducted by a Committee of the other House of Parliament;
and

- d) the Bill further contains provisions that seek to restrict access to judicial intervention, as well as punish state and public officers by introducing fetters and punitive measures to officers who would be deemed to have advised a House to pursue judicial intervention in a matter, contrary to Article 236 of the Constitution.

The Committee further found that there had been efforts, both in the previous and current term of Parliament, to have the two Houses negotiate and adopt an agreed version of a Bill on bicameral relations and the processing of legislation between the two Houses. These efforts had, however, not yielded fruit. Indeed, during the 12th Parliament, the Senate had developed, considered, and passed the Determination of the Nature of Bills (Procedure) Bill (Senate Bills No. 30 of 2018), and referred it to the National Assembly for concurrence. However, the Bill was not considered by the National Assembly.

The Senate improved on the said Bill and submitted it to the mediation process during the 13th Parliament that was spearheaded by the Office of the Prime Cabinet Secretary. This process stalled at some point, following which the National Assembly introduced and passed **its version** of the Bill, which has now been referred to the Senate for concurrence.

The Committee was also alive to the fact that the Supreme Court has, on several occasions, stayed proceeding with hearing and determination of *Petition No. 19 of 2021: The Senate of the Republic of Kenya vs the Speaker of the National Assembly of Kenya and others*, which seeks to, among others, resolve the question of the concurrence procedure on Bills. This has been done to allow the two Houses to consult, engage and reach consensus on bicameral relations between the two Houses.

Honourable Speaker,

Once the Committee resolved that, for the foregoing reasons, this Bill must be rejected by the Senate, the next question it faced was on whether to recommend that the Bills goes through the complete legislative process in the Senate, including debate at Second Reading stage, Committee of the Whole and Third Reading, or whether to recommend that the Senate rejects the Bill at Second Reading stage. The Committee was persuaded that, if the Senate takes the first option of considering the Bill and proposing amendments clause-by-clause, these amendments would no doubt be rejected by the National Assembly, due to fundamental differences between the understanding, by the two Houses, of the questions –

- i) at what stage should the determination of the nature of bills be done, and is it to be done for all bills being considered by either House?
- ii) what is a bill concerning counties?
- iii) what is a money bill?

Thus, in both instances, the end result would be mediation on the Bill. In one case, a lot of time would have been taken subjecting the Bill through the entire legislative process in the Senate while, in the other case, significant time would be saved by sending the Bill to mediation at the earliest possible opportunity.

Consequently, at Chapter Four of the Report, the Committee recommends that the Senate rejects the Bill at the Second Reading stage, **to pave way** for mediation on the Bill as contemplated under Article 113 of the Constitution. This will allow the two Houses a time-bound window within which to hammer out these questions, harmonize the two versions of the Bill, and come up with a version of the Bill that may be passed by both Houses of Parliament.

Honourable Speaker,

May I take this opportunity to commend the Members of the Committee for their devotion and commitment to duty which made the consideration of the Bill successful. I also wish to thank the Offices of the Speaker and the Clerk of the Senate for the support extended to the Committee in undertaking this assignment.

Honourable Speaker,





It is now my pleasant duty, pursuant to standing order 148(1) of the Senate Standing Orders, to present the Report of the Standing Committee on Justice, Legal Affairs and Human Rights on the Houses of Parliament (Bicameral Relations) Bill, 2023 (National Assembly Bills No. 44 of 2023).

Signed  Date..... 9/5/2024

**SEN. WAKILI HILLARY SIGEI, MP
CHAIRPERSON, STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS
AND HUMAN RIGHTS**

ADOPTION OF THE REPORT OF THE STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND HUMAN RIGHTS ON THE HOUSES OF PARLIAMENT (BICAMERAL RELATIONS) BILL, 2023 (NATIONAL ASSEMBLY BILLS NO. 44 OF 2023)

We, the undersigned Members of the Standing Committee on Justice, Legal Affairs and Human rights, do hereby append our signatures to adopt this Report.

No	Name	Signature
1.	Sen. Wakili Hillary Kiprotich Sigei, MP <i>(Chairperson)</i>	
2.	Sen. Raphael Chimera Mwinzagu, MP <i>(Vice-Chairperson)</i>	
3.	Sen. Fatuma Adan Dullo, CBS, MP	
4.	Sen. William Cheptumo Kipkiror, CBS, MP	
5.	Sen. Hamida Ali Kibwana, MP	
6.	Sen. Catherine Muyeka Mumma, MP	
7.	Sen. Veronica W. Maina, MP	
8.	Sen. Karen Njeri Nyamu, MP	
9.	Sen. Andrew Omtatah Okoiti, MP	

CHAPTER ONE: INTRODUCTION

1.0 Introduction

1. The Houses of Parliament (Bicameral Relations) Bill, 2023 (National Assembly Bills No. 44 of 2023) was published *vide* Kenya Gazette Supplement No. 130 of 28th July, 2023. The Bill was read a First Time in the National Assembly on Thursday, 17th August, 2023. It was thereafter passed by the Assembly on Thursday, 21st March, 2024 and was committed to the Senate.
2. In the Senate, the Bill was read for a First Time on 28th March, 2024, following which it was referred to the Standing Committee on Justice, Legal Affairs and Human Rights for consideration. A copy of the Bill is annexed to this Report as *Annex 2*.

