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SUPERVISOR

OKECH-OWITI

TOPIC:

**THE EFFECTIVENESS OF THE OVERSIGHT ROLE OF THE KENYAN
PARLIAMENT: A CASE STUDY OF THE PUBLIC ACCOUNTS &
INVESTMENT COMMITTEES IN THE NINTH PARLIAMENT**

OCHILO MBOGO AYACKO GEORGE

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Table of contents

List of Statutes, Orders in Council, Ordinances and Royal Instructions.....	i
List of Cases	iv
List of Abbreviations.....	v
Declaration	vii
Dedication	viii
Appreciation	ix

CHAPTER ONE

INTRODUCTION	1
1.1 Background	1
1.2 Objectives of the Study.....	12
1.3 Research Questions	13
1.4 Hypothesis	13
1.5 Research Methodology	14
1.6 Chapter Breakdown	14

CHAPTER TWO

THE EVOLUTION AND OPERATIONS OF PARLIAMENT AND

CAG	17
2.1 Overview	17
2.1.1 Introduction	17
2.1.2 The Westminster Model	20
2.1.3 Types of Legislatures	21
2.1.3.1 Rubber Stamp Legislatures	21
2.1.3.2 Arena Legislatures	22

2.1.3.3 Transformative Legislatures	23
2.1.3.4 Emerging Legislatures	24
2.2 PAC and PIC	26
2.3 Supreme Audit Institutions	30
2.4 Evolution of Kenyan Parliament	34
2.4.1 The Protectorate -1895-1920	35
2.4.2 Kenya Colony -1920-1963	39
2.4.3 Post-colonial period -1963-1969	46
2.4.4 Post-colonial period -1969-1992	48
2.4.5 Post-colonial period -1992-1997	51
2.4.6 Post-colonial period -1997-2002	53
2.5 PAC and PIC in Kenya	55
2.6 CAG and Parliament in Kenya	57

CHAPTER THREE

REVIEW OF THE 9TH PARLIAMENT

3.1 Overview	60
3.1.1 Introduction	60
3.1.2 Kenyans' Expectations of the 9 th Parliament	66
3.2 The Political and Legal Environment	69
3.2.1 Political Climate	69
3.2.2 The Legal Framework	78
3.3 Did the Legal Regime Allow for Effectiveness?	85
3.3.1 'The Constitution,' Parliament and CAG	85
3.3.2 Other Laws, Parliament and CAG	102

CHAPTER FOUR

CONCLUSION AND RECOMMENDATIONS

125

4.1 Introduction	125
4.2 Legal Framework	126
4.2.1 The Constitution	126
4.2.2 Other Laws	129
4.3 Political environment	133
4.3.1 Party Politics	134
4.3.2 The Whip System	135
4.3.4 Absence of Regulation of Political Parties	136
4.3.4 Imperial Presidency	137
4.4 Recommendations	138
4.4.1 Parliament and its Watchdog Committees	138
4.4.2 The CAG	142
Postscript	144
Appendix 1	147
References	150

List of Statutes, Orders-in-Council, Ordinances and Royal Instructions

1. Constituency Development Fund Act (No.10 of 2003).
2. Constitution of Kenya Revised Edition 2001.
3. National Assembly Remuneration (Amendment) Act (No. 2 of 2003).
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14. Public Procurement and Disposal Act (No. 3 of 2005).
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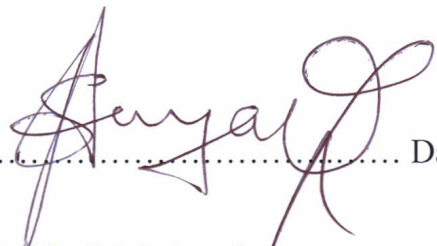
List of abbreviations

APP	African Peoples Party
CAG	Controller and Auditor General
CCK	Communications Commission of Kenya
CDF	Constituency Development Fund
DC	Departmental Committee
DP	Democratic party
EAD	Exchequer and Audit Department
ECK	Electoral Commission of Kenya
ERSWEC	Economic Recovery Strategy for Wealth & Employment Creation
FORD	Forum for the Restoration of Democracy
FORD-P	Forum for the Restoration of Democracy People
GAO	Government Accountability Office
GFMA	Government Financial Management Act
GNU	Government of National Unity
HBC	House Business Committee
INTOPAI	International Organisation of Supreme Audit Institutions
IPO	Initial Public Offer
IPPG	Inter-Parties Parliamentary Group
KACC	Kenya Anti-Corruption Commission
KADU	Kenya African Democratic Union
KANU	Kenya Africa National Union
KENAO	Kenya National Audit Office
KNAC	Kenya National Audit Commission
KNC	Kenya National Congress

KPU	Kenya Peoples' Union
LDP	Liberal Democratic Party
MoF	Ministry of Finance
MoU	Memorandum of Understanding
MP	Member of Parliament
NAK	National Alliance Party of Kenya
NAO	National Accounting Office
NARC	National Rainbow Coalition
NDP	National Development Party
NGOs	Non-Government Organizations
OAG	Office of the Auditor General
ODM	Orange Democratic Movement
ODM-K	Orange Democratic Movement Kenya
OIOS	Office of Internal Oversight Services
PAC	Public Accounts Committee
PAI	Public Audit Institution
PIC	Public Investment Committee
PICK	Party of Independent Candidates of Kenya
PNU	Party of National Unity
PS	Permanent Secretary
PSC	Parliamentary Service Commission
TI	Transparency International
UN	United Nations

DECLARATION

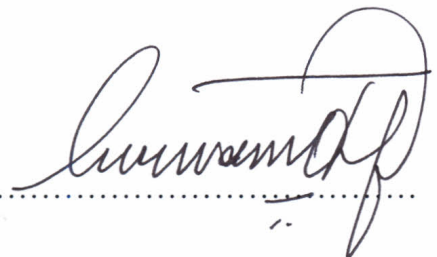
I Ochilo Mbogo Ayacko George do declare that this is my original work, which I have neither previously nor currently submitted for an award of a degree in any other university.

Signed  Date 23rd Day of Nov 2010

Ochilo M.G Ayacko

(G62/71827/2008)

This project is submitted for examination with my approval as university supervisor.

Signed  Date 23rd Day of Nov 2010

Okech-Owiti

Senior Lecturer, School of Law,

University of Nairobi.

DEDICATION

This project is dedicated to all Kenyans who were maimed, tortured or killed in their heroic struggles against tyranny and misrule and to many more who continue to fight for good governance, democracy and the rule of law to ensure that these virtues become the entitlement of all Kenyans.

APPRECIATION

My deepest appreciation goes first to the Almighty God for the gift of life and health, without which the commencement, continuance and completion of this project would not have been possible. Second, I owe my dear wife (Agnes) and children (Olivia and Louisa) profound appreciation for the support and encouragement I received from them as I burnt the mid-night candle writing the project. Third, I am forever indebted to my supervisor, Okech-Owiti, who was always available to advise on the project and promptly responded to my drafts. Fourth, my gratitude goes to my secretary, Jane Obiero, who tirelessly typed and retyped the scripts. Fifth, I am equally indebted to the Clerk of the National Assembly, Patrick Gichohi, and the acting Controller and Auditor General (CAG), who gave this study invaluable support by giving us access to information from Parliament and the office of the CAG.

Finally, it may not be possible to mention every person who provided support for this project. I none-the-less abundantly thank and wish all of them God's providence.

CHAPTER ONE

INTRODUCTION

1.1 Background

Kenya is a nascent multiparty democracy having returned to political pluralism only seventeen years ago. She is a former British colony and at her independence assumed most of British laws with little modification. She holds General Elections every five years to elect her political leaders- civic, parliamentary and presidential. These leaders serve for a term of five years unless elections are called earlier. The last General Election, which was the tenth since Kenya's independence from the British, took place in 2007. This study is in respect of the Parliament which was the result of the ninth General Election held in 2002. The Kenyan National Assembly is made up of two hundred and twenty four Members.¹ Two hundred and ten Members, including the President, represent parliamentary constituencies and twelve nominated members represent special interest.² The other two are the Speaker and the Attorney General, who are ex-officio members.

Kenya operates a system of Government that is hybrid; it is neither purely presidential nor absolutely parliamentary.³ The Independence Constitution established a parliamentary system of

¹ Section 31 of the Constitution of Kenya (Revised Edition, 2001).

² Ibid, Section 33

³ Murungi K., Ethnicity and Multi-partism in Kenya: Thoughts of Democracy, Series III, KHRC Publication, (February, 1995). See also Juma D., Devolution of Power as Constitutionalism: The Constitutional Debate in Kenya and Beyond, International Commission of Jurists, eds., Nairobi (2008), pp. 36-58. Available at SSRN: <http://ssrn.com/abstract=1382821> Accessed on 17th August, 2010.

governance headed by a Prime-Minister as Head of Government and the Queen/Governor as Head of State.⁴ Various amendments were visited on the Independence Constitution. Notable among them was the abolition of the Premiership and the establishment of the Presidency in 1964. The effect of the amendments was the establishment of a hybrid system with traits of both presidential and parliamentary systems of governance but with a bias towards the presidential system. Besides the President/ there is the Vice President who is the principal assistant to the President. After the 2007 General Elections, violence erupted in Kenya over the disputed results of the election. There was disagreement as to who won the presidential elections. To resolve the dispute, the two main parties in the elections, the Orange Democratic Movement (ODM) and the Party of National Unity (PNU) entered into a pact and created the position of the Prime-Minister and two Deputy Prime-Ministers.⁵ These three positions were later entrenched in the Constitution of Kenya as section 15A as read together with 'The National Accord and Reconciliation Act.'

The powers of the Government in Kenya are distributed amongst three arms of Government - the Executive, the Legislature and the Judiciary.⁶ Under the doctrine of separation of powers, these three arms are meant to operate independent of each other, but, strictly speaking, there is no such thing as absolute separation of powers in either their operations or composition. The three arms

⁴ Constitution of Kenya Review Commission, The Final Report of the Constitution of Kenya Review Commission, approved for issue at the 95th plenary meeting of the Constitution of Kenya Review Commission of Kenya held on the 10th February 2005; Muigai G., Constitutional Amendments and the Constitution Amendment Process in Kenya (1964-1997), A Study of the Politics of the Constitution, Ph.D Thesis, University of Nairobi (2001).

⁵ Refer to the National Accord and Reconciliation Act (No. 8 of 2008).

⁶ Chapter II, II, IV of the Constitution provide for Executive, Legislature and Judicature respectively.

of Government provide checks and balance to each other.⁷ For example, it has been widely acknowledged that the crucial role and power of Parliament over the Executive is to check the Executive's spending of the public money. In one of the Federalist Papers, Pablius wrote as follows about this role and power of the Legislature:

‘This power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure.’⁸

It is this power and role of Parliament that is the focus of this study. Paul Woltzwitz, the President of the World Bank Group, has indicated that most countries' Parliaments have the constitutional mandate to both oversee Government and hold it to account.⁹ In Kenya, this power is, indeed, a constitutional power. It is provided for under Chapter VII of the Constitution.

The Constitution provides that all revenues or other moneys raised or received for the purposes of the Government of Kenya shall be paid into and form a Consolidated Fund from which no moneys shall be withdrawn except as may be authorized by the Constitution or by an Act of Parliament (including an Appropriation Act) or by a vote on account passed by the National Assembly.¹⁰ Such payment should either be provided by the Constitution or Act of Parliament, or

⁷ Colburn J.E., *Democratic Experimentalism: A Separation of Powers for Our Time?* *Pennsylvania State University - Dickinson School of Law* (March 5, 2003) at SSRN: <http://ssrn.com/abstract=38622> (Accessed on 4th August 2009)

⁸ *Republicanism, Representation and Consent: Views of the Founding Era* by Daniel Elazar (Paperback - Jan 1, 1979) available at: <http://www.amazon.com/>. (Accessed on the 4th August 2009).

⁹ ‘Parliament that Work’ Conceptual Framework and Indicators for Measuring the Performance of Legislative Institutions available at: [Http://Www.Google.Co.Ke/Search?hl=En&Q=Parliament+That+Work%2C+CONCEPTUAL+FRAMEWORK+AND+INDICATORS+FOR+MEASURING+THE+PERFORMANCE+OF+LEGISLATIVE+INSTITUTION S&Meta](http://Www.Google.Co.Ke/Search?hl=En&Q=Parliament+That+Work%2C+CONCEPTUAL+FRAMEWORK+AND+INDICATORS+FOR+MEASURING+THE+PERFORMANCE+OF+LEGISLATIVE+INSTITUTION+S&Meta). (Accessed on 4th August 2009).

¹⁰ Section 99 of the Constitution of Kenya (Revised Edition, 2001).

voted by the National Assembly. Sub-section 2 of that section allows for provision of money in another public fund as may be provided under a law. This section gives Parliament power to prescribe the manner in which withdrawals may be made from the Consolidated Fund or any other fund of the Government of Kenya.

The subsequent section of the Constitution gives the Minister responsible for finance power to prepare estimates of revenues and expenditure of Government for the next financial year (the Budget).¹¹ The Minister lays a budget before Parliament for approval. Parliament may or may not approve. The section also provides for supplementary budgets, which must be approved by Parliament.

The same Constitution empowers Parliament to make provision for the establishment of a Contingencies Fund and to authorize the Minister for the time being responsible for finance to make advances from that Fund to meet certain needs.¹²

The Constitution also provides that all debt charges for which the Government of Kenya is liable shall be a charge on the Consolidated Fund. Such debt charges include interest, sinking fund charges, the repayment or amortization of debt, and all expenditure in connection with the raising of loans on the security of the Consolidated Fund and the service and redemption of a debt created thereby.¹³

¹¹ Ibid, section 100.

¹² Ibid, section 102.

¹³ Ibid, section 103.

The Constitution provides for the payment of salaries of certain officers from the Consolidated Fund. Such offices are the office of judge of the High Court, judge of the Court of Appeal, members of the Public Service Commission, members of the Electoral Commission, the Attorney-General and the Controller and Auditor-General.¹⁴

The Constitution establishes the office of the Controller and Auditor-General which is an office in the public service. The Controller and Auditor-General is charged with the following duties:

1. To satisfy himself that any proposed withdrawal from the Consolidated Fund is authorized by law, and if so satisfied, to approve the withdrawal¹⁵
2. To satisfy himself that all moneys that have been appropriated by Parliament and disbursed have been applied to the purposes to which they were so appropriated and that the expenditure conforms to the authority that governs it
3. To ensure that at least once in every year he/she audits and reports on the public accounts of the Government of Kenya, the accounts of all officers and authorities of that Government, the accounts of all courts in Kenya (other than courts no part of the expenses of which are defrayed directly out of moneys provided by Parliament), the accounts of every Commission established by the Constitution and the accounts of the Clerk of the National Assembly.¹⁶

The section further empowers the Controller and Auditor-General and any officer authorized by him/her to have access to all books, records, returns, reports and other documents which in his/her opinion relate to any of the accounts referred to above.

¹⁴ Ibid, section 104.

¹⁵ Although the Constitution mandates the CAG to authorize and approve withdrawals from the Consolidated Fund, this is not the case as discussed later in Chapter 3

¹⁶ Ibid, section 105

The Controller and Auditor-General shall submit every report made by him to the Minister for the time being responsible for finance who shall, not later than seven days after the National Assembly first meets after receipt of the report, lay it before the Assembly. This office is meant to be independent in the discharge of its duties.

These constitutional provisions demonstrate that Parliament in Kenya has a pivotal role in ensuring that public funds are used accountably and transparently. They also demonstrate the relationship between the Controller and Auditor General and Parliament. The institution of Parliament and parliamentarians are crucial in serving as a bridge between state and society and in implementing and strengthening the values of accountability, transparency and participatory governance.¹⁷

As indicated earlier, because of the large number of members the Kenyan Parliament may not efficiently carry-out its duties as a collective body. To enhance efficiency, the Kenyan Parliament, like many Parliaments throughout the world, has constituted several committees to carry out various tasks. These committees enable members of the public to participate in the legislative and governance processes by either appearing before the committees or sending memoranda to air their views and give suggestions on how operations of Government could be improved.

The Final Technical Report on the Kenya Legislative Strengthening Project recognizes the importance of these committees and states as follows:

¹⁷ World Bank Institute, *A Parliamentarian's Handbook on Controlling Corruption*, 2nd ed., Canadian International Development Agency (CIDA): Parliamentary Centre (2000).

‘A functional committee system is the lifeblood of an effective legislative body. Without the division of labour made possible for MPs through committees, it is simply not possible for MPs to carry out their constitutional and legal mandate to perform their representative, legislative and oversight duties.’¹⁸

The Standing Orders of the Kenyan Parliament provide for the formation of five kinds of committees: Sessional Committees; Standing Committees; Select Committees; *Ad hoc* Committees and Departmental Committees.¹⁹ This study is concerned with the Public Accounts Committee and the Public Investment Committees which are both Standing and Sessional committees (they are Standing Committees in that they are expressly named, given functions and their existence is provided for in the Standing Orders and not merely formed temporarily to look at specific matters then be dissolved once their mandate is extinguished while at the same time they are Sessional Committees in that the membership to these committees is only for a parliamentary session as opposed to a parliamentary term as membership in the Departmental Committees). This study is concerned with these two committees because their work involves direct financial oversight on behalf of Parliament.

The Public Accounts Committee and the Public Investment Committee are constituted under Standing Order No. 147 and No. 148 respectively in the revised Standing Orders.²⁰ They consist of a minimum of five and a maximum of eleven members nominated by the House Business

¹⁸ Center for International Development, Kenya Legislative Strengthening Project Final Technical Report, Nairobi, USAID/Kenya, Task Order No. 801, 2004.

¹⁹ See www.bunge.go.ke/parliament/committee_system.php (Accessed on 9th May, 2009).

²⁰ National Assembly Standing Orders (Revised Edition, 2003).

Committee and appointed by the House, on a motion by the Leader of Government Business.

The lifespan of the membership of these committees is for a session of the house sitting.

The Public Accounts Committee examines reports by the Controller and Auditor-General on central Government expenditure and Consolidated Fund accounts. It also considers results of value-for-money audits of the Government and other organizations which are within the purview of public audit. It may summon Government officials and senior staff of public organizations to attend public hearings to give explanation, evidence or information, or any other person to assist it in relation to such explanation, evidence or information if deemed necessary.²¹

The Public Investments Committee is charged with the duties of examining:

1. Reports by the Controller and Auditor-General on accounts of state corporations
2. Reports and accounts of public investments
3. Reports that are in the context of autonomy and efficiency of public investments, whether the affairs of public investment are being managed in accordance with sound business principles and prudent commercial practices.²²

This study focuses on the effectiveness of the oversight functions of Parliament by examining whether PAC and PIC discharged their mandates during the tenure of the 9th Parliament. During the period under study, several monumental financial scandals dogged the public sector. Most of these scandals brought into sharp focus the effectiveness of the oversight role of these committees. Some of these scandals are mentioned herebelow.

²¹ Ibid, No. 147.

²² Ibid, No. 148.

The Anglo Leasing Scandal

During 2004/2005 and part of 2005/2006 financial years, the Kenya National Audit Office conducted an audit on 18 Security Related Contracts funded by the Foreign Supplier/Credit arrangements.²³ The audit revealed that a total of Kenya Shillings. 17, 543 958 973 had been erroneously paid out as at 30th June 2005. Out of the 18 projects, twelve were contracted and respective agreements signed between 1997 and December 2002 while the remaining six were contracted and signed between January 2003 and January 2004.²⁴ The Report further indicates that competitive bidding as provided for in the Public Procurement Regulations (2001) was not applied in the identification and award of the contracts to the various suppliers. The suppliers were also not subjected to due diligence tests; thus their competence, capacity and capability to deliver on the contracts was not established.

Prior to the Controller and Auditor General's Report, on the 22 November 2005, John Githongo who was a Permanent Secretary in the Office of the President in-charge of Governance and Ethics, had made and sent to the President a ninety-one page report on his findings regarding cases of corruption concerning Anglo Leasing. This report triggered the audit by the Controller and Auditor General on Anglo Leasing contracts.

Safaricom Initial Public Offer (IPO) and Privatization of Telkom.

Before the issuance of Safaricom shares through an Initial Public Offer and the privatization of Telkom, Parliament through its Public Investments Committee did an inquiry into these

²³ Special Audit Report of the Controller and Auditor General on Financing Procurement and Implementation of Security Related Projects, (April 2006).

²⁴ Ibid, p. 8.

transactions. The committee made several findings and made recommendations to the Executive arm of Government.²⁵ Included in the Public Investment Committees findings and recommendations are positions discussed below.

1. 10% shareholding of Telkom Kenya Limited was irregularly transferred to Mobitelea Ventures Limited without the consent of Treasury and that of the parent ministry.
2. The Director of the Kenya Anti-Corruption Commission (KACC) should immediately institute investigations into the circumstances and manner in which Telkom's shares were transferred to Mobitelea and take action against anyone found culpable.
3. The Director of KACC should include a progress report on the Telkom-Mobitelea investigations in the Commission's quarterly report to Parliament.
4. The PIC, on behalf of Parliament, invites the Organization of Economic Cooperation and Development (OECD), the United Nations (UN), Transparency International (TI), and the Serious Fraud Office of London to also undertake investigations on the apparent grand corruption conceived and orchestrated by Vodafone PLC in Kenya.
5. The Chief Executive of the Communications Commission of Kenya (CCK), John Waweru, should be asked to step aside until the investigations are completed 'due to his role on the Board of the defunct KP&TC and Telkom Kenya at the time changes in Safaricom shareholding took place.
6. The Board members who discussed the Telkom Kenya Board Paper No. 56/99 and seem to have abetted the irregular transfer of public shares of Safaricom should be barred from holding public office.
7. The value of the 10% shares of Safaricom ceded to Mobitelea Ventures should be determined and Mobitelea and or Vodafone PLC be made to redeem the determined value by June 2008.
8. The awaited Initial Public Offer (IPO) of Safaricom Limited should be suspended until such time when the investigations into the transfer of Safaricom's shares to Vodafone PLC and Mobitelea are completed.

²⁵ Report by the Task Force on Grand Corruption, The Causes for Public Concern on the Telkom Privatization and Safaricom IPO.

9. The 10% of Safaricom shares that was irregularly transferred to Vodafone PLC should immediately revert to Telkom Kenya to hold in trust for the Kenyan public.

The Executive arm of Government literally refused to implement these recommendations and carried out these privatizations without any regard to the recommendations or the Privatization Act that Parliament had passed. The Minister for Finance had refused to bring the Act into operation. The refusal by the Executive to implement the recommendations tells a lot about the effectiveness of these two oversight committees. The blatant disregard of recommendation by Parliament and failure to operationalize the law begged a re-look into the ability of Parliament to hold the Executive to account.

These transactions, Safaricom IPO, Telkom privatization, and the Anglo Leasing scandal generated heated and acrimonious debate in Parliament. There were sharp divisions along political party lines with each political party seeking to have its way. Such divisive debates on many occasions have hampered the efficient discharge of duties by the two oversight committees. Resolution of issues by consensus and bipartisan approach is lost in the wake of such acrimony.

It is against this background that this study investigated the effectiveness of Parliament's oversight functions by examining effectiveness of the Public Accounts Committee's and the Public Investment Committee's watch over public funds during the 9th Parliament. The 9th Parliament was unique in the sense that it was the first post-KANU and post-Moi Parliament. KANU and Moi had ruled Kenya for decades and had shown no inclination towards reform

and/or being accountable to Parliament.²⁶ A new President and a new ruling party, the National Rainbow Coalition (NARC), had been elected on the promise of reform and accountability. It was also during this period that the effect of recently attained financial and administrative autonomy of Parliament through the constitutional establishment of the Parliamentary Service Commission was expected to be felt.

Following the many financial scandals that dogged the Executive during the tenure of the 9th Parliament, the exposure and audit of these scams by the Controller and Auditor-General and the constitutional duty of Parliament to watch over Government's handling of public funds, the effectiveness of the oversight role of Parliament was called into question. Using the 9th Parliament as the case study and specifically PAC and PIC, the study sought to answer the following research problem:

‘How effective is the oversight role of Parliament over public finances, a duty that is delegated to the Public Accounts and Investment Committees?’

1.2 Objectives of the Study

The purpose of the study was to inquire into the effectiveness of oversight functions of Parliament by studying PAC and PIC.

The specific objectives of the study were to:

1. Examine the extent to which Parliament, through PAC and PIC, was effective in carrying out its oversight role on the use of public funds.

²⁶ President Daniel Arap Moi was the second president in Kenya since independence and ruled Kenya for a record 24 year through Kenya African National Union, a party that had ruled since independence in 1963.

2. Interrogate the factors that determined/affected the extent of its effectiveness.

1.3 Research Questions

The study sought to answer the following questions:

1. To what extent was 9th Parliament, through PAC and PIC, effective in carrying out its oversight role over the use of public funds?
2. What factors determined/affected the extent of its effectiveness?
3. What remedies to the factors which caused the ineffectiveness of the oversight role of the 9th Parliament, if any, would be needed?

1.4 Hypothesis

The study hypotheses were:

1. The 9th Parliament (and its' PIC and PAC) was not effective in the discharge of its oversight role over public funds.
2. Political interference, lack of necessary capacity (technical and financial expertise) in the committees among others were factors that affected/determined the extent of Parliament's effectiveness in exercising its oversight role over use of public funds.
3. Constitutional and legal reforms would be necessary to remedy ineffectiveness of the oversight role of 9th Parliament.

1.5 Research Methodology

The research used both quantitative and qualitative data. Qualitative data was collected through in-depth interviewing of former Chairpersons of PIC and PAC, staff of CAG and clerks assigned to PIC and PAC in the 9th Parliament, who we identified as key informants in this study. These in-depth interviews with key informants were carried out to obtain information regarding the oversight function and effectiveness of Parliament, PAC and PIC, identify weaknesses and propose reforms to strengthen the oversight function and effectiveness in these institutions. The interviews further sought anecdotal evidence to support claims made regarding legal and technical weaknesses and concerns as experienced and perceived by or key informants during their tenure of office. The interviews were conducted using interview schedules/guide annexed. The data was codified into themes for ease of analysis.

The information derived from these in-depth interviews supplemented data sourced from the Hansard, minutes of PAC and PIC meetings, reports of CAG, PAC and PIC and books, journal articles and other works, and statutes.²⁷

In-depth interviews were used to gather data from members of PIC, PAC and CAG who worked during the 9th Parliament, including the technical staff of the aforecited entities. The nature of data from these interviews was geared at answering research questions relating to whether PIC and PAC in the 9th Parliament were effective in their oversight role and what factors contributed to the state. Further the data was expected to confirm or nullify the hypothesis suggesting that political interference and lack of necessary capacity (technical and financial expertise)

²⁷ See appendix 1 for a tabulation of the methodology used.

contributed to the effectiveness or otherwise of PIC and PAC. Finally, this data shed more light on other reasons for effectiveness or lack of it.

The interviews were restricted to the chairpersons and one member of each committee during the period under study, and two senior members of staff of CAG who were in office during the same period.

This study report is divided into four chapters, apart from this introductory chapter. Chapter Two gives a brief history of evolution of Parliament, types of Supreme Audit Institutions and history of PAC, and how they were introduced and have developed in Kenya. It explains the oversight role of Parliament exercisable through PAC and PIC and the relationship between Parliament and the office of the Controller and Auditor-General in respect of overseeing utilization of public funds. In this chapter a number of findings were made. The first is that parliamentary practice in Kenya originated in the colonial epoch and has a close semblance to the Westminster model of parliamentary practice. The second is that the Kenyan CAG is a Westminster prototype. The third is that through various constitutional amendments, the balance of power between the Executive and Parliament has tilted in favor of the Executive. The last one is that political pluralism has been on and off but has lately taken permanent inclusion in the Constitution.

Chapter Three interrogates the activities of the 9th Parliament, particularly the oversight role of Parliament over public funds, through PIC and PAC. The effectiveness of the office of the Controller and Auditor General, specific financial scams and how they were handled by the house and its two committees are examined. The chapter further identifies the weaknesses and strengths of PIC, PAC and the office of the CAG. A number of findings emerged in this chapter, the first of which is that the factors that influenced the effectiveness of oversight were the

political and legal environments under which oversight was conducted. Second, it was noted that the legal framework of the 9th Parliament had gaps which blunted the effectiveness of oversight. Third, it emerged that the political environment was riddled with wrangles and ‘political grandstanding’, attributes which impacted negatively on oversight and objectivity of decision making. The final finding was that the absence of technical and financial autonomy was an impediment to effective oversight.

