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## The Kenyan Parliament:

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[From Rubberstamp to Transformative Legislature]

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06 06 2012



## **Abstract**

Constitutions play crucial role as they are the long-term contracts between those ruled and the rulers that specify the conditions on which power is to be exercised. More importantly, legislatures are an institution of governance that plays a significant role when they perform their basic roles of oversight, representation and lawmaking. However, in many developing countries, legislatures are weak and ineffective, hence horizontal accountability is weakened. The onset of democratic governance in the 1990s witnessed the birth of new constitutions and changes in governance structures, and parliaments began to exert their influence forcefully. This thesis, a case study, examines how the new constitutional revisions in Kenya have affected the position of Kenya Parliament, touted as one of the most independent and most autonomous in Africa.

The Kenyan Parliament has not only become complex in its operations, it has also become extremely independent by playing its crucial role in a continuous system of check and balances. This thesis gives a background analysis of the dismantling of the independent constitution and the emasculation of powers by the Presidency. It shows the path the Kenyan legislature has taken, from an appendage legislature in the 1960s to an emerging legislature in the 1990s and finally to a transformative legislature it has transformed to-date.

In the new paradigm shift, the thesis measures the strength of the Kenyan Parliament using the Fish and Kroenig Parliamentary Survey Index based on 32 items that measure four different indicators of parliamentary strength. This thesis compares in the process, two constitutions and how they fare on the Kenya parliament. With two constitutions, one based on a hybrid model (former constitution) and the other one based on a pure presidential model (new constitution), the power shift in governance is apparent. Based on the results of the survey, premised on the research question, the thesis has come to the conclusion that the new constitution has indeed strengthened Parliament immensely.

## **Acknowledgement**

The wish to study the Kenyan Parliament began after the 2008 post-election violence in Kenya and the central role the Kenyan parliament played in bringing peace back in the country. The quest for a new constitution in Kenya took over two decades to be realized and Parliament again played a significant role in enacting the Agendas that were agreed upon in the National Accord and Reconciliation Act of 2008. It showed that when and where it matters, Parliaments can put partisan interests aside and put the interest of the Nation first. First I would like to thank the two anonymous librarians at the Kenyan Parliamentary Library who sneaked me into the MPs Only library and ensured that I got access to any document and information that would help in my research. They also made me understand the inner workings of Parliament and facilitated my entry into the public gallery of the Plenary where I witnessed MPs legislating. It was a great honour.

Secondly, my special thanks go to my “veileder”, Prof. Lars G.Svåssand who guided me patiently and systematically in every chapter I wrote. With his help, I got a good perspective and understanding how parliaments function and helped me focus on the issues that mattered. Thirdly, I would like to thank the Institute of Comparative Politics for the support I received during my research. Thanks to Democracy and Development Research Group and the Methodology Research Group for the good feedbacks I got when I presented my draft chapters. Thanks to Vibeke and Pro. Alvarez. At CMI, I thank Dr. Arne Tostensen for borrowing me books on the Kenya Parliament and other relevant materials. To my fellow students who sat with me and assisted me during those long lonely days and nights at Sofie Lindstrøm’s House, I say thank you for the support. These are Henrik, Kasper, Jon, and Terje.

I would like to thank the following individuals for their support during various stages of this study: Idunn Kristiansen, Svein-Erik Helle and Onyango Makogango who read the whole draft and gave me very important feedbacks that made this thesis better.

Lastly, my special thanks to my love, Miriam Bergan, who read, re-read and corrected every single chapter in the course of my writing and the final draft and for supporting me during those times I was down. Your support has been invaluable. I am grateful too, to all those I have forgotten but contributed in one way or another. I am responsible for whatever limitations remain in the pages that follow.

