

**THE LEGISLATIVE AUTONOMY AND
EFFECTIVENESS OF THE 8TH (1998-
2002) KENYAN PARLIAMENT**

**NANCY R. GITAU
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UNIVERSITY OF NAIROBI
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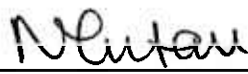
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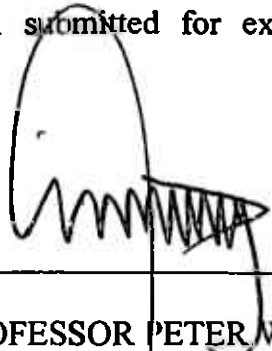
DECLARATION

This thesis is my original work and has not been presented for a degree in any other University

SIGNATURE: 

NAME: NANCY R. GITAU

This thesis has been submitted for examination with my approval as University Supervisor

SIGNATURE:  31.10.2006

NAME: PROFESSOR PETER WANYANDE

DEDICATION

This thesis is dedicated to my mother, Serah Njoki who has had an overwhelming influence in my life

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I wish to express my sincere gratitude to all those who in one way or another enabled me to accomplish this study

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LIST OF ABBREVIATIONS AND ACRONYMS

| | |
|--------------|---|
| AG | Attorney General |
| CKRC | Constitution of Kenya Review Commission |
| ECK | Electoral Commission of Kenya |
| HBC | House Business Committee |
| IPPG | Inter-Parties Parliamentary Group |
| KADU | Kenya African Democratic Union |
| KANU | Kenya African National Union |
| KPU | Kenya People's Union |
| LegCo | Legislative Council |
| MP | Member of Parliament |
| OP | Office of the President |
| PAC | Public Accounts Committee |
| PIC | Public Investment Committee |
| PSC | Parliamentary Service Commission |
| USAID | United States Agency for International Development |

ABSTRACT

This study seeks to establish whether or not the 1998-2002 Kenyan Parliament was effective in carrying out its legislative role. According to Section 30 of the Kenya constitution, the legislature and the executive share legislative power. The study sought to find out under what conditions a legislature exercises autonomy *vis-à-vis* the executive in the legislative process. The following indicators were used to measure the effectiveness of the Kenyan Parliament: bills presented to Parliament that are debated and passed, number of amendments and whether they were proposed by the government or backbench or committees, number of motions from private members and political parties that are passed into Acts. Our findings are that over the years, the Kenyan Parliament operated under the shadow of the executive under conditions of muted parliamentary democracy.

The study was based on an analysis of all the bills (103) as well as all the motions recording in a 25 per cent sample of 126 Weekly verbatim reports of Parliaments daily proceedings.

It is also noteworthy that 73.9 per cent of bills presented to Parliament received serious scrutiny in Parliament. Further, in 1998-1999, 86.5 per cent of bills moved by the executive were enacted into law. This figure dropped to an average of 40.1 per cent in the period 2000-2002. From these facts, we have concluded that Parliament began to exercise its autonomy in earnest after 1999. To our mind Parliament's growing legislative independence is based on two factors: a) the establishment of a Parliamentary Service Commission, which made Parliament financially independent; this meant that the Government no longer controlled their budget; and b) the establishment of a Parliamentary Service Commission enabled Parliament to invest resources in the committee system, thereby enabling MPs to develop the mechanisms and expertise needed to engage in active, legislative policy making.

Our conclusion is that multiparty politics was necessary, but not sufficient to make the Kenyan Parliament play a substantive role in law-making. It was not until the passage of

the Parliamentary Service Commission Act that Parliament as an institution could resist executive efforts at political dominance.

The study is divided into five chapters.

Chapter 1 introduces the study, presenting the statement of the problem, the objectives of the study, scope and justification of the study, the literature review, hypotheses theoretical framework and the methodology used.

Chapter 2 presents a historical perspective of the Kenya Legislature and discusses the legislative process and provides a description of the Eighth Parliament and how selected reforms impacted on it.

Chapters 3 and 4 present empirical findings and analysis of data.

Chapter 5 gives the summary, conclusions, implications and recommendations of the study.

CHAPTER 1

INTRODUCTION

1.1 INTRODUCTION

The word “parliament” is derived from the Latin-French word *parler* which means to talk (Loewenberg 1971). Parliament is, therefore, the forum where people talk to each other and carry out dialogue for purposes of managing public affairs. Parliament (or legislature, Assembly, House, Congress, [Japan] Diet) is viewed as the best institution for promoting representation, thereby enhancing liberal democracy. It is found in all forms of governments including autocratic and authoritarian ones and has always been a controversial institution. It has different manifestations—lower and upper house, elected and non-elected members, or even hereditary membership (Blondel 1973). It is thought to derive its powers from two essential characteristics, namely, equality of members in contrast to hierarchically ordered for, as well as to the claim of the members to representing communities (Loewenberg 1971: 3). Because of its representative function, Parliament is always assigned legislative functions as well as the power over taxation. However, the issue of autonomy of parliament in relation to the executive branch has attracted widespread debate from both classical and contemporary scholars such as Montesquieu (1689), Rousseau (1962), John Locke (1632) and Goldsworthy (1999). Montesquieu for example, argued that the executive should have the power to summon and prorogue parliament and that legislatures should not be involved in executing legislation. Rousseau on the other hand argued that legislatures should occupy a more important position in the state compared to the executive.

This study examines the extent to which the Kenyan Parliament is autonomous in relation to the executive. In order to achieve that objective, the study will identify factors that contribute to parliamentary effectiveness. These include: level of autonomy from the executive branch, budgetary allocations, availability of technically qualified staff to provide back up to members, presence of opposition members who provide checks and alternative viewpoints, time members allocate to parliamentary business, and level of members education which can facilitate quality debate and informed policy decision making process.

While most of these factors are interrelated, the extent to which Parliament is able to take actions that are independent of the executive is a critical determinant of Parliaments effectiveness. Thus, the study shall assess the level of Parliament's autonomy from the executive.

The following are important legal/constitutional and institutional indicators of parliamentary autonomy:

- (a) *Calendar*: Does parliament control its calendar, that is does it determine when it convenes, and for how long? According to section 58 of the Kenya Constitution, the President has the power to summon, prorogue and dissolve Parliament.
- (b) *Resources*: Does parliament have substantial control over resources—both financial and human?
- (c) *Legislative role of parliament*: The extent to which parliament originates, amends and passes legislation is a good indicator of parliament's independence.
- (d) *Legislative agenda*: An autonomous parliament is expected to determine its legislative agenda.

Although we are aware of the importance of all these indicators of autonomy, which we shall make reference to, this study will limit itself to the role of the Kenyan Parliament in the legislative process. Unlimited executive power is viewed to have a negative impact on the effectiveness of legislatures. Mwaikusa (1996) highlights the impact of limitless executive power on the effectiveness of legislatures in Africa in the following way:

Thus armed with limitless power, African presidents went on to act without any restraint whatsoever and Parliaments initially intended to provide control over executive power were turned into tools for serving the whimsical interests of the presidents by legislating, sometimes ex-post facto, deliberately for purposes of giving formal legitimacy to even the most despicable actions and inclinations of presidents. (Mwaikusa 1996:73)

The experiences of Nazi Germany and Fascist Italy in the early twentieth century are an indication of what happens when the executive or the legislature is overwhelmed by the other. The challenge for democratic parliamentary reform, therefore, is to strike the right balance between these two institutions and avoid a situation where one of these institutions overwhelms the other.

1.2 STATEMENT OF THE PROBLEM

The history of the Kenyan Parliament is replete with examples of rubberstamp actions (Gikandi 1982; Akivaga 2002) undertaken by Parliament including the 1991 constitutional amendment to reintroduce multi-partyism. But even with the end of KANU's monopoly of power, Parliament continued to be weak in the immediate post-1992 multi-party election period. A number of factors, including the presence of opposition parties in Parliament, helped to reduce the president's hold on the legislature. However, even the presence of opposition MPs in Parliament was not enough to bring about meaningful changes. Wachira Maina (1996) argues that, despite a series of reforms that Parliament passed in 1991 and 1992 following widespread local and international pressure exerted on the government, Parliament was still unable to play any meaningful role. Yet, the Seventh and Eighth Kenyan Parliaments (1993-1997 and 1998-2002 respectively) are said to have made important advances in exercising independence rather than simply legislating at the President's pleasure. It is not until some critical rules governing the operation of parliamentary business were passed before the 1997 elections that the Kenyan Parliament began to increase its capacity and to exercise autonomy.

An amendment to the constitution to allow for the establishment of a Parliamentary Service Commission (PSC) was passed in 1999 through the efforts of opposition members of Parliament. This was an important first step in attempts to de-link Parliament from the Civil Service, allowing Parliament to begin to exercise some level of independence. Barkan (2003) argues that the effectiveness of the Kenyan Parliament in the 1990s was influenced by a combination of several factors, namely an increase in the number of MPs with college degrees comparative to previous parliaments (a development that may have contributed to more informed parliamentary deliberations), multi-party democracy (which became enhanced during the 1998-2002 Parliament), and a substantial increase in MPs' salaries. Nakamura and John Johnson (2003) support this view arguing that the advent of multi-party politics, coupled with structural independence of the Ugandan and Kenyan legislatures, led to the rise in parliamentary capacity in these two countries.

Following the passage of the PSC Act, the financial allocation to Parliament almost doubled, mainly because Parliament had more clout and could negotiate directly with the Treasury for resources unlike in the past when it was viewed as a department within the

Government's Civil Service. With increased budgets and autonomy, Parliament's committee system, which was revived in 1998, became operational and its budget rose substantially. Whether with these increased powers and assertiveness the 8th parliament was in a better position to play its legislative role is an important research question. That is, to what extent was the 8th parliament successful in playing its legislative role? This is the concern of the study.

This study explores whether Parliament during this time functioned to legitimize executive legislative proposals or whether it was able to take independent legislative actions. Barkan (Ibid) Nakamura and Johnson (Ibid) posit that Parliament became effective from 1998 and was able to play its legislative functions in proposing bills and amending legislation brought to the House by the government, thereby demonstrating that it was no longer playing a rubberstamp role. However, these scholars and practitioners do not effectively demonstrate the extent to which Parliament was engaged in originating legislation or amending bills that the executive presented to Parliament. The study seeks to establish whether or not the Eighth Parliament had become much more effective in carrying out its legislative role. The study will do this by examining the bills that originate from private members against those brought by the Executive, examine the amendments on bills and nature of bills or motions discussed. This analysis should tell us whether or not Parliament was assertive in playing its legislative role. The extent to which bills proposed by the executive are amended and the number of private members'/party bills and party motions passed into Acts is a good indicator of Parliament's level of autonomy in the legislative process.

This study will

- a) assess the role of Parliament in the legislative process by examining bills proposed and the treatment accorded to such bills by Parliament during the 1998-2002 period;
- b) assess the extent to which this Parliament determined the legislative agenda by presenting motions/questions which get translated into legislation.

1.3 OBJECTIVES OF THE STUDY

The general objective of the study is to ascertain empirically whether the Eighth Parliament (1998-2002) was a rubberstamp or an effective institution; in other words it is to assess

whether or not Parliament played its legislative role. By doing this we shall be able to appreciate the importance of the relationship between the legislative and executive branches in the Kenyan system that is a mixture of presidential and parliamentary systems.

More specifically, the study will seek to:

- (a) assess the performance of the 1998-2002 Parliament in originating and amending bills;
- (b) assess the role of Parliament in setting the legislative agenda by identifying the most important concerns of Parliament, as these concerns may be discerned from an analysis of Parliamentary records,
- (c) Examines the extent to which these concerns/issues of Parliament got translated into bills or legislation.

In order to achieve these objectives, the study examines all the bills that Parliament dealt with to establish who between the executive and the National Assembly originated the bills. It also examines the extent to which the bills were subjected to amendments within Parliament.

1.4 JUSTIFICATION FOR THE STUDY

The study will increase existing knowledge on the role, effectiveness and autonomy of the Kenyan Parliament, and by implication provide an appreciation of possible enhancement of democratic practice since the reintroduction and entrenchment of multi-party politics. By examining the role of Parliament in originating and in amending legislation proposed by the executive, the study will increase our knowledge of the functions of Parliament and by extension help us better understand Parliament's relationship with the executive. We do know that during the multiparty period (from 1991) Parliament made attempts to exert its autonomy by passing the PSC Act, thereby obtaining financial independence from the Government and increasing salaries and benefits for its members. All these efforts were among other things, aimed at enhancing the effectiveness of Parliament. This study sheds light on the extent these efforts succeeded in improving Parliament's role in the legislative process, and helps us to assess the extent of its legislative effectiveness.

Although many studies on the Kenyan Parliament have been carried out (Barkan, 2003; Gikandi, 1982; Hakes, 1973), this one examines a particular period in history during which efforts were being made to transform it from a rubberstamp institution to a relatively autonomous one. Based on this assessment of Parliament's role in the legislative process, the study will offer policy recommendations on how to further strengthen Parliament in terms of quality of representation, the nature of rules governing its operations and what resources are needed to increase its capacity to carry out its functions. Additionally, the study will contribute to debate on how best to structure executive-legislative relations for optimum democratic practice. For example, the draft Kenyan constitution of 2004 proposes to give Parliament more power than that provided by the current constitution and it is important that factors that may undermine or enhance its capacity be understood. A policy question that needs to be answered is: what is the correct democratic balance in legislature-executive power relations?

1.5 SCOPE OF THE STUDY

The main focus of the study is the legislative and related activities of the Eighth Parliament of 1998-2002. The Eighth Parliament availed adequate categories for analysis. The unit of observation is the legislative process. As such, the five-year period of the Eighth Parliament provides adequate data to test our hypotheses. However, the study will make reference to prior periods so as to enrich perspectives on parliamentary performance over the years.

While the core of the study is the legislative performance of the Eighth Kenyan Parliament, this study provides a broad historical context for understanding the institution of parliament. The literature review in this chapter, as well as a historical preview at the beginning of Chapter 3 sheds light on the emergence of parliament as an institution of governance in Europe and the evolution of legislature-executive relations over the centuries. The study also shows, in chapter 2, how the Kenyan Parliament has evolved and how historical-political factors have shaped legislature-executive relations in Kenya.

The study focuses on the legislative work of the Eighth Parliament in order to assess the extent of parliamentary independence. It will examine who between the executive and Parliament originated legislation and what treatment was accorded to the bills presented, in an attempt to assess the effectiveness of Parliament. The study is not of a comparative

nature; to the extent that it limits itself to the Eighth Parliament and that it does not compare the Kenyan Parliament with another. It focuses on executive-parliamentary roles in the legislative process.

1.6 LITERATURE REVIEW

The relationship between the legislature and the executive is the subject of ongoing debate. We should note that the debate was started by 'classical' political thinkers more than three centuries ago, in the 17th and 18th centuries: John Locke (1632-1704), Jean Jacques Rousseau (1712-1778) and John Stuart Mill (1806-1873). Some contemporary scholars, essentially continuing this old debate, are of the view that these institutions should be separate entities (Goldsworthy 1999), while others argue that the two institutions could be combined into one (Silk 1998). Still others advocate a stronger legislature compared to the executive, while yet others would prefer a stronger executive comparative to the legislature. Rousseau, in the 18th century, argued for a system where the executive and legislative roles were combined but with the legislature playing the dominant role. He stated, in terms which are comprehensible to us today, that, "He who makes law knows better than anyone else how it should be executed and interpreted" (Rousseau 1962: 271). He seems to be oblivious to the problem of conflict of interest that may arise when law makers become the executives of the law. There is bound to be selective passage and selective application of the laws according to the interests of the legislators who are also the executives.

Mixed systems, where the executive and legislative powers reside in one institution, are found in majority of countries around the world. The U.S provides a rare example of a complete separation of the legislative and executive powers. However, in all types of systems, including the American system, the responsibility of originating legislation is shared between the legislature and the executive. This is with the exception of originating taxation and expenditure bills, which has always been a preserve of the executive. In most of the countries that we reviewed, we found that money bills are initiated by the executive. This can give the executive agenda-setting power and limit congress/parliament's authority to increase budgetary spending above the levels set by presidents (Haggard and McCubbins (ed) 2001) This allows the president "to obtain outcomes closer to his preference (ibid:77). However, when crafting the budget, the executive, can often take into account interests of

those MPs needed to pass it. Thus in competitive political systems, budgets often cater for legislators' interests.

Legislatures are rarely strong although they are considered as sovereign institutions. Legislative sovereignty has been defined as the ability of the legislature to enact or repeal all laws except those that touch on its sovereignty (Goldsworthy 1999). These restrictions on the exercise of unfettered, self-negating sovereignty are tied to the philosophical arguments advanced by early philosophers, such as Rousseau, who saw sovereignty as being nothing else other than the exercise of the general will which can never be alienated. "The legislature is sovereign only to the extent that collective being cannot be represented except by himself" (Rousseau 1962: 273). The representative nature of legislatures therefore limits and at the same time confers sovereignty. Also, the sovereignty of the legislature *vis-à-vis* other institutions (executive or judiciary) in enacting or repealing laws is limited by the tradition of executive (presidential) assent to bills passed by legislatures. It is also limited by the power of courts to review and declare statutes invalid, a development that is viewed around the world as an affront to the sovereignty of parliament (Goldsworthy 1999). There are perceptions that there exist rubber stamp legislatures that act at the prompting of executives (Blondel 1973), in spite of the fact that the representative nature of legislatures should naturally confer institutional sovereignty. In sum, we can see that there are expectations on what role parliaments should play, and what status they should enjoy, which then determines how their performance is assessed.

Legislative-Executive Relations According to "Classical" Political Thinkers

Several scholars and political theorists have over the centuries made legislatures a subject of their work. For instance, Hobbes (1651), who wrote during a period of history when the legislative institution was quite underdeveloped, is one of a few scholars who had no time for legislatures. He saw the role of the state as foremost—that of maintaining law and order; the state, according to Hobbes, is created by the people when they give up their right to self-government, in favour of a sovereign head of state. This surrender of power to a sovereign is irrevocable and the Leviathan assumes full authority. He argued that the foundation of every legal system is the sovereign who is the creator of all laws. Hobbes may have overstated his case for strong executive power. Political theorists such as John

Locke (1632-1704), Rousseau, and John Stuart Mill, who were virtually Hobbes's contemporaries, emphasized the important role legislatures play in law making, representing communities and providing oversight over government.

Locke (1690) said that people form the state for convenience and the legislative power is constituted by consent and exercised for the good of the subjects. He pointed out that people are obliged to obey the government, if it acts in their interest, and remove it if it acts contrary to that interest. To Locke, the purpose of the legislative power was to sustain the commonwealth. "The legislature is not only the supreme power of the commonwealth, but it is also sacred and unalterable in the hands where the community has once placed it. Nor can any edict of anybody else, in what form so ever conceived, or by what power so ever backed, have the force and obligation of a law, which has not its sanction from the legislature, which the public has chosen and appointed." (Locke 1690: 125). In contrast to Hobbes who advocated for strong executive power, Locke advocated for strong or supreme legislative power.

According to Locke, the law of nature gives each one of us absolute freedom. Liberty is the ability to act according to one's will, but free men can decide to establish a collective power, which is entrusted with rulership. That collective power has legislative, judicial and executive functions exercised to protect citizens. In regard to legislative power, he argues that anybody who wields it must be an ordinary citizen, with the government playing the role of a trustee. To Locke, the legislative power is superior as it represents the people's collective will, in contrast to the executive power. Locke, therefore, was in favour of the parliamentary system of government.

Rousseau admired direct democracy, which was practised by the Greek city-states and the Swiss cantons, arguing that sovereignty cannot be represented; therefore, laws that people have not ratified directly are null and void. According to Rousseau, the legislature is "the engineer who invents the machine, the prince [the executive] merely the mechanic who sets it up and makes it go" (Rousseau 1962). In essence Rousseau believed that a legislator occupies an important position in the state, but his powers are derived from the community. The concept of representation then allows parliament to make laws that are willingly obeyed. Rousseau sums up his perception of legislative-executive relations as follows:

Legislative power is the heart of the state; the executive power is the brain, which caused movement of all parts. The brain may become paralyzed and the individual still lives but as soon as the heart ceased to perform its functions, the animal is dead.” (Rousseau, 1962)

Mill (1968) believed in representative government, expressed through a widely representative assembly with a liberal franchise, supported by popular education and an enlightened public. According to Mill, the best form of government is a representative one where “the whole people, or some numerous portions of them, exercise through deputies periodically elected by them the ultimate controlling power”. (Mill 1968: 234) In all, Mill sees the supremacy of parliament as key: “It is essential to representative government that practical supremacy in the state should reside in the representative of the people” (*Ibid.*). Mill also called for checks and balances among the different institutions of governance where, for example, the crown is empowered to refuse to assent to any Act of Parliament. This allows for equitable distribution of political power. He called for leadership by an enlightened minority (elite) with special knowledge, but whom an enlightened public would keep on their toes.

Both Locke and Mill view legislatures as essential institutions which should be strengthened to guard against tyranny and to contribute to policy making. Mill has been referred to as the father of modern professional legislatures. Mill was among the first to recognize that legislatures could best perform their responsibilities if members were well paid, and to express the opinion that the hereditary English House of Lords should be abolished. Mill believed that political institutions are the work of men, depend on their intellect and are subject to errors. But he admitted that, where men are not intellectually fit, institutions may become instruments of tyranny. Mill considered the “talking” that takes place in Parliament as an important function that enables the legislature to represent every shade of opinion. “The Assemblies then should know that their role is to talk and discuss while ‘doing’ is the work of a miscellaneous body”. (*Ibid.*) He believed that the uneducated aristocracy had governed badly because they were incapable of rigorous thought. He argued that professionalizing the parliamentary work would free legislators from voters and enable them to focus on national affairs. Government then would be performed by a few for the benefit of the many, as voters would select representatives who were fully qualified to make sound decisions on public matters.

Contemporary Literature on Executive-Legislative Relations

Although legislatures provide oversight over executive actions and carry out legislative work, the most important role of parliament is that of popular representation and it is from this that it derives other functions. Because they are viewed as representing their constituents, and are constituted through consent, they “control the raising and spending of public money”. (Lower 1971: 38) The performance of executive and legislative roles and the nature of executive-legislative relations in a number of countries can be reviewed with a view to gauging the extent of parliament’s influence in policy making.

In Britain the cabinet, which is like a committee of the House of Commons, originates nearly all legislation (Appadorai 1974: 268) partly because the rules of the House favour the cabinet in allocation of time in parliamentary business. The House of Commons has less control over financial matters than the executive (Appadorai 1974) and their role is restricted to proposing reduction in expenditures—something that rarely happens. It is assumed that the cabinet makes laws with consent of the House of Lords and House of Commons (Goldsworthy, 1999) because the cabinet on its own cannot make good laws, except with the consent of the representatives of the governed in Parliament. In the legislature, deliberations and counsel are elicited and this ensures that the laws are reasonable. However, the British Parliament can make laws which no other authority can override. But overall, the executive (cabinet) controls over 80 per cent of the legislation—that is, 80 per cent of the legislation originates from the cabinet (Silk *et al* 1998, Appadorai 1974) and the responsibility of originating money bills rests with the executive.

Even though Parliament comprises MPs and the cabinet, the effectiveness of the legislative process is driven by the cabinet (Silk 1998). The legislature is, nevertheless, considered to be sovereign. Once the cabinet introduces a bill into Parliament, the legislature as a whole “legitimizes” it without any attempt made to amend what the cabinet proposes.

In England, according to Appadorai (1974), the upper house is comprised of hereditary peers and has both judicial and legislative powers. Both upper and lower houses have several committees and both houses can originate legislation except money bills.

The House of Lords has 900 members while the House of Commons has 635 elected members representing constituencies. Legislation, although debated and passed by

Parliament, almost always originates from the ministries and the cabinet (which is a committee of the legislature, chosen from its membership). The rules of the House, as has already been pointed out, favours the cabinet, which is given more time compared to private members.