Chapter Four, which is the final chapter, is the study’s conclusion and recommendations. It noted that the effectiveness of oversight functions of the 9th Parliament was hampered by the legal and political climate under which it operated. Changes to the legal framework are recommended. These changes range from clear constitutional provision on separation of powers and functions of Parliament vis-à-vis the Executive to amendment of other laws, to give effect to effective oversight.

CHAPTER TWO

THE EVOLUTION AND OPERATIONS OF PARLIAMENT AND CAG

2.1 Overview

2.1.1 Introduction

If Parliament is to be defined as a legislative organ of Government, then it would be correct to posit that Parliaments are as old as governance in society.²⁸ At the advent of Government executive, legislative and judicial functions of Government were fused in one institution: the ruler. The first 'Government' was hypothetically formed at the sunset of the *Hobbessian Society*²⁹, upon the creation of the *Leviathan* or the Commonwealth.³⁰ As the demand for civil and political rights gained currency, rulers/sovereigns were compelled to yield to the right of

²⁸ Wailer J., Steps to a Tripartite Theory of Multi-level-Government, in Jean Monnet Working Paper 5/03 Christoph Möllers, New York University, School of Law, New York (2003).

²⁹ The Hobbessian society refers to the state of society before civilization as described by Hobbes in his book *The Leviathan*. In such a society life was touted to be based on survival for the strongest and people got property by robbing, attacking or killing and even the strong could be killed in their sleep, there were no rules or norms and life was 'short brutish and nasty' as described by Hobbes in his conclusion.

³⁰ See, Hobbes T., *The Leviathan or the Matter, Form and Power of a Commonwealth, Ecclesiastical and Civil*, Printed for Andrew Crook at the Green Dragon at St. Paul's Church Yard, London (1652).

citizens to approve legislation directly or through their representatives. For instance in the ancient Greece, direct public assemblies or plebiscite, made law.³¹

Parliaments have since evolved, through the span of human history, from direct public meetings in city states, through small advisory assemblies to large legislative, oversight and vetoing bodies. Indeed, different forms of Parliament now characterize almost every polity worldwide. The iconic parliamentary journey has been fueled by the inherent human desire to control his welfare³² without jeopardizing his interests. The Napoleonic slogan of 'no taxation without representation' which characterized the French and the American revolutions evidenced the evolution of Parliament as an institution representing people.

Contemporary parliamentary notion began with audacious experiments in the medieval Greece and Rome.³³ In those two punctual civilizations, leading citizens adorned assemblies that pondered and decided over grave matters that excited public interest.³⁴ Kings and other rulers used councils and meetings of lords to advise them in law-making. The Greeks and the Romans

³¹ In what has been referred to as 'Government by Common Mass Assembly' by Dr. Almon Leroy Way Jr. in his *Constitutional Democracy and Other Political Regimes*, Cyberland University Of North America, (2002). p.1. See also Min Shu's, *Direct Democracy in Ancient Athens and Rome* (2009), www.aoni.waseda.jp/min.shu/teaching/referendum/DD2.pdf (Accessed on 15th, February, 2010).

³² A concept which has been reiterated in many political and social revolutions. The American Declaration of Independence finalizes the reason for their quest for independence that 'we hold that these truths are self evident...that every man is born equal...and is bequeathed with the inalienable rights to life ,liberty and the pursuit of happiness'. See The Declaration of Independence at www.constitution.org/usdeclar.

³³ Gavin S., *Acts of Parliament: A Narrative History of the Senate and House of Representatives Commonwealth of Australia* Melbourne University Press, Carlton South Vic (1988).

³⁴ See David C., *The History of Parliament: Past, Present - and Future?* In *Parliamentary History*, Vol. 26, pt. 3, pp. 366-386, Institute of Historical Research, University of London, London (2007).

used assemblies of leading citizens to make decisions.³⁵ Kings and other rulers used councils and meetings of lords to advise the ruler in law-making.³⁶

During the last few hundred years, the concept of electioneering characterized many countries, with Parliament being largely composed of elected representatives who make laws on behalf of all citizens.³⁷ In France the law-making body (*Le parlement*), consists of the National Assembly and the Senate. In Germany the Federal Parliament (the *Reichstag*) includes the *Bundestag* and the *Bundesrat*. When the United States adopted its Constitution in 1788, Congress was established consisting of the House of Representatives and the Senate. In 1979, Europeans voted for the first time for a European Parliament in Strasbourg.³⁸

The United Kingdom (UK) Parliament is one of the oldest modern archetype Parliaments, which was first started at the Westminster palace. The Westminster conceptualization of Parliament was later exported by the British to their colonies. Former British colonies such as Australia, Canada and New Zealand adopted the British parliamentary model in the 19th century while others such as India,³⁹ Kenya⁴⁰ and Malaysia⁴¹ did so in the 20th century. This British

³⁵ Ibid.

³⁶ Ibid.

³⁷ Aldershot G., *Parliaments of the World: A Comparative Reference Compendium*, Inter-Parliamentary Union (1986), <http://www.parliamentarystrengthening.org/budgetmodule/> (Accessed on 15th February, 2010).

³⁸ Marongiu A., *Medieval Parliaments*; Lord, 'The Parliaments of the Middle Ages and the Early Modern Period,' London: Eyre and Spottiswoode (1968).

³⁹ 15th August 1947 independence.

⁴⁰ At independence in 1963.

⁴¹ At Independence in 1965.

parliamentary practice, styled the 'Westminster' model, is the *sine qua non* in most British Commonwealth countries, albeit with some modification.

2.1.2 The Westminster Model

The history of the Westminster model can be traced to as early as the 11th Century in the Witan.⁴² Initially, there were councils consulted by Saxon Kings and attended by the King's own Ministers, magnates and religious leaders with the councils authorized to collect taxes.⁴³ These councils in the 13th century expanded to include representatives of counties, cities and boroughs. The British Parliament as we know it today descended from the Simon de Montfort Parliament that met in Westminster Hall in 1265.⁴⁴

The 1295 Parliament was recorded as the earliest Westminster model. It was constituted by two knights from each county, two burgesses from each borough and two citizens from each city. In the 14th Century two houses of Parliament emerged: the Commons composed of Shire and Borough representatives and the Upper House composed of religious leaders and magnates. In the 15th Century, members of the Upper House were summoned from then on by a royal writ. Members of the Upper House became equals - 'peers' - of different ranks: Duke, Marquise, Earl, Viscount and Baron.⁴⁵

⁴² White A., 'The Making of the English Constitution 449-1485,' G.P. Putnam's Sons, London (1908).

⁴³ *Supra*, note 34.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

During the 17th Century civil war, the Bishops were excluded from the Upper House and re-included in 1661. The 1689 Bill of Rights established the authority of the House of Commons over the Monarch. The Unification of England and Scotland in 1707 created the first Parliament of the United Kingdom. In 1832, the seats of commons were redistributed according to population.

2.1.3 Types of Legislatures

Legislatures may be classified according to whether they are unicameral, bicameral or multilateral. They may also be classified as presidential or parliamentary legislatures according to the model of separation of powers between the Executive and the Legislature. Legislatures have been classified on the basis of their level of independence and the extent to which they exercise power relative to the Executive.⁴⁶ It is this last classification that we will dwell on given that our study revolves around the effectiveness of a parliamentary function. This model classifies legislatures as rubber-stamp legislatures, arena legislatures, transformative and emerging legislatures.

2.1.3.1 Rubber-stamp Legislatures

Rubber-stamp legislatures⁴⁷ are those which simply endorse decisions made elsewhere in the political system, usually by parties and, or the Executive branch of Government. They are often

⁴⁶ Bert A. R., 'The Performance of Presidents and Prime Ministers and of Presidential and Parliamentary Systems,' in von Mettenheim (ed.), *Presidential Institutions and Democratic Politics: Comparing Regional and National Contexts*, Johns Hopkins University Press (1997), pp. 45-64.

⁴⁷ Martin L. W. & Vanberg G. S., 'More than a Rubberstamp: Parliaments, Coalition Governments, and Legislative Scrutiny,' Paper presented at the annual meeting of the The Midwest Political Science Association, Palmer House Hilton, Chicago, Illinois www.allacademic.com/meta/p84174_index.html at (Accessed on 15th April, 2010).

associated with communist or totalitarian nations, where decisions are made by a leader or vanguard party and the Legislature is expected to simply endorse these decisions.

Because demands on them are few, rubber stamp legislatures need little internal structure or expert staff. The *Duma*⁴⁸ of the former Soviet Union and the Mexican Congress during the decades of Partido Revolucionario Institucional (PRI)⁴⁹ dominance could be considered rubber stamp legislatures.⁵⁰ 'Rubber-stamp' generally connotes non-democratic, but it could also describe components of the election process such as the US Electoral College, whose delegates are expected to vote according to the dictates of those who sent them, and not according to personal opinion. Rubber-stamp legislatures neither communicate extensively with citizens, nor possess great quantities of information. They, therefore, do not hold public hearings, amend laws nor initiate budgetary process. Their resource requirements are few and they are generally the least expensive legislatures to operate.

2.1.3.2 Arena Legislatures

Arena legislatures are more powerful than rubber stamp-legislatures, and are places of real discussion, speech, and debate. Policy initiatives still come from outside the legislature, generally

⁴⁸ Russian name for a representative body, particularly applied to the Imperial Duma established as a result of the Russian Revolution of 1905. See Kunov A. & Shakin D., 'The Third Russian Duma: Coalitions versus Cleavages,' Paper presented at the annual meeting of the American Political Science Association, Marriott Wardman Park, Omni Shoreham, Washington Hilton, Washington DC (1st September, 2005) (www.allacademic.com/meta/p84174_index.html at (Accessed on 15th April, 2010)).

⁴⁹ Banerjee V., 'The PRI in Mexico: Peasant Rebellions, Lordly Remnants, and a Bourgeois Revolution,' Paper presented at the annual meeting of the Midwest Political Science Association 67th Annual National Conference, The Palmer House Hilton, Chicago, IL, Apr 02, 2009.

⁵⁰ *Supra*, note 34.

from executives or political parties. In arena legislatures, differences in society are articulated and Government actions and plans are evaluated from different perspectives, but they tend not to initiate or dramatically reshape policy proposals.⁵¹

In these legislatures information needs are greater than those of rubber-stamp legislatures: they need sufficient internal capacity to organize debate, a committee system adequate for channeling the business of the house, and capacity to analyze proposals in order to comment on them critically, and to make some technical amendments.⁵² The British House of Commons might be considered an arena legislature.⁵³

2.1.3.3 Transformative Legislatures

Transformative legislatures not only represent diverse societal interests, but also shape budgets and policies. They amend legislation and budgets received from the Executive branch, initiate their own policy proposals, reach out to citizens, and conduct public hearings. Transformative legislatures can be likened to a thermostat. As thermostats change the room temperature by activating heat or air conditioning, transformative legislatures change policies and budgets proposed by Government, and even initiate policies of their own. Not surprisingly, transformative legislatures are the most expensive to operate. They have highly complex internal structures (including strong committee systems) and great information needs, and depend heavily

⁵¹ Johnson J.K & Nakamura R.T., A Concept Paper on Legislatures and Good Governance, UNDP Paper, New York (1999) <http://siteresources.worldbank.org/PSGLP/Resources/conflictunit3> (Accessed on 15th February, 2010).

⁵² Ibid.

⁵³ John R. H., Legislative Institutionalization with Illustrations from the British House of Commons, *American Journal of Political Science*, Vol. 32, No. 3 (August, 1988), pp. 681-712.

on highly trained professional staff. The US Congress is probably the best example of a transformative legislature.⁵⁴

2.1.3.4 Emerging Legislatures

Emerging legislatures are in the process of change from one type to another.⁵⁵ Worldwide, several legislatures are attempting to exercise greater influence over Government policies and carry out their oversight responsibilities more effectively, and could be classified as emerging legislatures. Expanding their powers usually requires major legislative changes, among them amending rules and procedures, building stronger committees, expanding professional staff and developing improved information systems. Mexico's Congress is an emerging legislature and Kenya's Parliament exhibits similar tendencies.⁵⁶

In recent years both Mexico and Uganda established professional budget offices, helping those Parliaments to play a more assertive role in the budget process. All three legislatures expanded professional staff, and Kenya and Uganda's have made their administration independent of the Executive. Kenya and Uganda staff members are no longer civil servants; they serve at the command of Parliament's leadership. The Parliaments also now set their own budgets.⁵⁷

⁵⁴ *Supra*, note 34.

⁵⁵ *Supra*, note 51.

⁵⁶ Kenya's parliament can be considered as an emerging legislature in that over the last few years it has been able to exercise greater influence over the executive and this can be seen in the constitutional amendments as a result of IPPG, enactment of Parliamentary Service Act No. 10 of 2000, CDF Act, among others.

⁵⁷ Barkan J., 'Emerging Legislatures in Emerging Democracies: The African Experience,' Paper presented at the annual meeting of the American Political Science Association, Philadelphia Marriott Hotel, Philadelphia, 27th August, 2003 Available at http://www.allacademic.com/meta/p64707_index.html Accessed on 17th August, 2010.

Emerging legislatures are under significant stress, as Parliament's managers and staff struggle to meet the growing demands. Staff and resources that were sufficient for a less assertive legislature are no longer adequate. Emerging legislatures need more professional staff, better information systems, additional office space, and other capacities to help them carry out their representation, lawmaking, and oversight roles more effectively. MPs demand more of parliamentary staff members, who must respond more quickly, work faster, and do more than they have in the past.

The balance of political power in any political system ebbs and flows, with the Legislature at times gaining, and at other times losing power relative to the Executive. In balanced Governments, the branches act as checks on one another so that no branch becomes overly powerful relative to the others.

In developing - and frequently in developed - countries, Legislatures tend to be weak cousins of the Executive, lacking sufficient powers and resources to function as an effective check on the Executive.⁵⁸ An overly assertive Legislature is much less common, but, as Legislatures grow in strength, we should pay heed to James Madison's warning in Federalist Paper Number 48.

Madison warns of the dangers of:

'legislative usurpations, which, by assembling all power in the same hands, must lead to the same tyranny as is threatened by Executive usurpations. Checks and balances in democracies are meant to keep any branch of the Government from gaining too much power and this can include Parliaments.'⁵⁹

⁵⁸*Supra*, note 51.

⁵⁹ See the whole paper at www.bu.edu/law/central/jd/organizations/journals/.../MAGGS (Accessed on 20th March, 2010).

2.2 Public Accounts Committee (PAC) and Public Investment Committee (PIC)

The modern Parliament exercises its oversight responsibility through parliamentary committees. The most common financial oversight committee among the Westminster Legislatures is PAC. Kenya has both PIC and PAC. The concept of parliamentary oversight is nearly as old as legislative *power of the purse*.⁶⁰ Parliamentary committees assist the house by advising on decisions to be made in the chamber or by the Government.⁶¹ Parliamentary oversight committees have been lauded to be key to the oversight functions of a Westminster Parliament.⁶²

The principle behind legislative oversight of executive activity is to ensure that public policy is administered in accordance with the legislative intent.⁶³ According to this principle, the legislative function does not cease with the passage of a bill. It is, therefore, only by monitoring the implementation process that members of the Legislature uncover any defects and act to correct misinterpretation or maladministration. In this sense the concept of oversight exists as an essential corollary to the law making process.⁶⁴

⁶⁰ A concept developed over years to mean that the legislature allocates public resources and supervises how they are used.

⁶¹ Ulrich M., Case Study on the Performance of PAC: A Review of the Canadian PAC, 37th parliament in Stapenhurst's *The Role of Parliament in Curbing Corruption*, Washington DC, World Bank Institute (2006), p.94.

⁶² Dye K. & Stapenhurst R., 'Pillars of Integrity: Importance of Supreme Audit Institutions in Curbing Corruption,' Washington, D.C, World Bank Institute (1998), p.103.

⁶³ CPA, *Parliamentary Oversight of Finance and the Budgetary Process*. London CPA (2001), p.1.

⁶⁴ Ibid.

Even as far back as the 14th Century, the English Parliament had some power over the purse, when it was ruled that no taxes could be raised from citizens without parliamentary consent, and commissioners were appointed to audit tax collectors.⁶⁵ The importance of legislative oversight as a tool in monitoring Government activities was underscored when Woodrow Wilson, President of the United States of America wrote in 1885:

‘There is some scandal and discomfort, but infinite advantage, in having every affair of administration subjected to the test of constant examination on the part of the assembly which represents the nation ... Quite as important as legislation is the vigilance of administration.’⁶⁶

In most countries, the budgetary role of the Legislature is both *ex ante* (approval of the budget and/or change) and *ex post* (oversight).⁶⁷

PACs have a key role to play in public sector accountability, with such committees ensuring the appropriate use by Government of public moneys, and as such, have been described as one of the most important of all parliamentary committees.⁶⁸ The PAC helps Parliament hold the Government to account for its use of public funds and resources by examining the public accounts.

The evolution of legislative power of the purse dates back to medieval times, when knights and burgesses in England were summoned to confirm the assent of local communities to the raising

⁶⁵ Staphurston R., *The Legislature and the Budget*, Washington: World Bank Institute (2004). (<http://papers.ssrn.com>). Accessed on 12th March, 2010.

⁶⁶ Woodrow Wilson quoted in EGPA Study Group on Legislative Oversight (Glasgow Caledonian University, Glasgow [UK], 2000:1)

⁶⁷ Wehner J., *Back from the Sidelines? Redefining the Contribution of Legislatures to the Budget Cycle*. Washington: World Bank Institute (2004). <http://siteresources.worldbank.org> Accessed on 12th March, 2010.

⁶⁸ McGee D.G., *The Overseers: Public Accounts Committees and Public Spending*, London: Pluto Press (2002).

of additional taxes.⁶⁹ By early 14th century, the English Parliament had begun to use its legislative power of the purse to condition funds collected by the monarch as a result of public petitions presented to Parliament.⁷⁰ This process was confirmed in 1341, when King Edward III agreed that citizens should not be ‘charged nor grieved to make common aid or to sustain charge’ without the assent of Parliament.⁷¹

During this period, the English Parliament began to take an interest in how money was collected, as well as spent. As early as 1340, commissioners were appointed by Parliament to audit the accounts of tax collectors and where public officials were found to have been deficient, the House of Commons would impeach the officials and the House of Lords would try the case.

Parliament’s power of the purse evolved gradually, and was particularly strengthened during the 16th century when Tudor monarchs needed parliamentary support and its voting of funds in their various political and religious battles. King Henry VIII, for example, accorded Parliament enhanced status in policymaking, in return for support with his battles with Rome.⁷²

In the United Kingdom (UK), it is good to note that Parliament had for several centuries been responsible for raising revenue and authorizing expenditure (the English Civil War had been fought largely on this issue) but their control and scrutiny of public spending was weak. It was

⁶⁹ There was, however, no suggestion that they had the power to refuse such assent. See Stapenhurst R., *The Legislature and the Budget*, Washington: World Bank Institute (2004). (<http://papers.ssrn.com>).

⁷⁰ From such petitions evolved statutes, which required the assent of Parliament and the King, which were distinguishable from ordinances, which were the product solely of the King – thus marking the beginning of the transfer of power from the King to Parliament for the development of Statute law?

⁷¹ *Supra*, note 65.

⁷² *Ibid*.

not until the 1860s that the first major steps were taken towards proper financial accountability to Parliament by Ewart Gladstone.⁷³ He initiated the Exchequer and Audit Departments Act of 1866 which established a cycle of accountability for public funds in which The House of Commons authorized expenditure, the Comptroller and Auditor General controlled the issue of funds, and accounts were produced by departments and audited by the Comptroller and Auditor General. The results of the investigations were considered by a dedicated parliamentary committee, the Committee of Public Accounts (PAC).

Since that time, the 'power of the purse' function has been played by Legislatures around the world as a means to expand their democratic leverage on behalf of citizens. There is great variation, however, in the nature and effect of legislative engagement. Some Legislatures effectively write the budget; others tend to approve Executive budget proposals without changes. In some Legislatures, most of the debate on the budget takes place on the floor of the house (in the plenary) while in others the emphasis is on review in the relevant committee. Some Legislatures also fragment scrutiny of the budget across several committees while others have established a pre-eminent budget (or finance) committee that oversees the process. Ultimately, however, the final vote of approval on 'the budget act' takes place in the chamber.⁷⁴

⁷³ Champion of reform, William Ewart Gladstone initiated major reforms of public finance and Parliamentary accountability. His 1866 Exchequer and Audit Departments Act required all departments, for the first time, to produce annual accounts, known as appropriation accounts. The Act also established the position of Comptroller and Auditor General and an Exchequer and Audit Department to provide supporting staff from within the civil service. The C&AG was given two main functions; to authorize the issue of public money to government from the Bank of England, having satisfied himself that this was within the limits Parliament had voted, and to audit the accounts of all Government departments and report to Parliament accordingly. Gladstone also created the Public Accounts Committee.

⁷⁴ Wehner J. & Barkan J. L., *Emerging Legislatures in Emerging African Democracies*, unpublished World Bank report (2003).

3.3 Supreme Audit Institutions

Supreme Audit Institutions (SAIs) are national-level watchdog agencies responsible for the audit of Government revenue and, expenditure and by scrutinizing public financial management and reporting they provide assurance that resources are used as directed by national Governments.⁷⁵

SAIs are not specialized anticorruption agencies: on the whole they are not expressly charged with detecting or investigating corrupt activity.⁷⁶

The international umbrella association for SAIs is the International Organisation of Supreme Audit Institutions (INTOPAI).

There are three main models of SAIs:

1. The Westminster model
2. The Judicial or Napoleonic model
3. The Board or Collegiate model

The Westminster model, also known as the *Anglo-Saxon* or *Parliamentary* model, used in the United Kingdom and most Commonwealth countries, some European countries, and Latin American countries such as Peru and Chile. Key features include a National Audit Office headed by an independent Auditor General or equivalent, which submits audit reports to a committee of Parliament (often the Public Accounts Committee).⁷⁷

⁷⁵ *Supra*, note 62

⁷⁶ Magnus B., Supreme Audit Institutions – Their Roles in Combating Corruption and Providing Auditing and Accounting Standards and Guidelines in <http://www.10iacc.org/download/workshops/cs05c.pdf>. (Accessed on 13th April, 2010).

⁷⁷ Department for International Development: Characteristics of different external audit systems, Policy Division Info series, PD, (2004) Info 21. [<http://www.dfid.gov.uk/aboutdfid/organisation/pfma/pfma-externalaudit-briefing.pdf>] (Accessed on 13th April, 2010).

The *Judicial* or *Napoleonic* model used by France, Turkey, francophone countries in Africa and Asia and several Latin American countries including Brazil and Colombia. Here the SAI, often a Court of Accounts or *Cour des Comptes* forms part of the judicial system and forms judgments on the use of public funds by Government officials.⁷⁸

The *Board* or *Collegiate* model used by many Asian countries including Indonesia, Japan and the Republic of Korea, and some European countries, including Germany and the Netherlands. This approach has similarities to the Westminster model, except an audit board or boards produces audit reports and submits these to Parliament.⁷⁹

Each model has potential implications for the work of SAIs. In the Westminster model substantial power is concentrated in the position of the Auditor General, and the ability of the SAI to challenge corruption may depend on the authority commanded by this position and the extent to which the Auditor General is independent from other national institutions.⁸⁰ In Nigeria, for example, the Office of the Auditor General (OAG) is funded by the federal Government and OAG staff are civil servants, effectively making them subject to the control of the Executive.⁸¹

In the Napoleonic model Government officials are often held personally liable for the funds which they dispense in their professional capacity in cases where illegal payments have been

⁷⁸La Porta et al., Law and Finance. *Journal of Political Economy* (2004), Vol. 106: 1113-1155.

⁷⁹ Characteristics of different external audit systems
(http://www.train4dev.net/fileadmin/Resources/General_Documents/Characteristics_of_Different_PAIs_PFM.pdf)
(Accessed on 13th April, 2010)

⁸⁰ Frey B.S., Supreme Auditing Institutions: A Politico -Economic Analysis. *European Journal of Law and Economics* (2004), Vol. 1 (1): 169-76.

⁸¹ Transparency International's Nigeria National Integrity System Report 2004
(<http://www.transparency.org/content/download/1685/8494/file/nigeria.pdf>). (Accessed on 13th April, 2010)

made. This bestows responsibility for the proper use of funds with individual officers and acts as a potential deterrent to corrupt practice.⁸²

In the board model, there is scope for some variation in audit approaches across audit boards and their members, a diversity which may help SAIs challenge corruption where it has become normalized or institutionalized.⁸³

A state's Auditor General is usually the head of SAI. In the United States the Auditor General oversees the Government Accountability Office (GAO). A similar situation exists in India, where the Comptroller and Auditor General directs the Indian Audit and Accounts Department. Similarly, in the UK, the Comptroller and Auditor General heads the National Accounting Office (NAO).⁸⁴

In the United States SAI system, a close cousin to the Westminster model, the Comptroller General is the head of the General Accounting Office (GAO), which was created by the Budget and Accounting Act of 10th June 1921. The Comptroller General is appointed by the president on the advice of the Senate for a fifteen-year term and is subject to removal only by a joint resolution of Congress for a specified cause or by impeachment. The Comptroller General directs an independent agency in the legislative branch that was formed to assist Congress in providing

⁸² Lorenz B., Supreme Audit Institutions: Supremely Superfluous? A Cross Country Assessment March 2007, Working Paper No. 3/2007 to be found at www.icer.it/docs/wp2007/ICERwp03-07.pdf (Accessed on 13th April, 2010)

⁸³ Ibid.

⁸⁴ India Comptroller and Auditor General, 'Organization of the Indian Audit and Accounts Department,' available at <http://cag.nic.in/html/aboutusorganization.htm> (last accessed 10th April, 2010), also see Government Accountability Office: The Background of the Gao,' at www.gao.gov/docsearch/thebackgroundofthegao.html (Accessed on 10th April, 2010).

legislative control over the receipt, disbursement and application of public funds through a post-audit function.⁸⁵

The 1921 law vested the GAO with all of the powers of the six auditors and the comptroller of the Treasury, as set forth in the Dockery Act of 1894 and in other statutes extending back to the original Treasury Act of 1789. The law also broadened the Government's audit activities and established new responsibilities for reporting to Congress. Although the GAO continues to audit Government financial records, it now also evaluates the overall efficiency of Government programs and aids Congress in its legislative oversight duties.⁸⁶

In the United Kingdom, the National Audit Office has existed in its present form since 1983. The earliest surviving mention of a public official charged with auditing Government expenditure is a reference to the Auditor of the Exchequer in 1314. The Auditors of the Imprest were established under Queen Elizabeth I in 1559 with formal responsibility for auditing Exchequer payments. This system gradually lapsed and in 1780, Commissioners for Auditing the Public Accounts were appointed by statute. From 1834, the Commissioners worked in tandem with the Comptroller of the Exchequer, who was charged with controlling the issue of funds to the Government.⁸⁷

⁸⁵ Mansfield H.C., *The Comptroller General: A Study in the Law and Practice of Financial Administration*, New Haven, Conn.: Yale University Press (1939).

⁸⁶ Trask R. R., *Defender of the Public Interest: The General Accounting Office, 1921–1966*. Washington, D.C.: U.S. General Accounting Office (1996).

⁸⁷ www.nao.org.uk/about_us/history_of_the_nao.aspx. (Accessed on 13th April, 2010)

Major steps towards proper financial accountability to Parliament, however, can be traced to Gladstone's reforms which, among other things, established the 1866 Exchequer and Audit Departments Act which required all departments to produce annual accounts known as appropriation accounts. The Act also established the position of Comptroller and Auditor General (CAG) and an Exchequer and Audit Department (EAD) to provide supporting staff from within the civil service with the CAG being bestowed with the function of authorizing the issue of public money to Government from the Bank of England, having satisfied himself that this was within the limits Parliament had voted. The Act also bestowed on the CAG the function of auditing the accounts of all Government departments and reporting to Parliament.

