

**UNIVERSITY OF NAIROBI**

**INSTITUTE OF DIPLOMACY AND INTERNATIONAL STUDIES**

**THE ROLE OF PARLIAMENT IN THE FORMULATION AND IMPLEMENTATION  
OF KENYA'S FOREIGN POLICY**

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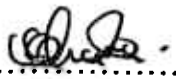
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**DECLARATION**


I, Sylvia Ocharo hereby declare that this research project is my original work and has not been presented for a degree in any other University.

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Signed.......... Date..... 12<sup>th</sup> November 2012.....

*Dr. Anita Kiamba*

## **DEDICATION**

This work is dedicated to my Dad Alexander, my mum Alice and my three siblings Brian, Alvin and Charity. I thank them for their encouragement and support throughout my study which enabled me to carry out this work smoothly to its conclusion. To God be the Glory, Honor and Power.

## **ACKNOWLEDGMENT**

I express my sincere gratitude to my supervisor Dr. Anita Kiamba for active interest and keen guidance during the execution of the project. The professional guidance from the staff in the Kenya National Assembly most especially Mr Njenga Njuguna, Director Committee Services, is high appreciated.

## **ABSTRACT**

This study is intended to examine the role played by parliament in the formulation and implementation of Kenya's foreign policy. The study recognizes that Kenya's constitution passed in 2010 which is also Kenya's Second constitution since independence redeems of the Kenyan legislature from the confinement of the Executive controls by strengthening its checks and balances. This will enhance parliament's ability to discharges its roles without restrictions. Previously parliament did not play a major role in foreign policy formulation. Under the old constitution, the conduct of foreign policy in Kenya was the prerogative of the President. With the new constitution parliament has been more empowered; treaties will have to pass through parliament for ratification unlike in the past and diplomatic envoys appointed by the president will also have to be vetted by parliament before taking office. These though can only the possible if the new constitution is implemented to the letter.

The study concludes that the Kenyan Parliament does play a limited role foreign policy formulation and implementation. But with the new constitutional dispensation speculation is rive that parliament will have a more enhanced role to play in foreign policy formulation and implementation. To enhance parliament's role the committee on defence and foreign relations should study important foreign policy issues with the help of inputs from experts and officials, and submit their conclusions and recommendations to the House for its consideration. Also important is that all Members of Parliament should undergo training on Kenya's foreign policy so as to be well versed on Kenya's national interests, etiquette and diplomacy.

## **List of Acronyms**

**AU - African Union**

**AMISOM - African Union Mission to Somalia**

**KANU- Kenya African National Union**

**KDF - Kenya Defense Forces**

**NARC - National Rainbow Coalition**

**NCOP- National Council of Provinces**

**NFD - Northern Frontier District**

**NGO - Non-Governmental Organization**

**ODM - Orange Democratic Movement**

**PCFA - Parliamentary Committees on Foreign Affairs**

**SOP - Standard Operating Procedures**

**TFG - Transitional Federal Government**

**U.S - United States**

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## CHAPTER ONE

### INTRODUCTION TO THE STUDY

#### 1.0 BACKGROUND

In this growingly interdependent world, the process of foreign policy formulation is becoming more and more complex in which, besides national actors, regional and international forces play an increasingly important role.<sup>1</sup> Kurgat defines foreign policy as a combination of aims and interests pursued and defended by a given state and its leaders in its relation with other states, and the methods and means used for the achievement and defence of these purposes and interests.<sup>2</sup> Kenya's foreign policy has been shaped by national, regional and international factors which have influenced both the process of its formulation and the final outcome. In the decades after independence the Kenyan foreign policy was based on continuity and consistency, it developed a sound conceptual footing in the 1980s this was as a result of the new regime; this has changed in recent times into incoherence<sup>3</sup>. During the first fifteen or so years after independence Kenya's foreign policy was marked by indifference. This meant that Kenya was content during this period to articulate the formal doctrines current in the international system. The content of consistency was that Kenya pleaded the doctrines of non-use of force in international relations, non-interference in internal affairs of states and the principle of good neighborliness.

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<sup>1</sup> Husain J. *The Process of Foreign Policy Formulation in Pakistan*, Pakistan Institute of Legislative Development and Transparency, Lahore. 2004

<sup>2</sup> Kurgat Paul, *Kenya's Foreign Policy and Africa's Conflict Management*, in P. Okoth and Ogot(ed), *Conflict in Contemporary Africa*, Jomo Kenyatta Foundation, Nairobi, 2000, pg 118

<sup>3</sup> Mwangiri .M, *The Elusive Quest: Conflict, Diplomacy and Foreign Policy in Kenya*, in , P. Okoth and Ogot(ed), *Conflict in Contemporary Africa*, Jomo Kenyatta Foundation, Nairobi, 2000, pg 177

According to John Howell, Kenya presents various faces to the international community. In global terms external policy has been markedly radical in nature and characterised by a strong sense of morality and idealism. Rarely does a major Kenyan foreign policy statement fail to contain some allusion to the inequalities of the present international order or some reassertion of both the desirability and the attainability of a peaceful and just international community of nations. In East African affairs, however, Kenya's policy has often been governed by rather more conservative, notably where any radical departure from the status quo is contemplated. Howell states that this is because day-to-day foreign policy often has to be conducted against a domestic background inhibited by the fragility of the political system and the serious limitations imposed by an under-developed economy. It would appear that where foreign policy issues touch directly on primary Kenyan interests like, national security, national development the overt radicalism of Kenya's broad international policy owing to Kenyatta's Government need for an active foreign policy as an outlet for a nationalist energy. One further aspect of Kenya's foreign relations is in the field of inter-African affairs, where tentatively one may suggest that Kenya has come to play the role of a prestigious neutral between two amorphous, but often distinct, groupings of what have been termed 'radical' and 'moderate' states.<sup>4</sup>

The evolution of the democratic system after the two world wars brought about democratic institutions such as the parliament, the media, various interest groups, and the public opinion into focus in some parts of the world.<sup>5</sup> Executive branch of government in Kenya for example, is no longer completely independent both in the formulation and implementation of the foreign policies. The very existence of these institutions serves as a major deterrent for the

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<sup>4</sup> Howell John, *An Analysis of Kenyan Foreign Policy*, in the *Journal of Modern African Studies*, Cambridge University 6, 1 (1968), pp. 29-48

<sup>5</sup> Charles Carstairs and Richard Ware, *Parliament and International Relations* (Milton Keynes: Open University Press, 1991), See also Peter Richards, *Parliament and Foreign Affairs* (1967)

leaders who have to be very careful in the making of the policy. They have to be accountable to their respective publics which exercise their control through these democratic institutions.<sup>6</sup>

According to Webber, foreign policy is composed of the goals sought, values set, decisions made and actions taken by states and national governments acting on their behalf, in the context of the external relations of national societies. It constitutes an attempt to design, manage and control the foreign relations of nations. Foreign policy is primarily concerned with the boundaries between the external environment outside of the nation state and the internal or domestic environment, with its variety of sub-national sources of influence.<sup>7</sup> Foreign policies are designed to help protect a country's national interests, national security, ideological goals, and economic prosperity.

Parliaments takes an increasingly active part in evaluating national policy options in areas that include foreign policy, which has hitherto been regarded as a preserve of government. At the same time, society too has undergone radical change and the public at large is taking a growing interest in policy, particularly foreign policy, as it is aware of the extent to which it is affected by the policies of neighboring or partner countries and has an impact on everyday life. Increasingly, the electorate looks to parliamentarians to ensure that its expectations are met and to influence choices made by the executive. Where there is separation of powers amongst the arms of government, well tuned to the changes taking place in society, parliamentarians need to develop their skills at interpreting community expectations and bringing them to the fore by discussing them nationally and internationally, seeking arbitration and proposing practical solutions at national level.

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<sup>6</sup> Amin Tahir, *Parliament and Foreign Policy: A Comparative Analysis of the US, UK, and India*, Pakistan Institute of Legislative Development and Transparency, Lahore.2004

<sup>7</sup> Webber, Mark & Smith Michael. *Foreign policy in a transformed world*. Harlow: Prentice-Hall. 2002.

The emergent national security threat from the Al-Shabaab militants from Somali has led to Kenya's change of tact from non-aggression to defensive; this has been occasioned by the various provocations from the militants on Kenyan soil including abduction of tourists and bombings. Currently Kenya's defense forces in conjunction with African Union Mission to Somalia (AMISOM) Peacekeeping Force are fighting the Al-Shabaab militant in Somalia.

This Study intends to evaluate the role played by the Kenyan parliament in putting in place checks and balance in the formulation and implementation of foreign policy. This is especially so owing to the new constitution Kenya promulgated in 2010. According to Mwangi, the largest challenge for foreign policy lies in its implementation. The proper management of foreign policy and of the diplomatic service are central to the success or failure of the implementation of foreign policy. Foreign policy plus the administration of the diplomatic service and of the policy itself give rise to the implementation of foreign policy.<sup>8</sup>

## ***1.2 STATEMENT OF THE PROBLEM***

There has been a disconnect between foreign policy formulation and implementation in Kenya since independence. Previously parliament did not play a major role in foreign policy formulation; this was because the two previous regimes (Kenyatta and Moi) were highly centralized. The former president Moi was responsible of foreign policy formulation and parliament only played a rubber stamp role, meaning it was relatively non-influential, and perhaps even a peripheral institution with respect to policy. Under the old constitution, the conduct of foreign policy in Kenya was the prerogative of the President. This though is going to change with the new constitution that was overwhelming approved in the 2010 referendum. With

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<sup>8</sup> Mwangi, M. The Missing Link in the Study of Diplomacy: The Management of the Diplomatic Service and Foreign Policy, in *The Journal of Language, Technology & Entrepreneurship in Africa*, Vol. 2, No.1, 2010, ISSN 1998-1279

the second constitution passed in 2010 parliament has been more empowered as in treaties will have to pass through parliament for ratification unlike in the past and diplomatic envoys appointed by the president will also have to be vetted by parliament before taking office. The Kenyan constitution underwent a scientific revolution from the old constitution to the new constitution in 2010. That was because the former constitution of Kenya developed significant anomalies over time; and in doing so, it was unable to solve important problems of the day in Kenya. Consequently, because of these significant anomalies, the 1963 constitution was overthrown in a scientific revolution, and was replaced by the 2010 constitution. As a result the role of parliament in foreign policy changed because it became institutionalized. Has the Kenyan Parliament been effective in foreign policy formulation and implementation? This study seeks to examine whether Kenyan parliament has a significant input in foreign policy formulation and implementation.

Pertinent questions to be asked are: Who formulates the national interest that become foreign policy, and who holds the relevant institutions accountable in the implementation phase? In general, the most appropriate instrument would be parliament but parliament needs to be capacitated and informed to perform its role in the country's decision-making process.<sup>9</sup>

### **1.3 RESEARCH QUESTIONS**

1. What role does parliament play in foreign policy formulation and implementation?
2. What are the lessons learned from other parliaments across the broader on foreign policy and can the lessons be applied to Kenya?
3. What internal processes are followed by parliament in policy making?

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Hughes T. Composers, Conductors and Players: *Harmony and Discord in South African Foreign Policy Making*, Conrad-Adenauer-Stiftung, South Africa. 2004

#### ***1.4 OBJECTIVES OF THE STUDY***

1. To determine whether the Kenyan parliament plays a role in foreign policy formulation and implementation
2. To establish lessons Kenya's parliament can learn from the other parliaments
3. To find out the internal procedures used by parliament in foreign policy making

#### ***1.5 LITERATURE REVIEW***

This study seeks to examine the role of parliament in Foreign Policy formulation and implementation. It begins by pointing out that quite a number of scholars have written on legislature in various political systems. This has led to abundance of literature on legislature despite that, there is a dearth of literature on the role of parliament in foreign policy making especially in Kenya. The study will review literature on the role of various parliaments in general: their functions, composition, and models. Also look at how the different types of parliaments perform their role and their effectiveness. Secondly it will look into the role of parliament in foreign policy formulation and implementation.

##### **1.5.1 LITERATURE REVIEW ON THE FUNCTIONS OF PARLIAMENT**

Parliament is the legislative arm of government charged with the responsibility of making or unmaking laws through passing and assenting to Bills. In the Kenya's case it consists of the President and the National Assembly which entails members of parliament. There are two common types of legislature those in which the executive and the legislative branches are clearly separated, as in the U.S. Congress, and those in which members of the executive branch are chosen from the legislative membership, as in the British Parliament, respectively termed

presidential and parliamentary systems. The legislature in a parliamentary system is a parliament; the legislature in a presidential system is a congress. Although the distinction goes beyond mere names, the names do reflect some of the differences. As political scientist James Q. Wilson has pointed out, the root of the word parliament is the French word "*parler*" to talk, whereas the root of the word congress is the Latin "*congressus*" to come together, or assemble. While most legislatures fall into one or the other of these categories, the names of individual legislatures are sometimes misleading. For instance, the Hungarian legislature is similar to a parliament, yet its name, the National Assembly, might suggest otherwise. Similarly, in Russia, the word "soviet" means "council" in English; nonetheless, the legislature is part of a presidential system.<sup>10</sup> In this study we shall use the term parliament and legislature interchangeably to mean the same.

Parliament is widely acknowledged as the pivotal institution of democracy. In broad terms, the functions of a parliament are agreed. Exactly how parliaments perform their role or should perform it is a subject that has not been sufficiently explored. It embodies the will of the people in government, and carries all their expectations that democracy will be truly responsive to their needs and helps solve the most pressing problems that confront them in their daily lives. As the elected body that represents society in all its diversity, parliaments have a unique responsibility for reconciling the conflicting interests and expectations of different groups and communities through the democratic means of dialogue and compromise.<sup>11</sup>

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<sup>10</sup> Ornstein, N. J. *The Role of the Legislature in Western Democracies*. Washington, D.C.: American Enterprise Institute for Public Policy Research, 1981.

<sup>11</sup> Parliament and Democracy in the 21st Century, Report by the Inter-Parliamentary Union at United Nations headquarters, New York, 7 to 9 September 2005 <http://www.ipu.org/splz-e/sp-conf05/democracy-rpt>



Scholars such as Hanna Pitkin tend to agree that there are three functions common to parliaments in democracies; representation of the people and special interests, lawmaking whereby they make laws, the rules that govern a nation, and exercises oversight over national revenue, its expenditure and state organs. Representation is central to the democratic functioning of a legislative body. Following an exhaustive survey of definitions and approaches, Pitkin offered one of the most influential formulations: representation means "acting in the interest of the represented, in a manner responsive to them".<sup>12</sup> A legislature that is not representative of and accountable to the people undermines the nature of democracy in a country. Legislatures can represent citizens in different ways, depending on their laws and traditions. Election systems may be designed so legislators reflect their constituents. The degree to which individuals and groups have access to the legislative body, or at least a legislator's ear, helps determine the legislature's degree of representation.<sup>13</sup> It involves listening to those one represents and making decisions and exercising influence on their behalf.