1.1. Background

3. During the 12th Parliament, the Senate had developed, considered, and passed the Determination of the Nature of Bills (Procedure) Bill (Senate Bills No. 30 of 2018), and referred it to the National Assembly for concurrence. However, the Bill was not considered by the National Assembly. A copy of the Bill, as passed by the Senate, is attached to this Report as *Annex 3*.
4. On commencement of the 13th Parliament, efforts were made to have the two Houses negotiate a legislative framework governing relations and processing of legislative business between the two Houses. Each House was tasked to submit its version of the Bill, whereupon the two would be harmonized to one Bill agreeable to the two Houses. The Senate submitted an improved version of the Bill passed by the Senate during the previous Parliament. However, the process was not completed. A copy of the improved version of the Senate Bill is attached to this Report as *Annex 4*.
5. Thereafter, the National Assembly proceeded to publish its version of the Bill, which it passed and referred to the Senate for concurrence.

1.2. Objects of the Bill

6. The principal object of the Bill is to provide for how joint resolutions of questions relating to the nature of bills under Article 110(3) are to be made, as well as how disagreements arising between the two Houses of Parliament are to be dealt with. The Bill also deals with matters relating to co-sponsorship of Bills and conduct of joint proceedings, including joint sittings of the Houses, joint committees and mediation

committees, and is therefore a key legislation that affects the conduct of core legislative business in both Houses.

1.3. Overview of the Bill

7. Clause 4 proposes that there be a publication of any Bill proposed by a member or committee of a House of Parliament in the Gazette, pursuant to Article 109(5) of the Constitution and the same be done in accordance with the appropriate House's Standing Orders. It further proposes that once the respective Clerk submits a request to the Government Printer for the publication of the said Bill, the Government Printer should cause the same to be published in the Gazette within seven days of receiving the request.
8. Clause 5 provides that once a Bill is passed by both Houses of Parliament or by the National Assembly under Article 109(3) of the Constitution is assented to by the President, the same shall be published in the Gazette as an Act of Parliament in accordance with Article 116(1) of the Constitution. The Bill shall be styled as "An Act of Parliament" and the words of enactment shall be "Enacted by the Parliament of Kenya".
9. Clauses 6 - 11 propose an outline of the procedures to be followed in the joint resolution of a question under Article 110(3) of the Constitution, from the point of notification of the existence of such a question, to the joint resolution of it; and further what takes place in the event of a disagreement.
10. Clause 6 proposes that whenever a Bill is published in the Gazette, a Speaker may at any time before the period specified for the Second Reading of such Bill in the Standing Orders of the respective House, become seized of a question as to whether the Bill concerns counties and shall as soon as is practicable, notify the Speaker of the second House of the question.
11. Clause 7 lists Bills on which no question can arise for joint resolution. They are:
 - (a) a Bill to amend the Constitution which is considered by both Houses;
 - (b) a Bill relating to the election of members of a county assembly or a county executive which is considered by both Houses;
 - (c) the annual County Allocation of Revenue Bill which is considered by both Houses;
 - (d) an Appropriation Bill which is considered only by the National Assembly;
 - (e) a Finance Bill introduced pursuant to Articles 95(4)(c), 114, 209(1), 210 and 221(1) of the Constitution which is considered only by the National Assembly;

- (f) any Bill providing for taxation and other revenue- raising powers of the national government which is considered only by the National Assembly; and
 - (g) a Bill not concerning county governments which is considered only in the National Assembly.
12. Once the Speaker of the Second House receives a notification of a question under Article 110(3) of the Constitution, they shall consider the said question and either agree or disagree with it as raised.
 13. If in agreement, the Speaker of the Second House shall prepare and transmit a Certificate of Joint Resolution for endorsement by the Speaker of the originating House, who will in turn indicate their resolution as soon as is practicably possible and convey a copy of the Certificate to the Speaker of the second House.
 14. In the event of disagreement by the Speaker of the Second House, Clause 10 proposes that the Speaker immediately refers back the question to the Speaker of the originating House for reconsideration noting the specific clauses of the Bill subject to the disagreement and the specific reasons for the disagreement.
 15. Once this is done, the Speaker of the originating House, guided by the appropriate procedures laid out in the respective Standing Orders may either:
 - (a) cause the Bill to be modified taking into account the observations and recommendations of the Speaker of the second House; or
 - (b) further disagree with the observations and recommendations of the Speaker of the second House on the question.
 16. If modification of the bill as presented in the first option is preferred and duly implemented, the question shall be deemed to have been resolved and the House shall be notified of the said modification and the procedure for its consideration as modified.
 17. However, if the Speaker of the originating House further disagrees with the observations and recommendations of the Speaker of the second House on the question, they may either refer the Bill to its sponsor for further consideration or jointly appoint any person or body of persons to make recommendations on the way forward as may be appropriate.
 18. If the disagreement persists beyond the above recommendations, Clause 11 proposes that the Speaker of the originating House proceeds with the consideration of the Bill notwithstanding such continued disagreement.
 19. Clause 12 proposes that a money Bill or motion be introduced only in the National