3.4 Evolution of the Kenyan Parliament

'History is important because the law was one of the major tools used by the colonial power to establish its presence, ... The law at independence, therefore, is the baseline from which all independent African states have started, and to ignore that baseline and its development is to tell less than half the story.

.....

[T] he political context is important because in many African states, particularly those whose systems of public law are derived from England, the operations of many of the institutions of the state, such as Government, Legislatures, Courts and Public Corporations, can only be understood if it is appreciated that the reality is that key interpretations of the law are given by politicians, or within a political rather than a legal framework....⁸⁸

Though it is beyond the scope of this study to analyze the effectiveness of the oversight role of Parliament for period earlier than the tenure of 9th Parliament, a trace of the history and evolution

⁸⁸ See Preface to Ghai, Y.P. & McAuslan, J.P., Public Law and Political Change in Kenya; a Study of the Legal Framework of Government from Colonial Times to the Present, Nairobi: Oxford University Press (1970).

of Parliament will equip the study by indicating the type, purpose and power vis-à-vis the Executive, the Kenyan Parliament has had over the years. In order to analyse the effectiveness of Kenyan Parliament, it is necessary to trace its historical origin and how it has evolved over time. The effectiveness of the 9th Parliaments' oversight is best assessed as a logical consequence of the political, social, economic and legal history of Kenya.

3.4.1 The Protectorate - 1895-1920

The governance structure of Kenya as a political entity began with the region's inclusion in the British sphere of influence in 1888 following the signing of the Anglo-German treaty and the subsequent establishment of a British protectorate and colony. It must be noted that initially, Britain was reluctant to take active responsibility for the region of East Africa and instead it assigned it to a commercial company (Imperial British East Africa Company: 1888-1895) with the right to administer and develop the territory.⁸⁹

Oginga Odinga comments that:

‘In the scramble for Africa that started in the seventies of the last century, Britain and Germany parceled out shares of territories they coveted and handed them over, in the initial stages, to chartered companies. This was to be a cheap and easy way of holding territories against outsiders’⁹⁰

The Kenyan Parliament's origin can be traced back some ninety years ago. Before its setting up by local legislation, the Kenyan Parliament was promulgated through Royal Instructions from

⁸⁹ Ibid, p. 9.

⁹⁰ Odinga O., Not Yet Uhuru, Nairobi: East African Educational Publishers (1967).

Britain commonly termed as Orders-in-Council. These Royal Instructions were implemented in the period between 1885 to 1890 by Sir A.H. Hardinge,⁹¹ who served both as the agent of His Majesty in the Kenyan protectorate and Consular-General in Zanzibar.

In 1903, white settlers, who on encouragement by Sir Elliot⁹² (the first independent Commissioner and Consular-General for East Africa Protectorate) had come to farm, formed a loose political-cum-welfare group, the Colonists Association which, though not a political party, had similar attributes, thereby giving it qualifications to be precursor of political parties in Kenya. It was formed as a result of the influence of the ancient liberties existing in Britain, for example 'no taxation without representation.'⁹³

In April 1905, the administration of East Africa Protectorate was transferred from the British Foreign Office to the Colonial Office⁹⁴ (the transfer did not affect the constitutional status of the territory; it continued as a protectorate). In mid 1905, the Colonists Association remitted a petition to the Secretary of State for the Colonies, demanding representation in the administration of Kenya. The response of the British Government was signified in a 1905 East Africa Order-in-Council which set up among others an Executive Council to be chaired by the Governor to assist in the administration of Kenya and making a provision for the setting up of a Legislative Council.⁹⁵

⁹¹ *Supra*, note 88, p. 14

⁹² *Ibid*, p. 42

⁹³ See The Magna Carta at http://www.archives.gov/exhibits/featured_documents/magna_carta/legacy.html last accessed on 5th April 2010.

⁹⁴ *Supra*, note 88, p. 42.

⁹⁵ www.parliament.go.ke (Accessed on 4th October 2009)

Ghai commented on the 1905 East Africa Order-in-Council that as being significant in that: 'It marks the first move away from the autocratic rule of the Governor. It is the beginning of a kind of 'separation of powers',⁹⁶

The said Order-in-Council set in motion the separation of powers between the office of the Governor and the Legislature, which was set to be formed.

In early 1907, the Governor and the Central Government machinery moved from Mombasa to Nairobi. The Executive Council, legislated until mid-August, 1907 when the legislative function was transferred to the Legislative Council to implement the provisions of the 1905 East Africa Order-in-Council and separate the executive function from the legislative function under one body. The Legislative Council's first recorded sitting was held on August 17, 1907. It was composed of seven Members, chaired by a Governor, Sir James Hayes Sadler. The seven members were four ex-officio (two nominated unofficial) and three officials. All nominations to the all whites Legislative Council were made by the Governor.⁹⁷

Among the first business transacted by the Legislative Council in that first meeting, were two bills. The first bill was for the abolition of legal status for slaves and slavery throughout the East Africa Protectorate. This bill was passed by the Council. However, the second bill for regulation of the sale of intoxicating liquors in the East Africa Protectorate was not passed; it was instead committed to a committee of the Council⁹⁸ composed of town officials and two unofficial.⁹⁹

⁹⁶ *Supra*, note 88, p. 144.

⁹⁷ *Supra*, note 95.

⁹⁸ First recorded Formation of Select Committees by the Legislature.

⁹⁹ *Ibid*.

Kihoro Wanyiri comments about the colonial Legislature that:

‘(It) was inaugurated under the pressures of the European capitalist settlers in Kenya. They sought to get their interests directly reflected in the socio-economic policies of the state and political power dispensation which held oversight over the model of accumulation of which they were a principal component in Kenya. Their representations became a key component of the Legislature – whose duty was to debate and provide oversight over Government policy, adopt ‘regulatory’ budgets and make legislation for Kenya within the framework of the colonial mandate as defined by his/her majesty’s Government in the United Kingdom.’¹⁰⁰

With the cessation of hostilities in the First World War, steps were taken by which the Legislative Council enacted the 1919 Legislative Council Elections Ordinance¹⁰¹, which provided for the election of eleven Europeans. The East Africa Protectorate was accordingly split into eleven constituencies.¹⁰²

The first elections were accordingly held in 1920, after which consideration for the provision of similar treatment to other races was initiated and in the same year, the Kenya (Annexation) Order-in-Council of 1920 was enacted and it changed the status of Kenya from an East Africa Protectorate to Colony.¹⁰³

3.4.2 Kenya Colony - 1920-1963

¹⁰⁰Kihoro W., *Politics and Parliamentarians in Kenya 1944-2007*, Centre for Multiparty Democracy CMD-Kenya, (2007), p. 21.

¹⁰¹No. 22 of 1919.

¹⁰²*Supra*, note 95.

¹⁰³*Supra*, note 88.

In 1924, the Legislative Council (Amendment) Ordinance of 1924¹⁰⁴ made provision for the election of five Indians to represent the Indian community and one Arab to represent the Arab community. The election for the Indian and Arab Members was to be by electorates of their communities.¹⁰⁵ In the same year a provision was made for nomination of a clergy man to represent African interests¹⁰⁶ on the Council with further provisions being made to introduce 'Native Councils'¹⁰⁷ pursuant to provisions of the Local Native Council Ordinance of 1924. Due to the dislike by the Indians for a separate voters roll, their election was delayed until 1934. The elected Indian Members took seats in the Council in April, 1934 and at the same time a further provision was made for nomination of one more clergyman to represent African interests and one more Arab to join the elected Arab Member.¹⁰⁸ Thus, the Legislative Council was composed of both elected and nominated Europeans, Indians and Arabs. The African interests continued to be looked after by the clergymen until 1944.

In 1944 the direct representation of African interests on the Council by an African begun by the Government nominating Mr. Eliud Wambu Mathu¹⁰⁹ who served continuously until March, 1957, when he lost in the first election of African Members to the Council. Following the

¹⁰⁴No. 1 of 1924.

¹⁰⁵*Supra*, note 95.

¹⁰⁶Frost R., *Race Against Time: Human Relations and Politics in Kenya Before Independence*, London: Rex Collings (1978), p. 17.

¹⁰⁷They were established to give voice to African concerns. For an extensive discussion on Local Native Councils (LNC) See Local government and the return to multi-partyism in Kenya by Southall et al to be found at www.accessmylibrary.com/article-1G1-18981396/local-government-and-return.html. Accessed on 10th April, 2010.

¹⁰⁸Section XV, Royal Instructions, 29 March 1934, Government Notice 256/1934.

¹⁰⁹Ross W., *Kenya From Within: A Short Political History*, London: Cass (1968), p. 468. Nomination of Mr. Mathu had been occasioned by the retirement of Rev. J.W. Arthur.

nomination of Mr. Mathu, the African elites, most of whom were his contemporaries, formed the Kenya African Union (KAU) in October, 1944. The formation of KAU was ostensibly for the purpose of giving guidance and support to Mr. Mathu, so as to ensure that his participation in the Council was in the best interest of Africans.¹¹⁰

The number of nominated African representatives on the Council was increased to four in 1948. In June, 1948, the Legislative Council met with a majority of unofficial Members. Mr. James Griffiths, then Secretary of State for the Colonies made constitutional proposals that were translated into the Royal Instructions of 1951.¹¹¹ These Royal Instructions implemented in 1952 resulted in the increase of the number of Government Members on the Council from sixteen to twenty-six; European elected Members from eleven to fourteen; Asian elected Members from five to six and the African nominated representatives from four to six. Arabs gained one more elected Member and a nominated representative. The overall strength of the Council still reflected an unofficial majority, in the proportions of twenty-six Government (Officials) against twenty-eight un-officials.¹¹²

In 1954 a New Constitution, the Lyttelton Constitution¹¹³ was introduced, to replace the 1922 constitution. Under the Lyttelton Constitution, there was introduced, a Council of Ministers which, like its predecessor the Executive Council, was appointed and chaired by the Governor. The Council of Ministers consisted of fourteen Ministers of whom six were officials from the

¹¹⁰*Supra*, note 95.

¹¹¹ Section 11, Additional Royal Instructions, 21 November 1951, Government Notice 1395/1951.

¹¹² *Ibid.*

¹¹³ Additional Royal Instructions, 13 April 1954, Government Notice 582/1954.

civil service, two Nominated Members and six un-officials. The six un-officials were three Europeans, two Asians and one African (Mr. B. A. Ohanga). The composition of the Legislative Council, remained at fifty-four members; fourteen European elected Members, six Asian elected Members, one Arab elected Member, and six African nominated representatives, one Arab nominated representative and eight ex-officio and eighteen Nominated Members. The last twenty six were all European civil servants.¹¹⁴

In 1955, following a Government survey indicating that Africans were becoming increasingly unhappy with having their representatives chosen for them, the Government appointed a Commission of Inquiry¹¹⁵ to look into the ways by which Africans could elect their representatives. Arising from the recommendations of the Commission, an amendment was made to the Legislative Council Ordinance, 1924¹¹⁶ (which was now referred to as Cap 38¹¹⁷), to effect the election of eight African representative Members. The first election of African representatives to the Legislative Council, in the eight electoral areas, was held in March, 1957.¹¹⁸

Following the result of the first elections of African Members, none of the elected African Members were prepared to accept office in the Government, and in order to resolve the deadlock, the Secretary of State for the Colonies, Mr. Lennox-Boyd, came to Nairobi in November 1957.

¹¹⁴ Ibid.

¹¹⁵ Commission of Inquiry to Enquire into Methods for the Selection of African Representatives to the Legislative Council (Nairobi, 1955).

¹¹⁶ No. 1 of 1924.

¹¹⁷ African Representation (amendment) Ordinance of 1956.

¹¹⁸ *Supra*, note 88.

He held consultations on this matter with various groups and soon it became apparent that an agreement was not in sight. The consequence of the deadlock was the resignation of White and Asian Ministers from their posts in the Government so as to give the Secretary of State a free hand to resolve the constitutional stalemate. The Secretary of State finally concluded that the constitutional arrangements of 1954 were unworkable.¹¹⁹

In 1958 a number of constitutional changes (Lennox-Boyd Constitution) were proposed by the Secretary of State and later enacted in a Kenya Constitution Order-in-Council,¹²⁰ signed by Her Majesty on April 03, 1958 and remained in force until 1961. The changes introduced by the Lennox-Boyd Constitution were to the effect that the seats for the African elected Members were increased by six; provisions were made for twelve Specially Elected Members; the number of nominated Members was left to the discretion of the Governor and the seats for all elected Members were set at thirty-six.

By-elections were held in March, 1958, in the African electoral areas, which had been subdivided. The thirty-six elected seats were apportioned in the ratios of fourteen Europeans, fourteen Africans, four non-Muslim Asians, two Muslim Asians and two Arabs. The twelve Specially Elected Members were to be chosen by the Legislative Council sitting as an electoral college in the ratios of one third each for Africans, Europeans and Asians. The Africans were given a second seat on the Council of Ministers.¹²¹

¹¹⁹ Ibid.

¹²⁰ Kenya (Constitution) Order in Council, 1958 (S.I. 600).

¹²¹ *Supra*, note 95.

The constitutional framework introduced by the Lennox-Boyd Constitution did not please the Africans. The Africans rejected, specifically, provisions regarding Specially Elected Members; the additional Ministerial seat, the continued use of qualitative franchise introduced by Coutts Commission report¹²² and the general policy of multi-racialism that was the main objective underlying the Lyttelton Constitution in 1954. Following the position expressed by the elected African representatives of the Legislative Council, in 1959, they formed a party, the Kenya Independence Movement.¹²³

In 1960, the new Secretary for the Colonies, Mr. Ian Macleod, convened a full-fledged constitutional meeting (the First Lancaster House Constitutional Conference) which was meant to map out the future constitutional development for Kenya.¹²⁴ The results of the conference caused major changes to the Lennox-Boyd Constitution and made provision for sixty-five elected Members (thirty-three for Africans, ten for Europeans, eight for Asians and two for Arabs) and twelve National Members elected by the Legislative Council sitting as an electoral college by proportional representation resulting into four each for Africans and Europeans, two non-Muslim Asians, one Muslim Asian and one Arab. In addition, there were three ex-officio Members and the Speaker. The conference also made a provision for appointment of a Council of Ministers. The Governor appointed and allocated portfolios to the twelve Ministers. The Council of Ministers comprised four ex-officials, four Africans, three Europeans and one Asian.¹²⁵

¹²²Report of the Commissioner appointed to Enquire into Methods for the Selection of African Representatives to the Legislative Council (Nairobi, 1955).

¹²³*Supra*, note 90, p. 181.

¹²⁴See *Ibid*, pp. 176-84 for an account of the deliberations at the conference and the results.

¹²⁵*Supra*, note 95.

The results of the First Lancaster House Constitution Conference on the whole fell short of the expectations and demands of both the Africans and Europeans. The African representatives intensified the struggle for a rightful share of power while the European representatives pressed on with whatever proposals that appeared to offer tangible safeguards to their interests. As much as it did not meet the expectations of Africans representatives, it was a step in the right direction in that a decision had been made that Kenya would progress like Tanganyika and Uganda towards responsible Government under African majority. Mboya comments that:

‘The five weeks of the Lancaster House Conference in January-February 1960 not only brought about the declaration we had sought, that Kenya was to be an African country; it also reversed the whole constitutional process’¹²⁶

The Second Lancaster House Constitution Conference was held in February, 1962, and resulted into an agreement on a firm framework for a New Constitution. This conference, like the first, was chaired by the Secretary of State for the Colonies and the agreed constitution consisted of:

1. A bicameral Legislature, elected by common adult suffrage
2. The Lower House or House of Representatives to comprise one hundred and seventeen Members from single-member constituencies; and twelve Specially Elected Members, to be elected by the House of Representatives sitting as an electoral college
3. The Upper House or the Senate, to comprise one Member from each of the forty-one districts; the Senate was to have special powers with respect to bills to amend the constitution; a strong and effective Central Government, responsible to the Central Parliament, to be responsible for external affairs and defense, among others
4. Regional Assemblies to be established in the seven regions, to ensure the maximum possible decentralization of the powers of Government.¹²⁷

¹²⁶ Mboya T., *Freedom and After*, London: Andre Deutsch (1963), p. 128.

Changes in the constitution would require a majority of seventy-five per cent of each house, except that with regard to particular changes which affect the entrenched rights of individuals, regions, ethnic authorities or districts, the majority in the Senate would have to be ninety per cent.

Final constitutional review and consultations were held in Nairobi in February 1963 at which agreement was reached for an Internal Self Government to assume office on June 01, 1963, and full independence six months later. A general election was held in the period May 18-25, 1963; out of which the Kenya African National Union led by Jomo Kenyatta won an overall majority against the Kenya Democratic Union led by Mr. Ronald Gideon Ngala and the African People's Party led by Mr. Paul Joseph Ngei. The interim period of Internal Self-government, did not witness any major constitutional changes. The constitutional provisions finalized in February,¹²⁸ 1963 remained virtually the same as Kenya remained a dominion within the British Commonwealth, with a Governor-General representing Her Majesty locally and a Government headed by a Prime-Minister.¹²⁹

Kihoro Wanyiri comments that:

‘Kenya at independence inherited a paradox: on the one hand, a hemorrhagic profit driven economy, and, on the other the elements of responsible and accountable

¹²⁷ *Supra*, note 95.

¹²⁸ Kenya Independence Act 1963 and Independence Order-in-Council 1963.

¹²⁹ *Ibid*.

democratic and humanist systems of governance, which the struggles of the common peoples of Europe had won',¹³⁰

Muigai Githu in his thesis took the view that the Independence Constitution: 'In a very real sense however, it institutionalized, entrenched and legitimized the colonial political and legal legacy thereby creating continuity and some measure of stability',¹³¹

Ghai took the position that: 'More significantly, it (the Independence Constitution) provided the parameters for all latter discourse on the political future of the country and its people',¹³²

3.4.3 Post-colonial Period - 1963-1969

The composition of the Legislature and the framework of the Government at independence remained in place until the first anniversary. Arising from close negotiations between the Government and the opposition, all the parties represented in the house agreed to merge under the Kenya African National Union (KANU) with the voluntary dissolution of the Kenya African Democratic Union (KADU) and the African Peoples Party (APP). This merger meant an unanticipated *de facto* one party status. In 1964, the Kenyan Parliament amended the Independence Constitution (the first amendment)¹³³ to constitute the Republic and on December 12 the same year, Kenya declared herself a sovereign Republic within the Commonwealth with a

¹³⁰ *Supra*, note 100, p. 17.

¹³¹ Muigai G., Constitutional Amendments and the Constitution Amendment Process in Kenya (1964-1997), A Study of the Politics of the Constitution, Ph.D Thesis, University of Nairobi (2001) p. 89.

¹³² Ghai Y.P., 'The Government and the Constitution in Kenya Politics,' 6 (1967), East African Law Journal, p. 74

¹³³ The Constitution of Kenya (Amendment) Act No. 28 of 1964.

Cabinet of eighteen Ministers. The first Vice President, Mr. Jaramogi Oginga Odinga, resigned on April 14, 1966 and immediately formed an opposition party, the Kenya Peoples' Union (KPU). The formation of KPU reintroduced multi-party political status in Kenya.¹³⁴

This period also marked the beginning of emasculation of Parliament by the Executive. Following the 'turn coat rule',¹³⁵ the tenure of sitting members of Parliament was terminated without reference to the electorate. The bill for the amendment of the Constitution was published without due procedure and the Standing Orders was flagrantly violated to pass the amendment in a day.¹³⁶

By the constitutional amendment¹³⁷ of 1966, the Senate and the House of Representatives were amalgamated. The amalgamation resulted into a single Chamber of the National Assembly comprising one hundred and fifty-eight elective constituencies and twelve specially appointed members, giving a total of one seventy representatives. Muigai Githu states that:

'There are a number of blatantly unconstitutional and undemocratic aspects of the seventh amendment. First it purported to bestow offices on persons who had not been elected to them. The former senators were declared elected members of the new National Assembly and were assigned constituencies without any elections being held. This was not only manifestly undemocratic but also contrary to existing electoral laws.'¹³⁸

Generally Muigai Githu argues that under Kenyatta:

¹³⁴ www.parliament.go.ke (Accessed on 4th October 2009).

¹³⁵ The Constitution of Kenya (Amendment) (No 2) Act No. 17 of 1966.

¹³⁶ *Supra*, note 131, pp. 125-8.

¹³⁷ Act No. 40 of 1966.

¹³⁸ *Supra*, note 131, p. 132.

'The constitutional amendments achieved two things. First, they completely destroyed *Majimboism* or regionalism and created a strong unitary state. Second, they distorted the balance of power between the three arms of Government by creating an all powerful executive presidency to which the Legislature and the Judiciary were subservient. The presidency created by the amended Constitution, both as head of state and Government, was so powerful that it could run the country by executive decree. Parliament dwindled in significance, becoming merely a rubber-stamp for executive orders and decisions.'¹³⁹

3.4.4 Post-colonial period - 1969-1992

No significant legal change in the structure of the National Assembly was recorded during this period except for the notable *de facto* one party membership of the National Assembly, a status which changed to *de jure* as a consequence of the passage of the Constitution (Amendment) Act No. 7 of 1982 which introduced section 2A to the Constitution. As a consequence of the *de jure* one party status and the continued dominance of political space by the then ruling party KANU the only available road to membership of the Legislature was through KANU primaries in 1988. The 1988 general elections were preceded by the preliminary nomination process in the much publicized, 'mlolongo' or 'Queue voting' process and whoever garnered seventy percent-plus of votes during the preliminary nomination process was declared duly elected and no general election would ensue in that constituency. There were also no presidential elections (as President Moi had been re-elected unopposed). The 1988 elections were not regarded as free and fair because of the absence of an independent electoral commission, interference by the Executive and the absence of secrecy in the ballot.¹⁴⁰ Expulsion of members of Parliament from the only

¹³⁹ Ibid, p. 147.

¹⁴⁰ Adar K. G., 'Ethnicity and Ethnic Kings: The Enduring Dual Constraint in Kenya's Multiethnic Democratic Electoral Experiment,' *Journal of the Third World Spectrum*, 5 (2) (Fall 1998), pp. 71-96.

lawful party (KANU) meant loss of elective seat, a fact that led to weakening of parliamentary oversight functions.¹⁴¹

Following the Constitution (Amendment)¹⁴² of 1986, the security of tenure of the offices of the Attorney General and the Controller and Auditor General which had been in the Constitution were removed and this altered the basic structure of the Constitution in a most significant and far-reaching manner. Its effect was to give the Executive led by the President unfettered, uncontrolled and unquestioned authority over all institutions of the State as he could hire and fire all office holders at whim, the President enjoyed absolute power.

Adar Korwa while commenting generally about President Moi's reign, said that:

'To ensure his grip on power, Moi systematically usurped the functions of the other institutions of governance to the extent that the principle of the separation of powers was rendered ineffectual... Members of Parliament, and by extension their constituents, surrendered their constitutional rights to the presidency. Parliamentary supremacy became subordinated to the presidency and the ruling KANU party.'¹⁴³

On the same matter Gathii had this to say: 'The Executive determined its calendar and agenda so much so that the president could prorogue or dissolve Parliament at any time at his discretion.'¹⁴⁴

Kihoro Wanyiri took the position that:

¹⁴¹ Widner J., 'Two Leadership Styles and Patterns of Political Liberalization,' *African Studies Review*, 37(1) (April 2004), pp. 151-174.

¹⁴² Act No. 14 of 1986.

¹⁴³ Adar K.G & Isaac M. M., *Human Rights Abuse in Kenya under Daniel Arap Moi 1978-2001*. *African Studies Quarterly* (2001) 5(1): 1. [online] URL: <http://web.africa.ufl.edu/asq/v5/v5i1a1.htm>. (Accessed on 4th April, 2010).

¹⁴⁴ Gathii J., 'Kenya's Legislative Culture and the Evolution of the Kenya Constitution' in Vyas, Kibwana, Owiti & Wanjala (eds.) *Law and Development in the Third World* (Nairobi: University of Nairobi Press, 1994), p.74.

‘It imposed detention without trial, proscription and criminalization of alternative ideas for democratic governance and development, and delimited debate in the National Assembly having abolished the Senate which had acted as a governance safety net; and used a sectional Attorney General to intimidate the Judiciary and the press into demeaning self-censorship...The National Assembly ceased to be the engine for responsible and accountable governance in Kenya, while those forces which sought its autonomy and sovereignty got marginalized either through detentions without trial, selective political prosecutions, general intimidation, and assassinations.’¹⁴⁵

It is also during this period that the Saitoti Committee¹⁴⁶ was formed to look into the grievances raised by the public as to the constitutional term of the President, multiparty democracy and the repeal of the single party constitutional provisions, the restoration of tenure of judges, Attorney-General, Auditor and Controller-General, as well as members of the public service commission, national constitutional convention, separation of party and Government and national referendum,¹⁴⁷ among others.

In 1990, the tenure of constitutional office holders was restored.¹⁴⁸ Frank Holmequist comments that:

‘Perhaps what is most significant in this amendment is that it represents the first piece of credible evidence that the Kenya Government was beginning to listen to both domestic and international criticism and, in particular, was beginning to respond to the view of the

¹⁴⁵ *Supra*, note 100, p. 22.

¹⁴⁶ *Supra*, note 131, p. 165.

¹⁴⁷ Republic of Kenya, Report of the KANU Review Committee, pp. 10-16.

¹⁴⁸ The Constitution of Kenya (Amendment) Act No. 2 of 1990.

donor community. This amendment was, therefore, effected at a time when serious demands of transparency and accountability were being made on the Government.¹⁴⁹

3.4.5 Post-colonial Period - 1992-1997

Following the repeal of Section 2A¹⁵⁰ the political system of Kenya returned from a *de jure* one party state to a multiparty state. Subsequently, the 7th Parliament whose election was on December 29, 1992 was composed of MPs from different political parties and was, therefore, a multi-party Parliament. The International Commission of Jurists in a report had stated of the 1992 elections that:

‘Unfortunately the 1992 elections were grossly distorted and clearly failed to pass the freedom and fairness test. The structural environment, which was still largely based on the one-party system (Apart from the repeal of section 2A of the Constitution no comprehensive review of the Constitution was undertaken), along with the numerous restrictions operating in favor of the ruling party, made the elections farcical.’¹⁵¹

The house witnessed various shifts in political alliances as some Members of Parliament defected from the parties that sponsored them to KANU; Party of Independent Candidates of Kenya (PICK) ceased to be a parliamentary party following the nullification by an Election Petition Court of the election of the sole PICK Member of Parliament. The foregoing, coupled with the defection of a Kenya National Congress (KNC) Member to KANU and other defections,

¹⁴⁹ Holmequist F. & Ford M., ‘Kenyan Politics: Towards a Second Transition?’ Africa Today Volume 45 Number 2 (1998), p. 46.

¹⁵⁰ The Constitution of Kenya (Amendment) Act No. 12 of 1991.

¹⁵¹ ICJ, *Kenya Elections, 1997: Free And Fair?* (1997), p. 8.

a total of fourteen (14) by-elections were occasioned. The most notable effect of the defections and by-elections was a change in the leadership of the Official Opposition Party from FORD-Asili to FORD-Kenya.

During the same period, a review of the Standing Orders was undertaken resulting in various amendments. Four new standing orders were created, ten were modified, and one deleted.¹⁵² The changes in the Standing Orders established, *inter alia*, departmental committees, and required that these committees review legislation giving Parliament an unprecedented potential to influence legislation.

The 1997 Budget Speech was presented to the house amidst shouts and chanting from members of the opposition calling for political reforms. The tension that ensued was defused by the formation of the Inter-Parties Parliamentary Group (IPPG) in August 1997. The IPPG played a pivotal role by staking out a middle ground.¹⁵³ The IPPG recommendations were ultimately drafted into bills passed by the house.¹⁵⁴ The bills introduced several measures affecting provisions in the Constitution, management of elections and the administration of peace, justice and security.¹⁵⁵ These changes allowed other political players on the political scene to participate in making certain appointments. Section 33 of the Constitution was amended¹⁵⁶ to allow the parliamentary parties to nominate, in proportion to the number of elected MPs, the 12 nominated

¹⁵² 'IPPG Recommendations and the Aftermath' Daily Nation, Nairobi, (16 January 1998).