The political party in Britain is an important element that ensures party discipline in the legislature. While it is arguable that in Britain, Parliament has power over money bills, according to Appadorai, its role is merely to ratify cabinet proposals with little scrutiny, thereby giving approval or legitimating government proposals. Appadorai presents a picture of a British Parliament reeling under the control of an elite, constituted by the cabinet, where members, through party whips, vote with the cabinet because they would not wish to lose their seats, for if their party in government is defeated, the Queen or King would dissolve Parliament and force them to seek re-election. Because of the huge election expenses, MPs are unwilling to risk losing their seats.

Paul Silk *et al* (1998), also writing about the British Parliament, provide details of the day-to-day workings of the House of Commons and the House of Lords, arguing that there is no separation of powers between the executive and the legislature. They point out that British citizens are well represented with one MP representing 89,000 constituents. General elections are held every five years, except when the Head of State (Queen or King) prorogues Parliament. Silk highlights the importance of political parties in Britain's political process, arguing that because parties send the MPs to Parliament, they exercise a lot of control over their members. Also, people join parties because they generally agree with their policies and are, therefore, likely to vote to endorse party positions and to follow their party leader. It is no wonder then that in Westminster, the government controls 80 per cent of the legislation.

Silk refers to a report on the House of Commons (1997-98) which found out that there was widespread resistance to amendment of legislation once it was introduced to Parliament. He refers to a claim made by one MP in 1995 to the effect that for 25 years only two opposition bills were recorded and that there is widespread perception in Britain that Parliament only "legitimizes" government programs. He states: owing to "the fact that Parliament does not see the draft, the sponsoring department usually hopes that the parliamentary stage of legislation will be limited to what is called legitimization, in other words the endorsement

of the government's will". (Silk 1998: 109). He explains this non-interventionist stance as resulting from the fact that MPs and their peers are involved in the internal processes that lead to the presentation of these bills. MPs are also involved in determining the parties' policies and act as spokesmen for interest groups which try to influence legislation. So when statistics for government bills are examined, almost all government bills are passed.

The British Parliament also plays a limited role in respect to the budget process, and voting on money matters is only done on the initiative of the government.

Parliamentary democracy does not imply Parliamentary control.... Government is exercised through Parliament. The leading figures in government, the Ministers, are drawn from Parliament. Because of this, it is simplistic to talk about 'Parliament' and 'government' as if we had a separation of powers between the executive and the legislature as in the U.S.A. (Silk 1998: 259).

According to Silk (*ibid*), there is little pressure for separation of powers in Britain. "It is broadly accepted that the principal task of Parliament is to provide the personnel for government and through the opposition parties, personnel for alternative government" (*Ibid*: 259). The role of Parliament in the U.K., then, is to give democratic authority to government actions. Silk focuses on a parliamentary system of government where the executive and legislature are rolled into one institution. This differs from the mixed system, which exists in Kenya.

In the case of Britain sovereignty of Parliament really means legislative sovereignty exercised conjointly by the Crown and both Houses of Parliament in a situation where there is no separation of legislative and executive powers (Goldsworthy 1999).

In the United States—a federal state with two legislative chambers—Congress has a law-making role similar to that of the legislature in Britain and France except that the executive has no role in Congress. The US legislature is sovereign as it has the power to do what it wants with all legislation without exception and has control over legislation and all bills except budget bills, which originate from the executive. With the exception of money bills, all other bills can be introduced by an individual Congress person or by one of the committees and go through readings. In the U.S., the budget is prepared by the Director of

the Bureau for Budget and is subjected to serious discussions in both houses before it is passed and forwarded to the president for assent. Appadorai sums up U.S. Congress's power vis-à-vis the president: "The control of Congress over the national finance is effective—perhaps too effective" (Appadorai, 1974: 338). In the case of the U.S., legislative sovereignty rests with Congress, but is limited by the presidential veto power, which, nevertheless, Congress can override with a two-thirds majority.

The United States' constitution dates back to 1789 and provides for two Houses of Congress—a Senate with 100 members and a House of Representatives with 436 members. Both Houses initiate all legislation except the money bills. Because the members of the upper house are all elected, Appadorai argues that this has made the U.S. Senate the most powerful upper chamber in existence.

Both Houses have standing committees and the Executive (the president, working in conjunction with his appointed ministers/secretaries) is not a member of either of the Houses. Instead, bills are introduced by individual members of Congress or by chairmen of Congressional committees. Although both Houses have equal powers in ordinary legislation, committees are very powerful and shape legislation. The budgetary role is not the sole prerogative of any one arm of Government. Although the executive makes the proposals (on taxation and expenditure) they are subjected to serious scrutiny in Congress. There is a lot of consensus building and horse-trading in the US legislature, but there is no executive presence in the US Parliament unlike in Britain. Thus in the U.S. case, there are wide range of interests that must be accommodated before a bill is passed leading to a situation whereby neither the Congress nor the President can impose it's own preferences. However, Appadorai does not study in any depth the process of legislation in the United States.

France has a presidential system where the president is elected by majority vote. The prime minister, who is appointed by the president and who in his turn appoints a cabinet, introduces bills into Parliament. France has two houses and both can introduce bills and propose amendments. During the Third and Fourth French Republics, Parliament increased its powers leading to the weakening of the executive powers. When in 1958 President Charles de Gaulle sought to correct this anomaly, Parliament was streamlined to the extent that the operations of parliamentary government became impractical due to executive

“political and procedural strength” (Loewenberg 1971: 11). From France’s case, we can deduce that when you have legislative majority opposed to an executive who has no veto or decree powers, he can be marginalized by passing legislation he cannot block. On the other hand, when you have a powerful president with unchecked ability to determine legislative agenda, he can dominate even when he lacks support from the legislature or pass policies and laws that are not necessarily in national interest.

In Canada and Australia, there is a cabinet appointed from the party which commands the majority of members in parliament, and the cabinet originates nearly all the bills. The head of government (the prime minister) is represented in Parliament which has two Houses. The Prime Minister is the leader of the majority party in parliament (Lower 1971). Although the two houses have law-making power, the Senate (upper house) has fewer powers on money bills than the lower house (Appadorai 1974). The Governor General, who is the head of state, opens, prorogues and dissolves Parliament.

Canada has a mixed parliamentary system of government, that is the executive (cabinet) sits in parliament. Parliament comprises two houses: the Senate with 102 nominated members representing provinces and the House of Commons with 264 members elected through universal suffrage.

From these two cases (Canada and Australia), we deduce that there is no complete separation of power and that the legislative role is shared by the executive and the legislature both of whom played the legislative role effectively. However, these cases do not tell us who between the legislature and Parliament played the lead role in the legislative process.

Bangladesh, a former British colony like Kenya, is a unitary state with a parliamentary executive and president as head of state. Legislative power is vested in the House of Nation, comprised of 300 elected members, but the president has power to assent to all approved bills before they become law. The president is an MP and, on election, he appoints a prime minister. He summons and prorogues parliament. There is a cabinet appointed from among members of parliament. Members of parliament are subject to laws similar to those found in Kenya—where a member who resigns or votes against the party which sponsored him loses

his/her seat. However, there are rarely members willing to lose seats, as that would require them to subject themselves to re-election. This ensures party discipline. There is no second chamber of parliament in Bangladesh. (Appadorai 1974)

Just like in other cases cited above, the legislative role in Bangladesh is shared by parliament and the executive. However, it seems as though the executive dominance in parliament gave it an upper hand in the legislative process.

While the literature has been concerned with examples of the above countries—Britain, the United States, France, Canada, Australia and Bangladesh—where generally democratic balance has been maintained in legislature-executive relations, there are cases where the balance was upset with disastrous consequences.

Hitler's Germany and Mussolini's Italy are cases where democracy failed and the state degenerated into totalitarianism. In Germany, the Weimar constitution instituted in 1919 is said to have guaranteed constitutional democracy by balancing the powers of parliament vis-à-vis those of the executive. There were two Houses (*Reichstag*—Lower House, and *Reichrat*—Upper House) and all bills were introduced in the Upper House first. "The *Reichstag* had the ability to pass laws subject to suspension veto of the *Reichrat*" (Appadorai 1974: 467). But a series of constitutional amendments reduced the powers of the legislature to a mere rubberstamp. The power of the legislature to approve money bills was taken away and Hitler banned all political parties but his National Socialist Party. Opposition was eliminated and the single "party became synonymous with the state" (Appadorai 1974: 470). The same scenario was repeated in the Italy of Mussolini, which was a unitary state where the real power rested with the executive. Appadorai defines the fascist state as "exercising power for the sake of community, but not derived from community" (*Ibid.*, 477).

These two cases indicate that where power is exercised at the expense of the legislature, and executive authority is not limited, totalitarianism is the likely outcome. Legislatures in such instances become ineffective and are called to merely 'legitimate' executive decisions.

But it should be appreciated that the consummation of totalitarianism in Germany contained the historical irony of the legislature itself having abetted the demise of democracy and

thereby the demise of an independent legislative entity. Exploiting an extended popular franchise in Germany, Adolf Hitler was able to mobilize popular discontent through his National Socialist German Workers' party (the Nazis) to gain control over the Reichstag in 1932 and to achieve election as Chancellor of Germany in 1933. He then used Parliament (the Reichstag), dominated by the Nazis, to ban all other political parties making Germany a one-party dictatorship. He also merged the executive and legislative powers under his control—that is, he merged the offices of president (head of state) and chancellor (head of government) and became Fuhrer and Chancellor of Germany. (Hobley 1971: 3) Consequently, he had unchecked power with which he was able to dominate the legislative process and make policies that were not in keeping with the national interest. Thus parliaments became ineffective.

The literature review so far, identifies three different types of government systems (see the above country cases): parliamentary, presidential, or mixed systems. In all these systems, with the partial exception of the United States, legislative powers are shared between the executive and the legislature. Our main study will focus on the Kenyan parliament which exists in a mixed system of government.

Several scholars and practitioners have argued that legislatures are often weak institutions beholden to the executive. For example, Blondel observes that “legislatures are rarely strong even in liberal democracies and many complain about their impotence, decline, ineffectiveness ... inconsistency, squabbles. Despite these weaknesses they have survived from the time they were established in the medieval period.” (Blondel 1973:13)

He points out that the popular appeal of parliaments stems from their perceived role of representation; and this perceived role in its turn generates ideas about what they should do or not do. He also observes that theorists such as Locke gave parliament the legislative role. Yet the concept of representation places limitations, first on effectiveness because the demands and needs of a numerous people can hardly be met by a relative handful of representatives, and second, on the legislative role because representatives have to play multiple roles besides legislation. Blondel also states that people see parliament as having the role of constraining the executive, and perceive the laws that it passes as reflecting collective thinking.

Despite these expectations, the history of parliament is replete with legislatures that failed to play their expected role. Blondel points to problems inside and outside the legislature as having conspired to reduce parliament's effectiveness. He observes: "... Hitler's Reichstag, like Mussolini's, Salazar's and Stalin's legislatures seemed to be the last step before the total demise of parliament. Such rubberstamp legislatures no longer seemed worthy of attention" (Blondel 1973: 6).

Blondel discusses the factors that can reduce the powers of legislatures. Internal constraints may include constitutions that give the executive emergency and veto powers; parliamentarians may sit for limited periods; there may be lack of political and technical expertise; or parliament may not provide the infrastructure needed. External constraints may include executive dominance: "the more the regime is imposed the more the legislature is likely to be subservient to the executive as the executive is not likely to tolerate manifestations of independence." (Blondel 1973: 49) In such circumstances, a legislature that is perceived to be going beyond its mandate is subjected to coercion. However, since coercion may not offer a long-term solution, the executive may endeavour to weaken the legislature through persistent influence. This is prevalent in monarchical states and in states where the executive has personal appeal or where there is a strong political party, which citizens identify with, and which is, therefore, able to impose its will on the legislators.

In Blondel's opinion, the disappearance of dictatorship and rise of democracy in Europe did not result in perceptions of revitalized legislatures. "The executive's upper hand seemed to have become so strong that assemblies appeared on the verge of becoming mere decorative organs despite longer sitting and debate" (*ibid.*: 7). The effectiveness of legislatures in carrying out the legislative role is hampered by the fact that they are not only ill equipped to carry it out, but also they have to contend with archaic procedures and lack of back-up within parliament. Thus, even if the constitution confers on parliament legislative responsibilities, these responsibilities are not always effectively carried out.

So, what exactly is parliament's role according to Blondel? Blondel enumerates the legislature's functions as: involvement in the legislative affairs of a nation through influencing the executive and promoting participation. The legislature also makes demands on the political system by transmitting demands from constituencies; they also play a role on policy formation and policy making, including fiscal policies. Legislatures also play an

integrating function by managing conflict through deliberation, adjudication and catharsis. The other integrating function they play is by authorizing and legitimizing government policies and law through representation.

Blondel observes that the role of parliament is very complex, and not what is put down on paper, and that, indeed, the actual role contradicts people's expectations of this important institution. For example, there are other channels outside the legislative process that MPs can use to influence the decisions made by ministers, including informal discussions or taking party positions on issues.

According to Blondel, the procedures one finds in parliament are not designed to facilitate law making. "What we see is a curious situation in which legislatures have become prisoners of procedures invented in the past." (Blondel 1973:17). Thus parliament is forced by circumstances to address constituency, oversight, policy and national issues within the constraints placed by procedures, often through time allocated for questions and debate and bills.

He does not seem to have any reverence for second chambers of parliament, which he considers as not having much impact on the effectiveness of parliament. He says that they are often frowned upon by democrats on the grounds that they limit sovereignty of the people. Yet they are very popular and sometimes are equal in status to the lower house. Oftentimes when the members are appointed as opposed to when apportionment of seats is made on the basis of proportional representation of sub-national territorial entities as in the United States where two senators are elected to represent each federal state, they become stronger.

To Blondel, the importance of the legislature has been exaggerated. Such perception has, in its turn, generated the wrong perception that the effectiveness of legislatures has declined. But he asserts that contrary to widespread perception that legislatures do nothing and have declined, are rubber-stamps and are often irrelevant, they remain influential in many countries.

In addition, this debate on the perceived decline of Parliament, Blondel observes, has been fuelled by the problem of data gathering that does not allow for systematic examination of legislatures to see what their strong points are. Blondel concludes that legislatures are not

sovereign, they are under pressure, and that law making is carried out by multiple institutions—but there is nothing wrong with that. He states: “It would be wholly abnormal for the legislature to make a common practice to reject those laws or to amend them beyond recognition” (Blondel 1973: 134).

On the relationship between the executive and legislature, he points out that it is a complex relationship. Some members of the executive come from the legislature. He argues that the executive should not be made to depend on the legislature, as this would hamper the conduct of public affairs. Instead the legislature’s role should be limited to providing general guidance and casual examination of executive activities. To him, the real functions of a parliament are to provide a channel of communication between government and the people. Popular demands are channelled through parliament and these demands are integrated into decision-making. The legislature plays a legislative role (*ibid.*) in so far as it facilitates popular participation, through representation, in processes with a bearing to legislation. Blondel recommends further single country studies to ascertain the “extent of activity and the levels of influence which corresponds to these activities” (Blondel 1973: 37). This study is a response to that recommendation.

Legislatures Reflect the Nature of Society

Appadorai (1974), like Blondel, traces the evolution of parliament right from the Medieval period to modern times. The earliest parliaments tended to exclude lower classes and the representatives were delegates with no independent voice. Thus the early parliament was more a representative body than a legislative one. According to Appadorai, social-economic and political developments favoured the rise of popular governments and the expansion of suffrage. The Industrial Revolution led to the rise of the middle class who started demanding representation in parliaments. Appadorai lays out the principles regarding organization of government, its structure and how it operates. To him, states can have sovereign legislative power dispersed or devolved to different institutions or located in one institution.

In the early 20th century, there was a rise in dictatorship in several countries in Europe. Appadorai attributes this rise to the strengthening of the executive at the expense of both the legislature and personal liberty. He discusses how in the authoritarian states of Germany and Italy, citizens’ rights to assembly were curtailed. Thus to Appadorai even though

several factors account for the rise of dictatorship—personality factors, mass economic distress, lack of democratic tradition/culture—he sees the usurping of the powers of the legislature and limitations on personal freedoms as key factors. (Appadorai 1974: 240)

He discusses the historical role and composition of legislatures in several countries—the USA, Britain, Bangladesh, Germany, Italy, and the USSR. He provides details on how the legislative process works in different countries, discussing the role of lower and upper houses where they exist.

Appadorai's views on the workings of the legislatures in key individual countries—Britain, France, the USA—have been ventilated in the earlier section covering country cases.

According to Appadorai, a second chamber of parliament has certain merits, such as providing a second opinion on legislation, but only if comprised of members different in origin, caliber and orientation from members of the lower chamber.

Appadorai discusses the role of representatives and senators in the US Congress. He points out that the senators, although sometimes viewed as full of wisdom and integrity and as people who may bring different expertise to bear on the legislative process, are in reality constrained by certain factors: they have constituents whom they must represent even as they engage in house deliberations. The need to address the needs of constituencies leads to parochialism in both houses of Congress. To Appadorai, parliament is not “a congress of ambassadors with differing and hostile interests”. Instead, “it is a deliberative assembly where local interest, if local interests are considered, does not lose sight of the national good” (*ibid.*: 529). The role of parliament is to pass laws, initiate and amend money bills, while the executive has the expertise to initiate legislation. The executive then has the ability to shape legislation while parliament provides checks on administration to stem abuses. However, Appadorai is of the view that parliament should have more power of passing money bills—which most parliaments do not seem to have except in the US. Thus, he feels that parliament's greatest role is ventilating of grievances.

He is of the view that the executive should have more power:

... The initiative of bringing legislation is left to the executive and final sanction left to House. The lower House should make final decision to matters of legislation and finance, the initiative being with the executive and the revision subject to final sanction of the lower House (*ibid.*: 554).

Appadorai points out that there has been a trend whereby the power of the executive has been growing at the expense of the legislature in both democratic and autocratic states. He attributes this to the fact that the executive initiates legislation and goes to parliament for its ratification. Also, during wartime, executives acquire powers which they are often unwilling to give up when peacetime returns. Like Gicheru (1976), he points out that the weakening of the legislature may result from the territorial basis of representation that brings about the need for MPs to focus on constituency electorates and to respond to public opinion. He also points out that the weakening of the legislature in autocratic states is the natural consequence of the policies of autocratic leadership.

To him, a well-informed and well-equipped legislature can enhance the powers of parliament. This view seems to be derived from Mill (*op. cit.*) who called for expertise in law making since it was not found in legislatures of his time. However, Appadorai, while speaking of experts as necessary, does not say whether that expertise should be found among members of the executive in parliament or among ordinary people's representatives.

Loewenberg (1974) brings together views of European and US scholars who have assessed parliament's performance and contributed ideas on how its capacity can be enhanced. He observes that in the Third World, where parliament is often the product of colonial rule, some legislatures are playing a critical function in recruiting executive leaders, unifying the nation, linking interest groups to government and incubating an opposition. He agrees with Blondel that criticisms of perceived failure or decline of parliament are based on expectations of what parliament's role in the state should be and not on an understanding of what role it is actually playing.

Loewenberg discusses how parliaments have faced competition from the executive and points out that various executive instruments have been used to maintain executive dominance over parliament. First, parliament cannot effectively organize its own timetable

and government bills enjoy complete priority. In such a situation, debate time boils down to ministerial statements and voting for package bills (miscellaneous amendment bills).

Second, the executive can often pass decrees without parliamentary ratification. This happened in France in 1967 when the Gaullists were returned to Parliament with a tiny majority. The executive (ministers) made its Gaullist followers “to vote a delegation of powers, removing from all parliamentary scrutiny, a major measure reorganizing the social services” (Francois Goguel, in Loewenberg 1971: 108).

Paul Silk and others’ (1998) critique of the workings of the British parliament has already been featured in the earlier section on country cases.

Jeffrey Goldsworthy (1999) examines the concept of the ‘sovereignty of parliament’ to ascertain whether parliament enjoys superior rights comparative to other branches of government. He argues that there are two existing schools of thought. One school of thought argues that parliament should be subject to some limitation on its powers. This is the argument that has been used by judges to invalidate some laws, arguing that they may violate fundamental rights. The other school of thought sees parliament as a popular representative body, which should have the ultimate authority to make laws, which any other authority is bound to accept, in a situation where parliament’s decisions are universally valid and binding. In other words parliamentary sovereignty would naturally reflect popular sovereignty.

Goldsworthy says that he takes a middle position between these two extreme positions. He acknowledges that the concept of parliamentary sovereignty is a fundamental rule whose “existence is constituted by consensus among senior officials in all three branches of government” (Goldsworthy 1999: 6). He traces the development of parliamentary authority through seven centuries to see how the concept of parliamentary sovereignty evolved. He views parliament as comprising the King and members of parliament. Thus Goldsworthy reaches the conclusion that legislative sovereignty is the supremacy of both the Crown and the two Houses of the British Parliament in producing binding law for the country. He seems to make a distinction between political and legislative sovereignty.

He sees the concept of parliamentary sovereignty as something that has evolved over the centuries. In the early days when the king met his subjects, the magnates, to seek counsel

and consent to raise taxes, the decisions parliament made were those of the king but such decisions were influenced by the counsel of the magnates. The magnates used these meetings with the kings to put forward their complaints and demand concessions. Power acquisition by the magnates progressed to the extent where parliament obtained enough powers such that any Acts that it passed were viewed as the highest law of the land. The power had devolved from the king to parliament.

By the 17th century, according to Goldsworthy, it had become clear that parliament was gaining independence and was not just an instrument of the Crown. The MPs represented their communities who felt that they were engaged in law making and imposition of taxes through parliament. The king (or queen) on the other hand could only make binding laws when the people, through their representatives, consented to them. Such laws could only be made on the advice of parliament.

Goldsworthy poses important questions in regard to the legislative power of the executive and parliament during the early history of England. Did the king alone make laws acting with advice and consent of parliament—but without sharing legislative power with parliament? Royalists supported this view. The other view, that laws were made in parliament by the executive sitting in parliament or by the executive conjointly with the members of parliament sitting in parliament, was supported by those who favoured a strong parliament.

Both the Royalists and the Parliamentarians, however, agreed that the king could legislate on all matters when in parliament and this view seems to support the concept of the sovereignty of parliament. That means that the Parliament in England possessed unlimited legislative authority, with the implication that judges could not then invalidate statutes. But to Goldsworthy legislatures are not sovereign as they are subject to the national constitution, which is based on fundamental laws which enjoy the express agreement and respect of the community. Goldsworthy (*ibid.*) thinks that judicial review of legislation in some cases may be essential for democracy—although it is not a prerequisite.

Goldsworthy's work focuses on the evolution of Parliament in England and extensively discusses the concept of parliamentary sovereignty. It is mainly preoccupied with the parliamentary system in England where the Parliament comprises the executive and the

members of the two Houses. He poses fundamental questions about who actually makes laws in Parliament, but his study has limitations in that he did not carry out any analysis of the actual legislative process to determine who in Parliament between the executive and MPs had more power or influence in law making. Without an examination of samples of actual legislation, it would be difficult to state whether or not MPs or the executive had more power in Parliament.

Ndoria Gicheru (1976), writing on the history and practice of the Kenyan Parliament, posits that the Kenyan Parliament has played a central role in molding the Kenyan nation by resolving conflicts and giving new ideas legal expression through its mediation of conflicting social interests and exercise of its legislative role. He traces the history of the Kenyan Parliament from its colonial beginnings when the Consul-General based in Zanzibar was given, in addition to his administrative duties, the responsibility of coming up with laws for local application. By 1903 suggestions had already been made to constitute both an Executive Council and a Legislative Council for the British East Africa Protectorate, namely Kenya.

Even after the British settlers had begun agitating for inclusion in the Legislative Council in law making, the Governor was reluctant to share with them responsibilities for enacting legislation. By 1906 the Legislative Council was comprised of members nominated by the Governor with no provision for elected members. It was not until 1919 when the Europeans received the franchise. The nomination of Indian members of the LegCo took place in 1924, and the nomination of Eliud Mathu, the first African on the LegCo, took place in 1944. In 1952 there was provision in law for the election of 14 Europeans and nomination by the Governor of one Arab, six Africans, and five Indians (Gicheru 1976). For the first time in the history of Kenya, the directly elected members of the Legislative Council were twenty-eight compared to twenty six of those nominated and referred to as Official Members of the Legislative Council. In 1956, six Kenya-African members of the Legislative Council were elected from eight electoral areas but not under universal suffrage.