The second function of parliaments is to make laws, the rules that govern society. Most legislatures have ample lawmaking authority in theory, under their national constitution, charter, or other foundational documents or traditions. In practice, though, broad ideas must be turned into specific proposals that can be analyzed, deliberated, and then drafted into formal legislation. Because lawmaking is the most visible activity of legislatures, effective lawmaking may mean more than the passage of specific legislative initiatives; it can also contribute to the strengthened

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<sup>12</sup> Pitkin, Hanna F. *The Concept of Representation*. Berkeley: University of California Press. 1967

<sup>13</sup> USAID Handbook on Legislative Strengthening, Washington, DC, 2000

legitimacy of the legislative body itself.<sup>14</sup> Effective legislatures not only represent the differences in society, they must also reach agreements on policy, taxing and spending.

Oversight is the third role of parliament, which entails check and balance through which it seeks to ensure that programs are carried out legally, effectively, and for the purposes for which they were intended. Legislatures vary in their ability and willingness to undertake these activities, depending on constitutional structure, access to budget information, powers to review and amend budgets, power to confirm and remove executive appointments, and the relationship of parties in the legislature to parties in the executive. Vigorous oversight promotes accountability of the executive more effectively than any other mechanism, and, thus, is basic to a strong legislature. Legislative oversight tools include the question period for ministers, the use of public accounts committees, investigatory and departmental committees, auditors general, subpoena and other court type powers. The increased national and international attention on government corruption in recent years has led to a greater focus on this aspect of parliamentary responsibility.<sup>15</sup>

According to Johnson, the role of parliament in government varies depending on a number of factors. This Study examines the effect of these four factors: the type of political and electoral system, formal legislative powers, political will and political space, and technical capacity. In the past decade more and more countries made a transition to democratic forms of government. These countries that are making the transition are faced with a number of new challenges as well as opportunities. In nearly all democracies, leaders of the executive branch typically command much of the political power, control the financial resources, possess staff

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<sup>14</sup> USAID Handbook on Legislative Strengthening, Washington, DC, 2000  
[http://www.usaid.gov/our\\_work/democracy\\_and\\_governance/publications/pdfs/pnac632](http://www.usaid.gov/our_work/democracy_and_governance/publications/pdfs/pnac632)

<sup>15</sup> Johnson John. *Parliament and Governance*, World Bank Institute, Washington, D.C.2005

dedicated to developing policies and implementing laws, produce the bulk of legislation, and manage government contracts and administer government programs.<sup>16</sup> Despite executive dominance in many countries, the relative balance of power between the legislative and executive branches in a country can be changed.

If new legislatures are going to have a central role in a nation's governance, it is up to legislators themselves to build strong legislative institutions, by asserting themselves in the regular law-making or oversight functions, or through specific structural changes via constitutional amendment, legislation or rules of procedure.<sup>17</sup> As Johnson posits there are four models of legislatures, depending on the power and influence they have on the executive. These are namely: Rubber Stamp legislatures, Arena legislatures, Transformative legislatures and Emerging legislatures. First, the simplest of legislatures are called rubber stamp legislatures. These bodies simply endorse decisions made elsewhere in the political system, usually by parties and/ or the executive branch. They are often associated with communist or totalitarian nations, where decisions are made by a leader or vanguard party, and in which the parliament is expected to simply endorse their decisions. Because demands on them are few, rubber stamp legislatures need little internal structure or expert staff and should not need long legislative sessions. "Rubber stamp" generally connotes non-democratic, but it could also describe bodies such as the American US Electoral College, whose delegates are expected to vote according to the dictates of those who sent them, and not according to personal opinion. Rubber stamp legislatures are the least expensive to operate. At one point during Moi's Era Kenyan Parliament was a rubber stamp legislature only the executive and more precisely the president and KANU party had the powers.

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<sup>16</sup> Johnson John. *The Role of Parliament in Government*, World Bank Institute, Washington, D.C.2005

<sup>17</sup> Strengthening Legislative Capacity in Legislative-Executive Relations, Legislative Research Series – Paper #6, National Democratic Institute for International Affairs, 2000

The role of parliament in foreign policy making process during this era was subordinate to the president. For example in 1980 parliament was not consulted when Moi entered into an agreement with Carter administration to allow the U.S Rapid Deployment Force to use Kenya's military facilities in Mombasa.<sup>18</sup>

Secondly, arena legislatures are more powerful than rubber stamp legislatures, and are places of real discussion, speech, and debate. Policy initiatives still come from outside the legislature, generally from executives or political parties. In arena legislatures, differences in society are articulated and government actions and plans are evaluated from different perspectives, but they tend not to initiate or dramatically reshape policy proposals. Arena legislature information needs are greater than those of rubber stamp legislatures: they need sufficient internal capacity to organize debate; a committee system adequate for channeling the business of the house; and capacity to analyze proposals in order to comment on them critically, and to some degree, refine them. A useful analogy for an arena legislature is a thermometer. As thermometers take accurate readings of the temperature around them but do not change the temperature, so arena legislatures accurately reflect the "political temperature" with regard to the issues before them.<sup>19</sup>

Thirdly, are the least common type of legislatures known as transformative legislatures which not only represent diverse societal interests, but they shape budgets and policies. Transformative legislatures can be likened to a thermostat. As thermostats change the room temperature by activating heat or air conditioning, transformative legislatures change policies and budgets proposed by government, and even initiate policies of their own. Not surprisingly,

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<sup>18</sup> Korwa A. & Schraeder, *Globalization and Emerging Trends in African Foreign Policy*, University Press of America, New York, 2007

<sup>19</sup> Johnson J. *The Role of Parliament in Government*, World Bank Institute, Washington, D.C.2005

transformative legislatures are the most expensive. They have highly complex internal structures including strong committee systems, great information needs, and depend heavily on highly trained professional staff. The US Congress is probably the best example of a transformative legislature.

Finally, a fourth legislative type, emerging legislatures are in the process of change from one type to another. Worldwide several legislatures are exercising greater influence over government policies and could be classified as emerging legislatures. Expanding their powers usually requires major legislative changes, among them amending rules and procedures, building stronger committees, expanding professional staff, developing improved information systems, and others. Mexico's Congress and Kenya's and Uganda's Parliaments could be classified as emerging legislatures. In recent years both Mexico and Uganda established professional budget offices, helping those parliaments play a more assertive role in the budget process. All three legislatures expanded professional staff, and Kenya and Uganda have made their administration independent of the executive. Kenya and Uganda staff members are no longer civil service; they serve at the pleasure of parliament's leadership. The parliaments also now set their own budgets. Emerging legislatures are under significant stress, as parliament's managers and staff struggle to meet the growing demands. Staff and resources that once met the demands of a less assertive legislature are no longer adequate. Emerging legislatures need professional staff, information systems, office space, and other capacities to enable them to expand their budget, policy making and oversight roles. MPs demand more of parliamentary staff members, who must respond more quickly, work faster, and do more than they have in the past.<sup>20</sup>

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<sup>20</sup> Johnson J. *Parliament and Governance*, World Bank Institute, Washington, D.C.2005

## 1.5.2 LITERATURE REVIEW ON THE ROLE OF PARLIAMENT IN FOREIGN POLICY FORMULATION AND IMPLEMENTATION

Some democracies, such as the United States, have presidential systems, in which legislative bodies are elected apart from the president. In these systems, legislature plays a direct role in making foreign policy by passing budgets, regulating rules, creating trade laws, even controlling immigration policy. Although the executive may attend summits and talks, any agreement they sign must be approved by their domestic legislature.<sup>21</sup> Although a few would argue that legislatures in presidential democracies do not influence foreign policy generally, different rules may apply to the use of military force. Some may argue that legislatures, like public opinion, rally around the flag during times of international crises. For example, three days after the September 11, 2001, attacks, the U.S. Congress voted to give the President Bush full authority to prosecute a war in Afghanistan. In October 2002, Congress passed a resolution authorizing use of force in Iraq. Thus legislatures rarely if ever challenge an executive on important military matters.<sup>22</sup>

In many parliamentary systems, such as Great Britain, executives are chosen from political parties that hold a dominant position in the legislative bodies. Often parliamentary executives do not need to submit treaties or policies for formal approval by the legislature. Parliament is not required to vote on international agreements negotiated by the prime minister, but it must approve any change to British laws that such agreements entail. Because most international agreements do involve these types of changes, parliament effectively exercises a right of ratification over international agreements. If a policy is controversial, parties that do

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<sup>21</sup> Milner, Helen. *Interests, Institutions, and Information: Domestic Politics and International Relations*, Princeton, 1997. Evans, Peter B., Harold Jacobson, and Robert Putnam, eds. *Double Edged Diplomacy: International Bargaining and Domestic Politics*, California, 1993.

<sup>22</sup> Goldstein J. and Pevehouse Jon. *International Relations*, Longman Publishers, New York, 2006

not have a majority in the legislature can attempt to call elections, meaning the country votes again on which parties will hold seats in the legislature. Thus, in parliamentary systems, legislatures play a key role in designing and implementing foreign policy.<sup>23</sup>

Three watershed events have transformed African foreign policies since the late nineteenth century. These are the Berlin Conference of 1884-85, which put an end to independent Africa (except for Liberia and Ethiopia) and made African foreign policy the domain of the European colonial powers; the end of colonial rule, which started with the independence of Libya in 1951 and gave African formal control over their international relations; and the fall of the Berlin wall in 1989 and with it, the end of cold war.<sup>24</sup> Zaffiro James posits that with the wave of democratization and political liberalization sweeping across the continent of Africa, what may have appeared a research non-starter, the issue of legislative involvement in the foreign policy process, now stood as an interesting and politically significant future possibility, at least for a handful of surviving African legislatures.<sup>25</sup>

According to John Howell, it is widely accepted that, especially for the new post-colonial states, the process of foreign-policy formation was largely an extension of the domestic political environment. It has, for example, been claimed that, 'for a new state, foreign policy is domestic policy carried beyond the boundaries of the state'.<sup>26</sup> In Botswana, since independence the National Assembly's role in foreign policy decision-making have been limited mainly to questions and debate of policies already decided in Cabinet, carried out by the President,

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<sup>23</sup> Ibid

<sup>24</sup> Schraeder, P. "African International Relations." In A. Gordon and D. Gordon, eds., *Understanding Contemporary Africa*, Boulder: Lynne Rienner, 1996, pp129-165

<sup>25</sup> Zaffiro J. African Legislatures and Foreign Policy-Making: The Botswana Case, *Botswana Notes and Records*, Vol. 25 (1993), pp. 39-58

<sup>26</sup> R. C. Good, 'New State-building as a Determinant of Foreign Policy', in L. W. Martin (ed.), *Neutrality and Non-Alignment*. New York, 1962), p. 12.

Department of External Affairs, or other ministries. Under the Constitution, the National Assembly has treaty ratification powers but these have not been invoked in practice. During times of crisis, in particular military threats to the country, as happened in the late 1970s from Rhodesia, and again from South Africa during the mid-1980s, media, both private and government-run, backbenchers, an opposition members all rally to the support of the government.<sup>27</sup>

Newell Stultz referred to parliaments in former British Africa as "decorations of state," symbolic of national political equality and popular government. His study of structural features and performance of legislative bodies in six states argued that parliaments "neither structure nor the political process, add materially to the content of political decisions, nor affect the distribution of political power." Parliaments mirror "the isolation and concentration of decision-making power," as reflected in the inexperience of debates, ineffectiveness of opposition, and dominance by the executive. Even in those few states where legislative bodies have stood throughout the post- independence decades, they have remained institutionally the weakest branch of national governments, rubber-stamping executive decisions, a distant third, with judiciaries holding precariously to minimal autonomy against powerful national executive leaders and bureaucratic elites. To take their constitutionally mandated place at the table of state governance in the 1990s and beyond, African legislatures must succeed in winning a role for themselves in national policy-making which stands apart from executive control <sup>28</sup>

According to Ojwang and Franceschi, Kenya's approach to the exercise of the foreign affairs power has been considerably influenced by Britain, its former colonial master. The

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<sup>27</sup> Op cit

<sup>28</sup> Newell M Stultz, "Parliaments in Former British Africa," in: Marion E Doro and Newell M Stultz, eds., *Governing in Black Africa*, (Englewood Cliffs, N.J.: Prentice-Hall, 1970), pp 144-57. Countries studied include: Ghana, Nigeria, Kenya, Tanzania, Zambia and Uganda. A number of comments are also directed to Botswana



histories of Britain and Kenya begin in 1895 with the declaration by the British government of protectorate status over East Africa (now Kenya). The colonial relationship continued until 1963 when Kenya achieved its independence on the basis of a constitution formulated and negotiated in London.<sup>29</sup>

Howell, Okumu and Orwa are some of the scholars who have written on the Kenya's foreign policy. Katete Orwa, points out that since independence the Kenyan foreign policy has been the subject of conflicting interpretations. Timothy Shaw<sup>30</sup> and Samuel Makinda used dependency approach to analyze Kenya's foreign policy. According to Shaw, Kenya is a "sub-imperial power" able to exert influence on East African affairs. This it does in terms of its ruling elites and in those of the elite's external associates.<sup>31</sup> Kenya is in this context seen in a dual role. First, it is a "client" of its foreign associates, second, it is a "sub-imperial power" able to exert dominance in its regional environment.

The former Constitution of Kenya did not regulate the exercise of the foreign affairs power in a comprehensive fashion. It made no express mention of treaties, recognition of states and governments, or war and peace. It only granted the President "the power to appoint a person to hold or act in the office of Ambassador, High Commissioner or other principal representative of Kenya in another country, and to remove from office any person holding or acting in any such office". This implies that the President had the power to conduct diplomatic relations and the primary responsibility for the conduct of foreign affairs.<sup>32</sup> This explain why the former President

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<sup>29</sup> J. B. Ojwang & L G. Franceschi, Constitutional Regulation of the Foreign Affairs Power in Kenya: A Comparative Assessment, *Journal of African Law*, 46, 1 (2002), 43-58 , School of Oriental and African Studies. United Kingdom.

<sup>30</sup> Timothy Shaw. "International Stratification in Africa: Sub- Imperialism in Southern and Eastern Africa", *Journal of Southern African Affairs*, Vol. 2((2) April, 1977

<sup>31</sup> D. Katete Orwa, "Foreign Policy, 1963-1986"

<sup>32</sup> J. B. Ojwang & L G. Franceschi, *Constitutional Regulation of the Foreign Affairs Power in Kenya: A Comparative Assessment*, *Journal of African Law*, 46, 1 (2002), 43-58 , School of Oriental and African Studies. United Kingdom.