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## 1.0 Introduction

Does Kenya have a shot at democracy after getting one of the most progressive constitutions in the world, or will it experience a “reverse wave” of democratization or experience a “stagnation of freedom” that Samuel Huntington’s historical model seemed to suggest, with many more countries falling back from democracy to authoritarianism than moving in the other direction (Diamond & Plattner, 2009: x)? The answer may depend on the strength of the Kenyan legislature<sup>1</sup> and the full implementation of the new constitution that came in effect in August 2010. Partly to deal with the problems that led to the post-election violence of 2008, the new constitution radically devolved powers to the 47 new counties, and to other governance institutions including a bicameral Parliament. The choice of distributing power among the various institutions of governance in the true sense of "separation of powers", or checks and balances, hold the key to Kenya's promising democracy and political future. Kenyans have learned from past experience that the overload of the presidency that encroaches on other institutions, and its immense powers, unchecked by a legislature and a judiciary with no teeth to bite, lead to abuse of power. Without working systems that can provide what Diamond, Plattner, and Schedler (1999: 2) call "credible restraints", the quality of democratic regimes - in this case Kenya - will remain low and corrupt and will not be in a position to safeguard basic civil rights.

This thesis examines the following research question: *How have the constitutional revisions in Kenya affected Parliament’s position in the political system?* With weakened institutions and an overbearing executive, the Kenyan Parliament under the former constitution has over the years (1966-1998) lost most of its powers of oversight and legislation. It has been reduced to a Parliament that rubberstamps legislation with legislators reduced to performing only constituency service. The new constitution, promulgated in August 2010, has on the other hand devolved governance and strengthened other institutions including the legislature. This paper contends that the transition to democracy (that stalled midway after the opposition won the elections in 2002) is back on track, now that Kenya has a transformative democratic constitution that provides a sound legal framework for constitutional and democratic governance. With an increasingly robust and empowered Parliament that holds the executive and other actors accountable and a reformed judiciary that is becoming increasingly independent, the Executive has no choice but to respect the rule of law as laid down in the new constitution. As Hughes (2005: 225) puts it, the nature of the

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<sup>1</sup> This thesis uses the words parliament, national assembly and legislature interchangeably for the generic word, legislature.

relationship between the executive and legislative branches of government is only laid bare when tested. This is true in the Kenyan context under the new constitution as evidenced in 2011 when Parliament and the Judiciary rejected the President's appointments of persons as Chief Justice, Attorney-general and Chief of Public Prosecutions, as unconstitutional.

According to Salih (2005b: 20), when the constitutional arrangements that make up the democratic governance of society are broadly defined, it is obvious that Parliaments or legislatures are at the heart of governance and of the national integrity system that citizens entrust with the burdensome task of ensuring that democratic states, aided by the constitution, fulfil their function in the interest of the citizens. It is this interwoven relationship between legislatures and constitutions – that each defines the other – that motivates me to analyse the new constitution in Kenya and the power that it has given to Parliament.

The structure of the thesis is as follows: the second chapter draws on the historical perspective on Kenya's quest for a new constitution. It starts with the independent constitution and through summarized historical moments, leads us along the path the first independent leaders of Kenya took in dismantling and amending the constitution by strengthening the executive and weakening other institutions including Parliament, which was reduced to a rubberstamp institution. The chapter also briefly touches on the transition to multiparty politics and mentions a key driver to the new constitution: The National Accord and Reconciliation Act. The chapter then highlights on how the new constitution will be operationalized and implemented and the provisions that will become operational after the next general elections. It concludes with analysis and observation of the Kenyan Parliament from independence to its current form.

Chapter three is the theory chapter where I look at the key concepts under examination in the thesis. This theory chapter has a three-prong approach that gives a theoretical framework with regards to the research question. First, it discusses constitutions in democratic theory. This will be followed by a discussion of accountability. It highlights both horizontal and vertical accountability. Finally, the chapter ends with a conceptual framework of legislatures. It briefly examines the question on how weakness on the part of legislature undermines horizontal accountability, discusses legislative-executive relations and ends with the generic role of legislatures.