Following the Lancaster Conference in 1960, KANU won the majority of elective seats and in 1963 two Houses replaced the Legislative Council, i.e. the House of Representatives and the Senate (Upper House). The Senate had four members from each district and one from Nairobi and the Speaker, while the Lower House had one hundred and seventeen (117)

members elected from constituencies. However, Kenya did not retain the bi-cameral parliamentary system as the two Houses were combined into one in 1967. Up until the 1960 elections, one can say that the Legislative Council was dominated by the colonial administration (Governor) with a strong European representation. (Gicheru, 1976: 42)

In discussing the role and functions of the Kenyan Parliament from 1963, and the procedures it employed to conduct its business, Gicheru highlights the challenges it faced in trying to fulfill its role. He sees this as tied to the fact that parliament is part and parcel of society, and it tends to reflect the challenges that face the country. For example, when a country is afflicted by tribalism and sectionalism, these vices are reflected in Parliament and may hobble its effectiveness.

Another challenge is that in a mixed system, such as we have in Kenya, where parliament comprises the president and elected members, the president may dominate parliament and turn it into a rubber stamp institution. He also sees party dominance as another challenge facing legislatures. Another challenge is the problem of exclusion from mainstream political life of certain sections of the community. Such challenges, when unresolved, provide good grounds for military takeovers.

Gicheru sees democracy supported by a free press and the practice of free and fair elections as a panacea for strengthening parliament. The legislature in a democratic environment can keep in touch with society and, with the representatives being backed by the professional staff, it will discharge its duties effectively.

While Gicheru's book is very illuminating in providing the background to the present Kenyan Parliament and its operations, it is limited in that it covers the period up to around 1974, when Kenya was a *de-facto* one party state and when there were no sectoral committees to consider bills before passage. He, therefore, saw the role of Parliament as essentially one of discussing national issues and resolving conflicts in society. No discussion is provided by Gicheru on the range of issues that Parliament of this period tackled or the nature of the legislation passed at this time.

Besides the important work of Gicheru Ndoria on the Kenyan parliament, I would like to highlight the work of Joel Barkan (1973) and Barkan *et al* (2003), Githu Muigai (1996) and mention the study done by Adams Oloo (1995).

Barkan *et al* (2003), in their comparative study of four African legislatures, argue that the structure of society and the political system, the formal rules, terms of service and institutional resources available to legislators are determinants of political behaviour. They rank the Kenyan Parliament as the most developed among those studied and point out a combination of factors that have led to this situation. These include the impact of a vibrant and well-informed civil society, the presence of a critical mass of young and well educated MPs, and the passage of critical legislation that paved way for better terms of service for MPs. He further argues that the authority of the legislature as a corporate body only increases when the functions of policy making and oversight of the executive take greater importance relative to constituency services. In our view, effective representation is a pre-condition for effective oversight and legislation. Without the MPs representing interests of a constituency (be it geographical or an economic group), they are not able to play their oversight and legislative functions. Therefore, one would further argue that for much of the post independence period, the Kenyan parliamentarian, despite his/her constituency work, acted more as an agent of government than of the people.

Githu Muigai (1996) states that for the legislature to be strengthened MPs must be allowed to operate freely without harassment; they should also be supplied with office facilities, qualified research staff, stationery and computers. He argues that the role of the opposition in the committee structure should be institutionalized and political parties must be adequately funded. Thus Muigai's view is that internal capacity of Parliament is critical to enhancing parliament's role. This study will attempt to establish whether the Kenyan Parliament of 1998-2002 had fulfilled some of the conditions enumerated by Muigai.

Adams Oloo's (1995) study, although focusing on the foreign policy making process in Kenya in the period 1963-1993 discusses the role of the Kenyan Parliament in foreign policy. His conclusion is that despite the fact that the constitution assigns Parliament a decision-making role in foreign policy-making, the executive has always by-passed Parliament. This observation is consistent with the findings of scholars who have studied executive-legislative relations where the executive is seen to persistently usurp the role of legislatures.

Barkan (1973) presents a compelling argument on the role of the legislature in political development in African countries, including Kenya. He considers the link between the legislature and the constituencies and attributes the marginal role played by the legislature in development policy formulation to acceptance of western notions of what legislators should do, i.e. represent their constituencies either as delegates or trustees within the institutional context of the legislature.

Some international studies, for example one by USAID and one by the World Bank, have not been Kenya-specific but have a general relevance on expectations in regard to legislatures in a democratic (democratizing) world.

According to the United States Agency for International Development (USAID, 2000) there are a number of factors that can weaken legislatures. USAID observes that legislatures are weakened when their communication mechanisms with society are weak. They are also weakened when electoral systems and political parties provide little incentive to legislators to reach out to civil society and constituents, or when legislative rules, traditions, and facilities discourage groups from dealing with legislatures or when the legislatures lack sufficient knowledge and control over resources. The structure of the legislature, the distribution of power and authority between the executive and the legislature, the electoral system, and the structure of political parties are also important in determining the effectiveness of legislatures.

The World Bank (*World Development Report, 2002*) argues that political institutions help to impose limits on the arbitrary exercise of power by politicians and bureaucrats. Where institutions are weak, the executive is able to exercise power that rightly should be exercised by parliament, leading to further erosion of the legitimate powers of institutions of governance as well as those institutions that would support market reforms. The legislature is a critical branch of government, which links citizens to their government and is central to democracy. Because legislatures fulfill oversight and representative functions they serve as an important check on the executive and the judiciary.

The above literature review has provided broad perspectives on perceived roles of legislatures and on legislature-executive relations, perspectives obtained not only over

recent years but, indeed, over the centuries. There are reasonable deductions that can be made from the literature review. The first such deduction is that legislatures are vitally important institutions of governance. They have, through the role of popular representation, facilitated some measure of people's participation in their government. The second deduction is that the executive arm is also a necessary branch of government. The third deduction is that for most of the literature, democratic governance is not guaranteed by either of the two branches of government overshadowing the other, but by the maintaining of a genuine balance between the powers and roles of the two. In sum, legislative power should never be left unchecked either in the hands of an all powerful executive or those of an all powerful legislature. When such situations arise, neither of these two institutions can be effective in law making.

Our study was enriched by these perspectives, that legislatures are a vital arm of government, are representative institutions, and the challenge was felt to make a contribution to the study of this important institution of government, parliament, by carrying out a study focused on the actual legislative work of a particular parliament, namely the Eighth Kenyan Parliament of 1998-2002. Whether one agrees with Blondel—one of the more controversial students of parliament—or not, his established dichotomy between what people *expect* parliaments to be and to do, and what they actually are and what they actually do, poses an obvious challenge: to carry out a study of an actual parliament's legislative process and its actual intercourse with its executive counterpart.

This study will provide analysis of the legislative process in the 8th Parliament and provide details on how bills/motions were initiated and by who and what amendments were made to the bills. This will indicate the actual power relationship between the executive and the legislature.

1.7 THEORETICAL FRAMEWORK

Theory, according to Mugenda and Mugenda (1999), is a set of concepts or constructs or ideas and the interrelations that are assumed to exist among these concepts. Thus concepts, according to this perception, help us to understand particular, separate and isolated phenomena or aspects of phenomena while a theory helps us to understand the essential relationships or universal aspects of these phenomena. Theories help us describe, predict and explain phenomena and thus promote knowledge.

This study has used the systems theory for analysis postulated by Easton (1965). The systems theory is one of the approaches that have been used to explain political phenomena in the field of comparative politics both at the macro and micro levels. It was derived from the natural sciences where various elements in a “system” are seen as interacting with one another. System as a concept is holistic in its application, that is, one part of a system cannot be explained unless one looks at the interaction of the parts, which is at the totality of the system. Easton (1965) defines a political system as behaviour or set of interactions through which authoritative allocations (binding decisions) are made and implemented for society. A system has recurring patterns of relationships among actors; it is universally accepted and authoritative; and it is political because it is concerned with the satisfaction of the needs of society.

The binding decisions of a political system can allocate advantages and disadvantages. The proponents of the systems theory have defined the components of a political system, which include, political community, regimes (norms, rules, values), and political authorities (individuals exercising power). Easton developed the concept of a political system, arguing that it can be used to analyze conditions under which political systems survive. He saw systems analysis as a framework with universal application that can be used to explain human political behaviour both in small and big institutions as well as in collections of groups of societies. He saw political systems as open to exchanges from the environment. These exchanges constitute the inputs, which go through a conversion process to become authoritative or binding decisions. For any political system to persist, it may have to transform its own structures to enable it to respond to stress.

This study conceives of the Kenyan Parliament as an open system, which has to respond to external influences coming from the citizens and the executive. However, in applying the systems analysis approach, we shall confine ourselves to the inputs that come into the political system (Parliament) in form of issues raised and debated as well as draft bills. When these inputs enter into the political system (legislature), they are supposed to be processed into bills that may be enacted into law. The “processing” of bills takes the form of amendments made on the bills by members of parliament guided by the standing orders and other internal rules.

Easton (1965) refers to demands made on the political system by political parties, interest groups, media and other citizens’ forums. When these demands are brought to bear on a political system where legislation originates from parliament they are processed into legislation. In the case of a mixed system such as that found in Kenya most of the bills originate from the government, but they still get processed through parliament.

This study assesses the degree to which issues and draft bills that the executive presented to Parliament during the Eighth Kenyan Parliament were subjected to a conversion process by the legislature. It examines whether the outputs of Parliament, in the form of legislation, were different or similar to what the executive had presented as draft bills. If bills are amended and reflect the issues of concern to parliamentarians, then we can say that Parliament exercises legislative independence.

The systems approach will help us explain the role that Parliament actually played during a period spanning five years. If we establish that Parliament did little processing of inputs, one can conclude that it did not play an autonomous role in/as a “system” and the executive made authoritative decisions in terms of final legislation. On the other hand, if Parliament originated legislation, and also extensively amended bills that the executive drafted, then we can say that it was able to play its “systems” function independently within the wider political system. The processing or conversion process that bills might have been subjected to could have been facilitated by the internal rules and regulations including more enabling standing orders that facilitated debate; the quality of MPs would also have a bearing on the conversion process.

This theoretical framework is applicable to the study of Kenya's Parliament. First, Parliament is a political institution and its members play their role as members of Parliament (MPs). Because Parliament is a formal institution, their political role can be easily isolated from other roles that MPs play outside of Parliament. For example, apart from being a Member of Parliament, an MP could also be a church leader, chairman of a school committee, etc. Thus, it is easy to delimit and confine our analysis to the role of Parliament as a political system.

Using Easton's conceptualization of a political system, we see that Parliament can operate as a corporate body with its own corporate identity. The MPs, although constituting different political orientations, display cohesion through the legislative process. The laws that Parliament passes are seen as products of the whole corporate body—not of a particular group of MPs. Therefore Parliament constitutes a political community.

The Kenyan Parliament of 1998-2002 could as well have been a passive transmitter of inputs coming from the environment without processing them through the conversion process into legislation outputs. Or it could have been able to regulate, control and modify legislation proposals before sending them out as legislation output. The systems analysis model will show what the actual process was like; for systems analysis is a dynamic model able to explain the effectiveness of the Kenyan Parliament in the 1998-2002 period.

However, we are aware of the shortcomings of the systems approach to the study of the input-output process in the political system that encompasses parliament. It is conceptualized as a framework with an emphasis upon interactions between the parts which make up the whole. In this study, there is an underlying assumption that the relationship between the executive and the legislature before 1998 was characterized by executive dominance. In applying this theoretical framework to the pre-1998 political process, we are faced with its inflexibility since binding decisions that political systems make could have been made outside Parliament by the executive. The bills coming into Parliament may have already been processed, such that Parliament was merely acting as a conveyor belt while giving the legislation a seal of approval. Therefore the systems theory is not able to handle effectively the executive-legislature relationship where the legislature plays a rubberstamp role, with the authoritative decisions being made outside the system.

Easton, in his study of political phenomenon, is centrally concerned with the need to understand why political systems persist as systems of behaviour in a world undergoing rapid change. In our perception, political systems are established or evolve to serve a particular need and as long as they meet these needs then they may persist. We are not in this study concerned with political systems that persist even when they are unable to meet the demands of citizens. We analyzed debates in Parliament to ascertain what issues Parliament dealt with and what political needs these debates fulfilled, and thus provide an answer as to why the Kenyan Parliament has persisted.

In studying the Kenyan Parliament, one is interested in finding out whether or not the legislature played its legislative role, which is whether it was effective or merely a rubber stamp. Thus, we shall focus on the legislative process and refer to it as a conversion process only to the extent that bills or proposals for legislation were amended.

Despite the shortcomings of Easton's systems analysis model, the input-output aspect of the systems theory is the only theoretical approach that is able to capture adequately the effectiveness (or lack thereof) of the Kenya Parliament from 1998-2002.

1.8 RESEARCH HYPOTHESES

The study seeks to prove or disprove the following hypotheses:

- a. The dominance of the executive over the Kenyan legislature explains why the legislature plays a limited role in law making.
- b. Lack of financial independence undermines the autonomy of Kenya's legislature..

A lot of changes took place in the Kenyan Parliament after the re-introduction of multi-partyism. In essence multi-partyism provided the impetus for change and is therefore an important factor in studying the development of the effectiveness of Parliament. However, in spite of its critical role in paving the way for the creation of the PSC, which in its turn was used to secure the financial autonomy of Parliament, it has not been a sufficient factor for empowering parliament. Financial autonomy seems to be a condition for political autonomy, which is an additional factor that would enhance the effectiveness of parliament.

1.9 METHODOLOGY AND DATA ANALYSIS

In carrying out the research, secondary data was used. This type of data was not only available but was reliable as well. The data was collected from Parliamentary records and included verbatim reports of daily proceedings (the Hansard), list of bills and Acts and reports of departmental committees of Parliament. This data makes it possible to conduct longitudinal studies in future as a follow up to this research.

Two research assistants were hired to assist with data collection.

There were problems of access to data, however. Data was obtained from the Parliamentary library which is a small facility used by MPs. The research took place during a parliamentary session when the library was crowded and noisy. It was difficult to confirm whether all the required information was available or whether reports of departmental committee meetings were the only ones ever produced as there was no sampling list.

The goal of the research was to analyze the role of Parliament in the legislative process vis-à-vis the executive. It set out to test the following hypotheses:

- (a) The dominance of the executive over Parliament explains why the Kenyan Parliament plays a limited role in law making.
- (b) Lack of financial independence undermines legislative autonomy.

In order to test the hypotheses, we set out to obtain and analyze two sets of data: (a) Bills presented to Parliament; and (b) motions and issues raised by MPs and debated in Parliament. This was done by obtaining two sampling frames: for (a) all bills and Acts of the Eighth Parliament; and for (b) daily records of verbatim reports (Hansard) of the Eighth Parliament. There were 126 Hansard reports, with each report compiled to cover every week. These were listed according to the dates they were compiled. There were 103 bills made up of the following categories: 52 bills which became Acts of Parliament and 51 that failed to be passed by the House; ten (10) out of the 103 Bills were Appropriation Bills. We prepared a list of all bills according to the dates of their publication. As a result, the first bill to be published during the Eighth Parliament was given number one and the last to be published was number 103.

We determined that most of the data on Acts and Bills would be obtained from the sample frame, without needing to develop a sample. We analyzed 46 bills in order to ascertain the

extent of the amendments that these bills were subjected to in Parliament. This number was obtained through a random selection from the sample frame of 93 bills (103 bills minus the appropriation bills, which Parliament currently does not have power to amend). This sample size of 46 bills constituted 49.5 per cent of all bills. Thus, it was adequate for our analysis and it is also representative. We examined the amendments proposed on the floor of the House or during committee meetings. The idea was to ascertain whether amendments were proposed by the executive or the backbench. If amendments were made at Committee of the Whole House stage, it was not difficult to record the amendments as they appeared in the Hansard. We also reviewed all committee reports that were available.

With regard to the Hansard reports, we determined that a sample was required in order to identify motions and other legislative proposals debated. Without a sample, we would be confronted with the impossible task of dealing with a huge mass of collected data without the resources, capacity and time to process that data.

From the sample frame of 126 we determined that a sample size of 25 per cent (n=32) was adequate. We listed the 126 Hansard reports beginning with the first volume of the Hansard dated February 1998, which we listed as Number 1 to the last Hansard for December 2002, which we listed as number 126. To obtain the sample of 25 per cent (n=32), we picked out every fourth volume to arrive at a total of 32 volumes of the Hansard. The sample picked was representative in that it covered every year and each year's cycle of activities ranging from debates of the budget, finance bill, questions time, and other bills. The volumes of the Hansard reports were obtained as follows:

1998 – 7 volumes covering the following dates

February 3, April 21-23, June 16-18, July 14-16, October 10-15, November 10-12, December 8-10

1999 – 5 volumes covering the following dates

May 4-16, June 22-24, July 10-22, October 19-21, November 16-18

2000 – 7 volumes covering the following dates

March 28-29, April 25-27, June 13-15, July 11-13, October 11-12, November 7-9, December 5-7

2001 – 7 volumes covering the following dates

April 10-12, May 8-10, June 26-28, July 24-26, October 2-4, October 30-November 1, November 27-29

2002 – 6 volumes covering the following dates

March 19-21, April 16-18, June 12-13, July 9-11, August 6-8, October 15-17.

The research used both qualitative and quantitative analysis of data. The quantitative analysis focused on bills and motions presented to Parliament: number of legislative proposals (motions), bills amended or rejected as a percentage of total bills, etc. The quantitative measurements thus involved arranging in tabular forms data obtained, summarizing it and conveying characteristics of a range of numbers, including percentages where applicable. Qualitative analysis was employed to interpret the data obtained. Both methods of data analysis allowed for an assessment of the extent the Parliament was effective in playing its legislative role.

1.10 DEFINITIONS OF TERMS

In this study, we shall make extensive use of certain concepts. Nachmias and Nachmias (1996) define a “concept” as an abstraction, a representation of a phenomenon or one of its properties or behaviors. To allow a clear understanding of the issues raised in this study, we shall define some of the main concepts used.

Effectiveness

This is used in explaining parliament’s ability to carry out its legislative role. When a bill is introduced into parliament, an effective parliament will review and amend it, if necessary, before it is passed as an Act. For the purpose of this research, any bill introduced by the executive that underwent extensive amendment while in Parliament during the period under study will be a good indication of Parliament’s effectiveness. This study excludes what inputs MPs who are part of the executive make into the legislative process outside of parliament. Such contributions of members of the executive are considered a part of the executive input and not that of parliament independent of the executive.

Political System

This term as applied in this study is derived from David Easton’s (1965) definition of a political system. He says that a system is considered political if it makes authoritative allocation of values. Parliament is political because it passes Acts that are binding on citizens and other legal persons. Parliament is also a system because, as Easton argued, it

has the following characteristics: it has an organized pattern of behaviour, is distinguishable from the rest of the institutional environment, constitutes a structure of systematic interaction, and manifests a set of independent actions that are coherent and constitute a whole.

Parliament is a formal institution and as conceived in this study, it has boundaries that distinguish it from other institutions. These other systems (executive, society [culture] etc) constitute the environment. The environment exerts influences on the political system. The environment includes other political phenomena and activities; for purposes of this study, they will be referred to simply as the environment.

Inputs

These are external influences that affect the political system. They may include culture, donor conditionalities, demands coming from the private sector or from citizens or voters, etc. However, we shall limit ourselves to the input of draft legislation. In Kenya the executive arm of government through the Attorney General's office is responsible for drafting legislation, which is then presented to Parliament for debate and passage. Individual MPs and political parties can also propose legislation through motions which, if passed, can be presented as draft bills.

Conversion Process

This is the process that the draft bills are expected to pass through within Parliament. It includes the acts of MPs scrutinizing and amending bills or proposals for legislation before they are passed or enacted. This conversion process takes place within the various sectoral committees as well as during the sitting of the whole House. Parliamentary standing orders define the procedures to be followed during this process.

Outputs

Output in the systemic analysis is the sum total of the outcome of the injection of input of demands in the organizational process, excluding unprocessed demands that re-enter the system as new inputs (demands). Output therefore includes the policy prescription that results from the processing of demands by the system. In our case the outputs refer to the bills passed by Parliament, which receive presidential assent to become Acts of Parliament.

The Acts passed are authoritatively binding and are expected to meet certain needs and expectations coming from the environment.

Standing Orders

These are parliamentary rules and regulations that guide the operations of parliament. Parliamentarians themselves have the responsibility of amending the rules. In the Commonwealth tradition, the standing orders are rarely changed by a sitting parliament to take effect in the duration that the parliament sits, as this would be seen as making rules that would benefit the sitting members. However, there is nothing in law to stop a sitting parliament from amending the standing orders at any time. In fact there is a growing number of MPs who believe that the current standing orders of the Kenyan Parliament should be amended.

CHAPTER 2

ORIGIN, EVOLUTION AND ROLE OF LEGISLATURES

2.1 INTRODUCTION

The purpose of this chapter is to establish the relationship between the re-introduction of the multi-party system and the effectiveness of Parliament as a legislative institution. From the literature review, we deduced that legislatures are vital institutions of governance, mainly due to their representative role. There is need to maintain a genuine balance between the executive and legislature so that the two institutions can check each other's powers. From the theoretical review, we deduced that political systems are established or evolve to meet particular needs of society, and as long as they meet these needs, they persist. As such, legislatures are part and parcel of society and thus must adjust themselves to the changing society and meet societal needs in order for them to survive. We first discuss briefly the origin and evolution of parliament in Britain, probably the country with the most consistent development of parliament from very early historical times. We also look at the relationship between parliament and the executive in the British context. The proliferation of parliament as an institution in other countries is then considered.

The Kenyan parliament is considered in its historical development and role. In this regard we review the constitutional provisions (structural factors) that specify the role and composition of the Kenyan Parliament. The constitution specifies Parliament's role, its membership, its composition and its relationship with the executive arm of government. These constitutional provisions have been actualized through the Standing Orders. We also assess the impact of reforms associated with the reintroduction of multi-party democracy on Parliament's composition and performance. These reforms revolutionized Parliament in terms of its ability to scrutinize and or propose legislation. For us to understand the key issues raised in connection with the Eighth Kenyan Parliament a historical background is necessary, hence the purpose of this chapter as a precursor to chapter three where we tackle

the core issues of the study, namely parliamentary performance and independence in the multi-party era.

2.2 PARLIAMENTS IN HISTORICAL PERSPECTIVE

In chapter 1, we mentioned that parliaments are found in all forms of governments including autocratic and democratic ones and that they evolved from the English parliament. The English parliament, the mother of all parliaments, has been evolving since Medieval times. Before the Norman Conquest of Britain during the 11th century, Anglo-Saxon kings used to sit in council, constituting a kind of 'parliament'. But it was the Normans from Normandy in France who adopted the Anglo-Saxon institution and gave it the name *parlement* (French) or *parliamentum* (Latin). In Norman medieval times *parlement* or *parliamentum* was "usually a meeting of the king in council in which the judges were summoned for the consideration of pleas and petitions (or bills) to the king to redress grievances". (*Encyclopaedia Britannica* 1972: 376) Parliament therefore initially played a judicial role. A *curia regis* (king's court or council) would listen to subjects' petitions in order to arrive at a judicial determination. Sometimes an order would be given to a sheriff to provide redress to a petitioner. Sometimes a general order which took the form of legislation requiring the improvement of customary law would be given by the council. (*Ibid.*)

Parliament at the outset is simply the king's court—an executive institution—carrying out judicial and rudimentary legislative roles.

In 1272 King Edward I summoned his "first parliament general after his coronation", "to discuss with the magnates the affairs of the kingdom". At that parliament, the Statute of Westminster I was enacted with the assent of the archbishops, abbots, priors, earls, barons and representatives of the 'commons'; the customs duties on wool and related products were granted to the king. (*Ibid.*)

The parliament of Edward I of 1295 institutionalized the principle of representation. Two knights were summoned from each shire (county) and two respected citizens from each borough (district or town). The king with Lords Spiritual and Temporal as well as with representatives of administrative districts now constituted parliament. While the king during the 13th century made laws without reference to the lords and the representatives of

the commons, parliament in the 14th century claimed a right to be consulted before the king made legislation, and *statutes* (laws based on petitions assented to by the king in parliament) took precedence over *ordinances* made by the king.