Moi, was at the center stage in the management of foreign policy. While in office he visited many countries personally to promote Kenya's national interests. Kenyatta took a low profile in foreign policy advocacy and implementation while Moi was very active.

Treaties or international agreements are among the most important means by which states relate to one another and to different organs in the sphere of international law. A treaty brings about external effects which bind a state to fulfill an international obligation. It may also produce internal effects if it has the consequence of producing some change in the municipal legal system. For a treaty to produce internal effects, it has to be incorporated in one way or another within the municipal legal system. Such incorporation, in its clearest forms, can come about automatically at the time of ratification (monist theory), or be indirect, by legislative enactment of the treaty (dualist concept).<sup>33</sup>

The constitutional referendum in Kenya on 4 August 2010 in which the citizens overwhelmingly approved the new constitution was a hallmark event in more than one aspect. It paved the way for the promulgation of Kenya's second constitution. The new constitution has reconfigured Kenya's institutions across board. It also created a scientific revolution in Kenya's treaty practice. For the first time, Kenya's treaty practice is enshrined constitutionally and marks a shift from the old dualist practice to monism. Mwagiru pointed out that the adoption of the monist treaty practice will indeed sharpen the separation of powers in Kenya. In this approach, the role of each of the three powers in Kenya will become even better defined. The executive will negotiate treaties; parliament will debate about them, and make voting decisions about whether they should be ratified. And following that decision making, and only following it, the executive will ratify the treaties as it is required to do by the laws and practices of treaty law and

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<sup>33</sup> D.J. Harris, *Cases and Materials on International Law*, 2nd ed., London, 1979, pp.60–62.

diplomacy. This will without doubt enhance significantly the diplomacy of treaty practice in Kenya. Since the constitution recognizes a ratified treaty as being part of the laws of Kenya, the old framework of transformation, or its various devices such as “domestication” will no longer be a required treaty practice of the republic. Once the treaties have become law in this way, the courts will interpret them as is their judicial function.<sup>34</sup>

Makumi Mwagiru argues that Kenya’s treaty practice until August 2010 was as follows: firstly parliamentary action was not required for permissive treaties, that is, those whose provisions were not inconsistent with any law in force in Kenya. On the other hand, treaties that require an act or omission not expressly authorized by any laws of Kenya required an act of parliament to give them that effect. Thirdly, where a treaty contained provisions which are not catered for by existing laws, a statute was to be enacted by parliament to give effect to such a treaty. Clearly from this Kenyan perspective, the executive has been able to ratify treaties and parliament’s role has been to amend any other laws so as to make them conform to Kenya’s treaty commitments. This has in effect been a practice that merged elements of dualism and monism, but with no consistency in practice. Kenya’s treaty practice until 2010 was therefore a corrupted dualist one, in which parliament was not required to give permission for the executive to ratify treaties; but where the executive ratified treaties, monist fashion, the role of parliament was to make amendments to other laws of Kenya to make them conform to the treaty.<sup>35</sup>

To conclude this review has surveyed the roles of parliament in general. It has examined the role of parliament in foreign policy formulation and implementation. Parliament can influence the foreign policy formulation and implementation process by adopting non-binding

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<sup>34</sup> Mwagiru M. *From Dualism to Monism: The Structure of Revolution in Kenya’s Constitutional Treaty Practice*, *Journal of Language, Technology & Entrepreneurship in Africa* Vol. 3 No. 1 2011 pg. 144-155; 148

<sup>35</sup> *Ibid* 149

resolutions on foreign policy issues; by holding hearings on crucial issues in the Departmental Committees on Foreign Affairs and by asking questions on foreign affairs in the House. In Kenya changes have been brought about by new constitution that came into place in 2010, which has contributed to foreign policy in terms of having the treaty practice enshrined in the constitution and having parliament play a role in treaty practice. It has been noted that the treaty practice that has been practiced since independence has been held hostage by the reality that the other two arms of government have been overshadowed by the executive in the treaty making process.

### ***1.6 JUSTIFICATION OF THE STUDY***

From an academic perspective, the study looks at the role played by parliament in the formulation and implementation of Kenya's foreign policy. The study is intended to offer relevant information that will be used to enhance the role of parliament in the formulation and implementation of Kenya's foreign policy. The information that will be generated is intended to expose the gap created in Kenya's foreign policy by inadequate participation of parliament. The information generated in this study will help policy makers, ministry of foreign affairs and parliament to formulate policies. While the role of the executive on foreign policy formulation and implementation has received considerable attention, the role of parliament in the same process has been lacking. It is this omission that drives the conduct of this study. The study intends to evaluate the role played by Kenya's parliament in putting in place checks and balances, in the formulation and implementation of foreign policy. This is especially so owing to the new constitution which came into place in 2010. The legislature has been given the mandate to conduct of foreign affairs, which was previously a purview for the executive and this is well put in the constitution of Kenya 2010.

## 1.7 CONCEPTUAL FRAMEWORK

Foreign policymaking is best conceptualized as a dynamic process that exists in a dialectical relationship with the outside world. Second, at times, the process is wide ranging, involving officials from all areas of government and a (growing) number of outsiders from both foreign governments and Non Governmental Organization (NGOs). Nevertheless, the process remains among the most secret in government. It is not just the public who have difficulty finding out where and when foreign policy decisions were taken or what the rationale behind them is. Even on a matter as important as the legal basis for war against Iraq, for instance, parliament received only a brief summary of the Attorney-General's opinion as a reply to a written question in the House of Lords.<sup>36</sup>

The foreign policy process is a process of decision making. States take actions because people in governments' decision makers choose those actions.<sup>37</sup> Decision making is a steering process in which adjustments are made as a result of feedback from the outside world. Decisions are carried out by actions taken to change the world, and then information from the world is monitored to evaluate the effects of these actions. This study will use Graham Allison's organizational process model, whereby foreign policy decision makers generally skip the labor-intensive process of identifying goals and alternative actions, relying instead for most decisions on standardized responses or standard operating procedures.<sup>38</sup> The organizational process model implies that much of foreign policy results from "management by muddling through."<sup>39</sup> The

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<sup>36</sup> Iain Byrne and Stuart Weir, 'Democratic audit: executive democracy in war and peace', *Parliamentary Affairs* 57: 2004, p. 456.

<sup>37</sup> Stein, Janice Gross. Psychological Explanations of International Conflict. In Carlsnaes, Walter, Thomas Risse, and Beth A. Simmons, eds. *Handbook of International Relations*. Sage, 2002, pp. 292-308. Snyder, Richard C., H. W. Tucker, and Burton Sapin. *Foreign Policy Decision Making (Revisited)*. Palgrave, 2002.

<sup>38</sup> Allison, Graham & Zelikow, Phillip. *Essence of Decision: Explaining the Cuban Missile Crisis, 2ed*. Longman. 1991.

<sup>39</sup> Avant, Deborah D. *Political Institutions and Military Change: Lessons from Peripheral Wars*. Cornell, 1995.

standard operating procedures (SOP) are rules according to which things are done. In parliament members are guided by standing orders. Standing orders are rules of procedure that guide debates and proceedings of the House.

The operational capabilities of organizations become particularly important in the implementation of policy decisions. High level government officials, whether in Congress or the executive branch, can rarely implement their individual policy decisions without organizational assistance. programs and standard operating procedures do not change significantly over time and so organizations do not change dramatically and if they change, its either due to increase in budget or decrease or due to dramatic performance failure. This study will use organization process model whereby the organization's foreign policy role and standard operating procedures shape the policy process. Organizational model claims that central coordination and control is key to governmental action that "requires decentralization of responsibility and power" government emphasizes all available options in constraining circumstances and allows for decentralization using factored problems and fractional power. This is the advantage in the model which eventually gets the goal achieved. Further, any crisis management and foreign policy making is not possible from one man, and so many organization indeed get involved. This model thus highlights important domestic political influences on foreign policy decision making. The disadvantage of this model is that it takes a lengthy time to get things done and policy formulated.

### ***1.8 HYPOTHESES.***

- i. Parliament has directly affected the conduct of foreign policy.
- ii. The different heads of state in Kenya have impacted differently on foreign policy.

- iii. Benefits of constitutional provisions in regard to Parliament's control over foreign policy.

### ***1.9 METHODOLOGY OF RESEARCH***

This study is a qualitative research that is a case by case analysis in Kenyan foreign policy practice, whereby it will analyze different occasions in which the common variable is the active conduct of Kenyan foreign policy. The study will make use of both primary and secondary sources on the subject matter under discussion. The Primary sources shall include: interviews a method of collecting data which involves presentation of oral-verbal stimuli and reply in terms of oral-verbal responses. This method can be used through personal interviews and, if possible, through telephone interviews. In this case the researcher will carry out personal interviews with members of parliament, parliamentary staff and officials from the Ministry of Foreign Affairs (because this is the Ministry in-charge of the Kenya Foreign Policy) among others. The merits of interviews are more information and in greater depth can be obtained. There is greater flexibility under this method as the opportunity to restructure questions is always there, especially in case of unstructured interviews. This will be important because it will be able to input latest information which may not have been documented by other scholars thus contributing to knowledge.

The study will look into existing academic literature and current reports to provide a contemporary analysis and debate on Kenya's foreign affairs so as to determine the linkages between its external relations and its domestic politics. The secondary sources will consist of general literature on the subject of Parliament and Kenya's foreign policy in particular. This will include books, official policy documents, HANSARD (official verbatim recordings) and academic journals. Published articles such as 'war on Al-Shabaab' in newspapers, magazines and

internet sources like 'jstor' will also be relied on for current information. For the HANSARD reports the researcher will access them from the parliament library.

### ***1.10 LIMITATION OF THE STUDY***

The study looks into the role of parliament in the formulation and implementation of Kenya's foreign policy. Further the study seeks to highlight the complexities entailing decision making in foreign policy. While writing on the role of parliament in foreign policy one confronts a range of difficulties: the most basic is the scarcity of academic writings on the role of the Kenya's parliament in foreign policy. Further difficult is posed by the topic itself, being a policy domain that has become occupied by an increasing variety of issues over time, many of which have historically been seen as domestic policy for example health and policing and others which have previously not been policy at all like environment.<sup>40</sup> Gyngell points out that study of foreign policy cannot therefore rely on an inherent 'logic' of a particular issue area to inform its study, as it may have once been able to do when foreign policy was mainly about security, trade and prestige. The area of study is viewed as sensitive especially by certain policy makers, thus making it a challenge to get information on foreign policy decision making. The scope of this study entails the role of parliament in the entire decision making process in foreign policy.

### ***1.11 CHAPTER OUTLINE***

The study comprises five chapters;

#### **Chapter One: Introduction to the Study**

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<sup>40</sup> Gyngell A. & Wesley M. Making of Australian Foreign Policy, 2<sup>nd</sup> Edition, Cambridge University Press, 2007 p. 18



Introduces the study it entails the following: Background of the Study, Statement of the Research Problem, Research Questions, Objective of the Study, Literature Review, Justification of the Study, Theoretical Framework, Hypotheses, Methodology and finally the Chapter Outline.

### **Chapter Two: Role of Parliament in Foreign Policy Formulation and Implementation**

It examines the significant role played by parliaments in Foreign Policy. I analyzed how parliament has been involved in foreign policy in other countries and what Kenya envisions and basically learnt lessons for Kenya.

### **Chapter Three: An Overview of Foreign policy in Kenya**

This chapter assesses foreign policy in Kenya. Provides an overview of the past and present state of the Kenya's Foreign Policy throughout the three different Presidents namely; Kenyatta, Moi and Kibaki and how each of them has contributed to shaping of Kenya's Foreign Policy.

### **Chapter Four: A Critical Analysis of the Kenyan parliament in the formulation and implementation of foreign policy**

This chapter basically analyzed the role of the Kenyan parliament in foreign policy formulation and implementation. Based on the previous chapters this study predicted and analyzed the possible role of Kenya's parliament.

### **Chapter Five: Conclusion and Recommendations**

This chapter summarized the major arguments of the Study pointing out the loophole and how they can be taken care of. This chapter outlined the objectives of Kenyan foreign policy. It delineates the thesis and show whether the research questions have been answered in this study. Finally it concludes with a brief mention of the current state of affairs and recommendations.

## CHAPTER TWO

### THE ROLE OF PARLIAMENT IN FOREIGN POLICY FORMULATION AND

### IMPLEMENTATION

#### *2.0 Introduction*

This chapter will look into the role played by parliaments of United States, Britain and South Africa in foreign policy formulation and implementation. In most countries, the foreign policy role of legislature is less than the executive branch decision makers and bureaucrats. That does not mean all legislatures are powerless. Their exact influence varies greatly among countries. Legislatures in non democratic systems are generally rubber stamp to the decisions of the political leadership. For example China's National People's Congress does not play a significant role in foreign policy making. The United States Congress on the other hand, plays a major role in foreign policy process. The Congress was a major factor in pushing the Nixon administration out of Vietnam, and since the war the Congress has been more active in foreign affairs than it was in the past. This study seeks to establish the role of legislature/ parliament in foreign policy formulation and implementation.

Parliament is considered in this study as a representative institution operating on the behalf of others in a binding and legitimate manner and making decision collectively but with formal equality. This definition of the parliament implies a set of key functions: linkage, and decision making. As Mathisen & Tjonneland noted, 'we have witnessed a significant institutionalization of legislatures in new democracies in the 1990s'<sup>41</sup> Agh Atila has also noted that scholarly interest has also expanded, especially those that relates to East and Central

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<sup>41</sup> Mathisen, H W & Tjonneland. *Does parliament matter in new democracies? The case of South Africa, Bergen:* CMI. 2000.

Europe.<sup>42</sup> These studies have concluded that legislatures have been important in the democratization process with profound consequences for the political systems in aforementioned regions. In particular, studies on Parliament-foreign policy nexus in Africa can simply be described as very few, again most of these few works are in fact focused on Southern Africa, South Africa to be specific. Indeed there are a number of recent studies on South Africa's post-1994 foreign relations, and the following have been selected to represent the broad range of issues discoursed and debated within this context. This has also been further sub-divided into two groups viz; the Foreign-Policy-focused literature and the literature addressing the role of the Parliament in foreign policy.<sup>43</sup>

By constitutional design and according to the democratic model, Congress should be responsive to public preferences; and it should have a substantial impact on policy.<sup>44</sup> This study will examine the role played by members of the legislature in asserting their authority in foreign policies of different countries. The study will provide insight into the themes of continuity and change in the policymaking process over time. We seek to found out: what specific roles do legislature or congress play in the policy process? What internal procedures are followed? What impact on policy does it have? This study attempts to look at the impact of the parliamentary institutions on the foreign policies of three countries, the United States, the United Kingdom and South Africa.

