

This work is licensed under a
Creative Commons Attribution-NonCommercial-
NoDerivs 3.0 Licence.

To view a copy of the licence please see:
<http://creativecommons.org/licenses/by-nc-nd/3.0/>

(832)

INSTITUTE
FOR
DEVELOPMENT STUDIES
UNIVERSITY COLLEGE, NAIROBI

THE ROLE OF THE SENATE IN THE KENYA
POLITICAL SYSTEM

by

J. H. Proctor
Duke University
(formerly Centre for Economic Research)



Reprint series: No. 11
Reprinted for private circulation from
Parliamentary Affairs, Vol. XVIII, No. 4, Autumn 1965
with the permission of the Editors.

REPRINT SERIES

1. P. Robson: Stagnation or Growth for East Africa?
2. D. M. Etherington: Land Settlement in Kenya; Policy and Practice.
3. D. A. Lury: National Accounts in Africa.
4. J. E. Price: International Burden-Sharing.
5. C. W. Howe & H. Karani: A Projection Model for the Kenya Economy.
6. D. M. Etherington: Projected Changes in Urban and Rural Population in Kenya and the Implication for Development Policy.
7. M. Gaskin: Monetary Flexibility in Dependent Economies.
8. C. A. Cooper and B. F. Massell: Toward a General Theory of Customs Unions for Developing Countries.
9. P. Robson: The Problem of Senegambia.
10. C. A. Cooper and B. F. Massell: A New Look at Customs Union Theory.
11. J. H. Proctor: The Role of the Senate in the Kenya Political System.
12. J. H. Proctor and K. G. V. Krishna: The East African Common Services Organization: An Assessment.

Reprints may be obtained from:

The Secretary,
The Institute for Development Studies,
University College, Nairobi,
P. O. Box 30197,
Nairobi.

Book Number	008120
INSTITUTE OF DEVELOPMENT STUDIES LIBRARY	
Classification	

are those of the author. They should
be sent to the Institute for Development
Studies, Nairobi.

THE ROLE OF THE SENATE IN THE KENYAN POLITICAL SYSTEM

by J. H. Proctor, Jr.

KENYA is one of the very few new African states which have instituted bicameral legislatures, and the survival of a second chamber in that country has been a matter of considerable uncertainty until quite recently.

Only a little more than a month after the first meeting of the Kenya Senate on June 7, 1963, one of the Opposition members voiced the suspicion that some Ministers had "a negative attitude towards this House" and reported that a rumour was already circulating "that the Senate may be washed out."¹ The Leader of Government Business sought to reassure the body in September. "So far," he asserted, "it is not the intention of either the Government or the party in power that the Senate should not continue."² Those words did not set the matter at rest, however; reference was made in December by another Senator to "grumbling in the last three months that the Senate would probably be dissolved."³ On March 25, 1964, the Leader of Government Business acknowledged that there had been widespread speculation as to whether the Senate should be "scrapped," but emphasized that a unicameral system could be established only by formally amending the Constitution.⁴

Following the announcement in August that the Government would soon submit for approval a comprehensive set of constitutional amendments designed to transform Kenya into a Republic and to concentrate more power at the center, Mr. K. N. Gichoya rose in the House of Representatives to urge those who were drafting them "to examine the position of the Senate to see whether it is necessary or desirable or is just an institution for consuming the public money."⁵ Anxiety about the future of the upper house mounted during September, for on the 4th of that month it was adjourned for an indefinite period because the palantypists who recorded its debates had resigned and no replacements could be found. Members of the Opposition thereupon accused the Government of seeking to undermine bicameralism

¹ Kenya Senate, *Official Report*, July 9, 1963, col. 292 (Sen. W. Wamalwa).

² *Ibid.*, September 24, 1963, col. 900 (Sen. J. P. Mathenge).

³ *Ibid.*, December 31, 1963, col. 35 (Sen. J. K. Kebaso).

⁴ *Ibid.*, cols. 518-520 (Sen. J. P. Mathenge).

⁵ Kenya House of Representatives, *Official Report*, August 14, 1964, col. 1747.

LIBRARY
STUDIES
DEVELOPMENT
OF
INSTITUTE

without bothering to amend the Constitution, and the editor of the Nairobi *Daily Nation* wrote that the Senate's "enforced vacation" was giving it "just the kind of publicity which is one of these days going to cost it its life." The people might well conclude, he predicted, that the second chamber was "actually superfluous" since "no national calamity has resulted from the Senate standstill," and the Government's supporters would now be more inclined to favor drastic changes in the Constitution.⁶

The Senate was able to resume its work on September 29, however, following the installation of tape-recording equipment, and on October 8 the Minister for Justice and Constitutional Affairs appeared before a special, off-the-record meeting of the Senators to inform them authoritatively that no alteration of the structure or the powers of the upper house would be included in the forthcoming amendment proposals—an assurance which was confirmed when the text of the Constitution of Kenya (Amendment) Bill was published later that month.

Now that this institution has survived what many regarded as an experimental if not probationary period, an analysis and evaluation of its record seems appropriate. What purposes was the Senate intended to serve, and to what extent had these been realized by October 8, 1964? What interests was it supposed to represent, and had these in fact found effective expression? What powers was it assigned, and what use had it made of them in practice? What functions had it actually performed? In the answers to these questions may be found an explanation for the uncertainty surrounding the Senate as well as for the decision to retain it.

I

The idea of a second chamber for Kenya was originally proposed by the Kenya African Democratic Union (hereafter called KADU) as part of its plan to provide protection for the smaller tribes, which that party represented, against the danger of domination by the larger and more advanced Kikuyu and Luo groups, which supported the Kenya African National Union (hereafter called KANU). KADU desired a federal system in which considerable power would be allocated to regional governments. An upper house was considered necessary to safeguard the autonomy of the regions and to assure sufficient representation of minority interests at the center, for it was recognized that a unicameral legislature elected on the basis of "one-man, one-vote" might very well be completely controlled by KANU which favored a greater centralization of power. Mr. Ronald Ngala, leader of KADU, said upon his arrival in London for the 1962 constitutional conference, "We believe that a two-Chamber Parliament with a Senate especially charged with preserving the rights of the regions is the only way to ensure the continuing liberty of the individual."⁷

⁶ *Daily Nation*, September 23, 1964.

⁷ *East African Standard*, February 12, 1962.

ROLE OF SENATE IN KENYAN POLITICAL SYSTEM

Bicameralism was also supported by Asian merchants and European settlers in Kenya as a means of providing some check against hasty, ill-advised, or discriminatory action.

KADU submitted to the 1962 conference a detailed set of proposals which included provision for a powerful Senate to be elected indirectly and on a regional basis. It would consist of five members for each region, chosen by the regional assembly and serving for a fixed term of four years. Its legislative power would be equal to that of the lower chamber; conflicts between the two would be resolved by a joint committee. The cabinet would be responsible to the entire National Assembly; its members would be elected by both houses sitting together. A 75 per cent affirmative vote in each house would be necessary for constitutional amendments, and a two-thirds majority would be required for the declaration of an emergency.

KANU went to London firmly committed to a unicameral parliament elected on the basis of universal suffrage. A second chamber would be too expensive and would make effective government too difficult, they held. The KADU proposal was condemned by KANU's leader, Mr. Jomo Kenyatta, as "the thin edge of the wedge which regionalists would exploit."⁸ KADU was so adamant, however, that KANU conceded the principle of bicameralism after a few days, but insisted that the Senate must not be empowered to block bills passed by the lower house and that it must be composed of one representative elected from each of the existing administrative districts.

