

THE ROLE OF THE LEGISLATURE IN PRESENT KENYA

A Dissertation Submitted in partial fulfillment of the
Requirements for the L.L.B. Degree, University of Nairobi.

BY

KIPKETTER A. CH^RICHIR CHUMO.

Nairobi 21st March, 1977.

UNIVERSITY OF NAIROBI
LIBRARY

ACKNOWLEDGEMENTS.

Several people have contributed to make the writing of this dissertation a success. I would like to thank my Supervisor Dr. S. K. Awuye for his guidance during the difficult and taxing time of writing the dissertation. His suggestions and constant criticism helped me in seeing the problem at hand in a clear perspective. I would also like to thank Mr. Shadrack Kipkemboi Maiyo and Mr. B. K. arap Maiyo for their help in making the arrangements to have the dissertation typed. Much thanks also go to Miss Margaret W. Macharia for doing the actual typing.

Kipketer Arap ChiChir Chumo.

Nairobi

21st March, 1977.

(i)

Contents

Introduction (iv)

Chapter I : The Development of the Legislature
1907 - 1963 1

Chapter II : Constitutional Role of the Legislature
19

Chapter III : Failure of the Legislature to assert
itself and reasons for the failure
21

Chapter IV : The Neo - Colonial setting and
prospects for the future 35 29

UNIVERSITY OF NAIROBI
LIBRARY

(ii)

Table of Cases

Kanderbhai V Commissioner of Lands 12 KLR 12 p. 9
Ole Njogo & Others V A.G. of E.A. Protectorate 1914
EALR 70 p. ~~9~~8

Ooko V R (Unreported) High Court Civil Case No. 1159
of 1966 p. ~~33~~27

CONSTITUTIONS USED.

The Constitution of Kenya, 1969,
The Constitution of Kenya African National Union (KANU)

(iii)

Table of Statutes

National Assembly (Powers and Privileges) Act Cap. 6

National Assembly and Presidential Elections Act Cap. 7

The Preservation of Public Security Act Cap 57.

The Vagrancy Act Cap 58

Legislative Council (African Representatives) Ordinance, 1956.

Outlying Districts Acts Cap 104

Special Districts (Administration) Act Cap 105

The Loans Act

Protection of Foreign Investments Act

Trade Disputes (Amendment) Act, 1970.

THE ROLE OF THE LEGISLATURE IN PRESENT KENYA

INTRODUCTION:

The Constitution of most countries today contain provisions defining the role of their legislatures. Kenya is no exception to this trend. The Kenyan Independence Constitution of 1963 contained specific provisions defining the functions of the two - tier Legislature.¹ The most important function of the Legislature was Legislation. The Legislature was also responsible for electing specially elected members. Provisions were also made for Powers, Privileges and Immunities of the Legislature²

This dissertation will deal in the main with the 1969 Constitution. A brief glance at 1963 and 1969 Constitutions shows that the major role assigned to the two tier Legislature in 1963 was the same role assigned to the United Legislature by the 1969 Constitution: Legislation. A secondary function is the authorisation of the raising of taxes. One significant change introduced by the 1969 Constitution is the election of the President. Under it the President is no longer elected by MPs but by the people.³ The President also has powers of prorogation and dissolution to the Legislature.⁴ In addition, he has powers to nominate people to Parliament.⁵

The thesis of this dissertation is that Parliamentary supremacy as provided for by the 1963 and 1969 Constitutions have largely been eroded. This has come about as a result of a series of Legislations which wittingly or unwittingly saw Parliament relinquish its powers to the Executive. In the period immediately after Independence, the Legislature showed signs of prominence. But after the formation of the Kenya Peoples' Union in 1966, a series of constitutional amendments were passed the net result of which was the relegation of the Legislature to a Secondary role behind the Executive. The Legislature's inability to assert itself has led to a corresponding increase in Executive power. Bills that have the blessing of the Executive are hardly scrutinised by Members of Parliament .

It will be argued that the Legislature has at times surrendered its powers when it needed not have done so, for example the sixth Constitutional amendment Act No. 18 of 1966 which rests hide emergency powers in the President. The relationship between the ruling party, KANU and the Legislature has also contributed to the erosion of the powers of the Legislature. All Parliamentary candidates must be nominated by a Political Party, and as Kenya is a ^{✓ but became de jure 1 Party state} de facto one Party State, membership of KANU is a condition precedent to membership of the Legislature.

Chapter I will mainly be historical, tracing the development of the present Legislature from 1907 to 1963. The role that the colonial Legislature ^{played} will be outlined. To be examined are the various pressure groups that existed and how their interests influenced the working of the Legislature council. leg Chapter II will examine the role assigned to the Legislature by the 1969 Constitution. It will be shown that the Westminster model embodied in the 1969 constitution has largely been a failure. The first Constitutional amendment way back in 1964 shook the foundations of the imported westminster Constitution. Traditional functions of the Kenya Legislature will be examined. Chapter III will trace instances of MPs' inability to assert themselves. Legislation was passed that in effect greatly increased the powers of the President. To be argued here are the views that the Legislature only Legitimises Executive's wishes and secondly that it has not been able to control Government expenditure nor effectively criticise Government action. Reasons will be advanced for this state of affairs. The relationship between Parliament and the strong Executive, Civil Service and KANU will be considered. Some of the most far - reaching of the ten Constitutional amendments will be looked at and their effects determined.

Chapter iv will have suggestions which should be adopted to bring the Legislature back to its original strong status. It will be submitted in chapter iv that the legislature should reassert ^{itself}. It can only do so by having a more clearly defined relationship between it and Executive.

The position of KANU should also be reexamined in the light of the need to strengthen Parliament some conclusions will also be made in Chapter IV. Preservation of Public Security Act should either be repealed or be amended so that emergency powers are brought within the control of the Legislature. The Legislature, it will be argued, should identify itself more with the electorate by repealing such colonial Acts as outlying Districts Act Cap 104 and special Districts (Administration) Act Cap 105. The vagrancy Act should be repealed as it is unnecessary in an Independent State and contrary to the constitution. It will, at the appropriate be considered why amendments to the Public Security Act are necessary. The form the actual amendments will ^{take will} be indicated. The Legislature should also tackle the issue of one man one job and ceilings to land ownership. An attempt will be made to look at the Political and Economic factors outside Parliament that determine the interests of MPs. It will further be suggested how the Legislators can more efficiently discharge their duties.

Footnotes to the Introduction

1. For example see sections 59 (1) and 69 (1) of the 1963 constitution.
2. National Assembly (Powers and Privileges) Act Cap 6 and S. 57 of 1969 Constitution.
3. National Assembly and Presidential Elections Act Cap 7
4. Constitution S. 59
5. *Supra* S. 33

British rule was established in Kenya in 1895 and colonial administration was headed by a commissioner. Ten years later, the title of "Governor" was adopted after the title "Commissioner" was discarded. To understand the development and role of the present legislature, one has to look at it in its historical perspective. The Governor had both executive and legislative powers; there was not separation of powers. In any case, there was little to legislate about as the protectorate was still in its early stages. Perhaps "regulations" and "rules" could best describe these legislation. In 1905, the administration of the Protectorate was transferred from the foreign to the colonial office. The colonists' Association, a body that catered for the interests of European settlers, in 1905, forwarded a complaint to the colonial office that they wanted a Legislative Council that could air their grievances. Other British colonies like Australia, Canada and Newzealand by 1905 had their own Legislative councils, and the Kenya settlers saw no reason why they should be the exception. After much pressure from the settlers, a legislative council was set up in 1907. The council consisted of members nominated by the Governor who were in all cases Senior Government Officials. The nominated members acted merely in an advisory capacity.