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<sup>42</sup> Agh Atila, 'The Experiences of the First Democratic Parliaments in East Central Europe' *Communist and Post-Communist Studies* Vol.28, no2, 1995. Pp 203-214.

<sup>43</sup> Banjo Adewale, 'A Review of Parliament-Foreign Policy Nexus in South Africa and Namibia', in the *Journal of Politics and Law*, vol. 2. September, 2009 61

<sup>44</sup> Brewer, T. *American Foreign policy: A Contemporary Introduction*, Prentice Hall, New Jersey, 1992 p. 93

## **2.1 Foreign policy formulation and implementation in the United States**

The Congress of the United States comprises of a Senate and House of Representatives. The House of Representatives is composed of Members chosen every second Year by the People of the several States, The Senate of the United States is composed of two Senators elected from each State. The Constitution divides the foreign policy powers between the President and Congress together the President and Congress make foreign policy. The executive is responsible for the formulation the policy, the legislature oversees the policy and judiciary interprets the constitution if a difference arises between the executive and the legislature. The constitution enables for checks and balances within the government this ensures no arm of the government works separately.<sup>45</sup> The executive is headed by the president who is also the chief architect of foreign policy.<sup>46</sup> In conjunction with the Secretary of State, with the assistance of the National Security Council and Cabinet the president he formulates policy. He is also the Commander in Chief of the United States.

As Rosati posits, the nature of foreign policy process within the United States is a very complex and political process. The president plays a crucial role in the making of the U.S policy. However, the president does not make the U.S foreign policy alone. Many other individuals and institutions are involved within the government and throughout the society in the foreign policy process: presidential advisers, high level officials within the executive branch, bureaucracies, Congress, the courts, state and local government, the public, political parties and many others. It is in this sense that the making of U.S foreign policy is a complex process. Policy making is not static, but as the word 'process' implies, dynamic. It's also a political process owing to the U.S

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<sup>45</sup> Mansfield D. and Bckley G. *Conflict in American Foreign Policy: The Issues Debated*, NJ: Prentice Hall, 1985

<sup>46</sup> Brewster C. Denny, *Seeing American Foreign Policy Whole*, Ill: University of Illinois Press, 1985

foreign policy tending to reflect the goals and priorities of those individuals and groups who are the most successful in influencing the political process within government and throughout society.<sup>47</sup>

The foreign policy process refers to how a governmental decisions and policies are formulated and implemented.<sup>48</sup> The focus of this study then is on examining foreign policy process and how decisions and policies are made. According to Rosati, the document Americans refer to as the Constitution is actually the second constitution. The first constitution, the Articles of Confederation, lasted only from 1781 to 1787. It created a weak central government, in which most of the governmental powers resided with the state. Second, the constitution was a short and ambiguous document. It was no more than a few pages long, one of the shortest written constitutions in the world. This meant the document consisted of sweeping statements and generalizations, making the document difficult to pinpoint the specific distribution of power throughout the government. Third, the constitution is over two hundred years old. It was written for the eighteenth century, not for the twentieth and twenty first centuries, although it has been remarkably adaptable to changing environment.

## ***2.2 Role of Congress in U.S in Foreign Policy Making***

Congress has asserted its authority in foreign policy over the last dozen years. The Congress has the power of the purse, under the constitution, thus no financial appropriations can be made without its approval.<sup>49</sup> Congress is most visible in its foreign policy role when it places legislation prohibitions or other limitations on the President's freedom of action in foreign

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<sup>47</sup> Rosati, J. *The Politics OF United States Foreign Policy*, Harcourt Brace College Publishers, New York, 1993, p. 3

<sup>48</sup> Ibid pg. 4

<sup>49</sup> Amin T. *Parliament and Foreign Policy: A Comparative Analysis of the US, UK, and India*, Pakistan Institute of Legislative Development and Transparency, Lahore.2004

affairs. Often these measures have been amendments to legislation authorizing or appropriating funds that the President was unlikely to veto. For example, on January 23, 1973, President Nixon announced the signing of the Paris peace accords to end U.S. involvement in the Vietnam war, but attacks by the Khmer Rouge in Cambodia continued and the United States resumed bombing in Cambodia. The Administration wanted to maintain freedom of U.S. action if North Vietnam or its Communist associates violated the accords. But Congress effectively halted such military action when it passed over the President's opposition amendments to funding legislation stating that after August 15, 1973, no funds under any legislation could be used to finance combat activities by United States military forces in, over, or from off the shores of North Vietnam, South Vietnam, Laos or Cambodia.<sup>50</sup>

The Congress has the power to declare war under the War Powers' Act though the President can send the troops into combat for thirty days even with the approval of the Congress.<sup>51</sup> It also has exclusive powers to oversee the external trade as mandated in the constitution to regulate commerce with foreign Nations. In relation to armed forces Congress handles the matters with regard to their creation, regulation and management. The Senate ratifies the treaties with two-third majority and confirms the appointments of all key foreign policy officials including the Secretary of the State and the ambassadors. At times members of Congress shape foreign policy by providing advice to the executive branch in informal contacts. An example is President Eisenhower's decision not to intervene militarily in Indochina in 1954. At a meeting on April 3, 1954. Secretary of State Dulles and other executive branch officials met with congressional leaders including Senate Majority Leader William Knowland, Minority

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<sup>50</sup> Thomas Franck & Edward Weisband. *Foreign Policy by Congress*, New York, Oxford University Press, 1979. P.13  
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<sup>51</sup> Senator Lugar, "Involving Congress Early: Presidential Imperative" in US Foreign Policy Agenda Vol.1, no 9 (July1996)P.9

Leader Lyndon Johnson, Speaker Joseph Martin, Jr. and Minority Whip John McCormack. Secretary Dulles said a unanimous congressional opinion developed in the meeting that there should be no congressional action on a resolution to support involvement until commitments for support were obtained from other nations. Without assurance of either congressional or allied support, President Eisenhower decided against intervention.<sup>52</sup>

Several constitutional provisions give Congress specific functions in foreign policy making: declaration of war, appropriation of funds, ratification of treaties, regulation of foreign trade, and confirmation of appointments to high level positions in the executive branch. But the executive branch is very much involved in each of these five functions. As commander-in-chief, the president is involved in war making. Request for the funds originate in the executive agencies and are reviewed and decided upon by the president, who recommends them to the Congress; and the executive agencies spend the funds that are appropriated by the Congress. Treaties are negotiated by the executive branch and then submitted to the Senate for ratification. Foreign trade agreements are negotiated by the executive branch, under the authority delegated by the Congress. The president nominates ambassadors, cabinet and subcabinet officials, and then Senate decides whether to confirm those nominations.<sup>53</sup>

The Congress shares authority in its performance of this function with the executive branch in general and the president in specific. These facts about congressional-executive relations in foreign policy require modification of the common notion that their relationship is one of separated powers of functions. In fact, only the institutions are separated; the powers are

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<sup>52</sup> Gibbons, William. *The Government and the Vietnam War, Executive and Legislative Roles and Relationships, Part 1, 1945-1961*. Senate Print 95-185 Pt. 1. Washington, G.P.O., 1984. p. 175-227.

<sup>53</sup> Brewer, T. *American Foreign Policy: A Contemporary Introduction*, Prentice Hall, New Jersey, 1992 p. 93

actually shared, not separated.<sup>54</sup> There is a constant struggle between the Congress and the executive branch over authority in foreign policy making. The struggle may wax and wane over time, but there is nevertheless a constant and continuing tension.<sup>55</sup> The tension with executive branch and the limitations on the Congress's power are evident in several congressional roles in foreign policy making.

Goldstein points out that between 1945 and approximately 1970; Congress displayed a marked tendency to follow the president's lead foreign policy. Among the numerous explanations for this surrender of power by the Congress, perhaps more compelling consists general agreement throughout the nation on the country's foreign policy priorities. Most Americana accepted the need to restrain what was perceived as an aggressive Soviet monolith that sought to dominate the globe. Whatever steps the president took toward this goal the majority of Americans both in and out of Congress was likely to accept. As the decade of the 1960 came to an end, Congress began to assert itself in the foreign policy field.<sup>56</sup>

Some of the major congressional actions in the 1970's include: Case-Zablocki Act 1972, named after Senator Clifford Case, whereby a secretary of state was required to report to Congress within 60 days of execution the text of any international agreement other than a treaty to which the US is a party; Cooper-Church Amendment (1973) prohibited US combat activity in Indochina; Foreign Assistance Act 1974, which required that any intended sale of defense articles or services worth \$25 million or more, or of major defense equipment costing \$7 million or more, be reported to Congress. Congress then has 30 days to disallow the sale by a majority

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<sup>54</sup> Neustadt Richard. *Presidential Powers*, Wiley, New York, 1976

<sup>55</sup> Fisher Louis, *President and Congress*, Free Press, New York 1972

<sup>56</sup> Goldstein M. *America's Foreign Policy: Drift or Decision*, Scholarly Resources Inc. Delaware, 1984, p 351



vote in both chambers; Ban on aid military to Turkey (1974). Repealed in 1978; Passed the Hughes-Ryan Amendment 1974. Required that CIA covert activities be reported to the appropriate committees of the Congress; Clark amendment (1975) which prohibited US military operations in Angola; Amendment to foreign assistance Act of 1974, declaring “a principal goal of the foreign policy of the US to promote the increased observance of the internationally recognized human rights by all countries.” Congress further required the president to submit an annual report on the human rights practices of each country for which security assistance was requested.<sup>57</sup>

On this basis Goldstein states that it is clear that the Congress reasserted itself in the foreign policy sphere. What reawakened the congress was the war in Vietnam. By early 1970s, there is no denying the fact that the very best advice of the experts in the executive branch had drawn the U.S into war that seemed unwinnable and was grievously dividing the population. Dramatic increase in the size of the congressional staffs, thus brought into the legislature more expertise, and on arrival of a new breed of legislator more unwilling to defer to executive leadership, boosted congressional participation in foreign policy.<sup>58</sup>

Congress shapes foreign policy through regular oversight of executive branch implementation of foreign policy, this is exercised through committees.<sup>59</sup> The Senate Foreign Relations and House International Relations Committees oversee the Department of State and other foreign affairs agencies; the Armed Services Committees oversee the Defense Department;

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<sup>57</sup> Spanier J. & Uslaner, *American Foreign Policy Making and the Democratic Dilemmas*, Macmillan Publishing Company, New York, 1994, p 161

<sup>58</sup> Goldstein M. *America's Foreign Policy: Drift or Decision*, Scholarly Resources Inc. Delaware, 1984, p 356

<sup>59</sup> “Congressional Committees and the Foreign Policy Process” in *US foreign Policy Agenda Vol1, no 9* (July, 1996)p.35

the Intelligence Committees oversee the Central Intelligence Agency, and other parts of the intelligence community. Mechanisms used in the committees include; hearings and investigations which may be on any subject within a committee's jurisdiction and raise questions about policy for public discussion. Senate Foreign Relations Committee hearings on the Vietnam War and national commitments in the late 1960s and early 1970s, for example, contributed to public opinion against continued U.S. participation in the war.

In recent years, according to Tahir, the Appropriation Committees of the House and Senate have become quite influential in foreign policy because of the frequent failure of the Congress to pass the authorizing legislation for foreign aid. Other committees, which also share jurisdiction on foreign policy, are the Select Intelligence Committees of both the Houses which monitor the activities of the CIA and other Intelligence agencies; the House National Security Committee and the Senate Armed Services Committees which deal with the defense matters; the House Ways and Means Committee and the Senate Finance Committee which deals with the trade and bills.<sup>60</sup> The many different committees with jurisdiction over aspects of foreign policy weaken the ability of the Congress as an institution to propose and carry out an alternative foreign policy. But they also provide opportunity for the administration to seek support from constituencies within the Congress for its foreign policy as well as pitfalls for the implementation of some policies.

Congress exercise significant restraints on the powers of the President, creating considerable tensions in the foreign policy process. The Congress has for many times been able to assert itself forcing the U.S. administration to change the foreign policy course. For example,

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<sup>60</sup> Amin Tahir, *Parliament and Foreign Policy: A Comparative Analysis of the US, UK, and India*, Pakistan Institute of Legislative Development and Transparency, Lahore.2004

President Woodrow Wilson could not get the ratification of the treaty meant to facilitate the U.S. entry into the League of Nations in the 1920s, since the congress did not support it.<sup>61</sup> President Lyndon B. Johnson was forced to disengage from the Vietnam War by the U.S. Congress which did not think that the war was in accordance with the American interests. The U.S. Congress passed the War powers' Act in 1973 making it mandatory that the approval of the Congress should be sought in declaring war.<sup>62</sup> President Reagan had to stop the U.S. covert intervention in El-Salvador in 1975, leading to the resignation of the two key officials of the U.S. administration responsible for the policy.

According to Tahir, this complex system of decision-making has merits and demerits. The merits include a significant check on the Presidential authority where he cannot abuse his power. The fear of Congress always acts as a deterrent and the administration has to keep in view the concerns of the Congress. The formulation of the policy is well-thought-out because of possible backlash from the Congress.<sup>63</sup> Despite the complexity of the process, due to the overlapping roles between congress and executive, it enhances greater stability, transparency and predictability of the decision-making processes as the different institutions share their responsibilities well knowing their limits. It must be emphasized that the Congress normally show deference to the policy formulated by the executive. It is only under the extraordinary situation that they react to the administration's policies.<sup>64</sup>

There are some major drawbacks which have been cited to the suitability of Congress for making foreign policy which include: domestic bias in the representative's role, the diffusion of

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<sup>61</sup> Brewster C. Denny, *Seeing American Foreign Policy Whole*, Ill: University of Illinois Press, 1985

<sup>62</sup> Mansfield D. and Bckley G. *Conflict in American Foreign Policy: The Issues Debated*, NJ: Prentice Hall, 1985

<sup>63</sup> Goldstein M. *America's Foreign Policy: Drift or Decision*, Scholarly Resources Inc. Delaware, 1984, p 356

<sup>64</sup> "The Making of US Foreign Policy, US Foreign Policy Agenda vol.5,no.1, (March,2000)

power in the Congress, the nature of the budget making process, lack of information, slowness of congressional action, the danger of information leaks, the loss of flexibility, loss of secrecy and the difficulties of achieving bi-partisan support. Hamilton argues that the Congress and the Senate sometimes show a fickle-mindedness through bypassing unilateralist bills against specific countries, making it difficult for the administration to conduct a flexible policy.<sup>65</sup>

In brief, Congress does play the role suggested by the democratic and pluralist models. And it is surely a decentralized institution that shares power with the executive branch, as the pluralist model suggests. There is also so much conflict within Congress over policy issues.<sup>66</sup> Congress in its oversight responsibility plays a role in the course of policy through enactment of legislation governing foreign relations and through the appropriation or denial of funds. Cooperation between the two branches is necessary for a strong and effective U.S. foreign policy.