Assembly and 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.

20. It is intended that where a money Bill or motion originates from the Senate, the relevant committee of the Assembly be allowed to make recommendations that:
 - (a) the Bill or motion be not proceeded with by the Assembly for want of compliance with the procedure set out in Article 109(5) of the Constitution; or
 - (b) the relevant departmental committee of the Assembly or a Member be at liberty to adopt the Bill and that the Bill be deemed to have originated in the Assembly pursuant to the provisions of Article 109(5) of the Constitution.
21. Clause 13 proposes that where a Member in charge of a Bill intends that his or her Bill be adopted by a Member of the other House, that Member shall include in the memorandum of objects of the Bill, a statement indicating the name of the Member of the other House who shall be in charge of the Bill upon its passage by the originating House.
22. A certified copy of that Bill shall thereafter be signed by the relevant Clerk and endorsed by the Speaker, after which the same shall be forwarded to the Clerk of the other House together with a Message-
 - (a) requesting the consideration of the Bill by the other House in accordance with the respective Standing Orders; and
 - (b) notifying the other House of the name of any Member of the House nominated to adopt the Bill.
23. Clause 13 is however, not intended to apply to a Bill which, in terms of Article 109(3) of the Constitution, is considered only in the National Assembly.
24. Clause 14 outlines the mediation procedures to be followed in the event a dispute arises on the account of one House passing an ordinary Bill concerning county governments that after rejection and subsequent reconsideration by the second House, is rejected a second time.
25. These procedures apply from the time a mediation committee is appointed by the Speakers of both Houses, to the resolution of the differences, subsequently occasioning a mediation report with an agreed version of the Bill.
26. Clause 14 proposes the marking as defeated, a Bill whose appropriate version the mediation committee fails to agree on.

27. Clause 15 proposes to give the Houses of Parliament authority to resolve to establish joint committees comprising of an equal number of Members of the National Assembly and the Senate.
28. Clause 16 makes provision for the manner of conducting joint sittings of the committees in their deliberation of matters of mutual interest and concern. It provides that a committee of one House may, with the written permission of the Speakers of the National Assembly and the Senate, hold a joint sitting with the corresponding committee of the other House to deliberate on matters of mutual interest and concern.
29. Clause 17 provides for the conduct of joint sitting of the Houses of Parliament. It mandates that the Speaker of the National Assembly shall preside, assisted by the Speaker of the Senate. The Clause proposes that at any Joint Sitting of the Houses, the Standing Orders of the National Assembly to apply with modifications and variations as the Speaker of the National Assembly may consider necessary or appropriate. It further proposes that the Speakers of the Houses of Parliament to be allowed to enforce any directions given during a joint sitting in relation to the conduct of a Member of Parliament in accordance with the applicable provision of the National Assembly Standing Orders.
30. Clause 18 on address of Parliament by visiting dignitaries, intends to allow the Speakers of the Houses of Parliament in consultation with the Leaders of the Majority and Minority Party, to arrange for a joint Parliamentary sitting for purposes of such address.
31. Clause 19 outlines public participation processes to be followed by each House of Parliament and its committees to facilitate conformity with Article 118 of the Constitution.
32. Clause 20 seeks to encourage the use of alternative dispute resolution by the Houses of Parliament before the formal declaration of the existence of a dispute between the Houses. The Clause provides that the Houses of Parliament should, in good faith, make every reasonable effort and take all necessary steps to amicably resolve their disputes by initiating direct negotiations with each other or through an intermediary. The Clause proposes a procedure to be followed in exercise of its recommendation for the exhaustive use of alternative dispute resolution mechanisms with the objective of having the Courts be the measure of last resort. It also proposes to surcharge state and public officers for advising a House to pursue judicial action.

1.4. Consequences of the Bill

33. If enacted, the Bill will extensively claw back on the Senate's legislative mandate as well as expose public and state officers to punitive measures for undertaking their functions.