KADU was very reluctant to accept such fundamental changes in its concept of what the upper house should be, but agreement was finally reached on a compromise solution which was based on a series of memoranda prepared by the Secretary of State for the Colonies, Mr. Reginald Maudling. He defined the purposes of a second chamber to be "partly to ensure proper representation of geographical views and interests, partly to act as a revising and reforming house, and also, possibly most important, to act as fundamental protector of individual rights and liberties."⁹ The essential point regarding its composition, he submitted, was to assure "particular influence to local or special interests."¹⁰ Election by districts would, he believed, "provide a much more effective safeguard for minorities and individuals" than regional elections which would only produce an unworkable house.¹¹ It was agreed, accordingly, that each of the forty districts plus the Nairobi area should elect one Senator, with qualifications for voters and candidates being the same as for local government elections. Moreover, consideration would be given in subsequent negotiations at Nairobi, which would be

⁸ *Ibid.*, February 26, 1962.

⁹ *Ibid.*, March 22, 1962.

¹⁰ *Ibid.*, March 13, 1962.

¹¹ *Ibid.*, March 22, 1962.

necessary to fill in the details of the constitutional framework, to including "non-voting members representing special interests."¹³

Mr. Maudling maintained that the Senate's powers must not be such as to "involve the possibility of bringing the government of the country to a standstill," but that they must be sufficient to prevent the majority from infringing the rights of individuals and minorities as defined in the Constitution.¹³ He therefore proposed that the Senate's legislative authority should be as limited as that of the House of Lords, but that its approval by a very large majority should be required for the use of emergency powers and for any changes in the Constitution which might affect the entrenched rights of individuals, regions, tribal authorities, or districts. These principles were accepted, and it was stipulated in the report of the London conference that a majority of 75 per cent of each house would be necessary for any constitutional amendments except those affecting the entrenched rights for which a 90 per cent majority in the Senate would be required, and that "substantially more than 50 per cent" of each house would have to approve the declaration of a state of emergency.¹⁴ Sixty-five per cent was subsequently agreed to.

KADU had thus won a second chamber for Kenya which was considerably weaker than it had wished for, but which had at least been given sufficient power to enable it to safeguard the Constitution. Whether it would function as a bulwark for regionalism seemed highly questionable, however, since the regions themselves would not be represented therein.

The only problems relating to the Senate which provoked open controversy as the final draft of the Constitution took shape in Nairobi were concerned with how its members were to be chosen. Strong objections were raised in the Kenya Legislative Council when the terms of the franchise were announced. These specified that to vote in Senate elections, one must either (1) be listed as the rateable owner or occupier of property by the local government authority for the place of registration and have paid all rates due on such property, or (2) have paid for each of the past three years a rate or tax levied for general purposes by that authority, or (3) have ordinarily resided in the local government area wherein he registered for at least five out of the preceding seven years, or (4) be married to a person falling in one of the previous categories. Such qualifications contrasted sharply with those required of voters for the House of Representatives, which were simply that one must have ordinarily resided in Kenya for at least a year preceding registration and in the constituency for only five months of that year. The difference was said to be designed to ensure that Senators would be elected by persons who were really identified with the

¹³ United Kingdom Parliamentary Papers, 1962, Cmd. 1700, *Report of the Kenya Constitutional Conference, 1962*, Appendix II, p. 16.

¹³ *East African Standard*, March 13, 1962.

¹⁴ Cmd. 1700, Appendix II, pp. 18-19.

ROLE OF SENATE IN KENYAN POLITICAL SYSTEM

areas in which they voted, and reflected the intention expressed at London to have local interests particularly represented in the second chamber. Mr. Oginga Odinga, KANU vice-president, condemned these special requirements as "unfair, unjust, discriminatory, contrary to the Bill of Rights and democratic principles,"¹⁵ and charged that their effect would be to deny the vote to poorer people and to those who had been removed from their home areas to detention camps during the Mau Mau Emergency. Such allegations were denied by the Minister for Legal Affairs, Mr. A. M. F. Webb, and the Minister for Labor, Mr. T. J. Mboya, who explained that the phrase "ordinarily resident" would be broadly interpreted so that Emergency detainees would not be excluded. The legislature thereupon defeated Mr. Odinga's motion which asked that the franchise for the Senate be the same as that for the lower house.

None of those who defended the controversial requirements argued that their aim was to favor property owners in Senate elections and thereby produce a somewhat conservative body which would balance the more democratically elected House of Representatives. A further indication that no such purpose was intended for the second chamber was the decision to drop the "possibility" accepted at London that non-voting members might be included to represent special interests—a decision which prompted a sharp but futile protest by Sir Frederick Cavendish-Bentinck, the leader of the European political group known as the Kenya Coalition.

Differences of opinion also emerged regarding the shape of Senate constituencies. There was some pressure for the creation of new districts to permit a more satisfactory representation for certain tribes, but this was initially resisted by KANU on the grounds that it would encourage people to think of themselves as tribal groups rather than as one nation. The commission which was set up to demarcate the six regions into which the country was to be divided recommended boundaries which cut through some of the existing districts in order to separate antagonistic tribes and to group together others that wished to be so associated.¹⁶ The Government accepted its report with only minor variations and therefore found it necessary to modify certain district borders so that no district would be located in more than one region. In the process, three districts were actually partitioned out of existence and three new ones created. The effect of these changes was to make the Senate constituencies more homogeneous tribally and thus provide more nearly—although still not perfectly—for the representation of tribes as such in the upper chamber. In thirty-five of the forty-one constituencies, one tribe constituted an absolute majority of the population and in seventeen districts over 90 per cent were of the same tribe.

¹⁵ Kenya Legislative Council, *Debates*, October 18, 1962, col. 168.

¹⁶ United Kingdom Parliamentary Papers, 1962, Cmd. 1899, *Kenya Report of the Regional Boundaries Commission*, pp. 1-16.

PARLIAMENTARY AFFAIRS

It was clear that representation on the basis of one member for each of these constituencies would operate to the advantage of the smaller and less advanced tribes, giving them more seats in the Senate than they could expect to receive on the basis of numbers alone. The pastoral tribes were generally favored over the agricultural tribes, for the districts of the former were more sparsely populated. The Samburu District, for example, had a population of 56,600 and the Masai District of Kajiado, 68,400; while the Luo District of Central Nyanza contained 617,800 and the Abaluhya District of Kakamega, 600,200.¹⁷ The districts had been defined in such a way as to assure the Kikuyu a number of seats proportionate to their size, but there were striking disproportions for other tribes. The Luo, for example, constituted approximately 13 per cent of the total population of Kenya and the Masai 1.7 per cent, but the number of predominantly Masai districts was equal to the number of predominantly Luo districts and each of these tribes would have 5 per cent of the seats in the Senate.

Agreement was reached, apparently without difficulty, that Senators should be directly elected and that the age requirement for them should be the same as for members of the House of Representatives—twenty-one years. There was thus no effort by the constitution-makers to assure that the second chamber would be a Council of Elders. The qualifications for election to the Senate did differ from those for the lower house, however, in that candidates for the former were required to be registered as voters in the particular constituency they proposed to represent. This was evidently designed to increase the likelihood that each Senator would feel a special concern for his own district.

It was also agreed readily that a Senator's term should be fixed for six years and that the life of the Senate would not be affected by the dissolution of the House of Representatives or the fall of a Government. This provision meant, as Mr. Mboya pointed out later, that "changes in the mood of the electorate will not be reflected so quickly in the composition of the Senate as in the composition of the House of Representatives" and was intended to enable Senators to "achieve a degree of detachment from the more violent fluctuations of political mood and party politics."¹⁸ The chances of fluctuation were further reduced by the provision that the expiration of the members' terms would be staggered so that no more than one-third of the seats would fall vacant at any one time.

The legislative powers specified for the Senate were modelled closely on those of the House of Lords, as had been decided at London. It was provided that money bills must originate in the lower house and could only be delayed by the Senate for one month. The reconsideration of other bills

¹⁷ *Kenya Population Census, 1962. Tables. Advance Report of Volumes I and II* (Economics and Statistics Division, Ministry of Finance of Economic Planning, January 1964), p. 4.

¹⁸ *East Africa Standard*, November 6, 1964.

could be forced; if the Senate failed to pass one or passed it with amendments unacceptable to the House of Representatives, that House could override the Senate by simply passing the bill again one year after its original action.

