THE CONCEPT OF DEMOCRACY WITH SPECIFIC REFERENCE TO THE KENYAN LEGISLATURE: A CASE FOR REFORM

A DISSERTATION SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE LLB DECREE, UNIVERSITY OF NAIROBI

BY

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NAIROBI, SEPTEMBER 1992

GENERAL: DEDICATION

To the Human Rights activists of the 18th and 19th C; You are the revolutionaries dead. You are the men and women, who created a New World in this Universe; as from 1789. You include the few who came together in 1948 to hammer out that document called the Universal Declaration of Human Rights (The International declaration of socio-cultural and Political Rights) of Man.

To you my founding Fathers, who in 1960, at Westminister struck in that document called the Constitution of Kenya, and in your wisdom included S3 and S84 of that Constitution to be the guiding torch of Chapter V and thus Rule of Law. You are the inventors of a future that became my Present.

To you the Champions of Freedom, the revolutionaries live or dead, who came out in 1990 July and sacrificed yourself for a worthy cause. Your innocent blood and suffering have brought the light that is shining this day. Your vision is in the process of being realised.

I want to thank you, the revolutionary alive and dead, for having made possible for me, near a quarter century of life as a Kenyan citizen aspiring to be under a Government of Laws; not men, and particularly for that precious BILL OF RIGHTS, which has made it possible, as it shall, for me to think, to express views unpopular as they may be, however foolish or mistaken at times - indeed, to write what follows without fear of suppression or fear of intimidation.

DEDICATION

To my late Father who never lived long enough to see his Foundation blossom, and to my Mother Salome Makori, who alone has struggled all through. To you I say, Thank you and may God bless you. And to Rose and my Sister Agnes, whose constant encouragement inspired me.

ACKNOWLEDGEMENT

My special thanks go first to my Supervisor Mr. Githu Muigai, whose keen, skilful, proper criticism and guidance made this work what it is. Were it not for his patience in reading through my scripts, this work would have been but a junk of disorganised ideas.

I am indebted to all those who in one way or another gave me the support I required. In my pursuit for academic excellence, Mrs. Elizabeth Wambui, Mr. Momanyi Philip, Mr. Hiran Kamau and Mr. Mosoti J. Kennedy. Not to forget Mr. Hezekiah Ondora who helped me with special materials.

I am most indebted to Mrs. Marcella Mayaki and Mrs. Anne Moke Simi, who tirelessly and skillfully reduced this work, from its original illegible form to the legible form it is. To you all, I say, Thank you.

I bear responsibility for any misdirection, misinformation, mistake or any other discrepancy in this work.

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INTRODUCTION:

The concept of democracy has been variously used in reference to different systems of government. With almost all systems of government claiming to be a democracy, A question arises as to what exactly democracy means.

Notwithstanding the diversity of the systems of government claiming to practice democracy, one concensus between them is that, democracy primarily entails people's popular participation in governance. Thus, democracy is but popular participation in decision making, or majoritan rule. In a modern state, this concept is realised through the principle of representation and thus the recognition of the institution of Parliament.

The institution of Parliament in Western Countries has been progressively developed and democratised, becoming in a sence the most fundamental organ of government. In Britain which is said to be the mother of parliamentary democracy, the government of the day emerges from the results of a parliamentary election. The Executive organ is answerable and accountable to the electorate through Parliament which, by majority vote can bring down the government on an important issue of policy.

The floor of Parliament is a forum of debate where the conduct of government is reviewed and the reactions of the people ventilated. Laws governing the country are therein made, public expenditure scrutinised and specific powers of public control on specific machinery of government are confered by Parliament. Therefore, Parliament is one of the most important organs of the government. Through

it, the masses are able to realise self governance.

Through colonialism, this was exported to Africa, Kenya included, as a result of which, Kenya drew heavily on British constitutional principles on government at independence.

It is under this background, that we intend to study Parliamentary democracy in the Kenyan context. Our main concern shall be to examine the extent to which the Kenyan Parliament is the manifestation of democracy. The main question shall therefore be, whether the people of Kenya can be said to be ruling themselves through Parliament, if not, why.

Our work shall be divided into four chapters.

Chapter Breakdown

Because the History of any given discipline cannot fulfil its proper function until it has been carried as far back as the available sources permit, and regrettably because a deeper understanding of the neglected material could lend the whole subject added importance and dignity, we intend in Chapter One, to specifically deal with definations and historical background of the concepts we shall examine. These concepts are of the state, democracy and Parliament.

The rise of state marked the beginning of the usurpation of the freedoms and rights of men. In order to acquire Legitimacy, the existence of the state had to be sanctioned by men's consent. This consent had to be achieved through peoples participation in the governance of their affairs. It's through this that the notion of representation gained root, and thus the origins and rise of the concept of

democracy and the institution of Parliament. Thereafter, there shall be an examination of their development in Europe before they were consequently exported to the colonies.

Chapter two will be an attempt on an examination of the historical and socio-political background of the Kenya's governing institutions. This shall include the pre-colonial societies' political organisation. It shall also cover a study of Kenys's colonial Parliament (the Kenya Legislative Council) and its development up to independence. Since this period has a bearing to the present system and parliamentary practice, it shall lead to a better understanding of the society to which these foreign concepts of the state (government) and parliamentary democracry were applied.

The third chapter shall be concerned mainly with the Kenyan Legislature from 1963 to the present. We shall examine how it is constituted, its functions, especially its representative role. Herein the bottlenecks contributing to Parliaments inefficiency shall be critically examined.

Chapter four shall contain our recommendations and the conclusion thereof. Herein we shall propose certain reforms that will go a long way in establishing a democratic system of government devoid of oligarchy and authoritarianism.

CHAPTER 1

HISTORICAL BACKGROUND

In this chapter we are concerned about the general background of our study. The background shall give us the insight of the realities to be found in the general study. This research work has two major areas. The first one is the concept of democracy and secondly, the Legislature (parliament). The Legislature is but the manifest expression of the concept of democracy. Our study shall be concerned thus, with the Kenyan Parliament as an expression of democracy or lack of it.

This chapter is but a prelude to a better understanding of the latter chapters. It will deal with the definations and historical evolution of the aforementioned phenomen. For this reason, we propose to discuss first the Concept of the state, which is the pivotal institution to the existence of both democracy and parliament (Legislature).

1:1 THE CONCEPT OF THE MODERN STATE

The term 'state' has two meanings: The first generalised meaning refers to a Country considered as an Organised political community controlled by one government. This is the whole of persons who are politically organised.[1]

The second more specific meaning of the 'state' is, the institutions of government.[2] That is a civil government of a Country. Its primary purpose is to maintain order and security. The exercise of it's jurisdiction is limited to definate geographical area, but within that area, the State is Sovereign; that is to say, it has supreme and exclusive authority.

The use of the term state for politically organised society is relatively recent. It only became prominent in the 16th Century. The political philosophers of the 16th Centuries have contributed much to the understanding of the modern state. In order to discern and understand how the modern state arose and developed, a look at what the various philosophers have contributed to this area is therefore, important and crucial.

Bodin was the first political theorist to isolate the concept of sovereignty and see it as the essential features that distinguished the state from other organisations. He defined sovereignty as the absolute and perpetual power of making and unmaking laws. By 'absolute' he meant unlimited, and 'perpetual' he meant not confined to any fixed period of time. If the right to legislate were of limited duration, Bodin argued, the possessor of permanent authority.

He was of the opinion that in aristocracy or democracy, the sovereign is the ruling group as a whole. According to him sovereign authority must have a moral foundation in Natural law, must be subject to constitutional law that determines succession and that it must not interfere with property. The sovereign has absolute power, but he may not levy taxes without concent. This shows that the sovereign, though absolute, is limited.

In his endevour to philosophically justify the absolute state, Hobbes painted a grim picture of what life would be like without political order. He argued that since men are largely selfish, are roughly equal in strength, and are liable to compete with each other in satisfying their wants, the 'Natural Condition' of mankind is a 'war of every man against every man, in which there is continual fear, and danger of violent death; and the life of man, solitary, poor, nasty, brutish and short. To avoid this, Hobbes argued, is

to maintain a state ruled with a sovereign with absolute authority. Absolute rule may be oppressive, but at least it secures men from the worst of evils, a state of war.

According to him, every man has a "Natural right" to do as he wishes, and that when men form a political state, they surrender their rights to the sovereign. They have authorised to issue laws and in turn, they have promised to obey them. However, he argues that there are some rights they cannot surrender and therefore, not all commands of the sovereign they should obey.

John Locke believed that the state of nature is not a state of war or one in which there is no sense of community. According to him a state of nature is inconvenient because it lacks an impartial judge to arbitrate disputes and to punish breaches of Natural law. Men are therefore, willing to set up a state or political society, the function of which is to protect their natural rights.

He distinguished the states source of authority from that of government. The state rests on a social contract, the governemnt on its part rests on a trust. A government is entrusted with power in order to protect life, liberty, and property, if it fails, it forfeits its claim to obedience. Thus, according to him, the sovereign is the government. He asserts that if the government forfeits its claim to obedience, the citizens are entitled to set up a different government instead Locke's political theory marked the beginning of liberalism.

According to Rousseau, it is only in society, and this means political society, that men can realise their moral - indeed, their human-qualities. One can become a man only by being a citizen. He believed that freedom and authority can go together. He argued that, since citizenship of a state is essential to being a man,

it must be possible to retain freedom when accepting political authority. To him one can only exercise freedom in the state (society). That since legislation is done by the general body of people the law expresses the general will and must be obeyed.

According to Hegelian philosophy, the state is necessary for true morality and the realization of freedom. Accordingly, he states that the state is society conceived as a moral order, in which private interest is marged into public. He considered the state as and end-indeed the ultimate end for social-action. He thought of it as divine, not only for its ethical character, but also for its power. The overall effect of Hegel's political theory, therefore, is to subordinate the individual to the state.

Marxist theory (Analysis) is based on dielectrical materialism. This theory can be traced to the life of its proponents of the 19th Century, Karl Mark and Fredrick Engels. Mark asserted that the state is a result of occumulation whose result is the Creation of social classes. He argued that, the classes identify their interests, after-which they struggle to champion their rights and consequently strive to protect the same. It is this struggle that gives birth to the state, a machinery that enables the stronger class to maintain its superiority over the overs.

According to Mark, the state is an instrument of class rule and robs men of their freedom. It consists of institutions of oppression in the form of navy, police, prisons and an army, all designed to maintain the existing economic systems.

These are the views which developed the modern understanding of of the concept of state. They started after the breakdown of the medieval order of society. They were developed to justify the then existing condition in society.

All these theories try to justify the existence of the state (civil society) and the state as an institution in society which is endowed with powers to regulate the society.

In our understanding we view a state as an assemblage of human beings occupying a definate territory for the promotion of their

welfare and the protection of their mutual rights. It's also a class of persons who wield political power in a society, using the same to control and direct the destiny of the society.

From the foregoing, suffice is to state that, both the civil society and the state i.e the government, exist for the benefit of more organised life, peaceful and safe as opposed to the unorganised, 'chaotic', dangerous and unpredictable life in nature. The state is therefore, essential for man to be able to exercise his rights, exploit his property, enjoy his freedom and realise his life.

It's existence however, and though absolute, it should be limited in that, its not allowed to interfere with the citizens property. It is set up for the citizens, and if it fails to live up to their expectations, according to Locke, they have a right and duty to replace it with another government.

C. F. Strong has stated that:

"A state is a fundamental association for the maintenance and development of social orders, and to this end its central institution is endowed with the united power of the community"[3].

He continues that;

"The state is the institution or set of instritutions which in order to secure certain elementary common purposes and conditions of life, unites under a single authority, the in-habitants of clearly-marked territorial area"[4].

Thus the civil society is a necessity for man to realise the totality of his life. However, society alone is not enough, the state or government has to come in to keep and maintain order. The concept of concent in the existence of these social institutions is salient in the theories of the philosophers discussed above. Rousseau terms it the 'general will'.

Our purpose of discussing the concept of state, is to understand well, how the concept of democracy can be maintained or watered down. The state is a major player in the existence or non-existence of democracy in a given society. Furthermore, it is when the government is limited in Bodin's and Locke's understanding, that democracy can be said to exist.

1:2 THE DEFINATION AND EVOLUTION OF DEMOCRACY

> "There is a good deal of muddle about democracy ---. The muddle about democracy is due to agenuine confusion as to what democracy is supposed to be all about"[5].
>
> MaCpherson C.B.

Many diverse and often contradictory ideas about democracy have continued to exist among people as to what democracy is, how it comes about, where it is to be found and what its basic characteristics are, if any.

In this sub-topic, we propose first and foremost, to study and discuss the various meanings of democracy, that have been provided for by various writers. We also propose to discuss how it has been understood and practiced in various places. Thereafter, we shall present our critique and thereupon attempt a defination based on deductive reasoning as well as empirical evidence gleaned through a rational observation of the real world.

The term 'democracy' literary means, the rule of or by people. It has however, several senses in contemporary usage; Firstly, its a form of government in which the right to make political decisions is exercised directly by the whole body of citizens, acting under procedures of majority rule. This is a referred to as direct or classical democracy.

Secondly, it is also a form of government in which citizens exercise the same right, not in person, but through representatives chosen by and responsible to them. This is known as representative democracy.

And thirdly, it may mean a form of government, usually representative democracy, in which the powers of the majority are exercised within a framework of constitutional restraints designed to guarantee minorities the enjoyment of certain individual or collective rights, such as freedom of speech and religion, known as liberal, or constitutional democracy.

The beginnings of democracy is in the ancient Greek city states in which the whole citizen body formed the legislature, a system made possible by the fact that the population was small. Furthermore, women and slaves enjoyed no political rights. Citizens were eligible for a large variety of executive and judicial offices. Some were filled through elections and others by lot. There never existed separation of powers and all officials were fully responsible to the popular assembly, which was qualified to act in executive, judicial as well as in legislative matters.

The Greek democracy was a brief historical episode that had direct influence on the theory and practice of modern states. From the fall of the Greek city-states to the rise of modern constitutionalism, there was a gap of nearly 2000 years in the theory and practice of democracy.

However, the above defination and practice of democracy i.e all members deciding and acting as one, jointly and unanimously, could not be maintained in successive generations. The extent and populations of the modern states became too big to allow the application of democracy in the Greek understanding. As the society developed and states expanded, suitable methods were sought to ameliorate the situation.

This was the background to the liberal-democracy in the West. Liberal-democracy is the super-structural product of the market economy and is in large measure associated with freedom necessary to develop Capitalist relations. Under this species of democracy, an ideological emphasis on individual rights and freedom is the rule.

"Hence the popularisation of the notion of 'limited' or 'little' government (with its roots in free thought) freedom, government accountability and so on". [7]

The liberal-democracies were liberal first and democratic later. That is, before democracy, there came the Society and the politics of choice the society and politics of competition and the society and politics of the market. Liberal here is taken to mean that both the society and the system of government were organised on a principle of freedom of choice. Thus democracy came as a later addition to the competition market society on the liberal state. This is important in that, FREEDOM is taken to be the basis of economic development and democracy.

Within the system of liberal-democracy, various writers have tried to understand this concept of democracy in different ways. We propose to examine some of these contributions in the understanding of democracy.

MaCpherson C.B has viewed democracy as a system of government by which power is exerted by the state over individuals inter se. He has stated.

> "Democracy as a system of government is, then a system by which power is exerted by the state over individivals ---- . But more than that, a democratic government like any other exists to uphold and enforce a certain kind of rights and aims. It exists to maintain a set of relations between individuals and groups within society which are power relations." [8]

He asserts that a democratic society exists to regulate the legal relations in society, since its geared towards equality between all the citizens. Equality in terms of interests and rights.

Nwabueze B.O.[9] has argued that, there exists a relationship between constitutionalism and democracy. That democracy is a pre-requisite condition for constitutionalism and that both are inter-dependent. Both are geared towards having a government that is responsible and accountable.

Bicket Alexander[10] has suggested that the relationship between the individual and the government, is defined by law. That law has its origins in a contract, an imaged legal transaction, through elections or the choosing of representatives, between the governor and the governed. It is through this process of election, that the notion of government of the people by the people is in herent. This relationship therefore, between the governor and the governed, should be shown through parliament.

> Elsewhere it has been stated that, "Democracy means not a state of society, but a form of government; namely, a constitution under which a sovereign's power is possessed by numerical majority of the citizens. "It is indeed opposed to every kind of aristocratic authority since aristoracy and oligarchy involves the existence of unequal rights and of class privileges, and has for its intellectual or normal foundation the conviction that the inqualities or differences which distinguish one body of men from another are essential and of permanent importance".[11]

Therefore, it can be said that, equality in terms of rights and class privileges is only realisable in a democracy.

Whitaker Phillip[12] has argued that democracy can only be realised though constitutionalism and Separation between the organs that legislate and executes. That democracy can only be realised where everybody helps to make decision, and specialists chosen from the general body of the citizens be endowed with the function of overseeing the execution of those decisions.