The nominated members could not therefore be expected to criticise Government as they were part of the colonial Governmental apparatus. What was the position like in the early years of this century? A former speaker of the Kenya National Assembly has written that "the history of Parliament of Kenya is an example of steady progress from colonial outocracy to true democracy"¹. This is an indication that the colonial legislature was not the mainstay of democracy. Settlers could not at that stage elect members to the Legislative Council. The Governor used his Legislative powers to the detriment of Africans.

Legislation on matters concerning payment of hut tax date from that period. While African interests were considered non-existent, orders and Regulations were made concerning their movements, taxation and general conduct. This was to be the plight of the African for a long time to come.

The Legislative Council was completely subordinate to the Governor. In addition to having veto powers, the Governor was not bound to follow the advice of the Council. This raises the question as to the reasons for setting up the Legislative Council. It may be suggested that this was done to cool down the constant demands of the settlers. The Local settlers were not happy with the Governor's powers of nomination and they resented Executive control and domination.² Some of the settlers who had come from South Africa had seen that Legislative Council with elected members was more effective than one with nominated members.

After World War I, the Colonial Government appeased the settlers, most of whom had contributed to the war effort by providing by Ordinance No. 2 of 1919 for an elected Legislative Council. The Colonial Government tended to recognise the European as the only group that had legal rights in the Protectorate. This arose from the theory that the settlers were the only group that understood the concept of elective representation and democracy. The complacent attitude of the other races encouraged the settlers to clamour for more representation. The basis of Kenyan Society at that time was racial discrimination.³

The Legislative Council in its early stages did not have an impressive debating record. It was not representative of majority (African) opinion. The white settlers were interested in having more lands and abolition of land taxes in addition to seeing that the unwilling Africans were driven from their homes to go and work in settlers' farms. In the end, the land tax was abolished, more land taken away from Africans⁴ who were forced to go and work in settlers' farms by tax legislations.⁵

The Official members were still in the majority by 1919 while the Governor still retained his veto powers and powers of nomination. The life of the Council being three years, settler members could not make their presence felt in so short a time. The Governor could nominate the same people to a new legislative council while the elected representatives could not be sure of re-election. The demands of settlers for more representation did not go unnoticed in the Indian (Asian) and Arab Communities who also demanded a representation in the legislative council. Such demands could not be ignored as members of the two communities contributed a lot to the colony as far as business was concerned. In 1923, the Indian community was given five elected seats on the legislative council. The 1923 Devonshire White Paper categorically stated that African interests in Kenya were paramount, yet in the same year, provisions were made for the nomination Of one ^{my foot!!} European to represent African interests, while the other communities were electing their representatives. The Legislative Council in the 1920's could not have been said to be representative, as African interests were not recognised. To talk of a European nominated to represent African interests was mere eyewash as at no time during the colonial era could any European have been said to truly ~~to~~ represent African opinion.

The legislative Council was not strong enough to act as ^o a check on the Executive power. Strong opposition to measures taken by the Governor could be interpreted to mean opposition to His Majesty, the ^{Queen} King. Kenya was a colony and not a free country and any ideas of the traditional role of Parliament as a check on the Executive had no relevance.

Policy decisions rested with the Governor and civil servants, and members of the Legislative council had no say in policy formulation process. The Governor acted as the President of both Legislative and Executive Council; and these bodies had much in common. As time went on these bodies split apart as one writer has correctly written " The Constitutional progress is measured by the manner in which there is growing separation of Institutions and functions" ⁵ In 1926 a Committee was formed to advise the Government on Public Finance and in 1934 a standing Finance Committee of the legislative council was set up for the purpose of scrutinising financial proposals. Unfortunately the Governor could veto proposals of the standing Committee. 1934 also saw the appointment of a second European to represent African interests.

In 1930s Indian members of the legislative council showed dissatisfaction with the arrangements by boycotts and resignations, but these had no effect on the colonial Government. Though no African political consciousness had increased by the 1930s no outlet was provided for these sentiments. The African Nationalists were branded as "agitators" and subversives". The nominated Europeans representing African interests were either unwilling to take their work seriously or had been ignored by the colonial Government. Settlers demands for and East African Federation and unofficial majority along the Rhodesian pattern were rejected.

In 1944, Eliud Mathu was nominated to the legislative Council. Though his impact on the Council was minimal, his record was impressive because he put African interests, fears and aspirations in the right perspective in the face of strong settler opposition. A second African, John Chemallan was .../5

nominated to the Legislative council in 1947. By 1948, membership of the legislative council comprised: 4 nominated African members, 5 Indian elected members and one nominated compared to 11 elected Europeans and 16 official (nominated) European members. Though by 1952 the legislative council had 28 official and 27 unofficial members, representation of Africans was still grossly inadequate. Increased African Nationalism led to a declaration of Emergency on 20th October, 1952. The emergency brought the unofficial settler members closer to the Government as their common aim was the suppression of the African uprising. The European members called for a tougher line to be taken against Africans but they failed to see that Africans were against continued subjugation and oppression. European members of the Legislative council often referred to Africans as "terrorists"⁶ The African nominated members did not shirk their responsibilities and constantly spoke against collective punishment of Africans by the colonial Government.

After African members voiced much criticism against the Llyttleton Constitution of 1954, provisions were made in 1956 for greater African Representation through elected members.⁷ The first African elections were conducted in 1957, thirty eight years after the first settler elections. In 1958, the Lennox - Boyd Constitution was adopted and the Legislative council was to consist of elected members as follows: 14 African, 14 European, 6 Asians and 1 Arab and such nominated members as necessary for official majority. The Legislative council by then had its speaker though this

did not bar the Governor from attending some of its sittings. The aim of the colonial Government was now altered "to protect any community against discriminatory legislation harmful to its interests"⁸ Effective representation could stop unfair legislation as each community would protest if its interests were put in jeopardy.

The 1958 Constitution was seen as "first attempt to establish any responsibility to a non-racial electorate"⁹ The legislative Council of late 1950's was quite representative as all the races in Kenya elected their representatives to it. As a result of the 1960 Constitutional conference, elections were held in which African majority in the Legislative Council was obtained. The aim for Kenya was Independence with a Westminster model of Constitution. Self-Government was achieved on 1st June, 1963 and independence came on 12th December 1963. In 1963, the legislative Council was renamed the National Assembly consisting of the House of Representatives and Senate. Meanwhile, the importance of European settlers had dwindled. An amendment to the Kenya Constitution in December 1966 merged the senate and House of Representatives into one house creating 41 constituencies to be represented by 41 ~~members~~ [✓] ex-senators.

Some important facts emerge from the foregoing survey. During the colonial era, the legislative Council could not assert itself as it had very limited powers. The supreme power rested with the Governor and the legislative council was used to represent racial interests, African entrance into the legislative council came late in comparison to European long established participation. The struggle for independence in Kenya was not spearheaded by the African members of the legislative council nominated before 1956 but the new generation that emerged after 1957 from the trade unions. /7

The strong veto power of the Governor inhibited free discussion and debate. As a result of the racial interests, the members of the legislative council could not play any meaningful role in the constitutional development of Kenya.