The Senate was given no control over the life of the Government. The Constitution specified that the Prime Minister would be chosen from the House of Representatives and would hold his position so long as he commanded a majority in that House. Only the lower house could pass a motion of no confidence.

No provision appeared in the final draft of the Constitution regarding its amendment. This omission was said by the Minister for Legal Affairs to be due to the fact that Kenya could not amend the basic instrument so long as it remained a dependency. The presumption was that the provisions agreed to at the London conference would become effective when independence was attained.

It soon became apparent, however, that those provisions were no longer acceptable to KANU. In the campaign preceding the general election of May 1963, the candidates of that party pointed out that it would be practically impossible to secure a 90 per cent majority in the upper house under any circumstances and that only five of its members could block a change strongly desired by all the other Senators and the entire House of Representatives. Mr. Mboya, in particular, urged that the Constitution be made more flexible as a means of strengthening constitutionalism itself. A constitution with such unworkable amendment provisions would create unbearable strains and might have to be broken, he argued.

KANU failed to win 90 per cent of the seats in the Senate, but did gain a majority in both houses, whereupon its leaders claimed that they had received a mandate to make the changes in the Constitution which they had proposed during the campaign. KADU maintained, however, that the electorate had merely given KANU a mandate to govern under the Constitution, and that the Constitution itself could be altered only in accordance with the amending procedure which had been agreed to at London.

The KANU view prevailed, for the question was finally settled through further negotiations with the British. At a conference which opened in London on September 25, 1963, the new Government demanded that ordinary amendments should be made by 65 per cent of the two houses sitting together, that the entrenched clauses should be amended by a 65 per cent majority in each of the two houses separately, and that a proposed amendment which Parliament rejected could be passed by a 65 per cent affirmative vote in a national referendum. The Secretary of State for the Colonies, Mr. Duncan Sandys, considered it necessary to go at least part way to meet these demands lest the entire Constitution be destroyed. He agreed, therefore, that the sections defining the powers of the regional

assemblies should be removed from the entrenched category, and that all sections which were not entrenched could be amended by a two-thirds majority in a referendum plus a simple majority of both houses in case a 75 per cent affirmative vote could not be mobilized in the two chambers initially. The clauses which remained entrenched and therefore could still not be changed without a 90 per cent majority in the Senate were those affecting the rights of the individual; the judiciary; the boundaries of the regions; the structure, composition, franchise, and procedure of the regional assemblies; tribal land rights; the Senate; the boundaries of the districts; and the amendment procedure.¹⁹ Thus the Senate retained the power to prevent assaults on constitutionally defined minority rights, but its capacity to defend the substance of the regional system itself was severely reduced.

II

The elections gave KANU a much smaller margin in the Senate than in the House of Representatives. Approximately two-thirds of the seats in the lower chamber were won by that party; while in the Senate contests sixteen KADU candidates were victorious, two members of the African Peoples' Party (hereafter called APP) triumphed over their KANU opponents, and only eighteen seats were won by KANU. KANU also received, however, the support of one Senator belonging to the Northern Province United Association, with which it had been allied during the campaign, and of one Independent who joined KANU as soon as the electoral results were announced, so that it had a majority from the start of 20 to 18. Moreover, one KADU member crossed the floor on the first day the Senate met and the two APP members followed him three months later. This gave the Government side a majority of 60.5 per cent (since three seats remained unfilled due to the boycott of the elections by the districts of the North-Eastern Region in protest against Britain's refusal to cede that area to the Somali Republic), which meant that KADU still had enough strength to prevent the declaration of an emergency, to force a referendum on any proposal to amend the ordinary provisions of the Constitution, and to block absolutely any effort to alter the entrenched clauses. This situation continued until February 28, 1964, when three members from the North-Eastern Region took their seats on the Government back-benches and another KADU Senator crossed the floor. The Government now enjoyed a 65.8 per cent majority—sufficient for the proclamation of an emergency but still short of the amount required for constitutional amendment. The Opposition suffered only one more defection during the period under examination, and that was not enough to give the Government control of the amending process.

As had been expected, the basis of representation in the Senate operated

¹⁹ United Kingdom Parliamentary Papers, 1963, Cmd. 2156, *Kenya Independence Conference, 1963*, pp. 7-8, 21-22.

in favor of KADU and the smaller tribes which supported it—so much so that the June 14th issue of the militantly pro-KANU magazine *Pan-Africa* termed the outcome of the election altogether unfair and undemocratic. In the twenty-eight contested constituencies, KANU polled a total of 1,028,906 votes and won thirteen seats, while KADU polled 474,933 votes and won twelve seats. The population of the five districts in which KANU candidates were unopposed was 880,000 while the population of the four districts which returned KADU candidates without contest was 351,800. Thus it could be said that on the average each KANU Senator had received the support of approximately twice as many voters as had each KADU Senator.

The composition of the new Senate was not such, however, as to provide any representation for the European and Asian minorities or for the propertied interests. All of its seats were filled by black Africans and none by men of wealth. Approximately half of its members were former school teachers and most of the others had earned their living in minor government posts. Only five described themselves as businessmen, and their businesses were quite small.

Whether the Senators would bring the benefits of greater maturity, wider experience, and broader vision to bear as they reviewed the work of the lower house seemed doubtful, for it was clear that the more able politicians had sought seats in the other chamber. The average age of the Senators was thirty-seven—hardly high enough to classify them as elders. Only three had received a university-level education; two of these graduated in Veterinary Science from Makerere College in Uganda and one attended that institution for three years but failed to complete the degree requirements. Only seven of them had travelled outside East Africa. Only two had served in the Legislative Council and neither of them for more than two years. Also questionable was whether the Senators would be any less partisan in their deliberations than the members of the House of Representatives. Approximately half of them had been very actively involved in politics, serving as chairman, secretary, or treasurer of local party branches.

III

Members on both sides of the aisle repeatedly affirmed that the Senate should play a vigorous part in the legislative process. Senators must carefully scrutinize every bill, they said, and should not hesitate to amend or reject those which had been passed by the House of Representatives without adequate consideration.

The Senate's legislative powers were asserted in practice to a very modest extent, however. Although the Constitution clearly permitted Senators to originate non-money bills, no such initiative was actually exercised. Every bill considered by the Senate was introduced by one of the members of the

Government Front Bench after having been passed by the House of Representatives.

Nor did the checking and revising function of the second chamber prove to be particularly significant.

Only one bill out of the sixty-two on which the Senate completed action during the period under examination was completely rejected by that body, and it was quickly repassed by the lower house. This was a measure which provided increased pensions for retired civil servants. It was opposed by Senators of both parties on the ground that the new Government could not afford such a heavy financial burden and should not be expected to shoulder it since the pensioners were mainly expatriates who had been employed by the colonial regime. A motion to return it to the lower house for reconsideration was carried without division on August 7, 1963, over the objections of the Leader of Government Business.

It was not necessary for the House of Representatives to take further action on this measure since it was a money bill and would therefore be presented to the Governor for his assent a month after being sent to the Senate even if that body failed to pass it—"unless," according to Sec. 51 (1) of the Constitution, "the House of Representatives otherwise resolves."²⁰ The Speaker of the lower house delayed presenting this bill for more than one month, however, because the Representatives had adjourned on August 2 and did not reconvene until September 10, and he felt that they should be given an opportunity to resolve that it should not now go forward. Such a resolution was moved by the Leader of the Opposition, Mr. Ngala, who emphasized that the Senators were "elected representatives . . . not just a House of Lords type of people" and argued that their decision therefore "shows that the whole country, the public, is completely against the Bill."²¹ The Minister for Justice and Constitutional Affairs, Mr. Mboya, stated that the Government respected the Senate, but could not accept Mr. Ngala's motion because the bill had already been fully debated, no new arguments had been produced in the upper chamber, and nothing had happened since the House's original action to justify a reversal of its position. The motion was thereupon negatived without division.