¹⁵³ Mutunga W., *Constitution Making From the Middle-Civil Society and Transition Politics in Kenya (1992-1997)* Nairobi: Sareat-Mwengo Press (1999), p. 19.

¹⁵⁴ Statute Law (Repeal and Miscellaneous Amendments) Bill 1997.

¹⁵⁵ Munene M., *The Politics of Transition in Kenya (1995-1998)* Nairobi: Quest & Insight (2001) p. 23.

¹⁵⁶ The Constitution of Kenya (Amendment) Act No. 10 of 1997.

Members of Parliament and also councilors in local authorities. The amendment also increased the number of Electoral Commission of Kenya (ECK) Commissioners from 4 to 21 by an amendment to section 41 of the Constitution.

2.4.6 Post-colonial Period - 1997-2002

The 8th Parliament's tenure was significant as it was during this period that Parliament sought to have financial and technical autonomy from the Executive. It proved to be less docile and more independent than any of Kenya's previous Parliaments, and took several concrete measures to establish its authority.¹⁵⁷ It enacted the Parliamentary Service Act of 2000 following a constitutional amendment in 1999.¹⁵⁸ The Parliamentary Service Act¹⁵⁹ made provision for the establishment of the Parliamentary Service Commission (PSC) that provides leadership and management to the Parliamentary Service employees. Members of staff employed by the National Assembly were now employees of the PSC and no longer answerable to the Civil Service and, therefore, the Executive. With the establishment of the PSC, both in the Constitution and through an Act of Parliament, Parliament acquired financial and technical autonomy from the Executive. This meant provision of facilities and recruitment of staff for Members of Parliament with the attendant benefit of enhanced capacity for research, debate, legislation and oversight.

Peter Oloo Aringo commented that:

¹⁵⁷ See Legislative Report of the Eighth Parliament of Kenya, Calendar Year 2001 (Report from SUNY/Kenya to USAID/Kenya).

¹⁵⁸ Constitution of Kenya (Amendment) Act No. 3 of 1999.

¹⁵⁹ No 10 of 2000.

‘The thrust of the Parliamentary Service Commission is to work out practical policies, programmes and projects for the implementation or actualization of the mission of Parliament which is to; efficiently and effectively fulfill the constitutional and legitimate mandate, roles and functions of a representative institution in responsible, accountable and democratic governance. Within this paradigm falls the mission of the Parliamentary Service Commission (PSC), which is; to facilitate the members of Parliament to efficiently and effectively fulfill the constitutional function in a representative system of Government, holding and ensuring the autonomous status of Parliament in its corporate relationship with other arms of Government. As long as the Constitution of Kenya subsists, even in its current form the Parliamentary Service Commission will, unless removed by law, subsist.’¹⁶⁰

Despite its achievements, it must be noted that the 8th Parliament was a hung Parliament. It was hung in the sense that KANU, the ruling party had not attained comfortable majority to govern at the inception of the Parliament and had to seek dalliance with National Development Party¹⁶¹ (NDP) in order to have a stable parliamentary majority.¹⁶² The KANU-NDP arrangement changed the political balance in the house by weakening the opposition whose traditional role is to keep Government and the ruling party on its toes.¹⁶³

Kihoro Wanyiri, commenting generally about the institution of Parliament from independence, said that:

¹⁶⁰ *Supra*, note 100, p. 22.

¹⁶¹ An opposition party; the third largest party in parliament

¹⁶² Munene M., Political Coalitions And Mergers In Kenyan History.
www.commonlii.org/ke/other/KECKRC/2001/23.html (Accessed on 10th April, 2010).

¹⁶³ Immigration and Refugee Board of Canada, Kenya: The Merger of the National Development Party (NDP) and the Kenya African National Union (KANU) and Whether the Situation of the Luo is Expected to Improve Given the Change in Political Structure, 30 October 2002, KEN39902.E, available at:
<http://www.unhcr.org/refworld/docid/3f7d4db923.html> [accessed 10 April 2010].

‘Parliament at independence largely reflected the diversity of the peoples, nations and the society of Kenya. Political power then had its centre of gravity in the Parliament of Kenya. This system of parliamentary governance is what the imperial presidency set to cripple and/or dismantle after Kenya attained the stature of a Republic. Thereafter political power in Kenya got relocated to the kitchen cabinet of its first imperial president, Mzee Jomo Kenyatta, M.P. Under both Kenyatta and Moi this mutation was brutal and bloody leaving behind a trail of assassinations and massacres.’¹⁶⁴

3.5 PAC and PIC in Kenya

The first recorded formation of select committees by the Legislature can be traced to the Committee of the Council in 1907 to deal with a bill for regulation of the sale of intoxicating liquors in the East Africa Protectorate.¹⁶⁵ The Committee was composed of town officials and two non-officials. However, the origin of PAC can be traced back to 1948 when a Committee of Public Accounts was set up for the examination of the accounts showing the appropriation of the sums granted for public expenditure and for any other accounts laid before the Legislative Council as it deemed fit.

The Committee of Public Accounts was later included in clause 158 of part XXI of the 1954 Standing Orders. This clause provided that the committee was to ‘examine the appropriation of sums granted by the council to meet the public expenditure and of such other accounts laid before the council as the committee may think fit.’¹⁶⁶

¹⁶⁴ *Supra*, note 100, p. 22.

¹⁶⁵ *Supra*, note 95.

¹⁶⁶ Standing Order Section 158 of part XXI of the Kenyan Parliament, 1954.

The title 'Public Accounts Committee' was used in the Standing Orders for the first time in 1967 and the committee was charged with the same functions as that of the Committee of Public Accounts which was not included in the 1967 Standing Orders.

PAC has been traditionally chaired by a member of the backbench or a member of an opposition party depending on whether Kenya is a single or multiparty parliamentary membership. It acts on audited reports of the Controller and Auditor General (CAG) conducted in respect of public funds authorized or not authorized by Parliament. CAG conducts annual audits of utilization of public funds as appropriated or not appropriated by Parliament and causes the audit report to be tabled before Parliament for onward transmission to PAC.

PIC, on the other hand, traces its origin to 1975/1976 report of PAC which recommended the setting up of a committee when it noted that '[h]uge chunks of public money is poured each year into these undertakings (public investments) ... it is only prudent that the public would wish to be informed of how their money is being used.'¹⁶⁷

Parliament acted on this report in 1979 by establishing a fully fledged committee known as Public Investments Committee (PIC), to 'examine, in the context of the autonomy and efficiency of public undertakings, whether the affairs of those investments are being managed in accordance with sound business principles and prudent commercial practices.'

¹⁶⁷ Public Accounts Committee Report of 1975/1976.

3.6 CAG and Parliament in Kenya

‘...all revenues or other moneys raised or received for the purposes of the Government of Kenya shall be paid into and form a Consolidated Fund from which no moneys shall be withdrawn except as may be authorized by this Constitution or by an Act of Parliament (including an Appropriation Act) or by a vote on account passed by the National Assembly under section 101. 168.....Parliament may prescribe the manner in which withdrawals may be made from the Consolidated Fund or any other fund of the Government of Kenya.’¹⁶⁹

The history of CAG can be traced to the passing of Ordinance No. 14 of 1952 which established the position and duties of the Director of Audit. In the same year, the accounting machinery was placed under the control of the treasury, so that both the policy (financial) and the accounting system become coordinated in one department. Y.P Ghai records that:

‘A review of all these developments (establishment of the position and duties of Director of Audit) was undertaken by a committee, which recommended the adoption of the British system. The recommendations were accepted and The Exchequer and Audit Ordinance was passed in 1955. The system thus created was continued under the constitution, which entrenched the basic principles, and the office and functions of the Controller and Auditor-General, which had been first established under the 1955 Ordinance.’¹⁷⁰

The office of the Controller and Auditor-General was, therefore, established under Section 105 of the Constitution to do the following:

1. Ensure any proposed withdrawal from the Consolidated Fund is authorized by law

¹⁶⁸ Section 99 (1) Constitution of Kenya (Revised Edition, 2001).

¹⁶⁹ Ibid, Section 99 (4).

¹⁷⁰ *Supra*, note 88, p. 339.

2. Ensure all withdrawn funds from the Consolidated Fund are properly used as approved by Parliament
3. Audit and report to Parliament on the public accounts of the Government of Kenya once every year.¹⁷¹

The CAG performs audit on the Government of Kenya, courts, commissions and the National Assembly. The CAG has both a control and audit function. The control function has been weakened substantially in the past by provisions in the Exchequer and Audit Act (Cap 412, Laws of Kenya) which limit it to confirmations of legality, for instance, if there is a vote and authority of Parliament.¹⁷² It does not require the CAG to satisfy himself that the expenditure is reasonable, for instance, in terms of cost of services.

In order to assist the CAG discharge his mandate more effectively, the Public Audit Act was passed in 2003 and came into operation in January 2004. It was aimed at strengthening the independence and operational capacity of the Controller and Auditor General.¹⁷³ The Act establishes the Kenya National Audit Office (KNAO), which comprises the Controller and Auditor-General and his/her staff. The Act provides for annual preparation of accounts showing fully the financial position of the Government, by the Treasury and submission to the Controller and Auditor-General. The Controller and Auditor General in turn is mandated to audit the accounts and submit a report on the audit to the Minister. The Minister of Finance has the responsibility of laying the report before the National Assembly. If the Minister fails to comply

Section 105 of the Constitution of Kenya (Revised Edition, 2001).

Kirira N., Function of Legislature - Public Finance / Financial Mechanisms.
www.commonlii.org/ke/other/KECKRC/2001/34.html (Accessed on 10th April, 2010).

Memorandum of the Public Audit bill 2003.

with this requirement, the Controller and Auditor General shall immediately present a copy of the report to the Speaker of the National Assembly for presentation to the National Assembly. The Act also establishes the Kenya National Audit Commission (KNAC) to oversee the KNAO.

It should be noted that the role of the Controller and Auditor-General is to give Parliament a technical audit/evaluation of utilization of public funds by Government and other public institutions.

Conclusion

This chapter has traced the recorded origin of Parliament and explored the different types of Parliaments and their operations. It has also discussed the Supreme Audit Institutions and watchdog committees of Parliament. All this has been done in the global and Kenyan context. From the discussions it is clear that Parliaments, regardless of their functions and composition, exercise oversight over the Executive to varying degrees. It is also clear that due to the large size of Parliaments in terms of membership, specialized functions such as oversight of use of public funds, is delegated to smaller but focused committees such as PAC and PIC to conduct thorough and detailed inquiry before tabling the matter for debate by the plenary or the whole house. Generally, the technical/audit reports, which form the basis of investigations by most PACs, are prepared by a Supreme Audit Institution (CAG, in the case of Kenya), which though autonomous, submit their reports to Parliaments.

From the foregoing, it is clear that the Kenyan Parliament, PIC, PAC and CAG have their ancestry in the Westminster Model with a little 'gene' from the presidential system associated with the American legal system.

CHAPTER THREE

REVIEW OF THE 9th Parliament

3.1 Overview

3.1.1 Introduction

The Kenyan Parliament is, by and large, ‘crafted’ from the ‘Westminster’ model of parliamentary practice. The notable difference between the Kenyan model and Westminster is the fusion of the President’s leadership of State and Government and the fact that he/she exercises executive powers on both fronts in contrast to the latter, where the Monarch and the Prime-Minister are separate (the Monarch heading the State while the Prime-Minister, Government). The Kenyan President is directly elected to office as a President and member of a specific geographic parliamentary constituency thereby wielding power as head of State and Government and Member of Parliament, a position that contrasts with the Westminster model where the head of State is neither directly elected to that office nor to represent a geographic constituency. Direct elections of heads of State are a practice prevalent in a presidential system which in its pure form, restricts the appointment of cabinet Ministers to non-Members of Parliament. In Kenya, appointment of cabinet Ministers is done by a directly elected President, but is restricted to Members of Parliament creating a hybrid of ‘presidential model’ and ‘Westminster model.’

The Westminster system is a democratic system of Government modeled after that of the United Kingdom system of Government with three independent arms of Government, the Legislature (Parliament), Executive and Judiciary. Out of the three arms of Government under the Westminster model, only the Legislature has authority drawn directly from the people: the Legislature is supposedly constituted through a 'democratic' process of election.

In Kenya, the concept of democracy is enshrined in Section 1A of the Constitution, which states that 'the Republic of Kenya shall be a multiparty democratic state.'¹⁷⁴ Several political parties participate in an election and the party or parties whose presidential candidate garners the highest number of votes become(s) the ruling party or parties and constitute the Government. Kenyans give authority or power to govern to the Executive by directly voting for the President and the authority to legislate, to Parliament, by directly voting for members of Parliament. However, in keeping with the desire to avoid exemplifying the old adage that 'power corrupts and absolute power corrupts absolutely,'¹⁷⁵ Kenyans mandate the Legislature to exercise oversight role over the Executive. Ideally, Kenyans, like any modern society, would have preferred to directly govern themselves. However, direct rule by citizens is not feasible in a complex and large society like Kenya. Democracy, therefore, provides a mechanism through which citizens elect their representatives to govern them. In a country aspiring for democracy, like Kenya, these representatives are Members of Parliament who are elected to represent certain electoral regions, or nominated to represent special interests. After electing their representatives, it is in the interest

¹⁷⁴Constitution of Kenya (Revised Edition, 2001).

¹⁷⁵Baron Charles de Montesquieu, *The Spirit of Laws*, London: Cambridge University Press (1748).

of the electors that the powers they bestow upon these representatives are exercised in accordance with their will or consent. Prof. Louis Villoro posits that:

‘In the first sense, *democracy* is the *power of the people*, where the *people* are the totality of members of an association. Democracy denotes an association in which all the members control collective decisions and their execution, only having to obey themselves. In this form of community, there is no form of domination by a few persons over others. If everybody holds power, nobody is subject to anybody else. Democracy is the achievement of the freedom of everyone. It is a guiding concept, under the influence of which politics can progressively bring society closer to the ideal, although, it can never be claimed that the ideal has been achieved in its entirety.’¹⁷⁶

Democracy pursues the objective of self governance. Professor Dahl contends that if democratic theory¹⁷⁷ is about the notion of human dignity as beings worthy of respect because of their very nature, adults must enjoy a large degree of autonomy, a status principally obtainable in the modern world by being able to share in the governance of their community. No modern country meets the ideal of democracy, which is a theoretical utopia. He further reckons that, to reach the ideal requires meeting five (5) criteria:

1. Effective Participation - Citizens must have adequate and equal opportunities to form their preference and place questions on the public agenda and express reasons for one outcome over the other
2. Voting Equality at the Decisive Stage - Each citizen must be assured his or her judgments will be counted as equal in weights to the judgments of others
3. Enlightened Understanding - Citizens must enjoy ample and equal opportunities for discovering and affirming what choice would best serve their interests

¹⁷⁶ Villoro L., Which Democracy? In Bassiouni Cherif M. et al. (eds.) *Democracy: Its Principles and Achievements* Geneva: Inter-Parliamentary Union (1998), p.95.

¹⁷⁷ Dahl R., *Democracy and its Critics*, New Haven: Yale University Press (1998).

4. Control of the Agenda – ‘Demos’ or people must have the opportunity to decide what political matters actually are and what should be brought up for deliberation
5. Inclusiveness - Equality must extend to all citizens within the state; everyone has a legitimate stake in the political process.

He calls politically advanced countries ‘polyarchies’ rather than ‘democracies’. Polyarchies have elected officials, free and fair elections, inclusive suffrage, right to run for office, freedom of expression, alternative information and associational autonomy.

An elected Parliament is charged with two forms of accountability: its own accountability to the citizens and the duty to make the Executive accountable to the public.¹⁷⁸ The Legislature, therefore, carries a noble role in the protection of public funds from misuse by the Executive.¹⁷⁹

In the *Electoral Commission of Kenya vs. Attorney General & 2 others*,¹⁸⁰ Nyamu J. interrogated the relationship between accountability/transparency and democracy. He argued that the democratic provision under section 1A of the Constitution of Kenya requires that all public institutions and entities (like Parliament) are accountable to the people they serve, because in a democracy, they owe their power and their existence to the need to serve the people. He further asserts that Section 1A of the Constitution embodies the ideals and values of a democratic society and accountability is one of the values to be inferred. It is so because it is an offspring of

¹⁷⁸David B., *Parliament and Democracy in the Twenty-First Century; a Guide to Good Practice*, Inter-Parliamentary Union (2006).

¹⁷⁹The Westminster Model. Discussed at: <http://www.dadalos.org/int/parteien/Grundkurs4/gb/westminster.htm>

¹⁸⁰[2007] eKLR, available at: http://www.kenyalaw.org/CaseSearch/case_search_one.php? (Accessed on 1st August 2009).

the wider doctrine of separation of powers which in turn is the cement or the thread that joins together the three arms of Government.

The doctrine of separation of powers is thought to have originated between the 17th and 18th centuries through the efforts of philosophical luminaries such as Harrington, Montesquieu and John Locke.¹⁸¹ It evolved on the basis of the principle that liberty and the rights of the individual were best preserved and protected if governmental powers were distributed amongst the three arms of Government. The ideal form of separation of power is obtainable through a presidential system which is typified in the United States of America and her South American cousins. Although in the Westminster model, there is separation of powers, Ministers, who are part of the Executive, are appointed from members of the Legislature. Thus, the Legislature is made up of members of the Executive (front bench) and members of the backbench. In Kenya, separation of powers, just as it is in the Westminster model, is not absolute; the President and Ministers are both in the Executive and in the Legislature.

Separation of powers as envisaged by the Kenyan legal and political system presupposes that the three arms of Government work separately and independent of each other. Separation of the legislative, executive and judicial functions of Government among separate and independent bodies has been justified by the need to limit the possibility of excesses by Government, since the sanction of all three branches is required for the making, executing, and administering of laws.¹⁸² The doctrine of separation of powers prevents the concentration of power in one body. In practice, this means each arm of Government keeps watch over the power of the others. The

¹⁸¹ Nwabueze B., *Constitutionalism in the emerging States*, London: C.Hurst & Company (1973).

¹⁸² Ghai, Y.P. & McAuslan, J.P., *Public Law and Political Change in Kenya; a Study of the Legal Framework of Government from Colonial Times to the Present*, Nairobi: Oxford University Press (1970).

Courts can judge the actions of the Legislature and the Executive but cannot legislate or execute laws. The Legislature enacts laws but cannot hand down judgments or take executive action. The Executive implements the laws but cannot adjudicate or enact laws.¹⁸³

In *Otieno Clifford Richard v. Republic*¹⁸⁴ the judge elaborated, broadly, the doctrine of separation of powers as containing the following features:

1. That the state power is vested and exercised by separate organs; it means that each organ is independent of the other
2. That the personnel in these organs are different; however, in most cases, Ministers who are members of the Executive are also members of Legislature
3. That the functions of these organs are different, for example, the Executive does not have legislative powers or the Legislature executive powers and neither of these can exercise functions of the Judiciary.

At the heart of the principle of separation of powers is a desire to enhance democracy, increase accountability and efficiency, and protect the fundamental rights of citizens against abuse.¹⁸⁵

These are the main benefits of the doctrine of separation of powers in a democratic society.

However, this separation is not absolute as the three arms of Government are expected to keep checks and balances over each other and at the same time work in a complementary manner. It is not a fixed or rigid constitutional doctrine; it is given expression in many different forms and made subject to checks and balances of many kinds.

¹⁸³ Republic of Kenya vs. Registrar of Societies and 5 others *ex parte* Kenyatta and six Others (2008) 3KLR (EP).

¹⁸⁴ [2006] eKLR, available at: http://www.kenyalaw.org/CaseSearch/case_search_one.php? (Accessed on 4th August 2009).

¹⁸⁵ Mabandla B., Separation of Powers in Sub-Saharan Africa, Konrad Adenauer Foundation's Rule of Law Conference, Wednesday, 8th November 2006, in Somerset West: South Africa (2006).

The delicate balance of power between the three arms of Government is a challenge that all democracies, old and young, continue to face to this day. Due to the need to work together, there is always encroachment by one arm of Government on the turf of another, thus defeating the essence of the doctrine. Critics of the Westminster model point out at the lack of actual counter-balances to check the executive power and the power of the head of Government. Its supporters emphasize its efficiency and its ability to make decisions quickly without being blocked by other institutional powers.

To realize national objectives harmoniously, it is necessary for the three branches to work cooperatively towards a common national agenda. Each arm should also be adequately funded and capacitated in terms of human resource and infrastructure to keep in check the others. Parliament, therefore, under the doctrine of separation of power is supposed to control the purse from which Government expenditure is met without curtailing the Executive's rational spending. This power is so great that Parliament, acting in the interest of its people, should be well equipped, legally and otherwise, to oversee the usage of public funds.

3.1.2 Kenyans' Expectations of the 9th Parliament

In December 2002, Kenyans went to the polls in what proved to be the beginning of a historic transition: the first electoral transfer of power in the country's history.¹⁸⁶ The shift was greeted with an outpouring of optimism and euphoria, as the vast majority of Kenyans hoped that the

¹⁸⁶ See Anderson D., 'Briefing: Kenya's elections 2002 — the dawning of a new era?', *African Affairs*, no. 102 (2003), pp. 331-342.

National Rainbow Coalition Party of Kenya's (NARC) promises of reform and revitalization of the Government would lead them to socio-economic prosperity and democracy.¹⁸⁷

The 9th Parliament was widely expected to play a central role in the fight against corruption and to facilitate economic recovery after decades of misrule by Moi and KANU.¹⁸⁸ In addition, NARC, which supported Kibaki, won the majority of seats in the National Assembly. These elections raised the prospect of a major shift in Kenyan politics. The new leadership's ambitious reform program included tackling corruption, economic and social malfeasance as well as undertaking institutional reforms designed to build and promote Kenya's democracy.¹⁸⁹

Sunny Bindra captured the NARC victory euphoria in the following words:

'On December 30, 2002, all Kenyan eyes were on Uhuru Park where the inauguration of the new president took place. Many of us sat in the mud under an unforgiving sun, oblivious of discomfort, transported by possibilities: the possibility that a new and noble era had dawned in Kenya; the possibility that we could leave tribalism, plunder and ineptitude behind us; and the possibility that our politics would now be progressive and our development progressive. We sat united, our hopes welded together by sheer joy.'¹⁹⁰

Frank Holmquist articulated the perception Kenya had, locally and internationally, as follows:

'The sense of a 'burden' being lifted was widely shared. People suddenly felt they were free to think bigger and better about their future. The election revived a long-dormant notion of a collective interest – indeed of a Kenyan national purpose. The prior regime was inept, parts of the bureaucracy were all but paralyzed, many bureaucratic offices were 'privatized,' corruption was routine, impunity was all but certain, poverty and crime

¹⁸⁷ Throup D.W., 'Kibaki's Triumph: The Kenyan General Election of December 2002,' Royal Institute of International Affairs, Briefing Paper no. 3 (2003). www.riia.org. (Accessed on 16th July, 2010).

¹⁸⁸ Lionel C., 'Kenya post-election prospects,' In *Review of African Political Economy*, Vol. 30, no. 96 (2003), pp. 341-3.

¹⁸⁹ Barkan D.J., 'Kenya After Moi,' *Foreign Affairs*, January/February 2004.

¹⁹⁰ Bindra S., 'NARC a problem child for its voter parents,' *Sunday Nation*, 28 December 2003, p. 14.

were spreading, basic social services were eroding, the economy was barely growing... The election changed all this. It also unleashed a powerful optimism, even euphoria, among Kenyans, including many supporters of the Moi regime. Overnight the global image of Kenya was transformed from rogue to righteous...'¹⁹¹

Kenyans had every reason to be ecstatic and optimistic as the pre-poll election campaign revolved around the issues of 'hope' and 'change.'¹⁹² The de-ethicized elections were fought over the maintenance of 'status quo' *versus* promise of 'change'. Mwai Kibaki in his inauguration speech said:

'We want every Kenyan who is trustworthy and patriotic to decide that we will fight corruption in all ways and that we will have no sympathy for anyone who will try to loot public property. There will be no sacred cows under my Government. Corruption will cease to be a way of life in Kenya.'¹⁹³

Johnson¹⁹⁴ states that the business of any Parliament in the world - the reason why Parliaments exist - is to make good laws which improve the social fabrics of society and to 'watch over' public institutions as they fulfill their obligations to citizens. He further posited that because parliaments are in the business of legislating, they are expected to be at the forefront of obeying and ensuring that the same legislations that they pass are complied with by all and sundry. It is

Holmquist F., 'Kenya's Post-election Euphoria – and Reality,' *Current History*, Vol. 102, No. 664, May 2003, p. 10.

The Kibaki government promised; economic growth, combating corruption, improved education, and rewriting the constitution. For more discussion on this see the National Rainbow Coalition 'Democracy and Empowerment,' manifesto for the National Rainbow Coalition (NARC), Nairobi, November, 2002.

Kibaki M., December 30th 2002 to be found at www.statehousekenya.go.ke/speeches/.../2002301201.htm accessed on 6th July, 2010.

Johnson J., *The Role of Parliament in Government*, World Bank Institute Working Papers, Series on contemporary issues in parliamentary development (2005).

against this background that we discuss the effectiveness of the oversight role of the 9th Parliament over the Executive's utilization of public funds.

3.2 Political and Legal Environment

The key actors in parliamentary oversight of the Executive in Kenya are Parliament (and its watchdog committees) and the Controller and Auditor General. These actors operate in a legal environment which constitute and define their method of operation and rules of engagement.

Parliament and its committees are composed of MPs whose stock in trade is politics. It can, therefore, be inferred that oversight is conducted on the infrastructural background of law which is oiled by the political climate of the day. The Executive, which is the subject of oversight by Parliament, derives its mandate from a political process, making oversight between the Executive and Parliament, a 'political' engagement. The two broad factors that impact on oversight are, therefore, politics and the legal framework under which it (oversight) is conducted.

3.2.1 Political Climate

Every public policy is a product of the political climate obtaining when it is (the policy) being developed. Public policies, whether for 'oversight' or legislation are made or implemented by politicians, in response to the political dynamics of the day. The policies are, therefore, essentially political in 'procedure' and 'substance'. A study by Transparency International ¹⁹⁵ concludes that one of the biggest problems with the 9th Parliament was the political environment

¹⁹⁵ Transparency International, A Report on Integrity: A Study of the Kenyan Parliament, Transparency International Kenya (March, 2010) at www.tikenya.org/viewdocument.asp?ID=365 (Accessed on 16th September, 2010)

in which it operated. It is, therefore, imperative to examine the operations of the 9th Parliament within the political climate in which it operated. Jerry Okungu, in one of his articles, stated that:

‘Kenya's 9th Parliament is a spectacle to behold in more ways than one. It is an institution that defies any logical description. Whichever way you want to look at it, it is a baffle and a mystery from every angle.’¹⁹⁶

The 9th Parliament was unique in a number of ways. For the first time in the history of post-independent Kenya, Kenya African National Union (KANU), which had ruled Kenya for its entire post-independence life was no longer the ruling party, having lost elections to NARC. The ruling party NARC had its leader as the new President of Kenya and a comfortable majority in Parliament.¹⁹⁷ The public had overwhelmingly voted for NARC which was enjoying tremendous domestic and international goodwill. Unfortunately, the NARC honeymoon did not last for long. No sooner had the new President announced his cabinet than cries of political betrayal emerge.¹⁹⁸ NARC was a pre-election alliance between two opposition movements, National Alliance Party of Kenya (NAK), led by Honorable Kibaki and Liberal Democratic Party of Kenya (LDP), led by Honorable Raila Odinga. The pact which was a confidential document between NAK and LDP and was referred to as an MoU, created NARC as a political party and is said to have stipulated that power be shared on an equal basis between NAK and LDP. With the elections won by NARC and the presidency secured by NAK aligned Kibaki, LDP expected the MoU to

¹⁹⁶ Okungu J., Does the Current Kenyan Parliament Deserve to Exist? To be found at <http://www.afroarticles.com/article-dashboard/article.php?id=7874&act> (Accessed on 16th July, 2010).

¹⁹⁷ NARC won 132 seats in parliament compared with KANU's 67.

¹⁹⁸ Miwa T., The Experience of the National Rainbow Coalition (NARC): Political Parties in Kenya from 1991-2007, IDE Discussion Paper No. 222, February 2010, p.11

be honored. When the new President announced his cabinet, loud murmurs of disapproval emerged from both NAK and LDP aligned Members of Parliament. There were claims that the President neither consulted nor fairly distributed portfolios according to the MoU in appointing his cabinet.