Chapter four introduces the methodology and the choice of method, that is, the qualitative study method. In this chapter, the choice of case study method and its goals will be discussed. The chapter will introduce the means of measurement that will be used to analyse the data. The means of measurement to be used are the Fish and Koenig 32 survey items that

measure various indicators of Parliamentary powers. A section in the chapter will discuss the data research sources and then introduce the survey items that will be used to do a comparative analysis of the former constitution and the new constitution.

Chapter five operationalizes the data by getting data for all the 32 items under survey. The 32 items are also divided into four categories or indicators that measure different strengths of parliament.

Chapter six analyses the results of the data collected in chapter five. It compares the results and analyses the weaknesses of the Kenyan Parliament under the former constitution and then with the new constitution. It concludes that the strength of the Parliament under the new constitution is double what it was under the former constitution in some indicators. The final results show that the strength or power of the legislature nearly doubled with the new constitution. Chapter seven is the final chapter and concludes the whole study.



## 2.0 Background

This chapter briefly focuses on Parliamentary democracy in African countries during the decades of one-party states and then with the introduction of multiparty politics in the 1990s. It discusses the independent constitution in Kenya, its dismantling leading to the agitation for reforms. In addition, the chapter briefly discusses the events of 2008 post-election violence and aftermath leading to a new constitution. It ends with looking at the three forms of evolution of the Kenyan Parliament.

### 2.1. Parliamentary Capacities in African Countries

Parliamentary democracy, the bedrock of good governance and accountability has witnessed phenomenal growth on the continent of Africa since the early 1990s (Ruszkowski, June 2011: 7). It was the period in the 1990s with the introduction of multiparty democracy in Africa that democratic elected governments came to power in free and fair elections in a number of countries. It is the wave of democratization worldwide that began in the late 1970s through the early 1990s that attention was focused on the evolutions of legislatures in new democracies (Carey et al 2002: 352). According to Carey et al (2002: 352), the interest is both motivated by the windfall of empirical cases triggered by regime transitions, and by a normative commitment to the idea that strong legislatures are essential to the performance of democratic institutions. Barkan (2008, 2009) acknowledges that there are few scholars who have delved into the questions of when and why legislatures evolve into significant political institutions in nascent democracies, or why this happens in some countries and not others. He points out that there are no systematic cross-national explorations of the relationship between legislative development and “third-wave” democratization save for two notable exceptions by M. Stephen Fish and Michael Kroenig, “The Handbook of National Legislatures: A Global Survey”<sup>2</sup> and M. Stephen Fish, “Stronger Legislatures, Stronger Democracies”. Barkan argues that the work on Africa has been limited to a mere handful of case studies, none of which is comparable in scope and as a result, our theoretical understanding of legislative development in this context of emerging democracies, and of Africa in particular, is still at an early stage (Barkan, 2008: 125).

Based on the assumption that Africa’s democratic consolidation is better served by an autonomous and influential parliament capable of holding the executive accountable (Wang, 2005: 183), and the examination of this relationship between the legislatures and democratic consolidation of six African states (Barkan, 2008) came up with one principal finding. That if

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<sup>2</sup> This survey is used and discussed extensively in the methodology chapter.

legislatures evolve into significant institutions of countervailing power – thereby contributing to democratization – it is for many reasons *other than* recurring “free and fair” elections. On the other hand, the analysis of post-communist legislatures by Fish (2009: 198) also concluded “*that the presence of a powerful legislature is an unmixed blessing for democratization*”. For Fish, then, the overriding priority in constitutional design is to create a powerful legislature (Diamond & Plattner, 2009: xxiii). According to Salih (2005b: 3-4), African legislatures are caught between two competing roles as first, part of the machinery that confers legitimacy on governments and makes or breaks governments by exercising the right to a vote of confidence. And second, as pivotal oversight institutions responsible for scrutinizing the activities of government in order to maintain high-quality governance and safeguard the public interest vis-à-vis any attempt by the executive to conflate public and private interest.