The two houses of the English parliament evolved from the practice of holding debates outside the formal sittings at which the king was present: clergy, knights and respected common citizens would sit separately and would evolve into the House of Commons, whereas the archbishops, bishops, abbots, earls and barons would sit separately, constituting the House of Lords.

The House of Commons would steadily grow in importance, and would claim greater freedom of speech under the championship of speakers who were elected to speak on behalf of the Commons. The claim to importance was fundamentally based on the principle of representation. For example at the beginning of the 16th century (1509) the Commons had 74 county representatives and 222 borough representatives; and in 1830 the numbers of county representatives and borough representatives had grown to 188 and 465 respectively.

Parliaments initially met irregularly at the behest of the Crown when their counsel and consent in decision-making was required especially in matters of taxation and war (Appadorai 1974; Gerhard Loewenberg 1971). In the 16th century parliaments were assumed to have full powers to bind communities to their decisions. Laws passed by parliament became the highest record of law “because everybody in England was deemed privy to and therefore bound by it” (Goldsworthy 1999: 31). These powers became so great in England such that Parliament could force kings to resign or abdicate (*Ibid*: 31). At their initial stages of growth, parliament represented special interests, and excluded lower classes and were an elite institution (Appadorai 1974: 222).

Over several centuries, the English Parliament continued to acquire independence by obtaining concessions from the Crown. However, this growing legislative independence faced opposition from royalists who felt that the legislative powers should reside with the Crown in parliament where he could make binding laws with people’s consent. Indeed, the English Civil War of the 17th century was caused by the contentious issue of who between parliament and the Crown should possess supreme authority. This question seems to have been resolved when it was generally accepted that parliament, including the king, possessed

legislative sovereignty (Goldsworthy 1999). The Monarch's power to assent or veto legislation ensured that the executive retained powers above those of the legislature.

Legislatures experienced unprecedented growth from the time of the French Revolution in 1789 up to World War I in 1914 as a result of growth in democracy across Europe (Appadorai, 1968). This was due to the expansion of suffrage in the context of the Industrial Revolution which brought in new groups on to the political scene, and posed new challenges to parliament's composition and its traditional role (Loewenberg, 1971).

Both Appadorai (1974) and Loewenberg (1971) have argued that the aftermath of World War I was a reaction to participatory democracy. The granting of universal suffrage brought in regimes that destroyed checks and balances established over several centuries, leading to a rise in dictatorship and a general decline in parliament as an institution of democratic governance and excessive strengthening of executive powers. The extension of suffrage, as we saw in Chapter 1, enabled Hitler to mobilize popular discontent through the National Socialist Workers Party to gain control over the German parliament (Reichstag) in 1932. This ultimately led to the exercise of dictatorial executive power under Hitler. A similar case obtained in Italy under Mussolini. In Germany, dictatorship was entrenched when Chancellor Hitler repealed the Weimar constitution passed in 1919, and embarked on a series of constitutional amendments that enabled the cabinet to enact money laws, abolish the powers of federal states and do away with the Upper House. The German executive appointed and dismissed the cabinet, and all but the ruling political party were banned. What mattered was loyalty to the Chancellor and the party: state power was strengthened at the expense of the legislature as a result. After the demise of Nazism, there was consensus that a strong parliament can protect democracy by guarding it against future dictatorship. When there was a revival of democracy in Europe, legislatures too became stronger.

The opposite was true in the early 20th century France. Here, a strong parliament was accompanied by a very weak executive. The challenge became how to balance the relationship between the two branches. This was effected in 1958 when limitations were put on parliamentary power. Since then, the executive powers have actually been greater than those of parliament.

The French, Italian and German cases suggest that while legislative dominance over the executive can compromise democratic governance, executive dominance over parliament may also lead to dictatorship. These countries' experiences seem to provide a strong case for focusing parliamentary reforms on enhancing its autonomy vis-à-vis other institutions of governance—while retaining fundamental balance between executive and legislative powers.

2.3 EVOLUTION OF THE KENYA PARLIAMENT

The literature review in Chapter 1 has given some picture of the evolution of the Kenyan Parliament. The evolution of a legislative body for the territory that is Kenya today starts with the establishment of formal British administration over the British East Africa Protectorate in 1895 (Olumwullah 1990: 98). Arthur Hardinge, the British Consul-General who was based in Zanzibar, not only came up with laws for local application (Gicheru 1976) but sought to establish a working administration throughout the territory—and it follows that the executive was predominant at the initial stage. Charles Eliot, the first Commissioner of British East Africa, in 1903 gave official support to the idea of establishing a Legislative Council (LegCo) made up of elected “official” members; but soon after he was in favour of a LegCo made up of nominated unofficial members. (Olumwullah 1990: 100). The 1905 constitution for the East Africa Protectorate made provisions for a powerful executive governor and for both an Executive and Legislative Council, the latter with nominated unofficial members. The LegCo first met in August 1907. A. M. Jeevanjee was soon to become the only non-European member of the LegCo, nominated to represent Indian interests. (*Ibid.*)

In 1919 every male British subject of European origin and with proven twelve months residence was allowed to vote for official members to the LegCo. In 1924 Indian and Arab nominated members joined the LegCo—and African interests were ostensibly represented by a British Christian missionary. It was not until 1944 that the first African, Eliud Mathu, was appointed to the LegCo. (Olumwullah 1990: 103; Goldsworthy 1982: 67).

What is telling about executive-legislative relations in the early colonial period is that in 1919 two members of the LegCo also served on the Executive Council. While the European settlers were gaining influence on government policy through their elected representatives,

a majority of nominated members in the LegCo ensured executive control. To quote Olumwullah, “the net result was that the governor had the combined powers of social leader, prime minister, head of the civil service and speaker of the Legislative Council”. (Olumwullah 1990: 105)

Significant developments took place in the post World War II period. In the period 1944-1956, African Representative Members (nominated) increased from one to eight, one of whom was a minister and one a parliamentary secretary. (Goldsworthy 1982: 67-68) “At this juncture Kenya was officially regarded as having moved to a stage of ‘multi-racial’ government under the Lyttelton Constitution, in which for the first time all the major communities—European, Asian, African—were represented in the Council of Ministers. Prompted partly by the new urgency which Mau Mau had given to Kenyan affairs, this development modified, but did not destroy, the concept of European leadership in Kenya.” (*Ibid.*)

To legitimise the *status quo*, Lyttelton had proposed in 1954 that African Legislative Councillors be for the first time directly elected from African constituencies (*Ibid.*) In 1956 eight African Members were elected on a qualitative basis (from eight electoral areas but not under universal suffrage).

After 1956 events acquired a new momentum. Emboldened by their sense of political legitimacy, the eight elected African Members of the LegCo formed the African Elected Members Organisation (AEMO) to agitate for greater African representation in the LegCo. And although British colonial policy continued to cling to a multi-racial vision of a future Kenya, there was new commitment in Britain to transfer British parliamentary and electoral institutions to African soil, and perhaps an awareness of the inevitability of African self-rule. (Barkan 1984: 71) Significantly four elections of LegCo members were held between 1957 and 1963.

In March 1957 the first direct elections of African Members of the LegCo took place. In 1958, in accordance with the Lennox-Boyd constitution which had replaced the Lyttelton constitution—the target of bitter attacks by the African Elected Members Organisation—six more African leaders, beside the previous eight, were elected communally, and four new members were specially elected by the LegCo sitting as an electoral college. (Goldsworthy

1978: 93-95; 95-97) In October 1959 Harold MacMillan won the British elections and his administration determined to obey the “wind of change” towards African self-determination—the implication being that the State of Emergency in Kenya would be lifted, and a constitutional conference would be held in January 1960, with all Members of the Kenya LegCo participating. The resulting Macleod constitution saw thirty-three open seats being contested between the newly formed political parties, the Kenya African National Union (KANU) and Kenya African Democratic Union (KADU). (Goldsworthy 1978: 181)

The Second Lancaster House constitutional conference was held in 1962, laying the format of legislative governance under two parliamentary chambers in an independent Kenya. In April 1963, the internal self government constitution was promulgated (*Ibid.*, 214) under which elections were contested under a multi-party arrangement for 117 House of Representatives constituency seats and 12 specially elected seats; 41 Senate seats for district representation were also contested. (Oloo and Mitullah 2002: 37, 38) The first June 1963 self government House of Representatives had 83 KANU members, the rest of the members being predominantly KADU. The head of government was the prime minister, the leader of the majority party.

Between November 1963 and December 1964 there was steady defection from the parliamentary opposition KADU to the ruling KANU party (Oloo and Mitullah 2002: 38) and in November 1964 KADU dissolved and Kenya became a de-facto one-party state. The first major constitutional amendment (the Amendment Act No. 28 of 1964) established the Republic of Kenya. Consequently, the second chamber of parliament (the Senate) was dissolved in 1967 and a unicameral parliament—the National assembly—was entrenched.

Role of Parliament as defined in the Constitution and Standing Orders

The Kenya Parliament, which began operating in 1963, is the product of a colonial heritage and is modelled on the British House of Commons, where ministers are chosen from among the members of Parliament (Gicheru, 1976). It has its roots in the Legislative Council (LegCo) that was established in 1906. The LegCo started as an exclusive club of colonial administration, and only had its first African representative in 1944. (Helgelson, 1973)

According to Section 30 of the current Kenyan Constitution, Parliament consists of the President and the National Assembly, which is made up of constituency representatives

elected by universal suffrage in free and fair elections. The constitution provides specific powers to the President over Parliament, including the power to appoint ministers from among members of the National Assembly and retaining veto power over bills passed by Parliament. Section 59(2) empowers the president to summon, prorogue and dissolve Parliament. The standing orders also provide that the government business not only be given priority over any other business, but be given more time as well. Consequently “by far the greatest time of the House is occupied in the consideration of Government business” (Gicheru 1976: 52).

Parliament has a limited role in determining its membership, this being defined by the constitution. The Constitution of Kenya (Chapter II, Part 1, Section 31) states: “The legislative power of the Republic shall vest in Parliament of Kenya, which shall consist of the President and the National Assembly”. Thus, according to the constitution, Parliament is comprised of the Executive and the National Assembly. The National Assembly itself is comprised of (a) geographic constituency representatives elected through universal adult suffrage; (b) nominated members; (c) the Attorney General; and (d) the Speaker. Both the Speaker and the Attorney General are non-voting members.

The constitution also prescribes the minimum number of constituencies and sets the time frame within which the constituencies are to be reviewed. The Electoral Commission of Kenya (ECK) is mandated by the constitution to review the constituency boundaries and determine the number of such constituencies. The review of constituencies has to be carried out within a period of not less than eight, but not more than ten, years. However, rarely do constituency boundaries get reviewed. For example, in 1967 following the merger of the Senate and House of Representatives, the total number of members of Parliament was 170 (made up of 158 constituency representatives and twelve nominated members). This number remained the same until 1988, when the next boundary review was carried out. That 1988 boundary review saw the number of constituencies increase by 30. (Cockar 2002). The next review was conducted in 1997 and it increased the House membership to 224. This number was made up of 210 constituency representatives, 12 nominated members, the AG and the Speaker.

The Speaker of the House has the responsibility of presiding over parliamentary debate. The Speaker, the President and the Chief Justice are the heads of the three arms of government,

namely the legislature, the executive and the judiciary respectively. The Speaker is elected by the National Assembly on the first day that Parliament sits after the holding of General Elections. He/she is nominated from among members of Parliament, excluding the President, Vice President, Ministers and their Assistants, and the Attorney General. But a Kenyan citizen who is not a sitting MP may be elected speaker provided that he/she has the qualifications to become a Member of Parliament and provided a parliamentary political party is prepared to sponsor his/her candidature. If the person elected speaker had earlier been elected as an MP representing a constituency, he/she has to relinquish his/her parliamentary seat. A Deputy Speaker is also elected. The deputy speaker must be a sitting Member of Parliament. After election he or she continues to hold his/her parliamentary seat.

According to the Kenyan Constitution, Parliament is responsible for making laws, approving taxation and expenditure of the government and, of late, approving some appointments proposed by the President. Parliament also debates any issue of national or local importance. This may include a motion of no confidence in the government, which could remove the government if the requisite majority votes for it. Parliament carries out its business under the Standing Orders. The Standing Orders are derived from Section 56 of the Constitution which stipulates that the National Assembly may make its own Standing Orders to regulate its own procedures and establish committees as it sees fit. In order for Parliament to discharge its responsibilities, Section 57 of the Constitution entrenches the powers, privileges and immunities for Members of Parliament against prosecution in a court of law for whatever is said in Parliament. The National Assembly (Powers and Privileges) Act, Cap 6, is derived from this constitutional provision.

As Slade (1967) observes, Parliament criticizes and advises the government and seeks explanations during time allocated to questions and through motions and debates on bills. This, according to Slade (*ibid.*) helps the government to hear about and understand through MPs, the grievances, doubts and responses to government policies and actions of those they represent. Parliament is also said to foster the national spirit by being a forum representing every part of the country. "Not only does Parliament provide a focus for national pride and a forum for expression of national opinion, it also serves to unite the people of the country" (Slade 1967: 35).

Chapter 3, Part 2 of the Constitution of Kenya specifies the legislative powers as well as procedures in the National Assembly. Legislative power is exercised through bills, which are proposed laws that Parliament debates and passes. Both ministers and ordinary MPs can introduce bills into the House either as Government bills, when moved by a member of the government, or as Private Members' bills when moved by back benchers.

The Standing Orders specify the procedure for introducing bills into the House. The procedures for introducing government bills, on the one hand, and private members' bills, on the other, differ as follows. A government bill is first published in the *Kenya Gazette*. It can be introduced into Parliament only after fourteen days have elapsed after its publication. The introduction of such bills is done through what is referred to as the First Reading—which is a formal reading of the bill's title. A bill comprises clauses, title, schedules and a memorandum, which outlines its objects and intents. After the first reading, the bill is referred to the relevant departmental committee for detailed analysis. Committees are supposed to report upon all bills that are referred to them within seven days.

On the other hand, the process for the introduction of a private member's bill is more stringent compared to a government bill. A private member is required to first prepare a motion seeking leave of the House to present the bill. The motion is accompanied by a memorandum indicating the objects and intents of the proposed legislation. If the motion is approved by the Speaker, it is allocated time for debate by the House Business Committee. The passage of a motion, following the parliamentary debate, gives the private Member the authority to move ahead and publish and then present his/her bill. The mover of the motion can use this authority to publish a bill in three consecutive issues of the *Kenya Gazette*. The last publication has to be done not less than 14 days before presentation of the bill to the House. The cost of publication, including making enough photocopies for all MPs, used to be borne by the member who was proposing the bill, before this responsibility was taken over by the Parliamentary Service Commission after 1999. Such costs are said to have been in thousands of shillings and they served to discourage MPs from initiating legislation.

At the beginning of the day when Parliament is sitting Ministers may lay Sessional papers before the House. Sessional papers define government policy in a particular sector. These

Papers are normally laid when the Speaker orders the Clerk to read Orders of the Day as they appear on the Order Paper. Questions, directed to Ministers by Members of Parliament, normally fall within Order of the Day No. 6. Question time takes one hour. Such questions are aimed at seeking information and pressing for action by government. All questions, however, must be forwarded to the Clerk in written form for approval by the Speaker beforehand to ensure that they comply with procedures. Standing Order No. 33 gives government business precedence over all other business of the House except on Wednesday morning when the House debates Private Members' motions. Also the structure of parliamentary business ensures that more time is reserved for government business. For example, Tuesday, Wednesday and Thursday afternoons are all reserved for Government business. However, "any member can interrupt regular business by moving (at a time appointed by the speaker) its adjournment to discuss [any] definite matter of public importance" (Slade, 1967:46).

Despite this lopsided time allocation for parliamentary business, the standing orders revised in 1997 ensured that sufficient time is allocated to the opposition to scrutinise Government policies and proposals and if appropriate to propose an alternative.

In ordinary legislation, a simple majority is required for passage of bills while a 65 per cent majority is required for constitutional amendments. Thirty members must be present in the House in order to form a quorum. All bills passed by the National Assembly must receive Presidential assent to become law. But Parliament can override the presidential veto with a 65 per cent majority vote. The constitution (Chapter II, Part 2, Section 46, sub-section 6) stipulates that a law made by Parliament cannot become operational until it is published in the *Kenya Gazette*. The publication in the *Kenya Gazette*, however, is the responsibility of the executive branch of government.

There are constitutional limitations placed on Parliament's role in money bills. The National Assembly cannot originate taxation bills; nor can it impose charge or withdrawal on the consolidated fund. Instead, the Minister for Finance presents the estimates of revenue and expenditure that are contained in the Finance and Appropriation bills. The executive cannot withdraw money from the exchequer without the authority of Parliament, which is given through the passage of an appropriation bill. An appropriation bill specifies the amount of funds required and the purpose to which the funds will be put. In case of

unforeseen expenses that may occur in the course of the year, the executive has to seek Parliament's approval through supplementary appropriation bills.

The Finance Bill is published around June at the time the Minister reads the budget statement. Once the finance bill is published, the Finance Minister is given provisional authority to collect duties and taxes for six months. The appropriation and the finance bills are presented to the Committee of the Whole House. That is, they are not referred to departmental committees.

However, the role of Parliament in money matters does not end with the passage of the appropriation and the finance bills. Instead, Parliament plays the role of monitoring and controlling how the government spends the money. Parliament is enabled to carry out indirect monitoring of government expenditure by the office of Controller and Auditor General, who is supposed to provide approval for withdrawal from the consolidated fund and to carry out audits of all expenses on an annual basis. The Controller and Auditor General presents reports to Parliament, and the Public Accounts Committee (PAC) examines these reports. The PAC and the Public Investment Committee (PIC) respectively examine accounts and public expenditures, and public investments. The PIC's role is limited to looking at the account efficiency and autonomy of public investments as well as whether or not they are being managed in accordance with sound business principles. Both the PAC and PIC cannot question government policy.

The constitution provides that the President shall be a Member of Parliament. He is elected both as a constituency representative and as president. Slade (1967:25) quotes a speech given by Tom Mboya to emphasize the relationship between the President and Parliament: "When our people go to the polls, they elect at one time a body which will make laws, that is Parliament, and the man who with his Ministers will rule under those laws". The ministers and assistant ministers have to be members of the National Assembly and are appointed by the President to serve at his/her pleasure. The President also determines the number and composition of the cabinet. The number of cabinet members even within one Parliament has varied considerably over the years. For example, there were 25 Ministers in 1993, and the number rose to 28 at the end of 1997.

At one time during the Eighth Parliament (1998-2002) there were 73 government Ministers, including full Ministers and Assistant Ministers. The number of MPs in the government in Parliament has sometimes been over and above that of the combined backbench. For example, in 1967, out of a parliamentary membership of 170, the executive dominated by having 94 members against 76 private members. In 1982, there were 27 ministers and 25 assistant ministers. The twelve nominated MPs were all nominated by the president without reference to Parliament up to 1998 when some critical reforms, referred to as the Inter-Parties Parliamentary Group (IPPG) reforms, were enacted. The IPPG reforms gave parliamentary political parties the responsibility, in consultation with the Electoral Commission of Kenya, of nominating the 12 members reserved for nomination in accordance with their proportional representation in Parliament.

According to the Kenya Constitution, the President as head of state can address the National Assembly any time he wishes to do so. He can also attend all sittings as a constituency representative. However, it is sections 58 and 59 of the constitution that give the President the power to summon, prorogue and dissolve Parliament. Each Parliament has a life span of five years, which are divided into sessions. The president determines when each session ends and when the next one starts. When a session ends, all the business of the House also dies with it. Consequently, any bill that is not concluded at the end of the parliamentary session is said to have died with the session. But it can be reintroduced during the next session as a new bill by its promoters, whether government or private members, if they so wish.

The president can dissolve Parliament at any time and call fresh elections. Thus, the president alone sets the actual dates of the dissolution of Parliament, decides when to call elections and when to convene the new Parliament. However, the constitution makes some general prescriptions that reduce the president's discretion in these matters: it specifies that once Parliament is dissolved, elections must take place and a new Parliament must convene within three months. The constitution also gives Parliament the power to pass a motion of no confidence in the president. When such a vote is passed, the President should resign after four days and, if he chooses not to resign, Parliament stands dissolved.

2.4 THE 1963-1991 KENYAN PARLIAMENT

At independence, Kenya had two major political parties: the Kenya African National Union (KANU) and the Kenya African Democratic Union (KADU). KADU dissolved itself in 1964 and its members joined KANU. In 1966 an opposition party, the Kenya Peoples Union (KPU), was registered and its members ran for elections amidst widespread government harassment, winning merely eight seats out of the twenty nine seats that were contested. KPU was later banned in 1969. Since then up to 1991 when multi-party democracy was re-introduced, KANU remained the only party. The President then was the head of state and the head of the party. However, KANU's institutional weaknesses as a party led to the growth of outspoken members of the backbench. These backbenchers did not succeed in derailing government actions by handing it defeat on legislation (Hakes 1973: 350) but they forced the government to concede to or rescind some decisions. However, the government used its excessive powers, including its tight control of the Provincial Administration, to control restless MPs through reward with ministerial appointments and appointments to boards in government bodies, or punishment through detention and assassination. During this period, there was no bargaining between the government and Parliament. Instead, the government expected total support from Parliament.

However, it was during debate on government bills that the Kenyan National Assembly of the 1960s and early 1970s spent time criticizing the government and ventilating grievances. Although MPs had little power over the legislative process (other than legitimating executive decisions), they used the platform Parliament provided to criticize the government, thereby giving Parliament, and by extension the whole institutional structure of government, legitimacy. However, Parliament's lack of effective power vis-a-vis the executive was compounded by the ability of the executive to reward compliance and punish non-compliance. Despite its handicaps, the National Assembly played an important role in social integration by mobilizing support and encouraging a sense of community through social representation. It also legitimized political authority (Gicheru 1976).

Huntington (1968) saw political parties as the principal institutional means of organizing political participation through mass support. He called for strong single party systems in

Third World countries, arguing that they can bring about political stability. But Jackson and Rosberg (1982), writing on personal rule in Africa, stated that presidents in Africa exercised so much power that the consequence was personal rule. Under such circumstances, the authority of Parliament, judiciary and civil service was only nominal; in essence only the will of the “big man” counted. Jackson and Rosberg’s (1982) observations apply to Kenya’s single-party era. A constitutional amendment making Kenya a one-party state was enacted in 1982, with the consequence that the ruling party KANU amassed excessive powers. As a result of the virtual merger of the party and government, the executive was able to usurp Parliament’s role. Arnold states: “There is no one party state on the continent in which the single party has not used its monopoly to crush actual or potential opposition in the name of unity.” (Arnold 1969: 50)

Several scholars have referred to the single-party Kenyan Parliament as a rubber stamp. Waruhiu (1994) observed that although Parliament exercised limited checks on government through parliamentary questions and through debate arising out of the presidential speech, it had little or no control over budget and taxation. The Parliamentary Accounts Committee and Parliamentary Investments Committee examined appropriations and compared them with actual expenditures. However, this exercise was carried out several years after the actual spending had occurred and, therefore, did not allow Parliament to play any meaningful role in controlling executive actions in budget matters.

The Kenyan Parliament of the pre-1992 period is said to have acted at the whim of the President. In fact some authors (Akivaga, 2002, Gikandi, 1982) have asserted that there was no difference between the only party KANU and government, and most critical decisions were made by government and the ruling party outside of Parliament. Akivaga observes: “Parliament and Parliamentarians became vassals of the President” (Akivaga 2002: 15). Cockar observes: “The one party legislature tends to be more amenable to the wishes of the executive. Bills are drafted by the executive and the debates on them are mere routine.” (Cockar 2002: 11)

Debate on queue voting—whereby in 1988, voters had to line up behind candidates—received overwhelming support from Parliament with only one dissenting voice. Yet it was KANU as a party that had come up with the voting rules during a delegates’ conference. The major outcome of the queue voting was that the majority of parliamentarians who

made it to Parliament unopposed were KANU nominees while known government critics lost through rigging. Thus, the executive, through the ruling party KANU made the election rules that were implemented during the 1988 elections.