Thus from the foregoing, it can safely be stated that, this type of democracy revolves around the individual freedom. That a government must be one of limited power, in order to guarantee liberty. That liberty is the pre-requisite condition to democracy.

The second type of democracy different from the liberal-democracy is the communist or socialist democracy. It goes back to the works of Karl Marx in 1880s. However, it gained root after 1917 Bolshevik Revolution in Russia.

The conception of democracy by the proponents of this type of democracy differ fundamentally with the liberal-democracy due to their different conception of the state. According to them, the state is a mechanism of exploitation or an institution for perverting man's natural goodness or capacity for development.

The driving force of Marx's whole belief is that man has it in himself capacity to be a freely creative being. With this went with

the belief that although throughout history man had so far, been unable to realise his full human nature, now for the first time, conditions for him to do so, were within sight. The means the removal of the class based system of capitalism.

Marx analysis was that so far as capitalism existed, the state was bound to be an apparatus of force by which one class maintained its power to exploit the others. That the system therefore, had to be overthrown by the policitically conscious working class.

The communist variant of democracy is based on the extent to which the party represents the working people. It's proponents argued that the state exists to carry out the will of the majority. The socialist states is controlled by the working class, which is a majority whose interests must be championed first and foremost.

Lenin in his book, "The dictactorship of the proletariat", has stated:

> "The dictactorship of proletariat alone can emancipate humanity from the oppression of capitalism, from lies, falsehood and hypocricy of the rich -------- that is, make the blessings of democracy really accessible to the workers and poor peasants".[13]

He continues to argue that, the proletariat democracy, would amount to a complete overhaul of the capitalist society. That the means of production system shall cease and change from individual to communal, and it's at such a time that there would be a classless society. That with a classless society, the government in power would cater for all people and not a particular class. He therefore,

concludes that, its only in a classless society that democracy can be obtainable.

The argument here is that, its only after the working class and therefore, the majority control the state that democracy can exist.

The third model of democracy is the under-developed variant or the Third World democracy. The Kenyan system of democracy comes under this type. This model came into being after colonialism. With independence, the formerly colonised states sought their own system of democracy. Apart from some few features taken from the first two models already discussed, this model differed with them in all other aspects. Thus it's neither Liberal nor Communist.

The reasons for the difference between the Third World democracy with the other two is historical. The competitive market society, which is the soil in which liberal ideas and the liberal state flourish, was not natural to them. In so far as they knew the market society, it was something imposed on them from outside and from above. Their traditional culture was generally not attuned to competition. Thus the notion of political Competition was just as unnatural to them as the notion of economic competition, so that there was little basis for a system of competing political parties.

> "The dorminance of single party or movement is of course apt to be the aftermath of any revolution. When revolution is made by a people largely united in a single overriding will to throw off foreign control, the dorminance of a single party is even more likely, when the people who are so united were not sharply class-divided among themselves, the single

party pattern is still more likely ---- "They generally saw no intrinsic value in wealth-getting and gave no respect to the motive of individual gain. Equality and Community, equality within a community, were traditionally rated more highly than individual freedom".[14]

(However, most of these states, especially in Africa, have accepted the introduction of competing political parties in their systems of government).

Another reason why these democracies differed, is the general aspirations of these states at independence. These states had a general will to keep and maintain their independence. Such demanded a strong leadership. Thus it would have been very difficult to a chieve this objective if they had introduced the liberal competitive party system.

Lastly, the departure of the Third World model from the former two was facilitated by the need to create a pervasive loyalty to the nation rather than to the tribe or the local community. A pre-political and pre-national people had to be brought to a political and national consciousness.

President Daniel Arap Moi of Kenya, while writing about Kenya's political philosophy has stated:

"Immersed within the spirit of Nyayo are it's democratic ideals. That is, by calling upon the people to share in the Nation's development, it presupposes their sharing in the decision making. Harambee creates a public baraza and gives

the people as a whole, a chance to analyse and criticise publicly the ventures in whose cause they are called upon to sacrifice. Therefore, Harambee resurrects and revitalises some of Africa's noblest traits, her democratic ideas, for the traditional baraza's were the people's parliament the market place of knowledge and ideals".[15]

Suffice it to state that, the above quotation categorically provides the position of the system of 'democracy' practiced in Kenya. It's part of the Third World Model. The fact is that, Africa's historical past has greatly influenced it's performance as far as democracy is concerned. The parliament which is supposed to express the people's wishes is sidelined in these barazas. We contend that in such barazas decisions cannot be properly promulgated nor can their execution be properly monitored by said the people.

The reason as to why Africa, and Kenya in that case, have not been able to practice democracy in the sense of the word is basically traditional and colonial.

These are the three commonly used or practiced systems of democracy i.e the Liberal, non-Liberal communist variant and the Third World democracies.

Despite the disperity in defination and understanding, some scholars have attempted to define democracy in modern terms. It has been defined as a government or deciding and ensuring the execution of decisions in a group by the members of the group in question.

Dr. Afrifa Gitonga has stated thus:

"Ideally, a democratic group is one in which all the members, each and everyone of them, participate in making collective decisions in ensuring their execution. All members decide and act as one, its perfect and pure form".[16]

We have so far attempted to explore the various definations and understandings that have been attributed to the concept of democracy. We now propose to present a critique on the term 'democracy', and thereafter our own understanding of the term. We shall use Dr. Afrifa Gitonga's defination as representing our own view.

In order to give the concept a concrete, social and material dimension, the empirical world has to be explored in an attempt to discover the raw materials and the implements with which democracy is built. This is what constitutes the foundations of democracy-the prerequisites or the preconditions upon which democracy is dependent.

In otherwords, the question that we shall endevour to answer is, what practices or processes enhance, consolidate erode or undermine democracy?

In view of the great variety and diversity of definations articulated by various regimes and systems, its difficult to establish the precise and objective meaning of democracy. Since almost all regimes claim to be democratic, the question is whether there are as many types of democracy as there are definations.

The fact is that, many definations attributed to democracy tend to be used to justify different ideological ideals. Needless to state that, though amorphous and difficult in defining the term, democracy

has some basic characteristics that are, but imperative for a democracy to exist.

Basically, the term 'democracy' is taken to mean rule of or by the people. That the government must belong to the people, created and formed by them for their benefit. To rule themselves thus implies that the exercise of power, authority and influence in society, must be done by the people.

It should be appreciated that, it is the rulers, those who exercise power, authority and influence, who largely determine the character and desting of human societies. Thus the democratic ideal requires that the people be the rulers; so that they can have their desting and that of the society in their own hands. They should rule themselves, order, organise and manage their own affairs.

The proposition that the people rule themselves, begs for the structure of self governance. Direct rule in the Greek sense is not practical nor possible. Therefore, the people as a whole need be taken to mean a pularity expressed by the Majority principle. Thus its only through representation that this principle of self rule can be realised.

The government's mode of existence is of importance. The purpose of it's being set up must be for the people. This means that since its for the people, the government must reflect the wishes and will of the people. Thus it should be one that can be described as fair and just.

Githu Muigai has stated that:

"Democracy seeks to create a state of existence that is in

> conflict with existing social forces. It seeks to restrain power and to make it accountable to the people. It seeks to create equality for men when all around them inequalities in liberty opportunity, income, wealth and the basics of self respect abound. It is therefore, a challege to deep seated sectoral interest".[17]

Thus, the said government must be socially legitimate, since its supposed to be a creative of the people and one which therefore, has its roots in the people. Such can only be recognised in a government if it operates according to and in conformity with the written or unwritten rules, procedure and repulations established by the people. In otherwords, must be in accordance and in conformity with the constitution.

We believe therefore, that a democratic government is that which lives upto its purpose for existence; which justifies its existence. Being a government for the people, it has to be one which caters for the material, social and other interests of the people.

For democracy to be total, the ways and means of implementing the democratic ideals discussed above is, but of importance. How the people can organise themselves to effect their self rule, and what functions their organisation shall execute and in what way shall it carry out those functions.

Since it's impracticable to apply the Greek System of direct democracy, only alternative which has been ackowledged widely in the modern times is indirect self rule, through representatives. The

representatives are selected through elections into representative assemblies whereupon they form the government.

> "Once the organs of government are in place and their mode of operation specified, it is necessary, as a final practical measure, that there be established a mechanism of control for ensuring that the people's will does (indeed) get implemented - that is indeed the people's government which results from the arrangements".[18]

This concerns the doctrine of separation of powers between the organs of the state (government), for it is not only dangerous, but also catestrophic for the same person to be the accuser, judge and executioner.

However, the mechanisms of forming this government of the people can be defective. The various organisational and institutional arrangements - the electoral procedure and rules are sometimes defective. Therefore, free and fair elections are hard to be achieved.

> "Most electorates are in capacitated by obective socio-economic conditions from playing a role in the choice of representatives. The television and other avenues of mass media political marketing for instance are used with extraordinary effectiveness in the manipulation of the electorate and public opinion, especially in such countries as the United States and Western Europe ---- the other end of the scale, the illiteracy, ignorance and poverty of third world masses plus such factors as poor communication facilities, militate to a large extent against the full development of the democratic process."[19]

Thus if it is not failed by defective procedure or mechanisms of implementation, then it is failed by bad faith of the implementors, or if not that, by objective conditions of the social and material life of the people until, in the final analysis, democracy in its ideal form and fullest sense remains what it has always been a dream.

While writing about African system of democracy, Leads C.A asserted:

> "Expressions such as 'slum', 'tutelary' and 'guided' democracy have been used to describe various forms of government in Africa, -- which have provided some of the outward forms of democracy (universal suffrage, elections, legislature and constitution) combined with certain authoritarian features such as a ban on opposition to the official party, recognition of only one official doctrine, no guarantee of human rights, and attempts via fraud and violence to falsify the popular vote in elections".[20]

This is the proper exposition of the democracy practiced in the third world, Kenya inclunsive. The general principles of democracy such as elections and a legislature exist, however, the manner in which they are applied leaves doubt as to the difference between these systems and oligarchies.

So far we have tried to discuss the various definations and understandings attributed to democracy. Since nearly all Countries claim to be democratic, it can be stated that most of these definations have been articulated with a view of justifying the various ideologies. Even Plato during his time defined democracy to suit his situation. He wrote in his book; The Republic, that:

"Then democracy originates when the poor will kill or exile their opponents, and give the rest equal civil rights and opportunities of office, appointment to office being as a rule by lot".[21]

To him, since the poor were the majority, democracy could be achieved only by having the poor as the leaders not withstanding the means by which they obtain that leadership.

1:3 DEFINATION AND THE EVOLUTION OF PARLIAMENTARY DEMOCRACY

The Concise Oxford Dictionary, has defined parliament as:

"A council forming with the Sovereign the supreme legislature of United Kingdom; consisting of House of Lords and hence of Commons".[22]

The Eucylopaedia Britterica has defined parliament as:

"A Solemn Conference of all the estates of the Kingdom summoned together by the authority of the Crown to consider the affairs of the realm. The Constituent parts of the parliament are the sovereign and the three estates of the realm".[23] (emphasis provided).

The definations disclose the existence of three estates. Since the English society was divided into estates, according to the defination therefore, each estate was represented.

The purpose, functions and mode of representation of parliament, shall be discerned from the exposition of its development and evolution as from the 11th Century.

Parliament is the name given to the original legislative assemblies of England, Scotland and Ireland. It became also that of some British Colonies. The British parliament consists of the sovereign (crown), the House of Lords and the House of Commons.

The United Kingdom is the Mother of parliaments. The beginning of parliament may betraced back to the reign of John (1199-1216). During his reign some facts were evident which came into sharper focus later in the 16th Century. Prior to this time, men owed loyalty to the King as a person and not as an embodiment of the nation. The development of wool trade at around this time, broke the communal barriers and brought a sense of nationhood. It's this sense of nationhood which brought forth the development of parliamentary system of the modern times.

The financial need of the Crown were always associated with the feudal principle of consent during the 13th Century. Since England was a feudal society, distinct classes existed. The barons who were the kings professional advisers, sat at the Curia Legis which was the kings council. The king could summon his council to meet at anytime and discuss matters pertaining to the realm. The summoning of this Curia Legis by the king, is still an important constitutional exercise today. We shall discuss this exercise later when trying to discover how its an erosion of democracy.

There was another class, the Knights. These represented the shires. They could only sit in the king's council upon invitation by the king himself. As a rule, the purpose of the Curia legis was to secure the extra aids (taxes in modern terms) and grants desired by the king. But discussions of royal financial needs necessarily

led to considerations of the policy occasioning them.

In 1258, the barons and knights met at oxford and formulated the Provisions of Oxford. Contemporaries of the meeting which was a large session of Curia legis called it a 'parliament'. To these people, parliament therefore, appeared as revival of the old Magnum Concilium, summoned to discuss the great affairs of the realm. The meeting of this parliament was to discuss, "the King's business and the business of the king and the kingdom".[24]

In 1295 the 'model' Parliament was summoned at a time of crisis. With French and Scottish wars, as well as a welsh rebellion on his hands, Edward I knew his financial demands would be higher. He therefore summoned representatives from all classes; the Barons, the Knights from the shires, Burgesses from baroughs and the proctors to represent the clergy. Each group assented to an aid (tax) for its own class only. Thus the notion of consent by representation.

Since the war became costly, the king continued to exert pressure on these classes to contribute more aid. He did this without consulting them, thus without their consent. The people put on a passive resistance to the king's demands. It was sufficient to persuade the king that without positive basking of the realm, his policies were doomed to fail. This reflects Bodins theory that the sovereign can not collect tax without consent. It also reflects Hobbes theory on the state that, though the people are supposed to obey the laws of the soverein, there are some commands they are not bound to obey, if such commands encroach on some of their rights.

Lowell C.R, commenting on this fact stated that:

"From this remarkable national for-bearance and royal understanding came the solution of the crisis in a constitutional formula which was to be vital for the future of Parliament".[25]

The Barons demanded that each group should give its own consent to these additional financial obligations. They also demanded that their king should always be within the previous charters which guided the English public life. The king prostate at the moment, assented to all their demands in 1297. The people's will was thus being expressed by their representatives in the Curia Legis. Lowell continued to state that:

"The importance of the new institution of charters for the future of the new institution of parliament was, however, great. As feudal dues provided less revenue for the king, it was necessary for him to ask for more aids. In the end, it became more convenient for him to secure the separate assents simultaneously at a single meeting, and what better place than Parliament".[26]

Thus parliament became an important institution as to the control and exertion of tax.

One of the charters to which the king was to be bound by after his assents, was the 1215 charter, the magna charter. Maitland states that:

"In it's 14th clause we obtain for the first time something that may be called a distinct defination of the body. The

12th clause declares that no scuttage or aid shall be imposed in our realm save by the common counsel of our realm".[27]

By this assent, the king emphasised the importance of parliament and also extended it' regular personel, bringing into the political life of his realm a class that under the feudal order had only a small part to play.

After 1641, the executive (crown), had to work with the legislature on all important issues, and in no case where royal policy encountered firm parliamentary opposition did it prevail nor was the will of parliament, even when contrary to royal wishes, ever frustrated.

For example, king James declared that the chancery as the writ issuing agency was the sole judge of the returns, only to retreat from his legally strong position into a 'compromise' whereby the House of Commons would have concurrent jurisdiction with chancery over election returns. Henceforth, the election returns lay with the House of Common and not the chancery. Thus the crown lost its control of commons.

Thus, from the foregoing, it can be said that the purpose of parliament is to represent the masses in governance. Parliament also has duty to restrain the executive (sovereign) from exercising excessive powers. These reflect the democratic ideals of having a government of and by the people. It also satisfies the democratic ideal that the government must be for the people - that is by a restraining the government from acting contrary to the wishes of the people; lest the people set up another government as propounded by John Locke.

In this chapter we have tried to define the concepts of the state, democracy and parliament. We have also discussed their historical backgrounds and socio-political evolution. This helps one to understand better the mysteries sorrounding the concept of democracy. For example, it can help one to undertand the reasons why democracy is such an amorphous term with various definations being attributed to it. It also helps in the understanding as to why the state plays a big role in either the existence or non-existence of democracy in a given society.

This background lays down the fundamental principles that would be discussed in the later Chapters. In the following Chapter we are going to discuss the background of the Kenyan Legislature. Its evolution and development throughout the colonial period upto independence i.e. 1964.

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CHAPTER 2

THE SOCIO-POLITICAL BACKGROUND OF THE KENYAN LEGISLATURE

In chapter one we discussed the definations and evolution of the concepts of the state and democracy. We also discussed the evolution and development of the institution of Parliament in England. In this chapter we propose to discuss how the concept of democracy and the institution of Parliament came into existence in Kenya. In other words, the chapter will deal with the question of the imprtation and application of the concept of democracy as manifested in the institution of Parliament.

But to the extent to which the present Parliament is the product and result of, and is conditioned by, the past, we must know the past in order to understand it (Parliament). This is important because, with such knowledge we can easily perceive and understand why Parliament is what it is and may envisage its conduct in the execution of its functions. Since the Kenyan parliament has prooved ineffective as far as democracy is concerned, we contend that the reasons thereof is the type of society the institution was established, instead of that for which it was intended. It should be remembered that the society in which Parliament evolved in England in the 14th Century, was very different and far much enlightened compared to the Kenyan society of 1900. The conditions facilitating the evolution of this important institution in England, differed fundamentally with those existing in Kenya by 1905. For this to be understood better, we shall examine impassante the Kenyan society shortly before colonialism.