The claim of political betrayal and exclusion re-surfaced; Instead of key NARC leaders (the Summit¹⁹⁹) being involved in the formation of the Government, there was a claim that an informal group associated with one of the coalition parties, the Democratic Party (DP) had engaged in under-hand decision making by shutting out other partners in the allocation of ministerial positions and key positions in the public service. Thereafter, NARC became a *tower of babel* with disagreements over dishonored MoU.²⁰⁰ Claims of tribalism,²⁰¹ nepotism in appointments, corruption, and disagreements over major legislations like the Bomas Draft²⁰² tore the once formidable NARC into tiny non-functioning factions. These disagreements led to some

¹⁹⁹ A group of eight leading members of NARC who were supposed to provide the framework for consultations among the coalition members in the event that the coalition formed the government.

²⁰⁰ The leading politicians (Hon. Mwai Kibaki, Hon. Michael Kijana Wamalwa, Hon. Charity Kaluki Ngilu, Hon. Kipruto Arap Kirwa, Hon. Stephen Kalonzo Musyoka, Hon. Raila Amolo Odinga, Hon. Prof. George Saitoti, Hon. Moody Awori) from the major ethnic communities signed a Memorandum of Understanding (MoU) on 21st October 2002 in Nairobi by which they agreed to form a coalition government if they win elections and equally share cabinet positions between the two major political groupings in the coalition, namely the National Alliance Party of Kenya (NAK) and the Liberal Democratic Party (LDP). This is the arrangement that gave birth to the National Rainbow Coalition (NARC). For more details on the MoU see Badejo Babafemi A., Raila Odinga: An Enigma in Kenyan Politics, Lagos and Nairobi: Yintab Books (2006).

²⁰¹ The president gave influential posts in the government to the people of Mount Kenya i.e. Ministry of Justice, Ministry of Finance, Ministry of Internal Security, Head of Civil Service, Chief Justice, Heads of Key Parastatals e.t.c. For more discussion on the same see Jonyo Fred, 'The Centrality of Ethnicity in Kenya's Political Transition,' in Oyugi et al., The Politics of Transition in Kenya: From KANU to NARC, Heinrich Ball Foundation (2003).

²⁰² National Constitutional Conference (NCC), The Draft Constitution of Kenya 2004 (Circulated to Delegates and Commissioners on 23rd March 2004), Incorporating recommendations after verification by commission, adopted by the National Constitutional Conference on 15th March 2004.

members of the cabinet forming alliances with the official opposition KANU and campaigning against the diluted proposed constitution (known informally as the Wako Draft)²⁰³ which was resoundingly defeated in November 2005. The purge that followed the Government's defeat at the referendum destroyed what was left of NARC with the President forming a 'loose coalition' which he named the Government of National Unity (GNU) to help him run the Government.

Mumbi Ngaru argues that GNU was:

'An amorphous Government arrangement whose main purpose was to strengthen the base of support for the Government in Parliament and in effect to put the original NARC coalition in a cold storage by bringing on board the opposition, KANU and FORD People.'²⁰⁴

What followed were political realignments both inside and outside Parliament reducing the tradition of parliamentary parties to a convenient fiction, with many MPs occupying party positions in several political parties at the same time. The party-hopping notwithstanding, the then Speaker did nothing to contain this flip-flopping.²⁰⁵ To give an example, Raila Odinga, who had been sponsored to the 9th Parliament by NARC fraternized with at least four political parties. He was a member of NARC, LDP, Orange Democratic Movement Kenya (ODM-K), and Orange

²⁰³ Republic of Kenya, The Proposed New Constitution of Kenya, Kenya Gazette Supplement No. 63, Nairobi, 22nd August 2005.

²⁰⁴ Ngaru M., Alliances and Agreements of Tolerance as a Pre-condition for Coalition Governments: Experience from Kenya, A paper presented at the Regional Conference on Political Parties and Democratization in East Africa, 27th August 2007, p.4

²⁰⁵ Though from time to time he strongly criticized this trend, calling it a form of 'Political Nomadism' (Daily Nation, June 24, 2005).

Democratic Party (ODM), within the same parliamentary tenure.²⁰⁶ In this duality, Raila was not one; The President and a couple of Ministers were fraternizing with a host of political parties.

uda argues that:

‘the axis of conflict between NAK and LDP/KANU that prevailed from 2003 to 2005 centered not only on power struggles among the political elites but also on the state of progress of democratization, which was essentially a debate whether or not presidential power should be significantly reduced.’²⁰⁷

umbi Ngaru contends that there was no mechanism or framework through which NARC parties could thrash out their differences (differences over cabinet appointments and other state appointments, constitutional reforms, ‘respect’²⁰⁸ and ‘betrayal’²⁰⁹ among others) ahead of important policy debates in Parliament and its committees, the differences clouded the entire tenure of the 9th Parliament.²¹⁰ Vital organs of the ruling party NARC, namely, the Summit, Coordinating Committee, the Council, Election Board and Parliamentary Group, were all dysfunctional and were checkmated by the incessant wrangles.

members of Parliament in Kenya had to be sponsored by political parties to be eligible for election. The Constitution did not provide for independent (partyless) candidates in the electoral

Supra, note 205, p.12

Ibid, p.17

Threats to de-register some political parties.

Democratic Party refused to recognize that the NARC government was a coalition as per the pre-election understanding (MoU) and insisted that NARC was a party

Supra, note 204.

Democratic Party (ODM), within the same parliamentary tenure.²⁰⁶ In this duality, Raila was not alone; The President and a couple of Ministers were fraternizing with a host of political parties.

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²⁰⁶ *Supra*, note 205, p.12

²⁰⁷ *Ibid*, p.17

²⁰⁸ Threats to de-register some political parties.

²⁰⁹ Democratic Party refused to recognize that the NARC government was a coalition as per the pre-election understanding (MoU) and insisted that NARC was a party

²¹⁰ *Supra*, note 204.

process. Nomination of candidates to vie for parliamentary seats was through political parties which were recognized by section 123 of the Constitution²¹¹ and registered under the Societies Act²¹² after complying with requirements of the law as to their constitutions or rules for nominating candidates for the National Assembly. Section 17 of the National Assembly and Presidential Elections Act²¹³ governed the nomination of candidates for the National Assembly and presidential elections. The internal politics of political parties impacted on its membership and formed part of the environment under which oversight was conducted. In the 9th Parliament, as discussed above membership of political parties was obligatory to MPs. MPs had to ride the crest and bows as they navigated the turbulent waters of party politics.

Dr. Winnie Mitullah (et al) analyzed the democratization state in the 9th Parliament with specific emphasis on the gains and losses or mixed fortunes during the 9th Parliament.²¹⁴ On a positive note, they state that for the first time Parliament was able to participate in public appointments, for example, the appointment of Commissioners of the Kenya National Commission on Human Rights and the Kenya Anti-Corruption Commission. They reckoned that the 9th Parliament also had its dark-side with allegations of bribery of Members of Parliament by lobbyists to pass or reject such bills as the National Social Health Insurance Fund Bill 2004 and the Tobacco Bill. The President's refusal to assent to various parliamentary bills as required by law, for instance, the Constitution of Kenya Review (Amendment) Bill 2004, the National Social Health Insurance

²¹¹ (Revised Edition, 2001)

²¹² Cap 108, Laws of Kenya

²¹³ Cap 7, Laws of Kenya.

²¹⁴ Mitullah W., Odhiambo M., and Osogo A. (eds). *Kenya's Democratization: Gains and Losses?* Nairobi: Claripress (2005).

und Bill, 2004 and the Wildlife Conservation and Management (Amendment) Bill was regarded as a drawback in the journey towards democratization.

Matiangi Fred in his article, 'Case Study on the Role of Parliament in the Fight against Corruption: the Case of the Kenyan Parliament'²¹⁵ discussed the role of Parliament in the fight against corruption. He interrogated three main functions of Parliament: legislation, representation and oversight. He posits that the Kenyan Parliament (the 9th Parliament) was unable to address scandals like Goldenberg, Anglo Leasing and others. Further, he argues that in some occasions, members of the 9th Parliament were bribed to pass or throw out certain bills, for example, the Tobacco Bill.

Karanja Mbugua argues that the problem with the 9th Parliament was purely ideological. NARC was comprised of four diametrically opposed political tendencies: first, the Kenyatta-era elite who had lost power and influence in the 1980s; second, the elite who rose under Moi in the mid-1980s, but deserted him when he unilaterally chose his successor in KANU in 2002; third, the historically marginalized groups (by both Kenyatta and Moi) and four, other individuals (liberals, social democrats and former socialists), whose aim was to influence public policy in the post-Moi era. He further argues that all these individuals were driven by the burning desire to win an election and form a Government and nothing else, resulting into the NARC coalition being characterized by ideological disconnectedness. According to Karanja Mbugua, NARC was a

²¹⁵ Matiangi F., 'Case Study on the Role of Parliament in the Fight against Corruption: the Case of the Kenyan Parliament,' in Staphenurst R., Niall J., Pelizzo R. (eds.), *The Role of Parliament in Curbing Corruption*, World Bank Institute (2006).

coalition of unlike minded partners, each with its own hidden agenda, which soon exploded, leading to constant squabbling and in-fighting within it.²¹⁶

Other commentators have tried to explain the 9th Parliament from the point of view of the unofficial roles of MPs being accorded greater prominence than their official legislative and oversight functions.²¹⁷ They argue that most voters give priority to subjective and mundane considerations such as how 'financially generous' the representative might be, more than substantive issues regarding the MPs' representative, legislative and oversight roles. Many others may not even be aware that the effectiveness of a representative may be affected by the political regime in which he or she operates.²¹⁸ Most MPs were driven by the pressures of local (their constituency) interests and with such considerations in mind, most MPs during the 9th Parliament, were mainly concerned with re-election rather than their official roles.

Conversely, Chabal and Daloz²¹⁹ assert that representation in an African context is markedly distinct from representation as perceived within a western model. The African notion of representation is communal or collective centered, and instrumental in that it entails the active furtherance and defense of communal interests. It henceforth deviates from the western liberal democratic conceptualization of representation which traditionally embodies the obligation of legislating on behalf of the common good, as well as acting in the interest of all the citizens an

²¹⁶ Mbugua K., Kenya's Crisis: Elite and Factional Conflicts in Historical Perspective, ACCORD.

²¹⁷ Wanyande P., 'Electoral Politics and Election Outcomes in Kenya,' *Africa Development*, Vol. XXXI, No. 3, Council for the Development of Social Science Research in Africa (2006), pp. 62–80.

²¹⁸ Oyugi W. O., 'Ethnicity in the Electoral Process: The 1992 General Elections in Kenya,' *African Journal of Political Science*, Vol. 2, No.1 (1997), pp. 41-69.

²¹⁹ Chabal P. & Daloz J.P., *Africa Works: Disorder as a Political Instrument*, London: James Currey (1999), p. 55

MP represents. Clientelism is a distinct feature of the informalized and personalized type of politics found in Africa, where legitimacy rests primarily on redistribution. Representation appears 'instrumentally to be connected with a complex nexus of transactional links between the leader, or patron, and his/her clientelistic constituency (both local and national).' When evaluating the MPs' orientation, this clientelist aspect should be taken into consideration, as well as representation in traditional western sense.

Behaviour of legislators during the 9th Parliament perhaps may also be best explained by the Public Choice Theory. This theory employs the game theory and microeconomic analysis to the production of law and conduct of oversight by Legislatures, courts and regulatory bodies.²²⁰ Briefly, the theory makes two important claims. First, legislators are motivated largely by self-interest when making law or conducting oversight. The scope of self-interest is, however, not definitive; some cynically see self-interest as narrow selfish interest whereas others view it more broadly as ideological interests or persuasions.²²¹ Whichever way one looks at it, it is possible to discern self-interest in the decisions which legislators arrive at. In this sense, therefore, legislators are seen in most cases, to legislate or conduct oversight for their own benefit/survival, rather than the public good or in line with the choices preferred by the public. This theory perhaps explains why MPs quickly passed the National Assembly Remuneration (Amendment) Act²²² which introduced a new schedule to the National Assembly Remuneration Act,²²³ raising MPs salary, parliamentary responsibility, constituency, mileage and house allowances, by

²²⁰ Bix B., *Jurisprudence Theory & Context*, Sweet & Maxwell: London (2004) p. 207

²²¹ Ibid p. 208.

²²² No. 2 of 2003.

²²³ No. 9 of 1975.

various proportions. Later, they passed the 2007 Gratuity Bill, which entitled each MP to gratuity payments of Kshs. 1.5 million. Second, political actors involved in legislation and oversight are seen to maximize benefits while trying to minimize the transaction costs. For instance, MPs will support projects which will increase their chances of re-election regardless of the cost to the taxpayers in general. The transaction costs to the MPs will be virtually zero, since the monies involved in such projects are public finances.

3.2.2 The Legal Framework

The quality of governance of any nation rests squarely on the conduct, integrity and performance of those in positions of authority. Parliamentarians in their individual and collective capacity as people's representatives are charged with the duty to ensure that those in authority (the Executive) adhere to the principles of good governance. Parliaments discharge this onerous mandate by exercising oversight of the Executive by ensuring that the public they (Parliament) represent get value for their taxes. The principle behind legislative oversight of executive activity is to ensure that public policy is administered in accordance with the legislative intent, and by inference, the citizens' aspirations.²²⁴ In this context, the legislative function does not cease with the passage of a bill. It is only through monitoring the implementation process that parliamentarians uncover any defects and act to correct misinterpretation or maladministration.²²⁵ In this sense, the concept of oversight exists as an essential corollary to the law making process.

²²⁴ Mars Group, The case against the Members of the 9th Parliament of Kenya: A Critique of The 9th Parliament of Kenya (2003 – 2007), Mars Group Kenya Report (2007).

²²⁵ Staphenurst R., Johnston N. & Pelizzo R., The Role of Parliament in Curbing Corruption, Washington DC: World Bank Institute (2006).

Parliaments the world over discharge their oversight role in four principal ways, namely: committee system, parliamentary motions and questions, censure of Government officials and vetting of Executive appointees.²²⁶ During the 9th Parliament there existed various mechanisms and instruments for oversight. These included:

1. Constitutional and legal provisions, including the house's Standing Orders
2. Parliamentary Committee probes and inspection visits
3. Questions and motions, Ministerial statements and petitions
4. Extra-parliamentary institutions established to support Parliament's watchdog functions, for example the Kenya National Audit Office (KENAO),²²⁷ and Kenya Anti-Corruption Commission (KACC)²²⁸ among others.

The Constitution of Kenya, Section 56 (1), provides for the National Assembly to formulate its own rules and procedures through Standing Orders. It also allows for the establishment of various house committees for general or special purposes that the house may deem fit. The Rules and Procedures of the National Assembly provide for the establishment of the following types of committees:

1. Committees of the whole house
2. Standing committees
3. Sessional committees
4. Departmental, portfolio/subject related committees
5. *Ad hoc* select committees.

²²⁶ Johnson J.K & Nakamura R.T., A Concept Paper on Legislatures and Good Governance, UNDP Paper, New York (1999) <http://siteresources.worldbank.org/PSGLP/Resources/conflictunit3> (Accessed on 15th February, 2010).

²²⁷ Established under Section 34 of the Public Audit Act (No. 12 of 2003), Laws of Kenya.

²²⁸ Established under Section 6 of the Anti-Corruption and Economic Crimes Act (Act 3 of 2003), Laws of Kenya.

In Parliaments the world over, the committee system assumes great importance since Parliament, by its very nature, cannot have complete oversight over Government and all its activities. In fact, a strong committee system is the hallmark of a dynamic Legislature. Indeed, the debates in the parliamentary reform programs across the globe have been on how to strengthen the legislative committee system.²²⁹ This is based on the understanding that a vibrant committee system is a useful instrument for Parliament in charting policy direction upon those matters that come before it for consideration. For a Legislature to be independent of the Executive arm, it must have a strong internal mechanism to enable it carry out the complicated task of policy oversight that would otherwise not be possible in the plenary session.²³⁰

The advantage of having an effective parliamentary committee system is to ensure that different parliamentary interests and points of view are taken into account when the Legislature makes its decisions. The committees provide avenues for meaningful probes and debates, management of complex parliamentary business and, above all, mechanisms for parliamentary accountability.²³¹

The entire role, functions and operations (procedure and proceedings) of Departmental Committees (DCs) like those of other select committees are carried out under the cloak of parliamentary privilege secured by the National Assembly (Powers and Privileges) Act (Cap 6).²³² To Parliament, its committees, individual Members, proceedings, officers, strangers or

²²⁹ Ackah J. E., 'Parliamentary Oversight Evaluation,' paper presented at ASDR on 'Reflections on Security' Series (2002).

²³⁰ Bagbin A., 'The Role of the Public Accounts Committee of Parliament and how it can effectively promote and enforce an ethics of management in public service,' *GII Alert*, No. 2, June 2004, p.6.

²³¹ See Gareth G., Who Makes the Point in 'Parliament and Accountability: The Role of Parliamentary Oversight Committees,' *Australian Parliamentary Review*, Autumn 2006, Vol.21, No.1 pp 7- 46.

²³² Cap, 6 Laws of Kenya.

witnesses Cap 6 and the Standing Orders are the guiding regulations. The National Assembly (Powers and Privileges) Act has its origins in section 57 of the Constitution under which the 9th Parliament operated which provided that:

‘Without prejudice to the powers conferred by section 56, Parliament may, for the purpose of the orderly and effective discharge of the business of the National Assembly, provide for the powers, privileges and immunities of the Assembly and its committees and members.’²³³

The preamble of the National Assembly (Powers and Privileges) Act provides that:

‘ it is an Act of Parliament to declare and define certain powers, privileges and immunities of the National Assembly and of the members of the National Assembly; to secure freedom of speech in the National Assembly; to make provision regulating admittance to and conduct within the precincts of the National Assembly; to give protection to the persons employed in the publication of the reports and other papers of the National Assembly; and for purposes incidental to or connected with the matters aforesaid.’

Section 14 (1) provides that the Assembly or any standing committee thereof may, subject to the provisions of sections 18 and 20, order any person to attend before it and to give evidence or to produce any paper, book, record or document in the possession or under the control of that person. Section 21 provides that any person who before the Assembly or any committee intentionally gives a false answer to any question material to the subject of inquiry which may be put to him during the course of any examination shall be guilty of an offence under section 108 of the Penal Code and liable to the penalty prescribed by the appropriate section for that offence.

²³³ (Revised Edition, 2001).

Section 23 of Cap 6 is equally important in that it aids the working of the parliamentary committees. In summary it can be said that by provisions of Cap 6, all parliamentary committees have powers to collect evidence in Kenya by summoning witnesses, ordering production of papers, documents and causing punishment for non-compliance.

The parliamentary watchdog roles on expenditure of public accounts and investments were conducted by the Public Accounts Committee (PAC) and by the Public Investment Committee (PIC) under Standing Order Numbers 147 and 148 respectively during the tenure of the 9th Parliament in respect of public owned or funded institutions.

The appointment of Members of Parliament (MPs) to sit on various committees like House Business Committee (HBC),²³⁴ PAC and PIC is provided for in the Standing Orders. The Standing Orders stipulate the number of members of committees assigned to the ruling party(s) and those assigned to members of opposition party(s).²³⁵ PAC and PIC required a quorum of five members to conduct their oversight business. By tradition and parliamentary practice,²³⁶ the Treasury was obligated to respond to reports of PAC and PIC through written Memoranda²³⁷ indicating remedial or other action taken to address findings and queries of PAC/PIC or the Controller and Auditor General. The Permanent Secretary, Treasury, was the overall Financial Accounting Officer in the Government.²³⁸ S/he was charged with the responsibility of appointing

²³⁴ National Assembly Standing Orders No. 145(revised edition 2003).

²³⁵ Ibid.

²³⁶ May T.E., Boulton, C. J. & Sweetman, J. F., *Erskine May's Treatise on the Law, Privileges, Proceedings, and Usage of Parliament*, London, Butterworths (1989).

²³⁷ Submissions that suggest possible ways or measures of addressing special issues that arose in the PIC report.

²³⁸ Section 4 of the Government Financial Management Act, (Act 5 of 2004), Laws of Kenya.

Financial Accounting Officers for all Ministries²³⁹ who were invariably Permanent Secretaries who in turn, were held accountable for Government revenues collected and expended by their respective ministries. The Accounting Officers, as per stipulations of the provisions of the Government Financial Management Act (GFMA)²⁴⁰ were supposed to prepare the financial statements for their respective ministries and forward them to the Controller and Auditor General for audit. The Controller and Auditor General, upon audit of the accounts of all Government departments, compiled a report. This report formed the basis of deliberation by the Public Accounts Committee.

During the tenure of the 9th Parliament, internal auditing functions were generally geared towards assessing and advising on risk management, control and governance processes in ministries, departments and districts. The objective of the internal audit was to provide quality assurance and consulting services designed to add value to Government operations.²⁴¹

Internal audit functions were governed by Section 9(1) (c) of GFMA as a service to all levels of management. The authority and responsibility of internal audit was derived from Section 4 (2) and (3) of the Exchequer and Audit Act.²⁴² According to section 29 of GFMA Treasury was required to prepare two reports on budgetary performance, one half yearly, and the other annually to be laid before the National Assembly. Treasury Circular No. AG/CONF/3/119/01

²³⁹ Ibid, Section 17.

²⁴⁰ Ibid, Section 18.

²⁴¹ Maina B., Public Finance Management in Kenya: A Review of the Draft Bill of the Constitution of Kenya Review Commission, CLARION Report (2003).

²⁴² Chapter 412, Laws of Kenya.

Vol. IV (28) dated 6th February 2006 required Internal Auditors (IA) in line ministries to review/audit budget performance reports before submission to Treasury. This review provided critical alignment with national strategic objective of the Economic Recovery Strategy for Wealth and Employment Creation (ERSWEC). The mandate of Internal Audit was to audit revenue throughout Government ministries and also verify expenditure. It, therefore, had a stake in revenue mobilization efforts of the Government and quality of expenditure management.

Three statutes governed the Controller and Auditor General (CAG): the Constitution of Kenya; the Exchequer and the Audit Act and the Public Audit Act. The relationship between the CAG and Parliament emanated from the Constitution.²⁴³ The Public Audit Act²⁴⁴ augmented the Constitution by providing for the terms of office, duties and powers of the Controller and Auditor-General. This Act restructured the CAG into the Kenya National Audit Office (KENAO), and created the Kenya National Audit Commission (KNAC)²⁴⁵ to consider and approve the estimates of KENAO and determine the remuneration and other terms of appointment of staff.

The mandate of KENAO was to carry out audits within statutorily set deadlines, and to assess the economy, efficiency and effectiveness of the Central Government, Law Courts, Local Authorities, National Assembly, Statutory Bodies, States Corporations and Commissions, and submit reports to Parliament. It played a major role in promoting accountability and good governance in the utilization of the national resources.

²⁴³ Section 105 of Constitution of Kenya (Revised Edition, 2001).

²⁴⁴ (Act No. 12 of 2003) Laws of Kenya.

²⁴⁵ Established by Section 48 of Public Audit Act (Act No. 12 of 2003) Laws of Kenya.

During the tenure of the 9th Parliament, there was no statutory requirement setting any time limits as to when the Government should make response to a report of a Select Committee. However, practice set so far, was that, in the case of reports of the Public Investments Committee, the replies were presented to the next committee in the form of Treasury Memorandum and reported to the house as an appendix of the committee report.

3.3 Did the Legal Regime Allow for Effectiveness?

The Constitution is the primary law that establishes national institutions, confers powers on them and defines how the institutions relate to each other. In the context of the 9th Parliament, the Constitution created the Executive, the Legislature and Judiciary, as the three arms of Government. The Constitution, together with other laws gave direction on how oversight of the Executive was to be conducted by Parliament. The Constitution created the office of the CAG to assist Parliament in 'watching over' the Executive's use of public funds. In order to evaluate whether Parliament was effective in its oversight over the Executive, it is imperative to examine how the Constitution created and empowered the key actors in oversight, and further, what other laws have added to this dynamism.

3.3.1 'The Constitution,' Parliament and CAG

Rick Stapenhurst²⁴⁶ argues that a fully effective oversight requires a combination of contributing factors, including appropriate parliamentary powers, resources, procedures, good executive accounting, reporting, transparency, skilled parliamentarians and an independent and vibrant

²⁴⁶ *Supra*, note 225.

civil society. However, the history of Kenya's Parliament reveals a protracted struggle by the Legislature to secure institutional independence from the Executive.²⁴⁷ Whereas this struggle appeared to have been determined at independence, a sequence of well-orchestrated amendments re-asserted the power of the Executive and the presidency over the Legislature.²⁴⁸ In the intervening period, Parliament became nothing more than a rubber-stamp for Executive actions, undermining the practice of constitutionalism and observance of the rule of law. In this period, one can argue that the Legislature experienced unprecedented forms of capture by the Executive. This made it possible for other interests (local and foreign) to influence the Legislature through the mediation of the presidency. These interests continued with this trend during the life of the 9th Parliament, although to a lesser degree.²⁴⁹

Eberlei and Henn argue that:

'The position of Parliaments vis-à-vis the Executive is traditionally weak in the countries of Sub-Saharan Africa. While the constitutions give them legislative, oversight and budgetary powers, they exercise these only to a limited extent, if at all. This is rooted in political systems that tend to strengthen the Executive, a generally weak democratic culture, and very limited capacity in terms of members and institutional resources'²⁵⁰

As discussed in the previous chapter, the Constitution to some extent provided for the separation of power between the three branches of Government. The National Assembly bore the

²⁴⁷ *Supra*, note 181.

²⁴⁸ Muigai G., *Constitutional Amendments and the Constitution Amendment Process in Kenya (1964-1997), A Study of the Politics of the Constitution*, Ph.D Thesis, University of Nairobi (2001).

²⁴⁹ *Supra*, note 217.

²⁵⁰ Eberlei W. & Henn H., *Parliaments in Sub-Saharan Africa: Actors in Poverty Reduction?* GTZ/Canadian Parliamentary Centre, 2003, p.31

constitutional mandate of checking the Executive. This mandate was based on the constitutional theory that Parliament represents the sovereign will of the people and thus the legislative function involved safeguarding people's welfare and interests, hence its watchdog role.²⁵¹ It has also been argued that law-making power goes with the power to ensure proper administration of law.²⁵² In this sense, the National Assembly had a responsibility to ensure that laws, resolutions and recommendations made by Parliament or its committees were fully implemented by the Executive.

However, some commentators have argued that the Constitution under which the 9th Parliament operated failed to establish clear roles and powers for Members of Parliament.²⁵³ To begin with, they argue that the job description for Members of Parliament was not provided for and this could only be constructed by inference. To some extent this argument holds in that the Constitution under which the 9th Parliament operated in section 34 and 35 only outlined the basic qualification and disqualification of a Member of Parliament, but did not give the actual job description or work requirements of an MP so as to be qualified to carry out their constitutional duties, which were specified in the Constitution.

By inference, the job description of a Member of Parliament under the Constitution in which the 9th Parliament operated included but was not limited to:

1. Law-making
2. Public-financial management or oversight.

²⁵¹ Ojwang J. B., *Environment & Legislative Representation in a Comparative Perspective: A Legislative Representation in a Comparative Perspective*, University of Nairobi Law Journal Vol 1 2003, p.34

²⁵² Ibid p. 35

²⁵³ *Supra*, note 224, p.7

Chapter III of the Constitution (Section 30-59) vested all legislative power in the institution of Parliament. Section 30 stated that ‘The legislative power of the Republic shall vest in the Parliament of Kenya which shall consist of the President and the National Assembly.’²⁵⁴

Chapter VII of the Constitution dealt with public financial management. Section 99 in part stated that ‘[a]ll revenues or other moneys raised or received for the purpose of the Government of Kenya shall be paid into and form a Consolidated Fund from which no money shall be withdrawn except as may be authorized by this Constitution or by an Act of Parliament (including an Appropriation Act) or by a vote on account passed by the National Assembly under Section 101’

The fact that the Constitution was not explicit on the role of Parliament and parliamentarians in regards to oversight over public funds was a drawback; it makes a defiant Executive question or doubt whether Parliament is truly seized of such powers. ‘Job’ description and specification is important in a number of ways. First, it clearly outlines the principle accountabilities of an office. Without clarity as to the ‘job’ description of an office, it is difficult to set performance measures (PMs) which a given office must deliver on for such an office to be considered effective. Second, lack of a clear job description creates problems and confusion as it fails to give clear expectations to both the ‘employer’ and ‘employee.’ In contrast, when it comes to executive authority, Section 23(1)²⁵⁵ of the Constitution was explicit and stated that ‘The executive authority of the Government of Kenya shall vest in the President and, subject to this Constitution, may be exercised by him either directly or through officers subordinate to him.’