Gikandi (1982) observes that during the single-party era, nearly all the bills that were presented to Parliament originated from the government and all were passed. He notes that out of the 500 bills introduced into the National Assembly over a period of 18 years only two had been introduced by private members. These are the Hire Purchase Bill of 1968, introduced by Hon J. M. Kariuki, and Hon Jean Seroney's Bill on Presidential and Parliamentary Elections. While the former was enacted into law, the latter was taken over by the Government and subsequently moved as a Government Bill, before being enacted into law. However, since independence, Parliament has never amended any appropriations bill or forced the withdrawal of any Finance Bill, although Parliament has adequate powers to question the government on money matters.

2.5 POST-1991 KENYAN PARLIAMENT

Attempts at Political Reforms

Since 1988 there has been a proliferation of countries operating competitive multi-party systems in Africa with varying degrees of success. "The political liberalization however extended to media freedom and vibrant public discussion on political issues." (Wiseman 1995: 2)

Following widespread internal and external pressure exerted on the government, as in most African countries, Kenya reintroduced multi-party democracy in 1991 when the Government and the ruling party acceded to the repeal of Section 2 (A) of the constitution, and the enacting of a constitutional amendment stating that Kenya would be a multi-party democratic state. This amendment paved the way for the registration of other political parties. Once again, the process that saw the repeal of Section 2 (a) in 1991, just as its enactment in 1982, was initiated outside of Parliament, this time at a special KANU delegates' conference called by the president. The first multi-party election since 1969 was held in 1992. The reintroduction of multi-party politics enabled members of political parties other than KANU to contest elections and when they won to sit in Parliament. KANU, the

ruling party since 1963, no longer held a monopoly over the legislation process. The presence of opposition parties in Parliament following the 1992 elections, allowed individuals with different views from those of the executive to express these views in the House without fear of having their political careers terminated.

However, the new presence of several parties in Parliament did not strengthen Parliament to the extent that would have been expected. It has been observed (Akivaga 2002) that in 1992-1997 Kenya was fast regressing into the pre-1990 period conditions, as there was increased police brutality, ethnic clashes were instigated in ethnically plural parts of the country and increased cases of corruption were reported. The civil society campaigned for legal and constitutional reforms with the intention of making the 1997 elections free and fair. Later MPs came together to craft the Inter-Parties Parliamentary Group (IPPG) reforms. The IPPG comprised 70 MPs from KANU and 36 from the opposition. They agreed on a wide range of reforms, including strengthening the independence of the Electoral Commission of Kenya (ECK) and allowing the political parties to nominate commissioners to the ECK. They also agreed to the removal of repressive laws to facilitate free and fair electoral campaign as well as to the considerable reduction of the powers of the provincial administration in elections. These reforms contributed to some extent to the leveling of the electoral playing field and allowed the political parties to compete on more equal terms than had been the case in 1992.

The 1997 elections took place against the backdrop of a relatively free political environment compared to that of 1992. The combined opposition gained 103 seats against 107 for KANU. President Daniel arap Moi also won the presidential vote with enhanced total votes of 40 per cent compared to 36 per cent in 1992. Mwai Kibaki increased his tally to 31 per cent of the votes cast from the 19 per cent he had obtained in 1992. Elections took place in December 1997. There were 9,028,789 registered voters against 13,285,436 eligible voters (Marcel Rutten *et al*, 2001). This means that 70 per cent of the eligible voters were registered for the 1997 elections as compared to 68.7 per cent in the 1992 elections. The elections were characterised by administrative problems but their results were judged as on the whole reflecting the general will and preferences of the Kenyan people. However, there were incidents of rigging reported by local and diplomatic observers.

Table 2.1: *Percentage of total votes received by presidential candidates in the 1992 and 1997 elections*

| Presidential candidates | 1992 | 1997 |
|-------------------------|------|------|
| Daniel arap Moi | 37 | 40 |
| Mwai Kibaki | 19 | 31 |
| Raila Odinga | - | 10.9 |
| Michael Wamalwa | - | 8.2 |
| Charity Ngilu | - | 8.0 |

Source: Charles Hornsby (2001)

Table 2.2: *Number of parliamentary seats held by different political parties in 1992 and 1997*

| Party | 1992 | Immediately before dissolution of Parliament in 1997 | 1997 |
|--------------|------------|--|------------|
| KANU | 100 | 111 | 107 |
| DP | 23 | 21 | 39 |
| NDP | - | 1 | 21 |
| Ford-Kenya | 31 | 31 | 17 |
| SDP | - | - | 15 |
| Safina | - | - | 5 |
| Ford-People | - | - | 3 |
| Ford-Asili | 31 | 23 | 1 |
| KSC | 1 | 1 | 1 |
| Shirikisho | 0 | 0 | 1 |
| KNC | 1 | 0 | 0 |
| PICK | 1 | 0 | 0 |
| Total | 188 | 188 | 210 |

Source: Charles Hornsby (2001)

Despite the 1997 reforms and the fact that there were several parties represented in Parliament since 1992, however, executive dominance over Parliament was not considerably reduced such that Parliament could take independent actions.

In addition to the dominance of the executive, Parliament's weaknesses after 1992 can also be explained by lack of capacity. Thomas Carothers (1999) asserts that totalitarianism, under-funding, lack of equipment, limited staff, lack of law-drafting capacity and political

inexperience have all led to the weakening of legislatures. He points out that unless structural changes are made to allow for effective operations, legislatures will continue to be weak in Africa. In the following sections, we shall examine the institutional reforms that Parliament instituted and discuss how these reforms could have impacted on the performance and independence of the legislature *viz-a-viz* the executive.

Institutional Reforms, 1998-2002

The Eighth Parliament convened in January 1998 with 224 members. These were made up of 210 constituency representatives (including the president), 12 nominated members appointed by the president upon the recommendation of political parties and on the basis of the parties' parliamentary representation, and the Attorney General and the Speaker who are non-voting members. There were 73 Ministers and Assistant Ministers.

The Eighth Parliament has been credited with being among the most independent on the continent (Barkan *et. al.* 2003). It was not only a beneficiary of past reforms, but it also took steps to strengthen Parliament as an institution. In 1999, Parliament passed the Parliamentary Service Commission Act. The Act provided for the creation of a Parliamentary Service Commission, with the objective of securing some financial and administrative autonomy of Parliament from the Civil Service. Parliament also reactivated the Parliamentary committee system in 1998 in order to enhance its scrutiny of draft legislation. The passage of the PSC Act, in addition to introduction of multi-parties, enhanced the capacity of the Eighth Parliament in an unprecedented way. Consequently, the Eighth Parliament was able to surmount, in an unprecedented manner, the structural and capacity limitations that faced previous Parliaments.

In the next sections, we shall examine closely some of these critical reforms that made the Eighth Parliament the most autonomous in the history of the Kenyan Parliament.

The Committee System

Since 1979, the Standing Orders provided for the establishment of departmental committees but due to constraints in capacity, including scarcity of committee rooms and trained staff, such committees were relatively inactive until 1998. It was only the Public Accounts and Public Investment Committees which had been consistently active for the main reason that they are also key to Government operations, especially in financial management.

Parliamentary committees may be divided roughly into three categories. First there is the category of House Keeping Committees which only look after Members' interests and the operations of the House. These committees include the House Business Committee (HBC), the Speaker's Committee, the Powers and Privileges Committee and the Catering Committee.

The HBC, comprising 5-20 members drawn from all parties, is responsible for nominating members from parliamentary political parties to be members of other House committees. The ruling party usually has more representatives in committees than the opposition parties. This is because these committees should reflect the party strength in the House and they also deal with matters referred to them by the House.

The second category of committees are the financial investigatory committees. These committees probe the Government's financial dealings on an annual basis. They are only two—the PAC and the PIC. Although the ruling party has a majority on these committees (six out of the eleven members) their chairs must come from the opposition.

The last category are the Departmental Committees which are intended to oversee the operations of ministries on a day to day basis.

But of course there is also the category of ad hoc committees set up for a specific purpose; such committees die immediately after submitting their reports to the House. Examples are the committee set up to probe the murder of Member of Parliament J. M. Kariuki in 1974 and the Musikari Kombo Anti-Corruption Select Committee established during the Eighth Parliament.

Key departmental committees that were operational during the Eighth Parliament included the Agriculture, Lands and Natural Resources; Energy, Communications and Public Works; Education, Research and Technology; Health, Housing, Labour and Social Services; Administration, National Security and Local Authorities; Finance, Planning and Trade; Administration of Justice and Legal Affairs; and the Defence and Foreign Relations.

Each committee elects its own chairman. Although it is preferred that the chairs should come from the ruling party, there is no fast rule on this and, indeed, some chairs have been

elected from the opposition. All committees prepare reports which must be submitted to the House for debate. The House has the power to adopt, reject or amend a committee report. The Kennedy Kiliku Committee report on the Ethnic Clashes was rejected by the House in 1992.

Some departmental committees and the statutory committees, that is the PIC and PAC, are supposed to meet regularly and prepare reports of their proceedings.

The departmental committees have wide ranging powers in regard to their specific mandate, which is to "shadow" their respective ministries. They can investigate, study programmes and policy objectives and effectiveness, review all legislation and propose new ones, study, assess and analyze the effectiveness of the Ministries, make reports and recommendations as often as possible and can summon witnesses. They can also request documents from both the public and the government. Since the legislative responsibilities in Kenya are shared between the executive and legislative arms of government, with the revitalization of the committee system, Parliament now had the capacity to carefully scrutinize legislation proposals and policy papers that the executive presented to the House. In chapter three, we provide a detailed analysis of the role of these committees.

Standing Orders

The Standing Orders revised in 1997 entrenched the participation of opposition parties in parliamentary debate through a number of provisions. For instance, during debate on both public and private bills as well as on Sessional papers there is no time limit for the leader of the official opposition just as there isn't for the leader of government business. This also applies to the chairperson of a parliamentary committee when he/she presents reports of the committee. Other MPs are allowed not more than thirty minutes each.

All bills are normally committed to the committees after the first reading, and a report is expected from the committee after seven days. However, the Minister, in whose portfolio a bill falls, determines in consultation with the Leader of Government Business, who is also the chairperson of the HBC, when a bill can be presented to the House for the second reading. During the second reading, the relevant Departmental committee through its chair person presents to the whole House a report on the bill. The report may propose substantive amendments to the bill. Before producing such a report, the committees normally invite the Minister in charge of a bill for a discussion. Committees during the Eighth Parliament could

make substantial amendments to any bill presented to Parliament because the standing orders facilitated the presentation of committee reports by the committee chairpersons. The standing orders also recognized the role of the opposition by allowing the official opposition leader time to respond to issues. Again, in chapter three, we shall present the outcomes of these reforms as reflected in Parliament's new ability to debate and amend bills presented by the executive in Parliament.

However, the revised standing orders did not increase Parliament's role in money bills. During the debate on the budget, especially on Supply, the opposition spokesman for the ministry whose budget is being debated (he/she may be the shadow minister) is given 30 minutes, while the rest of the members get only ten minutes.

Parliament sits as a Committee of the Whole House, otherwise called a Committee of Ways and Means, when it listens to the financial statement, and as a Committee of Supply when considering appropriations to Ministries. Debate on votes on appropriations to ministries is limited to 20 days. This in effect means that some Ministries' appropriations cannot be presented to Parliament for debate. Those that are not debated stand approved automatically when the Minister for Finance reads out their budgets. Therefore, despite the reformist standing orders, Parliament's role in the budget process is limited to approving the budget and appropriations with little time allowed for debate and without effective scrutiny or amendments. As such, no amendments were ever made on any appropriation bill during the Eighth Parliament.

The Parliamentary Service Commission

The Parliamentary Service Commission (PSC) was created in 2000 following a 1999 amendment to Section 45 of the constitution that was spearheaded by Oloo Aringo, an opposition member of Parliament. Membership of the PSC comprises the Speaker (Chair), the Leader of Government Business, the Leader of the Official Opposition party and seven members of the back bench (four (4) of whom are from the governing party while three (3) are from the opposition).

The Commission was given the broad administrative and financial mandate over the affairs of Parliament. It could hire and fire all staff, establish a commission to review salaries,

could source finances directly from the Treasury, thus according it some level of independence from the Civil Service.

With the passage of the PSC Act, Parliamentary staff were de-linked from the civil service and given better terms. Parliament ceased to be a department of Government in terms of budgetary allocation and began to obtain financial resources directly from the Treasury. Parliament could also determine through an independent tribunal, provided for in the PSC Act, the terms and conditions of service of members of Parliament as well as facilities needed to conduct business (Cockar 2003). One of the most visible outcomes of the PSC Act is the unprecedented increase in MPs' salaries and benefits. For example, a transport allowance for MPs of Ksh.15, 000 introduced in 1993 increased to Ksh. 45,000 in 1998 to Ksh. 118,000 in 2000 and Ksh. 336,000 by 2002 (Cockar 2003). The National Assembly Remuneration Act does not allow Parliament itself to increase its salaries and allowances other than through the recommendations of a tribunal. Due to this restriction, committees established to review the salaries of MPs, prior to the passage of the PSC Act, based their recommendations on the salaries that prevailed in the civil service at the time. (Cockar 2003: 29). However, Parliament found a way of going around this hurdle. They effected huge increases in transport allowances, while other benefits remained low.

With the passage of the PSC Act, the National Assembly appointed a tribunal to review the salary and allowances of MPs. The tribunal recommended an increase in salaries from Ksh. 10,000 to the current Ksh. 200,000 a month. The Cockar tribunal in addition to its recommendations that salaries be increased also called for the establishment of a Constituency Development Fund. The increased salaries and allowances enhanced the stature of MPs. Joel Barkan (2003) states that salary increments for MPs in Kenya are one of the single most important factor contributing to their independence and effectiveness: MPs could not be easily corrupted and due to financial security they could spend more time on parliamentary business, including committee work.

Another important outcome of the PSC Act was the apparent increase in Parliament's budgetary allocation. A review of Parliament's budgets between 1998 and 2003 confirms that there were huge increases as shown below.

Table 2.3: Parliamentary budget estimates 1998-2003

| | |
|-------------------------|--|
| 1998/1999 | Kenya Pounds 34,638,000 (Ksh. 692,760,000) |
| 1999/2000 | Kenya Pounds 46,863,620 (Ksh. 937,272,400) |
| 2000/2001 | Ksh. 1,623,743,460 |
| 2001/2002 | Ksh. 3,581,260,860 |
| 2002/2003 (projections) | Ksh. 2,959,060,444 |

(Source: Government of Kenya Estimates of Recurrent Expenditure)

Funds allocated to Parliament in the annual budget, were disbursed on a quarterly basis and in accordance to the needs and level of draw downs during the previous quarter. As such, all the funds allocated to Parliament during this period were available for its development and recurrent expenses.

2.6 SUMMARY AND CONCLUSION

The Parliament of the multi-party period in the early 1990s still operated under structural limitations produced by the constitutional provisions in regard to the parliamentary calendar, the requisite number of MPs, and its role in budgetary and legislative processes. The presidential powers were still immense as the president could still dissolve, summon and prorogue Parliament at will and assent to legislation. Also, the standing orders, while institutionalizing opposition parties, gave the executive more representation in committees, including the key House Business Committee that sets the parliamentary agenda and nominates departmental committee members.

However, it is undeniable that the Eighth Parliament had features that made it stand out among all Kenyan parliaments. The Eighth Parliament stood out because a number of environmental and structural changes that had a profound impact on Parliament had taken place. These include the razor-thin ruling party majority in Parliament, the IPPG reforms instituted in 1997, the revitalization of the committee system, and the passage of the PSC Act that led to the administrative and financial independence of parliament. All these changes and reforms were bound to have an impact on the way Parliament handled its legislative role and also on the relationship between Parliament itself and the executive. In the next chapter, we present evidence of the impact of these reforms.

CHAPTER 3

THE ROLE OF THE EIGHTH PARLIAMENT IN DISCUSSING BILLS

3.1 INTRODUCTION

Chapter two sketched the origin, evolution and role of legislatures in history. We also reviewed the history of the Kenyan Parliament, including its colonial heritage, its relationship with the executive during the single party era, and its adjustments to re-introduced multi-party governance in the early 1990s. We then outlined the reforms that Parliament put into place especially after 1997. We concluded that despite the restoration of a multi-party system of government, Parliament still operated under the shadow of the President, who exercised immense powers over it.

Important reforms were, however, noted since 1997. Some of these developments constituted important steps by Parliament to assert its autonomy. We have suggested that these reforms made the Eighth Parliament uniquely assertive compared to other Kenyan Parliaments. In the following two chapters, we shall present evidence to give credence to our assessment of the legislative autonomy and effectiveness of the Eighth Parliament.

In this chapter, we present data that provides evidence of Parliament's growing ability to handle bills brought by the executive and to propose more bills than was the case during earlier Kenyan Parliaments.

The data presented from field research demonstrates that Parliament's role in originating legislation and how it treated executive-proposed bills had increased greatly over a five year period.

The research data was collected to test the following two hypotheses: firstly, "The dominance of the executive over the Kenyan parliament explains why the legislature plays

a limited role in law-making”; secondly, “Lack of financial independence undermines legislative autonomy.”

It is important to fully understand the legislative process in order to know at what point the key players in Parliament provide input in the legislative process. This will be the purpose of describing how bills are presented to Parliament and how they move through the various stages of the legislative process up to the time they receive Presidential assent.

In order to test these hypotheses, we used the Kenyan Eighth Parliament (1998-2002) as the unit of analysis. The Eighth Parliament was selected because the previous Kenyan Parliaments could not provide us with the data we needed for the following reasons.

Firstly, prior to 1993, there was only one party represented in Parliament. As we saw in chapters 1 and 2, several scholars have asserted that there was no difference between the ruling party, KANU, and the government. Parliament became the arena where this relationship between the executive and the ruling party was acted out with Parliament being basically subservient to the executive. (Cockar 2002; Akivaga 2002; Waruhiu 1994) The conclusion made was that virtually all legislation that was passed by the single-party parliaments in Kenya was originated by the executive. This state of affairs is confirmed by scholars such as Gikandi (1982) and Hakes (1973). Gikandi (*ibid.*) observed that out of 502 bills introduced into Parliament during 1963-1982, only two (2) were private members’ bills one of which was passed (J. M. Kariuki’s) as a private member’s bill while the other was taken over by the Government and passed as a Government bill. Hakes (*ibid.*) also observed that backbenchers in Kenya, despite their high profile in the parliament of the late sixties and early seventies, did not succeed in exerting their influence on the government agenda. A multi-party parliament was, therefore, the appropriate unit of analysis for my study, for otherwise the study would produce only a one-sided picture—a picture of ineffectuality and ineffectiveness.

Secondly, comparison of the Seventh Parliament (1993-1997) and the Eighth Parliament made it apparent that the Eighth Parliament was an improvement over the Seventh Parliament, in that it enjoyed an enhanced democratic culture. As we noted in chapter 2, important developments/reforms helped strengthen the Eighth Parliament. These include: first, the standing orders revised in 1997, which revitalized the committee system; second,

the Inter-Parties Parliamentary Group (IPPG) reforms of 1997 that changed the rules for nominating MPs to parliament and reduced the number of MPs the ruling party could nominate out of the twelve reserved seats; third, a hang parliament party KANU majority in Parliament; and fourth, the passage of the PSC Act in 1999 that created a Parliamentary Service Commission and de-linked Parliament administratively and financially from the Government Civil Service. With the passage of this Act, Parliament could now hire and fire its staff, it could advocate for resources directly from the Treasury leading to a sharp rise in its budget. All these reforms taken together increased Parliament's capacity to play a more active role in the legislative process.

3.2 LEGISLATIVE PROCESS

Procedurally, when a bill is published and presented to Parliament, it goes through the First Reading, which is a formal reading of the bill's title, before it is referred to the relevant departmental committee. The committee is given seven days to present its report. However, it is the Minister in charge a bill who determines, in consultation with the Leader of Government Business, in his capacity as Chairman of the House Business Committee, the time the bill will be presented to Parliament for the Second Reading. During the Second Reading, the bill is debated by the whole House. The minister is the one who moves the bill for debate and sometimes the chairperson of the relevant committee to which the bill was referred may second the bill and table the committee report during his speech. The chairperson of the committee only presents the report of the deliberations and proceedings of the committee and the committee's recommendations regarding that particular bill. The committee's report normally includes proposals for amendments of the bill. At this stage the bill is open for debate and normally each Member speaking is given at least 30 minutes.

At the end of the Second Reading, the bill goes to the Committee of the Whole House stage during which every clause in the bill is read. At this stage proposed amendments to any clause may be either passed or rejected.

After the Committee of the Whole House stage, the bill goes for the Third Reading where it is formally debated for a brief period before a vote is taken. If it is passed it goes to the President for assent.

By examining the various stages that each bill went through in Parliament, it was possible to:

- a) Identify the initiator of the bill. Bills are either private member's bills or government bills. Private members can propose bills on their own behalf or on behalf of a political party. Government bills are moved by the Attorney General or minister in whose docket a particular bill falls.
- b) Determine whether the bill was subjected to parliamentary scrutiny during debate on the floor of the House or during departmental committee meetings. Bills are literally read by the Clerk during the First Reading, which is a formal reading of the title of the bill. It is during the Second Reading and at both the Departmental Committee and the Committee of Whole House stages that debate takes place and a thorough scrutiny of the bill is carried out. The debate that takes place during the Third Reading is short and a mere formality. A bill that goes through the Second Reading, the departmental stage and the Committee of the Whole House stage can be said to have been subjected to parliamentary scrutiny. The same cannot be said of bills that only reach the first reading.
- c) Determine who proposed amendments. A bill that is referred to a departmental committee is only examined by members of that committee. They may propose some amendments, and on a number of occasions the Minister in charge of the bill may adopt those amendments and move them accordingly during the Committee stage. But any member can bring his own amendments at Committee Stage so long as the Chair of the Committee of the whole House is informed in advance and in writing. Amendments are also moved during the Committee Stage. Records of amendments made by committees are recorded in committee reports which are presented to parliament by the chair of the committee. The data collection aimed at establishing the mover of each amendment. The assumption was that the greater the number of bills referred to departmental committees, the greater the participation of Parliament in the legislative process. Thus, by examining both the Hansard Reports and the committee reports, the information needed was obtained.

3.3 8TH PARLIAMENT AND FORMULATION OF BILLS

Presented in this section are the data obtained from the field research. This data confirms that Parliament was playing an active role in amending and/or rejecting bills that the executive presented to Parliament. Two sets of data are presented, namely, (a) data on bills presented to Parliament which did not get enacted into law, and (b) data on legislation enacted during the period. We examine how or whether bills were debated or scrutinized in the House. The objective in collecting this data was to determine who between the National Assembly and the executive was responsible for introducing bills. In this section, we shall also present data to show how bills were treated when they were in Parliament.

There were 103 bills presented to the Eighth Parliament. Of the 103 bills that were moved in Parliament, 98 (95%) were proposed by ministers and the Attorney General (who is also a minister) on behalf of the executive. These included 10 Appropriation Bills and five Finance Bills. Another 51 bills (49.5%) became Acts of Parliament while 52 (50.4%) were not passed into law. These include the following five (5) bills that were proposed by private members: the Central Bank of Kenya (Amendment) Bill, 2000 (Donde Bill); Equality Bill, 2002 (brought by Martha Karua); Oloo Aringo's Constitution of Kenya (Amendment) Bill, 2001 which was published again in 2002 as a new bill; and David Musila's Pensions (Amendment) Bill, 2002.

These private members' bills made up 4.8% of all the bills published and presented to Parliament. The Central Bank of Kenya (Amendment) Bill, 2000 which was proposed by Joe Donde, Ford-Kenya party MP, did not receive Presidential assent, and thus did not become law, despite being passed by parliament.