The focus of this thesis is on the power relationship between parliaments and the executive as well as the capacity for parliament to check on the executive in what is referred as horizontal accountability. While the focus of the thesis is primarily on the Kenyan Parliament, the experiences and growth of this institution is similar to the experience and characteristics of other African Parliaments, and probably in other parts of the developing world. From scholars such as (Pitkin, 1967), (Mezey, 1979), (Fish, 2006), (Johnson, 2005) to (Barkan, 2008) and several others, the general observation is that Parliaments plays a significant role in the development and performance of democracy. In theory, Doorenspleet (2005: 79) agrees that legislatures are believed to have important latent or symbolic functions for the consolidation of democratic regimes. In a consolidated democracy, the legislature is stabilized and functions in a democratic way, and democratic rules are accepted “as the only game in town” (Linz 1990 in Doorenspleet, 2005: 79). In practice, however, the contributions of legislatures in new democracies are more controversial as many scholars have debated whether new African democracies suffer from a “democratic deficit” (Doorenspleet, 2005: 79).

Few legislatures actually legislate; many have limited powers and most are clearly overruled by the executive power, and this weakness of Parliaments allow for only limited accountability and responsiveness producing a democratic deficit (Doorenspleet, 2005: 80). The concentration of this thesis then will be on the structural features of the Kenyan legislature, such as the legislative-executive relations or institutional influence, institutional capacity, specified powers, and institutional autonomy. Kenya is, indeed, an interesting case to study as it provides some useful insights into the consolidation of democracy in Africa in

general. Firstly, it has undergone some form of transition to democracy from one-party dictatorship to a multiparty democracy in the beginning of the 1990s, to a change of government through peaceful means. Secondly, it is a case study and a first in Africa, to have a coalition government that shares power on an equal basis. Thirdly, it has managed to change to a new constitution which has drastically changed the governance system in Kenya. It is this change, or revisions in its constitution, which has motivated me to seek to inquire how the new constitutional dispensation has affected the powers of Parliament.

## **2.2 Why African Parliaments Are Weak**

There is a configuration of factors unique to sub-Saharan Africa and consisting of two principal elements that make African legislatures historically weak institutions that are a major disincentive for members to perform the three core and collective functions (Barkan, Mattes, Mozaffar, & Smiddy, 2010: 3). These elements are: (1) Africa's demographics particularly the fact that most African societies are poor, agrarian, plural, and unevenly developed societies (Ake); and (2) The colonial legacy, especially the formal rules (e.g. constitutions, standing orders) that established the basis for today's legislatures in the run-up to independence (Barkan et al. 2010: 3). According to Salih (2005a: 260-261), the generic functions are not different from those of other Parliaments. However, they differ markedly in terms of political cultures within which they deliver their universal parliamentary functions. Salih (2005a: 260) contends that African Parliaments operate as the pulse of society representing not only the modern forces (public, civil society, and party); they are also slaves of African ethnicity, regional interests and patronage. Thus, in many nascent and developing democracies, the Parliament may be the only institution capable of providing checks and balances that prevents the executive from monopolizing power (Mandelbaum, 2011: 5). African Parliamentarians often undertake more burdensome functions, such as managing local conflicts and participating in social events, from marriage ceremonies to death celebrations (Salih, 2005a: 260). To be able to have a clear insight into the Parliaments in Africa, it is best to discuss them under the two periods. These are the period under one-party system and then the period under multi-party system.

## **2.3 African Parliaments in One-Party and Multi-Party Systems**

It should be noted though, that when Africa began to experiment with the norms of her first advisory councils/legislative assemblies and even contesting the first elections ever in the history of the continent, the political parties were embryonic (Salih, 2005b: 6-7); and at the

dawn of independence Africans' exposure to Western-style political parties and assemblies was too short to ensure the internalization of the political values and practices associated with it. Due to the accelerated pace with which political parties were engineered, ethnic groups were the only widespread institutional framework within which the majority of Africans were organized (Salih, 2005b: 5).