We also undertake to discuss the development of the Kenyan Legislature during the colonial period. It is hoped that in discussing these areas, the pre-colonial and during the colonial period, there shall be clarity as to the society unto which these foreign concepts of the state and Parliamentary democracy were applied.

There existed two types of political organisations. The first one was the so called chiefless or acephalous societies. It is eroneous to think of such societies as being without rulers. What distinguished these societies from the chiefly ones was the fact that authority among these ones was fragmented and widely difused. These have been refered to as 'primitive democracy'.

> "Leadership and a measure of prestige, but not authority, are vested typically in a headman and a council of elders or family heads with perhaps a few other semi-specialized functionaries to direct hunting or conduct particular rituals ..."[3]

Therefore, despite the fact that these societies had not developed to a level statehood, some form of political organisation existed. The ruler was to act at the instance of the Council's advice. This council assisted him in making decisions affecting the community. These councils consisted of elders most of whom were 'elected' to this council.

This council of elders can be equated to the Modern institution of Parliament but in its crudent form. However, the council did not meet regularly to discuss business affecting the community. It only met either when a calamity had befallen the community or to executè a very important matter affecting the community. The modern rigours of economic planning and development required of Parliament never existed. This meant that much significance was not attached to these councils as is Parliament today. On the other hand, there existed the chieftain type of government among the African tradition societies. In these societies, the leader was too powerful and uncontrollable. The council of elders in such a situation was just a formality, in existance. Nwabueze has stated on this that;

> "The most widely prevalent form of political organization

2:1 Pre-Colonial Societies

The purpose of examining this area is not to make this work a historical document, but to present trully, analytical and accurate facts. It shall be difficult to understand the constitutional events which took place in 1964, without first having some knowledge about its background and purported validity.

It also helps us understand the logic behind the argument in 1964 that, Kenya should have an all powerful executive President as opposed to having a divided executive i.e the Head of State and Head of the Government.

Before 1890, Kenya was not a unifed entity capable of being referred to as a state as per the defination.[1] Her occupants lived in small tribal societies. The various societies (communities) existed separately without having any co-ordination or attachment with any other community. We are therefore in order to state that Kenya never existed as an organised political community controlled by one government.

From the foregoing, it follows that since 'Kenyans' at this point in time, lived in small communities, the ideas of 'state', 'Parliament' etc were foreign to them. The modern system of governance was equally unknown to them.

The said communities formed the people's political organization. They had few, if any, specialised institutions or roles of a specifically political nature. However, 'certain political functions existed and being performed, the resultion of conflict, the distribution of scarce resources and decision making regarding sustenance activities![2]

> in Africa is the chieftainship. The chief is the apex of the political system. Like the Monarch in Europe, he was all three things at once - executive, judge and legislature though his functions were more limited in scope owing to the primitive conditions of the society over which he ruled. He might be obliged to exercise his powers in council with surbodinate chiefs and other functionaries but he never was a figure head."[4] (emphasis mine).

This has been emphasised further by Norman's exposition that;

> "But it so happened that ...slave wars had led to the institutions of chiefs or kings or tyrants in many East African tribes. In most cases the chief was elected, but with certain restrictions of choice. In some cases .. succession rendered if necessary to surround the monarch with an elaborate ceremonial expressive of sanctity, chiefs were arbitrary and blood thirsty" (emphasis provided)

Thus from the foregoing, at no one particular time, did the council of elders assert itself over the chief. The chief as the leader of the community was mystified and therefore the council could not contradict him. In most cases the decision of the chiefs were undebatable, neither the individuals nor the council could question or challenge his actions.

It's this scenario of an all powerful chief, weak council whose role was only to advise the former which advise was not binding, that colonialism took root. This pattern of administration was disrupted by the coming of the British in East Africa in the 1870-1880. However this was not broken down, since even as late as 1964 the leaders of the day appealed to these notions in their quest to establish a strong and powerful executive government

> "African Political experience and History is not confined to traditional form of political organization. The colonial period certainly forms an important part of African political experience and History; of which account must be taken in determining what form of government can be understood by the people".[6]

Its at the strength of this, that we propose now to turn to the question as to how democracy was imported into, and the development of the institution of Parliament in Kenya during the colonial period.

2:2. The Colonial Period

Up to 1895

The British interest and contact with Kenya was through a chartered company, the Imperial British East Africa Company. The Company had been undertaking trade and signing agreements in the East Africa coast from 1877, through a concession by the Zanzibar Sultan. It was granted a charter of incorporation in 1888 which empowered it to carry on the purposes and plicies of the British government in East Africa.

In pursuance of the power of administration the company could appoint to administer districts, promulgate laws, establish and operate courts of justice. This was the first move of disruption of the social mode of existance of the pre-colonial African societies. The inhabitants were to be faced with foreign rule which they did not, in the first place, consent to. It was but an intrusion and subsequent disruption of their social and plitical life. After 1890, the comapany's operational area extended throughout the British sphere of influence and beyond, covering much of present Kenya and Uganda. Thus at the outset, Kenya was for commercial enterprise. The company was simply concered with business i.e. raw materials there from.

In such a situation, it's only prudent and logical to conclude that Kenya was being ruled by businessmen, rather than administrators, who were more concerned with economics rather than things like democracy, rule of law and like.

Further more, these businessmen cum administrators ruled or administered the East African territory for and on behalf of the crown and not its inhabitants opinion and will was, was of little concern. Their concern was to effectively administer the territory for the crown.

The Protectorate

In June 1895 the British fovernment declared a protectorate over the rest of the territory administered by the company. The commencement of the protectorate marked the beginning of direct British government administration in the area hitherto controlled by the company. The power to exercise jurisdiction in the British East African protectorate (Kenya), was derived from the first Foreign Jurisdiction Act 1843. This was consolidated, with amending legislation, into the Foreign Jurisdiction Act 1890. It's this whole scheme of legislation, the Acts and orders in council made there under which provided the statutory base for the extent and exercise of jurisdiction by the company and afterwards the government in East Africa. Jurisdiction over persons whose rulers concluded agreements with the company was rested on those agreements which were phrased in the widest possible language. However, there was a provision by the Africa order in council 1889 to the effect that jurisdiction was to be exercised only with the consent of the natives concerned. But in respect of persons in relation to whom there were no agreements, it does not appear that the company had any power to exercise jurisdiction over them. Not even the protectorate government.

The charter of the company's incorporation limited it to acquiring jurisdiction bilaterally. From its administration, however, there is no evidence that the company was in anyway deterred by this requirement, from exercising sporadic though vigorous power in the interior.

This goes to show how the company flouted all rules of good governance, just to achieve its aim of economic exploitation. This was to be precedent of bad governance, in total disregard of the ruled people. The first of the significant instances in which the local indeginous population was forced into doing things without consent was the "Maasai Agreement" of 1911. In the case of Ole Njogo and others Us.A.G. of the East Africa Protectorate,[7] the plaintiff on behalf of some of the Maasai who had been compelled to move in 1911, brought an action for breach of the 1904 agreement on the ground that the agreeement of 1904 was a civil contract which was still subsisting, the 1911 agreement not having been made with those maasai capable of binding the whole tribe. The government raised succesful preliminary objections on the ground that the court had no jurisdiction since the agreements were treaties and not contracts, and that the alleged confiscation of the cattle was an act of state - neither of them was recognisable in a municipal court.

This illustrates the fact that the protectorate government as early as 1910 was undertaking decisions affecting the indegenous population without consulting them.

> "The use of the defence of act of state in these circumstances provides an example of arbitrary government which it is hard to parallel. The government could force the agreement on the maasai, could then enforce their obedience to it and when challenged, could decline to allow the matter to be judged in courts

and could prevent or punish any recourse to extra-legal remedies. The aggrieved people were compelled to rely on the goodwill and the sence of fair play of the government, by whose actions they had been wronged in the first place. ...the act of the state was the perfect instrument of executive tyranny."[8]

The Ole Njogo's case was just a cause celebre which reached the courts but similar or more serious divergence between law and practice occurred many times over the early history of the East Africa Protectorate that affected attitudes of both administrators and the administered thereafter.

The system of governance that was first established in Kenya was based on the principles of insurbodination. The legislature was subordinate to the Imperial government.

During the early days of dependency, its the commissioner who was the legislature. He ruled by decrees, his powers only being limited by the imperial government. He was responsible, not to the ruled, but to the secretary of state for overseas dominions. He had power under the 1899 East Africa order-in-council, to legilate a legal system for Africans. Legislations on administration were passed en masse.

"There were several laws to deal with public order, under which, the police were allowed to arrest without a warrant a 'vagrant' ...Movements of natives in the protectorate could be controlled by the pass system, communal activities like Ngomas were forbidden after 9.00pm and most importantly the commissioner could declare any district or part thereof a 'closed district', whereupon entry into that district and administrative Officers acting under the commissioner's orders."[9]

All these eroded the rights and freedoms of the natives. It restricted

their enjoyment of the same and therefore, eroding the original notion of establishing a state for the purpose of protecting and enjoying individual rights. Moreso, all this was done without any consultation whatsoever with the Natives. Being the legislature itself, the Commissioner legislated to the convenience of his administration and not the governed.

To this Humprey Slade has stated that:

> "When the British government first assumed control of what was then known as the East African Protectorate, it was governed by a Commissioner who was responsible only to that government. Laws were made for the protectorate by the British Parliament or by the Queen's-Order-in-council, or by the Commissioner himself in the exercise of his powers delegated to him by one of those two authorities. No inhabitant of the Country --- had any Constitutional right whatsoever, to share in the making of laws, the choice of the government or advice or criticism of the government".[10]

The reason why the protectorate government was not responsible to the governed was because, it belonged to the Imperial government and not the inhabitants. It had to safeguard the interests of the Crown for that was the reason of it's being set up.

The 1905 Order-in-council marked an important stage in Constitutional development. The powers of the Governor (formerly the Commissioner) were greatly affected by the establishment of the legislative and executive councils. The legislative council was empowered and authorised to, subject to instructions from the Crown, 'establish ordinances, to constitute such courts and officers, and to maked such provisions and regulations for the proceedings in such courts, and for the administration

of justice, as may be necessary for the peace, order and good government....."[11].

The Governor had a right to veto all such ordinances. Upon presentation to him of a bill which had been passed by the legislative council, the Governor was to declare that he assented to it, that he refused to assent to the bill or that he reserved it for the signification of the crows pleasure.[12]

The legislative council was set up in response to pressure from the European settlers who in the same year had asked for some form of representation in a legislative council. It consisted of the Governor as its President (he presided over its proceedings) the officials who were mainly heads of various government departments holding their seats ex-officio and some unofficial members nominated by the governor. The un officials represented the interests of the different sectors of the economy, farming business, industry and supposedly the natives.

As to the constitutional evolution from legislative council to parliament is concerned, only the faces and shapes which changed, while essentially, the creature remained the same.

The 1919 legislative council ordinance provided for the elective representation. It was recommended that since the coloureds by then outnumbered the whites, at this time of the protectorate's development it was undesirable that the franchise be extended it

was undesirable that the franchise be extended to Asians and Natives. Thus, the ordinance provided for full adult white suffrage, men and women who must be a British subject of European descent or origin.

The Indian representation first came in 1909 when Jevanjee, A.M. was nominated for a period of two years to the Legislative Council. The second representation came in 1919 when two Indians were nominated to the council.

African interests were first represented in 1924 when one European was nominated by the Governor, to represent them in the legislative council. A missionary was to represent their interests until " the time comes when the natives are fitted for direct representation.[13]

The initial assumption was that the Africans were unable to represent themselves, and it was therefore necessary to appoint a member of another community to speak on their behalf. Further than this that they never knew what was best for them. Thus the Governor and chief native commissioner were to continue to be responsible for the African Welfare.

The duration of the legislative council after the 1924 "elections" was up to three years. The nominated held their seats at the pleasure of the crown. These were intended to maintain the government majority in the legislative council. The council had to be summoned by the Governor in order to proceed with its business

(a practice retained up to date, though now its exercised by the president)[14]. He alone could originate with financial bills and since he had official majority, his authority was unchallenged. He could prorogue the council or dissolve it at any time.

Thus, the legislative was totally subordinated to the Governor who, apart from being its President, controlled it through various powers conferred to him by legislations. In such a situation, it is unlikely that his will could be defeated in the legislative council.

Throughout this period (1905-1948), the Governor maintained an official majority in the legislative council. In 1929, it was observed that;

> "The government still retains an official majority in the legislative council. Two of the European elected members have been nominated as members of the executive council, and have been thus admitted to the inner counsels of the government.....A practice has grown up in the legislative council of referring all questions of importance to select committees in which the official majority is seldom retained".[15]

The fact that the government had a majority in the council meant that what was to be discussed and championed was purely in favour of the government. Concerning the issue, Slade who was Kenya's first speaker of the National Assembly has stated that

> "At this time (around 1948) when there were twenty two representative members, the government had the support in the legislative

> council of only nineteen members of whom eight were the members of departments....remainder were members nominated by the Governor to sit with the government. This situation of an unofficial majority continued for a period of six years: it was the only period before self government during which elected and nominated representatives of the people out numbered and could outvote the government in parliament"[13]

Thus throughout, the first half of colonialism, it was the policy of the government, which in the first place was never representative, to dominate the legislative council.

By 1948, Africans were being represented by four nominated Africans. These were supposed to represent the large population of the natives as opposed to a large number of whites representing so few a population. Up to this time as from 1920, whereas other races had elective representatives, Africans were only represented by nominated members who enjoyed their tenure at the crown's pleasure.

The representatives of the natives, though expressing some measures of genuine representation, had no political unions and did not have enough opportunity for the expression of their views in the legislative council. The situation was aggravated by the intransigence of the Europeans, and the tendency to dismiss African political demands as emanating from a few political hot heads and unrepresentative of the mass of people. It is therefore not surprising that African political expression found other outlets and that the government lost in touch with African opinion.[14].

The growth of unrest led to the outbreak of MauMau and the consequent declaration of a state of emergency, with these there was no more constitutional development. Between 1954-60, the Llyttelton constitution attempted to bring all races into a more active participation in the affairs of the government. This was based on the recognition of communities as distinct units in society. In its concern with groups, regardless of numerical strength, rather than individuals, it was in conflict with the basic premise of a true democratic society.[18]

Under this Lyttelton constitution of 1954, a council of ministers was set up, to include not only six civil servants and two persons nominated by the Government, but also six elected or representative members of the legislative council (three Europeans, two Asians and one African).

> "This gave to the representatives of the people, for the first time, a substantial share in the government of the country".[19]

This arrangement was just a response to the outbreak of the Mau Mau rebellion of 1952. Though the change seemed a welcome gesture, the legislative council remained far from being fully representative. The Africans got their first elected representatives in 1957, when the nominated members were replaced with eight elected members. under the 1958 Lennox-Boyd constitution, the number of African elected members was increased to sixteen. At least the colonial government in liaison with the imperial government was flexing it's grip on Kenya. This was a good thing to do since Kenya was

approaching her independence, and it was therefore reasonable to give Africans a greater say in the legislative council. However, this was just a cosmetic change since, the said eight representatives were supposed to represent all the natives of the whole country. Furthermore, legislative council still remained subordinate to the colonial governments and therefore, Africans were far from deciding their own destiny.

The Governor was empowered by this constitution, to nominate an unlimited number of members. This was geared towards ensuring the continuity of the official majority in the legislative council, and therefore at all times out vote the Natives demands in the council. In ensuring that the Natives demands were always defeated in the legislative council, the colonial government aimed at maintaining the same old autocracy in Kenya rather than establish an acceptable, fully representative and democratic system. The colonial government knew that establishing such a system would mean the collapse and infact outright termination of colonialism. This being the case, the advent of such system had to be postponed to a near future.

A new type of membership to the legislative council was created by this lennox-Boyd constitution. These were known as the specially elected members. There were twelve such members, four from each race. These were elected by the other members of the legislative council sitting as an electoral college. This was the first attempt to establish any elected members of the council with

responsibility to a non-racial electorate. This is so because their election was not based on communal roll.

The elected African leaders (members of the legislative council) detested and opposed the constitution under which they had been elected. This led to the first Lancaster House Conference of 1960. The Africans at this conference demanded "undiluted democracy" a common roll for one mau one vote to give them a legislative majority. However, they were prepared to consider safe guards for the minority as temporary provisions. They refused any sort of permanent safeguards of a communal kind on the ground that this tended to perpetuate racial groups and prevented the emergence of democracy. One of them later observed that,

> "The five weeks of the Lancaster House conference in January-February 1960 not only brought about the declaration we had sought, that Kenya was an African country; it also reversed the whole constitutional process".

However, its doubtful if there was any reversing done on the constitution. The fact remains that the most important thing the Africans who attended the conference wanted, was self government and everything else was to come later. However, at the later part of this chapter we shall see what this "reversing of the constitutional process" was

The two major institutions of government discussed above, the executive and the legislature, had remarkable continuity.