Ironically, in this case the Senators were less resistant to the mood of the electorate than were the members of the House of Representatives. They might even have been accused, with some justification, of toadying to the masses in refusing to approve an unpopular but necessary bill and thereby forcing the lower house to assume full responsibility for its enactment. No such charge was actually made, however. In fact, only one member of the House of Representatives expressed any irritation over what the Senate had done; a KANU back-bencher, Mr. Waira Kamau, said simply :

²⁰ Kenya Gazette Supplement No. 30, 18 April 1963, p. 48.

²¹ Kenya House of Representatives, *Official Report*, September 12, 1963, cols. 1855-1856.

. . . if we continue to repeat such Motions or Bills whenever they are passed, it is going to cause confusion between the Government and the public outside. So I would say to the House that whenever it passes a Bill, it should be final and other people should not play about with it.²²

The Senate succeeded in securing amendments to only three bills and all of these changes were quite minor. The Pyrethrum Bill as passed by the lower house required licensed growers of pyrethrum to pay a cess to the Marketing Board, which would issue to them in return one unit of loan stock for each 100 shillings paid in. Any amount less than 100 shillings would be credited to the next unit of stock, provided that if one ceased to be a licensed grower he would forfeit his interest in that amount. Sen. N. W. Munoko, the Leader of the Opposition, moved that the proviso be deleted, arguing that it would be unjust to require the forfeiture of any amount and that the poorer growers would be the ones who would suffer most. This amendment was accepted by the Leader of Government Business and approved by the Committee of the Whole Senate on March 10, 1964; but after consulting with the Minister for Agriculture, he moved that the bill be recommitted and thereupon proposed that the words "100 shillings" be changed to "twenty shillings" throughout the bill and that the forfeiture proviso remain.²³ Sen. Munoko accepted this modification and the bill, so amended, was finally passed by the Senate. When the House of Representatives re-assembled on June 9, the Minister for Agriculture announced that the Government was quite prepared to accept the Senate amendment, offering no other explanation than that 100 shillings was too high a figure for some of the small farmers. The amendment was thereupon carried without debate.

The second bill to be successfully amended by the Senate was the Central Road Authority Bill. Sen. G. G. Kago (KANU) proposed that an appointee of the Minister for Commerce and Industry be added to the membership of the Authority since that Minister had a strong interest in the determination of which roads should be constructed and improved. The amendment was accepted by the Leader of Government Business and approved by the Senate without debate on September 1, 1964. Its adoption by the House of Representatives was moved on October 14 by the Minister for Works, Communications and Power, who said that he saw no particular reason for including such an additional member but that it really made no difference to him. The Minister for Agriculture and the Minister for Commerce and Industry also spoke in support of the amendment. It was opposed by a few KADU members, one of whom strongly implied that the Minister for Commerce and Industry had himself surreptitiously suggested such a change to the Senate. This allegation was denied by the Minister and withdrawn in com-

²² *Ibid.*, cols. 1862-1863.

²³ Kenya Senate, *Official Report*, March 17, 1964, col. 327.

PARLIAMENTARY AFFAIRS

pliance with the Deputy Speaker's ruling when it could not be substantiated.

Finally, two amendments were made in the Export Duty Bill on September 30, 1964. "Nyasaland" was changed to "Malawi" in the list of countries to which coffee might be shipped without the payment of export duties and the "Republic of South Africa" was dropped from the list. The Leader of Government Business warmly endorsed these alterations, which had been proposed by Sen. Kago (KANU), and they were approved without objection. The House of Representatives quickly agreed to the amendments after the Parliamentary Secretary to the Treasury termed them "purely procedural" and said the Senate had merely caught two "small errors" which the House had inadvertently made.²⁴

The only amendment passed by the Senate but rejected by the House was one which the Government was apparently prepared to accept originally. It provided that the consent of the entire National Assembly rather than of the House of Representatives alone should be required for the Cereals and Sugar Finance Corporation to incur an indebtedness exceeding £5 million. This amendment was introduced by the Leader of the Opposition, passed unanimously by the Senate on October 7, 1964, and presented to the House of Representatives by the Minister for Finance and Economic Planning without objection since, he said, "it amounts to the same thing."²⁵ The Speaker offered his opinion at this point, however, that such a change would in fact constitute an encroachment on the lower house's special responsibility for financial matters, whereupon the Minister conferred with his colleagues on the Front Bench and then announced that the Government opposed the amendment. It was thereupon defeated.

Additional amendments to the Central Road Authority Bill and to eighteen other measures were suggested by various Senators, but were not pressed to a vote except in six cases and then without success.

A mere tabulation of bills defeated or modified as a result of Senate action does not, of course, provide a sufficient indication of that body's role in law-making. It is possible that there was so little open conflict between the two houses because the wishes of Senators had been taken into account before the bills were introduced in the lower house, although there is no evidence of any systematic effort to discover their views in advance. It is true that the Leader of Government Business in the Senate received Cabinet papers and consulted frequently with individual Ministries, but he did not attend Cabinet meetings except on very rare occasions at the special invitation of the Prime Minister and his opinion on contemplated legislation was not sought as a regular procedure. Moreover, the KANU members of the two houses met in separate caucuses until only six weeks or so before the end of the period under examination.

²⁴ Kenya House of Representatives, *Official Report*, October 7, 1964, col. 3208.

²⁵ *Ibid.*, November 4, 1964, col. 4264.

ROLE OF SENATE IN KENYAN POLITICAL SYSTEM

It might also be argued that the will of the House of Representatives was challenged so seldom because it had done such an excellent job that the Senate simply felt there was no need for any revision. This argument was in fact put forward by four Senators who issued a public statement on September 23, 1964 in reply to criticism of the second chamber's performance.

Such a defense would be more persuasive if it could be demonstrated that the Senate actually considered the measures referred to it in a careful, thoughtful, and non-partisan manner.

As a matter of fact, the Senate's examination of bills were generally quite brief and often rather perfunctory. The average time between the first reading and final action was only six days. Five bills were disposed of in one day, fourteen in two days, one in three, and seventeen in four. Only seven bills were before that body for more than a fortnight and five of those were delayed because of a recess. Moreover, twenty-four bills—almost 40 per cent of those considered—were passed without discussion at any stage beyond the short explanatory statement by the Government member introducing them.

Speediest action was taken on the Immigration and Deportation (Miscellaneous Amendments) Bill. It was sent to members on the evening of February 27, 1964, and passed through all stages in both houses before lunch the following day. The Minister for Justice and Constitutional Affairs told the Senators that it was "not the policy of the Government to encroach upon the right of the Senate by trying to reduce the period within which they may read and consider Bills," but that immediate passage was necessary in this case "because of extreme urgency." Details could not be disclosed, he added, "due to security reasons."²⁶ The bill was thereupon approved without debate.

The Senate agreed to exempt twenty-three bills from Standing Order No. 88 which provided that not more than one stage in their consideration could be taken at a single sitting. In some cases the bills were termed urgent while in others the exemption was said to be sought simply to give the Senate enough work to keep it occupied that day.

There were strong objections from several Senators of both parties to this practice. The Government was rushing things so much, they charged, that there was not sufficient time to think about the bills, to consult constituents, or to debate them in a statesmanlike fashion. The Senate seemed to be regarded, some complained, as a mere rubber stamp. It is clear that Senators were several times called upon to act quickly on measures of which they had only the vaguest understanding. The Deputy Chief Whip on the Government side himself expressed concern over the pressure to which the Senate was subjected. "This is becoming rather ridiculous," he said. "At times we are blind to what we are passing."²⁷

²⁶ Kenya Senate, *Official Report*, February 28, 1964, col. 94.

²⁷ *Ibid.*, March 4, 1964, col. 105 (Sen. J. M. Koinange).