CHAPTER TWO: CONSIDERATION BY THE COMMITTEE

2.0 Introduction

34. The Houses of Parliament (Bicameral Relations) Bill, 2023 (National Assembly Bills No. 44 of 2023) was read a First Time in the Senate on Thursday, 28th March, 2024, following which it stood committed to the Standing Committee on Justice, Legal Affairs and Human Rights for consideration.
35. The Committee, pursuant to the provisions of Article 118 of the Constitution and Standing Order 145 (5) of the Senate Standing Orders, proceeded to undertake public participation on the Bill. In this regard, the Committee published an advertisement in the *Daily Nation* and *Standard* newspapers on Tuesday, 2nd April, 2024 inviting members of the public to submit written memoranda on the Bill. The advertisement was also posted on the Parliament website and social media platforms. A copy of the advertisement is attached as *Annex 5*.
36. In response to the advertisement, the Committee did not receive any submissions from stakeholders or members of the public.
37. The Committee therefore held several meetings to consider the Bill and identified the following issues for its consideration:
 - (a) at what stage should the determination of the nature of bills be done, and is it to be done for all bills being considered by either House?
 - (b) what is a bill concerning counties?
 - (c) what is a money bill?
38. In considering the above issues, the Committee identified the relevant provisions of the Constitution, as well as various court decisions on the matters under consideration.

2.1. Determination of the nature of bills

39. Article 110(3) of the Constitution states as follows—

(3) Before either House considers a Bill, the Speakers of the National Assembly and Senate shall jointly resolve any question as to whether it is a Bill concerning counties and, if it is, whether it is a special or an ordinary Bill.
40. A plain reading of Article 110(3) of the Constitution is that **BEFORE** either Houses considers a Bill, the Speakers must resolve whether the Bill concerns counties.

41. This issue was conclusively settled by the Supreme Court in 2013 in *Advisory Opinion Reference No. 2 of 2013; In the Matter of the Speaker of the Senate & Another [2013] eKLR*. However, the National Assembly claimed that the decision of the Supreme Court was merely advisory and not binding and therefore continued to bypass the Senate in enacting legislation.

42. The Supreme Court in *Advisory Opinion Reference No. 2 of 2013* held that the joint resolution of the Speakers is a mandatory condition precedent before a Bill is considered in the originating House. The Supreme Court stated as follows:

*“[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 a 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)].

2.2. Bills concerning counties

43. Article 110 of the Constitution provides as follows:

“110. Bills concerning county government

(1) In this Constitution, “a Bill concerning county government” means—

(a) a Bill containing provisions affecting the functions and powers of the county governments set out in the Fourth Schedule;

(b) a Bill relating to the election of members of a county assembly or a county executive; and

(c) a Bill referred to in Chapter Twelve affecting the finances of county governments.

(2) A Bill concerning county governments is—

(a) a special Bill, which shall be considered under Article 111, if it—

(i) relates to the election of members of a county assembly or a county executive; or

*(ii) is the annual County Allocation of Revenue Bill referred to in Article 218;
or*

(b) an ordinary Bill, which shall be considered under Article 112, in any other case.

44. The Supreme Court in *Advisory Opinion Reference No. 2 of 2013* (supra) stated as follows:

“[102] The Court’s observation in Re the Matter of the Interim Independent Electoral Commission is borne out in an official publication, Final Report of the Task Force on Devolved Government Vol. 1: A Report on the Implementation of Devolved Government in Kenya [page. 18]:

“The extent of the legislative role of the Senate can only be fully appreciated if the meaning of the phrase ‘concerning counties’ is examined. Article 110 of the Constitution defines bills concerning counties as being bills which contain provisions that affect the functions and powers of the county governments as set out in the Fourth Schedule; bills which relate to the election of members of the county assembly or county executive; and bills referred to in Chapter Twelve as affecting finances of the county governments.

*This is a very broad definition which creates room for the Senate to participate in the passing of bills in the exclusive functional areas of the national government, for as long as it can be shown that such bills have provisions affecting the functional areas of the county governments. For instance, it may be argued that although security and policing are national functions, how security and policing services are provided affects how county governments discharge their agricultural functions. As such, a bill on security and policing would be a bill concerning counties With a good Speaker, the Senate should be able to find something that affects the functions of the counties in almost every bill that comes to Parliament, making it a bill that must be considered and passed by **both Houses.**”*

45. The Supreme Court has held that any matters touching on county government should be so interpreted as to incorporate any national-level process bearing a significant impact on the conduct of county government. In *Supreme Court Petition 1 of 2018; Institute for Social Accountability & Another v National Assembly & 3 Others &*

5 Others (Petition 1 of 2018) [2022] KESC 39 (KLR) (8 August 2022) (Judgment), the Supreme Court held:

“70. In Re the Matter of the Interim Independent Electoral Commission, Sup Ct Const Appl No 2 of 2011 [2011] eKLR at para 40 we stated:

“We consider that the expression ‘any matters touching on county government’ should be so interpreted as to incorporate any national-level process bearing a significant impact on the conduct of county government.” [emphasis added]

71. This court’s jurisprudence is to the effect that a matter touching on county government incorporates any national-level process bearing significant impact on the conduct of county government.”