### ***2.3 Foreign policy formulation and implementation in Britain (United Kingdom)***

In British constitutional practice most acts related to the exercise of the foreign affairs power are said to be acts of state. An act of state means “essentially an act of sovereign power, and hence cannot be challenged, controlled, or interfered with by municipal courts”. Moreover, acts of state seem to have been used by the Crown as a shield in actions brought by private individuals, such as cases of aliens outside British territory; in cases of enemy aliens within British territory; and in cases of acts done by the Crown in British protectorates in relation to the local inhabitants. In relation to treaties, domestic application generally requires the enactment of

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<sup>65</sup> Hamilton Lee, “Impact of Congressional Power Shift on Foreign Policy” *US Foreign Policy Agenda*, Vol. 1 , no. 9 (July 1996)

<sup>66</sup> Brewer, T. *American Foreign policy:A Contemporary Introduction*, Prentice Hall, New Jersey, 1992 p. 93

facilitating legislation, though this has been subject to exceptions, in particular in the context of the more recent European regional integration agreements.<sup>67</sup>

The Parliament in the UK does not have specific powers to restrain the executive. The control of foreign affairs rests in the hands of the Crown and is shared with the Legislature only to the extent that the Crown deems this desirable. The British government retains the power to carry on diplomatic negotiations without reference to the Parliament, to make and ratify treaties without obtaining Parliamentary approval and even to refuse information to the Parliament on the ground that it would be prejudicial to the public interests. Judiciary sides with the government in the foreign policy matters because of the distinction that the Parliament should primarily remain confined to the domestic matters, leaving the executive independent in the foreign policy matters.<sup>68</sup>

Tahir argues that Parliament has however, been able to assert a recognized right to be consulted in the case of Declaration of war, which carries more of a moral sanction than a legal one. For example, the government did not have any problems in making a war declaration on the occasion of the first World War (1914) and the second World War (1939) where the Parliament supported the government but the government faced a great difficulty during the Suez crisis of 1956 when Britain and France had declared war against Egypt over the issue of the nationalization of the Suez canal.<sup>69</sup> The British Parliament has no official role regarding engagements by means of treaties. Nevertheless, according to the constitutional practice that is

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<sup>67</sup> J. B. Ojwang & L G. Franceschi, Constitutional Regulation of the Foreign Affairs Power in Kenya: A Comparative Assessment, *Journal of African Law*, 46, 1 (2002), 43–58, School of Oriental and African Studies. United Kingdom.

<sup>68</sup> Bishop D., *The Administration of British Foreign Relations* Connecticut: Greenwood Press, 1961

<sup>69</sup> Amin T, *Parliament and Foreign Policy: A Comparative Analysis of the US, UK, and India*, Pakistan Institute of Legislative Development and Transparency, Lahore. 2004

termed "The Ponsonby Rule", every treaty or agreement that require the Government's ratification, are presented to Parliament at least twenty one working days before the ratification, so that Parliament can express its opinion on them. In addition, there is a custom according to which treaties that have direct budgetary ramifications, require the consent of Parliament, due to their effect on State revenue. This is in particular about bilateral agreements, which are designed to prevent double taxation.

British Parliament entails two houses; House of Lords and House of Commons. The House of Commons controls the public funds, therefore, the fate of foreign office and the defense forces rests on the consent of the Parliament. The Members of the Parliament also have right to information. The government has to keep the members informed through speeches, periodic reports and answering the questions about the state of foreign relations.<sup>70</sup> Parliament is responsible for approving new laws. The basic function of the Parliament is to examine the policies which cabinet has decided. However, Parliament can normally be consulted only after decisions have been made. Its control over foreign affairs results from its place in the government and the general legislative functions.<sup>71</sup>

The British Parliament has three committees dealing with issues of foreign affairs: Foreign Affairs Committee, Committee on European Legislation and the Committee of Public Accounts which exercise considerable check on foreign affairs. Foreign Affairs Committee consists of eleven Members of Parliament, drawn from the three largest political parties. It is appointed to monitor the policy, administration and expenditure of the Foreign and Commonwealth Office (FCO) and its associated public bodies, including the British Council and

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<sup>70</sup> Carstairs C. & Ware R, *Parliament and International Relations* (Milton Keynes: Open University Press, 1991), Peter Richards, *Parliament and Foreign Affairs* (1967)

<sup>71</sup> Op cit

the BBC World Service. The Committee chooses its own subjects of inquiry. It takes written and oral evidence and produces reports to which the Government issues a response. After a Foreign Affairs Committee inquiry a report is made to the House and published both in hard copy and on this website. The Committee reaches conclusions and makes recommendations to the Government in its reports. The Government then undertakes to give a detailed response to the Committee's reports within two months of publication. The Committee's reports are often debated either in the House or in Westminster Hall.

Parliament and government both play a part in forming the laws of the Britain. They are separate institutions that work closely together, so it's easy to mix-up exactly what each one is responsible for. Parliament is the highest legislative authority in the United Kingdom. It has responsibility for checking the work of government and examining, debating and approving new laws. It is also known as the Legislature.

#### ***2.4 Foreign policy formulation and implementation in South Africa***

The 1994 democratic elections in South Africa ushered in a new government. Its main aim was the creation of new domestic political and socio-economic structures, but it also signaled a change in the area of foreign policy.<sup>72</sup> As early as 1993, African National Congress (ANC) president Nelson Mandela articulated several principles which would underpin South Africa's future foreign policy.<sup>73</sup> These principles were further elaborated in March, 1994, when the ANC published a comprehensive foreign policy document entitled, "Foreign Policy Perspectives in a Democratic South Africa". For the ANC the struggle for an apartheid-free South Africa was in many ways a struggle for fundamental human rights. It is no coincidence,

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<sup>72</sup> Pfister Roger, *South Africa's Recent Foreign Policy Towards Africa: Issues and Literature*, Beitrage, 2000

therefore, that human rights was accorded as a cornerstone in its foreign policy. Furthermore, the emphasis on the promotion of democracy and adherence to international law embodied the values and norms enshrined in South Africa's new constitution. It is also worth noting that South Africa's neighbours suffered immeasurable harm in aiding and supporting its struggle for liberation.

Post-apartheid South African foreign policy has been dominated by two presidents who, for markedly different reasons, may be regarded as 'foreign policy' presidents. By force of personality, history, reputation and the symbolism of his struggle, peace-making and nation-building achievements, Nelson Mandela was feted by the international community and *de facto* became South Africa's foreign policy image. Although the Presidency is divided into four branches the Private Office of the President and Corporate Services, the Office of the Deputy President, the Cabinet Office and the Policy Coordination and Advisory Service (PCAS) for purposes of understanding the role of the Presidency as an institution in foreign policy formulation, it is the Cabinet Office, and more particularly the PCAS, that is of significance.<sup>74</sup> Parliament and South African political parties have remained substantially calm in the discussion on foreign policy. With the exception of the stance on Robert Mugabe's regime, Parliament has not become polarised nor have the political parties faced deep divisions over other substantial issues of foreign policy.

Raymond Suttner explains the difficulty South Africa faces in trying to promote human rights and democracy, while simultaneously trying to build bilateral and multilateral diplomatic relations with countries known for human rights violations.<sup>75</sup> In *Parliament and foreign policy*

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<sup>74</sup> Hughes T. *Composers, Conductors and Players: Harmony and Discord in South African Foreign Policy Making*, Konrad-Adenauer-Stiftung, South Africa. 2004

<sup>75</sup> Suttner Raymond. *Foreign policy of the new South Africa: a brief review 1996*, p 191-205.



Suttner argues that the question of whether parliament should be concerned with formulation of foreign policy or not, and discusses the situation in South Africa after April 1994, where as yet no institutionalized mechanism exists whereby a creative relationship between the department and the portfolio committee concerned with foreign policy can be formed.<sup>76</sup>

South Africa has a total of 490 Parliamentarians, with National Assembly consisting of 400 members, while the National Council of Provinces [NCOP] has 90 members. One key role of the legislature is to check, challenge, monitor and legitimizes policies undertaken in the name of the state by the executive branch of government. Specifically there are Parliamentary Committees on Foreign Affairs [PCFAs] that often created to deal with issue of foreign relations and international/diplomatic affairs. Tim Hughes has argued that the Parliamentary Committee on Foreign Affairs is fundamentally created and tasked with maintaining oversight of: the exercise of national executive authority within the sphere of foreign affairs, the implementation of legislation pertaining to the spheres of foreign affairs, any executive organ of the State within the sphere of foreign affairs; and any other body or institution in respect of which oversight was assigned to it.<sup>77</sup> The Parliamentary Committee on Foreign Affairs also enjoys considerable specific powers. It may monitor, investigate and make any recommendations concerning any constitutional organ of state within its purview. The committee is granted such powers with regard to the legislative programme, the budget, rationalization, restructuring, functioning, structure or staff and policies of any organ of state or institution. Furthermore, the committee is to consider all bills and amendments to bills referred to it. A further role unique to the

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<sup>76</sup> Raymond Suttner, *Parliament and foreign policy*, South African yearbook of international affairs, 1996, p 136-143.

<sup>77</sup> Tim Hughes. *The parliamentary portfolio committee on foreign affairs*, in South African yearbook of international affairs / SAIIA, 2002, p 97-104.

Parliamentary Committee on Foreign Affairs is the consideration and approval of all international conventions and treaties prior to their ratification by Parliament.<sup>78</sup>

The South African Constitution stipulates that the holding of negotiations and the signing of international agreements are within the competence of the executive branch. Nevertheless, the approval of Parliament is required so that these agreements shall be binding. This approval is granted by the two Houses of Parliament.<sup>79</sup> The Constitution stipulates that international agreements of a technical, administrative or executive nature, or agreements that do not require ratification or accession by the executive branch, are binding without the need for parliamentary approval. These agreements must be laid on the table of Parliament within a reasonable period of time.<sup>80</sup>

For most democracies across the world, legislative engagement in foreign policy development has traditionally been limited to ratification of international agreements and oversight of the executive. While the parliament of South Africa tends to adhere to this traditional approach, deferring to the executive on matters of foreign policy there is need for a collaborative approach between legislature and executive branches as articulated in the South Africa's constitution. This should form the basis of South Africa's foreign policy development process.<sup>81</sup>

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<sup>78</sup> Banjo A., *A Review of Parliament-Foreign Policy Nexus in South Africa and Namibia*, in the *Journal of Politics and Law*, vol. 2. September, 2009

<sup>79</sup> Constitution of the Republic of South Africa, 1996

<sup>80</sup> Ibid

<sup>81</sup> Ahmed K. *The Role of Parliament in South Africa's Foreign Policy Development Process: Lessons from the United States' Congress*, in *South African Journal of International Affairs*, vol. 16, No. 3, December 2009, Pg 291

## **2.5 Conclusion**

In conclusion the Congress in the U.S has an active role in challenging the administration. The Congress checks on the executive, ensures a stable and transparent foreign policy which is often well thought out. The challenge of the Congress having a lot of powers include: the loss of flexibility because majority of the members have to agree on something for it to pass, loss of secrecy and delay in implementing the foreign policy decisions. For Britain and South Africa the parliaments give near total freedom and autonomy to the executive and assume a submissive role which always agrees with the government. The role of the Parliament in these cases is more of a general supervision and consultation depending upon the will of the government. By comparing the Parliament of South Africa, a legislature with limited policy influence, to the United States Congress a policy making legislature, it becomes clear from the Congress that political will in employing constitutional power is the most important factor in ensuring legislative engagement in foreign policy decision making.<sup>82</sup>

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<sup>82</sup> *ibid*

## CHAPTER THREE

### THE FORMULATION AND IMPLEMENTATION OF FOREIGN POLICY IN KENYA

#### 3.0 Introduction

This chapter delves into the Kenya Foreign Policy precisely exploring the influence held by Kenya's heads of state on the formulation and implementation of policy. Kenya has had three presidents since independence, Kenyatta being the first followed by Moi who ruled for 24 years and finally Kibaki who is still in power. Kenya along with Nigeria and South Africa is one of three "anchor states" in sub-Saharan Africa-countries that are key to the stability of the region because of location and resources.<sup>83</sup> The first two years after independence (1963) were for adjustment, this was in relation to formulation and implementation of Kenya's foreign policy as noted by William Ochieng'.<sup>84</sup> At independence two election manifestos prepared by Kenya African National Union (KANU) in 1961 and 1963 became the principles objectives of Kenya's foreign policy. These two early documents set the discussion agenda for the policy debate from 1963 to 1966 between the radicals and conservatives in the party regarding whether Kenya needed to adopt radical or moderate policies at home and abroad.<sup>85</sup>

The party manifesto for 1961 stated among other things that independent Kenya would: vigilantly safeguard national interest, maintain independence, join with other nationalist democratic movements in Africa and other continents to eradicate imperialism, racialism and all forms of oppression, work for international peace and peaceful settlement of international

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<sup>83</sup> Joel Barkan, Kenya After Moi, in *Foreign Affairs*, Vol. 83, No. 1 (Jan. - Feb., 2004), pp. 87-100

<sup>84</sup> William R. Ochieng' (ed.) *A Modern Political History of Kenya: 1895-1980*, Evans Brothers Ltd. Nairobi, 1989.

<sup>85</sup> John Howell, An Analysis of Kenyan Foreign Policy, in the *Journal of Modern African Studies*, 6, 1 (1968), pp. 29-48 Cambridge University

disputes through United Nations. The 1963 KANU election manifesto reaffirmed those principles and translated some of them into national interests. It stated the responsibilities of independent Kenya government formed by KANU : protect the security of the people, preserve national integrity, maintain military forces, foster East African co-operation, conclude defense arrangement with regional states, give support to liberation movements in East Africa, be non-aligned in global politics and participate fully in international affairs.<sup>86</sup>

According to Korwa Adar Kenya's foreign policy is largely influenced by its economic and political interests and national security concerns. Kenya's foreign policy makers have consistently invoked the principles of respect of sovereignty, territorial integrity, and peaceful co-existence vis-à-vis their neighbors. This chapter will attempt to analyze Kenya's foreign policy under three different regimes (Kenyatta's, Moi's and Kibaki's).<sup>87</sup> The executive powers conferred on the president by the old constitution of Kenya permeate all government branches. This constitutional provision remained the same since 1960s, thus foreign policy making process under various administrations depended on the president's leadership style and the issue at stake<sup>88</sup>. This make it crucial for the study to look at the influence held by the Presidents in Kenya's Foreign Policy. It will also look at the changes brought about by Kenya's new constitution 2010. The basic elements of the foreign affairs power are: the treaty making power, the making of war and peace, diplomatic relations, and recognition of states and governments.