PARLIAMENTARY AFFAIRS

A particularly unfortunate effect of this practice was that it reduced the opportunity to move amendments. When Sen. Munoko (KADU) attempted to amend the Native Vessels (Amendment) Bill at the Committee Stage after having notified the Clerk of his intention to do so just before the Senate went into committee, his motion was disallowed by the Chairman because he had not complied with the Standing Order which required that notification of an amendment must be given before the beginning of the sitting at which the bill was considered in committee. Sen. Munoko pointed out that they had gone into committee immediately after the Second Reading at the same sitting, and protested that this would "set a precedent that the Government can come at any time and have the Second Reading and Committee Stage on the same day, and in that way they will avoid having any amendments."²⁸ His point was that the need for an amendment was not apt to become apparent until the Second Reading, and then it would be too late.

The treatment of money bills was especially ineffectual. The Committee Stage was omitted altogether for six of them without objection since, as the Leader of Government Business pointed out, the Senate was powerless to alter such measures. Several Senators, indeed, questioned the usefulness of their considering money bills at all. Sen. J. K. Kebaso (KANU) at one point asked the Speaker, "Is it not wasting the time of the public to take all this afternoon for the graduated personal tax Bill when the Senators know that they cannot interfere with money Bills?"²⁹ When criticism of the Supplementary Appropriation Bill became rather spirited, the Speaker felt impelled to read out that part of the Constitution which stipulated that the Senate could not amend money bills and then said that there had been too much talk about making changes in the various items. This prompted the Deputy Chief Whip for the Government to ask, "Why are these money Bills brought to this Senate. . . ? What are we here for?"³⁰ to which the Speaker could only reply that the situation could not be changed without a constitutional amendment.

Senators on both sides of the aisle indicated their dissatisfaction with several bills in the course of the debates, but party affiliation was almost always determinative when the time came to vote. A thorough analysis of their voting behavior is not possible since a division took place on only three bills. One of these was the unanimously approved Compensation and Retiring Benefits (Amendment) Bill, which required a division because it involved a redefinition of certain rights enshrined in the Constitution. Another was the Essential Services Bill on which the voting followed party lines exactly with the single exception of Sen. C. K. Lubembe (KANU). The third was the Agriculture (Amendment) Bill which was opposed by all the KADU members and supported by everyone on the Government side except

²⁸ *Ibid.*, December 4, 1963, col. 1279.

²⁹ *Ibid.*, col. 1227.

³⁰ *Ibid.*, March 4, 1964, col. 138 (Sen. J. M. Koinange).

ROLE OF SENATE IN KENYAN POLITICAL SYSTEM

the two APP Senators who had crossed the floor three days previously. The KANU majority was sufficiently cohesive in the *viva voce* voting on the other bills to enable the Leader of Government Business to have his way in all cases but one—the rejection of the Pensions (Increase) (Amendment) Bill. The Agriculture (Amendment) Bill, the Trade Disputes Bill, the Asian Officers' Family Pensions (Amendment) Bill, and the Essential Services Bill were each openly criticized by a sufficiently large number of KANU members to defeat them had those Senators pressed their opposition to the point of voting negatively.

It is clear that pressure was brought to bear on the dissidents by the party leadership before the voting took place on these measures. In his reply on the Asian Officers' Family Pension (Amendment) Bill, the Leader of Government Business invoked party loyalty in the following terms:

It is the intention of Government—let me make it clear, particularly to Members on this side of the House—that this Bill should be passed and become law as quickly as possible. . . . I am asking hon. Senators, particularly on this side, to support the Second Reading of this Bill, otherwise I do not know what the consequences will be.³¹

When the Agriculture (Amendment) Bill was under consideration, Sen. J. K. Lenayiarra (KADU) expressed his pleasure at seeing members from the other side stand up to speak against it. "This clearly shows," he said, "that the Members of the Senate are mature and are above party politics."³² But his colleague, Sen. W. K. Rotich noticed that some of the KANU members seemed to have changed their minds overnight. "Yesterday they were with us," he said, "they saw the thing as we saw it, and I understand that they have been instructed by the Minister who produced the Motion to support it."³³ The Leader of Government Business accused the Opposition of seeking to exploit the bill for partisan purposes and appealed explicitly to those behind him to vote affirmatively. When a KADU Senator raised a point of order on whether the Leader of Government Business could "force the Members on the other side to support the Bill," the Deputy Speaker ruled, "What is the use of appointing a Leader of Government Business if he cannot advise the Government Back-benchers?"³⁴ Some restiveness with party discipline was revealed in the debate on the Trade Disputes Bill. Sen. Kago, for example, protested, "We should not be told that we must pass this Bill or the other."³⁵ But although he and five other KANU Senators urged that it be amended, it too passed without change.

³¹ *Ibid.*, August 7, 1963, col. 764 (Sen. J. P. Mathenge).

³² *Ibid.*, September 20, 1963, col. 876.

³³ *Ibid.*, col. 877.

³⁴ *Ibid.*, col. 884.

³⁵ *Ibid.*, March 25, 1964, col. 489.

IV

An evaluation of the Kenya Senate must also take into account its efforts to criticize and advise the Government.

The Senators exercised much more initiative in this respect as they proceeded to introduce and debate motions and to ask parliamentary questions. Forty-eight motions were voted upon during the period under examination (not counting those dealing with the declaration of an emergency, which are treated separately below, nor those concerning Senate procedure), only seven of which were first considered by the House of Representatives and then introduced by the Leader of Government Business or at his direction. These seven either commended the Government or endorsed something for which it desired support. All of the others urged the Government to do something which it was not then doing.³⁶ Moreover, the Government was asked a total of 202 questions, followed by numerous supplementaries, none of which was obviously "planted".

The Senate did not use these weapons in such a way as to protect or promote the interests of the regions, however. KADU sought to do so at the start, but its efforts were resisted by KANU members who argued that it was altogether improper for Senators to act as regional representatives. The first motion introduced by a KADU member affirmed that the development of the Western Region was being hampered by the lack of electric power and called upon the Government to supply electricity to the two townships there. Sen. J. P. Mathenge (KANU) maintained that this motion was based on a "misconception." He said:

The Mover of this Motion has placed himself as a Member for the Western Region, not for his particular constituency. If he had moved some Motion referring just to his constituency, well and good, but it looks as if he is moving this Motion as a representative of the Western Region.³⁷

Sen. Mathenge became the Leader of Government Business a fortnight later, and the principle which he had enunciated was generally observed thereafter. There were indeed only two more motions which reflected concern for a particular region. The first of these was moved by Sen. A. R. Tsalwa (KADU) on November 21, 1963; it called for the extension of the railway from Butere to Bungoma so that it would pass through Kakamega. That route should be followed, said Sen. Tsalwa, because Kakamega was the headquarters of the Western Region. This motion was amended at Sen. Mathenge's suggestion so as to delete any reference to Kakamega. The second one asked the Government to encourage the construction of a textile factory in Nyanza Region. It was introduced by a KANU Senator who emphasized that the purpose of such a factory would be to benefit the entire country, and was passed without

³⁶ There were also six motions on the adjournment which provided further occasions for criticism of Government policy. None of them was pressed to a vote, however, and they are not included in the following analysis.