There were some bills, which originated from the National Assembly/private members but were taken over by the government, which then moved them in the House. These include the Anti-Corruption and Economic Crimes Bill (2000), the Parliamentary Service Commission Bill (2000) and the Constitution of Kenya (Amendment) Bill, 1999. Table 3.1 shows the total number of bills presented to the Eighth Parliament.

Table 3.1: Bills/Acts presented to the Eighth Parliament

| Year | Total | Money Bills | Exec. | Private Member | Passed by Parliament | President's Assent | %tage passed | Comments |
|--------------|------------|-------------|-----------|----------------|----------------------|--------------------|--------------|----------|
| 1998 | 11 | 3 | 11 | 0 | 11 | 11 | 100.0% | |
| 1999 | 15 | 3 | 15 | 0 | 11 | 11 | 73.3% | |
| 2000 | 23 | 3 | 22 | 1 | 10 | 9 | 43.5% | Donde's |
| 2001 | 27 | 3 | 26 | 1 | 11 | 11 | 40.7% | |
| 2002 | 27 | 3 | 24 | 3 | 9 | 9 | 33.3% | |
| Total | 103 | 15 | 98 | 5 | 52 | 51 | 50.5% | |

Source: Study Data

In Table 3.1 we see a drastic drop in the percentage of bills passed by parliament from the year 2000 onwards. Most certainly this is because it is the period over which the Parliamentary Service Commission Act provisions began to be implemented, and the autonomy of Parliament from the office of the president, consequent upon that implementation, started to bear fruits. The ensuing administrative and financial autonomy gave Parliament the confidence to strictly question bills without the hitherto inhibiting fear of executive reprisals. The reduced influence of the executive office over Parliament was reflected in the reduction of bills passed since MPs had the courage to question and scrutinize bills especially those originating from the executive.

Because of the high number of unsuccessful bills in Parliament, it was necessary to find out at what stage of the legislative process, these bills were rejected or withdrawn. We therefore traced each bill through the various stages. The results of the analysis are presented in Table 3.2, which indicates the various stages of the legislative process and the number of bills that reached each stage.

Table 3.2: Bills which were withdrawn or rejected and the various legislative stages that they reached

| Year | First reading | Second reading | Third reading |
|--------------|---------------|----------------|---|
| 1998 | 0 | 0 | 0 |
| 1999 | 4 | 0 | 0 |
| 2000 | 10 | 2 | 2 (one deferred, one denied pr. assent) |
| 2001 | 14 | 1 | 1 (no requisite majority) |
| 2002 | 11 | 5 | 2 |
| Total | 39 | 8 | 5 |

Source: Study Data

Table 3.2 indicates that there were 39 bills that were published and presented to Parliament, but did not go beyond the first reading. These unsuccessful bills represent 75 per cent of all the unsuccessful bills that were presented to parliament or 37.8 per cent of all bills. When a bill “dies” during the First Reading, any of the following circumstances may have obtained: the bill was never discussed on the floor of the House; it received hostile reception (outside parliament) upon publication; or it may have received hostile reception at the departmental committee meeting such that the minister (with or without committee knowledge) may have decided not to present it for the Second Reading. In some cases it could have been that the bill may have already achieved its purpose by merely going through the first reading (which could be to show that the government was concerned about an issue that the bill ostensibly addressed).

In addition to the unsuccessful bills presented to Parliament, which did not become law, there was an additional 13 bills that were published but did not reach Parliament. Of the 13, three were private members’ bills. There are various probable reasons as to why these bills never reached Parliament. These include a bill being time barred, necessitating its having to be re-introduced in the next session of Parliament.

It was also established that there were several bills (seventeen) that were published more than once. This means that a bill would be introduced into parliament during one session, but would not go through all the different stages by the time the session ended. Such bills would be re-introduced the following year as different bills, renamed accordingly. An example of a repeat bill is the Industrial Property Bill which was published in 1999, 2000 and finally in 2001 when it was passed. Thus, even though the Industrial Property Bill appears on our list as three bills published in 1999, 2000 and 2001 with similar titles, it was actually one bill that was published three times.

However, when we looked closely at the list of 103 bills presented to the Eighth Parliament, we noted that 17 out of the 103 bills were repeated more than once, the repeats adding up to a total of 38 bills. Consequently, when we count the actual bills (less the repeats) we end up with a total of 82 bills. It is significant that none of the 15 money bills were published more than once.

Table 3.3 shows the list of bills that were published several times during the five year life of the Eighth Parliament.

Table 3.3: The 17 Repeat Bills presented to the Eighth Parliament

| Title of bill | 1998 | 1999 | 2000 | 2001 | 2002 | Stage reached |
|--|------|------|------|------|------|-------------------------|
| Medical Laboratory Technicians & Technologists Bill | Y | X | | | | Enacted |
| The National Commission on Gender and Development Bill | | | X | X | X | 2 nd reading |
| The Equality Bill | | | Y | Y | X | 1 st reading |
| The Children's Bill | | | X | X | | Enacted |
| The Domestic Violence (Family Protection) Bill | | | X | X | X | 2 nd reading |
| The Universities (Amendment) Bill | | | X | X | | 1 st reading |
| The Statute Law (Miscellaneous Amendment) Bill | | | X | X | X | Enacted |
| The Kenya National Commission on Human Rights Bill | | | X | X | X | Enacted |
| The Public Service Ethics Code | | | X | X | X | 3 rd reading |
| The Anti-Corruption and Economic Crimes Bill | | | X | X | | 2 nd reading |
| The Industrial Property Bill | | X | X | X | | Enacted |
| The Criminal Law (Amendment) Bill | | | | X | X | 2 nd reading |
| The Constitution of Kenya Review (Amendment) Bill | | | X | X | | 1 st reading |
| The Central Depositories Bill | | X | X | | | Enacted |
| The Constitution of Kenya (Amendment) Bill (Aringo Bill) | | | | X | X | 1 st reading |
| The Petroleum Bill | | | | X | X | 1 st reading |
| The Traffic Amendment Bill | Y | | X | Y | X | 2 nd reading |

Key

Y – Bill published but not moved

X – Bill published and moved

Source: Study Data

Of interest here is the question why bills would be presented to Parliament in one session and yet not manage to go through the three readings by the end of a parliamentary session. Notably, when one session of Parliament ends, usually towards the end of a calendar year, all the bills die as well. However, all bills that die when one session of Parliament ends, can be re-introduced in another session of Parliament as new bills. Several of the repeat bills

seem to fall into that category. For example, the Universities (Amendment) Bill, the Kenya National Commission on Human Rights Bill, the Domestic Violence (Family Protection) Bill, the Industrial Property Bill and the National Commission on Gender and Development Bill, were first moved towards the end of a parliamentary session (around November and December) and did not get to be debated before the end of the parliamentary session during which they had been introduced. Some of these bills were re-introduced at the beginning of the next session (around March or April).

It is worth noting that despite being given priority during the next session, the Kenya National Commission on Human Rights, the National Commission on Gender and Development and the Domestic Violence (Family Protection) bills did not go beyond the first reading when they were reintroduced the second time. It is only after the three bills were re-introduced a third time in 2002 that they were subjected to debate. On the other hand, the Universities (Amendment) Bill, first drafted in 2000 and reintroduced in 2001, did not go beyond the first reading. It was not clear whether or not it was referred to a departmental committee as no departmental committee report could be traced.

Table 3.4 shows the stages that the various bills reached in Parliament. According to the parliamentary procedures, a bill first goes for the First Reading, which is a formal reading of the bill's title before it is referred to a relevant departmental committee. The next stage is the Second Reading. This is a crucial stage in the legislative process as this is the time the bill is subjected to the debate of the whole House. Debate at the Second Reading stage is enriched by the report of the departmental committee that scrutinized the bill, and the input of the minister, under whose portfolio the bill falls and who has had the benefit of input from different stakeholders. After the Second Reading the bill benefits from the input of the MPs who are free to make amendments during the Committee of the Whole House. When debate is concluded at this stage, the bill is read a third time. Normally, the Committee of the Whole House and the Third Reading take place during the same sitting. After debate following the Third Reading the bill is subjected to a vote.

Table 3.4: Stages different bills presented to Parliament reached*

| Year | Drafts | 1 st reading | 2 nd reading | 3 rd reading | Presidential Assent |
|--------------|-----------|-------------------------|-------------------------|-------------------------|---------------------|
| 1998 | 3 | - | - | - | 11 |
| 1999 | 0 | 4 | - | 0 | 11 |
| 2000 | 1 | 10 | 2 | 2 | 9 |
| 2001 | 2 | 14 | 1 | 1 | 11 |
| 2002 | 6 | 11 | 5 | 2 | 9 |
| Total | 12 | 39 | 8 | 5 | 51* |

Source: Study Data

To summarize, there were 103 bills moved in the Eighth Parliament out of which 51 were enacted into law while the other 52 (50.4%) were unsuccessful. There were 5 bills that were proposed by private members and none of them became law. These constituted 4.8 per cent of all the bills moved in the Eighth Parliament. However, there were some bills that were originated by ordinary members of parliament, but which were later taken over by the executive. These include the Constitution of Kenya (Amendment) Bill, 1999. This Bill was drafted by Hon Oloo Aringo but the Government later on took the bill as it was, made it a Government bill, and brought it for debate to the House. The bill was enacted into law in 1999. The bill sought to establish a Parliamentary Service Commission. The other bill is the Anti-Corruption and Economic Crimes Bill, 2000 drafted by the Parliamentary Anti-Corruption Select Committee and taken over by the Attorney General. It was republished again in 2001 but did not go beyond the Second Reading.

Most bills that stall during the legislative process (in parliament) stall at the First Reading. This category of bills constituted 37.8 per cent of all bills presented to Parliament. The highest number (14) of stalled bills was recorded in 2001. No bills stalled in Parliament in 1998, while only 4 bills were recorded as having stalled in 1999. Between 2000 and 2002 there were a total of 35 bills that never went beyond the First Reading. This is a high of 33.9 per cent of all bills moved in the Eighth Parliament. This high number of bills that stall during the first reading can explain why so many bills are republished several times in the following parliamentary sessions.

* These included 10 Appropriation Bills.

The percentage of bills published and ultimately enacted into law varied from year to year, with the lowest number recorded in 2000. Table 3.5 shows the bills passed as a percentage of the total number of bills moved each year.

Table 3.5: *Number of bills enacted as a percentage of bills moved*

| Year | % of Acts |
|-------------|------------------|
| 1998 | 100.0 |
| 1999 | 73.0 |
| 2000 | 39.0 |
| 2001 | 40.7 |
| 2002 | 40.7 |

Source: Study Data.

We find that there were more successful bills in 1998 and 1999 compared to the period 2000-2002. The unsuccessful bills stalled after the First Reading, meaning they could have faced hostile public opinion or hostility from members of Parliament at departmental committee stage. This made the executive unwilling to bring them up for the Second Reading. We submit that the passage of the Parliamentary Service Commission Act in 1999 changed the way Parliament used to operate. Parliament gained an unprecedented level of resources and autonomy—and confidence. As it is highly unlikely that the executive would propose some bills that they did not in the first place intend to see passed, it is most probable a more assertive Parliament hindered the executive’s legislative intentions. We also note that money bills were almost always passed.

3.4 SUMMARY

On the basis of data presented, we have discussed the number of bills moved during the Eighth Parliament. We have established that the majority of bills, comprising 95 per cent, were moved by the executive, while 4.8 per cent were moved by private members. This is an important finding. We conclude that the executive, through government ministers, including the Attorney General, played a leading role in drafting and moving bills that came into the House. However, the number of the private members’ bills recorded during this period was unprecedentedly high in the history of the Kenyan Parliament. As noted earlier, it was the first time that private members’ bills were being brought to Parliament since the unsuccessful attempt by Hon. Seroney and the successful attempt by Hon. J.M. Kariuki in

the 1960s and '70s (Gikandi 1982). It is important to note that private members moved bills in the Eighth Parliament after the passage of the 1999 constitutional amendment establishing the PSC.

We also established from the data that 49.5 per cent of the bills moved became Acts of Parliament. There were two successful private members' bills namely the Central Bank of Kenya (Amendment) Bill, 2000 (Donde Bill) and the Constitution of Kenya (Amendment) Bill of Oloo Aringo under which the Parliamentary Service Commission was established. However although Parliament voted for the Donde Bill to become law, this did not happen because the bill was denied presidential assent.

It was also established that even though there were 103 bills moved in Parliament, several of them (17) were published several times in subsequent years. Therefore the actual number of new bills in the Eighth Parliament was 82 and not 103. Although we tried to look for explanations for the repeat bills, it is recommended that further studies be carried out to establish the cause of this.

Finally, we established that a substantial number of bills stall at the First Reading. This suggests that such bills could have been subjected to hostile scrutiny at departmental committee stage and the government in consultation with the committee decided that the bills should not proceed to the Second Reading.

We have noted that there were two critical periods during the life of the Eighth Parliament. The first was the period 1998-1999 when an average of 86.5 per cent of the bills were passed each year; and the second was the period 2000-2002 when 40.1 per cent of the bills were passed. The most probable explanation for this difference is the passage of the PSC Act in 1999, giving Parliament political autonomy and the resources that enabled committees to become more active in subjecting bills to critical scrutiny. Thus, the Eighth Parliament had the ability to approve, amend or reject bills that the executive proposed. The more the financial and administrative capacity, the more the number of government bills rejected and the higher the number of private members' bills.

We examined the findings against the first hypothesis of this study, namely, "The dominance of the executive over the Kenyan Parliament explains why the legislature plays

a limited role in law making". It was noted that the executive took the leading role in drafting and moving legislation while the private members only moved 5 bills and drafted another two that were taken over by the government. The bills drafted outside the executive comprised 6.7 per cent of the total number of bills moved in the House. While this figure may look small, it is significant given Kenya's historical experience of the virtual domination of the legislative process by the executive.

The Standing Orders allow both private members (and political parties) and the executive to draft and move bills in Parliament. But as we saw in chapter 2, the process and the cost for moving private members' bills used to be borne by individual members before the establishment of the PSC, which took over the responsibility. This used to create a disincentive for private members and political parties. Following the passage of a constitutional amendment to establish a PSC, the salaries of MPs were increased and maybe the MPs could spend more time sponsoring and drafting bills than was the case in the past.

Also, with the establishment of the PSC, Parliament developed a strategic plan in which it sought to, among other things, provide Parliament with law drafting capacity. By the time the Eighth Parliament was dissolved, Parliament had not taken any steps to establish this critical legal drafting unit. Until the time this unit is established, the number of executive bills will continue to be disproportionately high compared to those of private members. One, of course, takes cognisance of the fact that even in parliamentary democracies where there is a legal drafting unit, the executive still dominates the business of the house, including introducing for debate the greater number of bills per year.

Again, it is important to note that the PSC itself is a constitutional corporate body in which the executive is over-represented. Like parliamentary departmental committees, it is comprised of six members from the ruling party, including the leader of government business and the Speaker, and four members of opposition political parties, including the leader of the official opposition. The speaker, although he may be sponsored by a political party, is considered neutral.

Also, the House Business Committee that sets the parliamentary agenda is dominated by the executive which has about 13 members out of a total membership of 20. This committee determines what bills are to be brought into Parliament and when. However, although the

Standing Orders give priority to government business over all other business (except on Wednesday morning), it also recognizes the importance of political parties and private members. According to Standing Order number 33 private and party motions may have precedence over government business if the House Business Committee in consultation with the Speaker so determines. Therefore the rules on how to conduct House business were adequate in enabling MPs to bring party or private members' bills if they wished to do so. From the data presented, it has been noted that the MPs took advantage of the opening provided by the revised Standing Orders and presented the highest number of private members' bills ever recorded.

3.5 CONCLUSION

In sum, the data provided in this chapter proves that Parliament did not play a passive role in law-making. Despite the superior powers of the executive vis-à-vis Parliament, the Standing Orders, the financial resources that became available with the establishment of the PSC and the committee system enabled Parliament to propose and reject bills. This led to a decrease in executive proposed legislation and an increase in private members' bills with effect from 2000.

In the following chapter, we shall examine how bills are initiated before they are drafted. To that extent our research will focus on motions. We shall also assess the extent to which bills are subjected to amendments while they are in Parliament. Our objective in chapter 4 will be to determine whether Parliament plays a passive or an active role in proposing and amending the bills that are presented to Parliament by the executive.

CHAPTER 4

THE ROLE OF THE EIGHTH PARLIAMENT IN ORIGINATING AND AMENDING LEGISLATION

4.1 INTRODUCTION

In chapter 3, we examined bills presented or moved in the Eighth Parliament, some of which became Acts of Parliament. We also indicated the proportion of bills moved by the executive, on the one hand, and those moved by private members, on the other. We also identified the bills that passed through the first, second and third readings up to the stage they received presidential assent, where applicable. It was shown that there were 103 bills moved in the Eighth Parliament out of which 49.5 per cent were enacted into law. The rest, comprising 50.4 per cent of the bills, were unsuccessful and failed at various stages of the legislative process. We concluded that it is the executive that plays the major role in initiating legislation. We also established that 95.1 per cent of the bills brought to the Eighth Parliament were proposed by the executive. More importantly, we established that 4.8 per cent were proposed by private members. The significant increase in the percentage of private members' bills moved in parliament and in the number of executive proposed legislation that does not reach the third reading stage of the legislative process, constitute evidence of Parliament's growing legislative autonomy and assertiveness.

However, these observations do not tell us conclusively who between Parliament and the executive plays the major role in the legislative process. Neither does the data presented so far confirm or disprove our hypothesis that: "The dominance of the executive over the Kenyan Parliament explains why the legislature plays a limited role in law making."

In this chapter, therefore, attention is focused on the process that takes place in Parliament before a bill is drafted and presented for debate. We review the Parliamentary records to identify legislative proposals, in form of questions and motions that MPs made in the Eighth Parliament. We also review the amendments made on bills when they become the property of Parliament.

This chapter is divided into two parts. Part one, made up of Section 4.2, focuses on motions and other legislative proposals that MPs presented to the House either for parliamentary

action itself or for executive action. Part two, namely section 4.3, reviews amendments that MPs made to bills while they were the subject of debate on the floor of the House—during the Second Reading and at the Committee of the Whole House stage—or during the departmental committee stage.

The two main parts of this chapter, namely sections 4.2 and 4.3, are aimed at answering the questions: If Parliament had a limited role in initiating bills that were presented to the House as we saw in chapter 3, did it have any influence on the bills that were drafted and moved by the executive? Did Parliament amend the bills that were brought before it or was it content to rubberstamp the bills the executive brought to the House? To answer these questions, we reviewed the Hansard Reports, which are the verbatim records of daily proceedings in Parliament, as well as departmental committee reports to establish what role Parliament played in influencing the legislation that came into the House. It is in the Hansard Reports that one may see the types of questions and issues that MPs raised in the House and also the motions that were moved.

4.2 MOTIONS AND OTHER LEGISLATIVE PROPOSALS PRESENTED TO THE HOUSE

Before a bill is moved or introduced into parliament, the House must grant approval to a motion seeking leave to move the bill. Motions are brought to the House by MPs to achieve various purposes: to introduce legislative proposals, to raise constituency matters, and to raise issues on service delivery, national affairs, economic issues, etc. An MP may bring a motion seeking leave to present a bill—that is, a motion with a legislative purpose. An MP may also, to the same end, bring a motion requesting the government to bring to parliament a certain kind of bill. An MP can bring in a motion for leave to raise an issue of national importance. An MP can also bring in a motion seeking leave to ask for an adjournment.

When a legislative motion is brought to the House, debated and passed, the House directs the Attorney General or a private member to publish a bill and present it to Parliament. We therefore needed to review the legislative proposals of the Eighth Parliament to determine what kind of bills Parliament would have liked to see enacted. Motions are therefore supposed to be the precursors of bills presented to parliament. We wanted to establish the

correlation between the legislative proposals in the form of motions allowed and the bills that were presented to the Eighth Parliament.

We then examined the amendments proposed on the floor of the House or during committee meetings. The idea was to ascertain whether amendments were proposed by the executive or the backbench. If amendments were made at Committee of the Whole House stage, it was not difficult to study the amendments as they were all recorded in the Hansard. However, it was only possible to access a limited number of departmental committee reports, which we were informed were the only reports that the committees had prepared during the Eighth Parliament. The analysis of the committee reports is discussed here below.

According to the Standing Orders (revised in 1997), MPs may put questions to Ministers relating to public affairs, in accordance with the Ministers' areas of concern, on any matter of administration to which the Ministers are connected. Questions are interrogative and aimed at seeking information. However, all questions are submitted in advance to the Clerk for approval. One hour of each day that Parliament sits is set aside for such questions. On Wednesday mornings, as has already been stated in chapter 2, the House debates members' private motions.

In regard to motions, Standing Order number 95 (2) directs that an MP desiring to introduce a bill into the House should first move a motion seeking leave to introduce the bill. In the motion, the MP should indicate the objects and reasons of the bill he/she intends to introduce. If the motion is passed, the House is assumed to have ordered the publication of the bill. In Kenya, the Attorney General, who is also a member of the House, is charged with the responsibility for drafting bills on behalf of Parliament. The Standing Orders have also made provision for individual MPs to present their own bills, which are referred to as private members' bills. They can do that by drafting the bills themselves or getting experts to do it for them.

Motions seeking leave to bring legislative proposals to Parliament are reflected in the Hansard Reports. Hansard Reports capture debate in Parliament including questions asked during question time, and debate on particular bills during the second and third readings and during the Committee of the Whole House. Motions that MPs present to Parliament are a good indication of the interests or concerns MPs may have in relation to particular bills.

We analyzed the motions brought to the House to seek leave to introduce bills to see if they were accepted or not. We compared their objects with the bills that were later debated in Parliament. Of interest was whether there was a correlation between the bills presented and enacted and the legislative motions presented to Parliament. Our assumption was that if there is a strong correlation between bills and motions, then this is evidence that Parliament has a large role to play in determining the legislative agenda. However, if there is little or no correlation, then we can conclude that the executive, not Parliament, determines the legislative agenda and that Parliament has no autonomy in regard to the legislative process.

Issues and Concerns

Below is an analysis based on the Hansard Reports of the Eighth Parliament

Constituency Issues and National Issues

MPs used question time to raise issues about the lack of facilities in their constituencies. For example, they requested that studies be carried out on specific economic activities in their areas, called on the government to exempt *mnazi* (local brew) from the restrictions of the Traditional Liquor Act, urged the government to construct or repair roads and other infrastructure and bail out local industries. Although the motions had a local focus and were sometimes constituency-specific, there were times when MPs expressed concerns over matters that spanned multiple constituencies over large areas. However, it is clear that MPs tend to raise issues that are relevant to their own particular constituencies, hence our decision to refer to these issues as constituency issues.

Tied to the constituency issues are national policy issues. For example, MPs introduced motions urging the government to do a number of things, including formulating a water harvesting policy, reviewing voter registration, exploiting mineral resources, financing political parties, settling squatters, employing indigenous police reservists, scrapping Kenya School of Law, establishing information and communication centres, formulating crime prevention policy, and so on.

Even as Parliament made policy proposals, their focus on policy matters tended to concentrate more on adopting policy papers that government presented before Parliament. It is important to note that as long as the proposals made by MPs are not translated into a sessional paper or a bill, such policy proposals have no effect in law. However, there were

some policy proposals that were later translated into bills by the executive as well as by private members. Here below are some of the policy recommendations that can be linked to particular legislation. The motion by MP for Gachoka, Norman Nyaga urging the government to formulate a water-harvesting plan (1998) is related to the Water Bill brought to the House by the Attorney General. Also, MP for Mwingi South, David Musila's motion urging the government to pay workers' dues (2000) may seem to have led to the Pensions (Amendment) Bill, 2002. A motion by Obwocha (MP for West Mugirango) in 2000 urging the government to continuously review voter registration may be seen to have resulted in some of several amendments included in the Statute Law (Miscellaneous Amendment) Bill, 2001. MPs also raised several questions and motions highlighting their concerns about the non-performance of the sugar industry. For example, a motion to revive the Ramisi Sugar Factory, (2002) and another urging the government to introduce a sessional paper on debts incurred by the Nzoia Sugar Factory (2001) could have influenced the drafting of the Sugar (Amendment) Bill, 2002.