46. In *HC Petition 272 of 2016; Council of County Governors v Attorney General & 2 others; Commission on Revenue Allocation & 15 others (Interested Parties) [2019] eKLR*, the High Court applied a holistic reading of the Constitution. In this regard, the High Court found that the role of the national government under Article 204 of the Constitution (Equalisation Fund) as read with section 18 of the Public Finance Management Act is limited to the operational aspects of establishment and maintenance of an account for the Equalisation Fund but the basic services for which the Equalisation Fund is to be used under Article 204(2) of the Constitution such as water, roads, health facilities and electricity at the local level, are county government functions under Part 2 of the Fourth Schedule to the Constitution. For that reason, they can only be implemented by the County Governments.

47. In *High Court Petition 252 of 2016; Council of County Governors v Attorney General & 4 others; Controller of Budget (Interested Party) [2020] eKLR* the High Court considered conditional grants granted to county governments by the national government under Article 202 (2) of the Constitution. The High Court held that the purpose of conditional or unconditional grants is to enable the national government to meet its policy objectives at the county level of government. However, while

allocating such grants, the national government is expected to adhere to the provisions of Article 189(1) of the Constitution by firstly, performing its functions and exercising its powers in a manner that respects the functional and institutional integrity of the county level of government. Secondly, the High Court held that the national government must respect the constitutional status of the county level of government. The High Court found that the national government violated the provisions of Article 187 of the Constitution by allocating money intended for functions of the county level of government without liaising with the county level of government.

48. These two decisions of the High Court are further buttressed by the Supreme Court finding in *Supreme Court Petition 1 of 2018; Institute for Social Accountability & Another v National Assembly & 3 Others (supra)* that a Bill which affects the allocation of revenue to the county governments is a Bill concerning county governments as it affects the powers and functions of the county governments. The Supreme Court stated as follows:

*“Drawing from the above analysis, we fault the appellate court’s restrictive approach in interpreting the law to hold that the Bill in its objects indicated that it did not concern county governments or affect the powers and functions of the county governments. **It is our considered view, that the replacement of article 202 of Constitution with article 206(2) had an effect on the allocation of revenue to the county governments. Consequently, we find that the CDF (Amendment) Act, 2013 had an effect on the functioning of county governments.**”* (emphasis added)

49. Further, Bills touching on the mandate, powers and functions of the Senate directly affect the Senate’s ability to undertake its constitutional mandate including its ability to consider bills that affect counties and therefore are Bills concerning county governments. This is consistent with the findings of the Court of Appeal in *Nairobi Civil Appeal; E084/2021; National Assembly Another vs Senate of Kenya & Others* and the High Court in *Nairobi High Court Petition Number 284 of 2019*

consolidated with Nairobi High Court Petition Number 353 of 2019; Senate of Kenya and Others vs The National Assembly & Another.

50. The Court of Appeal in Nairobi Civil Appeal; E084/2021; National Assembly Another vs Senate of Kenya & Others held:

“176. But having said that, it is necessary to observe that at the time of enactment of the 2002 Act, there was only one House of Parliament, the National Assembly. And at the time, it had the sole mandate to enact such legislation. Following the promulgation of the 2010 Constitution, and with the establishment of two Houses of Parliament, the situation changed. Any bills enacted to govern the administration and operations of the Houses of Parliament would of necessity require to take into account the existence of the two Houses. This is particularly because of, and we discussed this earlier, the establishment of a bicameral Parliament with two Houses of Parliament where each was accorded its own separate and distinct role to play at the national and county levels of government.

177. Indeed, if special attention was made to ensure that the composition of the members of the Parliamentary Service Commission established by Article 127 of the Constitution equally represented both Houses, it would follow that both Houses required to be provided with an equal opportunity to enact legislation that would affect their joint and several operations. It was not possible for the Senate to be reduced to a bystander in the enactment of a bill that would have such a profound impact on its administrative operations.

178. With the result that in the interest of ensuring that both Houses have an equal opportunity to chart their respective destinies, it was right and just that before the bill was passed into law that the Senate was provided an opportunity to consider and pass the Parliamentary Service bill. Since the Appellants conceded that because the bill affected the workings of both Houses, that the Senate had the right to consider and pass the bill, by passing the bill into law without the Senate having had an opportunity to consider it, we find its passage

to be unconstitutional for want of the Senate's consideration."