³⁷ Kenya Senate, *Official Report*, July 2, 1963, col. 97.

significant change. When, during the discussion of the latter motion, KADU Senators attacked the Minister for Commerce and Industry for overlooking the development of regions other than his own, the Leader of Government Business deplored such criticism since, he said, it might become "a precedent whereby the Senate will be regarded not as a national house but as a Regional Assembly."³⁸

There was, moreover, strong resistance on the part of a few KANU members to allowing the Senate to become a forum for the expression of district or tribal interests, although such a role had clearly been intended for it by the framers of the Constitution and had been recognized as legitimate by Sen. Mathenge. In the course of the debate on the Governor's speech to the National Assembly, Sen. M. T. Jilo asserted:

We, as Senators of this House, are not, and have not been told or authorized to speak on behalf of our constituencies, but to say things that represent the views of the people of the country as a whole. . . . The Leader of the Opposition has shown clearly that he himself is a tribalist, and his speech yesterday shows that he is not representing the country as a whole. . . . His speech was that of a man representing one particular district of the country.³⁹

Similarly, Sen. Lubembe attacked a KADU motion which urged the Government to eliminate wild game outside the Parks so as to reduce the loss of life and property particularly in the Masai and Samburu districts, saying that it was tribalistic and therefore "outside the jurisdiction of this Senate." He added, "When you start talking of tribalism . . . , you become no statesman. Therefore you do not qualify to sit in this Senate."⁴⁰

The Jilo-Lubembe interpretation did not in fact prevail, however. KADU Senators insisted that they were perfectly justified in emphasizing the particular grievances and desires of their own constituents since they were elected by them and were best acquainted with their problems and needs. Accordingly, they introduced ten motions which called upon the Government to do something for individual tribes or districts, asked thirty-seven questions dealing with purely local matters, and persisted in criticizing the Government for neglecting the economic and educational development of the more backward tribes and for favoring the Kikuyu and Luo in appointments to the civil service, the award of scholarships for study abroad, the provision of water and electricity, and the location of hospitals, schools, roads, factories, and settlement schemes. A strong concern for their own districts was also displayed by several KANU Senators, particularly those from the smaller tribes. Their attitude was illustrated by Sen. J. H. Robaro when he asserted, "I who represent the Turkana must speak for them and

³⁸ *Ibid.*, November 21, 1963, col. 994.

³⁹ *Ibid.*, June 20, 1963, col. 37.

⁴⁰ *Ibid.*, August 6, 1963, col. 727.

tell the Government all about them and their difficulties."⁴¹ There were sixty-nine questions and five motions from the Government benches reflecting the interests of particular localities. When one of these motions was attacked as "tribalistic and selfish," Sen. S. F. Mbeo (KANU) asked for a ruling from the chair as to whether it was wrong for a Senator to introduce a motion dealing with his own district. The Deputy Speaker replied that "the Government would not have allowed this Motion to be brought in this House if it was wrong."⁴² KANU Senators also voiced criticism of Government discrimination against certain tribes, and their right to do this was also upheld by the chair. When Sen. Lubembe asked the Deputy Speaker whether it was in order for Sen. J. M. Nthula (KANU) to complain that the Wakamba had only one Minister in the Cabinet, he replied, "Why was he elected if he cannot represent his tribe?"⁴³

KANU Senators displayed considerable independence of the party leadership in asking questions as well as in introducing and speaking on motions. One hundred and thirty-six of the questions came from them. Seventeen of the motions which originated in the Senate were introduced by KANU members and most of these were evidently not cleared with the Leader of Government Business previously, for he or another Front Bencher proposed amendments to eleven of them and opposed three others altogether. Several KANU Senators spoke in support of these motions before the wishes of the Government were made known, and a few were openly reluctant to change their position thereafter. Moreover, seventeen of the KADU motions drew favorable comments from across the aisle. A few KANU Senators were quite outspoken in asserting their independence. Sen. Lubembe, for example, announced that he would support the Opposition motion calling for immediate Africanization of the staff of the Parliament Buildings "even if the Government bring up all sorts of amendments, and even if the Leader of Government Business says I must not support it."⁴⁴ Sen. Kebaso endorsed the motion urging the Government to reconsider its restrictions on coffee planting with the comment, "We are not here merely to voice the opinion of Government, we are free thinkers and should express our thoughts."⁴⁵

The Government responded to thirty-six of the forty-one motions which it did not initiate by either calling for their rejection or proposing amendments which would render them acceptable, and when the votes were taken party lines actually held well enough for its wishes to prevail in all but four cases. The Leader of Government Business was defeated on a division only once; his amendment to a motion which urged that the Government make loans to County Councils for the improvement of housing for primary school

⁴¹ *Ibid.*, August 11, 1964, p. 1 2 (typescript).

⁴² *Ibid.*, September 19, 1963, cols. 848-849.

⁴³ *Ibid.*, March 12, 1964, col. 276.

⁴⁴ *Ibid.*, July 25, 1963, col. 504.

⁴⁵ *Ibid.*, November 27, 1963, col. 1093.

ROLE OF SENATE IN KENYAN POLITICAL SYSTEM

teachers was negatived on March 12, 1964 by a vote of 15 to 11. Seven KANU Senators defied the Whip, all but one of whom were themselves former schoolteachers.

The effectiveness of the Senate's effort to influence the behavior of the Executive was severely limited by the fact that there was no Minister and only one Parliamentary Secretary among its members. The failure to name a Senator to the Cabinet was thought by some to be part of a calculated attempt by the Government to reduce the significance of the second chamber, while others felt that it resulted simply from the fact that there was no one of Ministerial caliber in that body. Whatever the explanation might be the effect was clear enough: the Senate was denied the benefit of direct, regular communication with the Cabinet and of fully authoritative explanations of Government policy.

One Senator was designated as Leader of Government Business and ten others were given responsibility for answering on behalf of particular Ministries during the debates and question periods. These ten were clearly not in close touch with their respective Ministries, however, and liaison between the Senate and the Government was conducted almost entirely by the Leader of Government Business.

These arrangements were sharply criticized by the Opposition. Mr. R. S. Alexander, a KADU member of the House of Representatives, called attention to contradictory statements in the two chambers regarding Government policy on nationalization of the radio and press, and held that this was merely an illustration of the difficulty which was bound to arise unless at least one Minister could be drawn from the upper house. Such an appointment was necessary, he said, "for the smooth working, the efficient working of the Senate."⁴⁶ Sen. Munoko (KADU) charged that the Senators on the Front Bench could not "get the inside of the workings of the Ministries" and the Senate could therefore not "carry out the Government Business in a respectable manner."⁴⁷

In an effort to improve the situation, a provision was added to the Constitution at the London conference of September-October 1963 which authorized Ministers to attend all meetings of the house of which they were not a member and to take part in its deliberations but not to vote.

Thereafter, Senators repeatedly asked that various Ministers be invited to appear before them to reply to certain questions and motions, but the only cabinet members who actually attended the Senate during the period under examination were the Minister for Justice and Constitutional Affairs, the Minister for Information, Broadcasting and Tourism, and the Minister for Education. The first of these was present at the two meetings devoted to the declaration of an Emergency in the North-Eastern Region and urged

⁴⁶ Kenya House of Representatives, *Official Report*, July 2, 1963, col. 495.

⁴⁷ Kenya Senate, *Official Report*, July 9, 1963, col. 291.

PARLIAMENTARY AFFAIRS

in the strongest possible terms that the Senate act favorably. He appeared again two months later when the extension of the Emergency was considered, but did not speak in support of the motion then as there was clearly no danger of its being defeated. He also participated in the debate on the Immigration and Deportation (Miscellaneous Amendments) Bill at the same meeting, stressing the necessity for immediate approval by the Senate. The visit of the Minister for Information coincided with the introduction of the Kenya Broadcasting Corporation (Nationalization) Bill on June 25, 1964; he departed as soon as consent was secured to waiving the Standing Orders so that its passage could be accelerated. Only the Minister for Education came to answer parliamentary questions, attending briefly the meeting of September 29, 1964. Such limited appearances were quite in keeping with the wishes of the Leader of Government Business; he told the Senate that he had not wanted Ministers to come "all the time" for "it would detract from the dignity of this House."⁴⁸ Others were not satisfied, however. Particularly distressing was the failure of the Prime Minister to visit the upper house; it seemed to indicate, complained the Chief Government Whip, that the Senate was "not recognized."⁴⁹

The Leader of Government Business himself clearly thought that the problem of liaison demanded some other solution. When he was asked why he had not been appointed a Minister, he declined to offer an explanation but confessed his belief that "it should have been done" and invited the questioner, Sen. Munoko (KADU), to table a motion on the matter so that the Senate could make its wishes known.⁵⁰ Sen. Munoko's motion, which called upon the Government to make the Leader of Government Business a Minister without Portfolio and to pay a salary of £400 to each of the Senators on the Front Bench, was ruled inadmissible by the Speaker on July 3, however, because of the constitutional restrictions on the Senate with regard to financial measures. Later that month the Leader of Government Business was sharply criticized by the Speaker for his tardiness in supplying answers to parliamentary questions. He replied that he was hampered by the fact that he lacked executive authority and had received very little cooperation from the Ministries. When the Government spokesman failed again the following day to have an answer ready at the question period and cited in defense the lack of Parliamentary Secretaries in the Senate, the Speaker commented that something was "very seriously lacking in Government organization here," and added that if such occurrences continued he did not see how the Senate could proceed with its business or, indeed, how its existence could be justified.⁵¹

The significance of the Senate's critical function was further reduced by

⁴⁸ *Ibid.*, July 1, 1964, galley proof H (Sen. J. P. Mathenge).