Footnotes Chapter I

1. Slade, H The Parliament of Kenya (EAPH, 1969) p. 11
2. Constitutions of African States Vol. I Oceana Publications Inc N.Y. 1972 p. 607
3. Kanderbhai v Commissioner of Lands 12KLR 12.
In that case, it was ruled that Asians could not bid for or buy land in areas that had been preserved for the use by White settlers.
4. Ole Njogo and Others v AG of E.A. Protectorate 1914 EALR 70
The case arose out of the Second Masai agreement of 1911 by which the Masai were to make way for more European Settlers. In the process of being moved, a lot of livestock belonging to the Masai were confiscated. The confiscation of the Livestock and removal of the masai was held to be acts of state over which Municipal courts had no jurisdiction.
5. Ghai, Y.P & Mc Auslan J.P.N. Public Law and Political Change in Kenya (O.U.P, Lond 1970) p. 35
6. Legislative Council Debates 29th October, 1952.
7. Legislative Council (African Representation) Ordinance 1956 Act No. 10 of 1956 amended by Acts. No. 30 and 56 of 1956.
8. Gichenyu, Ndoria Parliamentary Practice in Kenya (Transfrica Publishers 1976) p. 39
9. Slade Supra p. 15

UNIVERSITY OF NAIROBI
LIBRARY

...../9

CHAPTER II CONSTITUTIONAL ROLE OF THE LEGISLATURE

At independence in 1963, Kenya inherited a two-tier legislature; the House of Representatives and Senate.

The idea of having Senate was originally proposed by KANU, the major opponent of KANU, to protect the interests of the smaller tribes and to safeguard the autonomy of the Regions.¹

Senate could delay money bills for no more than one month after which the House of Representatives could authorise the Minister for Finance to raise money without authorisation by Senate. The debating role of Senate was minimal as 40% of the bills introduced in 1964 were passed without discussion at any stage². There was no Cabinet Minister in Senate and this tended to slow the benefit of direct and regular Communication between Senate and the Ministers. In the end, Senate did not play a significant role in the Kenya Political system and it was finally abolished in 1966.

The House of Representatives was more active than Senate. It performed most of the traditional functions of any Parliament, namely making of laws, authorising the raising of money by taxation and criticising some Government actions. A bill authorising the raising of money could only originate in the House of Representatives and not Senate³. If Senate did not pass a money bill that had been debated by the House of Representatives it could be presented to the President for his assent without its having been debated by Senate⁴. The alteration of the constitution needed acceptance by 75% of all the members of either house and alteration of specially entrenched provisions required 75% majority in the House of Representatives and 90% majority in the Senate⁵.

The two-tier system, though seen as one of the inherited aspects of the Westminster model, was cumbersome as passage of bills tended to take long. Senate acted as the House of Lords in the Kenyan Context while the House of Representatives was a reflection of the House of Commons in Britain. The House of Representatives had more Legislative powers than Senate hence it was more effective. The main part of this dissertation deals with the role assigned to the single legislature by the 1969 Constitution.

Westminster model has as one of its ^{tenets} tenets, the concept of separation of powers. The Kenya Constitution has attempted to stick to this concept but with little success. The traditional functions of the Legislature that will be examined are legislation, formulation of policy, authorisation of raising of money by taxation, control of the Executive and representation.

(a) Legislative role.

Legislation is the most important function of Parliament, and the Constitution expressly vests this function in the Kenya Parliament. A proposed bill is published in the official gazette and will not be debated upon by Parliament until fourteen days have passed.⁶ After a bill has been debated by Parliament and passed it is presented to the President for assent and it becomes law.⁷

The legislatures' ability to legislate is subject to Presidential assent referred to above. The issue has not come to the test as the President has never refused assent to a bill that has been passed by Parliament. According to Professor Wade,⁸ speaking of the British situation, Parliamentary supremacy means that Parliament has the power to

make or unmake laws. Courts cannot challenge the Legality
of Parliamentary enactments. Subsidiary Legislations by
Ministers and Local Authorities derive their powers from
Acts of Parliament. The Legislature has power to ²Alter
the Constitution.⁹ What Professor Wade says of the British
situation is also true of the position in Kenya. The
Legislative power ~~of~~ Parliament is really the Legislative
power of the Executive as most Acts that go through
Parliament are initiated by the Executive arm of Government.
There has only been one private members bill, the Hire
Purchase bill, 1968 that has become law. It was steered
through Parliament by the late J.M. Kariuki and was passed
without much problem as it had the blessing of the
Government and Finance Companies. Presidential assent to
the bill ¹posed no problem as the bill was generally accepted
by all. Parliamentarians have however been able to secure
amendments to some Government sponsored bills. Parliamentarian
would be more effective if they were successful in
steering private Member's bill through Parliament rather
that merely amending Government sponsored bills.

Parliamentarians' ability to block bills should not be
underestimated however. In, 1966, the Government
had to withdraw the Dairy Industry bill because of strong
backbench opposition.¹⁰ Had the Government insisted on
continuing the debate on the bill, the result would have
been an embarrassing defeat; a sure sign of the Governments
inability to control backbenchers. The Legislature at
present ^{is} ~~is~~ not the only law making body in Kenya. The East
African Legislative Assembly has Legislative powers regarding
telecommunications, harbours and research. The President
enjoys wide

enjoys wide Legislative powers given to him by Preservation of Public Security Act as regards North Eastern Province and some parts of the Coast Province.¹¹ The President can make orders akin to Legislations to govern areas under emergency regulations.

Though the Legislature in effect only formalises Government sponsored bills such a power is still an indication of Parliamentary supremacy. The fact that the Constitution recognises Legislative power of Parliament means that no other body rivals Parliament in Legislating.

(b) Financial Control

The Kenyan Legislature is vested with the power of authorising the raising of money through taxation. It also has the right of scrutinising Government expenditure. Chapter VII of the constitution Indicates that Parliament has control over financial matters with regard to the consolidated fund. Withdrawal from the consolidated fund has to be authorised by Parliament.¹² Financial control by the Legislature is strengthened by the provision for the office of Controller and Auditor General¹³ who has broad powers of control over Government expenditure. Parliamentarians have used the reports of the Auditor General to bring the Government to task about the misuse of Public funds.

The Government has the duty of initiating bills on proposed bills dealing with the raising of money and Parliamentarians only debated on specific provisions of the proposed Legislation. Parliament has in most cases openly criticised Government initiated bills aimed at raising of money through taxation. An example of this was the loans Guarantee bill¹⁴

of 1966 where MPs defeated Government proposals for new taxation.

The Legislature cannot control day to day expenditure of Public funds as that is entrusted to Civil Servants. A large proportion of Government expenditure goes to such bodies as Posts and Telecommunications whose expenditure is controlled by the East African Legislative Assembly and not Parliament. Parliament has not made any attempt to curb the ability of the Government to raise loans. At times, these loans are not used for the purpose for which they were raised. In November 1976 the Press carried a report of a top Civil Servant who used Public funds to buy himself a new car. The unfortunate reality is that Parliament has little control over those who misuse Public funds. Criminal law of Kenya seems not adequate enough to deal with the culprits who are only chastised through the Press. In any case, debates on financial measures usually occur after the money has been spent. Civil servants entrusted with actual expenditure do not care much about the Report of the Auditor General; they simply ignore such reports. Most MPs do not have the basic knowledge of expenditure procedures to enable them to meaningfully and effectively criticise the misuse of public funds. The Public Accounts committee of Parliament only ensures that Public Funds have been spent. What the Committee should look at is how efficiently such money is used and give suggestions for a better future spending.