Introduced early in 1905 as a result of settler pressure, they helped to influence and qualify official policy and promote political awareness.

> "In practice, however, power remained with the Governor and the colonial office until just before independence, and while the exercise of this power was to a certain degree influenced by pressure resulting from the democratization of institutions, the governors discretion was still wide. The impression of popular control and influence but without in practice the substance of their feature which can to some extent be said to characterise their successor institutions."[21]

Up to independence the legislative council was a manifestation of the executive will, it was never a reflection of the peoples will as it should be. It was under the surveillance and complete control of the governor. The government had a perpetual majority in the councils and therefore its will was exercised unhindered. The legislative council could not be said to be representative nor articulating the will of the people. It was far from being a manifestation of democracy!

Suffice it to state that during the colonial period, there existed no government of the people, established by them nor meant for them[22]. Rather, there existed a colonial government, constituted by the imperial government meant for the crown. Neither can it be argued that the people ruled themselves through the legislative council. This is because first and foremost the legislative council was established in 1905 to please the settler and not any other group. Therefore it could be expected that those in the

council championed the interests of the settler. The best example is the alienation of land for the settlers, and depriving the natives of their land in toto by confining them in native reserves (the Kenya Highlands is the best example).

Secondly, the membership of the legislative council was biased in favour of the settlers. The Africans, for example, got their first elected representative on the eve of independence, 1958. Therefore many laws or ordinances passed by this council were discriminatory of the Africans and Asians, if any, in favour of Europeans. For example the pass laws were meant to restrict the Africans to one reserve in order to be able to offer labour in the European settlements. Also Poll Tax was meant to force the Africans to work for the settlers. All this was not done out o the peoples will they detested these restrictions very much. All that was done in favouring the settlers was meant to maintain them in Kenya and improve the economy of the colonial government, and therefore sustain the interests of the imperial government in this part of Africa.

Thirdly, the colonial government maintained an official majority in the legislative council. This was meant to thwart al efforts of any group in the legislative council, which was opposed to the will of the government. This government which exercised its will in the legislative council, was neither of the majority nor indigenous. As aforestated, it belonged to the crown who was the colonizer.

Lastly, the will of the majority (natives) conflicted with that of the government. The farmer's will was to have self rule and a return of their confiscated property. Whereas the will of the government was to continue colonising the former by maintaining its rule over the land. Therefore the government was bound to use all means, legal and or para-legal, civil and uncivil, within its ability to exercise its will thereon.

Therefore to refer to the legislative council as a representative body would be but an abuse of the word "representative".

However, the council laid the foundation for our present parliament. Being the predecessor of parliament, the fundamental principles governing the conduct of the latter as well as its features find their origins in the legislative council. It established the notion of representation.

The colonial government established a "state", its territorial boundaries, its notions of statehood and its existence as an organised political community controlled by one government, finds its origins in the administration of the colonial government. Prior to this Kenyans lived under tribal communities incapable of being referred to as a state, in the sense of the word.

The colonial government established the notion of a state. The colonial government established the notion of a state as a government. This is so because as seen at the beginning of this

chapter, we discussed how the Kenyans lived in separate communities whose interests were addressed essentially on tribal basis. Thus the notions of a state as a social organization and as a government found their efficacy in the colonial period.

2.3 At Independence

The beginning of 1960s saw great constitutional changes. The 1962 second Lancaster House Conference was concluded with the drafting of the constitution of the Republic of Kenya. This constitution prepared the country for self government.

The introduction of the 1962 constitution was preceded by a general election to the National Assembly which was row bicameral. it consisted of, the House of representatives as the lower house and the senate as the upper house. For the first time, these elections were based on a common roll and universal adult suffrage. They were the first free elections in which the Africans participated.

The independence Act and Independence order-in-council gave the Kenyan Legislature full power to make laws having extra-territorial operation. The independence constitution provided for a parliamentary government. There were 41 elected senators representing administrative districts and Nairobi area; its constituency members elected to the House of representatives and 12 specially elected members and the Attorney General as an ex-officio member.

The executive powers though vested in the Queen and delegated to the Governor, he had to exercise them on the advice of the cabinet. This was so arranged because it was believed that, since the members of the cabinet were elected members, they will not only representing and expressing the peoples wishes in decision making but also execute those decisions on the people's behalf. And as a result therefore, the people would be said to rule themselves.

It was also based on the conviction that, since they were elected members, if they failed to represent the people's wish properly while executing their duty of governance, the electorate shall censure them by voting them out. it was believed that this would make them (the members of the cabinet), more responsive to the electorate and thus creating a government for the people, ruling on their behalf.

The governor appointed the prime Minister from the lower House who appointed the rest of the cabinet therefore. The cabinet was responsible to both houses of the National Assembly.

Through a vote of no confidence, the lower House could remove the government. it was thought that through this power of censure, the Lower House (people's representatives) would be able to keep the government on its toes. That, the government would rule for the benefit of the people since failure to do so, the government risked being driven out of power and another one set up in its place. However, in the next chapter, we intend to examine the

constitutional and practical limitations of this power of censure. Conversely, the Prime minister could ask the Governor-General to dissolve the lower House.

Provisions were made to ensure free, fair and impartial elections to the legislature in the future. An independent electoral body headed by the two speakers of both houses, a nominee of the Prime Minister and each regional President, was set up. This was to guard against fraudulent elections in the future; in order to ensure that those who went to the National Assembly were the true representatives of the people.

When Kenya became a republic in 1964, the posts of the Head of the government (Prime Minister) and the Head of state were merged and came under one person, the President. This was an outright move to strengthen the already strong executive. This was vehemently opposed by the opposition in the lower house responding to the opposition, the then Minister for constitutional Affairs, the Ho. T.J. Mboya stated;

> "The historical process, by which in other lands, Heads of state, whether Kings or Presidents, have become figure heads, are no part of our African tradition. Our people have always governed their affairs by looking to a council of elders elected and headed by their own chosen leader giving them strong and wise leadership. The tradition which is an Africanism will be preserved in this new constitution"[33] (Emphasis provided).

Thus the Minister was reiterating what he had stated before that the Lancaster House conference inter alia had reversed the whole constitutional process[24]. It meant that Kenya was not going to have a controllable divided executive, but rather a strong, powerful and indivisible executive equivalent to the chieftainship in pre-colonial traditional African communities[25].

It meant that the executive President was to hold immense powers more than the previous Governor-General. Since until then the legislative was subordinate to the government, the reasonable conclusion to be drawn from the merger would be, that, the legislative would now be even more subordinate to the government than ever before. The President's power became immense and uncontrollable. His roles as Head of State and Government was from then a=onwards to interfere with the independence of the legislature in its business. We propose to tackle this question in the next chapter where in we shall examine how this has watered down the institution of parliament as a manifestation of democracy. Speaking about the need for executive presidency, Dr. Julius Nyerere, former Tanzanian President, on his countries Republican constituted stated that;

> "To us, honour and respect are accorded to a chief, monarch, or President not because of his symbolism but because of the authority and responsibility he holds. We are not used to the division between real authority and formal authority."[26]

Thus it seems that at independence the task was not of establishing "little" governments but powerful executive Presidencies equivalent

to the African traditional chiefs. Discussing this issue of executive Presidency in the African context, Nwabueze has stated thus;

> "The ground upon which the separation of the Head of State from the Head of Government has been more emphatically and uniformly repudiated in it's incompatibility with African political experience. This is the aspect of autochthony that asserts that a constitution should accord with the peoples traditional way of thinking about government and with their historical tradition generally .... for a formerly dependent people, the constitution should be an instrument of cultural revival of national restatement', reflecting the people's choice of a frame of government as well as their traditional political concepts[27] if not specific institutions and procedures. (Emphasis mine).

Nwabueze's exposition, here above, can be understood to mean that the constitutional framework of a country must reflect the people's traditions; and that the constitution must be autochthonous. He argues that what the African leaders were doing in setting up strong and powerful governments at independence (by establishing executive presidency, Kenya inclusive), was an attempt to establish autochthonous governance under the auspices of Africanism. This is the justification he gives for such move under taken at independence.

In other words this means that in so far as they could find justification in autochthony, the said leaders could go forward and establish such systems at that time. Here we content that its constitutionally unacceptable to flout known principles of "good governance" is the name of autochthony. it is a fact that

democracy can and is practiced in many forms the world over, but, it's essential features remain uniform. Its here that we hope to reiterate the good words of Humprey Slade, Kenyas first speaker who stated that,

> "Democracy is common in the world today. Its form may vary from place to place, but its substance is always the same. The meaning of democracy is simply that, government and the making of laws belongs to the people and are in the hands only of those whom the people themselves elect for such purposes".[28]

Humprey[29] refers to this unchanging substance of democracy. This is what we are calling the uniform essential features. one of them is that, the representatives of the people as a body (i.e. the National Assembly, must not, at any one time, be subordinated to any other body or organ of government. This is because, in so doing, the representatives will not express the peoples will, but that of the body to which they are subordinate. The said body (National Assembly) must be sovereign, which sovereignty can only be expressed in there is equality between all the three organs of the government.

In the next chapter, we shall undertake a discussion how this strong and powerful executive presidency has negated the doctrine of the sovereignty of parliament. We shall also endeavour to show how this negation has erodes the concept of democracy.

At independence the system of regionalism was introduced. it's objective was that, its not enough to be protected from tyrannical rule, its also important to participate in the processes of government. it was believed that regionalism would make such participation possible on the part of even the minority tribes. There were 40 districts (Regions) and the Nairobi area, each with its own Assembly having elected members. The senate was intended to act as a safeguard for this system.

However, the importance of the senate waned as years passed by the dissolution of the Kenya African Democratic Union (K.A.D.U), and the governments committed policy to ensure it's abolition, saw the eradication of most features of regionalism which was the back bone of the senate.

On 20th December 1966, a legislation was introduced in the senate for the merger of the two houses. It was passed and the members of the senate and the House of the representatives were declared elected members of the new National Assembly having only one House. new constituencies were created for the farmer senators.

Thus by 1967, the Kenyan Parliament as it is today had completed its metamorphosis. its the parliament that existed as by 1966 that is still in operation.

In this chapter, we have discussed the pre-colonial African societies in Kenya. Here we were mostly concerned with their

political organization. We observed that there existed two types of political organizations. The acephalous or non-centralised societies which practiced what can be referred to as "primitive democracy", and centralised societies. in the latter, it was found that, the chiefs exercised absolute authority, unchallengeable and unquestionable. And that the council of elders which was compared to the present form of parliament, was virtually powerless as far as the chief or king was concerned.

This helped to understand why the leaders of this country at independence, rejected the system of having a divided executive, i.e. head of state and head of government. It was found that the said headers opposed to African traditionalism to justify the system they adopted. And also the fact that the subordination of the legislature to the executive, the later having the President as its head, was partly based on the traditional practice of having the council of elders being subordinate to the traditional African chief, as exposited by Hon. Tom Mboya, the then Minister for Constitutional Affairs.

We have also discussed the development of the Kenyan legislature through the colonial period, its. undemocratic nature and powerlessness before the colonial governor and the colonial government up to 1960. The features of the colonial legislature were carried over to independence, eg. the government having perpetual official majority in the legislative council, the establishment of the 12 special elected members, the councils lack

of powers to originate with financial bills summoning of the council by the governor etc. in general, the legislative council was the foundation and predecessor of the present parliament.

We have also examined the position of the Kenyan Parliament at independence up to 1966. There are no great changes that have taken place concerning parliament since the time any of the changes that have taken place, eg the dark ages of the queuing system. shall be discussed in the following chapter.

Conclusively, most of the weaknesses found in the present parliamentary democracy in Kenya finds their origins in the systems or periods discussed in this chapter. For example the African traditional system of governance was used to justify the establishment of a powerful and strong executive, headed by the President of the Republic who was both the Head of state and government. His dual roles as Head of state and government gave him immense powers which would and has infact enabled him to interfere with the National Assembly. Most features, especially those facilitating the insubordination of the legislative council to the governor, during colonial times evolved in toto and are equally affecting the present parliamentary system. However, this we are going to discuss in the next chapter.

FOOTNOTES FOR CHAPTER TWO

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9. Supra Note 10 Pg. 11.

0. Tom J. Mboya Freedom and After Pg. 128 London Andre Deutch 1963.

21. Supra Note 8 Pg. 78.

22. Supra Chapter One-as to the varying definition of democracy.

23. House of Representatives Vol. III part III 1964 October 3081-3

24. Supra Note 20

25. Supra see part 2:1 in this chapter concerning the nature of the traditional African societies.

26. Contained in a letter to the Observer in London in July 1962 and his country's 1962 Republican Constitution. Reproduced in African Report Vol. 7 No. 7 July 1962 Pg. 7.

27. Supra Note 4 Pg. 64

28. Supra Note 10. Pg. 10

29. Ibid.

30. Supra Note 20. Pg. 128.

CHAPTER 3:

THE KENYAN LEGISLATURE: POST INDEPENDENCE

In the previous Chapter, we discussed how the concept of representative democracy was imported into Kenya through colonialism. We also studied the development of the Kenyan legislature during the colonial period up to 1967, when the two Houses, the Senate and the House of Representatives, were merged into one National Assembly.

In this chapter, we intend to study the Kenyan Legislature from 1967 up to the present day, (1992). In a nutshell, our purpose herein shall be, to inquire how Parliament is constituted, and whether the mode of its constitution justifies a tentative conclusion that, the Kenyan people have constituted a body which shall rule on their behalf. In discussing about the functions, we shall examine whether that body which has been democratically constituted, if at all, has effectively executed its role, and if not, the reasons thereof.

3.1 The constitution of Parliament.

In a democratic society, Parliaments are constituted through the electoral process. This system or process of elections is undertaken out of the recognition that, not all the people can participate in the process of governance and therefore, they are availed an opportunity to govern through representatives. Through the process of elections, people are able to choose from amongst themselves, those to represent them.

Election has been defined as, 'the art of choosing or selecting one or more from a greater number of persons, things, courses or rights. The choice of an alternative. The selection of one person from a specified class to discharge certain duties in a state, corporation, or society. With respect to the choice of persons to fill public office or public policy, the terms means in ordinary usage, the expression by vote of the will of the people, or of a somewhat numerous body of electors.'[1]

Elections are a means of making polictical choices by voting. They are used in the selection of leaders to determine issues. 'This conception of elections implies that voters can choose among a number of proposals designed to settle an issue of public concern. The presence of alternatives is a necessary condition, for although electoral forms may be employed to demonstrate popular support for incubent leaders and their policies, the absence of alternatives disqualifies such devises as genuine elections.'[2]

The substance of elections is, that the voter has free and genuine choice between at least two alternatives. Fundamental to the use of elections, is the contribution they make to democratic government, where the members of a body politic cannot themselves govern and must entrust government to representatives. Elections serve not only to select leaders acceptable to the voters, but also to hold the leaders accountable for their performance in office.

The possibility of controlling leaders by requiring them

to submit to regular and periodic elections contributes to solving the problem of succession in leadership and, thereby, to the continuation of democracy. 'By mobilizing masses of voters in a common act of governance, elections lend authority and legitimacy to the acts of those who wield power in the name of the people.'[3]

The concept of elections as is of democracy finds its origins in the Greek city states in the 5th and 6th centuries B.C. In these states most public offices were filled by lot, but for the few offices for which special qualifications were needed, these were filled by election. During the middle ages, voting was narrowed to a minority in society. But from the 19th century, the trend has been towards the broadening of the suffrage. Presently, in many democratic states, the same is conducted periodically under universal adult suffrage.

In the Kenyan context, the constitution of Parliament is provided for, by the constitution of Kenya[4] and the National Assembly and Presidential Elections Act.[5]

Writing about the constitution of Kenya, Professor Ghai[6] stated,

> "In Kenya, however, the constitution was designed to introduce liberal democratic values of which constitutionalism (the limitation of the powers of the government, the assurance of the rights of the citizens) and representation (the government must be regularly elected by, and responsive to the people) are the most important, and these were values which while they may have existed in traditional socities in Kenya, did not exist in the society established by colonial rule."[7]
>
> (Emphasic Mine.)

The provisions for elections in Kenya are contained in the constitution [8] and the National Assembly and Presidential Elections Act.[9]

It is a constitutional right for all Kenyans who have obtained the age of eighteen years and who have registered as voters in elections to vote. Only persons detained in lawful custody, or disqualified by law from voting in those elections on the grounds of having been convicted of an offence connected with elections[10] or, on the ground of having been reported guilty of such an offence by the court trying an election petition, that are legally barred from voting in elections.[11]

For proper conduct of elections, the Law provides for the creation of an independent Electoral Commission, consisting of a chairman and not less than four other members appointed by the President.[12]

The function of this Electoral Commission is interalia to decide on matters concerning the boundaries and number of constituencies in Kenya. It's also required to conduct all Presidential, National Assembly and Local Authority elections.[13]

The Commission is allowed to confer powers or impose duties on any public officer or authority for the purpose of the discharge of its functions.[14] This includes appointing returning officers during General Elections to conduct elections in the districts.