Salih (2005b: 9) notes that due to the speed with which political development occurred, numerous ethnically based parties emerged in opposition to other ethnic parties, and once established, began to assume the structures and functions of Western-styled political parties, poised to engage Parliamentary democracy. In many countries, Salih (2005b: 10) points out, civilians politicians who inherited power soon began to ban existing political parties, except their own, and transformed their states into one-party systems in order to achieve goals similar to those pronounced by military leaders, including development and national integration. A good example is the Kenya's, Tanzania's, and Uganda's independence constitutions which embodied liberal democratic principles which included a prime ministerial and cabinet system and a dichotomy between the formal authority of the constitutional Head of State, and the real authority of the Head of Government, the Prime Minister and the leader of the majority party (Maxon, 2011; Salih, 2005b: 10). A series of constitutional amendments had reversed the system either under the one party system or dominant party systems into dual to unified executive in Tanzania and Kenya, that circumvented the principle of parliamentary supremacy and elevated the chief executive branch to a powerful dominant machinery of government (Salih, 2005b: 11).

Salih (2005b: 11-12) summarizes five observations that could be made on the role of parliaments under a one-party system: These are: one, parliaments were formed and expected to be loyal to the single and at times constitutional political party or military rulers and ensure that the laws and legislations put forward by government were rubberstamped. The absence of separation of power made the relationship between the legislature, the executive, and the judiciary so blurred that checks and balances and accountability are non-existent. Two, one party parliaments were considered all-purpose institutions, which indulge not only in enacting laws and legislation, but also decision-making, policy implementation, and justification of executive decisions. Three, legislative powers of parliament were under the scrutiny of the ruling party. Not only were the MPs not in fact true representatives of the electorates but were often carefully vetted by the Central committee of the ruling party before they were allowed to contest elections. Four, one-party parliaments were not only bound up with the executive in a manner that makes a mockery of the doctrine of the separation of power, they were used to

bestow legitimacy on the illegitimate and non-competitive political process. In this sense, the government was not accountable to a parliament freely elected by and responsive to the electorate's preferences and aspirations. And fifth, parliaments were the voice of the ruling elite and the oppressive regime they represented - not the expression of the peoples' preferences and aspirations.

With the disappearance of single-party systems, came the emergence of competitive politics or multiparty democracy, where African Parliaments gained some of the lost ground they lost during the period from the late 1960s to the early 1990s and have slowly begun to exert the new constitutional powers that have come with the transition away from dictatorships to multiparty politics (Ruszkowski & Draman, 2011: 9). According to (Salih, 2005b: 13), Parliaments started assuming more seriously the six generic roles of political governance; that is legislation, representation, oversight, recruitment, legitimacy and conflict management. According to Ruszkowski and Draman (2011: 9), many legislatures face serious challenges and this range from lack of formal powers and established clear procedures, many lack institutional capacity as well as incentives to encourage MPs and Parliamentary officers to exercise their responsibilities. The extent to which African Parliaments have been able to discharge these basic functions is contingent on several factors, not least the nature of the political environment within which they operate, the strength of the political institutions and civil society organizations, and the constitutional arrangements governing the relationship between legislature and executive (Salih, 2005b: 13).

## **2.4 Kenya's Quest for a constitution and Its Legislative Development - A Historical Perspective**

Since the end of the disputed election of 2007, Kenya's people and politicians alike have sought to bring into being a new constitutional order and it became one of the most important items agreed upon by the leaders who formed the national unity government in 2008<sup>3</sup>. However, it took the post-election violence of 2007 and its aftermath, to make a two decade search for a new constitution possible<sup>4</sup>. There had been dissatisfaction with the way in which valuable sections of the Independent Constitution were changed and power concentrated in the Presidency (Lumumba, 2008: 1) and the many political, social and economic problems