* (c) Critical function and control of Government

The basis of critical function of Parliament is the Constitutional provision for a vote of no confidence in the Government.¹⁶ The Purpose of such a resolution is to show that Parliament no longer has confidence in the Government which should therefore resign. Needless to say, such a resignation would involve the President and his Cabinet. If the President and his Cabinet resign, then the President need not dissolve Parliament. Such a resolution has not been passed or even mooted upon Kenya. Gertzel¹⁷ has correctly pointed out that Parliament has the "right and indeed the duty to seek and explanation from the Government and to criticise and advise the Government in the exercise of its Executive authority". No other body or Institution apart from Parliament can assume the critical function.

The role of Parliament as a watchdog of individual rights will now be examined. Questions have been asked in Parliament about Police brutality¹⁸ brutality by chiefs, racial discrimination, Africanisation, eviction of landless squatters and on host of other sensitive issues. The fact that the Government is answerable to Parliament is seen in the way the Government has been put to task because of acts done by its agents. MPs have asked questions on issues ranging from Constituency to National and International affairs. They have sought and obtained adjournment on motions they disliked or did not clearly understand. Private members' motions have been passed even disagreeing with Government Policy on Africanisation.¹⁹

ave

The Legislators' role as critics of Government has been very remarkable. Debate in the House has been very free and remarkable. Members have used the House as a forum for criticising Government measures with which they did not agree. The critical function of MPs has meant championing the causes of the masses and criticizing brutality of police and chiefs. Of late, criticism of Government has been muted by the implication that criticism of the Government is equated to criticism of the ^{President} personally. Most MPs have not been willing to be branded as personal critics of the President. This is so because MPs have great loyalty towards the President. Parliamentarians have not approached issues as a United group. The fear that a too critical Parliamentarian will be expelled from KANU and hence lose his Parliamentary seat is enough to silence most MPs.

shows be in quotes!

(d) Formulation of Policy.

Policy formulation role of Parliament exists more in theory than in practice. This is true of Parliaments the world over. As already noted, appropriation bills are initiated by the Government. Formulation of policy rests with the Government and Civil servants. The issue of Africanisation has shown who is in actual charge of policy formulation. MPs would like Africanisation of industry and the Judiciary to be rapid but the Government's pace of Africanisation has been very slow indeed and despite wishes of the Legislations, the Judiciary and most of commerce has hardly been Africanised at all. The much - acclaimed sessional Paper No. 10 on African

Socialism, 1965 said that the Government's intention was to provide social justice and equal opportunities for all Kenyans. Though the intentions of the paper were good and laudable, not even one of its provisions has been implemented.

It has been argued ²⁰ that major decisions within the Ministries are made by Permanent Secretaries and Ministers. This is typical of all countries as MPs are constituency (Local) orientated whereas policy formulation embraces the whole country. It is only fair that policy formulation should be in the hands of those who administer the country. The danger is that Ministers being MPs may be tempted to favour their home areas when development projects are under consideration. Administrators are best placed to know the requirements of the country and thus plan in accordance with the needs. But Parliament as the supreme law making body should also have a say in the policy formulation process.

It is submitted that the legislature only ratifies decisions which have already been decided by the Executive. Where a bill is based on policy, the Minister introducing the bill will explain the policy behind it and give MPs a chance to question the policy behind the bill. This questioning will not yield much difference as MPs are not equipped with enough background ^{knowledge} to effectively participate in questioning policy. It is not likely that the Legislature will in the near future challenge the Executive in policy formulation. It is difficult to accurately assess how successfully Parliament has performed its constitutional role. Some functions like critical and representational

are not expressly provided for in the Constitution but they are implied as these functions are traditionally the preserve of any Legislature. The critical role comes ~~from the role comes~~ from the doctrine of separation of powers embodied in the Westminster Model. A legislature that is not critical of Government measures and that does not speak out when Constitutional rights of citizens are infringed ^{is} ~~to~~ hardly an effective one at all.

Parliament can play a greater role in a ^{multi-} ~~multi-~~ party system and not in a ^{de jure} defacto one party system like Kenya. One need only look at Parliamentary debates of the late 1960's to realise how vigorous Parliament was when KPU was in existence. At the time of writing, Parliament has been prorogued and the time of reconvening is uncertain. The critical function of Parliament is always overshadowed by the fear of dissolution, given the fact that the President has powers of ^{prorogation} ~~prorogation~~ and dissolution. ²¹

Footnotes to Chapter II

1. Proctor J.H. The Role of the Senate in the Kenyan Political system IDS Paper 1965 p. 394.
2. Ibid P. 401
3. S. 59 (2) of the 1963 Constitution.
4. Ibid S 61 (1)
5. Supra S. 71 (2) and S. &1 (6)
6. Slade, Humphrey The Parliament of Kenya(EAPH, 1969) P. 43
7. Kenya Constitution, 1969 S. 46 (3)
8. Wade, E.C.S. Constitutional Law (5th Ed Longmans 1962) P. 470
9. Constitution S. 47
10. Official Report. House of Representatives Vo. X Part II 23 November, 1966 Cols 1902 - 1931, 24 November, 1966 col 1965.
11. In addition, the Outlying Districts Act Cap 104 and special Districts (Administration) Act Cap 105 provide that Administrative Officials have power to refuse permission to non-residents of such Districts from entering such Districts without the permission of an Administrative Official. Property of people not complying with the Acts can be confiscated. Administrative Officials can make regulations governing conduct of residents of such Districts. These Acts will be dealt with more fully later.
12. Constitution S 99(1)
13. Ibid S 105 (1)

The functions of the Controller and Auditor -General are wide. He must satisfy himself that the proposed withdrawal from the Consolidated Fund is authorised by Law. He also must make sure that the money withdrawn has been used for the express purpose for which it was withdrawn. He is also responsible for auditing and reporting on the expenditure of all Government departments. To secure his impartiality, the Auditor General is not put under the control of any person or authority.

14. The loans Guarantee bill was tabled before the House of Representatives in 1966. Among its provisions was a reduction in married peoples' tax allowance. Parliamentarians rejected such a proposal and amended the bill. The amendment was accepted by MPs. The amendment was accepted after the Government had been defeated when the question was put to the vote. The Minister went back on his earlier threat and did not resign.
15. Loans Act. Act No 25 of 1966.
16. Constitution S. 59 (3)
17. Getzet, Cherry Politics of Independent Kenya (EAPH, 1970)
P. 166.
18. Official Report 1st Parliament 4th Session Vol. IX 31 may 1966 cols 183 - 186. This was an issue that arose out of an allegation that some students had been brutally beaten by the Police in Mombasa and afterwards detained with no cause. An MP who went to investigate the fate of the students was also detained by Police for a short period. Due to an unsatisfactory reply by an Assistant Minister for Home Affairs, a select Committee was formed to probe the alleged brutality.

As a result of the probe, the Policemen who were responsible for the brutality were disciplined though not dismissed from the Police force as recommended by the Probe Committee.