In the past, the Electoral Commission has not been effective in its role of supervising elections. It appointed

public officers (administrative officers - i.e. District Commissioners) who are agents of the Executive in the Districts, as returning officers. These have in the past been involved in fraudulent and election malpractices. They have been at 'war' with candidates participating in elections because of their partisan activities. They have manipulated and rigged elections, the result of which has been alot of irregularities being reported concerning elections. Some of these irregularities have been so serious that doubt has been cast as to whether it is elections which are conducted or it is selections.

For example, during the last General Election - 1988, among the irregularities reported was that, papers of Butere Constituency belonging to a certain candidate were found mixed with those of another constituency.[15] Another ballot box was found among those for local authorities during the counting exercise, the District Commissioner, who was the returning officer, ordered some agents of a particular candidate out of the counting hall.[16]

Such incidents are sometimes geared towards enabling the defeat of certain candidates, while on the other side ensuring the victory of others. This makes the voters despair as to the rationale of having pre-determined by the authorities that be. This fact has given rise to a situation of having extremely low turnouts for elections, since many voters feel cheated when they participate in them and such irregularities are caused, whose calculated result is to 'choose' an identified candidate.

It is our submission that, where such situations exist, where only part of the eligible population participate in voting, democracy does not exist. This is because, those who end up in Parliament are elected only by the majority of part of the entire eligible population.

It can also be observed that, such members whose entry to Parliament is as a result of selections as opposed to election, will always express the will and wishes of their 'selectors' and not that of the electorate.

Therefore, with such inefficient Electoral Commission having personel of partiality in the execution of their duties, no free and democratic elections can be done. This means that even the Parliament constituted thereof has flows in its democratic base or foundation.

Apart from these electoral short comings, there are also other factors which affect the Kenyan system of representation ab initio, from being trully representative. Practice, and therefore experience, has shown that not all Kenyans who are qualified to vote do really participate in elections. A good example, in the 1982 General Elections where, for example, in a constituency having 50,154 registered voters, only 31,160 votes were cast.[17] Another constituency having 45,516 registered voters, only 14,233 votes were cast.[18] This may be used to show the general apathy which the Kenyan electorate may have towards elections. It can therefore be observed that, about half of the eligible Kenyans do not participate in the National Assembly and Presidential elections.

This apathy has been brought about by many factors. One of them is the general illiteracy prevalent in Kenya. It may

not be educational as such, but the general lack of understanding of the constitutional significance of having elections. Some people who participate in elections do so as a matter of routine without attaching any constitutional importance on the matter.

A section of the Kenyan electorate is also disillusioned with Parliament. They see no need of participating in elections, since all the promises given during election campaigns turn out to be political gimmicks. Most of these promises are not fulfilled.[19]

Most people gauge the success of the representatives by the 'amount of development' he or she has brought into the area. To these people it matters not whether the representative participates effectively in Parliamentary debates or not, It also matter not, what type of laws he has participated in enacting or how much he has contributed in effectuating Parliaments role of controlling the government and therefore participating in governance. They think in terms of, the number of Harambees he has participated in or conducted in the area, among others.

This being the case, many members of Parliament opt to keep quiet in the House, in the hope of being 'rewarded' by the Chief Executive through appointment to the cabinet or other senior positions. In so doing, they hope to use such positions t develop their constituents and consequent therefore, an assurance of re-election come the next General Elections. This has facilitated Parliament's self censorship!

the flaws, is recognised and constitutionally provided for in Kenya. In Kenya the winning of the majority is by peaceful means, by persuation, by electioneering, by trickery sometimes but not by wholesale threats of force.'[22]

Though this right of choosing representatives exist, ignorance, apathy and lack of training may hinder voters from making their influence felt. Various pressures, economic, social and political are brought about to bear upon the voters whom if they fail to learn to make wise their choices, they will whittle away their freedoms.

Having discussed how the Kenyan Parliament is constituted under the Law and in practice, we now proceed to discuss what its functions are and how effectively it has discharged them, if at all it has.

The Role Of Parliament.

> "They make or unmake governments; they debate great issues of public concern; they constitute a grand inquest of the nation. They act as a committee of grievance and a Congress of Opinion."[23]
>
> Wheare K.C.

Parliament is a constitutional organ with a democratic foundation charged with specific constitutional duties. It is a move from political to constitutional order. As a constitutional organ, Parliament crystallizes that collective authority of the people as a whole and expresses their voice in terms of, Law and ultimate Constitutional resolutions.

John Stuart Mill has observed that;

> "While it is essential to representative

Other people vote because they are promised and actually are given money. It follows that such people would vote for a candidate, not because he has the propensity of being a good and worthy representative, but because of money and influence. When such candidates find their way to Parliament, they do not have representation as their priovity, but to use that chance as a spring board to make their ends meet. A Parliament having such members would not have any properly defined political philosophy, but rather ecclectic and divergent aims.

One of the requirements for one to qualify to be elected as a member of the National Assembly, is that he must be nominated by his party (up to 1991, it was the Kenya African National Union - K.A.N.U.).[20] There have been occassions when some candidates have failed to be nominated by the party for reasons better know to it. In a single party system, of which Kenya had been until 1991, the result of having such a requirement is, the presentation to the electorate of but hand picked candidates by the Party hawks. This has sometimes led into having unopposed candidates, which is in conflict with the fundamental requirement in elections, of having a free choice from alternatives.

The constitution recognises the democratic principle that electoral right and its exercise must be recurrent. It provides that unless Parliament is dissolved sooner, it shall continue for five years from the date when the National Assembly first meets after dissolution and shall then stand dissolved.[21]

Conclusively therefore, election as a fundamental requirement for the existence of democracy in any given society, despite

> government that the practical supremacy in the state should reside in the representatives of the people, it is an open question what actual funtions, what precise part in the Machinery of government shallbe directly and personally discharged by the representative body ---. It is one question therefore, what a popular assembly should control, another what it should itself do. It should--- control all the operations of government. But in order to determine through what channels this general control may most expediently be exercised, and what portions of the business of government the representative assembly should hold in its own hands, it is necessary to consider what kinds of business a numerous body is competent to perform properly. That alone which it can do well, it ought to take personally upon itself. With regard to the rest, its proper province is not to do it, but to device means for having it well done by others."[24]

(Emphasis provided).

Therefore, those functions meant for Parliament should be thoroughly executed by it in the exclusion of others, and for those it can not, other organs of the government should execute them under strict supervision of Parliament. This is in line with the doctrine of seperation of powers.

In a democratic system, the main funtions of Parliament are, Legislation, Controlling Public expenditure and taxation, criticism of National policy, scrutiny of Central administration and procuring the redress of individual grievances.

Legislative

This is probably the most important function of the legislature because, the making of Laws is often a formal process of giving a legal sanction to Executive policy. This power of legislation expresses Parliament's Sovereignty.

Sovereignty of Parliament means that there exists no competing authority with Parliament in Legislative matters. It can also be observed that within the limits of physical possibility, Parliament can make or unmake any Law whatever.

Writing about the British Parliament, Keir[25] has stated,

> "The principle of parliamentary sovereignity therefore implies that the courts will not intrude into the legislative process, and that an Act of Parliament validly passed under the appropriate procedure and in the accustomed form must be put into effect." [26]

On exclusive authority to legislate any law possible, he continued;

> "A statute which is contrary to the reason of the Common Law or purpots to take away a prerogative of the crown is none the less valid, but it will, so far as is possible, be applied in such a way as to leave the prerogative or the Common Law rights of the subject intact.--- <u>If it is clear from the express words of the statute or by necessary implication that Parliament has intended to do them, Cadit quaestio.</u>" [27]

(<u>Emphasis provided</u>).

The Acts of Parliament binds all, the chief executive included. In the case of <u>Ecclesiastical Persons</u>[28], it was stated;

> "In diverse cases, the King is bound by an Act of Parliament, Although he be not named in it, nor bound by

> "express words. And therefore all statutes which are made to supress wrong, or to take away fraud, or to prevent the decay of religion, shall bind the King although he be not named, for religion, Justice and truth are the sure supporters of the Crowns and diadems of Kings."[29]

In an expression of Sovereignty, 'no Parliament can bind its successor, otherwise the supremacy and sovereignity of succeeding Parliaments would be limited.'[30]

Parliament's sovereignity is well expressed by the fact that, it's the only organ of the givernment which can give statutory powers to individuals or authorities. The courts can only interprete and may not question the validity of Acts of Parliament. In the case of Bilston Corporation V. Wolverhampton Corporation,[31] Salmond J. stated;

> "The function of Parliament is wholly different. It is to consider public interest, and on the basis to give Statutory powers to individuals or authorities.---. Questions of policy in the broadest sense which have no place in the consideration of a case in this court are, if not the only matters, the substantial matters which Parliament has to take into account.---. That is a matter falling properly within the purview of Parliament which is informed of what has taken place and is competent to determine whether an obligation heretofore imposed on a person or Corporation ought to remain binding him."[32]

In the same way, the powers confered by Parliament are unchallengeable in court. In the case of Managers of the Metropolitan Asylum District .V. Hill,[33] it was

held that, where the terms of a statute are not imperative but permissive, the fair inference is that the Legislative intended that the discretion, as to the use of the general powers thereby confered, should be exercised in strict conformity with private rights. However, where the terms are imperative, the powers confered shall be effected, private rights not withstanding.

Thus, with regard to Legislation Parliament has exclusive powers. It can not only legislate to the exclusion of all other organs of government but also without reference to either of them. This is so because, it's it which has the mandate of the people to so legislate, and through it, the masses are able to govern themselves.

Having discussed the principles arising from Legislative Sovereignty of Parliament, we now turn to the Kenyan experience.

The Legislative power of the republic is vested in the Parliament of Kenya, which consist of the President and the National Assembly.[34]

The Kenyan Parliament, with no other competing authority in legislative matters, have powers to make Laws with retrospective effect (and often does), though such effect cannot be given to a law making an act or omission a criminal offence.[35] In the exercise of this power, Parliament can retroactively legalize the government's administrative acts. In the Kenyan situation, this was clarified in 1967, when the Maize Marketing (Amendment) Bill was under debate. A

A member sought to know whether the government can do legally what only Parliament ought to do and later on seek legalization by requiring Parliament to legislate to that effect. The then Deputy speaker responded and stated;

> "I think I might state quite clearly that quite often governments do something administratively and then seek the permission of Parliament to legalize it retrospectively. This is nothing unusual although it may not be the nicest way of doing it, but it is done. Parliaments do in their wisdom, often ratify such acts. Of course, it is open for the House, and it may happen on some occassions, that Parliament may not ratify such an act retrospectively, in which case the government would find itself in difficulties. However, it is not illegal---".[36]

This means that without Parliaments sanction, nothing done can have a force of Law. While writing on the British Parliament in the Legislative process, Griffith[37] stated that;

> "When Parliament is called the Legislature, what is meant is that nobody or person can issue an order, rule, regulation, Scheme or enactment having a force of Law, without Parliamentary authority."[38]

The Constitution[39] provides that the Legislative function of Parliament is exercisable through Bills. The initiative for a Bill can come from any member of the Assembly, except Bills in relation to finance wherein only the government can propose legislation.[40]

Though this be the position in Law, the role of Parliament in Law making is very small. The legislative process comes into it only in its advanced stage. It has been observed that:

> "The Legislative process embraces the whole train of events which take place from the conceiving of a measure to its final enactment by the King in Parliament."[41]

Proposals for legislation originate with the government, which formulates its policy, sometimes after discussions with interests outside Parliament, reduces it to a draft Bill which is then for the first time presented to Parliament often months after work began on it and generally by which time the government's views have been crystallized. 'Under the circumstances therefore, Parliament's role is sometimes little more than stamping.'[42]

Despite the fact that the initistive for a Bill is open for any member of the Assembly, there are negligible Private Member's Bills that have been enacted to become Law. The only Law of importance that have arisen from the Back Bench is the Hire Purchase Act[43] of 1968. It's enactment, however, was as a result of the fact that it was an important piece of Legislation, which even the government required at the time.

One of the reasons why nearly all the Bills originate from the government, is the procedure involved. The standing orders impose more stringent rules for the Private Members Bills introduced in the House than those by the government. In the former case, the member introducing the

Bill must first seek the leave of the House to introduce the Bill, support it by an explanatory statement of its objects and reasons. Such a member will have to incur considerable expense including fees for legal assistance and the drafting of the Bill.

This may explain the reason for the general laxity of the Back Bench in introducing Private Members Bills. Since all legislations have been and do emanate from the government, suffice it to state that its the government which has taken an upper hand in legislation and not the representatives of the people signified by the Back Bench.

We do appreciate that Parliament includes both the Back Bench and the Front Bench, which represent the Government (Executive), but we contend that though part of Parliament when the government legislates it does so to suit its own interests. It is this recognition that the government in Parliament (Exectutive) is different from the people's representatives, and therefore cannot articulate the wishes of the people, that the doctrine of separation of powers was enunciated and developed. It has therefore been stated that;

> "A government wishing to act despotically can pass any laws it wishes, administer them ruthlessly without regard to the rights of the individual and judge corruptly any opposition to them. Thus in order to preserve political and social liberty, it was essential for the constitution to ensure that the Executive, the Legislature and Judiciary were independent of each other." [44]

This observation was made in the recognition that the government has its presence in, and therefore sometimes over, the Legislature. Since the government is part of

Parliament and takes part in legislative matters, sometimes the May emasculate Parliament thus rendering it powerless in its representative role. The government here should be taken to refer to the executive organ. This has been the case with the Kenyan Legislature from the late sixties upto date!

Having found that most, if not all, legislations emanate from the government, Parliament would be expected to remedy the situation by discusssing government Bills vigorously. It's also expected of Parliament to reject any Bill which it deems to be against the 'public interest'. However, the position is sympathetic because, even at the committee stage at which vigorous, effective, criticism and instructive debate are expected, seldom have such taken place. Instead members debating matters properly before them, they have used such opportunity to support the government of the day, while on the other hand attacking their opponents both in and outside Parliament.

An example is when one member, while 'contributing' to an important Bill, the Finance Bill 1991, after thanking the chair for an opportunity lent to contribute to the motion, let a scathing attack on a fellow member who was then the Party Chairman in his District.[45] In his 'contribution', he never addressed himself to the Bill whatsoever. The next member to take the floor, Mutatis Mutandis, lashed and castigated the then multi-party advocates, while praising the government of the day.[46] The member did not address himself to the Bill, he just castigated the said persons who infact were members of the public who were supposed to be the

'people' being represented in the House!

This shows the general lack of direction to which our legislature has fallen into. It has abdicated its role and instead become an ardent supporter of the government of the day; to an extent that one cannot differentiate between Parliament and the government (Executive).

Part of the reason why the Kenyan Legislature have been ineffectual in discharging its legislative function properly, is its marginalization by the government majority in the House. The Law has given the President exclusive powers of creating Ministries. With such a Lacunae, the Chief executive have exploited the chance by creating so many Ministries others of whose functions are not properly demarcated. He has created some Ministries with little or no functions at all. For example, the creation of the Ministry of National Guidance and political affairs, in 1988,[47] was later on disolved when it was found to be just but a hoax. In creating such 'Ministries', the intention of the Chief Executive has been to establish and consequently maintain a government majority in the House.

Mutatis Mutandis, the law has not prescribed the number of Assistant Ministers a single ministry should have. The Cheif Executive have capitalised on this by appointing as many as three assistant ministers in one Ministry. In so doing he has succeeded in maintaining the government majority in Parliament.

The constitution provides that there shall be twelve nominated members of the National Assembly, who shall be appointed by the President from amongst persons who, if duly nominated, would be qualified to be elected as members of the Assembly.[48] Initially, this was meant to help the government to bring in talents and professions unrepresented. It was also as a devise for a stable government.

At independence, these were referred to as 'specially elected members.' They were elected by both Houses while sitting as an electoral body. Later, however, the constitution was amended and the powers of their appointment was confered upon the President. This was and still is a colonial replica. During colonialism, the Governer used such members to maintain a majority in the Legislative Council. Presently, the practice is to appoint 'Professional Loyalists', some whose educational background is obscure. These also, are expected to contribute in the House, their illiteracy not withstanding!

With such majority in the House, when properly mobilised, government motions and bills sail through without any difficulties.

There is also the Parliamentary Group (since 1982, there has been the K.A.N.U. Parliamentary Group). This always meets immediately before the opening of each or commencement of a new session. It discusses, agrees on, and concludes all that which Parliament should deliberate on and pass as law during that session. Therefore, it suffices to state that Parliament always deliberates and effects government

pre-determined matters as well as Bills.

Parliament no longer takes legislations seriously. The Kenyan Parliament is on record to have flouted cusomary procedural rules and enact laws with no seriousness at all. There have been legislations which have been introduced, debated and passed on the same day. This was witnessed in the 15th Constitutional Amendment which sought to extend the prerogative of mercy enjoyed by the President,[49]

> "The Bill was published on 9th December 1975, debated on 10th December 1975 going through all the stages of Parliament (1st, 2nd and 3rd readings) in one afternoon, received Presidential assent on 11th December 1975 and was given retroactive effect to have come into force on 1st January 1975! Nowhere has such a lack of seriousness when dealing with the fundamental law of the country been recorded."[50]
>
> (Emphasis Mine.)