²⁵⁴ Constitution of Kenya (Revised Edition, 2001).

²⁵⁵ Ibid.

While section 30²⁵⁶ was explicit on the legislative role of Parliament, confusion was created by the provision which read that: '[t]he legislative power of the Republic shall vest in the Parliament of Kenya, which shall consist of the President and the National Assembly.' This in effect meant that legislative 'authority' was a shared function between the President and Parliament.

There were also laws that conferred upon the Executive the authority to borrow without proper oversight. One of such laws was the Internal Loans Act²⁵⁷ which authorized the Government to borrow money in Kenya but did not obligate the Minister to report to Parliament the purpose for which the debt was required or report on the use. The Act assumed that this blanket authority was given via authorization of a deficit budget and approval of the Minister's financing plans. This was usually provided in the financial statement that accompanied the budget presentation, which presented the financing plan and the level of intended domestic borrowing.

This simply meant that the oversight role of Parliament was construed and supported by customs and traditions as there was no explicit provision that bestowed on it the oversight role. The problem with this is that when the constitutional foundation of the oversight role of Parliament (the principal) over the Executive is not crystal clear, the oversight role of a parliamentary committee (a delegate of Parliament) is blur. This informs J.B Ojwang's argument when he states that:

'Convenience rather than theory is the basis of Kenya's parliamentary committees; thus they are limited in number and have no authority of their own separate from that of plenary assembly ... yet, if the committee's (PAC) operations can be regarded as a

²⁵⁶ Ibid.

²⁵⁷ Chapter 420, Laws of Kenya

portrait of the Legislature power of control, the ineffectiveness of this power has been all too evident, as over-expenditure (use by the Executive out of the consolidated funds monies not voted for in Parliament) has continued to rise over the years....²⁵⁸

H.B Ndoria Gigheru took the position that:

‘perhaps the most important of all the Public Accounts Committee’s function is merely to exist, for the very existence of the committee is an overwhelming deterrent to any form of financial irregularity or laxity. The Auditors comments by themselves are not enough – by himself, he would be, as it were, one public servant against another. Any irregularity is fairly sure to be brought to light by him, but it is for Parliament, working through its committees, to hear the defense and to express a view publicly on how serious any slip has been.’²⁵⁹

A report by Mars Group states that:

‘during the 2003-2007 Parliament revelations of grand corruption and misappropriation of public funds continued unabated, and Parliament took no action to prevent illegal charges on the Consolidated Fund. The epitome of this state of affairs was the Anglo Leasing scandal in which the Controller and Auditor General informed the 9th Parliament that close to 40 billion shillings was paid out by the Treasury on 18 bogus security related contracts without parliamentary approval between 1997 and 2004. To date none of the public officers and companies involved have faced the law for the manipulation of Kenya’s External Public Debt Register in breach of the Constitution of Kenya. Although the Public Accounts Committee made two reports on the Anglo Leasing scandal (2004 and 2006), no further action was taken on them and it appears they were abandoned by the 9th Parliament. A second example of an illegal charge on the Consolidated Fund and parliamentary laxity involves an alleged loan of over Ksh 4 billion owed to an Austrian bank for the Ken Ren Fertiliser factory which has not been built since first conception in the 1970s. Despite civil society statements of objection to this fraud, Parliament took no action to establish why loan repayments for this phantom project were being made in 2007.’²⁶⁰

²⁵⁸ Ojwang J.B., Constitutional Development in Kenya: Institutional Adaptation and Social Change, Nairobi, ACTS Press (1990) p. 138

²⁵⁹ Gicheru Ndoria H.B., Parliamentary Practice in Kenya, Nairobi: Transafrica Publishers (1976). p. 128

²⁶⁰ *Supra*, note 224, p.8

Betty Maina argues that Sections 16, 19, 22, and 24 of the Constitution under which the 9th Parliament operated dealt with the structure and size of Government and provided for the creation of Ministries, Ministers, Assistant Ministers and Permanent Secretaries and public offices by the president and he/she single handedly determined the size and structure of Government as well as the tenure of senior public officers without oversight or reference of any other public body.²⁶¹ The establishment of ministries and other public offices without parliamentary approval leads to expansion of Government without checks and balances on the necessity for such ministries of public offices. The mere fact that institutions that expend public funds can be created at the discretion of the Executive without reference to Parliament and such institutions are legally valid casts doubt on the claim that Parliament exercises oversight over the Executive.

Chapter VII of the Constitution outlines Parliament's role in public finance management. The Constitution states that all withdrawals from the Consolidated Fund must have been authorized by an Act of Parliament (unless specifically authorized by the Constitution itself).²⁶² The National Assembly was also empowered to establish a contingencies fund to underwrite urgent expenditure, which may not otherwise have been provided for under any approved vote.²⁶³ Thus, Parliament, at least in theory, played the role of safeguarding public finances by wielding the key to withdrawals by Government from the Consolidated Fund. However, the tendency by the Executive to withdraw funds without Parliament's approval or knowledge puts in doubt the supremacy of Parliament in the accountability relationship between Parliament and the Executive

²⁶¹ Maina B., *Public Finance Management in Kenya: A Review of the Draft Bill of the Constitution of Kenya* Review Commission, CLARION Report (2003).

²⁶² Section 99 of the Constitution of Kenya (Revised Edition, 2001).

²⁶³ *Ibid*, Section 102.

n respect to collection of revenue and authorization of use of public funds. The CAG report of 2007 reads in part:

‘It is unacceptable that Ministries continue to carry forward large unsupported balances representing billions of shillings. Analysis and clearance of these balances, in my view, should be given priority.

.....
‘[R]eluctance or inability to analyze and clear these huge balances from Below the Line Accounts increases chances that misappropriation of funds and other malpractices, including outright theft, could go undetected for a long time.’²⁶⁴

Perhaps the absence of constitutional clarity on Parliament’s oversight role explains the reason the Executive ignores the oversight role of Parliament. Some members of the Executive have refused on a number of occasions to give evidence to PAC/PIC citing the Official Secrets Act.²⁶⁵ In other instances, perhaps to pre-empt adverse findings by parliamentary committees, the Executive hurriedly constituted commissions of inquiry²⁶⁶ to interview individuals peripheral to some matters in attempts to deny these committees the mandate to summon these individuals. The individuals later refused to heed parliamentary committee summons to give evidence claiming that they have already given evidence.²⁶⁷

²⁶⁴ Republic of Kenya, Report of the Controller and Auditor-General for the Financial Year ended 30th June 2006, Government Printers (2007).

²⁶⁵ Cap 187, Laws of Kenya.

²⁶⁶ Established under Commissions of Inquiry Act (Cap 102, Laws of Kenya).

²⁶⁷ AfriCOG, Postponing the Truth: How Commissions of Inquiry are Used to Circumvent Justice in Kenya, AfriCOG (September, 2008).

Prerogative powers are granted 'for the good of the society'. Sections 16 and 19 of the Constitution granted the President the prerogative to appoint Ministers and Assistant Ministers. However, the Constitution did not restrict the number of MPs to be so appointed or political parties from which the President could appoint, resulting into unchecked powers by the President to appoint an indefinite number of Ministers and Assistant Ministers. This unconfined prerogative meant that the President could, in theory and practice, change parliamentary composition by party functions (ruling party(s) or official opposition parties) and boost his/her parliamentary majority without recourse to the electorate. Given that Ministers and Assistant Ministers were bound by the doctrine of collective responsibility, they all had to support the executive directive at the expense of oversight. The dangers of this constitutional provision (of appointing unlimited number of MPs) on oversight manifested itself during the preparation of Anglo-Leasing Report, where a section of members of the PAC were appointed into the Executive as Assistant Ministers.²⁶⁸ The aim of the Executive then could be interpreted to mean an attempt at either frustrating or scuttling preparation of the PAC report by causing a quorum hitch and/or denying PAC invaluable membership.

Patzelt,²⁶⁹ however, was of the opinion that the constitutional powers granted to Parliament are necessary but not sufficient for explaining the power of Legislatures as the frequent discrepancy between formal and actual powers cannot be underlined. He further states that express letters of constitutions should never be overlooked since they stipulate the basic structures, powers and relationships of the different organs of the Government. Formal powers, he explains, should be

²⁶⁸ The Members of PAC who were appointed as assistant ministers were: Hon. Ekwee Ethuro, Hon. Adelina Mwau, Hon. Koigi Wamwere, Hon. Kembi Gitura.

²⁶⁹ Patzelt W. J., 'A Framework for Comparative Parliamentary Research in Eastern and Central Europe' in Attila (ed.) *The Emergence of East Central European Parliaments: The First Steps*, Budapest: Hungarian Centre of Democracy Studies Foundation (1999).

looked at as a means of identifying and examining areas where the distribution of power relations between the Executive and the Legislature is unbalanced in favor of the Executive. Where the explanatory power of *de jure* rules is clearly perceived as inadequate, informal factors should be turned to, so as to explain the *de facto* workings of the accountability relationship between the Legislature and the Executive.

It may also be argued that the composition (the presence of the front and backbench) of Parliament violated the principles of separation of powers as the Executive formed part and parcel of Parliament's membership. The fact that the President was an MP representing a geographical parliamentary constituency, and also part of the constitutional definition of the National Assembly as President, created doubt as to the existence of separation of powers.

Further, the Constitution gave the President immense powers over Parliament, leading to the capture and control of Parliament by the Executive, with far-reaching impact on effectiveness of oversight. Under sections 57 and 58 of the Constitution, the President occupied an important position within the framework of Parliament. The President had powers to convene, prorogue and dissolve Parliament and, therefore, controlled the parliamentary calendar. The annual calendar of Kenya's Parliament during that period amounted to a working period of about 27 weeks per year, generally making a parliamentary session to run from March to December with recesses.²⁷⁰

The President's influence over Parliament did not end there: As head of Government, the President influenced parliamentary agenda through introduction of Government bills and

²⁷⁰*Supra*, note 224, p.9

determined the outcomes of the legislative processes by wielding the veto power.²⁷¹ For example, during the 9th Parliament, the President refused to assent to the Constitution of Kenya Review (Amendment) Bill 2004, the National Social Health Insurance Fund Bill, 2004 and the Wildlife Conservation and Management (Amendment) Bill.²⁷²

Even though the National Assembly was empowered to pass a 'vote-of-no-confidence' as a mechanism of checking the Executive, the same was a suicidal process which if successfully initiated, lead to dissolution of the house.²⁷³ The consequence of a 'vote-of-no-confidence' is unpleasant to Parliament as it results in a general election involving the President and Parliament alike.

The Constitution did not obligate institutions against which Parliament made resolutions to adhere to those resolutions.²⁷⁴ The long and the short of it was that the resolutions of the 9th Parliament and its committees were not binding on the Executive, they were merely advisory. First, Ministers and Assistant Ministers were political appointees of the President and they served at his or her pleasure. The President was not obliged in law to explain his/her reasons for appointing or retaining any person as a Minister or Assistant Minister. This in effect meant that even if the watchdog and audit organs were uncomfortable with the political appointees, it was the President who had the final say. Ministers and Assistant Ministers were, in fact, answerable to only the President and not any other institution. The same was true of senior public servants

²⁷¹ Section 46 of the Constitution of Kenya (Revised Edition, 2001).

²⁷² *Supra*, note 214.

²⁷³ *Ibid*, Section 59.

²⁷⁴ The recommendations range from prosecution of individuals, methodology for recovery of lost funds to barring individuals from ever occupying public office.

such as Permanent Secretaries,²⁷⁵ Ambassadors and High Commissioners,²⁷⁶ Corporation Heads and Board Chairpersons. This explains why public officials who were found to have been involved in malpractices and corruption continued in office provided that the President was pleased with them. No wonder holding and keeping plum public jobs became a function not of competence and integrity, but of loyalty to the President.

Second, the power to prosecute was vested in the Attorney General (AG) by section 26 of the Constitution. Section 26 (8) stated that: 'In the exercise of the functions vested in him by subsections (3) and (4) of this section and by sections 44 and 55, the Attorney-General shall not be subject to the direction or control of any person or authority.'²⁷⁷ This was where the problem of CAG and Parliament began. Parliament had no authority to compel the AG to take legal action against individuals who had been found by CAG or its committees as culpable. In the circumstances, hundreds of cases of blatant corruption have gone unpunished.²⁷⁸

Third, by tradition, the Speaker was sponsored for election by the party with the majority in Parliament which invariably was the ruling party. This meant that the ruling party could bring pressure to bear on the Speaker to go slow/soft on matters affecting itself, members or the Government it had formed. When push turned to shove, a desperate ruling party could enlist the 'shield' of the Speaker. The Speaker held a very powerful and critical position in Parliament

²⁷⁵ Section 22 of the Constitution of Kenya (Revised Edition, 2001).

²⁷⁶ Ibid, Section 107 (4) (e).

²⁷⁷ Ibid

²⁷⁸ Mati M. & Githongo J., Judicial Decisions and the Fight Against Corruption in Kenya, Transparency International Kenya (December, 2001)

which, depending on his decisions, could impact positively or negatively on oversight. The functions and powers of the Speaker included:

1. Presiding over sessions of Parliament²⁷⁹
2. Issuing writs to declare a vacancy of a Member of Parliament²⁸⁰
3. Transmitting bills to the President for assent and receiving Acts of Parliament assented to by the President or memorandum by the president in the event of withholding of assent to bills²⁸¹
4. Participating in the process that determines whether the President is competent to hold office for reasons of physical or mental infirmity²⁸²
5. Heading of the Parliamentary Service Commission²⁸³
6. Spokesperson of Parliament.²⁸⁴

A key informant gave information that the Speaker could decline to sign summons of important witnesses. Under the National Assembly (Powers and Privileges) Act, it is only the Speaker who authorizes issuance parliamentary summons to witnesses.²⁸⁵ In the Anglo-Leasing Report, PAC noted that Hon. Kiraitu Murungi initially declined to be examined, citing various reasons and publishing information accusing PAC of partisan agenda and lacking in mandate. He claimed that the parliamentary rules, practice and procedure have no room for a committee of the house to summon an Honorable Member, and that a member could only be '*requested*' to attend committee sessions. The committee consequently referred this matter to the Powers &

²⁷⁹ Section 38 of the Constitution of Kenya (Revised Edition, 2001).

²⁸⁰ Ibid, Section 44.

²⁸¹ Ibid, Section 46.

²⁸² Ibid, Section 12.

²⁸³ Ibid, Section 45.

²⁸⁴ Even though this role is not listed anywhere in the Constitution, it has nevertheless evolved from tradition and practice

²⁸⁵ Section 14 of the National Assembly (Powers and Privileges) Act (Cap 6, Laws of Kenya).

Privileges Committee²⁸⁶ for further action, to no avail. The Speaker could also decline to sanction investigatory trips or actions recommended against defiant witnesses pursuant to Cap 6, Laws of Kenya. In the event that the Speaker became an impediment to oversight, the affected committees did not have any recourse.

In Australia and New Zealand, the Government is required to formally respond to PAC recommendations.²⁸⁷ The timeframe ranges from three to six months with Ministers²⁸⁸ encouraged or required to submit an explanatory statement if they need more time to respond. If the Minister is unable to comply with this requirement, an interim response must be tabled setting out the reasons for not complying. A final ministerial response is required no later than six months. Under a resolution of the Australian Capital Territory Legislative Assembly in April 2002, Government agencies are required to disclose the status of Government-accepted PAC recommendations in their annual reports. The information to be reported includes a schedule outlining actions taken and progress made on the implementation of PAC reports.²⁸⁹

²⁸⁶ Established by Section 10 of the National Assembly (Powers and Privileges) Act (Cap 6, Laws of Kenya) to inquire into any alleged breach by any member of the Assembly of the Code of Conduct which is alleged to have been intended or likely to reflect adversely on the dignity or integrity of the Assembly.

²⁸⁷ The responsibility for responding to PAC recommendations normally falls to the relevant portfolio minister, however, if the recommendation has policy and / or whole of government ramifications, the approval of the leader of the government or cabinet can be required before the minister formally responds. For example, in Victoria, government responses to the committee's recommendations are considered by cabinet.

²⁸⁸ While the majority of committee recommendations involve practices and procedures in individual or multiple public sector agencies, it is generally the responsibility of the government minister to respond.

²⁸⁹ KPMG, The Parliamentary Public Accounts Committee: an Australian and New Zealand Perspective Report (2007) www.latrobe.edu.au/psgarc/assets/downloads/.../kpmg-pac-report.pdf (Accessed on 4th March, 2009).

The Constitution of Kenya did not have provisions for performance measurement or basic standards of good conduct,²⁹⁰ setting values such as honesty, integrity, transparency, accountability and good leadership. This meant that there was no yardstick against which to measure success, ethics or defining standard of conduct expected of Parliament or parliamentarians. Though a structured approach to performance assessment is a key principle of good governance the world over, it was not inbuilt in the Constitution, and, therefore, the 9th Parliament was not obliged to pass any legislation by a specified time-frame or examine specified number of reports. In fact, in the history of post-independent Kenya, it is only the 9th Parliament that did not add any comma or full-stop to the Constitution.²⁹¹ Many are of the view that the 9th Parliament did abandon the national interest and converted its legislative authority and goodwill to the private interests of MPs as they increased their salaries and allowances at will.²⁹² Within the first five months of its election, the 9th Parliament had increased the MPs salaries. It became the most expensive Parliament in terms of salaries payable to MPs, and at the time of its dissolution it had passed a paltry 67 laws (an average of 13 laws per year). To pass less than 14 statutes per year is dismal as some Parliaments such as the South African Parliament passed over 40 statutes in one year during the same period.²⁹³ In Australia, the Victorian Public Accounts and Estimates Committee annual report includes work plans and performance targets with an assessment of actual achievement against these targets. These targets include key

²⁹⁰ Such a code existed in the Public Officer Ethics Act (Act No. 4 of 2003) Laws of Kenya, but its enforcement was however non-existent.

²⁹¹ The 9th Parliament stands as the only parliament of post independent Kenya which completed its 5 year term without any Constitutional input of any kind, whether positive or negative.

²⁹² Amendment to the National Assembly Remuneration Act (Act No 9 of 1975) by introduction of the National Assembly Remuneration (Amendment) Act (No.2 of 2003), for the purpose of enhancing the salaries and allowances of all members of parliament about threefold on average from the hitherto existing levels.

²⁹³ *Supra*, note 224.

performance indicators such as the percentage of recommendations accepted, the number of reports completed when planned and the number of submissions received.²⁹⁴

Without performance contracts, the watchdog committees (PAC/PIC) were under no legal obligation to audit or discuss a specified number of CAG reports. They looked at the reports at their own pace. Information availed by key informants indicated that PIC and PAC were convened at the convenience of members and, at times, merely to draw allowances. This truancy prompted the then Speaker to direct that Members of Parliament would only be entitled to allowances if they attended committee meetings in time and for a reasonable duration.²⁹⁵

The PIC and PAC of the 9th Parliament were behind schedule in scrutinizing reports of CAG, a situation that was aggravated by the absence of a legal duty binding Parliament and its committees to complete determinate and quantifiable oversight work. This already sorry situation was complicated further by the fact that PIC and PAC dealt with 'post-mortem' of public expenditure. Some of the issues that the 9th Parliament was expected to deal with had become cold case files. This has resulted in a number of commentators questioning the effectiveness of parliamentary watchdog committees since they have been relegated to performing post mortems. These sentiments are well articulated by the remarks of a former MP as recorded in the Hansard:

'Our Standing Orders provide for a Public Accounts Committee. However, this... Committee merely does a post-mortem, six months after the end of the (relevant) financial year. When you do a post-mortem, it means, of course, that the whole thing is finished and the person is already dead. If money has been misappropriated and mistakes

²⁹⁴ *Supra*, note 289.

²⁹⁵ A Key informant revealed to the study that the Speaker issued instructions to the clerk to process members allowances only if there committee sittings had quorum, commenced at the designated time and continued for a reasonable duration.

have already been made, all the ... Committee (can) do is ... issue warnings, make recommendations and hope that those mistakes will not be repeated.²⁹⁶

Constitution vested in the Executive unfettered powers to hire or initiate the process of firing CAG. The President was under no obligation to consult any person when appointing the CAG or constituting a tribunal to justify his/her firing, resulting in lack of independence of the CAG. In theory, the stipulation of the Constitution that the CAG was an appointee at the sole discretion of the President created room for political manipulation, meddling and interference by the Executive, with potentially far-reaching impact on effectiveness of oversight. The removal of the CAG depended solely on the President.²⁹⁷ Second, the 'touted' security of tenure of the CAG (which this study faults), did not extend to the staff of KENAO. Third KENAO was not financially autonomous and was, therefore, unable to implement its public audit work plan unless it enjoyed the goodwill of the Executive. This want of autonomy also impacted on its ability to engage technical experts to meet challenges of modern audit. Both the CAG and the KENAO required security of tenure to protect independence of audit reports and secure them from intimidation from auditees and their proxies.

In Australia, PAC has a say in the appointment of the Auditor-General since the PAC is the formal link between Parliament and the Auditor-General.²⁹⁸ In America the Comptroller General is appointed by the President, with the advice and consent of the Senate, for a 15-year, non-renewable term. The President selects a nominee from a list of at least three individuals

National Assembly, Official Report, Vol.22 (17 March, 1971) , Col 914

Section 110 (6) of Constitution of Kenya (Revised Edition, 2001)

Supra, note 289.

commended by an eight member bipartisan, bicameral commission of congressional leaders. The Comptroller General may not be removed by the President, but only by Congress through impeachment or joint resolution for specific reasons.²⁹⁹ From the example of Australia and America, it may be correctly said that the Kenyan CAG is weaker in terms of security of tenure.

2.2 Other Laws, Parliament and CAG

The Constitution having discharged its momentous mandate of establishing and spelling out the functions of Parliament and CAG leaves other laws to operationalize and regulate the internal procedures of these institutions. Notable among these statutes are the Standing Orders of Parliament, National Assembly (Powers and Privileges) Act, the Exchequer and Audit Act and the Public Audit Act.

The Standing Orders are the rules that establish parliamentary committees, regulate the procedure of debate and decision making of Parliament and its committees. The study identified the weaknesses in the Standing Orders. The major areas of weakness were the tradition of the 'Speakers' and House Business Committee to appoint committee members on behalf of the house, the sessional tenure of watchdog committees, the *sub-judice* rule, the absence of the rule fixing a definite time for debating reports of watchdog committees or a definite parliamentary 'calendar', and the non-establishment of an implementation and follow-up committee.

McKe³⁰⁰ argues that in any country, the characteristics of the chamber itself could affect the legislature's capacity to impact on the policy-making process and thus the accountability

McGraw, GAO 1966-198:1 An Administrative History, U.S. General Accounting Office (1981), p.84
Mwambi W., The Accountability Function of Parliament in New Democracies: Tanzanian Perspectives, CMI Report, 2005 available at www.cmi.no/publications (Accessed on 4th August, 2010).

function of Parliament. The powers, procedures and mode of meeting of the committee of the whole house are potentially of great importance in relation to the policy-process. It is important to note that there is a crucial link between party groups and the chamber in the same way as there is a close relationship between party and the committees in Parliament. For instance, the party leadership's access to sanctions and the representative role of the MPs are central in relation to the functioning of the chamber as well. He posits that:

'Of relevance in relation to the structure of the chamber are factors like: What are the procedures for dealing with legislation? How autonomous is the chamber in determining its agenda—are there many private member bills and motions? Does the assembly have a set period for asking questions to Ministers? Are questions asked spontaneously or by notice? How open are the proceedings to the mass media and the public? Is there a period where the MPs can make statements of their own? How regularly does Parliament meet and what about the attendance?'

The 'whip system'³⁰¹ affected considerably the formation of committees and tabling and implementation of reports. Sometimes, parties took certain positions and expected all their members, including those in oversight committees to abide. If a member defied a party position, the whip was expected to take action including 'de-whipping'³⁰² defiant members. Traditionally,

³⁰¹ A system through which parties conduct business within parliament. The party whip has an important role in party business as he/she keeps MPs from his/her party informed of forthcoming parliamentary business, maintains the party's voting strength by ensuring members attend important debates and support their party in parliamentary divisions, acts as go-between for the party's leadership and its backbenchers, ensures that the wishes of the leadership are carried out, report back to the party leader whether or not new proposals are likely to go down well with the main body of their Members and if and where pockets of dissent might be brewing. The use of the term 'whip' in Parliament goes back to the 18th Century England, describing a small group of MPs whose responsibility was to keep their colleagues toeing the line. Whips are appointed within their parties by the party leader. For more see May E., *Parliamentary Practice*, 23rd Edition, London: Butterworth (2004).

³⁰² Informally it refers to the techniques used by party whips to ensure that party members in parliament toe the party line.

party whips are appointed by party leaders to 'whip' members to support and vote for party positions on various issues. It is the party whips who submit names of members to be appointed to various committees and, therefore, wield considerable powers over members. On sensitive matters, party leaders direct whips to ask members to take certain positions even if such positions are diametrically opposed to the resolutions of the committee in which the members participated. The Standing Orders did not enjoin the whips to consider or entertain factors such as professional qualification and background, experience, competence and credibility of members when recommending them for appointment to committees. In most cases, the whips were guided by party loyalty, political considerations and the desire of party leaders when identifying members for appointment into various committees. Further, there was no provision in the Standing Orders to regulate or bar any MP with an unresolved public audit query from sitting in the watchdog committees.³⁰³ Since members MPs include persons who may have previously served in public institutions with unresolved audit queries, it was possible for watchdog committee membership to include members with unresolved audit queries. This, in effect, meant that members could be judges in their own causes. Gladwell Otieno³⁰⁴ while looking at the 9th parliament argues that only KANU nominated members with technical ability to comprehend government policy in matters related to the committees they were nominated to, which was a crucial step in effective oversight by the Legislature.

³⁰³Section 162 of the new Standing Orders bars parliamentarians with pending audit queries from chairing parliamentary select committees.

³⁰⁴See <http://www.tkenya.org/documents/TACKLING%20GRAFT%20IN%20PUBLIC%20EXPENDITURE>. Accessed on 1st July, 2010.

Australia and New Zealand,³⁰⁵ the average parliamentary experience of PAC members is just over eight years. The seniority of opposition members reflects, in part, the pre-eminent status of PAC as a parliamentary accountability mechanism. In terms of skills and expertise, an understanding of public sector structures, administration and governance, are considered to be most desirable skills. By convention, PAC members serve for the term of the Parliament. There is no prohibition against reappointment in the next Parliament and reappointment is quite common. There is significant diversity in the experience and profile of PAC members. The diversity in experience is indicative of the differing role PAC can play in a member's career – for new parliamentary members, the PAC provides opportunity for a broad knowledge of government operations and an opportunity to interact with and influence Ministers. The PAC members with longer parliamentary experience include shadow Ministers, former Ministers, and parliamentarians who have a history of committee involvement. The involvement of PAC members with extensive parliamentary and committee experience also assists in ensuring continuity of knowledge and providing guidance and mentoring to less experienced members.³⁰⁶

Beke³⁰⁷ argues that the effects of party and party groups on the internal workings of Parliament are essential for understanding the impact as well as the behavior of MPs as parties may contribute to greater institutionalization of party discipline and commitment of policy or issues. However, he further argues that, complete dominance of parliamentary behavior by parties limits the potential for independent action by the MPs. In a system where the Executive has a strong

³⁰⁵ In New Zealand, the appointment of PAC members is the responsibility of a separate Business Committee. In practice, the role of the Business Committee is to ensure proportional party representation is followed, leaving it to the parties to nominate individual members. The Business Committee can also appoint non-voting members.