19. Debates 5th Session Vol. XII part II 7th July, 1967 cols 1962 - 1988.
20. James, Jeffrey Policy Formation and the Kenya National Assembly: Indications for the future 1972 p. 16
21. Constitution S. 59

FAILURE OF THE LEGISLATURE TO ASSERT ITSELF AND REASONS
FOR THE FAILURE

This Chapter will examine specific cases of failure by the Legislature to assert itself and reasons for this. In doing so, the background to some far reaching Constitutional Amendments will be analysed in order to throw light on the necessity or otherwise of such amendments.

The first major Constitutional amendment was adopted in 1964. It got rid of the distinction between Head of State and head of Government. Such a distinction is a strong feature of the Westminster model of Government where two different figures occupy the two different offices. The adoption of the Republican form of Government meant that the Executive President was given more powers as he was now the head of State and head of government. Reasons given for that amendment were that the President deserved undivided loyalty and division of such powers in a newly Independent Nation could lead to confusion. Perhaps a much more convincing reason is that such a change was necessary by virtue of the fact that the Country was adopting a Republican status and Republican status was a dominant feature of Commonwealth African States.

The fourth amendment now S.39(136 -C of the Constitution made a serious inroad into the powers of the Legislature by providing that a Member who absented himself from the Assembly for eight consecutive sittings without permission of the speaker would lose his seat. This amendment was found to be necessary as too many Parliamentarians were absenting themselves from the House and attending to their businesses elsewhere. The proviso to S.39(1) b - c provides that President

"may in any case if he thinks fit direct that a member shall not vacate his seat by a reason of his failure to attend the Assembly as aforesaid" ²

To date, Jan Mohamed Bruce Mckenzie and, more recently, Odero Joni have had to lose their seats due to the operation of S 39(1) b - c. The president has not directed that a member shall not vacate his seat after he has lost it due to the operation of S.39(1) b - c.

Section 35(1) (b) provides that a member loses his seat if he is imprisoned for more than six months. The first victim of that Provision was A.L. Gaciatta, former M.P. for Nyambene ^{South} Suruth. Recent victims have been Abu Somo, Mark Muithaga (Nakuru Town) Peter Kibisu (Vihiga) and Morogo Saina (Eldoret North). During Debate on the provision of S 35(1) (b) in 1969, Shikuku former M.P. for Butere ^{Said} said that Government critics would always find themselves convicted of dubious criminal charges so that they can ^{would}

lose their seats. That fear has been qualified. For example Mark Mwithaga, ~~an~~ a Government critic, was charged with and convicted of malicious damage to property of an ex-wife twenty two months after the alleged offence had been committed. In such a case, the Government's assurance that Mwithaga's case was criminal and not Political is very unconvincing. In passing such a Constitutional Amendment, MPs knew that they would be caught by the Provision of S 35(1) (b). They should have vigorously resisted such an amendment. ^{At times} It denies the Executive has not been willing to tolerate opposition and criticism. The President has not hesitated to apply Public Security Act to detain MPs. The Government decision in late 1969 to ban the opposition Party Kenya Peoples Union (KPU) and detain ^{all} ~~92~~ opposition members and top KPU officials was quite an indication of the powers of the President. The Executive in late 1960s used the Penal Code to suppress what was generally called "Communist Subversion", Literature from Communist countries. Parliament has also been undermined by the fact that the President is no longer elected by the Legislature but by the Public.

The President has been given power to bring into operation part III of the Public Security Act³. It is ironical that whereas a simple majority (16 members) is required to approve of Emergency regulations, bringing an Emergency into an end under S.85(4) of the Constitution requires a majority of the members of the assembly (80 members) excluding "ex officio". Members.

The strengthening of the position of the Executive by Legislation has also led to the strengthening of the position of the Civil Servants. The Provincial Commissioners are seen as representatives of the President in local areas and they become leaders of Development projects to the exclusion of MPS. They also have more powers than MPS. The Civil Service played a central role in the centralisation of power that has enlarged the scope of the Executive since Independence.⁴ In fact District Commissioners have ^{power} ~~power~~ to cancel ^{of} ~~of~~ Licence Constitutional meetings of MPS with the result that there has been much friction between MPS and Local Administrative Officials. Parliamentarians as a group should have power to summon Civil Servants to answer for their misconduct ^{of} ~~of~~ excessive use of power.

The President has been given the power of prorogation and dissolution by Section 59 of the Constitution and he has not hesitated in using these powers at times. Under S. 46(3) of the Constitution, the President has to assent to bills before they become law. The Constitution

does not expressly give the President the Power to withhold assent to bill but such a situation has not arisen. The President in 1974 refused assent to a motion⁵ by an Assistant Minister that provided that before seeking election to Parliament, Civil Servants must ~~...~~^{resign} at least two years prior to election date. The Legislature, it is submitted, acted unwisely in voting the President ~~wide~~^{to} emergency powers which he can use without any Parliamentary Control.

The erosion of the powers of Parliament has led to a corresponding increase in the role played by the ruling party, KANU. In Mid 1960s, KANU was ~~acelatively~~^{relatively} weak party but after the KANU delegates conference at ~~Sinusu~~^{Limuru} in 1966, reforms were carried out with the intention of ~~reguvenatin~~^{regeneration} the party. As a result of KANU party elections in 1966, the then Vice President of KANU Oginga Odinga and his supported^s were voted out of leadership positions in the party. Odinga and his supporters left KANU to form an opposition party. Soon, KANU faced mass defection and a way had to be found round the problem. The solution came in the form of the fifth amendment⁶ which was to the effect that any ~~meber~~^{member} who changed political loyalties during his term of office had to seek a fresh mandate. The intention clearly was to stifle KPU, and indeed all KPU MPS lost their seats ~~When the amendment~~^{The Government}, in bringing the fifth amendment disregarded parliamentary procedure because if the procedure was followed it would have caused delay. The standing orders laid ~~done~~^{down} that for a Constitutional Amendment to be brought, fourteen days had to elapse between ~~date of~~^{the} bringing notice of the intended amendment and actual debate. The Government could not wait for the fourteen days; standing orders were suspended and the Amendment was debated and assented to in 48 hours. Parliamentary ruling party, KPU members were very critical of the suspension of standing orders and one of them Okello Odongo said such suspension "does not normally happen in the affairs of Parliamentary Government"⁷. The fifth amendment subordinated Parliament to the ruling party KANU as no member could resign from it without having to go and ~~consult~~^{contest} an election again.

A writer has correctly summarised the purpose of the fifth amendment by saying "it might be interpreted as a potential disciplinary measure which increased the control of the Executive over its party ~~suppliers~~^{supporters} in the Legislature"⁸. There was no question of Independent Candidates and a Member's loyalty had to be to KANU otherwise he would use his nomination at the next elections. Party discipline was thus attained through a Constitutional Amendment. The fact that a Parliamentary Candidate has to be nominated and supported by a Political Party has strengthened KANU vis-avi

the Legislature—During the 1974 general elections some past KPU officials, including Oginga Odinga, were denied nomination by KANU and no provisions having been made for Independents, those who were denied nomination could not contest elections. Again in 1976, some former KPU officials were banned from contesting KANU party elections.