⁴⁹ *Ibid.*, June 30, 1964, col. 177 (page proof) (Sen. D. O. Makasembo).

⁵⁰ *Ibid.*, July 1, 1964, galley proof H.

⁵¹ *Ibid.*, July 31, 1964, galley proof E.

the lack of any assurance that its resolutions would be implemented, for that body had no means of enforcing its will. Senators of both parties repeatedly protested at the Government's failure to carry out their motions and even questioned the utility of continuing to pass them. The Government reply typically was that the proposals could not be put into effect until the necessary money became available. Action on the motions passed over the Government's objections seemed altogether unlikely. Sen. Mathenge made it clear that compliance with the one regarding teachers' housing could not be expected. That motion, he asserted, "means nothing as it is unconstitutional," since primary schools were under the jurisdiction of the regions.⁵² Moreover, he told the press after the Senate had passed a resolution urging the appointment of a committee to recommend ways of combatting tribalism that the Government rejected the motion and considered it "unfortunate" that it had even been considered.⁵³

The Senators were in a position to control the Government effectively in one respect, however—the use of emergency powers—and an opportunity to exercise this control arose at the end of 1963. On December 25, when both houses were adjourned, the Government proclaimed a State of Emergency in the North-Eastern Region to strengthen its hand in coping with the "shifita" raids in that area by those who favored its transfer to the Somali Republic. According to the Constitution, the Emergency would lapse unless approved by 65 per cent of each house within seven days.

KADU was unwilling to support the proclamation primarily because the Leader of the Opposition had not been consulted before it was issued. Members of that party also argued that there was no need for an Emergency since the Government had not exhausted the powers already available to it. The necessary majority was easily obtained in the House of Representatives, but the danger of defeat for the Government was very great in the Senate since KADU held 39 per cent of the seats there.

The Minister for Justice and Constitutional Affairs, Mr. Mboya, sought to persuade the Opposition Senators in a dramatic speech to the upper house on the morning of December 31, 1963. He indicated that the Government would continue the Emergency regardless of what the Senate might do, even if this involved violating the Constitution, saying:

Let nobody be deceived that if this Motion is not passed there will be no State of Emergency; there will still be a State of Emergency. Then you will have no one to blame but yourselves. The world will know that the people who first made it impossible for the Kenya Constitution to work were the Opposition and not the Government. . . .

My own view is that it is wrong to be forced to live outside the Constitution, . . . but I also know that as a Government we have a responsi-

⁵² *Ibid.*, March 12, 1964, col. 265.

⁵³ *Daily Nation*, March 20, 1964.

PARLIAMENTARY AFFAIRS

bility . . . to safeguard human lives, property and the integrity of this country's boundaries, and that responsibility is supreme. . . . this Government must act and, I hope, Mr. Speaker, with the full support of the Senate. . . .⁵⁴

The Opposition was not intimidated by this threat, however; all fourteen KADU Senators present voted against the proclamation. Every Senator on the Government side supported it, but their twenty-three votes produced an insufficient majority of only 60.5 per cent.

In a final effort to avert a serious constitutional crisis, Mr. Mboya and Mr. Joseph Murumbi, Minister of State, hastily arranged a meeting with Mr. Ngala and Mr. D. T. Moi, the chairman of KADU. Agreement was reached among them that the Senate should be called together again that afternoon so that the motion could be re-opened for another vote. The statement issued by these four affirmed that the Prime Minister had intended to contact Mr. Ngala before the debate on the Emergency but had been unable to do so.

At the afternoon session of the Senate, the Leader of the Opposition rose to support the Government motion rescinding the previous decision, but deplored the threat which had been made. His deputy also supported the motion, but asked the Government to "realize that the Senate has a part to play in the running of this country" and to honor the Constitution. The Leader of Government Business welcomed the change in the Opposition's position "at a critical moment . . . when the fabric of the Constitution could have been broken," and congratulated the Senate for having "proved its maturity as a guardian of the Constitution and of the rights of the people of Kenya."⁵⁵ The motion was thereupon passed.

V

A further function which might be expected of a second chamber would be for it to make a contribution towards the education of public opinion. The Kenya Senate cannot be judged a great success in this respect, however, for its debates reached a very small number of people and were accorded but slight respect.

There was little interest in observing the Senators' deliberations. The gallery overlooking the hall in which they met was quite small and almost never well filled. The House of Representatives, in contrast, generally attracted a sizeable audience, due largely to the fact that the better known politicians were to be seen in action there.

Moreover, the press and radio reported the proceedings of the Senate with much less prominence and detail than those of the lower house, and sometimes ignored Senate meetings altogether. Senators repeatedly complained of this neglect and called for more equal coverage. Some charged that the lack of publicity was part of the Government effort to undermine bi-

⁵⁴ Kenya Senate, *Official Report*, Dec. 31, 1963, cols. 32, 34.

⁵⁵ *Ibid.*, cols. 50-51 (Sen. N. W. Munoko, Sen. J. P. Mathenge).

cameralism; the failure to inform the people of what the Senate was doing was creating a situation, they feared, in which the electorate would be unwilling to support its expenses. Others accepted the less sinister explanation that what went on in the Senate was simply recognized by the mass media to be less important.

The voice of the Senate was further muted by the delay in publishing its Hansard. The official reports for the first year were made available to the public only in the form of three large and expensive volumes, and there was an interval of approximately five months between the last debate in each volume and the date of its publication. In contrast, daily Hansards were issued for the House of Representatives within about a fortnight of each meeting. Sen. Munoko (KADU) warned that the Senate was being made to appear "non-existent" and introduced a motion urging that its reports be published more promptly.⁵⁶ He was informed by the Leader of Government Business, however, that the Government Printer was too busy to produce daily issues and that there was no money available to pay for having them done elsewhere.

The educational effect of the Senate was also limited by the fact that the standard of its debates was not of a very high order. It was a rather boisterous and unruly house. Those speaking were frequently interrupted by shouts and fraudulent points of order which made it quite difficult for them to develop their arguments thoughtfully and for the debate to proceed systematically. The presiding officer cautioned Senators repeatedly to comply with the rules of order and warned them against undignified behaviour which would bring the House into disrepute. On one occasion he expelled an intoxicated member for fourteen sitting days. There were many irrelevancies and much repetition in Senators' speeches, and their language was often quite emotional and intemperate. It was also often evident that members had not done their "homework."

The quality of the Senate's deliberations was such, indeed, that the Leader of Government Business was prompted to warn its members that their conduct was weakening the case for retaining bicameralism. He said:

... I take this opportunity to appeal to hon. Members to try and behave with the dignity that is required of this House as the Senate. This is the Senior House, and it is supposed to consist of the elder statesmen. But at the moment there is a tendency for many people—and I have had this from other Members of the House of Representatives, who have made derogatory remarks on our procedure—to realize that a higher standard of debate and more serious contributions to the Government of the country, will make this House a considered one, and the more right we will have to remain if we are going to remain.⁵⁷

⁵⁶ *Ibid.*, July 9, 1963, col. 289.