The amendment was passed to save a certain politician from political oblivion, having been found guilty of an election offence under the Election Offences Act,[51] and barred from contesting parliamentary elections for five years! Thus, Parliament at the whims of the Executive legislated to save a personal friend[52] of the President, from falling from grace and thus licensing more powers to an already powerful Chief Executive.

It has been argued that such substantive amendments ought to be referred back to the people by way of referendum.[53] Such however, may not be practicable at the moment

since there is no provision for a referendum in Kenya. When such a provision is secured in our laws, the idea of a referendum would be a very important step in revamping the Legislature, from the oblivion it has been squeezed to by the executive. This is because, Parliament's ability to confer such excessive powers to the Executive as the latter may wish, shall be controlled by public opinion.

It has become a tradition of the government to introduce hurried legislations in the House and, by using its majority therein have them passed without any constructive debate being undertaken. Some Back Benchers have in the past voiced their concern about this, but there seems to be no remedy forthcoming. For example, during a debate on the Exchequer and Audit (Amendment) Bill, a member[54] opposed the Bill complaining that the members should be given enough time to study it and make their contributions thereto. He stated;

> "I do not know what reason there is for this hurry, and that makes me go back to what was bothering me right at the beginning, that is, why is it considered necessary for us to debate this Bill so quickly without being given time to study it." [55]

While contributing to a Bill requiring the House to approve US $ 100 million guarantee by the goverment to the Kenya Airways to purchase two aircraft of a particular model, another member observed that;

> "There are times the government brings motions for us to approve in a hurry and that makes us look like a rubber stamp."[56]

The government in introducing hurried legislations, intend to confuse Parliamentarians, deny them a chance of debating its objects and significance of but have them pass them as Laws. In so doing the Executive is sure to have all Laws, both good and bad, passed by Parliament and have them imposed on the people. To the extent that the representatives of the people do not have a chance to debate and effectively contribute to legislations affecting the masses, Kenyans are far from being said to be governing themselves through Parliament.

Therebefore, we had stated that Parliament has no competing authority in legislative matters, however, it can and has often delegated its legislative authority to other bodies. The authority to which legislative power has been conferred or delegated, can only make Laws within the terms of the delegation.

Delegated Legislation has been justified on the ground that, being a natural consequence of the increase in governmental power, it springs from the fact that detailed administrative rules cannot all be contained within the principle legislative proposal.[57]

Accepting the inevitability of delegated legislation with reference to the British Parliament, Sir John Marriot, said;

> "The position in which we find ourselves amounts to nothing less than an abdication on the part of Parliament of its supreme legislative function ---, it was the traditional method of English Legislation to provide by statute as far as possible, beforehand for every contingency which could be expected to arise ---. The

> "danger we have to face at present is whole delegation to the administration departments of legislative or quasi-Legislative powers, which ought to be exercised by Parliament itself or, to put it at the lowest, under closer scrutiny and supervision of Parliament."[58]
>
> (Emphasis Mine).

Therefore, since delegated legislation cannot be avoided, Parliament must closely scrutinize the exercise of these powers by the authorities to which such has been delegated.

This is one area where Parliament has completely failed to play its supervisory role. The authorities to which these legislative powers has been delegated, do often abuse them. Parliament only comes in to legalise the abuse after its commission. One good example where Parliament has aided and abetted these abuses, is with regard to the appointment of commissions to run Local Authorities, instead of elected councils, by the Minister of Local Government. An example is Nairobi City where in, since 1983 when the last Nairobi City Council was dissolved, the city has continuously been run by commissions. Parliament has consented and validated this arbitrary denial to the city residents of their democratic right, to have an elected council which can be accountable to them.

One other area where Parliament has aided and abetted abuse of power is with regard to Presidential directives. We hope to deal with this area later on, when we shall endevour to show how Parliament has kept quiet when the President has made some directives which have either amended

some Acts of Parliament or repealed others all together.

Furthermore, the Bills that are introduced in Parliament are drafted technically. Sometimes it becomes difficult for members, most of who are not legally of they Bills they are being asked to pass as Law. This means that members sometimes vote a Law they do not understand only to realise later, when its adverse effects have affected either the public or Parliament itself to the benefit of the government.

From the foregoing, we submit that Parliament has utterly failed in its legislative role. The government has coersed it into sometime legislating to its own detriment, e.g., the Constitutional amenment which removed the twelve 'specially elected members' and conferring the power of appointment on the President. What exists as of present is legislation by the government (Executive). It can therefore be observed that, Kenyans have not had a chance to legislate for themselves, since the institution established for their representatives to legislate for them, have become but a fiasco. Presently, what remains is an external entity, i.e. the government in Parliament, to legislate as it deems fit, presumably on behalf of the people and in their 'own interest'.

Financial Control of Public Expediture.

Under the Kenyan Law, provisions for financial control of government expediture are not only complicated but

also extensive. In controlling public expediture, Parliament plays an important role though not exclusive role. These provisions are not to be found in any one single comprehensive legislations. Basically however, Parliaments authority to contol public finances is to be found in the constitution.

It's provided that, all revenues or other moneys raised or received for the purposes of the Government of Kenya shall be paid into and from a consolidated fund from which moneys shall be withdrawn except as may be authorised by the consitution or by an Act of Parliament (including an appropriation Act) or by a vote on account passed by the National Assembly under S101 of the Constitution.[59]

Its further provided that, provision may be made by or under an Act of Parliament for any revenues or other moneys received for the purposes of the Goverment of Kenya to be paid into some public fund (other than the consolidated fund) established for a specific purpose, or to be retained by the authority that received them for the purpose of defraying the expenses of the authority, but no moneys shall be withdrawn from any such public fund unless the issue of these moneys has been authorised by or under a law.[60]

From the above provisions, it suffices to state that, the Constitution lays down some two basic principles to facilitate proper and effective control of public finances. Firstly, that no taxation or revenue can be levied without parliamentary authority and secondly, that no public money can be expended without the same authourity. Parliament is

able to control revenue and expediture through the establishment of the consolidated fund into which all revenue of the government must be paid.

However, Parliament may give authority for the establishment of other funds for specified purposes and it may also provide that some of the revenue need not be paid into any established fund but may be retained by the authority which received it for defraying its expenses.

In the same way it may establish a contingencies fund and authorise the minister for Finance to make advances from that fund if he is satisfied that there has arisen an urgent and unforseen need for expediture for which no provision exists. To safeguard against Executive disregard of Parliament, the latter can fix the amount of the fund and the government is obliged to present supplementary estimates to Parlaiment as soon as possible for the replacement of the sum borrowed.[61]

Parliament has prescribed the procedure whereby money may be withdrawn from the funds. This is through the Exchequer and the Audit Act,[62] the Paymaster-General Act,[63] and the Civil Contingencies Fund Act.[64]

However, the constitution has imposed some limitations on Parliament with regard to certain financial measures. Unless the President recommends through a Minister, the National Assembly can not proceed upon a Bill (including an amendment to a Bill) that makes provision for the imposition of taxation or the imposition of a charge on the consolidated fund or any other fund of the Government of Kenya or the alteration of any such charge otherwise than by re-

duction; or the payment, issue or withdrawal from the consolidated fund or any other fund of the Government of Kenya of moneys not charged upon the fund or an increase in the amount of the payment, issue or withdrawal; or the composition or remission of a debt due to the Government of Kenya; or to proceed upon a motion (including an amendment to a motion) the effect of which would be to make provision for any of those purposes.[65]

The historical reasons for these restrictive rules are taken from Britain. 'The Commons aware of the unpopularity of levying taxes, were traditionally infavour of royal economy and obstained from taking the initiative in offering money to the Crown. Later the Commons, in undated by petitions from individuals for pecuniary relief, found the restriction on its competence useful and wrote it in its standing orders'.[66]

Justification for these restrictions today is the argument that, the provision of finance is intimately connected with plans for social and aconomic development for which the government has a Primary responsibility. The Government monopoly of revenue and expediture is also considered necessary to ensure economic and monetary stability.[67]

However, despite all these justifications, the effect is to put serious restrictions on the control by Parliament of Public finances, and thereby reducing its role to one of critisim and scrunity only. This means that it's the government which shall be deciding on how and on what,

public money is to be spend. On the other side, the peoples representatives are let only to legalise the same!

The National Assembly should be allowed to have a say in financial legislations. Members should be able to originate with such Bills or motions, instead of being held at ransom by the recommendation of the Chief Executive. Since public revenue is derived from inter alia the people through taxes, we see nothing illogical in having the same people, through their representatives, originating with a motion or Bill whose effect would be an expediture of their money. Such motions can succeed if the government took them and incorporated them in it's policy. In so doing, it can be said then the people are controlling their finances since, not only would Parliament be directing how to spend finances to some degree but also controlling its expediture through the normal existing procedure.

Furthermore, such restrictions imposed on Parliament are not to be found in other countries, like the United States; and yet the government thereof is able to plan and successfully execute its policy formulation and consequent implementation.

The Law provides to the effect that, the minister for the time being responsible for finance shall prepare and lay before the National Assembly in each financial year estimates of revenue and expediture of the Government for the following financial year.[68] The standing orders on the other hand provide that matters of revenue and expediture are to be considered by committees of the Whole House.[69] These committees are, the committee of ways and means, and the committee of supply.

The Committee of Supply's duty is to consider the estimates and to vote such grants of money as may appear to be required. On the other hand, the committee of ways and means is conferred with dual functions. First, it authorises taxes and secondly, to authorise the issue and appropriation of money out of the National till to meet the grants by the committee of Supply.

With reference to the British House of Commons, Wilson wrote;

> "The Committee of the Whole House on Supply has the name but has none of the methods of a Committee. It was established in the days of recurring conflict between the Parliament and the Crown as a device to secure freedom of discussion on matters of finance.--- By going into committee under the Chairmanship of a member freely selected, the House of Commons secured a greater degree of privacy and independence."[70]

Because the Kenyan Parliamentary practice is based on the West Minister Model, its expected that the same purpose for such practice of the House of Commons is the same one for the Kenyan Parliament.

Since the legislative process may delay the authority for collection and expediture, and because it may be important to acquire the authority quickly to prevent the avoidance of payment, provisional measures have been provided for. Under the Provisional collection of Taxes and Duties Act,[71] as soon as the Bill is published in the Gazette providing for a new or altered duty or rate, the minister can make an order for collection under the proposed terms. Such an order cease to be inforce if the Bill is not introduced into the National Assembly within eight weeks of the order; or on the rejection or withdrawal of the Bill.

This provision raises questions as to why such exertion of taxes and rates should be imposed on the people before being debated and accepted by Parliament. It may lead to unfair taxation if rejected when tabled in the National Assembly. In such a situation it shall be grave injustice because there will be no remedy in form of compensation for the 'unworthy' and unwarranted taxes. This is yet another example where Parliaments' role is reduced to that of effecting and legalising Government already executed policies.

The office of the Controller and Auditor-General is established by the Constitution.[72] Though a presidential appointee, the Controller and Auditor-General is usually considered an officer of the National Assembly. He helps in securing parliamentary control over finance.

He is not supposed to be subject to any person or body, In order to enable him to perform his function, he has been given access to all the documents he considers relevant.

His salary and tenure is secured. However, in the years 1987-1991, through gullible amendments of the constitution, these were suspended. In the period proceeding the amendment, he had reported massive mismanagement of public finances by government departments and parastatals. The only irrestable conclusion that can be drawn from the amendment is that, the government had been embarrased for its mismanagement and wanted to use Parliament to formerly enable it to further its mismanagement of public funds without any disclosure. Parliament being ineffective as it has always been, conferred upon the President, the powers of hiring (appointing) and firing the Controller and Auditor-General.

Thus through its own legislation, Parliament did foreclose itself from properly monitoring public expediture by the Government![73] This shows how Parliament is easily manipulated by the government to legislate and legalise matters beneficial to the latter, notwithstanding it's prejudiciability to the public or itself.

The functions of the Controller and Auditor-General as defined in the Constitution, is restricted to the expenditure of Public money. To add on this the responsibility in relation to the collection thereof, vested on him by the Exchequer and Audit Act.[75]

Constitutionally, withdrawals from the consolidated Fund are possible only upon his authorisation, which he gives on satisfying himself that the proposed withdrawal is by law. Further, he has to satisfy himseld that all moneys that have been applied for purposes for which they were appropriated, and the expenditure is generally in conformity with the Law. At least once in every year he has to audit and report on the public accounts of the government, the National Assembly and the Commissions established by the Constitution. He may also report at ant time he feels an irregularity has been committed. It has been observed that, 'since Parliament itself is ill-adapted to exercise a continuous control and check on governmental expenditure, the role of the Auditor-General is extremely crucial, and his reports provide indispensable means whereby the Government can be called to account by the legislature.'[76]

His reports are very essential particularly to the finance committee. When the Assembly has an official opposition Party, the Chairman of the Public Accounts Committee which is concerned

with finance, would be the leader of the opposition. Also the majority of the members of the Committee shall be from those not on the government side. Traditionally, it's function is to examine the accounts showing the appropriation of the sum voted by the Assembly to meet public expenditure and other accounts laid before the Assembly as it may think fit. It's expected that by the fact of its composition, the Committee would be thorough in its work and the government would always be in its toes for fear of full disclosure.

However, there is one weakness on this Committee's function. It's primary concern is to ensure that the money has been spent for the appropriate purpose, rather than to examine how efficiently it has been used, notwithstanding the fact that it has been spent on the purpose for which it was appropriated. There before, we argued [77] that, democracy does not only encompass representation in the making of decisions. In this case Parliament is only involved in the voting of finances for expenditure, but not in their real expenditure . It only comes later to scrutinize how the money was expended. If the same has been mismanaged, Parliament has no otherwise except to see other sanctions against the government, which in the past have proved ineffective.[78]

Furthermore, in Kenya, for over two decades, there has never been offical opposition Party in the House.[79] As a result therefore, the practice has been that, the same Party which formulates policy for it's own government, is the same Party that has had the role of scrutinizing the accounts of its government. Thus the Party has been, inotherwords, deciding its own case! In such a situation, neither seriousness nor proper scrutiny can and has ever taken place.

This may explain the reasons why, each year there has been

over expenditure in the government departments. For example, in the year 1989/90, the government Ministries overdrew their budgetary allocations by more than KSh 10.1 billion. For the 1990/91 financial year, a report tabled in the House by the Public Accounts Committee showed that the excess spending was KSh 5.6 billion. The report indicated that expenditure incurred without Parliamentary authority increased by over 46% from KSh. 667.4 million in the 1988/89 financial year to KSh 976 million. The Committee said that expenditure control by the government bodies had deteriorated.[80]

The Legislature have not taken seriously debates concerning financial matters. For example, the House was hit twice by lack of quorum during a debate on the report of the Public Accounts Committee for the year 1987/88.[81] At the time the members had returned from a month's recess and the business was only two hours old! It is discouraging to find that in a House of 202 members, only fifteen members were present to discuss such an important matter. There was also prolonged interruption, when the House was debating the Exchequer and Audit (Amendment) Bill, because of lack of quorum.[82]

From these two examples among many others, the irresistable conclusion that can be drawn is that Parliament has abdicated its role as the Chief Watchdog of Public finances. Its role has been just to vote and legalise government expenditure for any financial year in question.

Thus, from the foregoing, suffice it to state that, Parliament no longer exercises as much control over public expenditure, as is traditionally expected. As a already stated, the initiative for financial Bills lies entirely with the Executive.[83] At best the Legislature has only a power of veto which power has been

defeated by the government majority in the House.

Another practical limitation is the provisions that, as a rule, financial business has priority over other business, and if the estimates have not been approved by the alloted time, they shall immediately be put to a vote, without further debate. This means that even before 'enough', proper and effective debate has been done for the motion on finance, the same is put into vote and many members may be influenced by other extreneous matters to vote for it, not forgetting the existence of the ever government majority in the House.

The estimates are long and complex, it's doubtful if there is ever enough time for a thorough debate and only a few items get selected for detailed discussion. Because the estimates are yearly, the Assembly has little opportunity for control over long term expenditure. 'In an age of five years (or longer) plans, this is a serious defect.'[84]

Writing about the Committee of Supply of the House of Commons, Wilson has stated;

> "They cannot effectively consider the details of finance. The time at their disposal is strictly limited. They cannot examine witnesses, they have no information before them but the bulky volumes of the estimates, the answers of a minister to questions addressed to him in debate, and such casual facts as some indefatigable private member may be in a position to impart. A body so large, so limited in its time, and so ill-equipped for inquiry even if the discussions were devoted entirely to that end."[85]

(Emphasis Mine)

Most of the governments financial policies are carried

3:2:3 Criticism and Control of government

The ultimate power of control over the government lies in the provisions of a vote of no confidence, which if passed, can lead, depending on the decision of the President, either to the dissolution of Parliament or the resignation of the government. This is in line with the principle that the executive should be accountable to the Legislature. That the government can remain in power, only so long as it enjoys the confidence and support of the majority of the nation's representatives.