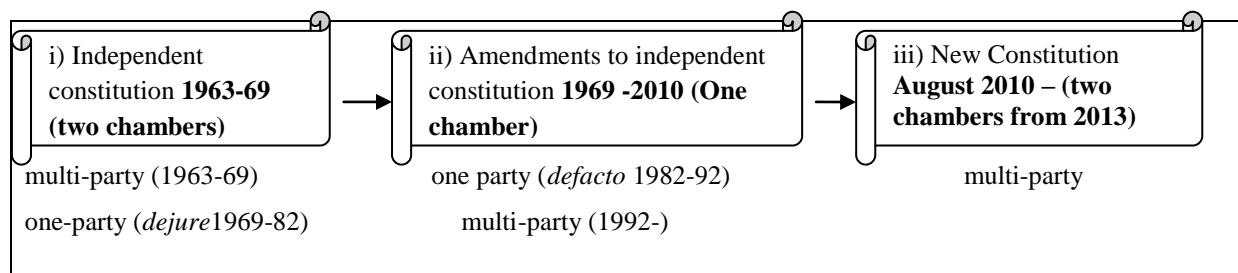
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<sup>3</sup> The unity government came about after the violence that occurred after the disputed polls and the subsequent negotiations led by Kofi Annan. See also page 7 on the National Accord and Reconciliation Act of 2008. A new Constitution was promulgated 2 years later on the 27<sup>th</sup> August 2010, as agreed in the Accord and after being endorsed in a referendum on the 4<sup>th</sup> July 2010.

<sup>4</sup> As had been variously pointed out, constitutional changes often happen after a crisis. The French constitution and the American constitutions were implemented after revolutions.

facing the country were attributed to the deficiencies in the Constitution<sup>5</sup>. The calls for reforms in the 1990s were motivated by the need to update and improve the constitution and were not a call for a radically new constitution (Lumumba, 2008: 1). Touted as a democratic constitution at independence, the constitution was dismantled over the years (Ghai & Ghai, 2011: 10) and the demands in the 1990s for a systematic review of the constitution were to review or abolish the amendments that caused concern. See figure 1. These were: one-party rule, detention without trial, removal of security of tenure for judges, the Attorney-General, the Auditor-general and the weakening of the principle separation of powers (Lumumba, 2008: 1). This section will highlight some of the changes and amendments that the independent constitution underwent through the years leading to the agitation for reforms and eventually the birth of a new constitution.

**Figure 1: Constitutional Phases**



## 2.5 The Independent Constitution (The 1963 Constitution)

The struggle for independence in Kenya stemmed from the desire to establish a democratic government after nearly half a century of authoritarian British colonial rule (Wanyande, Omosa, & Ludeki, 2007: 1). African majority rule or independence was expected to result in democratic governance and an improvement in the social and economic wellbeing of Africans, and the new governance regime was intended to produce two critical conditions – freedom and prosperity (Wanyande et al., 2007: 1). The independent Constitution was a negotiated constitution and distinguished itself from previous colonial constitutions which were external impositions (Ghai & Ghai, 2011: 7) and was a product of political, social, and economic context of late colonial Kenya, but it also particularly reflected the changing perceptions and goals associated with decolonization (Maxon, 2011: 7). African political leaders played a pivotal role in the process and the negotiation of the constitution was

<sup>5</sup> The constitution referred to here is the former constitution before Kenya got a new one in 2010.

between the leaders of the larger tribes and the smaller tribes, with significant European involvement, under the auspices of the British government<sup>6</sup> (Ghai & Ghai, 2011: 8).

On the contents of the 1963 constitution, there were many democratic features<sup>7</sup> and the post-colonial regime included newly created political institutions that are generally regarded to be the pillars of Western liberal democracy (Wanyande et al., 2007: 1). Some of these were: elective legislatures divided between two houses (one to represent regions), independent judiciaries, autonomous and trustworthy public bureaucracies, independent electoral bodies, executive power vested primarily in the cabinet headed by the prime minister but drawn from Parliament, among others. Each of these institutions would to some extent act as check on the other. The independence constitution, according to Ghai and Ghai (2011: 9), was intended to represent a departure from the colonial, executive dominated, and highly centralized system of government, without any guarantees of human rights. It is under this constitution that Jomo Kenyatta was elected as the first prime minister of Kenya.