⁵⁷ *Ibid.*, September 24, 1963, col. 901 (Sen. J. P. Mathenge).

VI

The Senate had little chance to exercise its formal constituent powers during the period under examination, for only one measure came before it which involved a constitutional question and therefore required resort to the amending process. This was the Compensation and Retiring Benefits (Amendment) Bill, which sought to exclude locally recruited officers from the provision of the Order in Council promulgated by the United Kingdom on December 11, 1963, dealing with pensions for civil servants who might be compulsorily retired in the interest of Africanization. The Constitution stated that benefits could not be reduced below what was provided by the laws in force at the time of independence, and the Speaker therefore ruled that a 75 per cent majority would be required for the passage of this bill. That was quickly and easily obtained on March 11, 1964; no objections were raised in the debate and no negative votes were recorded in the division.

There was, however, ample opportunity for the Senate to play its role as guardian of the Constitution in a larger sense as it discussed altering the distribution of powers between the center and the regions. Here too party considerations proved decisive. KADU members alone defended regionalism; they urged the Government to transfer powers and funds to the regions as required by the Constitution, argued that the system was working well, and warned against any attempt to scrap it. KANU Senators were uniformly critical of regionalism; they charged that it caused a waste of money and time, and complicated the problems of economic development, nation-building, and maintaining law and order. They not only made it clear that they favored a marked reduction in the powers of the regions but also took the position that it was altogether inappropriate for that system to be defended by anyone in the Senate. The Leader of Government Business affirmed, "In my view this question of *Majimbo* [regionalism] is just something which does not deserve any mention in a very respected House like this. . . ."⁵⁸

As it began to appear that the new Government was determined to secure modifications in the Constitution, a KADU Senator introduced a motion affirming adherence to the existing arrangements and urging the Government to discipline its members "who of late have been making irresponsible statements about changing the Constitution."⁵⁹ KANU Senators refused to support it, however. In fact, the Chief Government Whip said:

The mandate has been given . . . to change the Constitution overnight. . . . It is not up to us to say that we should not change the Constitution. This is a Motion which cannot be accepted by the Government. . . . It cannot be before this House. . . . if Kenyatta accepts that the Constitution will stay then it will stay, if not it must go, it will go because he is the man

⁵⁸ *Ibid.*, July 3, 1963, col. 151 (Sen. C. K. Lubembe).

⁵⁹ *Ibid.*, August 1, 1963, col. 662 (Sen. G. N. Kalya).

who has the mandate of the people. . . .⁶⁰

When the conference to revise the Constitution got under way in London later that year, all the KANU Senators sent a cable to Mr. Kenyatta supporting his demands although these included a substantial reduction in the ability of the Senate to prevent constitutional changes.

The terms of The Constitution of Kenya (Amendment) Bill which was published on October 21, 1964, were no doubt affected "prenatally" by the fact that the Senate still possessed considerable power over amendments. Changes in the entrenched clauses had to be carefully avoided for KANU knew that it could not mobilize the 90 per cent majority in the upper chamber required to make them effective. A drastic reduction in the authority of the regions was proposed, however, for a negative vote by all the KADU Senators on those changes could do no more than force a referendum which KANU was confident of winning.

VII

The Senate certainly did not play a larger role in the Kenyan political system during the sixteen months of its initial trial period than had been provided for it in the Constitution. There was no expansion of its authority and no increase in its functions either by usage or formal amendment.

In fact, the new second chamber had not even exercised its assigned powers in such a way as to realize fully the purposes intended by those who urged its creation.

The Senate clearly did not operate as a bulwark of regionalism, although its failure in this respect could readily have been anticipated and must be attributed primarily to the decisions at the two London conferences regarding its structure and powers.

Its performance as an instrument for protecting minority rights and local interests was more impressive, but left a good deal to be desired. At least it served as a forum in which tribal anxieties were freely ventilated and the needs of localities publicly articulated. Actually, however, the protests and demands of Senators speaking for the smaller tribes were no more effective than were those of their Representatives in the lower house. In both chambers, the minority tribes could be heard, but in neither could they determine the action on bills or motions. Although their strength was relatively greater in the Senate, party affiliation generally proved decisive when voting took place and the KANU majority almost invariably prevailed. The two major revolts against the party leadership were due more to loyalty to an occupational grouping (the motion on teachers' housing) or sensitivity to public opinion generally (the bill to increase pensions) than to specific constituency pressures.

When one looks back over the Senate's record, the conclusion can hardly be resisted that its survival was due less to the accomplishment of any

⁶⁰ *Ibid.*, cols. 672-673, 675 (Sen. D. O. Makasembo).

positive good than to the fact that it did no great harm. Its contribution to the making of laws was of very slight value, but it did not delay or tamper with bills so as to create problems for the Government. Its influence on the exercise of executive power was insignificant, but it did not harass the Ministers unduly with motions and questions. Its impact on public opinion was negligible, but it did not emerge as a rival of the House of Representatives in the eyes of the people. Its guardianship of the Constitution was irresolute; it did not interfere materially with the KANU effort to strip the regions of their powers.

The inconveniences which the Senate caused from time to time were not serious enough to justify the trouble which would have been involved in abolishing it. To eliminate it constitutionally would have been practically impossible because 90 per cent of the Senators would have had to agree and there were strong indications that members on both sides of the aisle would resist. To abolish it unconstitutionally would have been politically unwise at a time when approval was being sought for amendments which would reduce the powers of the regions and strengthen the position of the Executive, and when the transition to a one-party state was being arranged. The retention of an institution which was regarded as the child of KADU and which was so constructed as to favor the smaller tribes would increase the respectability of the new regime, assist in refuting charges of authoritarianism, and possibly contribute to the growth of unity and stability in Kenya.

The Senate's survival may also have been due to the fact that it provided an additional platform from which the Government could defend itself, and to the hope that its members might be of value in mobilizing support for Government programs. That such a service might be expected of Senators was indicated by the Leader of Government Business when he replied to an Opposition motion which asked for an improvement in the supply of water to certain coastal areas. He stated that the mover could "be of great assistance . . . to the Government . . . if he would hold meetings with his own people, explain Government policy to them and enlist their cooperation with Government officers."⁶¹

There is a real possibility that the Senate will play a more prominent and constructive role in the months ahead. Having decided to retain it for at least a while longer, the Government may undertake to make it somewhat more useful and thereby, perhaps unintentionally, strengthen its importance. The Senators themselves may now feel less inhibited by the danger of abolition and more inclined to assert their prerogatives. This tendency may be increased by a growing sense of corporate identity. In addition, as the Senators acquire more experience, they can be expected to function more effectively. The position of the upper house may also be improved by

⁶¹ *Ibid.*, September 3, 1964, pp. J 1-2 (typescript) (Sen. J. P. Mathenge).

ROLE OF SENATE IN KENYAN POLITICAL SYSTEM

the new constitutional changes, for they have freed it of the incubus of regionalism; its identification with that system was a factor which discredited bicameralism in the eyes of many. Moreover, bills may be more sharply scrutinized and local interests may find more effective expression under the recently established one-party system, for the elimination of a formal Opposition is said to reduce the need for such strict party discipline. There is, at any rate, greater need for a vital second chamber now, for it is desirable to have as many channels of communication and as many opportunities for re-examination and criticism as possible in the absence of an opposing party.

On the other hand, it must not be concluded that the future of the Senate is now completely assured. If the single party can be tightly controlled, the second chamber can be liquidated by amendment of the Constitution. If not, the possibility of its abolition unconstitutionally is not altogether inconceivable. Although given a new lease on life, it remains on probation. Whether Kenya can afford to maintain an institution which actually contributes no more than has the Senate may well become increasingly doubtful. If, however, in attempting to accomplish more, it seems to be obstructing the Government, it may well be swept quickly away. The challenge facing the Senate of Kenya at present is to discover ways of participating in the governing process that will justify but not jeopardize its existence.