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<sup>86</sup> Katete Orwa, *Continuity and Change: Kenya's Foreign Policy from Kenyatta to Moi*, in Oyugi Walter, *Politics and Administration in East Africa*, East Africa Educational Publishers, Nairobi, 1994 pg. 298-300

<sup>87</sup> Ibid Orwa

<sup>88</sup> Adar Korwa & Schraeder, *Globalization and Emerging Trends in African Foreign Policy*, University Press of America, New York, 2007

### ***3.1 Foreign Policy in the Kenyatta Era (1964 -1978)***

In December, 1963, Jomo Kenyatta formed the first independent Kenya government, it was clear that the new state's foreign policy would be affected by both internal and external factors. First national security and unity were under threat by the secessionist movements in the Northern Frontier District now North Eastern Province. The Somalis considered themselves a different race and therefore demanded a separate or integration into the republic of Somali. The desire to protect Kenya's territorial integrity shaped Kenya's policy of living in harmony with all Kenya's neighbors. Kenya adopted the non alignment as a policy in international affairs which was consistent with the demands of national survival of the new state. Non-aligned stand acted as Kenya's independence and determination to participate fully and objectively in international affairs. Low levels of national capabilities ensured that Kenya sought to increase international bargaining power through collective political alliance within the framework of non-aligned countries.<sup>89</sup>

As head of state throughout his tenure Kenyatta hardly left the country on official visits. He instead delegated foreign policy responsibilities to his minister of foreign affairs. Kenyatta centralized power around the presidency through a series of constitutional amendments. The first amendment abolished the office of the prime minister, while the second replaced the office of regional presidents with provincial commissioners, appointed directly by the president. The president was also empowered to invoke his constitutional prerogative by declaring a state of emergency for twenty eight days at a time. These and other amendments strengthened the executive power of presidency as compared with parliament and the judiciary. Notwithstanding

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<sup>89</sup> Tom Mboya, *The Challenge of Nationhood: A Collection Speeches and Writings* by Tom Mboya. London Andre Deutsch, 1970, p. 234

the amendments, Kenyatta remained disinterested in foreign policy, opting for a “wait and see” approach towards international affairs. He often delegated foreign policy making to his ministers. Muyua Waiyaki, minister of Foreign affairs then stated that he had a license from the President to steer Kenya’s foreign policy.<sup>90</sup>

Korwa reiterates that two foreign policy decision making models were applicable to Kenyatta’s presidency, namely organizational process model and bureaucratic politics models. In organizational process model, the organization’s foreign policy role and standard operating procedures shape the policy process. The bureaucratic politics models add to this foreign policy mix, emphasizing political competition between separate and competing bureaucracies. The ministry of foreign affairs was responsible for the formulation and implementation of Kenya’s foreign policy, particularly in routine situations. But during crisis situation, such as when Kenya severed diplomatic relations with China and Czechoslovakia or the declaration of a state emergency in the 1960’s, Kenyatta involved Cabinet, Parliament, Ministry of Foreign Affairs and the intelligence community.<sup>91</sup>

According to Maria Nzomo, the locus of decision making in general and foreign policy in particular did not reside in Kenyatta as a person but in the elaborate power structure which had been built around him to perpetuate the myth of his power and authority. Kenyatta according to Nzomo did not personalize foreign policy making, but instead involved people who were very close to him, and various departments of government. These people, Nzomo called “The Palace

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<sup>90</sup> Adar Korwa & Schraeder, *Globalization and Emerging Trends in African Foreign Policy*, University Press of America, New York, 2007

<sup>91</sup> *ibid*

Advisors” and they included cabinet ministers, prominent public servants, relatives and friends and most of them hailed from his ethnic community, the Kikuyu.<sup>92</sup>

Parliament had an impact on the formulation and implementation of Kenya’s foreign policy during Kenyatta’s era though limited. This was demonstrated by its proactive involvement in foreign policy questions, such as the extension of emergency powers in the Northern Frontier District (NFD) in the 1960s in response to Somalia’s activities in the region, the establishment of the East African Federation, and the Unilateral Declaration of independence in South Rhodesia now Zimbabwe by Ian Smith.<sup>93</sup> At one point in 1963, for example, the personal intervention of the minister of justice was required to persuade senators to vote in favor of the extension of emergency powers.

### ***3.2 Foreign Policy in the Moi Era (1978 - 2002)***

Korwa and Orwa, noted that Moi inherited and further strengthened a centralized and personalized state especially after an attempted coup in 1982. The transformation of Kenya into a de jure one party state laid the foundation for this process. The emergence in 1986 of the highly published *Mwakenya*, a conglomeration of groups and individuals opposed to Moi, served as the pretext for the regime to increase its authoritarian and oppressive rule over the country. Over the years KANU and the state became identified with Moi. Specifically, the party, the state and the president became one and the same thing.<sup>94</sup> Mwai Kibaki, who was the vice president and leader of government business in Parliament at that time, put it before members of the House that:

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<sup>92</sup> Maria Nzomo, *The foreign policy of Kenya and Tanzania: the impact of dependence and underdevelopment*. Dalhousie University, Canada, 1982

<sup>93</sup> Adams Oloo, “The Role of Parliament in Foreign Policy Making-Process in Kenya, 1963-1993”. MA Thesis, University of Nairobi. Pg 84-121

<sup>94</sup> Adar Korwa & Schraeder, *Globalization and Emerging Trends in African Foreign Policy*, University Press of America, New York, 2007



people belonging to a nation were only identified in living sense to the extent with which one identified themselves with the head of state. "We were elected on the KANU ticket and we in a one party state owe a lot to the head of our party."<sup>95</sup>

It was apparent that Moi's foreign policy thinking was not far from his predecessor. Like Kenyatta Moi was wary of policies that sought to adjust national boundaries, national security and national sovereignty. Under Moi, Kenya's posture of non alignment remained the same. Kenya's support for African liberation movements not only remained the strong but also upgraded to include inviting liberation leaders to national day celebrations and military pass out ceremonies. One feature that differentiated the Moi Policy from that of Kenyatta is Moi's personal diplomacy and involvement in the management of foreign policy. Whereas Kenyatta maintained a low profile in the management of foreign policy, Moi was at the centre stage. After taking office, he visited many countries personally to promote Kenya's national interests.<sup>96</sup>

Foreign policy making during the Moi administration was best characterized as highly centralized or State House centric. Moi was always at the centre stage in the management of Kenya's foreign policy both in crisis and in routine situations. Parliament and the Ministry of Foreign Affairs were subordinate to the presidency in the process foreign policy making. For example, Parliament was not consulted when Moi in 1980 entered into an agreement with Carter administration to allow the U.S Rapid deployment Force to use Kenya's military facilities in Mombasa.<sup>97</sup> The Minister of State in the Office of the President made it clear when he emphasized in Parliament that the defense and security issues could not be discussed publicly,

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<sup>95</sup> Weekly Review, 28, September 1984, 4

<sup>96</sup> Adar Korwa & Schraeder, *Globalization and Emerging Trends in African Foreign Policy*, University Press of America, New York, 2007

<sup>97</sup> Ibid

suggesting that parliament had no role to play in the country's foreign policy. This issue had been raised in the House by the members of parliament.<sup>98</sup>

A parliamentary Committee responsible for foreign affairs tabled in parliament under Sessional Paper No. 10 of 1979 and adopted by the members of the House never became operational. This showed evidently how during Moi reign parliament played no role in foreign policy making process. For example when Kenya severed diplomatic relations with Norway in 1990, it was the presidency that unilaterally made the decision without seeking approval from parliament. This State House-centric foreign policy making process, with Moi at the helm, reflected a highly personalized foreign policy making model in which the president and his inner circle were directly involved in the formulation and implementation of foreign policy.<sup>99</sup>

According to Mwangi, presidential involvement in Kenya's diplomacy was pervasive. One of its effects was the overshadowing of the Minister for foreign affairs. This was evidently the case during the transitional tenure of Mungai Waiyaki the minister for foreign affairs who had played a central role in the formulation of Kenya's foreign policy, and the conduct of its diplomacy. The head of state began making diplomatic and foreign policy forays of his own, thus the role of the foreign affairs minister diminished considerably. Ministers of foreign affairs became peripheralised within Kenya's foreign policy. All the foreign ministers after Waiyaki were better servants of the president than of Kenya.<sup>100</sup> To ensure his grip on power, he systematically usurped the functions of the other institutions of government to the extent that the principle of separation of powers was rendered ineffectual. This was because he associated

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<sup>98</sup> National Assembly of Kenya. House of Representatives, vol. LIV. 1981

<sup>99</sup> Adar Korwa & Schraeder, *Globalization and Emerging Trends in African Foreign Policy*, University Press of America, New York, 2007

<sup>100</sup> Makumi Mwangi, *The Elusive Quest: Conflict, Diplomacy and Foreign Policy in Kenya*, in Godfrey Okoth & Bethwell Ogot, *Conflict in Contemporary Africa*, Jomo Kenyatta Foundation, Nairobi, 2000

insecurity and instability with open criticisms and challenges to his policies and style of leadership.

The revised constitution of 1998 conferred more powers on the president than on Parliament. The president was empowered to appoint twelve members into the National Assembly; he had the right to dissolve Parliament, these made the president all powerful. Moi ruled the country by issuing decrees, some of which were rushed through the National Assembly to legitimize his actions, making parliament a rubber stamp legislature.<sup>101</sup> The post 1992 multiparty electoral dispensation did not greatly alter his leadership style, particularly with respect to foreign policy making. Specifically on the issue of foreign policy making, Moi remained the first among equals, particularly in relation to the cabinet, parliament and other institutions of governance.<sup>102</sup>

### ***3.3 Foreign Policy in the Kibaki Era (2002 - 2013)***

On December 27, 2002, more than five million Kenyans went to the polls to elect Mwai Kibaki as the country's third president Kenya's first electoral change of government since independence. The election marked the end of the 24-year presidency of Daniel arap Moi and an opportunity for Kenya to return to its once-vaunted record of political stability and economic growth. Kenyans were elated, their expectations high.

President Kibaki has been at the realm of power for two terms since 2002. According to Korwa during President Kibaki first years in office Kenya's foreign policy priorities remained unclear, ad hoc and inchoate. However the regional, continental and global foreign policy

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<sup>101</sup> Okondo, P.H *A Commentary on the Constitution of Kenya*, Nairobi: Phoenix, 1995

<sup>102</sup> Adar, K. G "Assessing Democratization Trends in Kenya: A Post Mortem of Moi's Regime" *Commonwealth & Comparative Politics*, 2000, 38(3)

interests set out during Kenyatta's era for example respect for sovereignty and territorial integrity among others fundamentally remained unchanged. Foreign policy under his administration is best referred to as decentralized, mixed and ad-hoc. This is in contrast to the Moi administration; President Kibaki provides a relatively open environment for cabinet ministers to discharge their responsibilities, with limited interference. The transfer of East African Community portfolio from the Ministry of Trade to the Ministry of Foreign Affairs and International Co-operation demonstrates the foreign policy importance that Kibaki administration attaches to the latter. Kibaki's leadership style in regard to foreign policy reflected a mixture of Kenyatta and Moi leadership style. The minister for foreign affairs and international cooperation was given much leeway to manage foreign affairs like in Kenyatta's case while like Moi he decided to retain the defence and intelligence portfolio within the Presidency<sup>103</sup>

When Kibaki came into power through National Rainbow Coalition (NARC) he promised to deliver a new constitution within a year. This did not come to pass until 2010 during his second term. New constitution was a hallmark event in more than one aspect. It paved the way for the promulgation of Kenya's second constitution. The new constitution has reconfigured Kenya's institutions across board. For example in the old constitution the legislature was only one house, but with the new constitution it shall become bicameral meaning it will have two houses namely; National Assembly and Senate. The 2010 Constitution provides that there shall be 290 constituencies instead of the current 210 after the general elections in 2013. Unlike the old constitution which is silent on a threshold, the new one establishes the maximum possible

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<sup>103</sup> Adar Korwa & Schraeder, *Globalization and Emerging Trends in African Foreign Policy*, University Press of America, New York, 2007

departure from the principle of the equality of the vote. There will be one woman elected from each county by the voters of the county in the National Assembly (article 97 (b)). So at a minimum there will be at least 47 women in the 349 member National Assembly. And lastly there will be 12 members nominated to represent “special interests” including youth, persons with disability and workers.<sup>104</sup>

The Senate shall have a total of 67 members. First, one member will be elected by the voters for each of the 47 counties.<sup>105</sup> Second, 16 women members will be nominated from party lists, and allocated to the parties in proportion to the number of seats they won in the country elections for Senate members.<sup>106</sup> These members will be additional to any women elected directly from counties. Third, one man and one woman will represent youth and one man and one woman will represent persons with disability; all of whom will be taken from party lists.<sup>107</sup> Kenya’s legislature has transitioned from the hybrid system to a pure presidential system. It will entail the following; fixed calendar for parliament, the president will not be a member of parliament, the attorney general will not be a member of parliament, members of parliament will not be in the executive among others.