³⁰⁶ *Supra*, note 289.

³⁰⁷ *Supra*, note 300.

and disciplined majority of its partisans in the Legislature, these partisans are very likely to support the Executive's important as well as less important policy proposals. The Legislature's independent impact on the policy process is thus reduced.³⁰⁸ The logic is that no matter how large majority a governing party may have in the Legislature, the frequency with which the legislature constrains the Government increases when party discipline declines and vice versa. Party discipline and the Legislature's viscosity are in this way inversely linked.³⁰⁹ The same logic applies to the parties' impact on committees. Shaw³¹⁰ presents the party as the most important conditioning influence on committee behavior. A common assumption is that the more important the parties are, the less important the committees and vice versa.³¹¹ If the same cohesive and disciplined party has had a dominant position in the Legislature for an extensive period of time, it is plausible to believe that the committees may become extraordinarily weak.³¹² Vibeke³¹³ argues that when exploring the impact of the party on the Legislature's autonomy and hence its viscosity relevant factors are: How organized are the parties in Parliament and how much freedom do they permit in relation to voting and speaking; in other words how cohesive

³⁰⁸ Such legislature's may, however, constrain the executive, for instance through more informal mechanisms such as threat of public opposition, discussions within party caucuses and active use of oversight prerogatives.

³⁰⁹ Mezey M., 'Executive-Legislative Relations' in George Thomas Kurian (ed.) *World Encyclopedia of Parliaments and Legislatures Vol. 2*. Washington D.C: Congressional Quarterly Inc (1998), p. 782

³¹⁰ Shaw M., 'Conclusions' in J. D. Lees and M. Shaw (eds.) *Committees in Legislatures: A Comparative Analysis*. Oxford: Martin Robertson (1979), p. 241

³¹¹ Olson D., *The Legislative Process: A Comparative Approach*, Cambridge: Cambridge University Press (1980)

³¹² *Supra*, note 300, p. 247

³¹³ Vibeke W., 'Parliament as a Mechanism of Control in the Political System. The Case of the Tanzanian Bunge', *CMII Report* (2005). available at www.cmi.no/publications (Accessed on 4th August, 2010).

are they and how strong is the party discipline? Moreover, it is important to examine which means the party leadership has at its disposal when it comes to punishing or rewarding MPs who do not conform to the party line. Can the party apply sanctions, and if this is the case, what kind of sanctions are applied? Are the MPs allowed to cross the floor? Important also for determining the degree of party discipline is the representative role of the MPs. What kind of representatives are they? The two last areas are just as relevant for the functioning of the plenary as the committees.

The Standing Orders vested in the House Business Committee (HBC),³¹⁴ which invariably had a majority of its members from the frontbench (Government), the power to prioritize parliamentary business. Under the Standing Orders, there were four 'sittings' each week. Government business was conducted in Parliament on Tuesday, Wednesday and Thursday afternoons from 2.30 pm to 6.30 pm. On Wednesday mornings, Parliament sat between 9.00 am and 12.30 pm for what was called 'private members' business (that is, to address issues brought by MPs from the backbench). This was the case until the house, in the 6th session, converted it to Government time in order to deal with pending legislation that had gone unattended and was causing public disquiet.³¹⁵ Standing Order No. 17 set out the working hours of Parliament.³¹⁶

Since the Standing Orders did not compel HBC to allocate time for debating committee reports, the provision of time and date for debate of reports was at the discretion of HBC. It was not far-fetched to fear that reports with damning information on the Government, the ruling party or

³¹⁴ Established by National Assembly Standing Orders No. 145 (revised edition 2003).

³¹⁵ *Supra*, note 224, p.9

³¹⁶ National Assembly Standing Orders No.17 (Revised Edition 2003).

their proxies would receive unfavorable scheduling in the order of parliamentary business in the Government-dominated HBC. A case in point is that during the tenure of the 9th Parliament, the PAC report on 'Cowboy Contractors and How Construction Works in Kenya,' contained in the Public Accounts Committee Report on the Accounts of the Government of Kenya for the year 1999/2000, was tabled for debate in April 2007, three years after the PAC Report was completed and an incredible 7 years after the financial year 1999/2000.

Billow Kerrow,³¹⁷ while discussing the adverse effects of tabling delayed reports for discussion in regards to the PAC report for 2000/2001 financial year, states that:

'some of the people negatively mentioned in the report spanning the 8th Parliament have died, long retired, quit the civil service or joined elective politics.... Another anomaly with the 550-page dossier prepared by PAC in September 2004 is that all but three of the 11-member team made it back to Parliament in the last general election'

Kerrow's argument is valid in a number of ways. First, some of the people mentioned in grand corruption may be long dead before the report is debated by the house. In this event, the recommendations of PAC/PIC and parliament may be rendered nugatory. Second, it may be difficult to trace witnesses after many years as they may be dead or no longer be in a position to give evidence as they may be long retired, old and senile or not seized of the relevant documents. Third, some of those mentioned in these grand-corruption schemes, may have joined elective politics and are influential members of main political parties, HBC, PIC or PAC or occupy prestigious positions as party whips or Ministers, among others. Fourth, members of PAC/PIC who investigated these grand scams might no longer be in parliament or if they are, they may no

³¹⁷Daily Nation, Ministers skip debate on 2000/01 PAC report, 23 April 2009.

onger be members of these committees, making it difficult for them to defend contents of the PAC/PIC report or recommendations they made then.

n Victoria, for example, thirty minutes is allocated to the debate of PAC reports in each sitting week.³¹⁸ Once the reports are tabled, PAC issues media release disclosing quantifiable performance information and posts the reports on the internet. This helps with assessment as to whether PACs delivered on their terms of reference and identification of opportunities to improve effectiveness.

he Standing Orders did not specifically define when parliamentary sessions began and ended. The absence of a determinate parliamentary calendar meant that the Government (the Executive) could move for adjournment from time-to-time denying committees time to debate oversight reports. The net effect of this was that committees such as PAC, PIC and DCs with oversight mandates were not in a position to plan their activities. During the first session of the 9th parliament watchdog committees were not constituted as the Government whip refused to submit the official list of committee members.³¹⁹ This meant that during the first session of the 9th parliament, no oversight activity was carried out by Parliament through any of its committees. It is worthy of note that there were no regulations compelling either the whip or HBC to constitute committees by a given time or date³²⁰ which meant that parliamentary committees served at the discretion of the party whips and the HBC. In August 2006, key opposition parties walked out of HBC citing Government dictatorship in reserving only eight seats for the opposition

Supra, note 289.

Question Schedules.

The composition of committees is determined by provisions of the parliamentary Standing Orders supervised by House Business Committee.

ties and purporting to assign which members would occupy these seats. Oversight of parliamentary business was left entirely in the hands of the Government.³²¹

During the 9th Parliament, appointment to watchdog committees was sessional. Members were expected to serve for a session, which was invariably the period between March and December like membership of Departmental Committees which was for the elective life of a given Parliament. Information gathered from a key informant suggested that the 'tension' between party loyalty and independence of thought by members occasioned a high turnover of members from the watchdog committees. This denied the committees stability, experience, institutional memory and made them susceptible to extraneous pressure from party whips, leaders and other interest groups.

Mezey and Olson³²² argue that there are many attributes defining a committee's ability to impact the policy-making process. These include:

1. Whether the committee is permanent or *ad hoc*
2. Whether its work cross-cut the administrative structure or is parallel to it
3. Whether the committee has distinct and autonomous jurisdictions
4. Whether the committee is well-resourced in terms of staff, funds, research facilities, offices and other infrastructure
5. Whether the committee has the power to set its own agenda, change legislation and whether its vested with the power to take evidence and summon witnesses
6. Whether its members are independent and able to make independent choices
7. The composition of its membership.

The definition of the opposition was not very clear in the 9th Parliament as a split in the ruling NARC party persuaded the president to invite bona fide opposition MPs into government to replace sacked 'rebels' in what was considered a government of national unity.

Mezey M. & Olson D., Legislatures in the Policy Process, Cambridge, UK: Cambridge University Press (1991).

the assumption is that an informed membership is better and able to subject bills and proposals to scrutiny.³²³ Where committees are permanent, a continuing service by incumbents may develop 'a collective expertise and a more independent ethos.'³²⁴ An overlap in the jurisdiction of committees may create confusion and lead to responsibilities being ignored.³²⁵ The viscosity of a Legislature is expected to be stronger if it is vested with the powers to summon witnesses and require the submission of written material. This will naturally increase its expertise.³²⁶

Generally, the *sub judice* rule regulates the publication of matters which are under consideration by the courts. Matters are considered to be *sub judice* (Latin for 'under judgment') once legal proceedings become active. The basis of *sub judice* rule is to sanctify courts' roles as the official arbiters of disputes and cushion them from being influenced, rivaled or challenged by institutions (such as Parliament) which have not been constitutionally mandated to adjudicate disputes. It is a rule intended to safeguard separation of functions or powers. In Parliament, it was expected that the authority of the Judiciary would be respected by Parliament if it (Parliament) declined to debate and decide issues that were actively before the Judiciary. The Standing Orders gave the Speaker powers to use discretion to allow debates on policy matters relating to ongoing inquests and cases in courts so far as a clear distinction was maintained between policy matters and the details of a case. However, the Speaker could abuse his/her discretion to limit parliamentary debate more than necessary even in cases where a clear distinction was made between policy

Norton P., 'Introduction: The Institution of Parliament' in Philip Norton (ed.) *Parliaments and Governments in Western Europe*, Vol 1. London: Frank Cass (1998).

Ibid, p.11

Norton P. & Nizam A., 'Legislatures in Asia: Exploring Diversity' in Norton, Philip and Nizam Ahmed (eds.) *Parliaments in Asia*, London: Frank Cass (1999), p. 7

Supra, note 322, p. 11

matters and details of a case. This rule could be used to deny Parliament an opportunity to conduct oversight. Oversight matters are matters of public interest and to use *sub judice* to restrict debate on such matters especially when such debates do not prejudice trials, may affect effectiveness of Parliament in the discharge of its mandate. In the 9th Parliament, the *Goldenberg Scandal* was never discussed in the plenary as the Speaker ruled against such discussions in the plenary.³²⁷

The Standing Orders did not empower Parliament to implement its resolutions. This simply meant that the work of committees was virtually done when they tabled their reports in Parliament. What followed the tabling of the report was beyond the scope and mandate of committees. In the majority of cases, the debate for the adoption of reports was heated and polarized and reduced to a contest between political parties, ethnic groupings and regional interests regional interests, to the extent that the noble oversight intention was lost in the dust and cacophony of the debate. A good example of the foregoing took place in 2005 when a *Special Audit Report of the Controller and Auditor General on the Procurement of Passport Issuing Equipment* was prepared at the request of the Public Accounts Committee. PAC scrutinized the CAG special report, made its recommendations and requested the house to adopt the report. In the ensuing highly charged debate on the floor of the house, PAC's recommendation that the then Minister for Finance, Hon. David Mwiraria be held responsible for involving the government in an expensive and fraudulent project with a company whose directors were unknown, was expunged from the report following a dilatory amendment motion by the then Minister for Water, Hon. Martha Karua. In addition, the recommendation which stated that ministers should be held responsible for any fraudulent activities or embezzlement of funds in

IEA, The Parliamentary Budget Oversight in Kenya: Analysis of the Framework and Practices since 1963 to date, IEA Research Paper Series No. 19 APRIL 2009.

their ministries was deleted. The motion for the adoption of the committee report was consequently rejected on a vote by the house.³²⁸

As stated, the Standing Orders treated MPs as either being on the Government side or in the opposition. By parliamentary practice and tradition the PAC had always been headed by the Leader of Official Opposition³²⁹ or a senior opposition MP (to show the seriousness with which Parliament took its oversight role).³³⁰ However, during the tenure of the 9th Parliament, the Leader of Official Opposition in the last session of Parliament endorsed openly the re-election of the incumbent President while at the same time holding on to his position as the PAC chairperson.³³¹ This was not lost on observers who questioned whether all along the Government had been auditing its own accounts as at this time it was not clear which parties were in opposition and which were in Government. In Australia and New Zealand, for example, the party representation of PAC members is proportional to the party representation within Parliament.³³²

The Standing Orders set the quorum of the number of MPs required to conduct parliamentary business either in the plenary or in the committees. Standing Order No. 24³³³ declared the quorum of the house and a committee of the whole house to be 30 members excluding the person

³²⁸ Kenya Times, Anglo Leasing - PAC Vows To Deal Blow To Mwiraria, February 10, 2005, p. 3

³²⁹ See <http://www.tkenya.org/documents/TACKLING%20GRAFT%20IN%20PUBLIC%20EXPENDITURE>. Accessed on 1st July, 2010.

³³⁰ The Standing Orders No. 147 (Revised Edition, 2003) provided that the Chairperson shall be a member who does not belong to the parliamentary party which is the ruling party.

³³¹ The problem appears to arise from the fact that the Speaker cannot under any Standing Orders take judicial or other notice of defections, and can only act on signed resignation letters delivered to him by the resigning MP.

³³² *Supra*, note 289.

³³³ National Assembly Standing Orders (Revised Edition, 2003).

presiding. The quorum for meeting of PAC and PIC committees was in each case, the chairperson and 4 members. Standing Order No. 25³³⁴ outlined the procedure to be followed. The issue of quorum came to the fore during the tenure of the 9th Parliament as the public became more aware that parliamentary attendance had hit an all time low. The fault was in the procedure to be followed in raising the issue of lack of quorum by a Member of Parliament. Section 51 of the Constitution³³⁵ provided as follows:

‘If any member of the National Assembly who is present takes objection that less than thirty members of the Assembly besides the person presiding are present in the Assembly and, after such interval as may be prescribed in the Standing Order of the Assembly, the person presiding is certain that there are still less than thirty members of the Assembly present, the person presiding shall thereby adjourn the Assembly.’

Key-informants interviewed revealed that some bills were passed without quorum. They gave the example of the Media Bill, 2007.

Key informants confirmed that there were no rules governing the selection, planning, scheduling and prioritization of foreign and local trips by parliamentary committees. It was common for MPs to ask committee staff to enquire from the internet availability of international conferences. In the end, the actual relevance of such conferences obtained via the internet was in doubt. Only a few trips were properly arranged. In most cases committees’ foreign trips excluded government officers and hence had little technical input or benefit gained by MPs as they carried out their oversight mandate. The upshot was that corrective measures recommended by MPs had little utility or value since they were made with little or no technical hindsight. In Australia,

³³⁴ Ibid.

³³⁵ Constitution of Kenya (Revised Edition, 2001)

Given time and resource limitations, PAC is selective in determining what inquiries and trips (both local and foreign) to undertake. Priority is first given to matters referred by the Auditor-General then to issues, where:

1. There has been major disagreement between the Auditor-General and the auditee
2. The inquiry is considered to be in the public's interest
3. The activity being considered is significant in financial or other terms
4. The Committee believes there is the potential to improve public administration more broadly.³³⁶

The Standing Orders did not guarantee the 9th Parliament and its committees access to adequate resources with which to hire experts to assist them in examination of technical issues. This was aggravated by the brief (sessional) tenure of the watchdog committees, legal procurement hitches and resource constraints. PAC and PIC had to do with the parliamentary staff provided to them. This meant that Parliament had to make do with the skills of the regular parliamentary staff; their support was as good as the quality of the staff they had.

Stapenhurst and Jack Titsworth³³⁷ are of the opinion that several features are crucial to the success of SAIs. These include:

1. Supportive environment
2. Clear mandates
3. Independence
4. Adequate funding, facilities, and staff
5. Sharing of knowledge and experience
6. Adherence to international auditing standards

³³⁶Supra, note 289.

³³⁷Stapenhurst R. & Titsworth J., Features and Functions of Supreme Audit Institutions, Washington, D.C.: World Bank Institute (2001).

SAIs are effective only to the extent that they are permitted to conduct their work and their reports are used to promote accountability. Where public accounts are poorly maintained, Parliaments are weak, and flagrant violations identified by SAIs are not prosecuted, SAIs are unlikely to be effective.

Auditing mandates should be anchored in rules set by Parliament. Before drafting such legislation, SAIs and Governments must determine the auditors' independence and reporting responsibilities, the scope of audits, and the entities to be audited. Without clear mandates, SAIs are unlikely to be effective.

Independence is a basic feature of SAIs in developed democracies. Autonomy is essential for an auditor general given the need to report directly to Parliament without interference from other branches of Government. The leader of a supreme audit institution needs both legal and traditional status to ensure that senior bureaucrats will make information available and respond appropriately to recommendations. In the Napoleonic model as discussed in the previous chapter, for example, the autonomy of the *cour des comptes* is guaranteed by its status as a court, by the security of tenure of its magistrate members, and by its right to design its own program of activities.

SAIs require adequate funding, equipment, and facilities. Governments need to recognize the costs as well as the high returns of audits, and provide commensurate funding. To ensure high-quality work, SAIs need qualified and adequately remunerated staff who are encouraged to continuously improve, especially in their areas of expertise. The number of authorized personnel should be determined independently of Government control. For example, in the board model the audit commission determines the number of workers in the general executive bureau. To

maintain their credibility, SAIs should be managed such that a performance audit of their operations would result in a favourable report.

International exchanges of ideas, knowledge, and experience improve audits, harmonize standards, promote best practices, and generally help SAIs fulfil their mandates. International congresses and training seminars, regional and interregional conferences, and international publications have promoted the development of auditing. Moreover, supreme audit institutions should work closely with enforcement officials in Government agencies to share skills and insights and to become more adept at uncovering corruption.

Audits are more effective when supreme audit institutions adhere to professional auditing standards, such as those promulgated by the International Organization of Supreme Audit Institutions (INTOSAI) or international professional accountancy bodies.

The laws governing the office of the CAG are mainly the Constitution, the Exchequer and Audit Act and the Public Audit Act.

Though the Constitution gave the CAG both control and audit functions, the control function had been weakened substantially by provisions in the Exchequer and Audit Act, which limited it to confirmations of legality (if there was a vote and authority of Parliament). It did not require the CAG to satisfy him/herself that the expenditure was reasonable. The CAG did not conduct value for money audits in terms of cost of services under the Exchequer and Audit Act. The authority to stop unlawful expenditure (expenditure without Parliament approval) was not given to the CAG either by the Exchequer and Audit Act or its partial successor, the Public Audit Act. The Exchequer and Audit Act and the Public Audit Act did not give the CAG sufficient legal muscle

to deal with instances where the Executive incurred expenditure without authorization of Parliament thereby rendering the control functions theoretical.

The Exchequer and Audit Act³³⁸ was concerned principally with administration of public money and it provided that the Minister for Finance had authority over management of the Consolidated Fund and supervision, control and direction of all matters relating to financial affairs in the country. The Institute of Economic Affairs (IEA)³³⁹ argued that Cap 412 had become superfluous as citizen expectations of public resource management had graduated to the need to know whether there was value in the expenditure. Unfortunately, this Act was in operation in the early years of the 9th Parliament and continues partially even with the enactment of the Public Audit Act.

The Public Audit Act defines the specific oversight powers and responsibilities of CAG as envisaged in the Constitution. This Act has some challenges. First, this Act requires state-owned corporations and local governments to pay audit fees as determined by the CAG.³⁴⁰ It prescribes that the fee shall be decided by the CAG. The payment of audit fees for the conduct of statutory audit may create a conflict of interests as no authority other than the CAG is empowered to conduct a statutory audit. The international best practice in such cases is to clearly state the

³³⁸ Cap 412, Laws of Kenya.

³³⁹ *Supra*, note 327

³⁴⁰ Section 28 of the Public Audit Act (Act No. 12 of 2003) Laws of Kenya.

various components of the fee structure and to provide for a process of arbitration in case the client does not agree with the proposed fee.³⁴¹

Second, whereas the CAG is identified as the auditor of the National Assembly, the Public Audit Act requires him to submit his report to the Minister of Finance who in turn transmits it to Parliament. This is improper as the Ministry of Finance is one of the Ministries that the CAG audits. The danger of the provision is that the CAG has no recourse if the report he is submitting to the Minister is altered when it reaches the floor of the house.

Third, the Public Audit Act gives the Minister and Permanent Secretary enormous powers without corresponding accountability requirements. Where the accountability exists, they are framed in a manner that opens them to manipulation. For CAG to perform his/her task adequately he/she needs to be independent from the entities that he/she audits and he/she must be protected against any form of outside influence. Only an independent external government audit function, in conjunction with professional staff and methodologies, can guarantee an unbiased, reliable and objective reporting of audit findings. The requirement that the CAG submits his/her report to Parliament, through the Minister of Finance, the auditee, needs re-examination

Another law which impacted on the performance was the Government Financial Management Act (GFMA). It focuses on withdrawals from the Consolidated Fund and payments, but does not cover budget formulation and hardly covers budget execution processes. Regulations under this Act were not issued during the 9th Parliament and compliance as well as application of sanctions remained weak. The Internal Auditor General's Department (IAGD) was established under the

McInnes W.M., (ed.), *Auditing Into the Twenty-first Century*, A Discussion Document by the Research Committee of The Institute of Chartered Accountants of Scotland, The Institute of Chartered Accountants of Scotland, Edinburgh (1993).

provisions of the GFMA.³⁴² However, the scope and coverage of internal audit, and the duties and responsibilities of the Internal Auditor General were not prescribed. Internal auditors in the ministries, departments and districts continued to operate under the provisions of outdated Treasury circulars.³⁴³

The Permanent Secretary (PS) in the Ministry of Finance issued a circular in October 2005³⁴⁴ revising the mandate and guidelines of ministerial audit committees earlier prescribed in 2000. The PS also issued an internal audit manual in November 2005, which was intended to be a handbook for use by internal auditors in the delivery of internal auditing services in Government ministries, departments, and districts. The provisions in that manual basically replicated international best practices in the area of internal audit in theory but not in practice. These laws and treasury circulars constituted the weak and fragmented legal basis for the internal audit function under which audit was conducted during the 9th Parliament tenure.

During the 9th Parliament, long delays in submitting accounts reports to CAG continued to undermine accountability as most Government officials associated with the loss of public funds never got to account for the funds. The CAG was continuously unable to provide meaningful opinion on several financial statements due to unexplained discrepancies, omitted expenditure accounts, lack of documentation and explanations to support some of the figures appearing in the financial statements.

³⁴²Section 9(1) (c).

³⁴³Treasury Circular No. 4 of March 1997 as amended in October 2003.

³⁴⁴Treasury circular No. 16/ 2005 of 4th October 2005.

the extent to which the Government's financial statement accurately and fairly reflects the Government's financial position was, therefore, suspect. The term 'fair' as used by the CAG in certification of Government accounts in most of its reports is misleading. This term does not determine the degree of error or inaccuracy, as it describes neither 'good nor bad'. 'Fair' is a neutral term. It is also crucial that the CAGs audit methods are based on current scientific and technical knowledge and that the auditors have the necessary professional qualifications and moral integrity as serious financial scams were only revealed during special audits,³⁴⁵ a clear indication that annual audits were routine exercises that did not add any value to the oversight process. Thus, both financial and compliance audits were suspect as CAG did not produce satisfactory 'value-for-money' audits that showed whether the Government spent less, spent all, and / or spent wisely. Satisfactory 'value-for-money' audits would have revealed whether the Government was meeting the three Es: economy, efficiency, and effectiveness.

In Hong Kong, the Director of Audit submits his/her value-for-money audits completed between March and September of each year in October to safeguard public money and ensure proper accountability by authorities concerned.³⁴⁶ In Sri Lanka, the Constitution requires the Auditor General to report to Parliament within 10 months of the close of each financial year and when he/she deems it necessary to discharge his or her duties and functions.³⁴⁷

Restricted audit with narrow scope to inquire into specific matters; also known as Limited Audit.

For more information see <http://www.info.gov.hk/aud/>

supra, note 325.

There was a weak system of checks and balances for KENAO as there was no adequate mechanism in place to audit KENAO. KENAO did not follow up on monitoring the impact of its audit reports and did not get any feedback from Parliament, the public and the media.

In a nutshell, the office of the CAG was severely undermined by the weak constitutional protection of the technical officers during the 9th Parliament tenure. The absence of prosecutorial powers, limited financial and human resources during that period did not make matters any better. Under KENAO, CAG primarily concentrated in the performance of the audit function at the expense of control function consequently; monies were withdrawn from the Consolidated Fund without CAG authorization. The challenge was that the office was helpless in law even in the face of such abuses. CAG only catalogued the abuses 'after the fact' at the end of the financial year. A report by Institute of Economic Affairs summarizes the inefficiencies in the law when it stated:

'The legal framework is quite robust. It is outlined in the Constitution and various Acts of Parliament. However, it is quite old and out of date and does not cover critical areas such as extra budgetary funds. This framework is quite procedural and does not build in robust mechanisms for oversight and accountability. The Legislature, which approves the budget, does not have sufficient time or resources that enable it to influence the outcomes. The CAG undertakes his Control function in a purely routine manner – confirming that payments being made have authority. He does not have sufficient space to judge whether the expenditures are reasonable or reflect efficient use of public resources The legislation does not provide for sufficient reporting on the budget and hence there is infrequent disclosure or it is undertaken as per administrative decisions for which there is no penalty to the Executive.'³⁴⁸

Institute of Economic Affairs, Budget Transparency: A Kenyan Perspective, IEA Report (2003).

conclusion, it can be said that effectiveness of an institution to discharge its mandate can be ensured if that institution has a clearly defined performance indicator (and it performs as per the indicator) and a mechanism through which it (that institution) is held to account. Internationally it is increasingly being accepted that there are institutions and instruments critical for ensuring effectiveness of oversight of Parliament and its committees. These are legal framework expected to establish vertical and horizontal accountability), distinction of roles, responsibility, access of information by the public, transparency in implementation of budget and commitment to implementation of recommendations of oversight bodies (Parliament and its committees).³⁴⁹

From the foregoing, a number of observations can be made. First, political environment as exemplified in the whip system, orientation of MPs and party politics influence the effectiveness of oversight functions of Parliament. Second, lack of clear constitutional separation of powers and explicit, legal oversight mandate impedes Parliament ability to check the Executive. Third, use of outdated auditing methods makes it difficult to gauge whether public funds have been spent efficiently and wisely. Fourth, lack of legal, financial and technical autonomy negatively impacts on credibility of audit reports. Fifth, absence of a determinate parliamentary sitting calendar is a challenge to the oversight output of parliamentary committees. Finally, on a positive note, the acrimonious engagement between the Executive on the one hand and Parliament and its Committees on the other, drew the attention of the citizens, media and civil society to the need to join forces and fight the misuse of public funds. The country began to witness the rise of a vigilant citizenry, media and civil society.

³⁴⁹ IMF, *Manual on Fiscal Transparency*, <http://www.imf.org/external/np/fad/trans/manual.htm> (Accessed on 14th July, 2014).

CHAPTER FOUR

CONCLUSION AND RECOMMENDATIONS

1 Introduction

Parliamentary oversight plays a key role in safeguarding public funds, ensuring institutions are accountable and uphold high standards of efficiency in serving the public as they give the public value for their money. The taxpayers, through their elected representatives, who in this context are parliamentarians, need to be assured that their taxes are spent in their best interest and in accordance with the law. Parliament plays a key role in holding the Executive to account for the way public funds have been spent.

This study examined the factors which influenced the effectiveness of the oversight functions of the Kenyan Parliament. The watchdog committees of the 9th Parliament were used as a case study in this inquiry. The study interrogated the legal and technical design of oversight frameworks, factors which promoted or impeded the effectiveness of oversight, and the role politics played in the overall process. The findings of this study will, hopefully, be a positive contribution to suggestions on how to make parliamentary oversight more effective.

This study makes observation in two broad areas, namely:

1. Legal framework
2. Political environment under which the 9th Parliament functioned.

4.2 Legal Framework

The study observed that the watchdog functions of the 9th Parliament were underpinned by the Constitution,³⁵⁰ Standing Orders of Parliament,³⁵¹ National Assembly (Powers and Privileges) Act,³⁵² Exchequer and Audit Act,³⁵³ Public Audit Act³⁵⁴ and parliamentary traditions.