In practice however, though these provisions have been provided for, they have never acted as a threat to the government of the day.

There are both legal[88] and practical limitations that inhibit the National Assembly from exercising this power. Firstly, the resolution must be passed by the majority of all the members of the Assembly (excluding the ex-officio members). Before such a motion is moved, a seven day notice must be given of the government through the Party Whip to gather and lobby support in the House, combined with its majority, thus defeating such a motion as and when it comes up.

Secondly, another problem created by the provision is that, if the Presidxnt does not resign or dissolve Parliament within three days of the passing of the resolution, Parliament stands dissolved on the fourth day following the day the resolution was passed. This creates insecurity among members. This is

because once such a motion is passed, it's more likely than not that they'll be required to go back to the electorate once again to seek mandate. Most members are not ready to expose themselves to such a risk, for they are uncertain whether they might get a chance of returning back to the House once Parliament is dissolved. As a result therefore, even if such a motion was to be tabled in the House, most members would not be enthusiatic to support it however much they'd be willing to punish the government. However, this power has never been exercised in Kenya by Parliament since independence.

Thus it may be observed that the power of removal, may be conceded only as a drastic way in a drastic situation. Otherwise Parliament discharges its responsibilities when it criticises and proposes. This chance is obtained during the debate on legislation and financial proposals. However, as already stated,[89] Parliament have not utilised these chances properly.

Parliament also has a chance to criticise the government and therefore contribute in controlling it, during the motion to thank the President for his address at the opening of a session, which outlines the policy and the legislative programme of his government. This can be a forum for through debate, with numerous questions being put to ministers and is usually followed up with supplementaries.[90]

However, the Kenyan Parliament has not effectively used this chance to control the government, instead

it has used the chance to the support the government against members of the public, whom it has called "disgruntled elements or persons'...' For example contributing to the Presidemtial address in one occassion,[91] the members turned their wrath on the members of the public who were not even in Parliament. One member called for the prosecution of a member of the public for trying to register an opposition Party.[92] Another member lashed at a cleric[93] for calling for the introduction of Multi-Party democracy in the country. These are only one of the many examples which evidence Parliaments weakness in the area of criticism and general control of the government.

Parliament also uses questions to control government policy. Questions may be put to the Ministers on matters of administration or policy (each sitting normally starts with oral replies). However, this also has its own shortcomings. The provisions thereto[94] restricts the purposes for which they may be employed. For example, a question cannot raise a matter of policy too wide to be dealt within limits of an answer. Secondly, the same cannot be made the occassion of debate. Thus, if the answer is not satisfactory enough the member has to be contented and no debate there from should ensue. To that extent, the will of the people is not effectively expressed nor their uncertainty clarified, since their representative(s) are left without any remedy but to be contented by what has been given by the usually un-co-operative Front Bench.

Members have an opportunity to air their criticisims during the debate for a motion of adjournment. It may be

either for adjournment on a matter of administration or an adjournment on a definate matter of urgent National importance. The limitations to this is that, the acceptance of the speaking that the matter is of such a nature as to be of National importance and the support of at least fifteen members, must be sought before such a matter can be debated. This has in the past raised some problems since, it depends on the discretion of the speaker to accept a matter raised by a member as being of National importance. As a result, there has arisen occassions when real matters of National importance have been rejected by the Speaker as not being of National importance.[95]

However, these limitations not withstanding, some members have taken this chance to raise matters of grave concern to the public.[96]

The Kenyan Parliament have to a greater extent been marginalised by the Executive. The private members motions have been overlooked. These are supposed to give the members a chance of, at least, having their views (and therefore that of the people) discussed and if possible, implemented as part of Government policy. For example, a private motion by the member for Changamwe, urging the Government to Curb Corruption in Mombasa Municipal Council was met with fierce opposition from the Front Bench and finally defeated.[97]

Another example of disregard of the Private Members Motions, was evidenced when the Government introduced a procedural motion asking the House to overlook a standing order[98] allocationg Wednesday mornings to private members Motions and allow the Government motion to be debated. At the time two

motions had been filed by an M.P. to the sessional Committee and were ready for debate. The Back Benchers complained that they had come ready to debate the Private Memeber's Motion and that the Front Bench was taking them for granted. One of the stated;

> "---today being the day set aside for the Private Memebers Motions, we were all prepared as members of the Back Bench to debate Private Members Motions of our collegue --- had given notice of in this House.--- This means that it had been taken for granted that this House will agree to pass this Procedural Motion---. I must say that this is a very bad trend and this House should not be taken for granted in this way---. I think we are getting into a situation whereby the Ministers assume that whatever decisions they make will be adopted by this House---."[99]

Despite this protest, the Front Bench pressed further and after some lobbying, the matter was put to question and was agreed on. Thus Private Members Motion was sacrificed for the sake of a Government motion, notwithstanding that there is only a limited time allocated for such motions.

These two examples shows the fact that, the Executive is powerful enough to bulldoze the House into succumbing to it's terms, notwithstanding protests of the Back Bench.

One area where Parliament has completely failed is in relation to the general control of the Executive headed by the Chief Executive. The Chief Executive in Kenya has in the past made political outbursts which in one way or another have been treated as Presidential directives, thus in effect

having a force of Law.

Presidential directives are rule - like prouncements, proclamations or promulgations issued by the President, based on authority which he has or thinks he has.[100]

The function of The Executive, headed by the President is legally understood to be and should be implementing the Laws enacted by the Legislature. In the previous chapter,[101] we laboured to show how, the leaders after independence, made amendments to the constitution with the primary aim of strengthening the Executive. The result was having the chief Executive being the holder of both the offices of, the Head of State and the head of the government. This enabled him to have his feet in two organs of the government, one foot in the legislature, whilst the other in the Executive.[102]

In order to be legally valid, Presidential directives are supposed to be issued pursuant to powers bestowed upon the President. However, a peculiar problem in Kenya is that; these directives are at most issued at public gatherings, and immediate enthusiastic enforcement follows even before their legal validity is scrutinized. By legal validity we mean whether, the President have expresss or implied constitutional or statutory authority for the promulgation And if he has, whether the appropriate procedures have been followed in translating that directive into Law.

Most of these directives have been in conflict with the constitution and the general Law of the Land. Since the President cannot be sued for contravening the Law, it follows that even when his directives infringe upon fundamental rights of the citizens, there can be no remedy

obtainable through the legal process.[103] Therefore, since the citizens cannot be left to live at the mercy of the President, there can be recourse to extra-Legal avenues. It's our submission that the only avenue existing is Parliament where an aggrieved party can complain through his representative. Therefore, its expected that when the Chief Executive has contravened a constitutional provision or any other Law, Parliament should move fast and act as a scheck to such abuse. However, in many a time when the President has arbitrariry directed for the derogation of the citizens' rights, or abused the due process of the Law, Parliament has had no quarrel with him.

We propose to give an example of such an occassion. Sometimes in 1982, the President ordered for the deregistration of the then Academic Staff Union of the University of Nairobi. He made this directive while attending a wedding ceremony in Machakos.[104] His directive not only infringed on the constitutional provision for the protection of Freedom of Assembly and association,[105] but also contravened the provisions of the societies Act[106] as to the procedure of deregistration of a society.

The Act provides that, where in respect of any registered Society, 'the registrar is of the opinion that the registration of a society should be cancelled or suspended on the ground that, the society has in his opinion, among its objects, or is likely to pursue or to be used for any unlawful purpose or any purpose prejudicial to or incompatible with peace, welfare or good order in Kenya would, in his opinion, be likely to be prejudiced by the continued

registration of the society, or that the terms of the Constitution or of the rules of the society are, in his opinion, in any respect repugnant to or inconsistent with any law --- the registrar in his discretion give notice in the prescribed form to the society calling upon the society to show cause why its registration should not be suspended ---.' [107]

The Academic staff union in question had been registered in 1972. It was formed mainly to represent those members of staff employed on academic terms. It was also formed to regulate and improve relations between members of the University Council and the students, as well as to negotiate salaries and conditions of service for its members. From this objects, it can be concluded that, none of them was prejudicial to peace or public order as required by the societies Act, [108] to warrant its deregistration. The President is reported to have said;

> "I have sufficient information about this manoevoure by a neighboring country, which wants to use the University of Nairobi for subversive activities including killings. I am going to be careful with the University of Nairobi." [109]

Soon thereafter, the Union was de^reg^istered, and a Senior Lecturer who had tried to defend it against the charges made by the President was arrested and thereafter released. This was an act of intimidation to warn all those who intended to defend the Union.

It was logical enough that, since the provisions concerning deregistration of societies had been contravened, and the President taken the role of the Registrar of societies, a wrong had been committed against the public. The Law provides that, no proceedings in which relief is claimed in respect of anything done or omitted to be done shall be instituted or continued against the President while he holds office or against any person while he is exercising the functions of the office of the President.[110] Thus the members of the Union could not recourse to court for a remedy. The only avenue open to them, in our opinion, was through Parliament.

Since an Act of Parliament had been contravened and, in the process, the much cherished fundamental rights of some citizens infringed, Parliament being peoples watchdog, should have come out and critised the act. We submit that, if Parliament would have done so, probably such occassions would not in future have to be repeated, since the powers that be shall first warn itself of Parliament's wrath in case of a repeat of a similar act.

In order for Parliament to execute its functions properly, there need be protection against external interference. This is provided by the existence of Special Parliamentary priviledges and immunities allowed to it under the Law. Without parliamentary priviledges, Parliament would not be able to effectively perform its functions to the general good of the masses, especially in controlling the excess of the executive.

Concerning Parliamentary priviledge in the British context Erskine wrote;

> "Parliamentary priviledge is the sum of the peculiar rights enjoyed by each House collectively as a constituent part of the High Court or Parliament and by members of each House individually without which they could not discharge their functions and which exceed those possessed by other bodies or individuals."[111]
>
> (Emphasis Mine)

Thus, in the British Context, 'Parliamentary privilege is seen as vital in the protection of the two Houses of Parliament and their members acting in the public capacities against outside interference so as to enable them to carry out their constitutional functions effectively.'[112]

In the case of Stockdale V. Hansard,[113] Patterson J. stated:

> "The power claimed is said to be necessary to the due performance both legislative and inquisitorial functions of the House.--- Both of these powers (of priviledges and immunities), proceed on the same ground, viz, the necessity that the House of Commons and the members thereof should in no way be obstructed in the performance of their high and important duties, and that if the House be so obstructed, either collectively, or in the persons of the individual members, the remedy should be in its own hands and immediate ... Hence Liberty of Speech within the walls of the House, freedom from arrest, an and from some other restraints and duties during the sitting of Parliament."[114]
>
> (Emphasis provided)

This being the position in Britain, it's expected to be the same position in Kenya, since the Kenya, since the Kenyan Legislature finds its origins therefrom through colonialism.

The Kenyan position is exposited by the constitution which provides that, Parliament may, for the purpose of the orderly and effective discharge of the business of the National Assembly, provide for the powers, privileges and immunities of the Assembly and its Committees and members.[115] Parliament has done this through the National Assembly (Powers and Privileges) Act.[116]

The Act provides[117] inter alia that members have immunity from legal proceedings for words spoken before or written in a report to, the Assembly or its committees, including motions and resolutions introduced in the House. Thus, with such wide protection, it is expected of Parliament to be a vigorous organ or institution discharging its functions effectively without fear of retribution. This was the case after independence as from the reports on Parliamentary debates. The first Parliament was very vigorous in the discharge of its functions, especially critism of the government.

Despite the privileges and immunities from legal suit, members are not exempt from the operation of detention Laws. The constitution[118] provides that, nothing done under the authority of Part III of the Preservation of Public Security Act,[119] is to be held to be held to be inconsistent with the constitutional guarantees of personal liberty, freedom of expression and movement. The chief Executive has throughout used this provision to terrorise, intimidate and subdue

Parliament. He has used the provision to defeat any opposition directed against the government.

In several instances, the Chief Executive has used the provision to subdue those members of the Back Bench who have tried over the years to be critical of the government and it's policies. In 1967, after John Keen was detained (then a member of the National Assembly), confusion reigned as to whether the members were immune to detention without trial. The speaker assured the House that they were. When the government was called upon to clear the position, the then Vice-President and Leader of government business in the House stated;

> "---, this clause of course (on privileges and immunities) covers only civil and criminal proceedings and I agree that it does not cover detention under the Preservation of Public Security Act.[120] Therefore, I would like to add Mr Speaker and give assurance to the members of this House, that the government recognises this principle, that no M.P may be detained on account of anything said by him in the House. <u>The Government, however, expects that members of Parliament will behave responsibly</u>. In other words the statements or speeches made by Honorable Members in this House, must not be careless and irrespondible. So, I hope that members will help in this direction ---.[121]
>
> (Emphasis Mine)

Behaving 'responsibly' meant that, the members were not at liberty to discuss and debate any matter critical of the government of the day. Sticking to it's policy of making members to behave 'responsibly,' the government detained other members of the House in 1975[122] and 1977[123]

respectively. This was enough warning to make the members cower and desist from then henceforth, from being critical of the government and its policies. In a contemptions show of power, the state arrested all these members in the prescints of the House in contravention of the National Assembly (Powers and Privileges) Act.[124]

From the foregoing, unless there be some amendments to the Law to prevent Part III of the Preservation of Public Security Act[125] from being applied to members of Parliament by the executive, for things they say within the due proceedings of the House, the doctrine of parliamentary privilege is as good as extinct in Kenya. Lack of this parliamentary privilege, in total, may explain why the member may have shuddered from discussing sensitive matters involving the executive, not withstanding the fact that the rights of the people whom they represent, is at stake!

We have tried to show that, the Kenyan Parliament has failed to a greater extent, to act as the people's reprentative body. The reasons have been partly, the general laxity on the part of its members. Members have been known to be out of the House when important matters are being debated. For example, during the debates on the Exchequer and Audit (Amendment) Bill,[126] whose effect was to reduce Parliaments Control over the finances of parastatals, the Report of the Public Accounts Committee for the year 1987/99[127] and the Finance Bill,[128] there was prolonged interruptions because of lack of quorum. In a House of 202 members, there was hardly enough members to make a

quorum of 30! These are just examples to show the lack of either interest or seriousness on the part of the members. As a result, Parliament has generally weakened through the years.

Members of the House have genrally cultivated a culture of silence. They abstain from asking the government embarrassing questions with a hope that, the Chief Executive would reward them by appointing them into Ministerial positions or as Directors or Chairmen of Public Corporations. By doing so, they abdicate their role of critising the government whenever it does any wrong.

We have also shown that, the most crucial factor contributing to the weakness of Parliament, is the ever growing strong executive. After independence, ground was laid for a future strong executive headed by a powerful Chief Executive. It was a leaf borrowed from the colonial experience where the Governor was very powerful in relation to the legislative Council. This has developed over the years to a point where the executive has finally overshadowed Parliament completely.

From the foregoing, we submit that, to a greater extent, Kenyans cannot be said to be ruling themselves through Parliament. Instead its the executive, which Parliament was initially established to control, that formulates policies, Legislates and implements them. This being the position, it does not tally with our conception of democracy.

At the beginning of this work, we stated that demo-

cracy means, people participating in the formulation of policies and making of decisions affecting them. That they must also fully participate in the implementation of those policies and decisions. This is achieved through their representatives. Therefore, since the Kenyan Parliament, which is the representative body of the people, has failed in the execution of its role effectively, the concept of democracy exists in letter and not in practice.

FOOTNOTES TO CHAPTER 3:

1. Black's Law Dictionary, 5th Edition Pg. 461.

2. Encyclopedia Britannica Vol. 4 Pg 827.

3. Ibid Pg. 830

4. Act No. 5 of 1969 as Amended.

5. Cap 7, Laws of Kenya.

6. Y.P. Ghai & J.P.W.B. McAuslan. Public Law and Political change in Kenya: 1963-1969: Oxford University Press, Nairobi, 1970.

7. Ibid pg

8. S31 an S32, Supra.

9. S14, Supra.

10. Under the Election Offenses Act Cap 66, Laws of Kenya.

11. S32 and S43, Supra Note 4.

12. S41, Ibid.

13. S42 (1) Ibid.

14. S41 (10), Ibid.

15. Reported in the Daily Nation March 23, 1988

16. March 24, 1988, Ibid.

17. A constituency in Uasin Gishu - Reported in the Daily Nation, Thursday March 23, 1988.

18. A constituency in Nairobi Area - Reported Ibid.

19. In a questionnaire we undertook, these are some of the sentiments expressed by those who have voted in the past as well as those who have voted once and thereafter abstained. The areas and number of people we interviewed is as follows:

Nairobi Area	- 85 people
Machakos District	- 15 people
Nakuru District	- 178 people
Kisii & Nyamira District	- 155 people

This being a negligible number we do not intend it to represent public opinion, but we felt that, since they were of different economic & social background, yet they expressed

opinions which nearly seemed similar if not the same. Rightly or wrong we arrived at the conclusions expressed thereof.