51. Under Article 110 (1) (a) of the Constitution, a Bill is a Bill containing provisions affecting the functions of a county government if the Bill:
- (a) directly or indirectly affects the operations of the county governments;
 - (b) would have a direct or indirect impact on the functions of county governments under Part 2 of the Fourth Schedule to the Constitution;
 - (c) would have an impact on the exercise by any person upon whom a function or power is conferred under the Bill on any institution or office of the county government, the finances of the county government or the property held by or vested in the county government;
 - (d) contains provisions which the county governments are required to implement or are binding on county governments;
 - (e) confers a function or power on a person that would affect the exercise of the functions and the powers of the county governments under the Fourth Schedule to the Constitution;
 - (f) seeks to transfer a function or power between the National Government and the county governments under Article 187 of the Constitution;
 - (g) that affects the ability of the Senate to carry out its functions under Article 96 of the Constitution; or
 - (h) provides for any other matter that would directly or indirectly affect the functions and powers of the county governments.
52. Under Article 110(1)(c) of the Constitution, a Bill is a Bill concerning county governments if the Bill is referred to in Chapter Twelve affecting the finances of county governments. These Bills are as follows:
- (a) the equitable sharing of revenue under Article 202(1) of the Constitution;
 - (b) the additional allocation of funds from the National Government's share of revenue to county governments under Article 202(2) of the Constitution;

- (c) the additional allocation of funds to county governments under Article 190(1) of the Constitution including proceeds of loans and grants from development partners;
- (d) a matter relating to the appropriation and administration of the Equalisation Fund under Article 204 of the Constitution;
- (e) the sharing of revenue or any financial matter concerning county governments as contemplated in Article 205(1) of the Constitution;
- (f) the transfer of equitable share to the county governments pursuant to Article 219 of the Constitution;
- (g) the withdrawal of money from the Consolidated Fund under Article 206 of the Constitution that affects the finances of county governments;
- (h) the withdrawal of money from a County Revenue Fund;
- (i) the establishment of public funds by counties and the management of those funds;
- (j) the establishment of a fund by Parliament for the benefit of a county government or a county government entity;
- (k) advances from the Contingencies Fund under Article 208 of the Constitution that affect the finances of county governments;
- (l) the imposition of a tax, duty or charge under Article 209(3)(c) of the Constitution;
- (m) borrowing by the National Government under Article 211 of the Constitution;
- (n) public debt under Article 214 of the Constitution that is to be charged on a public fund established for the benefit of county governments;
- (o) borrowing by counties including the terms and conditions under which the National Government may guarantee a loan under Article 212(a) of the Constitution;

- (p) any matter concerning the Commission on Revenue Allocation under Articles 215 and 216 of the Constitution;
- (q) the form, content and timing of budgets for National and county governments prepared pursuant to Article 220 of the Constitution;
- (r) estimates for expenditure from the Equalisation Fund prepared pursuant to Article 221(2)(a);
- (s) an appropriation under Article 223(4) of the Constitution that affects the finances of a county government;
- (t) the form and procedure for processing county budgets and appropriation Bills prepared pursuant to Article 224 of the Constitution;
- (u) financial control measures and mechanisms under Article 225 of the Constitution;
- (v) the keeping of financial records and auditing of accounts of county governments and the designation of accounting officers in the county governments under to Article 226 of the Constitution;
- (w) the procurement of public goods and services under Article 227 of the Constitution;
- (x) the powers and functions of the Salaries and Remuneration Commission to set, review and advise on the remuneration and benefits of public officers in the county governments under Article 230(4) of the Constitution; or
- (y) any other matter referred to in Chapter Twelve of the Constitution affecting the finances of county governments; or
- (z) the Bill is –
 - (i) the annual Division of Revenue Bill under Article 218(1)(a) of the Constitution; or
 - (ii) the annual County Allocation of Revenue Bill under Article 218(1)(b) of the Constitution.

53. The Constitution does not define what a bill not concerning county governments is, and it may therefore be considered as any Bill that is not “a bill concerning county governments” upon joint determination by the Speakers of the two Houses.

2.3. Money Bills

54. ‘Money Bills’ are subject to the concurrence process as provided for under Article 110(3) of the Constitution. The Supreme Court in *Advisory Reference No. 2 of 2013* held that the Speakers, in addressing the nature of the Bill in question must settle three sub-questions, that is:
- a. is this a 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**?”*
55. Where the two Speakers have jointly resolved that a Bill concerns counties, the issue of ‘money Bill’ does not arise.
56. What constitutes a money bill is a matter of strict interpretation as such a Bill must solely deal with the matters specified in Article 114 (3) of the Constitution. This is in line with the provision in Article 114 (1) of the Constitution which provides:
- “114. (1) A money Bill may not deal with any matter other than those listed in the definition of a money bill” in clause (3).”*
57. Where a Bill deals with matters other than those listed in Article 114 (3) of the Constitution, the Bill is not a money Bill, that is, a bill may contain financial provisions but where the contents of the bill are outside the ambit of the matters listed in Article 114(3) of the Constitution, such a bill is a bill concerning county governments and not a money bill and therefore such a bill-
- (a) can originate in the Senate pursuant to Article 109(4) of the Constitution; and
 - (b) must be considered by both Houses of Parliament pursuant to Articles 110 to 113 of the Constitution.
58. Moreover, unlike Article 109 (3) which provides that a Bill not concerning county governments may only be **considered** in the National Assembly, Article 109(4) only restricts **introduction** of money Bills in the Senate, not the consideration of the same. Introduction of a Bill in this context means the same as origination of a Bill, while consideration would refer to debate, voting, public participation and other processes that a Bill goes through before it becomes law.