4.2.1 The Constitution³⁵⁵

The study observed a number of weaknesses in the Constitution. First, the Constitution did not explicitly provide for the oversight role of Parliament. The absence of a clear provision to the effect that oversight over the Executive was an explicit mandate of Parliament had far-reaching legal and practical implications on Parliament's effective exercise of its oversight mandate. This scenario allowed for the interpretation that oversight function of Parliament was debatable rather than mandatory. It meant that the oversight function of Parliament over the Executive during the 9th Parliament was constructed through theories and concepts of democracy and separation of powers and not from the letters of the law. The power relations between the Executive and Parliament were, therefore, distorted; with the consequence that parliament could not check and balance the Executive. It also meant that the Executive could ignore Parliament, treat it as an irritant, and decline to implement its resolutions with impunity. The Executive was not

³⁵⁰ Constitution of the Republic of Kenya (Revised Edition, 2001).

³⁵¹ National Assembly Standing Orders (Revised Edition, 2003).

³⁵² Cap 6, Laws of Kenya.

³⁵³ Cap 412, Laws of Kenya.

³⁵⁴ (Act No. 12 of 2003) Laws of Kenya.

³⁵⁵ It is acknowledged that Kenya has adopted a New Constitution which may or may not address some of the issues raised. It is, however, beyond the scope of this study in terms of time-frame.

constitutionally or legally obligated to act on Parliament's resolutions, leading to the cliché that Parliament had become a toothless bulldog, merely barking but having no teeth to bite. Prosecutorial powers or authority to initiate public interest civil litigation was the exclusive domain of the Attorney General, who besides being a member of the Executive, was according to section 26 of the Constitution, not subject to the direction and control of anybody, including Parliament, in the discharge of his functions.

Second, due to the existence of a constitutional prerogative allowing the President to appoint any and every Member of Parliament to the Cabinet, watchdog committees were at risk of losing their membership, if the President so decided. This study observed that incidence of poaching of members of watchdog committees by the Executive did take place during the 9th Parliament and had the undesired consequence of negating the effectiveness of oversight functions of Parliament. Whenever the Executive poached members of watchdog committees by appointing them to the frontbench, the appointed members ceased membership thereby paralyzing the committee operations.

Third, the Constitution did not limit the number of Ministers and Assistant Ministers, thereby allowing the President to gain parliamentary majority and acquire loyalty by appointing an unlimited number of MPs to the frontbench. This lacuna, coupled with the doctrine of collective responsibility imposed upon members of the front bench, created a scenario where Parliament became a pro-executive voting machine which unquestioningly rubber-stamped the decisions of the Executive at the expense of its oversight function. The presidency exploited this legal lacuna to defeat or alter recommendations of Parliament that were adverse to it.

Further, the Constitution did not give the actual job description or duties of MPs, leaving parliamentary tradition and the MPs to define their mandate. Further, there were no yardsticks or performance indicators inbuilt in the Constitution to measure their (MP's) effectiveness. Consequently, the MPs were not obligated to ensure that they efficiently and effectively discharged their oversight functions by looking at a reasonable number or all of CAG reports, conducting thorough inquiries, vigorously debating reports in the plenary, and following up implementation of their recommendations.

Further, Parliament had no control over its calendar given that it was convened and prorogued at the behest of the Executive. In effect, Parliament did not have a determinate time to carry out its oversight functions as it was not responsible for its calendar. It was the President who had powers to summon Parliament, determined its business, prorogued and dissolved it. From the foregoing it is clear that the President allocated time for oversight.

Further, the Constitution did not confer on Parliament authority to impose sanctions against individuals or institutions who defied parliamentary resolutions. All sanctions were the prerogative of the Executive. Even in situations where Parliament had the authority to pass a vote of no confidence on the Executive, such vote led to a suicide pact as it led to dissolution of Parliament too.

Further, the study observed that the appointment and removal of CAG was solely in the hands of the Executive. When appointing or initiating the removal of the CAG, the President was not obliged to consult, which meant that the 'touted' security of tenure of the CAG was not immune from presidential intrusion. This is a classic example of where the auditee is the hirer and firer of the auditor; therefore, talk of an independent audit is a misnomer.

length, the much 'touted' security of tenure of CAG, which this study faults, is limited to himself and is not extended to his staff. This implied that the autonomy of the office of the CAG was individual and not institutional. An overbearing Executive could, in theory, fire or redeploy staff of CAG.

Finally, the Constitution did not give financial and technical autonomy to the CAG, meaning that an Executive which was hell-bent on frustrating the CAG could easily underfund it, thereby denying it capacity to discharge its audit mandate.

2.2 Other Laws

This study observed that oversight function of Parliament, although domiciled in the Constitution, equally depended on stipulations of other laws. The following laws were important to the conduct of oversight role of Parliament: Standing Orders; National Assembly (Powers and Privileges) Act; Parliamentary Service Act; Exchequer and Audit Act and Public Audit Act.

First, it was observed that although the Standing Orders and parliamentary traditions mandated the whips and the House Business Committee (HBC) to appoint members of the committees, they did not stipulate the professional qualification, seniority and experience of the prospective members and mandatory date of their appointment. This wide discretion granted by the Standing Orders relegated to the periphery factors like merit, competence, and timelines within which committees had to be constituted, with negative impact on effectiveness of oversight role.

Second, the sessional tenure of the watchdog committees as stipulated by the Standing Orders denied them continuity and institutional memory and encouraged a high turnover in committee

membership. This coupled with the fact that Parliament did not control its calendar, created instability and inability of the committees to have a determinate work schedule.

Third, the Standing Orders gave the HBC the absolute discretion to allocate and prioritize time, date and type of business to be discussed by plenary. The absence of a rule enjoining HBC to allocate date and time to discuss the reports of watchdog committees meant that the Government-nominated HBC could decline to allocate time to discuss committee reports they deemed adverse to their (Government) interest.

Fourth, the Standing Orders have not benchmarked the workload of committees or set mandatory length and numbers of sittings for members and the time frame within which committee reports have to be concluded and debated by plenary. This makes it difficult to assess the effectiveness of committees.

Fifth, the study also observed that as a result of *sub judice* rule emanating from the Standing Orders, Parliament could not discuss matters that were active in court or under the consideration of a judge. This rule precluded the 9th Parliament from summoning witnesses and discussing matters before courts, thereby making it difficult to conduct oversight.

Though the powers and privileges of the Kenyan Parliament are drawn directly from the Constitution, they are given effect by the National Assembly (Powers and Privileges) Act. The National Assembly (Powers and Privileges) Act constrains watchdog functions in a number of ways. First, though it granted Parliament powers to compel witnesses to attend, testify and produce documents before parliamentary committees and even provided sanctions against non-compliance, such compulsion and sanctions were exercisable through the Speaker and the AG respectively. Second, matters are made worse by the legal stipulation that the President (the

litee) could direct that a specific document not be produced. In the 9th and previous Parliaments, Speakers were invariably members of the majority party and had been sponsored for election (to the seat of Speaker) by the said party(s) and, therefore, owed them allegiance. It was, therefore, possible that the Speaker's office could be used to impede compulsion of attendance of members. Third, whereas it was only the Speaker who was authorized to ask the AG to prosecute any person who defied Parliament, the AG, a member of the Executive, was under no compulsion to take action. The import of this was that criminal sanctions that Parliament could impose on persons who were in contempt of it rested with the discretion of officials (Speaker and AG) whose loyalties were not necessarily with Parliament.

The study observed that the Exchequer and Audit Act, the main law guiding both internal and external audit during the early years of the 9th Parliament, had legal weaknesses which affected the effectiveness of its (9th Parliament) oversight function. First, the legal framework for internal audit under the Act was weak resulting in serious deficiencies in the internal audit systems. The internal audit guidelines developed under the Act were outdated. The Act neither allowed for annuals with properly prescribed internal auditing standards nor did it compel the Government to conduct internal audit in all departments. Worse, it did not obligate the Government to recruit professionally qualified internal auditors for all of its departments. Since the internal audit report formed the basis of external audit by the CAG, in most cases, it was difficult for Kenya National Audit Office (KENAO) to render its objective opinion on whether books of account of most departments were in order as receipts and relevant documents at times could not be produced. This resulted in the CAG using the term 'fair' to denote the state of accounts, a neutral term that did not reflect whether or not there were improprieties. As a result, Parliament was also unable to

conduct effective oversight as they were unable to give an opinion on whether there were malpractices or not.

Second, the Exchequer and Audit Act did not mandate the CAG to conduct a comprehensive audit to include financial, compliance, performance, risk-based and value-for-money audits to enable the CAG form an opinion on whether the taxpayers' funds were spent wisely to meet the 3Es - Economy, Efficiency and Effectiveness. Without a comprehensive audit it was difficult for Parliament to render an opinion on whether the taxpayers got a good bargain from the use of public funds.

Third, the Exchequer and Audit Act did not guarantee the autonomy of the office of the CAG. The CAG lacked both technical and financial autonomy. Due to inadequate funding, CAG could neither recruit and retain adequate qualified professional staff nor fund all his/her programmes. Owing to understaffing and underfunding, the CAG could not carry out timely audit in all government departments. This resulted in a backlog of unaudited accounts of some departments running into years, a factor that affected the effectiveness of Parliament as sometimes their (CAG) reports came too late, when misuse of taxpayers funds could not be redressed.

Fourth, the Exchequer and Audit Act created a weak link between the CAG and Parliament. The CAG had to submit his/her reports to the Minister of Finance (MoF) who in turn submitted them to Parliament. The danger with this was that the CAG had no redress when the report he submitted to MoF was changed or delayed before it got to Parliament. The mere fact that an officer responsible for disbursement of funds to the office of the CAG had the audit report before Parliament had far-reaching implications. The MoF could influence the final report of the

CAG, put CAG under pressure to change sections of the report adverse to it (MoF), or starve it of funds if CAG disobeyed it.

Although an attempt was made to cure the defects of the Exchequer and Audit Act by the enactment of the Public Audit Act during the 9th Parliament some defects still persisted. The Public Audit Act did not give authority to CAG to impose sanctions on Accounting Officers who submitted their accounts for audit later than the stipulated period or failed to comply with audit guidelines issued by CAG. In the event of late submission of accounts by Accounting Officers, the procedure was for the CAG to report this to the MoF which had the discretion of imposing sanctions against the Officers. Late submission of accounts to CAG by Accounting Officers affected the effectiveness of oversight function of Parliament as it delayed their work. Worse still, the absence of authority to punish persistently defiant Accounting Officers by both CAG and Parliament bred a culture of impunity.

3 Political Environment

Enactment of legislation and oversight is done by Members of Parliament, who are first and foremost politicians and whose interest and motivation are functions of a complex interplay of social, economic, political and power intrigues. The study observed that MPs were beholden to their desire to be re-elected to office which was dependent upon their loyalty to popular leaders of their political parties. They equally needed personal resources which they could easily access through being patronized or appointed to positions of influence by the Executive. Personal resources would go a long way in facilitating their re-election in comparison to benefits which could possibly accrue to them from the accolades arising from performance of their constitutional duties.

The political environment of the 9th Parliament was dominated by coalition politics arising from the memorandum of understanding (MoU) which gave birth to the ruling party NARC. The absence of a regulatory framework for political parties within and without Parliament did not make matters any better.

The existence of the parliamentary whip system as a procedure of lobbying, rewarding and punishing MPs for taking certain positions on issues complicated the political environment the more. All these intrigues played out against the political background of a Constitution that created an imperial presidency with a winner-takes-all, reward-loyalty and punish-dissent mentality.

3.1 Party Politics

Political parties were the main actors in parliamentary activities of the 9th Parliament. They played the role of constituting Government, and parliamentary committees, charting Government business in Parliament and exercising oversight over Government, depending on whether they (parties) were ruling or opposition in mandate.

It was observed that at the inception of the 9th Parliament, the ruling party, NARC, was a 'hotchpotch' of political parties which came together through a pre-election MoU that had promised power-sharing to its leadership. The fallout that arose from the failure to honor the MoU changed the political power balance in Parliament to the extent that the *de jure* and *de facto* ruling party were completely different. The intra-party hostility among the various factions of the ruling party became more intense than between it and the official opposition party, thereby diminishing its parliamentary majority. The counterbalance measure taken by the President of

forming a post-election coalition with opposition parties further disfigured the known face of Kenyan Parliament as being made up of ruling and opposition parties.

These political party-hopping and the corresponding loyalty shift tremendously impacted on effectiveness of oversight function. First, composition of watchdog committees by party membership became a nightmare as it was impossible to distinguish between ruling and opposition parties. Second, after the constitution of watchdog committees, voting in the committees and at plenary was no longer left to the policy of individual political parties, but to political expediency. Third, the political distinction both in terms of policy and agenda between a ruling party and an opposition party, which is the hallmark of adversarial debate in a parliamentary system, was obliterated. This made it impossible for the 9th Parliament to conduct objective debate on reports of watchdog committees.

3.2 The Whip System

The party whips, through whom the party leadership lobbied MPs for support of their parliamentary agenda, and who had the additional responsibility of appointing members of the committees, got sucked into the arena of intra - and inter-party wrangles. Due to the absence of regulations to guide whipping and de-whipping of MPs, the whips added insult to injury by excluding MPs associated with factions adverse to theirs from committee membership and whipping members to oppose adverse watchdog committee reports.

The whip system also affected the objectivity of members while conducting oversight. Sometimes, parties took certain positions and expected all their members, including those in oversight committees, to abide by certain resolutions regardless of the consequences on oversight. This denied members autonomy to support some procedures, resolutions and

commendations. Members who exercised independent thought that conflicted with the party position faced hostility from both the party and the voters as in most cases this was viewed as hurting the party.

3.3 Absence of Regulation of Political Parties

The absence of a law regulating the conduct of political party affairs both inside and outside Parliament affected the conduct of oversight during the 9th Parliament tenure. First, it allowed members to party-hop within and without Parliament, with impunity. The role of political parties as mobilizers of specific public agenda and sponsors of candidates to Parliament was negated. This created a disconnect between position taken on issues by an MP, his political party and the public, thereby undermining the novelty of representative democracy.

Second, the President did 'poach' members of other political parties and appointed them to the cabinet without consulting their sponsoring parties or the electorate.

Third, MPs, without regard to their parties or constituents, defected and counter-defected, during their term in Parliament, without losing their seats in the house, a factor that made it difficult to determine the number of Government and opposition MPs at any particular time.

Fourth, absence of a law regulating funding of political parties meant that certain individuals funded some political parties and then treated them as personal fiefdoms. This affected the activity of oversight reports and debates in the house as it reduced MPs to being puppets of these individuals.

Finally, the absence of regulations enjoining political parties to practice and inculcate a culture of democracy by holding regular elections meant that the political parties were not accountable to

their memberships. This, by inference, meant that political parties, which were major actors in parliamentary business, were not obligated to account to the public through regular, free and fair party elections. A political party that is not accountable to the public is not expected to be committed to the public good of exercising oversight over Government use of public funds.

3.4 Imperial Presidency

It was observed that the activities of all political actors were revolving, rotating and gravitating around the presidency. The Constitution had conferred upon the presidency all powers, to create and abolish offices, hire and fire public servants and allocate and distribute resources besides other forms of authority.

First, most MPs craved the support and attention of the President with the hope that appointments and resources would be the resultant benefit. In order to be perceived by their constituents as development-conscious and, therefore, deserving of re-election, MPs were not ready to take positions critical of Government. This meant that, faced with a choice of placating the imperial presidency (and, therefore, accessing political goodies) as opposed to exercising oversight over it (and suffering its wrath), a majority of MPs would prefer the former.

Second, voters placed higher premium on services obtainable from the Executive like employment, roads, access to education and health that only MPs with presidential patronage could satisfy. Voter demands ensured that most MPs were concerned with the interest of their constituents to receive more public resources so that they (MPs) stood better chances of getting re-elected rather than legislating or conducting oversight. The study observed that in the last session of the 9th Parliament, most MPs were preoccupied with schemes and politics of re-election and not with oversight or legislating.

4 Recommendations

From the foregoing it is apparent that effectiveness of the oversight functions of the 9th Parliament was influenced by two broad factors, the legal framework and the political environment within which it operated. The legal framework mediates the tension between public institutions as they perform the delicate act of executing public mandate in accordance with public will as, legislated, funded and overseen by representatives of the public. Oversight, just like democracy, is a function that always requires improvement and renewal. Like a curving life that has been put to use and which must be sharpened so that its performance is enhanced for its next usage, the legal framework requires constant review. It is on this understanding that the study recommends measures to be undertaken to improve the effectiveness of oversight functions of Kenyan parliament having examined the 9th Parliament. The key actors in the Kenyan parliamentary oversight are Kenyan Parliament and its watchdog committees and the Office of Controller and Auditor General. The study recommendations revolve around these two actors.

4.1 Parliament and its Watchdog Committees

4.1.1 The Constitution

First, for the avoidance of any doubt as to the functions of Parliament, the Constitution should explicitly confer upon Parliament the prerogative of overseeing the execution of public mandate on the Executive and equip it with authority to impose sanctions against the Executive

individually and collectively) for defying public will as reflected in the legislation or approved budget.

Second, to balance the powers exercisable by the Executive over Parliament and equip the latter with the ability to check the former, the Constitution should provide for a clear separation of powers among the three arms of Government. The Constitution should provide Parliament with autonomy vis-à-vis the Executive in respect of membership, finances, calendar, implementation of its resolutions, and related immunities.

Third, the Constitution should spell out clearly the job description of MPs, put in place a mechanism for regular public audit of their performance and place oversight as the main function of MPs.

Fourth, in order to enhance accountability of the Executive and MPs, the Constitution should have provisions that regulate political parties. These regulations should relate to mandatory internalization of democracy in political parties, funding, membership, party-hopping and other malpractices.

Fifth, the Speaker and the Attorney General's offices' exercise of control over parliamentary initiated legal proceedings, be it *nolle prosequi* or issuance of sermons, must be restricted. The latter is an office in the Executive, while the former is an elective office occupied through the support of majority MPs who are invariably members of the ruling party. To cushion Parliament from the impediments likely to be imposed by these two offices, the Constitution should safeguard actions taken by Parliament from termination by the AG or interference of the Speaker whose loyalties may reside elsewhere. Implementation of a resolution by Parliament for legal

action to be taken against an individual or that summons should issue should not be at the discretion of the AG or Speaker.

Other Laws

First, to address the need for merit, competence, experience and the blanket power given to the whips and House Business Committees (HBC), the Standing Orders should be reviewed by introducing provisions obligating the whips and HBC to consider factors such as experience and training when constituting watchdog committees.

Second, to ensure stability and continuity in the tenure of watchdog committees, the Standing Orders should be amended to change the watchdog committees from sessional committees to standing committees, serving for the entire tenure of a given Parliament.

Third, to commit the watchdog committees to high performance and self evaluation, Standing Orders should set benchmarks on quorum, length of sitting, and other scales of measurement of effectiveness.

Fourth, to ensure that Parliament considers watchdog committee recommendations, the Standing Orders, just as it sets out time for debating the budget, must delineate time for Parliament to debate oversight committee reports.

Fifth, to ensure implementation and follow-up of committee reports, the Standing Orders should be amended to establish an implementation and follow-up committee.

sixth, the Standing Orders should obligate the whips, HBC and other relevant departments of Parliament, to ensure that watchdog committees are constituted and adequately funded and staffed at all times.

The parliamentary powers and privileges are spelt out in the National Assembly (Powers and Privileges) Act. The powers of Parliament to compel attendance of witnesses to produce documents or give evidence and punish those in contempt of such powers is resident in this Act. In order to enhance effectiveness of oversight functions of Parliament, a revision of this Act is necessary.

First, the proviso allowing a witness to decline giving evidence or producing documents on the ostensible reason that the President has directed that such information should not be availed should be deleted from the Act. This is because such a proviso can be used to encourage opacity and undermine oversight.

Second, the requirement that all summonses be issued with the permission of the Speaker should be amended to remove the Speaker's discretion when it pertains to oversight functions so that issuance of summons is a matter of course. This will go a long way in forestalling situations where the Speaker is an impediment to oversight even if he/she is under pressure from the Executive or his sponsoring party to do so.

Third, the stipulation that consent of the AG should be obtained in order to institute contempt proceedings against a person who has violated parliamentary privilege should be reviewed. This is expected to prevent the AG, who is traditionally a member of the Executive, from using his position to undermine parliamentary privilege.

urther, the Act should be revised to cushion MPs from being detained, either by the police or on court's order, for suspicion of commission of an offence. As it is, the immunity from arrest enjoyed by MPs under the Act is restricted to the precincts of Parliament and is often negated when MPs are detained by the police or on court orders after being arrested outside the precincts of Parliament. In short, the duty of the state to arrest and prosecute suspects, including MPs, should, to the extent that an MP is required to participate in the proceedings of the house (including oversight), be applied in a manner that balances the rights of complainants to access justice against all, with the corresponding need to ensure that all MPs are available unhindered to discharge their duties to oversee Executive activities.

.2 The CAG

Financial oversight is initiated by audit report of the CAG, without which office, Parliament would be unable to access scientifically conducted audit. It, therefore, follows that the effectiveness of the office of the CAG, as the primary process of the parliamentary oversight role, cannot be overlooked. The CAG is an institution whose appointment, function and tenure derived from the Constitution. Other laws, for example, the Exchequer and Audit Act and the Public Audit Act also impact on the effectiveness of the CAG.

e Constitution

In order to ensure that CAG enjoys autonomy in terms of appointment, removal and in the discharge of his/her mandate, various recommendations are made. First, the Constitution should clearly state which arm of Government the CAG accounts to. However, since the CAG audited

largely the Executive and worked 'hand in hand' with Parliament, it could be assumed that the CAG is an integral part of parliamentary oversight. The Constitution should, therefore, involve Parliament in the identification, appointment and removal of the CAG and not leave it to the sole discretion of the Executive.

Second, the Constitution should give explicit mandate to CAG and provide for sanctions against Accounting Officers who refuse to co-operate with the CAG in his audit work. In other words, for the CAG, to carry out his constitutional functions of controlling and auditing public institutions, those in charge of those institutions must be brought within the mandate of CAG and punished for being contemptuous of such mandate.

Third, the Constitution should extend the same immunity granted to the CAG to his/her staff. The immunity should include financial and technical autonomy from the Executive directly emanating from the Constitution.

Other Laws

The Exchequer and Audit Act and the Public Audit Act are the two main statutes which give effect to the constitutional provisions which established the CAG. The effectiveness of CAG is largely dependent on these statutes. First, the Exchequer and Audit Act and the Public Audit Act should be consolidated into one legislation for ease of reference.

Second, the provision in Public Audit Act to the effect that CAG reports to Parliament through the MoF should be reconsidered. This recommendation is informed by the desire to have a clear relationship between CAG and Parliament on the one hand and Parliament and the Executive on the other hand. It is also intended to minimize friction that may arise between the CAG and the

MoF should CAG exercise the option of transmitting his/her report through the Speaker, and not MoF. Third, the Public Audit Act should be revised to empower the CAG to take action against Accounting Officers who persistently submit their accounts late for audit or who disregard audit instructions from the CAG. These late submissions of accounts and disregard of audit instructions from the CAG were identified as impediments to timely audit.

In summary, the study identifies the legal and political framework under which Parliament performs oversight as the key factors impacting on effectiveness of its performance. The study recommends a legal framework which may not be used by one arm of the Government to impeach the effective performance of the other arm(s). It was found that owing to the above factors, the oversight role of Parliament through PAC and PIC was not effective. The study therefore recommends constitutional, legal, institutional and political reforms with the objective of promoting the practice of good governance, transparency and accountability.

POSTSCRIPT

Background

On the 4th of August 2010, Kenyans in their millions went to national polls, not to decide who would be their ‘executive magistrate’ or ‘lawgiver’, but to settle conclusively how they would be governed; the relationship between the institutions of governance and the residual powers they (Kenyans) retained for themselves. This process was a plebiscite which gave birth to a new legal and political order whose effective date was on 27th of August 2010, when the President promulgated the New Constitution into law.

The clamor for constitutional and legal reforms has been a national political and legal agenda in Kenya for more than two decades. The attainment of this agenda is quickly becoming a reality with the passage, promulgation and subsequent setting in motion the process of implementation of the New Constitution. Although the study recommended constitutional, legal, institutional and political reforms, a scrutiny of the New Constitution indicates that some of the suggested reforms have or are in the process of being addressed. It is hoped that the study findings and recommendations will continue to inform the ongoing process of reforms.

New Constitution

The New Constitution besides emphatically re-stating the sovereignty of the people of Kenya, has enshrined in it democracy, human rights, rule of law, good governance, transparency and accountability. The New Constitution shares the ‘executive authority’ of the Government

between the National and County (devolved) Governments. Legislative authority has similarly been shared between the two chambers of Parliament (National Assembly and Senate) on the one hand and the County Assemblies on the other.

First, chapter eight of the New Constitution establishes the Legislature. Article 95(4) (c) and (5) (d) explicitly confer on Parliament oversight role over collection and use of national revenues and further oversight authority over all state organs. Second, Articles 130 (1) and 152 (2) provide for the separation of the Executive from the Legislature by making it explicit that members of the Executive are not to be Members of Parliament. Third, Articles 94, 95, and 96 of the New Constitution have clearly spelt-out the work of parliament and on this basis, its (Parliament's) performance can be objectively evaluated. Fourth, at Articles 92, 117, 124, 125 Parliament is enjoined to enact laws to regulate political parties, provide for its powers, privileges and immunities, establish committees, their rules and procedures and exercise powers similar to those of the High Court when dealing with witnesses and evidence. Fifth, the New Constitution fixes the tenure of Parliament and guarantees its autonomy through the establishment of Parliamentary Service Commission. These are provided for in Articles 102 and 107 of the New Constitution. Sixth, Articles 228 and 229 provide for appointments, with the approval of Parliament, the holders of the office of Controller of Budget and the Auditor General. The mandates of these two officers are enhanced in the new dispensation.

Other Laws

The New Constitution enjoins Parliament to enact specific pieces of legislation to give effect and meaning to it. These pieces of legislations range from Standing Orders, Parliamentary powers, privileges and immunity to national audit legislation.

Conclusion

The challenges experienced by previous Parliaments when conducting oversight functions, have been, to a large extent, addressed by provisions in the New Constitution. Further, issues of leadership and integrity have been prescribed at Articles 73, 74, 75, 76, 77, 78, 79, and 80 (chapter six). The provisions of the New Constitution addressing electoral issues, for example political parties, or, the integrity of the electoral process, may go a long way in addressing the political climate under which oversight is conducted.

APPENDIX 1

MAIN RESEARCH QUESTIONS	SUBSIDIARY RESEARCH QUESTIONS	TYPES AND SOURCES OF DATA	DATA COLLECTION METHOD
1. To what extent is Parliament, through PAC and PIC, effective in carrying out its oversight role over the use of public funds? 2. What factors determine/affect the extent of its effectiveness?	1. What pieces of legislation do PIC, PAC and CAG depend on for their work? 2. What is the law establishing Parliament and its oversight functions? 3. What is the law establishing PIC, PAC and CAG? 4. What is the scope of audit work	1. Standing Orders (Primary Data) 2. Hansard Reports (Primary Data) 3. Key informant Interviews/In-depth interviews (Primary Data) 4. Reports of PIC and PAC (Primary Data) 5. CAG reports (Primary Data)	1. In-depth interviews based on the qualitative research method; 2. Content analysis of Statutes, Reports of PIC, PAC, Hansard, CAG, NGO's and publications by scholars and other Authors 3. Desk based research to review and analyze literature relating to the research topic which include internet and library

	expected of CAG in a year?		sources
5.	How many audit reports were tabled by CAG in the 9th Parliament?	6. Constitution of Kenya, Kenya National Audit of 2004, National Assembly Powers and Privileges Act (Primary Data)	
6.	How many audit reports tabled by CAG, PIC and PAC were scrutinized?	7. Minutes of PAC and PIC during the 9th Parliament.(Primary Data)	
7.	Do PIC, PAC and CAG have financial and technical autonomy?	8. Analysis and literature on watchdog functions of Parliament by NGO's, Scholars and other authors.(Sec ondary Data)	
8.	Do PIC and PAC have enough		

	time to conduct their work?		
	9. Is there a follow-up mechanism for ensuring compliance with PIC and PAC report?		
	10. Are PIC and PAC recommend ations adopted or rejected by Parliament and for what reasons?		
	11. What is the membership of PIC and PAC and does it impact on its work?		

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