Disciplinary powers of KANU have been greatly enhanced by the fact that KANU can discipline recalcitrant MPS. An individual's membership of Parliament depends on his being a member of KANU and a strong supporter as well. Expulsion from KANU would automatically mean a loss of the Parliamentary seat. The importance of the Party has been reinforced by the Presidents use of detention powers to detain party ^{critics} ~~civics~~. John Serony and Martin Shikuku were promptly detained on 16th October, 1975. At the time of writing, the Party is undergoing reorganisation through elections. Such a reorganisation could lead to more disciplinary powers being vested in the party. Through the Kenya Constitution does not prohibit a multi-party system, Kenya has for the last eight years been a de facto one party state with no opposition Party in existence. Through KANU has been organisationally weak, no opposition Party has emerged within the last eight years. KANU Parliamentary group has always been chaired by the President and issues have been settled in the Parliamentary group without reaching the floor of Parliament.⁹

Election of President and MPS depends on the Party as the President has to be nominated by ~~the President~~ a National Official of the Party.¹⁰ The power of election of the President has been transferred from Parliamentary ~~group~~ group to the Party and the masses. Parliament during the time of KPU gave the Government a lot of power. The existence of KPU did not alter the power balance but only served to increase the powers of KANU. This played ^{put} Parliamentarians ^{squarely} equally at the mercy of KANU.

The sixth amendment¹¹ rendered the Legislature impotent. It removed the existing Legislation relating to Parliamentary control over emergency legislation. The Public Security Act was used during Colonial rule to detain Nationalists ~~who~~ who were considered a threat to Public Order. Whereas formerly the President needed the permission of Parliament to bring part III of the Act (special Public Security measures) he now needs no such authorisation to do so. Part III of the Act can be brought into operation under S.85(1)¹² of the Constitution and use of such powers according to S.83(1)¹³ is not a derogation from fundamental rights and freedom as laid down under sections 72, 76, 79, 80 or 81 of the

Constitution. The Preservation of Public Security Act gives the President legislative powers in that he can make regulations under the Act.¹⁴

It is submitted that in agreeing to give the President such extensive detention powers, the Legislature failed in its duty as a champion of individuals freedom and freedom of movement. The Legislature should have retained the power to direct the operation of the Act. The sixth amendment led to a situation whereby the Legislature's control over the use of emergency powers dwindled, leading to dominance of the Executive.¹⁵

Many KPU Officials were detained under the Act in 1966.¹⁶ The National Assembly (Powers and Privileges) Act cap 6 has not been of much help to MPS¹⁷. On October 16, 1975 the then Deputy Speaker of the National Assembly Jean Marie Seroney and Martin Shikuku were detained for saying that KANU party was dead. The arrests and subsequent detentions had sobering effects on the Members as they realised that the Powers and Privileges Act does not grant them immunity from detention. To make matters worse, the arrests took place inside the precincts of the National Assembly.

The Seventh Amendment abolished Senate but extended the life of the United Legislature by two years. This was a serious disregard of the electorate as Constituency boundaries were redrawn with the unfortunate result that electors found themselves represented by a person they had not chosen. Specially elected members who originally used to be elected by MPS became nominated members; the power of nomination was to rest with the President.¹⁸

The Legislature has also failed efficiently to champion the interests of the masses by passing the vagrancy Act cap 58 in 1969. The Act gives power to Police officers to arrest and detain people who are "apparently" vagrants. The Act is unfair as it contravenes S.81 of the Constitution; for it interferes with freedom of movement. The Act was enacted to control movements of "undesirable" and this provides a satisfactory basis for the "status Quo." MPs wanted to ^{cut} ~~can~~ movements of people from rural to urban areas without ascertaining and trying to remedy what causes such a movement. Vagrants are to be detained pending inquiry and repatriation. Under section 8 of that Act, a person leaving his area of confinement commits an offence and is liable to prison term.

The Legislature erred in retaining such Acts as the Outlying District Act cap 104. The Act, which was enacted during colonial rule is aimed at closing Districts or parts of Districts to travellers.

Kenyan Society is not static and as change is always rapid, past colonial Acts that do not reflect the aspirations of the masses should be ^{repealed} repeated.

Another Act which should have been ^{repealed} repeated by now is the special Districts (Administration) Act cap 105. The Act first came into operation in 1934 and was used for suppressing the so-called "hostile" tribes. The Act gives a lot of power to Administrative Officials and Police in that they can make orders and regulations to be followed by residents of such District. Freedom of movement is interfered with under the two Acts. ^{The two Acts have a constitutional basis¹⁹ and for such.} The ~~two~~ Acts to be repeated Section 81(6) of the Constitution will have to be amended. Parliament in 1970 passed the Trade Disputes (Amendment) Act which gave the Government the powers to control strikes and thereby protect Foreign capital and companies from being laid waste by strikes.

The Legislature itself does not escape blame ^{for} having surrendered its powers. The ^{case} with which Constitutional Amendments were passed ^{raises} doubts as to the farsightedness of MPS. Parliamentarians have accepted the Speaker's ruling on collective responsibility.²⁰ Though of late, Ministers have been criticised by MPS and the Press for the Messes in their particular Ministries. MPS in giving the President extensive Emergency powers did not satisfy themselves as to the desirability of such measures in an independent country. MPS have at times taken their duties lightly. ⁱⁿ the words of Gertzel "No member of Parliament tabled a private bill before 1967 and one question suggested that some Members were unaware of their rights to do so."²¹ She continues "Members' performance in ordinary debates suffered from their general lack of information on a wide variety of subjects (especially details of Economic Policy) as well as from their ⁱⁿ ability to use Parliamentary procedure advantageously"²²

Appointment of MPS to statutory bodies has increased their ^{loyalty} to the President as patronage is an important aspect of Kenyan ^{Politics} Policies. Parliament has failed to assert itself due to some factors especially a strong Executive, Civil Service and ruling Party. The Political atmosphere in the late 1960s was such that a rebellious Parliament could not be expected. Parliament has now been made into another arm of the Executive that ratifies the wishes of the Executive.

Footnotes Chapter III

.... / 27

1. Act No. 16 of 1966
2. Constitution S.39(1) (c)
3. Supra S.85 (1)
4. Gertzel, Cherry Politics of Independent Kenya

5. The difference between a bill and a motion is that a bill is proposed Legislation which an acceptance by Parliament and presentation to the President for assent it becomes law. A motion is a recommendation or a proposal that is introduced to cover something particular. A motion does not have the force of law though its recommendations are in most cases followed.

6. Acts No. 16 of 1966 and no.4 of 1967. Now S.40 Constitution.

7. Debates 28 April 1966 Col 1957.

8. Gertzel supra p. 78

9. In March 1965, the House of Representatives challenged the Agriculture (Amendment) Bill and persuasion by the Minister of Agriculture having failed, personal intervention of the President was called upon and the challenge was dropped.

10. National Assembly and Presidential Elections Act Cap 7

11. Act No. 18 of 1966

12. Section 85(1) of the Constitution provided that "Subject to this section, the President may at any time by an order published in the Kenya Gazette, bring into operation, generally or in any part of Kenya, part III of the Preservation of Public Security Act of any of the provisions of that part of that Act"

13. The relevant part of 83 reads "...reads "...and nothing contained in or done under the authority of any provision of part III of the Preservation of Public Security Act shall be held to be in consistent or in contravention of those sections (72, 76 79,80 and 81) of this Constitution when and in so far as the provision is in operation by virtue of an order made under Section 85 of this Constitution."