According to Mwangi both bilateral and multilateral treaties are one of the clearest manifestations of the complex interdependence of international relations. States enter into agreements either bilaterally or multilaterally, on a wide range of issues touching on their mutual relations. Without the system of treaties and agreements pervading international relations, the

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<sup>104</sup> Government of Kenya, *The Constitution of Kenya*. Nairobi: Government Printers, 2010

<sup>105</sup> *The Constitution of Kenya*, 2010, Article 98

<sup>106</sup> *The Constitution of Kenya*, 2010, Article 90

<sup>107</sup> Adams Oloo, ‘Elections, Representations and the New Constitution’, Society for International Development, Constitution Working Paper No. 7

world would be more impoverished. Treaties are an increasingly important feature of international and regional relations. They are an important aspect of diplomacy, and a notable feature of regional diplomacy.<sup>108</sup> Treaty practice is concerned with how, domestically, international law and municipal law relate to each other.<sup>109</sup>

Kenya's treaty practice has for the first time, been enshrined in the Kenya's second constitution thus marking a shift from the old dualist practice to monism. Monism entails incorporation whereby, treaties are automatically incorporated into municipal law, and hence are automatically binding. Dualism involves transformation whereby, treaties do not become automatically binding on states unless they have first been transformed into municipal law. The process of transformation requires that the legislature which makes laws domestically, to first of all transform treaties into municipal law. The transformation of treaties into municipal law entails making them part of the statutes of the country. In Kenya for example, the Vienna Convention on Diplomatic Relations was transformed into the Privileges and Immunities Act (chapter 179 of the laws of Kenya), while the 1949 Geneva Conventions were transformed into the Geneva Conventions Act (chapter 198 of the laws of Kenya).<sup>110</sup>

Before the new constitution was passed in August 2010 Kenya's Treaty practice was characterized as follows: parliamentary action was not required for permissive treaties, that is, those whose provisions are not inconsistent with any law in force in Kenya. Treaties that required an act or omission not expressly authorized by any laws of Kenya required an act of

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<sup>108</sup> Mwagiru. M. The Missing Link in the Study of Diplomacy: The Management of the Diplomatic Service and Foreign Policy, in *The Journal of Language, Technology & Entrepreneurship in Africa*, Vol. 2. No.1. 2010, ISSN 1998-1279

<sup>109</sup> Brownlie, Ian, *Principles of Public International Law*. Oxford: Oxford University Press. 1990

<sup>110</sup> Mwagiru. M. The Missing Link in the Study of Diplomacy: The Management of the Diplomatic Service and Foreign Policy, in *The Journal of Language, Technology & Entrepreneurship in Africa*, *Opcit*

parliament to give them that effect. Where a treaty contained provisions which are not catered for by existing laws, a statute was to be enacted by parliament to give effect to such a treaty. Thus, the executive was able to ratify treaties and parliament's role was to amend any other laws so as to make them conform to Kenya's treaty commitments. Kenya's treaty practice until 2010 was therefore a corrupted dualist one, in which parliament was not required to give permission for the executive to ratify treaties; but where the executive ratified treaties, monist fashion, the role of parliament was to make amendments to other laws of Kenya to make them conform to the treaty. The adoption of monist treaty practice will indeed sharpen the separation of powers in Kenya. In this approach, the role of each of the three powers in Kenya will become even better defined. The executive will negotiate treaties; parliament will debate about them, and make voting decisions about whether they should be ratified. And following that decision making, and only following it, the executive will ratify the treaties as it is required to do by the laws and practices of treaty law and diplomacy. This will without doubt enhance significantly the diplomacy of treaty practice in Kenya

### ***3.4 Conclusion***

One main challenge for Kenya, particularly on foreign policy, is to provide a clear vision for the country's future, such that the administration is not only reacting to events. The old constitution did not regulate treaty making the Executive had the sole power over the matter. The Executive signed and ratified all treaties, but no treaty would produce internal effects unless it is translated into statutory law through the intervention of Parliament. The difficulty then was double; the consent of the legislature was not required for ratification, but was required for adoption of a treaty into Kenyan municipal law after it has already been ratified.

It can be noted as Mwangi put it that, treaty practice that has been practiced since independence has been held hostage by the reality that the other two arms of government have been overshadowed by the executive in the treaty making process. This overpowering by an imperial executive in turn generated rationales such as the dualism, as the basis on which treaties can be applied in municipal law. The dualist paradigm has now eventually been overthrown in a scientific constitutional revolution. This scientific revolution was long overdue in Kenya's treaty practice. With the passing of the 2010 constitution parliament has a role to play in foreign policy which entails debating about treaties, and make voting decisions on whether they should be ratified.<sup>111</sup>

There are differences in the formulation and implementation of Kenyans foreign policy during the presidency of both Kibaki and Moi regime namely; presidential personal diplomacy and involvement in the management of foreign policy. Kibaki is known in maintaining a low profile in the management of Kenyans foreign policy formulation by involving other departments and parties like the ministry of foreign affairs and the vice president in the diplomatic negotiation of Kenyans foreign policy implementation and formulation. This was evident through "shuttle diplomacy" carried out by the vice president which was to rally other states to support Kenya's deferral case from the International Criminal court - ICC at the Hague. In contrast to Moi, who was thick in the management of Kenyans foreign policy. He personally visited many countries to promote Kenyans national interest at the international level. Under the presidency of Moi, Kenyans close relations with the western European countries was strengthened by personal

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<sup>111</sup> Ibid



presidential visits. Unlike Kibaki regime state visits have been limited to only summits and international conferences at some level.

## **CHAPTER FOUR**

### **CRITICAL ANALYSIS OF THE KENYAN PARLIAMENT IN THE FORMULATION AND IMPLEMENTATION OF FOREIGN POLICY.**

#### ***4.0 Introduction***

This chapter analyzes the role of the Kenyan parliament in foreign policy formulation and implementation. In many jurisdictions, constitutional practices and traditions give the executive the monopoly of all principal processes of foreign policy including formulation, execution, oversight and review or restructuring. The National Assembly is often made to play subsidiary roles of budget provision for foreign relations, the approval of budgetary votes for key embassies or requisite adoption, approval of treaties or agreements entered into by the executive and its agent or review of treaties and relations in which the National Assembly plays a part.

Historically, the Kenyan parliament has been relegated to performing post-mortem roles of foreign policy formulation and implementation. International relations positively or negatively, affect internal power relations. Therefore it is too important to be left entirely to the executive arm of the government. It remains imperative to ensure from the outset that the executive and parliament subject foreign relations to the needs of the popular national interest. Parliament has the constitutional mandate and plays a critical role in enacting legislation, formulating policies and approving programmes for foreign and international relations together with the executive. It also has the primary duty of oversight over the execution of policy and its regular appraisal. Parliament's participation goes beyond mere policy formulation. Parliament ought to actively participate in negotiations. In the past, Kenya's parliament has not been

adequately involved in such negotiations.<sup>112</sup> Parliament as a sovereign Assembly of elected representatives offers deliberative and consultative bases through its plenary debates and relevant committees for the continuous oversight of the foreign ministry operations, including the scrutiny of the budget for different embassies, the periodic review, restructuring and the overhaul of foreign policies and activities undertaken by missions abroad.

In the formulation and conduct of foreign policy, the Head of State is the top diplomat because he represents the state in international conferences and summits. The head of state accredits diplomatic envoys, sign credentials given to the head of diplomatic missions, and authorizes delegations to sign a treaty on his /her behalf. In many states, the formulation and implementation of foreign policy begins and ends with the head of state. The head of state appoints ambassadors who represent him in other states and all these envoys report directly to the head of state making him a central figure in the foreign policy formulation, conduct and implementation.

According to Kenneth Marende, the current speaker of the Kenyan legislature, Parliament is the integrated whole, it is the concoction that is a Nation. Its majesty is found in its position as an independent institution anchored in the constitution and with its own set of rules of procedure and in its tripartite mandate that stems from its configuration as the supreme organ of governance to: represent, legislate, and exercise oversight over the executive and judiciary.<sup>113</sup> Some of the key functions of parliament, with regard to foreign policy, involve proposing, deliberating and deciding about public policy. Foreign policy is an externalized public policy. This means that

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<sup>112</sup> Gitobu Imanyara, *Expanding Parliament's Role in National Diplomacy*, in *Kenya: A Timeline of the Country's Democratic Progress*, 2010

<sup>113</sup> Kenneth Marende, *Parliament and Conflict Management for Stability and Prosperity*, in *Kenya Parliament Magazine*, volume 3, 2 December, 2011

parliament formulates policies and establishes relevant committee structures for example Defence and Foreign Relations committee to advise and also oversee the implementation of foreign policy. The foreign policy decisions such as ratification of important treaties are sanctioned by the parliament, which is the representative of the people. In this way, legislators can be seen as actors in the sense that they determine whether or not a given foreign policy is to be pursued.<sup>114</sup>

Kenya's second constitution promulgated on August 27<sup>th</sup> 2010 was a momentous and historical event which envisages many changes. It provides for a pure presidential system of government much like the American system. One of the achievements of Kenya's 2010 Constitution is the redemption of the Kenyan legislature from the confinement of the Executive controls by strengthening its checks and balances. Indeed for decades, Parliament had been used as a 'rubber stamp' for Executive decisions. The Pre-2010 Constitution created a legislature that operated under the imposing prerogative powers of the executive, denying the former the freedom to effectively carrying out its oversight function. With the passage of the Constitution, Parliament has been empowered to up its collective responsibility as a 'watchdog' institution.<sup>115</sup> The new constitution changed the nature of foreign policy making in Kenya by reducing the much powers consolidated at the head of state enhancing distribution of powers in Kenyans foreign policy making through the inclusion of other key government departments and ministries in decision making process. It can be affirmed that the 2010 constitution is bound to radically change the way foreign policy was carried out in the past.

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<sup>114</sup> Ombado Obado, *The Diplomatic Post, Brief comparison and contrast of Kenya's foreign policy during the Moi and Kibaki eras. Foreign Policy Review*

<sup>115</sup> Marale Sande, *Parliamentary Oversight Enhanced*, in *Kenya Parliament Magazine*, volume 3, 2 December, 2011

President Kibaki has emphasized that with the new Constitution, the country's foreign policy framework must be designed to be in tandem with the emerging realities. Under the new Constitution, for example, functions such as international trade have been placed side by side with the foreign policy. This means that more prominence needs to be given to foreign trade promotion. One of the key pillars of Kenya's foreign policy is economic diplomacy thus this pillar must be given serious attention. Before 2010 foreign policy formulation was essentially a function of the Executive, according to the new constitution it will now be shared with the Legislature. Parliament will also vet nominees to serve as envoys as well as the Cabinet secretary who were formerly the minister, and the principal secretary in the foreign affairs department. As stated in the constitution Article 132 (2e) the president shall nominate and with approval of the National Assembly, appoint, and dismiss high commissioners, ambassadors and consular representatives.<sup>116</sup>

From chapter two it can be observed that Kenya's treaty practice has for the first time, been enshrined in the Kenya's second constitution thus marking a shift from the old dualist practice to monism. Kenya's treaty practice until 2010 was a dualist one, in which parliament was not required to give permission for the executive to ratify treaties; but where the executive ratified treaties, the role of parliament was to make amendments to other laws of Kenya to make them conform to the treaty. Kenya has now embraced monism and to make this possible there is need for parliament to enact laws to facilitate the process. The adoption of monist treaty practice will indeed sharpen the separation of powers in Kenya. The role of each of the three powers in Kenya

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<sup>116</sup> The Constitution of Kenya, 2010, Article 132(2e)

will become even better defined.<sup>117</sup> The executive will negotiate treaties while parliament will debate about them, and make voting decisions about whether they should be ratified. The Kenyan constitution in Article 2 (6) now makes treaty negotiations a consultative and intense affair to ensure that whatever is negotiated is in conformity with what the country wants.

In the United States the Congress has the powers to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States; under the constitution, thus no financial appropriations can be made without its approval.<sup>118</sup> In Kenya the 2010 Constitution has significantly altered the public finance landscape in country. The roles and powers of the Executive and the Legislature have been significantly delineated with the parliament having additional responsibilities over Public Finance Management (PFM). Kenya's most significant transformation in legislative scrutiny of the budget is its involvement in reviewing and approving the overarching fiscal framework including key assumptions on revenues and expenditures underpinning the following year's budget. Legislature's influence on the budget proposal is also determined by the time allocated to consider budget proposals. It is true that a legislature that has limited time to examine budget proposals is at a disadvantage. The United States has the longest lead time as the period spans to 9 months. For other countries, the period ranges between three months to a few weeks. The 2010

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<sup>117</sup> Mwangi. M. The Missing Link in the Study of Diplomacy: The Management of the Diplomatic Service and Foreign Policy, in *The Journal of Language, Technology & Entrepreneurship in Africa*, Vol. 2. No.1. 2010, ISSN 1998-1279

<sup>118</sup> Amin Tahir, *Parliament and Foreign Policy: A Comparative Analysis of the US, UK, and India*, Pakistan Institute of Legislative Development and Transparency, Lahore.2004

Constitution has attempted to eliminate the firm monopoly by the Executive over the budget making process.<sup>119</sup>

According to the Kenya's constitution Article 132(4e) the president with approval of parliament can declare war and call for extensions of states of emergency. This means that the president cannot just declare war without having it approved by parliament.<sup>120</sup> The Kenyan parliament was in full support for the war against Al-Shabaab militants by the Kenya Defense Forces.<sup>121</sup> In accordance to Kenya's constitution Article 238 (2a) national security is subject to the authority of the constitution and parliament.<sup>122</sup> The Minister of State for Defence Hon. Yusuf Haji, while moving a motion on the deployment of Kenya Defence forces under AMISOM in parliament on December 07, 2011 informed the members of the Kenya National Assembly , that they recalled there have been numerous cases of Al Shabaab impunity and cross border incursions that have been propagated by the militants such as the attack on Dajabula Police Post in 2009, General Service Unit (GSU) camp in Liboi in 2010, laying of mines and improvised explosive devices in Mandera Town targeting the police and military in July, 2011 and the increase in bandit attacks along the border in September, 2011. Other border violations have also been documented during initial operations in Bula Hawa in March 2011, Bula Haji operation in September, 2011 and the recent operation in Doble also in September, 2011.

The house was informed that the Al Shabaab has also been responsible for several kidnappings and hijackings within the country. Some of the documented cases include abduction of two Catholic nuns in Elwak and Non-Governmental Organization (NGO) workers in Mandera

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<sup>119</sup> Martin Masinde, Navigating Through the Storm: The Budget Process in the 2010 Constitution, in Kenya Parliament Magazine, volume 3, 2 December, 2011

<sup>120</sup> The Constitution of Kenya, clause 95(6), 132(4e), 2010

<sup>121</sup> Standard Newspaper, Tuesday, October 20. 2011

<sup>122</sup> The Constitution of Kenya, 2010

in 2009 and the capture of two soldiers at Diff in July, 2011. On 16th October, 2011, the Kenya Defence Forces (KDF) in exercise of the right to self determination under Article 51 of the Charter to the UN, engaged the *Al Shabaab*. This was done in defense of the sovereignty and the territorial integrity of the Republic. Consequently, the Kenya Defence Forces (KDF) launched the *Operation Linda Nchi* and in hot pursuit of *Al Shabaab*, crossed into Somalia. The ongoing operation is now being carried out jointly with the Transitional Federal Government (TFG) forces of Somalia. So far, the operation has been successful to the extent that over 50 per cent of southern Somalia has been liberated. This has brought the process of change to the lives of the people of southern Somalia.<sup>123</sup>

The Minister noted that the Commission of the African Union (AU) has requested the Government of the Republic of Kenya to consider the integration of KDF into AMISOM, currently engaged in Somalia. In pursuant to Article 240 (8) (a) (i) and (ii) of the Constitution of Kenya, which requires parliamentary approval for any regional or international deployment. The Minister requested Parliament to approve the request by the Commission of the AU to integrate the KDF currently operating in Somalia to AMISOM. The motion on the deployment of Kenya Defence forces under AMISOM was approved overwhelming by the members of the tenth parliament. The Minister for Foreign Affairs Hon. Moses Wetangula argued that in the past before 2010, one could sit in an executive office and declare that troops are going to Somalia. He stated it was now important that parliament which is made up of the representatives of the people of Kenya must have a say, must know and must approve what we are doing with troops in the Army.