Motions for Adjournment

The MPs also moved motions for adjournment to discuss issues they considered to be of an emergency nature. For example, they moved motions for adjournment to discuss the Wagalla massacre, famine in different parts of the country, a teachers' strike, and issuance of identity cards, etc. The idea here was to give the government a signal of their concerns about situations they considered to be of a crisis nature, thus drawing the government's and the public's attention to these concerns.

International Issues

Kenyan parliamentarians showed least concern for international issues, comparative to other issues. The times that Parliament spent debating foreign affairs was limited to adopting reports of study tours and other reports presented by the executive. For example, the House adopted reports on ministerial study tours to Sierra Leone, Israel, and Russia. They also adopted reports on the East African Community, and on EAC election rules presented by the executive. They also passed a motion by an opposition MP, urging the government to promote East African treaty protocols.

Parliament's Oversight Role

Parliament spent a considerable amount of time playing their oversight role. For example, Parliament urged government to meet its legal obligations by implementing the Kwach Report on the reform of the judiciary, and implementing the signed agreement between the government and the Kenya National Union of Teachers on the payment of salary increments. It is while playing their watchdog role that Parliament adopted reports of the Public Accounts and Public Investments committees and approved taxation measures and supplementary estimates, and authorized withdrawal of money from the consolidated fund. Finally, there were motions that were procedural in nature and rarely were these moved by the opposition. They include proposals to limit debate before vote, extension of sitting hours, and motions for adjournment.

Table 4.1 indicates the topics covered during time allocated for questions and for raising motions in Parliament. The first column shows the range of issues or topics raised by MPs. The second column shows the number of motions and questions devoted to each range of issues. And the third column shows the number of motions and questions devoted to each range of issues as a percentage of the total number of questions and motions devoted to the whole range of issues.

Table 4.1: *Numbers of MPs' motions and questions devoted to different ranges of issues and the number of these motions and questions as a percentage of total motions and questions devoted to the whole range of issues*

| Range of issues | Actual no. of motions/questions | As a % of total motions/questions |
|-------------------------------|--|--|
| National policy | 23 | 18.0 |
| Constituency service delivery | 19 | 14.9 |
| Emergency | 8 | 6.2 |
| Foreign affairs | 6 | 4.7 |
| Legislative | 36 | 28.3 |
| Oversight | 16 | 14.7 |
| Procedural | 19 | 14.9 |
| Total | 127 | 100.0 |

Source: Study Data.

Motions Geared to Legislation

It can be observed from Table 4.1 that most of the motions and questions that MPs bring to Parliament are geared towards proposing legislation. The legislative motions/questions constitute 28 per cent of all questions and motions brought to the House. And among these legislation-related proposals, 29 per cent urge the government to initiate legislation. They include motions requiring the government to amend existing Acts (e.g. Local Government Act and the Education Act) or to repeal existing Acts such as the National Youth Service Act.

Seventy-one per cent of the legislative motions asked for Parliament's leave to move several bills, for example the Banking Bill brought by Joe Donde. Following the presentation of such motions, both the executive and other MPs could draft bills and present them to Parliament.

We assessed the extent to which MPs' motions get translated into legislation. We examined a sample of 127 motions and tried to assess whether there was a related bill drafted by either the executive or a private member that could have been derived from these motions. Table 4.2 below provides lists of legislative motions and bills. The first column lists the motions, while the second column lists the bills that were derived from the legislative motions listed in column one. The table indicates that when MPs proposed legislation by moving motions that asked the House to grant leave to bring a specific bill, there was a 36.8 per cent probability that such motions would be translated into bills. Yet legislative proposals constitute only 28 per cent of all the motions/questions that MPs brought to the House.

Bills are either drafted by the executive or by private members, consequent upon the presentation of legislative proposals. We can conclude that no matter the number of legislative proposals, the chances that these motions will be translated into bills remain low. Backbenchers devote only a certain percentage of their effort in proposing legislation and this can explain why they have a limited influence in originating bills that come before the House. Part of the reason for this is, of course, the fact that MPs perceive their role to go beyond legislation—to require, for example, that they champion the interests of their constituents in an extra-legislative manner.

Table 4.2: *List of legislative motions brought to the Eighth Parliament, with an indication of some consequent published bills*

| Motion | Mover of motion | Consequent bill |
|---|------------------------|---|
| Govt urged to amend Local Govt Act | R.P [*] | Unascertained |
| Leave sought for Parliamentary Office budget bill | O [*] | Unascertained |
| Leave sought for amendment to Chief's Authority Act | O | Unascertained |
| Leave sought for bill to establish Kenya National Youth Council | O | Unascertained |
| Leave sought for Family Protection Bill | O | Domestic Violence (Family Protection) Bill, 2000 |
| Leave sought for Education Act Amendment bill | O | Unascertained |
| Leave sought for Rent Control Act Amendment Bill | O | Unascertained |
| Leave sought for Banking Act Amendment Bill | O (Donde) | The Central Bank of Kenya (Amendment) Bill, 2000 (Donde bill) |
| Leave sought for bill to increase women's participation in Parliament | O | Unascertained |
| Leave sought for bill to increase constituencies | O | Unascertained |
| Leave sought for CBK Amendment Bill, to alter commencement date | O (Donde) | The Central Bank of Kenya (Amendment) Bill, 2002 (Donde Bill) |
| Leave sought for bill to establish a National Disaster Centre | O | Unascertained |
| Leave sought for gender equity bill | O (Martha Karua) | The Equality Bill, 2002 |
| Government urged to establish a Commission on Gender Equity | G | National Commission of Gender and Development Bill, 2002 |
| Govt urged to amend laws to provide for direct election of provincial admin. officers | O | Unascertained |

^{*} See key at end of Table.

| | | |
|--|------------------------|---|
| Leave sought for National Disaster Management bill | O | Unascertained |
| Leave sought for constitutional amendment to facilitate holding referenda | O | The Constitution of Kenya Review (Amendment) Bill, 2002 |
| Leave sought for constituencies development fund bill | O | Unascertained |
| Leave sought for constitutional amendment to create independent KACA | AG/O | The Constitution of Kenya (Amendment) Bill, No. 3 of 2002 |
| Leave sought for Political Parties Fund Bill | O | Unascertained |
| Leave sought for Media bill | O | Unascertained |
| Leave sought for Oil Regulatory Board Bill | AG/O | Petroleum Bill, 2001 |
| Leave sought for State Corporations Reform Bill | O | Unascertained |
| Leave sought for Constitution Amendment Bill | O (Oloo Aringo) | The Constitution of Kenya (Amendment) Bill No. 2, 2001 |
| Leave sought for bill to liberalize power generation | AG/O | The Petroleum (Amendment) Bill, 2001 |
| Govt urged to introduce a bill to amend Education Act | O | Unascertained |
| Govt urged to introduce bill to register religious organizations | Kiminza (O?, R.P?) | Unascertained |
| Leave sought for govt ministers bill | O | Unascertained |
| Leave sought for electoral code of conduct bill | O | Unascertained |
| Govt urged to repeal NYS Act and relocate assets to military | R.P | Unascertained |
| Leave sought for electric power amendment bill | R.P | The Electric Power (Amendment) Bill, 2002 |
| Leave sought for promotion of national unity/reconciliation bill | Mover unascertained | Unascertained |
| Govt urged to amend necessary laws to legitimize transport agents at termini | O | Unascertained |
| Govt urged to amend Local Authority Act to facilitate direct election of mayors, council chairs and deputies | O | Unascertained |

| | | |
|---|------------------------|--|
| Govt urged to introduce Constitution of Kenya Amendment Bill to delete section 9(2) | R.P | Unascertained |
| Parliament urged to establish a Parliamentary Service Commission | O | The Parliamentary Service Commission Bill. |
| Government urged to continuously review voter registration | Obwocha/ Opposition | The Statute Law (Miscellaneous Amendment) Bill, 2000 |
| House urged to adopt PSC report on corruption in Government, 2000 | O | The Anti-corruption and Economic Crimes Bill, 2001 |
| Motion of adjournment to discuss civil servants, participation in politics | Karua/O | The Public Service (Code of Conduct and Ethics) Bill, 2001 |

Key:

R – Ruling Party

O – Opposition

G – Government

According to the data in Table 4.2, 11.8 per cent of the motions resulted into bills that were drafted and presented to Parliament. It is notable that MPs spend a relatively high amount of time making legislative proposals (28% of all motions) and other policy recommendations that may require new laws or amendment of existing ones.

The fact that the majority of the motions accepted by the House leave the way open for either the executive or individual MPs to draft bills for presentation to the House poses the question why there was such a big gap between the number of legislative motions and the number of bills actually drafted and presented to Parliament. MPs moved “open” legislative motions presumably hoping that the backbenchers would draft bills and present them. But this did not happen as only 5.2 per cent of all bills presented to Parliament were drafted by private members. There could be several reasons as to why this was the case. The amount of resources and time needed to draft and move a bill are enormous. Individual MPs do not have the time and technical capacity and money needed to move bills. In any case, a proactive executive would move fast and draft a bill for which the House had granted leave so that it gets the credit. The executive has all the resources required for bill drafting.

However, by merely making legislative proposals, Parliament was able to influence the types of bills that were later presented to Parliament by the executive and private members. For example, an opposition MP sought leave to introduce the Oil Industry Regulatory Board Bill. The Minister for Energy opposed the bill, arguing that what was needed was a bill to enhance the administration and management of the petroleum sector; he was against the imposition of price controls, arguing that market forces should be allowed to work. The mover of the motion wanted oil prices to be regulated by the government and this is what the amendments proposed by the minister aimed at removing from the bill. A compromise motion was passed with amendments that included the removal of the provisions for control of oil prices. Parliament, therefore, played a critical role in influencing the types of bills that were presented and debated in the Eighth Parliament.

Conclusion

We have established that 28 per cent of all motions moved in the Eighth Parliament were for proposing legislation. Only a limited number of legislative motions that MPs made expressly directed the Executive to draft specific legislation, while 75 per cent of legislative motions generally sought leave of Parliament to introduce bills or urged the government to bring about certain desirable social public goals. These “open” legislative proposals left room for both the private members and the executive to draft bills and present them before the House. An example of such an “open” motion was one moved requesting the house to “grant leave for the National Disaster Management Bill”. There seemed to be an acknowledgement of the primacy of Parliament in initiating legislation.

Apparent from the data was the fact that 11.8 per cent of these legislative proposals influenced the type of bills that were moved in the House. We concluded that if parliamentarians spent more time (say 50% of the time allocated to questions and motions) moving legislative motions seeking leave to introduce private members’ bills or asking the government to bring specified bills to the House, the number of bills originating from the initiative of Parliament would increase, say, by 22 per cent. This is still a low percentage. One should look for an explanation as to why Parliament plays a limited role in proposing and initiating legislation.

Parliament has several functions that go beyond legislating to include popular representation, and providing oversight over executive actions. Due to their role as constituency representatives, MPs raise motions and questions that are of a purely constituency interest. They also use time allocated to motions to draw executive attention to situations they consider to be of a crisis nature. For example, they called for the House to adjourn to address such matters of national concern as famine, strikes, etc.

Parliament's role in budget matters is also limited. According to section 48 of the constitution, Parliament's role in financial matters that may result in a charge on the consolidated fund or in increasing taxation is restricted. This point is emphasized by Standing Order number 132 (National Assembly Standing Orders, 2002). In Commonwealth parliamentary practice, to which Kenya conforms, a parliamentary vote for a substantial reduction in appropriations proposed by the government would be tantamount to a vote against the government. Therefore in normal practice Parliament cannot reduce appropriation beyond a symbolic one pound. In effect it could not propose amendments on the Appropriations Bills that government presented to Parliament. As such, no amendments were ever made on the ten Appropriations and Supplementary Appropriations Bills which the executive presented to the Eighth Parliament. Instead, Parliament's role was limited to proposing amendments to the Finance Bills (which we discuss elsewhere in this chapter), and authorizing withdrawals from the consolidated fund, when requested to do so.

We also established that the executive presented sessional papers to Parliament for debate and approval and initiated legislation that touched on foreign affairs. This is because MPs appear least concerned with foreign affairs of all classes of issues and therefore made little effort to propose legislation in this area. The net result is that the government took a leading role in proposing the few bills touching on foreign affairs, moved all the money bills and, naturally, presented all the sessional papers to Parliament for scrutiny and approval.

4.3 DEBATE ON AND AMENDMENTS OF BILLS

In this second section of this chapter, we examine what happened to the bills when they were presented to Parliament for debate and passage. The focus will be more on the bills that reach the second reading and then go on to the Committee of the Whole House because it is at the second reading stage and at the Committee of the Whole House stage that we confirm whether bills were subjected to debate and amendments. We were mainly concerned with the following three matters:

- (a) the presentation of the reports of the relevant departmental committees to which bills are referred, immediately after the First Reading, for detailed analysis and proposed amendments. We did not come across a committee report on a bill that was rejected at committee stage;
- (b) amendments made by the relevant Minister on behalf of government at the Committee of the Whole House; and
- (c) amendments proposed by the general membership of the House through debate during the Committee of the Whole House.

It was established that 64 bills reached the second reading stage during the Eighth Parliament. This represents 62.1 per cent of all bills presented to the Eighth Parliament. Of these, ten were Appropriations Bills, which MPs could either reject or approve with no amendments except to reduce a ministry's budget by a symbolic one pound to show disgust at the performance of that Ministry. Parliament chose to approve all the Ministries' budgets without amendments.

A total of 46 (71.8%) of all the bills that went through the second reading were examined. We wanted to establish whether there were amendments proposed on the bills and if so whether they were made by the executive or by the backbench. If a bill was proposed by government and the government went ahead to propose all the amendments made on the bill when it was in the House, it would suggest that Parliament was a mere rubberstamp of an executive-driven legislative process. However, if a bill was presented in Parliament by either MPs or government and several amendments were proposed by ordinary Members of Parliament, this would suggest that Parliament played a critical role in the legislative process and in determining the legislative outcomes. We were, of course, aware that even amendments brought by the executive usually originate from the views Members have

expressed in debate. And, indeed, amendments proposed by members at departmental committee stage are normally taken over by the Minister in charge of the bill if they are acceptable.

To be able to arrive at some conclusions, we examined the debate in the Hansard Reports and reviewed all the reports of the departmental committees that were available in Parliament. Table 4.3 shows the number of amendments made to bills and whether or not these bills were passed by Parliament. Following the Table, we make comments about Parliament's role in making the amendments.

Table 4.3: Number of amendments made to Bills

| Bills | No. of Amendments |
|--|---------------------------------|
| | <i>p/n.app./na</i> [*] |
| 1. The Community Service Orders Bill, 1998 (AG) | 3 p |
| 2. The National Hospital Insurance Fund Bill, 1998 (AG) | 15 p |
| 3. The Kenya Communications Bill, 1998 (AG) | 23 p |
| 4. The Postal Corporation Bill, 1998 (AG) | 11 p |
| 5. The Supplementary Appropriation Bill, 1998 (MOF) | – p |
| 6. The Finance Bill, 1998 (Minister) | 7 p |
| 7. The National Intelligence and Security Service Bill, 1998 (AG) | 18 p |
| 8. The Constitution of Kenya Review Commission (Amendment) Bill, 1998 (AG) | Consensus p |
| 9. The Appropriation Bill, 1998 (MOF) | – p |
| 10. The Medical Laboratory Technicians and Technologists Bill, 1999 | 27 p |
| 11. The Bukura Agricultural College Bill, 1999 | 17 p |
| 12. The Tea (Amendment) Bill, 1999 | 30 p |
| 13. The Supplementary Appropriation Bill, 1999 | – p |
| 14. The Finance Bill, 1999 | 7 p |
| 15. The Parliamentary Pensions (Amendment) Bill, 1999 | 5 p |
| 16. The Appropriation Bill, 1999 | – p |
| 17. The Constitution of Kenya (Amendment) Bill, 1999 (AG) | Consensus p |
| 18. The Kenya Roads Board Bill, 1999 | 23 p |
| 19. The Central Depositories Bill, 2000 | 6 p |
| 20. The Capital Markets Authority (Amendment) Bill, 2000 | 36 p |

^{*} See key after the Table.

| | | |
|-----|---|-------------|
| 21. | The Supplementary Appropriation Bill, 2000 | - p |
| 22. | The Treaty for the Establishment of the East African Community Bill, 2000 | 100 p |
| 23. | The Finance Bill, 2000 | 40 p |
| 24. | The Statute Law (Miscellaneous Amendments) Bill, 2000 Heavy parliamentary opposition, some provisions termed draconian | n.app. |
| 25. | The Public Service (Code of Conduct and Ethics) Bill, 2000 Opposed and deferred for 6 months | n.app. |
| 26. | The Central Bank of Kenya (Amendment) Bill, 2000 (Donde) | na |
| 27. | The Parliamentary Service Bill, 2000 (AG) (originally Aringo's) | p |
| 28. | The Appropriation Bill, 2000 (AG) | - p |
| 29. | The Kenya Water Institute Bill, 2001 | none p |
| 30. | The Children Bill, 2001 (AG) | 72 p |
| 31. | The Constitution of Kenya Review (Amendment) Bill, 2001 | Consensus p |
| 32. | The Industrial Property Bill, 2001 | 25 p |
| 33. | The Supplementary Appropriation Bill, 2001 | - p |
| 34. | The Constitution of Kenya (Amendment) (No.2) Bill, 2001(Aringo) | n.app. |
| 35. | The Coffee Bill, 2001 | none p |
| 36. | The Finance Bill, 2001 | 47 p |
| 37. | The Banking (Amendment) Bill, 2001 | 1 p |
| 38. | The Sugar Bill, 2001 | Extensive p |
| 39. | The Appropriation Bill, 2001 | - p |
| 40. | The Kenya National Commission on Human Rights Bill, 2002 | 8 p |
| 41. | The Domestic Violence (Family Protection) Bill, 2002 heavily opposed | n.app. |
| 42. | The Public Officer Ethics Bill, 2002 | n.app. |
| 43. | The Supplementary Appropriation Bill, 2002 | - p |
| 44. | The Finance Bill, 2002 | 19 p |
| 45. | The Constitution of Kenya Review (Amendment) Bill, 2002 (AG) | Consensus p |
| 46. | The Appropriation Bill, 2002 | - p |

Source: Study Data.

Key:

p passed

na No Presidential Assent

n.app. Not approved

none no amendments

It was deduced from Table 4.3 that 73.9 per cent of the bills received serious scrutiny in Parliament. This was made possible through the debate of the departmental committees as well as by individual MPs who proposed amendments during the Committee of the Whole House stage. Thus, all the executive-initiated bills and those brought by private members were either passed or blocked through the efforts of Parliament as an institution.

These bills include two bills moved by private members that received different types of treatment in the House. The Central Bank of Kenya (Amendment) Bill, 2000 (the Donde Bill) was passed by Parliament at the third reading but was denied presidential assent. Aringo's Constitution of Kenya (Amendment) Bill, 2001 could not obtain a two-thirds majority when put to the vote.

Table 4.3 also shows that some bills received serious criticism in the House and were either shelved or deferred. For example, the Statute Law (Miscellaneous Amendment) Bill, was not subjected to a vote, but was heavily criticized and termed draconian and had to be shelved. The Public Service (Code of Conduct and Ethics) Bill, 2000 received objections from the floor because MPs were concerned that the bill violated the separation of powers principle. The Eighth Parliament was dissolved before this bill (popularly referred to as the Ethics bill) could go for third reading. It was later redrafted and presented in 2002 and again in 2003, when it was passed. Another bill worth of mention is the Domestic Violence (Family Protection) Bill, 2002. It was a highly contested bill, which was subjected to lengthy debate and then rejected.

Departmental committees are comprised of members from all major parties in Parliament. In all, there were six members from the then ruling party KANU while the balance of five were drawn from opposition parties. This means that the ruling party had more members in each committee and therefore was likely to carry the vote. However, this was not the case. It is widely acknowledged that MPs, although drawn from different parties, tended to operate above their party loyalties as members of committees. Thus, committees operated as corporate bodies.

The Minister in whose docket a bill falls is considered a friend of the relevant departmental committee. He is informed of the deliberations and is called to present his views on the bill.

In essence, most of the amendments that ministers propose on a bill and which they present during the second reading are the results of a compromise agreement between the Minister and the committee. In addition to reviewing bills, committees have the mandate to review sessional papers, which specify government policies in a particular sector. For example, in October 2002, a joint committee on Agriculture and Finance met to review the Sessional Paper No. 1 on Re-structuring of the Agricultural Finance Corporation (AFC). They did not propose any amendments, but they recommended that the House approve the sessional paper. The Agriculture Committee also reviewed the Sessional Paper No. 2 on Liberalization and Re-structuring of the Tea Industry, which became the basis for the Tea Bill which Parliament passed.

In April 1999, the committee in charge of Agriculture summoned the Minister and told him that he was not doing enough on the development of irrigation. From the Minister's briefing they learnt that Mwea Irrigation Scheme was having problems with the National Irrigation Board (NIB). They recommended a comprehensive review of the Agriculture Act.

Sometimes a committee may not make specific amendments to a bill, but may make fundamental recommendations to the government, which the Minister responsible is supposed to take into account while making revisions to the Bills. Such recommendations give the government leeway in revising the bill. For example, in a report dated November 2001, the Agriculture Committee after meeting to review the Coffee Bill recommended that the Minister's powers to give directions to the Coffee Board be reduced. They did not specify what provisions of the bill needed to be revised to take into account their recommendations.

The Finance, Planning and Trade Committee (Finance Committee) has powers to oversee government financial policies. They exercise these powers by scrutinizing Finance Bills and reviewing reports prepared by the Central Bank of Kenya. For example, in November 1999, the committee presented a report based on the review of the first, second and third Monetary Policy statements prepared by the Central Bank and presented by the Minister for Finance. The Monetary Policy statements specify policies and means by which CBK intends to achieve policy targets, give reasons for adopting such policies, and review and assess the success of the implementation of the Bank's monetary policy during the period preceding the policy statement in accordance with the Central Bank of Kenya

(Amendment) Act of 1996. In a report they prepared following the November 1999 review of the policy statements, the Committee raised the following issues: why were the reports presented late?; they questioned the policy of selling Treasury bills; they expressed concern about high and fluctuating inflation; and they questioned why the government supported the operations of the National Bank independent of the oversight of Parliament. The Committee recommended that the Central Bank strengthen its discipline in the banking sector.

From a review of the committee reports that were made available to us, it was clear that the Departmental Committees took the analysis of bills very seriously.

The Committee on Defence and Foreign Relations had made a report on their deliberations on the Draft Treaty for the Establishment of the East African Community. They prepared the report after holding a total of 31 sittings to review the treaty and proposed over 100 amendments to the draft. In a report presented to Parliament dated May 2000 on the review of the Capital Markets Authority (Amendment) Bill, 2000, the Finance, Planning and Trade Committee indicated that after the Bill went through the First Reading on April 13, 2000, the committee held 3 sittings and made 36 amendments all of which were agreed to by the Minister.

The same committee presented another report dated April 2000 on the Central Depository Bill, 2000. The Bill was aimed at streamlining the capital markets. This Bill was the republished Central Depository Bill, 1999, which had been tabled before the House in 1999. After two sittings, the committee made two proposals, which were incorporated into the bill by the Minister. The Committee also recommended that the Minister formulate Central Depository (CD) rules.

The Finance Committee also presented a report dated October 2001 on the Banking (Amendment) Bill, 2001 in which they recommended that the Minister prepare an amendment to the Building Societies Act, separate from the Banking Act. They thus removed any reference to Building Societies from the Banking Bill before approving the bill. In October 2001, the Finance Committee presented yet another report of their review of the Finance Bill, 2001. The Finance Bill had been referred to the Committee on July 4 and the Committee held its first meeting on July 13, 2001. The committee proposed six amendments, which they referred to the Minister.

The Committee on Health, Housing, Labour and Social Welfare (Health Committee) also held several sittings and prepared reports on several bills and Sessional papers. After a review of the National Hospital Insurance Bill, 1998, which was referred to the Committee on April 30, 1998, they prepared a report dated October 1998. They held eight sittings beginning on June 12. The Minister for Health and government officials attended some of the sittings. The Committee agreed with the Minister to incorporate 15 amendments and other policy issues.