14. The Preservation of Public Security Act Cap.57 S.3(2) and 4(1)

15. Ghai, 7.p Constitutions and the Political Order in East Africa.

University of Dar-es Salaam in Inaugural Lecture Series no.10,1976,p.18

16. One of the detainees P.P. Ooko brought a case against the Government High Court Civil Case No.1159 of 1966 P.P. Ooko vR where Justice Rudd said "the arrest and detention of Mr. Ooko has not been established to have been illegal." p.3 of the case. As a result of the outcome in Ooko's case, no other detainee brought his case to the High Court.

17. Section 3 of the Act states

"No Civil or Criminal Proceedings shall be instituted against any member for words spoken before, or written in a report to the Assembly, by reason of any matter or thing brought by him therein by a petition, Bill Resolution Motion or Otherwise."

The Section talks of "proceedings" but a detention order does not involve legal proceedings as there is not need to take and Individual to courtx if his detention is seen as necessary for preservation of Public Order. Court proceedings take a long time and in criminal proceedings, the affected MP has chance of acquittal. The Act therefore deals with legal proceedings and not detention. Detention, whie is an administrative Act is outside the scope of the provision of the Privileges Act.

18. Act No 40 of 1966. Now S.33 of the Constitution.

19. Section 81(6) of the Constitution gives strength to the two Acts by providing that

"Until it is otherwise provided by Act of Parliament nothing in this section shall affect the operation of the Outlying Districts Act of special Districts Administration Act or any law amending or preparing either of those Acts."

In other words, the Constitutional right of protection of freedom of movement is enjoyed subject to the operation of the two Acts.

20. Debates Vol xl Feb. 1967 Col 1974.

21. Gertzel Supra p. 130

22. Ibid p.131

CHAPTER IV: THE NEO-COLONIAL SETTING AND PROSPECTS FOR THE FUTURE

The foregoing chapters have shown the complete inability of Parliament to reassert itself and champion the interests of the masses after the strengthening of KANU through Constitutional amendments. Parliament has to be seen in the light of forces external to it in order to understand this weakness.

Legislative proposals have not been revolutionary at all; they have tended to be conservative and only aimed at serving a small section of the Kenyan Society. The entrenchment of property provisions in the constitution is an example where Parliament has been used to maintain the status quo¹. The Executive has used Legislative action to do control what it calls undesirable². Newspapers are always full of reports of people being repatriated to their home areas under the vagrancy Act. Foreign investments which are of questionable benefit to Kenyans have been protected by Legislation.³

The fate that has befallen the Legislature in Kenya has occurred in other parts of Africa Carey Jones has written that:

"Constitutions are not sacred in Africa they are no more than political devices for shifting the balance of forces within the country and not for establishing an immutable structure within which these forces can play"⁴

Constitutions are only used to achieve set aims and not for creating a favourable political atmosphere for all. It is contended that the Executive has used Legislators as one of the aims of the Executive in the growth and extension of neo-colonialism.

The Trade Dispute (Amendment) Act 1970, enables the Government to control strikes and thus save foreign capital from waste. The Policy paper on African Socialism of 1965⁵ said that social justice, human dignity, and economic welfare for all, was the aim of Development planners. It is submitted that such aims have not been achieved. The Legislature discussed some aspects of the paper and then immediately set it aside. The paper also laid down that "sending needed capital abroad, allowing land to lie idle, and misusing the Nation's limited resources and conspicuous consumption when the Nation needs saving are examples of anti-social behaviour that African socialism will not countenance"⁶. Unfortunately, Parliamentarians have not strived to see that such acts termed as anti-social are rooted out.

No land ceilings have been proposed as this would hit almost all Parliamentarians. The idea of one man one job has also been greatly resisted by Kenyan leaders. Such state of affairs should be blamed on members of Parliament who have the power to change the status quo but have been unable to do so. This is because they are part of the ruling class.

Colin Leys⁷ has summarised the position of the legislature in Kenya by saying that "So long as they draw their Parliamentary salaries and voted for Government bills and did not organise an opposition or criticise Kenyatta they were tolerated as a useful safety valve. The Assembly's

real function was to serve as a town club for politically active members of the petty bourgeoisie (even the 1971 coup plotters discussed their plans there at one point) providing income and status (and hence credit) and for the skilful possibility of advancement". Membership of Parliament has been seen as a step towards economic and political betterment of the individual concerned but not for his constituents. The above quotation may appear to be too unfair to Parliamentarians but if it is true as regards position in present Kenya.

Supremacy of Parliament has collapsed together with the concept of constitutionalism. To quote from leys again" the myth of constitutionalism wore thin sometimes even the government seemed to lose interest in refurbishing it; for instance when the President was said to have ruled (he had no decree power) that Local Government elections due in 1972 were to be postponed to 1974" The Executive has times over reached his powers.

Kenyatta has shown that he does not have much respect for the Westminster Model of Constitution He says: "The Westminster model of Government has evolved from the traditions of the people of Britain over many hundreds of years. The irritating aspects of the British traditions to be discerned on some occasions in the house of commons have been transplanted into unwritten rules which embody the emotions of the Anglo-Saxon"⁹ In short, he says that the Westminster Model is not suitable for Kenya. Such a view is questionable. A champion of the Westminster model has remarked that 1960 Ghana Constitution which gave Kwame Nkrumah alot of powers led

to an unfortunate state of affairs where Nkrumah turned himself into dictator under the constitution¹⁰. One is bound to agree with Nwabueze that total rejection of the Westminster model leads to a state of affairs that should be avoided.

RECOMMENDATIONS AND CONCLUSIONS.

It has been shown that Parliament has lost its powers as a result of the strength of the Executive, KANU, the Civil Service and also because of shortcomings on the part of Parliamentarians themselves. Parliament should curtail powers of the Executive. Preventive Detention powers of the Executive should be reduced and the Act needs to be amended so that the President can bring part III of the Act (special Public Security Measures) only with the approval of a majority of all the members of Parliament. Parliament should also have the power of revoking a declaration of emergency. This will mean that Section 85 of the Constitution which puts basic human rights second to Preservation of Public Security will be repealed. Basic human rights as guaranteed by Chapter V of the Constitution should take precedence over powers enjoyed by the Executive in the exercise of Emergency powers. Privileges and Immunities Act¹¹ should be amended so that Parliamentarians become immune from detention for words spoken by them in the Assembly. The arrests and subsequent detention of JM, Seroney and J. Shikuku clearly indicated that Cap 6 is subject to Public Security Act.

The position of KANU should be redefined. The Constitutional provision¹² for floor crossing by members is too

harsh and tends to strengthen the position of the ruling party at the expense of the wishes of Parliamentarians. Though it may be difficult to repeal S. 40 of the Constitution on light of the prevailing political climate, constitutional provisions should be made for independent Parliamentary Candidates as the ruling party tends to be too strong in a "defacto" one party state. *and so it is in a defacto 1-party state*

Relationship between the voters and their representatives should take precedence over the wishes of party Stalwarts. KANU leaders and Parliamentarians should realise that it will be to their advantage if the strict provisions regarding discipline in the KANU Constitution are modified ¹³

The Provision that all candidates should be nominated by a political party is not necessary as it could be used to deny nomination to critics of the ruling party. There should be no regulation by Law of Political parties in the electoral or Legislative process. This would be in keeping with the traditions of the Westminster Model. ¹⁴

The civil service has also had a lot to do with the reduction of powers of Parliament. There should be more co-operation between members of Parliament and civil servants. There should be more consultation between civil servants and Parliamentarians as regards development projects. Civil servants should be answerable not to the Executive alone but to Parliament. Parliamentarians as representatives of the people represent the popular will. One too often hears of District Commissioners cancelling meetings convened by members of Parliament.