59. Further, Article 114 (3) of the Constitution cannot be read in isolation. It must be read harmoniously with Articles, 96 (1), 96 (2), 109 and 110 of the Constitution. Where the Speakers of both Houses concur that a Bill is one that concerns counties, pursuant to Article 109 (4), it must be passed in accordance with Articles 110 to 113, 122 and 123 of the Constitution and the Standing Orders of both Houses.
60. In addition, a conjunctive reading of Article 114 (3), Article 110 (c) and Chapter 12 of the Constitution, all of which provide for financial matters, would lead to the conclusion that where a Bill deals with financial matters and such matters affect the finances of county governments, such Bill affects counties and must be considered by the Senate.
61. Article 249(3) also provides that Parliament shall allocate adequate funds to enable each commission and independent office to perform its functions therefore meaning that the Senate, as one of the Houses of Parliament, has a role to play in annual appropriation of funds to commissions and independent offices.
62. Consequently, Article 114 (3) of the Constitution cannot be read in isolation to limit the mandate of the Senate as set out specifically under Articles 96 (1) and (2) of the Constitution.
63. Additionally, the Committee of Experts on Constitutional Review considered the need for efficiency of processing money bills and the need to strike a balance between the potential risk of burdening the Executive and the Executive unduly constraining Parliament. The Committee of Experts observed as follows –
- “While the CoE appreciated the potential risk of appropriations that could overburden the exchequer, it also noted that provisions on money bills should not enable the executive to unduly constrain the legislature’s independence and thus erode its oversight function. ... control of “the purse” is an important check on the executive in a presidential system.”*
64. The matter of the Senate’s participation in consideration of these Bills has been conclusively determined by the Supreme Court in *Advisory Reference No. 2 of 2013: The Speaker of the Senate and Another v the Attorney-General and 3 Others (In the Matter of the Speaker of the Senate & Another [2013] eKLR)*, and as restated in *Supreme Court Reference No. 3 of 2019: Council of Governors & 47 Others v. the Attorney-General & 3 others [2020] eKLR*. The Supreme Court, at paragraph 148(a) of *Advisory Reference No. 2 of 2013* observed as follows –
- “(a) The Division of Revenue Bill, 2013 was an instrument essential to the due operations of county governments, as contemplated under the*

Constitution, and so was a matter requiring the Senate's legislative contribution. Consequently, the Speaker of the National Assembly was under duty to comply with the terms of Articles 110(3), 112 and 113 of the Constitution, and should have co-operated with the speaker of the Senate, as necessary, to engage the mediation forum for resolution of the disagreement."

CHAPTER THREE: COMMITTEE OBSERVATIONS

3.0 Committee Observations on the Bill

65. Having considered the Bill, the Committee made the following observations, that –
- (a) during the 12th Parliament, the Senate had developed, considered, and passed the Determination of the Nature of Bills (Procedure) Bill (Senate Bills No. 30 of 2018), and referred it to the National Assembly for concurrence. However, the Bill was not considered by the National Assembly;
 - (b) on commencement of the 13th Parliament, there have been a few initiatives seeking to have the two Houses negotiate a legislative framework governing relations and processing of legislative business between the two Houses, but the initiatives have so far not been successful. One of the initiatives involved the establishment of a joint team to come up with recommendations on implementation of Article 110(3) of the Constitution with a view of reaching an amicable solution and recording a consent in *Supreme Court Petition No. 19 of 2021: The Senate of the Republic of Kenya vs the Speaker of the National Assembly of Kenya and others*. A second initiative was led by the Prime Cabinet Secretary, and each of the Houses was expected to prepare a draft Bill and submit it to the Attorney General, who would then prepare a harmonised draft for consideration. The Senate submitted an improved version of the Bill passed by the Senate during the previous Parliament;
 - (c) there has been no progress in the negotiations spearheaded by the Office of the Prime Cabinet Secretary towards agreeing on a version of the Bill that could be passed by the two Houses;
 - (d) thereafter, the National Assembly proceeded to publish its version of the Bill in August 2023, which had now been passed and referred to the Senate for concurrence;
 - (e) the Supreme Court has stayed making a determination on the Petition before it, regarding the concurrence procedure under Article 110 of the Constitution, to await the outcome of the negotiations between the two Houses;
66. The Committee further observes that –
- (a) the current Bill seeks to restrict the legislative mandate of the Senate contrary to Articles 1, 94, 96, 109, 110, 112 and 114 of the Constitution;
 - (b) Article 1 of the Constitution provides that all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution, and that the people may exercise their sovereign power either directly or through their democratically elected representatives. Parliament is one of the organs to which this people is to be delegated, and it may be exercised at national or at