20. S34 (d), Supra note 4.

21. S52 (4), Ibid.

22. Njeru Macharia, 1990 LL:B Dissertation.

23. Wheare K.C., Legislatures. Pg 1 1966

24. Considerations on Representative government. Chapter V Quoted by Griffith J.A.G. in The Place of Parliament in the Legislative process. 14 M.L.R. 279 at pg 291.

25. Keir D.L. of Lawson F.H. Cases in constitutional Law. Oxford Press 5th Ed. 1967.

26. Pg 8, Ibid.

27. Ibid.

28. (1601) 5 Co.Rep. 14 b., cited in Keir and Lawson, Ibid.

29. Pg 10 Ibid.

30. Wase E.C.S., Constitutional Law. Pg 43 6th Ed: (c) Longmans Green & co. Ltd. 1980.

31. (1942) Ch.391.

32. Pg. 393, Ibid.

33. (1881) 6. A.C. 193.

34. S30, Supra note 4.

35. S47 (4) Ibid,

36. National Assembly debates Vol. XI 22nd March 1967 Cols. 1490-1491.

37. Supra note 24.

38. The place of Parliament in the Legislative Process: 14.M.L.R. 279 at pg. 290

39. S47, supra Note 4.

40. S47, Ibid.

41. Pg 286, Supra note 33

42. Pg 335, Supra note 6

43. Cap 307, Laws of Kenya. The motion was moved by the former Member of Parliament for Nyandarua, the late J.M. Kariuki.

44. Kanyeihamba G.W., Constitution law and Government, Uganda. Pg 147 E.A. Literature Bureau. 1975.

45. The National Assembly, Hansard. Vol. LXXVII 3rd april 1991.

46. M.P. for Mvita, an Assistant Minister for Information and Broadcasting.

47. Reported in the Daily Nation Friday March 24, 1988.

48. S33, supra 4.

49. S27, Ibid.

50. Githu Muigai, "Amending the constitution" The lessons from history. (A paper presented at the I.C.J. (Kenya section) seminar on 'Freedom of Expression, Association and Assembly' 6th-9th May 1992 - Safari Beach Hotel, Mombasa.

51. Cap 66, Laws of Kenya.

52. Paul Ngei, a former M.P. for Kangundo had been not only a close confidant of President Kenyatta and a co-accused in the Kapenguria trials, but also a fellow inmate at Lokitoung.

53. Pg 21, supra note 50.

54. The Member of Parliament Hon. Mashengu wa Mwachofi (as he then was).

55. The National Assembly official Report. vol. LXVI Col. 980.

56. The National Assembly official Report. Vol. LXVII Col. 221

57. Pg 293, supra note 38.

58. 226 House of commons Debates 5s Cols. 2507 est. Quoted in pg 292, Ibid.

59. S99 (1), Supra Note 4.

60. S99 (2), Ibid.

61. S102, Ibid.

62. Cap 412, Laws of Kenya.

63. Cap 413, Laws of Kenya.

64. Cap 425, Laws of Kenya.

65. S48, Supra Note 4.

66. G. Reid, The politics of financial Control. Pg. 40 London. Hutchingson, 1966.

67. Pg 345, Supra Note 6.

68. S100 (1), Supra Note 4.

69 Part XVIII of the standing orders.

70. Wilson, Geoffrey. Cases and Materials on Constitutional and Administrative Law. Pg 239 Cambridge University Press. 1966.

71. Cap 415, Laws of Kenya.

72. S105, Supra Note 4.

73. S104 and S110, Ibid.

74. Since then (1991), the Security of tenure and salary of the Controller and auditor General have been secured by a consequent amendment reversing the former.

75. S11 (2), Supra note 62.

76. Pg 334, supra note 6.

77. Ante Chapter 1.

78. Post.

79. The Last opposition party was outlawed in 1969, (K.P.)

80. Reported in the Daily Nation Friday, June 5, 1992 Pg 12.

81. Reported in the Daily Nation Wednesday June 5, 1990.

82. The National Assembly Official Report Vol. LXVI Cols. 985.

83. S48, Supra 4.

84. Pg 345, Supra 6.

85. Pg 239, Supra 70.

86. Supra 6.

87. House of Representatives Debates Vol. III part I (June 25, 1964) cols. 616-634.

88. S59 (3), Supra 4.

89. Ante. 3:2:(1 & 2).

90. House of Representatives debates Vol. VII. In the second session of Parliament (13 Dec. 1964-22 October 1965) questions submitted in the House of Representatives was 1917 and 1533 were answered.

91. Reported in the Kenya Times thursday, april 4 1991.

92. Mr. Jaramogi Oginga Odinga who tried to register his National Democratic Party in 1991. However he was not successful.

93. Bishop Henry Okullu.

94. Standing orders 35-39.

95. In the Daily Nation March 20, 1992, it was reported that the Speaker of the National Assembly, Professor Jonathan Ng'eno refused for the sixth time to have the politically instigated tribal clashes be discussed in the House as a matter of National importance.

96. It was reported in the Standard, Friday June 19, 1992 that the member for Saku, Mr. Jilo Falana had given a notice to move a motion to censor, unreservedly the Minister for finance for condoning corruption in the Treasury.

97. Reported in the Standard, Thursday November 20, 1991.

98. Standing order number 33.

99. The National Assembly Hansard vol.LXXXII 3rd April 1991.

100. Maranya I: Presidential Powers/Directives and Fundamental Human Rights. A conflict?
LLB Dissertation 1984.

101. Chapter 2.

102. Sections, 23, 27, 30, 52, 58 and 59. Supra 4.

103. S14, Ibid

104. Weekly Review, July 25, 1982

105. S80, Supra 4.

106. Cap 108, Laws of Kenya

107. S12 (1) a, b, c, Ibid.

108. Ibid

109. Weekly Review, July 25, pg26

110. S14 (2), Supra 4.

111. May, Sir Thomas Erskine: Treatise on the Law of Privileges, proceedings and Usages of Parliament. pg.61 18 Ed. 1961.

112. De Smith S.A. Constitutional and Administrative Law. pg 315 4th Ed. by H. street and R. Brazier Harndsworth, Middlesex Penguin Books 1981.

113. (1839) 9 A & E 1 cited in Keir & Lawson Constitutional Law cases, supra.

114. pg. 283, Ibid

115. S57, Supra 4.

116. Cap 6, Laws of Kenya

117. S3, Ibid

118. S85, Supra 4

119. Cap.57, Laws of Kenya

120. Ibid

121. National Assembly debates vol. 13 part 2. 1967-68 Cols. 2159.

122. Hon. Mr. Martin Shikuku then M.P. for Butere, and Jean Seroney who was at the Chair at the time were detained for averring that K.A.N.U was dead. - Reported in Weekly Review Nairobi 27-Oct-75.

123. The then Member of Parliament for Kitutu East Mr. George Moseti Anyona was detained for what was felt to be resulting from critical speeches he had made in the House.

124. S4, Supra 116.

125. Supra 119.

126. The National Assembly Official Report Vol. LXVI cols. 985.

127. Reported in the Daily Nation Wednesday June 5, 1990.

128. The National Assembly Hansard Vol. LXXX II 3rd April 1991.

CHAPTER FOUR

4:1. Towards the restoration of democracy in Kenya.

A sovereign Parliament is necessary in a democratic country because it enables for the existence of a Parliament or legislature that can fully perform its roles and functions which include control of Mal administration, the representative function, control of Government finances, legislation and acting as a check on the executive arm of the government.

For Parliament to be re-enactivated, the Preservation of Public Security Act[1] should be repealed. This piece of Legislation has been in the past used by the executive to terrorise and intimidate Parliament and make it succumb into the former's machinations. Its repealing will guarantee parliamentary privileges which would enable the members to freely criticise the Government, and thereby effectively, control it as required. In the past, members have been cautious in whatever they say in the floor of Parliament lest they be detained for "irresponsible talk".[2]

The time allocated for Private Members Motions is too short.[3] The time should be doubled at least. This will enable the people's representatives to discuss matters affecting the masses and probably have them implemented as government policy. This may bring some sence of acceptance of government policies by the people, since they shall have a feeling of participating and contributing in their formulations.

One of the problems that is affecting our Parliament, is the often lack of quorums. Firstly, the number required to constitute a quorum is very small.[4] In the enactment of Laws, the requirement is just a simple majority. This means that when the House has about 31 members and 16 of them votes for a Bill, automatically the same becomes Law affecting the millions of Kenyans. We recommend that the quorum should be raised to half the number of all the members of the Whole House.

Secondly, as regarding lack of quorums, the Law should be amended and provide that, a person shall cease to be a member of the House if he fails to attend any three consequtive sittings of the House, instead of the eight days presently provided for.[5]

Under the Provisional collection of Taxes and duties Act,[6] as soon as a Bill is published in the Gazette providing for a new or altered duty or rate, the minister can make an order for collection under the proposed terms. This means that even before Parliament has discussed and given its consent, the government can levy taxes from the public for a maximum period of eight weeks. We submit that for there to be a sence of legitimacy and bona fide acceptance of such taxes amongst the people, the same must first be debated thoroughly in Parliament and consequently agreed upon before such exertion.

Though economic and development planning lies with the Government, and therefore has the repository knowledge of the amount of funds available to be allo-

cated to different development projects, Members should be allowed to originate and debate financial Bills. It's only when the Government can prove lack of enough funds for a deliberated financial Bill that the same can be postponed to a later date. In so doing, the electorate shall have a feeling of participating in the economic decisions of their country. Therefore, the provision of the constitution[7] providing to the effect that only by a Minister through the consent of the President can the National Assembly debate a Financial Bill, should be amended to allow the House to proceed on such matters without the President's consent.

A limit should be put on the number of Ministries that shall exist in Kenya at any particular point in time. If at all the Government of the day feels a need of an addition, it should make a request to that effect through Parliament which should have the power to accept or reject such request after lengthy deliberations. This shall act as a bar to the creation of such mundane Ministries like the former Ministry of National Guidance and Political Affairs, which did not have any specific function at the time. This has, in the past, been used by the Chief Executive to create a Government Majority in the House.

Together with this, should be a provision delimiting the number of Assistant Ministers of which each Government Ministry shall have at any one particular time. This shall not only check and reduce Government expenditure but also control the

Government majority in the House.

One area which requires real strengthening is the provision for a vote of censure of the Government. The provision thereof[8] is ineffective because its effect is disastrous both to the Government and Parliament itself. If the National Assembly passes a resolution supported by the majority of the members of the Assembly, that it has no confidence in the Government, the President may resign within three days of the passing of that resolution, or he may disolve Parliament without which, Parliament shall stand dissolved on the fourth day following the day on which that resolution was passed.

Thus the passage of such a resolution exposes the members of Parliament to the uncertainty of ever making it back to the House once it has been dissolved. Most members loathe the rigours and the rigmarole connected with or incidental to electioneering. Therefore this, is one way or another would make the Memebrs to think twice before moving or supporting such a suicidal motion. Therefore, for effective control of the government by Parliament, the provision[9] should be amended to the effect that, once such a resolution is passed, the automatic result and consequence should be for the President and the Government of the day to resign, and not Parliament to be dissolved. This will guarantee Parliament its security against the Chief Executive who would want to intimidate it by dissolving it. Its only in so doing that the Government shall submit to Parliamentary Control.

The future of democracy in Kenya depends mainly, in the reduction of executive power on one hand and the

strengthening of the Legislature on the other. The government therefore should ensure that it is an elected government devoid of electoral malpractices and therefore responsible to the electorate.

The Law should not be used as a weapon to ensure political survival and the constitution should be amended only, on matters of sound national need. The substance of future amendments must relate to the process not of enlarging the state over civil society but of creating greater democratic avenues of public participation, greater respect for human rights and greater control of public power.[10]

Elections should be held often as they have been in the past, but the results must be protected from fraud and manipulation. The masses should be educated first and foremost as to what elections are all about. They must know its importance and above all, must be made aware of the dangers of ecclectic choice of leaders (representatives).

The Legislators should make Laws which will meet the social and economic needs of the public at large, and not just constitutional amendments meant to strengthen the government over the rights of the citizens, for both (the government and the rights) are established for the welfare of the masses.

It's sheer truth that most Kenyans are of the view that they want democracy. Where the public interests are represented; the publicat large must participate in decision making if democracy is to be achieved. This can only be done through their repre-

sentatives properly, popularly and fairly elected, in Parliament. It's high time the Legislature woke up to perform its role as required of it.

Its only through these reforms, that Kenyans shall be said to rule themselves and therefore having democracy!

4:2 Conclusion.

In chapter one, a general discussion of the concept of democracy, its defination and that of the State and Parliament were attempted. Their development was also examined. It was noted that the term democracy is used in an ideological context so that, for different people in different places and circumstances, the term may be used to serve certain ends.

It was argued that for true democracy to be realised, the society and the government must of necessity be organised in such away that, the masses are not only represented in decision making but also in the execution there of.

In chapter two, there was concentration in the political organisation of the Kenyan Society during the colonial period. The pre-colonial Kenyan society was also examined. It was concluded that from the way the society was politically organised, with the imperial government and the colonial government, through the Governor, striving to maintain their power over the ruled people and the Legislative Council, there was but massive alienation of the

masses in the running of the country. It was also seen how this culture was carried over by the African elites who took the mantle of leadership from the colonists in 1963. The attempt by the independence leaders to establish a powerful chief Executive equivalent to the powerful chieftainship in the African traditional Society was also examined. This they did through a series of constitutional amendments.

In chapter three, it was argued that democracy denotes a government where the power is in the hands of the people. People being able to control the government through legal means of elections. It was also argued that this power has been diluted by having the requirement that each candidate for parliamentary and presidential elections must be nominated by a party of this own.[11] For over two decades, since the banning of the last opposition party, the Kenya Peoples Union in 1969, Kenya was under a one Party rule, the Kenya African National Union. This party nominate candidates of its own choice while barring others. In so doing, it gave the electorate hand picked candidates to choose from, sometimes giving them no alternative to choose from but sole unopposed candidates.

Also, the devise of having an independent electoral Commission was meant to strengthen the democratic principle of having free and fair elections. However, it was seen how this has been watered down by having administrative officers being the returning

officers culminating in election irregularities and consequent riggling thereof.

Chapter three also concentrated on the form of government that is found in our country. The relationship between the Executive and the legislature was particularly considered. In theory, the people are said to rule themselves through their elected members. Therefore, these members are expected to have maximum freedom to express their views on all matters that may affect the people.

In essence the members of the Legislature are supposed to control and demand that the government should do or refrain from doing certain things. However, an examination of the same revealed the reverse as being the case. Instead of the Legislature controlling the executive, it was found that the Legislature often at the mercy of the Executive. In general, a member of Parliament's function in Law making has been more ceremonial than real. His responsibility has been to legitimate legislation initiated by the Government and the Party drawn by specialised legal draftsmen and approved by the cabinet.

In a democracy, the opposition in the House is supposed to keep the Government of the day on its toes and enlighten the masses of what the government is doing so that, come the next elections, they may vote the government out. However, opposition in Kenya has been suppressed by hook and crook. To

this extent, there is no democracy in Kenya since the suppression of opposition left the Executive to be the all powerful and in control of everything. It is hoped that re-introduction of multi-Party democracy in 1991 will change the image of Parliament and make it more vigorous and alert in its functions, and that the government would not bulldoze the House at will any more.

The criticisms that has been levelled against the Government by individual members of Parliament have not made any difference. The Government still plays the tune. With the Preservation of Public Security Act[12] hovering over them, the Memebers of Parliament fear taking their criticisms 'too far'. To this extent, Legislative Control of the Government has been far from being achieved.

Those interested with power at independence to lead in the fight for democracy, thus betrayed and have continued to betray the cause for democracy for their personal greed for more power, wealth and personal prestige.

It is because of this unchecked exploitation of the mass of the people and the rejection of any form of democracy, that the ever rising discontent over the government for a long time, culminated in the 'Saba Saba' riots of July 1990.

It is also the peoples unfailing quest for popular participation in their governance, that finally led to the re-introduction of the much cherished multi-party democracy in 1991, which

had been robbed of Kenyans in 1982.

Conclusively therefore, the role of Parliament has only been that of rubber stamp, to bless the executive acts and a cloud to cover the citizens from knowing that they have little, if any, part to play in their own government. Thus, ours has been and is the rule of minority, and thereof an oligarchy and not democracy!

#

FOOTNOTES: CHAPTER FOUR

1. Cap 57, Laws of Kenya.

2. National Assembly debates Vol. 13 Part 2 1967-68 Cols. 2159.

3. Only on Wednesday Mornings.

4. S51, The Constitution of Kenya, Act No. 5 of 1969, as Amended. 30 members.

5. S39 (1) (d), Ibid.

6. Cap 415, Laws of Kenya.

7. S48, Supra Note 4.

8. S59 (3), Ibid.

9. Ibid.

10. Githu Muigai; 'Amending the Constitution.' The lessons from History. opp. cit.

11. S34 (d), Supra Note 4.

12. Supra Note 1.

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