The Health Committee also prepared a report dated November 1999, based on their review of the Medical Laboratory Technicians and Technologists Bill, 1999. In this report, the committee indicated that they had met and held discussions with the Minister with whom they agreed on 27 amendments to the Bill. The same committee met to deliberate on a labour dispute between the Kenya National Union of Teachers (KNUT) and the Government. In a report dated April 2002 on the dispute, the committee told the government to honour its contractual obligations with the teachers' union.

Select committees also provide critical input into the legislative process. A Parliamentary Select Committee on Constitutional Review recommended the extension of the term for the Constitution of Kenya Review Commission. This recommendation was followed up with the passage of an Act. The PSC comprised 15 members of government (NDP and KANU), and 11 Opposition MPs. A select Anti-Corruption Committee drafted the Anti-Corruption and Economic Crimes Bill, with the assistance of staff from the Attorney General's Office. The Bill was taken over and moved by the Attorney General in 2000.

Further, the Energy, Communications and Public Works Committee (Energy Committee) prepared a report on the operations of the Kenya Roads Board as a follow up to the review of an Act they felt the executive had failed to implement. The Committee on the Administration of Justice and Legal Affairs (Legal Affairs Committee) reported on their deliberations on the Constitution of Kenya (Amendment) Bill, 2000. The Legal Affairs Committee indicated in their report that they were concerned that a select committee was constituted to look into constitutional matters, thus usurping the committee's mandate. They were opposed to the Constitution of Kenya Review Commission Bill, 2000 that the AG was planning to bring to the House and claimed that 91 MPs had signed up their names

to indicate their opposition to the bill. The Committee requested that the CKRC (Amendment) Bill, 2000 be shelved or deferred to allow Kenyans to build consensus and confidence in the constitutional review process. The report dated July 3, 2000 seemed to contradict the position taken by the parliamentary select committee on the constitutional review, which had recommended that the draft bill be passed.

Treatment Given to Bills in House, Including Amendments Made

Tables 4.4 (a) and 4.4 (b) indicate the treatment accorded to a sample of bills presented in the House.

Table 4.4 (a): Treatment given to Bills while in the House

| Treatment | No. of Bills |
|------------------|---------------------|
| Amended | 23 |
| Consensus-passed | 4 |
| No amendments | 12 |
| Rejected | 2 |
| Other | 5 |
| Total | 46 |

Source: Research data

Table 4.4 (b): Number of amendments made to Bills

| No. of Amendments | No. of Bills |
|--------------------------|---------------------|
| 1-5 | 3 |
| 6-10 | 5 |
| 11-15 | 2 |
| 16-20 | 3 |
| 21-25 | 3 |
| 26-30 | 2 |
| Over 30 | 5 |

Source: Research data

We can see from Tables 4.4 (a) and (b) that only three out of the 23 bills amended received less than five amendments each. In addition to the 23 bills amended, there were 4 constitutional bills, which were passed through consensus. Constitutional bills can only pass if they have the support of 65 per cent of the MPs. Given the volatile nature of the politics of this period and the negotiations that went into developing a consensus on the constitutional review process, we can conclude that the bills were negotiated and had extensive input of Parliament. Additionally, one constitutional bill, seeking to amend

sections 58 and 59 of the constitution to give Parliament the power to set its own calendar, was rejected.

Further, two bills were passed without any amendments proposed on the floor of the House. These are the Kenya Water Institute Bill, 2001, and the Coffee Bill, 2001. It was not clear from the analysis why Parliament decided not to propose any amendments. We were not able to establish whether Parliament had earlier approved relevant sessional papers on the same (maybe the sessional Paper No. 1 of 1999 on the National Water Resources Management and Development) upon which the bills were based. The reasons for the inability to do so were the unavailability of committee reports on these bills, while the Hansard Report indicated that there were no amendments made on the two bills when they came for the second reading and were subjected to the Committee of the Whole House. Instead, the Minister is said to have received no objections at the Committee of the Whole House stage.

There were three bills that did not pass through the second reading, although they were presented for debate; instead they received a lot of hostility from members and had to be shelved. These were the Public Service (Code of Conduct and Ethics) Bill, 2000, the Statute Law (Miscellaneous Amendment) Bill, 2000, and the Domestic Violence (Family Protection) Bill, 2002.

The Public Service Code (Code of Conduct and Ethics) Bill was moved by the Minister for State during the second reading. According to the Minister who moved it, its purpose was to create an efficient, transparent, accountable, neutral and independent civil service. Its goal was to reorient the civil service towards efficient and effective service of the public. It was first read in the House on July 26, 2000 and referred to a committee, which was supposed to bring a report after seven days. It received a lot of hostility, with one Opposition MP stating that it undermined the doctrine of separation of powers: “[We] cannot have one committee that supervises the conduct of judges, MPs, civil servants. ...We should have three separate committees.... This is a civil servants’ committee appointed by the President.” (Hansard Report, November 28-30, 2000:3038) The MPs wanted an independent committee that would exclude serving civil servants. The House recommended that the Bill be shelved for six months. It was re-introduced as a new bill in

2002, which was debated but did not go to the third reading where it could have been voted for.

The Criminal Law (Amendment) Bill, 2002, went through the second reading on October 31, 2002. The AG argued that the Bill would improve the administration of justice and promote human rights by abolishing corporal punishment, removing the requirement for the AG's consent to the prosecution of incest, subversion and corruption cases and making inadmissible in court trials confessions made at police stations as the admissibility of such confessions encourage the torture of suspects. While the government supported the miscellaneous amendments, the opposition opposed them arguing that the crime of incitement, which had been used by the government in the past to harass the opposition, had been retained in the Bill. They also argued that the bill would enable the government to fast track the prosecution of those accused of subversion, who were mainly opposition members. They also pointed out that the government had discovered a political offence called incitement and many MPs were facing criminal charges on incitement, and the government now wanted to enhance penalties for this new "crime".

The Domestic Violence (Family Protection) Bill, 2002, a progressive piece of legislation in terms of protecting women's rights, was rejected by an overwhelming majority of MPs.

The Central Bank of Kenya (Amendment) Bill, 2000 (Donde Bill) drafted and moved by an opposition MP, Joe Donde, aimed to control interest rates by putting a cap on the interest charged by commercial banks on loans. The Minister for Finance sought to introduce some amendments to the bill at the Committee of the Whole House stage, arguing that the amendments were necessary because, left as it was, the Donde Bill would make the financial sector react negatively. The Minister's amendments were rejected and the bill passed. Despite receiving overwhelming support in Parliament, it did not receive presidential assent.

The Parliamentary Service Bill, 2000 was initially drafted and moved by Oloo Aringo, another opposition MP, but later taken over by the AG. It was a very popular bill because it would have an impact on the salaries and conditions of service for MPs and was passed.

Ten Appropriations Bills received no amendments while in the House.

In retrospect, neither the executive nor the backbench could claim to have a monopoly over the legislative process in the Eighth Kenyan Parliament. The question of the relative roles of the executive and Parliament in the legislative process is a complex one. The complexity of the debate is captured clearly by statements the Attorney General made several times on the floor of the House. His point was that whereas private members would come up with piecemeal constitutional amendments and other legislation, the executive was ahead of them in being able to propose cohesive legislation. We wish to highlight sections of that debate here to emphasize this point.

In June 2000, during the Second Reading of the National Commission on Gender and Development Bill, the AG emphasized his view that the Executive is ahead of Parliament in terms of its ability to initiate legislation. The purpose of the bill that was under debate was to put in place a commission for looking into the national development plans to ensure that they did not allow discrimination on the basis of sex. The AG who moved the bill said that the bill arose from the findings of the task force he had set up in 1993. Again, during the second reading of the Kenya National Commission on Human Rights, 2000, the AG expressed surprise at the fact that there was a private member's motion seeking to bring a private member's bill to establish such a commission.

Also during the debate on the Domestic Violence (Family Protection) Bill, the Attorney General expressed surprise that an MP was seeking leave from the House to bring a similar, private member's bill. He argued that this bill was a government initiative that had developed from the findings of a task force he had set up to come up with a draft Domestic Violence and Family Protection Bill, which he had then published.

Critical of the fact that an MP had sought leave to bring a bill to consolidate electoral laws in parliament, the AG argued that the Electoral Commission of Kenya had started consultations with parliamentary political parties on the issue of consolidating and updating electoral laws. He also pointed out that several opposition MPs had called for complete parliamentary independence and yet that was an issue that was best tackled during the constitutional review process, which the government had initiated. He went on to state his preference for separation of powers, but argued that the issue of parliamentary independence was complex and required broad consultations as envisaged in the CKRC Act.

During the Second Reading of the Statute Law (Miscellaneous Amendments) Bill, 2000, the AG explained that he was proposing to make several amendments to Acts of Parliament touching on 39 different Acts, including amendments to increase salaries for the members of the Speaker's Panel and allowing for continuous voter registration.

On the registration of voters he said: "I know that members of parliament have been very much concerned with this whole issue of registration of voters, which normally takes place just before a general election and it stops there." (Hansard, December 5-7, 2000:3078). He went on: "Just recently, a motion was moved by Hon. Obwocha calling for a system to be put into place for continuous registration of voters. This is what the amendment [the AG was proposing] was all about" (*ibid.*: 3078). Again the AG was arguing that the government was ahead in proposing legislation. One of the Acts the Statute Law (Miscellaneous Amendment) Bill, 2000, intended to amend was the Advocates Act, to include provisions for restitution for victims of advocates' misconduct. In order to obtain the support of MPs, he stated that he had consulted broadly with all the stakeholders in the legal sector before reaching agreement on the new provisions. Other proposed amendments were to the Industrial Property Bill, and the Books and Newspapers Act, to increase penalties for publishers and distributors of books and newspapers who did not meet the requirements specified by government. This particular amendment received opposition from backbenchers who argued that the law would take Kenya back to the old days of authoritarian governmental excesses. The House was adjourned *sine die* to break for Christmas before the debate on this bill was concluded. A similar bill was reintroduced in 2002 and passed without much debate

4.4 SUMMARY AND CONCLUSION

Parliament played a critical role in influencing the types of bills that were presented and debated in the Eighth Parliament. They amended most of the bills the Executive brought to the House, mainly through the work of departmental committees. Several constitutional bills were passed through consensus while several unpopular bills were rejected or/and deferred.

The data presented has confirmed our hypothesis, namely "The dominance of the executive over the Kenyan parliament explains why the legislature plays a limited role in law

making". We have consistently noted that Parliament began to assert effective legislative independence after it acquired financial as well as relative political autonomy with the 1999 enactment of the Bill setting up the Parliamentary Service Commission.

While the constitution and the Standing Orders empower Parliament to initiate and amend any legislation, the Parliamentary Service Commission Act was a confidence booster for Members of the Eighth Parliament who became motivated to assert unprecedented legislative independence. It was, however, noted that private members proposed a limited number of Bills compared to the executive, which proposed 95.1 per cent of all the Bills. This can be explained by several factors including lack of legal drafting capacity, the costs of drafting and moving bills which are borne by MPs, the MPs' expectation that the AG would draft bills once motions urging the government to bring bills were passed, and the fact that MPs have a difficult time balancing their multiple roles of representing their constituents, and playing their watchdog and legislative functions. The executive, through the Attorney General and Ministers, had the capacity to draft and move several bills. The executive had other advantages compared to the private members. It had more members in the House Business Committee, has exclusive responsibility to move money bills, and government business takes precedence over any other business in the House most of the time. However, despite having more members in the departmental committees, the executive, and by extension the ruling party, does not control the outcomes of committee deliberations due to the corporate nature of committees.

On the other hand, private members were free to propose legislation if they could mobilise the technical know-how and meet the costs. They drafted five of the bills and initiated another two, which were later taken over by the executive. They also moved motions, which to some extent influenced the types of bills that the executive later drafted and moved in the House. When the bills were brought to Parliament by the executive and private members, parliamentarians made extensive amendments to them. Thus all the bills that passed (51% of all bills) had the support of MPs.

In addition, it is observable from our analysis that legislative motions comprise a substantial percentage (28%) of issues that MPs raise during time allocated for moving motions and asking Ministers questions. However, only 11 per cent of the motions and questions got translated into bills that were moved in Parliament. There are various reasons

to explain this discrepancy. It can be explained by the fact that the MPs did not follow up the motions by drafting bills for various reasons, including lack of funds to meet the costs, lack of technical know-how and lack of time. It could also be that the MPs expected the executive through the Attorney General to take up concerns expressed by MPs and bring bills to the House. We noted that the executive sometimes did bring bills that addressed the concerns expressed by MPs, but in the majority of cases it did not and ended up bringing other bills altogether.

Although we did not see a strong correlation between the motions and the bills brought to the House, MPs used the time in Parliament to ventilate their grievances, to raise issues of concern to their constituents, and to let the government know their views on various national issues. For example, MPs used the occasion of a debate on a motion of adjournment to demand that the Minister for Finance come up with details on money to be allocated to constituencies, since a motion had been accepted during the session to establish such a fund. The Minister for Finance also took the opportunity to tell the House that he was consulting with stakeholders to ensure that the Donde Bill was concluded and implemented. Other MPs expressed their widely shared concern that the Kenya Roads Board had not implemented the Kenya Roads Board Act of 1999 as no funds were disbursed to the District Roads Committee. Yet another MP used the same occasion to say that she wanted to see Parliament acquire control over its own calendar.

Thus, MPs used opportunities presented by question time, time for moving motions and debate on bills and presidential speeches to express their concerns and to make legislative proposals. An analytical comparison of motions and bills that the Eighth Parliament dealt with has helped to establish that Parliament does not play a passive role in legislation. Instead, it influences the types of bills that get presented to Parliament by either the executive or by private members.

In sum, although the executive had the upper hand in the legislative process, it did not exercise unchecked hegemony over Parliament as an institution. The executive could not pass bills which did not have the support of Parliament. Neither the executive nor the National Assembly enjoys autonomy over the legislative process, which is a joint effort of the two institutions. While it was clear from our analysis that the executive had the upper

hand in influencing the legislation passed, it was noteworthy that the Eighth Parliament had become assertive in the legislative process.

CHAPTER 5

SUMMARY OF FINDINGS AND GENERAL CONCLUSIONS

5.1 INTRODUCTION

This study investigated the extent to which the Kenyan legislature plays the legislative role conferred upon it by the constitution. The Kenya Constitution (Section 30) defines Parliament as comprising the President and the National Assembly. The Constitution also recognizes that governmental power is exercised by the legislature, the judiciary and the executive. The relationship between the executive and the legislature was analysed in order to assess the extent of parliamentary autonomy. Our perception was that the less the legislature's autonomy, the more limited its legislative role, and vice versa.

Drawing from our theoretical framework—the systems theory—we hypothesized that the higher the degree of parliamentary autonomy, the higher the participation of Parliament in legislative matters. Our choice of the systems theory is particularly significant in that it allowed us to conceptualize Parliament as a system, which is engaged in authoritative allocation of values. It is also seen as a system open to external influences. As a system, it is responsible for processing the inputs, in the form of legislative motions and bills, into outputs in the form of legislation.

5.2 SUMMARY OF FINDINGS

In chapter 1, we reviewed the history and operations of various parliaments in the world to see how the executive-legislative relations have played out. We noted that institutions operate within a given context or environment. Our focus was on reviewing different contexts within which parliaments have operated in various countries and within different historical periods. In all, we concluded that parliament as an institution operates as an open system, which is sensitive to the environment within which it operates.

Philosophers such as Montesquieu (1748) had argued for a complete separation of powers in order to avoid a situation whereby a Senate (or monarch) may enact tyrannical laws, which they would also execute in a tyrannical manner. But from our review of the historical experience of different countries, we noted that legislative and executive powers have not

been kept separate. We saw in chapter 2 that the English parliament evolved from the Monarch's (executive's) engagement with lords and commons, who increasingly played a people-representative role. In Britain the executive is part of the legislature, while the chief minister in the cabinet, which is part of the British parliament, advises the Monarch on when to dissolve parliament. In Kenya, the separation of powers principle is valid only to the extent that the legislature is an institution constitutionally distinct from the executive and the judiciary. However, because parliament has ultimate authority in legislative matters, we can then speak of parliamentary sovereignty (Goldsworthy, 1999). Neither the executive nor the National Assembly separately can make laws.

In chapter 2 we reviewed the history of the Kenyan parliament in the colonial and post-colonial periods. Our main goal was to put the Kenyan Parliament in historical context by throwing light on its Westminster heritage. We noted that the legislature has always comprised of the executive and the National Assembly (of elected and/or nominated members). However, the executive tended to dominate the legislature, which then operated at the whims of the executive, in effect rubberstamping executive decisions. Up until 1999, no member of parliament, with the exception of J. M. Kariuki who introduced the Hire Purchase Bill of 1968, had successfully drafted a bill that was adopted by parliament and passed. (We noted that J. Seroney's bill on Presidential and Parliamentary Elections was taken over by the government and subsequently became law.) There are few records of private members' bills in the period 1967-1974. We also noted that in the 1960s and '70s, attempts by backbenchers to influence legislation did not succeed in derailing the executive legislative agenda, due to the executive's ability to silence MPs through appointments to government, outright bribery or intimidation. The Kenyan Parliament during this period operated within an oppressive political environment where the executive dominated other institutions of governance. In applying the systems theory, we noted that Parliament then was a system open to exchanges coming from the environment dominated by a strong executive president. Even as Parliament made authoritative decisions in the form of legislation, it is the will of the executive that mattered.

With regard to the working out of legislature-executive relations during the multiparty period beginning in 1992, we noted that the executive maintained its power to summon, prorogue and dissolve Parliament while the legislature had the power to approve

government budget and taxation measures set out in the Appropriations and Finance Bills. We noted that the Standing Orders gave the executive and backbenchers power to propose legislation and amend any bill at various stages of the legislative process.

Drawing from the systems theoretical framework with its emphasis on the input-output function, we established that the effectiveness of the Eighth Parliament in the legislative process was a function of the degree of independence that Parliament had vis-à-vis the executive; and the extent of its ineffectiveness was a function of the persisting dominance of the executive over Parliament. It became apparent that the higher the level of parliamentary autonomy, the higher the participation of MPs in the legislative process.

The critical reforms that went to shape the Eighth Kenyan Parliament were assessed at the end of chapter 2, including the unprecedented activation of the committee system, the institutional entrenchment in the Standing Orders of the parliamentary Opposition's role in Parliament, and the creation of the Parliamentary Service Commission. Thus, in addition to the presence of opposition parties in Parliament represented by 103 members compared to 107 from the ruling party, the reactivation of the committee system in early 1998, the revision of the Standing Orders in 1997, the institutionalization of multiparty system in Parliament, and the establishment of a Parliamentary Service Commission all had a significant bearing on legislature-executive relations in Kenya. These and the presence of a large group of opposition MPs, elected in the 1997 General Elections, strengthened Parliament in ways that had not been experienced since independence. Up until 1999 when the PSC Act was passed, Parliament did not have the power to determine the salary of its members and its staff. This is because their budget remained under the control of the Office of the President. Since the passage of this Act, as was noted, the budget for Parliament has grown considerably with a corresponding increase in MPs' salaries, benefits and allowances, thus enabling MPs to spend more hours on parliamentary business including committee work. The reactivation of the committee system in 1998 enhanced Parliament's capacity to give serious scrutiny to bills before they got passed. When we compared the Eighth Parliament (1998-2002) to Parliaments of previous periods, we concluded that it had reached critical benchmarks of autonomy. Because of this, we chose the Eighth Parliament as our unit of analysis.

In chapter 3, we reviewed the legislative role of the Eighth Parliament in respect to the treatment of bills—moving bills, amending bills and rejecting bills brought by the executive—using specific data collected. And in the two main parts of chapter 4 we assessed, again using specific data collected, the role of the Eighth Parliament in, first, bringing motions and legislative proposals and, second, its role in debating bills and proposing amendments to such bills.

It is apparent from our study findings that the Kenyan Parliament began to exercise its autonomy in earnest after the passage of the PSC Act. It, therefore, seems reasonable to argue that, Parliament's growing legislative autonomy and power is based on two factors: first, the passage of the PSC Act, which made Parliament financially independent; and, second, the activation of the committee system. The first factor meant that the president no longer controlled their budget, as was the case previously. Second, the PSC enabled Parliament to invest more resources in the committee system, thereby enabling the parliamentarians to develop the mechanisms and expertise needed to engage in active policy-making. In retrospect, multi-party politics was not enough to make the Kenyan Parliament a strong institution. It was not until the passage of the PSC Act that Parliament, as an institution, could resist the executive's efforts at political dominance. By analyzing the role the executive and the backbenchers play in the legislative process, we were able to see clearly the increased parliamentary autonomy which led to more participation by Parliament in law making.

5.3 GENERAL CONCLUSIONS

We provided figures indicating the relationships between the independent and dependent variables. The independent variables are the executive and the National Assembly. The dependent variables include varying degrees of executive dominance over parliament, and the role of multipartyism and institutional reforms, including the Standing Orders, accommodation of the parliamentary opposition, and activation of the committee system. On the basis of available data we have confirmed our hypotheses that: "The dominance of the executive over the Kenyan legislature explains why the legislature plays a limited role in law making" and that, "Financial and political autonomy of parliament grants it an effective legislative independence."

We have to qualify the hypotheses on the basis of intervening variables encountered in this study. For instance, despite increased autonomy brought about by reforms, Parliament's effectiveness was affected by various factors including lack of in-house technical legal drafting capacity, dominance of the executive through a high number of the front bench and the high representation of the executive in departmental and House Business Committees, and lack of incentive to propose legislation on the part of the legislators. The high cost of drafting and moving bills that a private member had to bear, before the Parliamentary Service Commission started to bear the cost of printing bills after 1999, was another factor inhibiting Parliament's effectiveness in contrast to the executive's with its legal capacity found in the office of the Attorney General, and its access to the state's financial resources.

5.4 POLICY RECOMMENDATIONS

Key areas of policy concern have been highlighted by the findings of our research. There are several factors that enhance the effectiveness of Parliament. These include not only Parliament's independent access to resources from the Treasury, but also the use of these resources to develop Parliament's in-house capacity. Parliament has to develop research capacity so that departmental committees can have access to expertise in various fields for effective analysis of bills and policy making. Parliament should also develop legal drafting capacity that can support private members' initiatives in publishing bills. It is quite commendable that the cost of printing bills is borne by the PSC in accordance with the provisions of the PSC Act. The development of the twelve-year development plan for Parliament in 1999 was only a first step. Now is the time to actualize that plan if long term strengthening of Parliament is to be sustained. In addition, the proposal to have Parliament determine its calendar would be a positive move towards institutionalizing its autonomy. In our view parliamentary independence entails four main factors: first, research capacity and capability; second, access to independent resources; third, security of members; and fourth an autonomous calendar.

Although from our study's findings committees were operating as corporate bodies, there is need for Parliament to conduct a comprehensive review of the Standing Orders to make them consistent with the goal of strengthening Parliament as a democratic institution. For example, there is need to assess the long term impact of the rule that allows the ruling party more representation in committees that set the Parliament's agenda and shadow the government ministries.

5.5 SUGGESTED AREAS FOR FURTHER RESEARCH

This research has shed light on potential areas for further inquiries.

First, the study focused on the Eighth Parliament. As a comparative study, it has limitations, which can be addressed through longitudinal studies covering more than one Parliament. It is therefore recommended that studies of the 1988-1992 and the 1993-1997 Parliaments be conducted for comparative purposes. This would enrich our study by helping us to more effectively gauge the impact of multiparty democracy on parliamentary development, including growing legislative independence over a longer period.

Secondly, it is recommended that studies be conducted to analyze the nature of bills proposed by the executive, on the one hand, and those proposed by the private members, on the other hand. Such a study would help us understand the issues such bills were trying to address and help us answer the following questions that confronted us in the course of this study:

- (a) Why were there such a high number of repeat bills? What were the objects and nature of such bills?
- (b) Why did certain bills elicit so much support or opposition from Parliament? What issues were they actually trying to address?
- (c) What issues were the backbenchers trying to address through legislative motions and draft bills? Why were almost all private members' bills unsuccessful?

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