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<sup>123</sup> Hansard Report, Kenya National Assembly, Wednesday, 7 December, 2011



Parliamentary Oversight in Kenya derives its powers from the Constitution, public laws and House rules and is utilized by Parliament to hold government to account. Parliament uses these mechanisms to assert its role as the defender of Kenyans' interests by ensuring transparency and openness in government activities. These mechanisms largely exercised at two levels; at Committee level and plenary (chamber) provide the much needed public arena in which the policies and actions of Government are debated, scrutinized, and subjected to public opinion.

In Kenya's legislature there is a Departmental Committee on Defence and Foreign Relations which was established pursuant to provisions of Standing Order 198 (1). The Committee is also mandated to scrutinise the budget of line Ministries as provided for under Standing Order No. 152. The Committee oversees the performance of the following Ministries and Government department: Defence, Foreign Affairs, East African Community, and National Security Intelligence Service. Under the above Ministries, the Committee covers the following subjects; Defence matters, Foreign policy, Treaties, Conventions and Agreements, International and Regional Organisations, Bilateral and Multilateral Relations, Regional Cooperation policy, East African Community Affairs; National Security Intelligence. Committees organize for Hearings as primary tools in obtaining information related to specific policies or issues under investigation or clarification. Hearings may involve inviting a specific Minister/Cabinet Secretary, government official to appear before the Committee so as to provide evidence regarding an issue under scrutiny.<sup>124</sup>

The Kenya foreign policy has always been based on the ruling party manifesto. In 2005 the minister for Foreign Affairs during that time Hon. Chirau Mwakwere while appearing before

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<sup>124</sup> Standing Orders, National Assembly, Republic of Kenya, Government Printers

the committee of Foreign Affairs was advised that the foreign policy document should be pegged on the ruling party's manifesto and not NARC, which was the party with a majority of members in the house at that time, as the situation was likely to change in future. The committee during this session strongly urged the Ministry to prominently factor the promotion of Kenya's economic interests in the foreign policy document, so as to make Kenya prosperous, respected, and proud besides promotion of national security through good neighborliness.<sup>125</sup>

Parliament through its committee on Defense and Foreign Relations makes recommendations to the Ministry of Foreign Affairs on issues concerning foreign policy for example in its report on December 2009 it was recommended that the Ministry should operationalize its foreign policy as contained in the policy document. That regular training and skills development was critical in professionalizing the Foreign Service for efficient and effective service delivery. That it should review and evaluate the performance of its missions and further review its policy of establishing new missions with a view to maximize on economic diplomacy. The committee further recommended that missions with little or no economic viability be closed immediately.<sup>126</sup> The committee in its report on June, 2010 also recommended that future agreements and treaties or conventions entered into by the executive be ratified by parliament which is the legitimate institution charged with the mandate of legislating and

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<sup>125</sup> Minutes of the 48<sup>th</sup> Sitting of the Departmental Committee on Defense and Foreign Relations held on 27<sup>th</sup> September, 2005 at 10.00 am, Parliament Buildings, Nairobi

<sup>126</sup> Report on the Study Visit to Turkey, Republic of Ireland and United Kingdom, by the Departmental Committee on Defense and Foreign Relations, December 2009

representing the people of Kenya.<sup>127</sup> This has been made possible by its inclusion into the 2010 constitution.

Parliamentary questions are the most commonly used oversight tool intended to clarify or discuss government policies by specific Ministers. However, the 2010 Constitution with its clear separation of powers has Cabinet Secretaries as non Members of Parliament and therefore 'strangers' in the House. With the expected change in Parliamentary procedures, and question time in Parliament likely to be scrapped, the oversight role of Committees cannot be overemphasized.

From Chapter three of this study it can be asserted that the influence impacted by the Presidents on Kenya's Foreign Policy formulation and implementation cannot be ignored in this study. The executive powers conferred on the president by the independence constitution of Kenya permeate all government branches. This constitutional provision remained the same since 1960s, thus foreign policy making process under various administrations depended on the president's leadership style and the issue at stake.<sup>128</sup> For example, Kenyatta delegated foreign policy responsibilities to his minister of foreign affairs. During his regime parliament impacted on foreign policy; through its proactive involvement in foreign policy questions, such as the extension of emergency powers in the Northern Frontier District (NFD) in the 1960s in response to Somalia's activities in the region, the establishment of the East African Federation, and the Unilateral Declaration of independence in Zimbabwe.<sup>129</sup> Moi was always at the centre stage in

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<sup>127</sup> Report of the Departmental Committee on Defense and Foreign Relations on the Agreements between Kenya and International Partners on Combating Piracy in the Indian Ocean, June 2010

<sup>128</sup> Adar Korwa & Schraeder, *Globalization and Emerging Trends in African Foreign Policy*, University Press of America, New York, 2007

<sup>129</sup> Adams Oloo, "The Role of Parliament in Foreign Policy Making-Process in Kenya, 1963-1993". MA Thesis, University of Nairobi. Pg 84-121

the management of Kenya's foreign policy both in crisis and in routine situations. Parliament and the Ministry of Foreign Affairs were subordinate to the presidency in the process foreign policy making. President Kibaki first years in office Kenya's foreign policy priorities remained unclear and ad hoc. Kibaki provides a relatively open environment for cabinet ministers to discharge their responsibilities, with limited interference.

This though is bound to differ with the new constitutional dispensation, status quo will change greatly after the 2013 general election. The 2010 constitution provided for separation of power between the executive and the legislature. Parliament has been greatly empowered by the 2010 constitution meanwhile the executive powers have been diminished. Gone are the times when Kenya used to have an all powerful president, the president is going to be answerable to the legislature in accordance to the laws of Kenya this will keep the executive in check. Foreign policy decisions making will no longer be left to the executive exclusively, the legislature is empowered by the constitution to play a major role.

#### ***4.1 Conclusion***

In summary, Kenya's foreign policy is a product of the co-ordination works of many actors which include heads of state, parliament, foreign affairs ministry, judiciary and other government port-folio which directly or indirectly affects foreign policy formulation, conduct and implementation. So far parliament has not directly affected the conduct of foreign policy in Kenya albeit contributing a little. But with the new constitutional dispensation speculation is rife that parliament will have a more enhanced role to play in foreign policy formulation and implementation. It can also be reaffirmed that until 2010 the different presidents of Kenya impacted differently and a lot on Kenya's foreign policy. For example Moi's highly centralized

style did not give room to parliament to play any role in the formulation and implementation of foreign policy. Lastly but not least the 2010 constitution brought with it many benefits in regards to parliament's control over foreign policy. With the separation of powers, parliament has an upper hand in performing its role as per the laws of Kenya.

## CHAPTER FIVE

### CONCLUSION AND RECOMMENDATIONS

#### *5.0 Introduction*

This chapter concludes the study illustrating issues raised. This study sought to examine the role of parliament in the formulation and implementation of Kenya's foreign policy. There were three objectives for this study namely: To determine whether the Kenyan parliament plays a role foreign policy formulation and implementation. To establish lessons Kenya's parliament can learn from the other parliaments. To find out the internal procedures and mechanisms used by parliament in foreign policy making. To beginning with the first objective the Kenyan Parliament does plays a limited role foreign policy formulation and implementation. But with the new constitutional dispensation speculation is rive that parliament will have a more enhanced role to play in foreign policy formulation and implementation. The foreign policy decisions such as ratification of important treaties are sanctioned by the parliament, which is the representative of the people. In this way, legislators can be seen as actors in the sense that they determine whether or not a given foreign policy is to be pursued.<sup>130</sup>

Secondly the Kenyan parliament has a lot of lessons to learn from other parliaments for example the United States Congress, which plays a leading role in the formulation and implementation of foreign policy. Several constitutional provisions give Congress specific functions in foreign policy making: declaration of war, appropriation of funds, ratification of

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<sup>130</sup> Ombado Obado, *The Diplomatic Post, Brief comparison and contrast of Kenya's foreign policy during the Moi and Kibaki eras*. Foreign Policy Review, 2010

treaties, regulation of foreign trade, and confirmation of appointments to high level positions in the executive branch. Congress shapes foreign policy through regular oversight of executive branch implementation of foreign policy; this is exercised through committees,<sup>131</sup> by ensuring a stable and transparent foreign policy which is often well thought out. The Congress has for many times been able to assert itself forcing the U.S. administration to change the foreign policy course. For example, President Lyndon B. Johnson was forced to disengage from the Vietnam War by the U.S. Congress which did not think that the war was in accordance with the American interests. The U.S. Congress passed the War powers' Act in 1973 making it mandatory that the approval of the Congress should be sought in declaring war.<sup>132</sup> It is very important that foreign policy role of Kenya's parliament has now been included in the Kenya's second constitution just like in the US Congress. It has clearly stated the roles of the executive and that of the legislative arms of government.

Thirdly Kenya's parliament applies mechanisms largely exercised at two levels; at Committee level and plenary sessions which are held in the chambers, which provide the much needed public arena in which the policies and actions of Government are debated, scrutinized, and subjected to public opinion. Parliament as a sovereign assembly of elected representatives offers deliberative and consultative bases through its plenary debates and relevant committees for the continuous oversight of the foreign ministry operations, including the scrutiny of the budget for different embassies, the periodic review, restructuring and the overhaul of foreign policies and activities undertaken by missions abroad. In Kenya's legislature there is a Defence and

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<sup>131</sup> "Congressional Committees and the Foreign Policy Process" in US foreign Policy Agenda Vol1,no 9 (July,1996)p.35

<sup>132</sup> Mansfield D. and Bckley G. *Conflict in American Foreign Policy: The Issues Debated*, NJ: Prentice Hall, 1985

Foreign relations committee who deal with five subjects namely: Defence, East African Community matters, Pan- African Parliament, regional and international relations, agreements, treaties and conventions. The Committee organizes for Hearings as primary tools in obtaining information related to specific policies or issues under investigation or clarification. Hearings may involve inviting a specific Minister/Cabinet Secretary, government official to appear before the Committee so as to provide evidence regarding an issue under scrutiny. Parliamentary questions are the most commonly used oversight tool intended to clarify or discuss government policies by specific Ministers. But this will come to an end after the 2013 General Elections as it is not provided for in the constitution.

The regimes of the three presidents of Kenya have been characterized by unique themes in foreign policy. During Kibaki's presidency emphasis shifted to economic diplomacy with commerce being the driving force of Kenya's foreign policy.<sup>133</sup> This has also brought about different impacts for example the Look East Policy during Kibaki's era. This new look east policy has been designed to expand the country's access to new markets, appropriate and affordable technologies and foreign direct investment and development assistance from China, India and Russia. China has for example facilitated and constructed the Thika super highway among others.<sup>134</sup>

It is often diplomats and officials rather than members of parliament who conduct negotiations on international treaties. With the 2010 constitution Parliament is mandated to vet nominees to serve as envoys, Cabinet secretary, and the principal secretary in the foreign affairs

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<sup>133</sup> Muriuki A. "Commerce to Drive Kenya's Foreign Policy" in Business Daily 23 April, 2008

<sup>134</sup> Pauline Njagi, Kenya's Foreign Policy in a Changing World: Themes, Fora and Prospects, M.A Project, University of Nairobi, 2008



department. The contribution that members of parliament could make to foreign affairs would be significantly improved, because this will enable Parliament to scrutinize more effectively than it can now the allocation of important diplomatic posts, especially considering in the past these posts are filled by political appointees.

One of the main challenges for Kenya's foreign policy is the lack of a clear vision for the country's future, such that the administration is not only reacting to events. A sense of direction is the pre-requisite of any planned and successful foreign policy.

### ***5.1 Recommendations***

The following recommendations are suggested for improving and strengthening the process of foreign policy formulation and implementation in Kenya: To enable parliament play an active role foreign affairs in a systematic manner, it is necessary to activate the Committee on Defence and Foreign Affairs. This committee should study important foreign policy issues with the help of inputs from experts and officials, and submit their conclusions and recommendations to the House for its consideration. For accomplishing this task, the Committee should be provided with necessary secretarial and financial support. The views of this committee and the debates on foreign policy issues in the parliament would provide valuable and independent input representing the views of the people. The executive should make a conscious effort to consult the parliament on foreign policy issues more frequently than has been in the past.

All Members of Parliament should undergo training on Kenya's foreign policy so as to be well versed on Kenya's national interests, etiquette and diplomacy. Owing to the fact that members of parliament are always travelling to other countries either for exchange programmes or to attend to international meetings it is important for them to be educated on Kenya's foreign

policy since they carry with them the Kenyan image. This will enable them to handle the ever dynamic, complex and highly globalised international system. For them to be able to sell/advance the country's interests it is crucial that they should know Kenya's foreign policy well. They should also be able to be diplomatic in the ways in which they react and act on issues. Etiquette is another very important component in which members of parliament should be trained on.

The cabinet secretary in-charge of the ministry of Foreign Affairs should brief parliament on matters related to Kenya's foreign policy regularly for example at least after every six months to ensure that all members are always aware of the country's foreign policy status. Many current or future legislators must have the basic education needed to usefully receive specialized training and briefings on foreign affairs, so that in turn, they may be in a position to debate policy options and provide information to constituents on external affairs matters

There is need to issue diplomatic passports to Members when they travelled abroad on diplomatic assignments, this is a suggestion made by Hon. Amb. Mohammed Affey, currently only a few members possess diplomatic passports. This will be a small but significant sign of greater foreign policy role for the legislature.

The role of Parliament in the negotiation and ratification of international treaties is marginal at best. Parliament could already do more than it does to participate in and scrutinise the negotiation of treaties. In order to implement this new constitutional treaty practice for Kenya, it will be necessary to have a separate statute on Kenya's treaty practice. Such a statute will help to harmonise the treaty practice and all its various elements. It will spell out clearly the role of each of the three powers of state the executive, parliament and the courts, in such a way

that problems and contentions between them will be duly minimized, if not abolished altogether. In reducing the separation of powers conflicts, that statute will have enhanced the process of treaty making and its practices in Kenya.

To conclude, a more assertive Parliament could at least achieve some reform and develop a more effective parliamentary arm to our democracy. Our recommendations are designed to assist this process.

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