- county level;
- (c) Article 94 (1) of the Constitution provides that the legislative authority of the Republic is derived from the people and, at the national level, is vested and exercised by Parliament, which under Article 93, comprises the Senate and the National Assembly. The exercise of the legislative authority that is contemplated under Article 94 as read with Articles 109 to 113 of the Constitution, therefore requires the participation of both Houses in the legislative process which constitutes the following two limbs—
 - (i) pursuant to Article 110 (3), through their respective Speakers, determining whether a Bill is one that concerns counties and if it is, whether it is a Special or an ordinary Bill; and
 - (ii) pursuant to Articles 96 (1) and (2), 109 and 110 (4) where the Bill concerns counties, considering such Bill in accordance with Articles 110 to 113, 122 and 123 and the standing orders of the Houses; and where it does not concern counties, it is considered by the National Assembly only, in accordance with Article 122 and the standing orders of the National Assembly;
 - (d) in each instance therefore, both Houses “ACT” or participate in the legislative process and the final product becomes an Act of Parliament. Where any of the two limbs is omitted, the final product is not an Act of Parliament but an Act of one House. Pursuant to Article 2 (4) of the Constitution, any act or omission in contravention of the Constitution is invalid; and
 - (e) the role of the Senate under Article 96 of the Constitution is to represent the counties and to protect the interests of the counties and their governments. The exclusion of the Senate from the legislative process in respect of Bills that concern counties is a breach of Article 110 of the Constitution and undermines the Senate’s ability to represent the counties and to protect the interests of the counties and their governments through the legislative process.

67. Additionally, the Committee observes that—

- (a) the Bill, as framed, violates the provisions of the Constitution by derogating from provisions of the Constitution and various judicial pronouncements on the procedure for introduction and processing of legislation in the two Houses as provided for in Article 110 of the Constitution, as follows –

- (i) it purports to restrict joint determination of the nature of a Bill, which Article 110(3) considers to be mandatory and a condition precedent before consideration of any Bill, to instances where a Speaker is “seized” of a question as to whether the Bill concerns county governments;
 - (ii) it purports to introduce a definition of what a Bill not concerning county governments is, and in the process, attempts to exempt a large category of Bills from the joint determination of the nature of the Bills by the Speakers of the two Houses of Parliament under Article 110(3), thus limiting the Senate’s role in legislating on matters concerning counties and therefore threatening the interests of counties and devolution in general;
 - (iii) the First Reading stage of a Bill is considered, in Commonwealth and Kenyan Parliamentary practice, as the first stage in the legislative process. It is at this stage that the joint determination of the nature of a Bill should be done, and not the Second Reading, as suggested in this Bill. This is because the Bill is considered by the relevant Committee of the House and subjected to public participation after the First Reading and before the Second Reading, hence consideration of the Bill will already have commenced if joint determination is done after the First Reading; and
 - (iv) it purports to subject Bills which have been passed by the Senate and thereafter referred to the National Assembly under Article 110 (4) to an additional process of determining if it is a money Bill or not. Further, Bills originating from the Senate have been held in abeyance citing the “money Bill” argument. This process has led to uncertainty in the legislative process by taking Bills through a process that is unknown to the Constitution, which process was previously declared to be unconstitutional and expunged from the National Assembly’s standing orders. This has ensured the continued erosion of the legislative mandate of the Senate and weakening of devolution;
- (b) the Bill also violates Article 118 of the Constitution by proposing that a Committee of the Second House of Parliament can elect not to conduct public participation on account of public participation conducted by a Committee of the other House of Parliament; and
 - (c) the Bill further contains provisions that seek to restrict access to judicial intervention, as well as punish state and public officers by introducing fetters and punitive measures to officers who would be deemed to have advised a House to

pursue judicial intervention in a matter, contrary to Article 236 of the Constitution.

68. The Committee therefore observed that proposing amendments would not cure the inherent defects in the Bill, and it would be better if the Bill were rejected at Second Reading and thereafter subjected to the mediation process under Article 113 without further delay so that a version of the Bill that does not violate the various constitutional provisions and claw back on the Senate's legislative mandate is negotiated and passed.

CHAPTER FOUR: COMMITTEE RECOMMENDATIONS

4.0 Committee Recommendations on the Bill

69. Arising from its Observations as set out in the preceding Chapter, the Standing Committee on Justice, Legal Affairs and Human Rights recommends that the Houses of Parliament (Bicameral Relations) Bill, 2023 (National Assembly Bills No. 44 of 2023) **be rejected** by the Senate at Second Reading stage, to pave way for mediation on the Bill as contemplated under Article 113 of the Constitution.