Members of Parliament themselves should play a greater role in National Development. In the words of Seroney

"If the Government needs the support of the members, they should, ^{be} associated in policy making and even in discussing bills and framing development plans" ¹⁵ The Legislature should have the power and ability to reject Government sponsored Legislation if it does not reflect the wishes of the masses. Such oppressive Acts as Vagrancy Act, Outlying Districts Act Cap 104, special Districts (Administration) Act 105 and Preservation of Public Security Act should be repealed. MP's should critically examine Government sponsored bills and contribute meaningfully to debates. They should be well versed in Economic policy and planning. ¹⁶ An examination of Parliamentary debates shows that at times MPs do not do their homework. There should be more sharing of policy - making powers between Parliament and the Executive.

17

Robert Martin has suggested that a committee of Parliament should be formed to play a part in the development planning and policy formation together with the Executive. MP's should ensure that the development projects they initiate are carried out. In this way, the Legislature will identify itself more with development planning. Parliament should control expenditure of Public money. The reports of controller and Auditor General as regards Government expenditure should be given more weights. Civil Servants who misuse public funds should repay it. The bureaucracy should not take sides in Political questions.

CONCLUSION

The dissertation has shown that Parliament has failed to reassert itself and effectively perform its duties. Some forces outside its chambers account for

this sorry state of affairs. Such examples are the powerful KANU and the Civil service over which the legislature has not control. The super structure is still the same as it was during colonial era especially as regards ownership of property. The failure of MPs to make provisions with regard to ceilings on land and property ownership in a land of squatters and the poor is indicative of the apparent insensitivity of the country's leaders to the plight of the masses in this country. Parliament in Kenya has not escaped the onslaught that has affected legislatures in other parts of commonwealth Africa. Kenya's Parliament is freer than Tanzania's and Malawi's. Amin got rid of Parliament as soon as he came to power in Uganda in 1971. There is still some hope of "ressurrection" for the Kenya Parliament. MPs' first Loyalty should be to the constitution and not to the Executive. Guy Arnold¹⁸ has pointed out that "the Parliamentary group made it impossible for backbenchers to take an independent line without having a direct clash with the President". This is what Parliamentarians have always avoided; a direct clash with the President. In going through Official Report, one is struck by the consistency with which questions dealing with parochial interests are asked. MPs should become more Nationally oriented. They should not be required to have licences for constituency meetings as this places the civil servants in a stronger position. The issue of Ministerial collective responsibility should be re-examined and individual ministers should be accountable to the Legislature for the messes that crop up in their individual ministries.

Perhaps a too bleak picture of Parliament has been drawn but this is inescapable as Parliament has been

very passive and ineffective. M.P.'s have not questioned the use of Emergency powers. If some of the recommendations put forward are adopted in future, Parliament would then assume a more meaningful role in development and Politics in Kenya. A quotation from Jeffrey Jones provides a hopeful prospect for the future " The Legislature in Kenya has remained a prominent and visible Institution despite other forces and events which have eroded its statute"¹⁷ The need for political survival has been greater than respect for constitutionalism hence the relegation of the legislature to a spot behind the Executive.

Not to be used

FOOTNOTES TO CHAPTER IV

1. Kenya constitution S 75 which provides inter alia that the owner of the acquired property will be promptly awarded full compensation. In addition, the compensation money may be remitted to any country of the affected party's choice.
2. Vagrancy Act 1969. The Act provides that a police officer has power to arrest an "apparent" vagrant who does not give a proper account of himself. Several people have been affected by the provisions of the act regardless of the fact that Section 81 (1) of the constitution provides that "No citizen of Kenya shall be deprived of his freedom of Movement, that is to say the right to reside in any part of Kenya, the right to enter Kenya, the right to leave Kenya and immunity from expulsion from Kenya".

It is submitted that the Act was deemed necessary to check the influx of unemployed people from rural to urban areas. A perusal through section 81 of the constitution does not indicate the Constitutional validity of the Vagrancy Act.

3. Protection of Foreign Investments Act.
4. Jones, Carey The Anatomy of Uhuru; An Essay on Kenya's Independence (Manchester Univ. Press 1966)

5. African Socialism and its application to planning in Kenya (Govt. Printer 1965), p. 1
6. Ibid p. 5
7. Leys, Colin Under development in Kenya (Heinemann (Lond) 1975) p. 244
8. Ibid n. 245
9. Kenyatta, Jomo Suffering without Bitterness (EAPH 1968), p. 227.
10. Nwabueze, B.O. Constitutionalism in the Emergent States (C. Hurst & Co. (Lond) 1973), p. 78
11. Cap 6
12. Constitution s. 40
13. S. 11 of 1966 KANU Constitution provides that a member of Parliamentary if his conduct is expelled by the President if his conduct is detrimental to the Party. S. 21 (2) of the same Constitution lays down that the District Executive may expel any member from the branch. Just before his detention in 1975 the former Deputy Speaker of the National Assembly J.M. seroney had been expelled by Nandi KANU District branch. Seroney contended that his loyalty was to his Constituents and not to KANU. The issue was never put to the test as Seroney was detained soon after his purported expulsion from KANU.

14. Ghai Y.P. Constitutions and the Political order in East Africa (Dar es Salaam University Press 1970, p. 19)
15. Official Report may 28, 1967 Col. 432.
16. Jones, Jeffrey Policy Formation and the Kenya National Assembly. Indications for the future 1972 p 8
17. Martin, Robert Legislatures in Socio Economic Development in Commonwealth Africa an article presented in Albany New York 20-24 Jan 1975 p. 41
18. Arnold, Guy Kenyatta and the Politics of Kenya (Dent and Sons Ltd. Lond 1974), p. 190
19. Jones, Jeffrey Supra p.10

UNIVERSITY OF NAIROBI
LIBRARY

BIBLIOGRAPHY

BOOKS

- Arnold Kenyatta and the Politics of Kenya
(Dent and Sons Ltd., London, 1974)
- Gertzel Politics of Independent Kenya
(EAPH, NAIROBI, 1970)
- Ghai & McAuslan Public Law and Political Change
in Kenya (Oxford University Press,
London, 1970)
- Gicheru Parliamentary Practice in Kenya
(TransAfrica Publishers, Nairobi,
1976)
- Jones The Anatomy of Uhuru: An Essay on
Kenya's Independence. (Manchester
University Press, Manchester, 1966)
- Kenyatta Suffering without Bitterness (East
African Publishing House, Nairobi,
1968)
- Leys Under development in Kenya (Heine-
mann, London, 1975)
- Nwabueze Constitutionalism in the Emergent
States (C. Hurst & Co., London, 1973)
- Slade The Parliament of Kenya
(East African Publishing House,
Nairobi, 1969)
- Wade Constitutional Law (5th Ed. Longmans
London, 1962)

Articles

- Ghai, Y.P., 'Constitutions and the Political order in
East Africa' University of Dar es Salaam
Inaugural Lecture Series No. 10, 1970.

- James, J., 'Policy Formation and the Kenya National Assembly
Indications for the future' IDS 1972
- Martin, R., 'Legislatures in Socio-Economic Development
in Commonwealth Africa' 1975.
- Proctor, J.H., 'The Role of the Senate in the Kenyan
Political System. IDS Paper 1965.

UNIVERSITY OF NAIROBI
LIBRARY