## **2.6 Dismantling the Constitution**

The process of political representation was watered down through deliberate changes that the post-colonial Kenya African National Union (KANU) government introduced in the constitution, the electoral laws and in practice. See also section 3.7. On the first anniversary of independence, and in the following years, Kenyatta changed or removed most of the provisions of the constitution directed at democracy, power sharing and human rights (Ghai & Ghai, 2011: 10). Along with the amendments that his successor, Daniel Moi, made, the system of government reverted in effect to the colonial system - in what Katumanga and Omosa (2007: 65) refer as the “colonial state becoming alive” - with vast powers of the governor now in the President, with decreasing accountability of the government, and in practice exploiting ethnic distinctions (Ghai & Ghai, 2011: 10). Kenyatta transformed the system of government from Parliamentary to Presidential, through the Constitution of Kenya Amendment Act No 28 of 1964 (Katumanga & Omosa, 2007: 64), combining the offices and powers of the governor-general and prime minister in the President, creating a powerful new post, with effect also of weakening Parliament (Ghai & Ghai, 2011: 10). The powers of the new office were secured by the constitutional provision for immunity of the President against legal action while in office (Wanyande et al., 2007: 7). The senate was also abolished,

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<sup>6</sup> Robert M. Maxton (2011: 272) in studying the era of constitution-making found that in the evolution of the independence constitution, compromises among the elite owed little to it. All the constitutions of the period and the 1950s were in one way or another imposed by Britain.

<sup>7</sup> In looking at the constitution-making process during these years, Maxton (2011: 10) argues, it became clear that democracy was not a priority for many of those involved.

reducing checks on the administration and both the civil service and the police were brought under executive control. The desire for personal accumulation brought about the need to amend the constitution so as to entrench patrimonial rule, and the Constitution of Kenya Amendment Act No2 of 1968 provided for the succession of the President by the vice-President - thus reversing the 1964 Amendment Act No 28 which had given the House of Representatives powers to elect the President (Katumanga & Omosa, 2007: 67).

It is instructive to note that the dismantling of the democratic and accountability mechanisms generally continued under Moi<sup>8</sup> through constitutional amendments to maintain political power. The Constitutional amendment Act No 7 of 1982 introduced Section 2A that transformed Kenya into a *de jure* one-party state, followed closely by other amendments that removed the security of tenure of judges, the Controller and Auditor-General and the Attorney-General (Katumanga & Omosa, 2007: 69). Thus, with the independence of the courts of law undermined from extraneous influence, the judges were at the mercy of the President's discretionary powers to appoint and dismiss them at will (Wanyande et al., 2007: 7). As (Ghai & Ghai, 2011: 10) points out, many amendments under both Presidents were rushed through the legislature<sup>9</sup>; often all stages were disposed of in one day. The most notable of changes included a shift from multi-party to a single-party system and the transfer of supervision of elections from an independent body to the Provincial Administration that was tightly controlled and manipulated by the Kenyatta and Moi regimes during which electoral malpractice pervaded (Throup and Hornsby 1998 in Wanyande et al., 2007: 3).

The effect is that election results were rigged<sup>10</sup>, the demarcation of electoral boundaries favored the interests of the KANU regime, and the appointment of the 12 nominated MPs followed criteria other than incorporation of excluded interests (Wanyande et al., 2007: 3). One of the consequences of this is that the electoral system produced illegitimate representatives who are not the genuine preference of the electorate and who are unable to articulate adequately the interests of "their" constituents (Wanyande et al., 2007: 3). The net effect of the dismantling of the independence constitution and by practice is best summed up by Wanyande et al. (2007: 4):

"The failure of the Post-colonial KANU regime to manage public affairs in the interest of the citizens implies a corresponding failure of the established political instruments for government

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<sup>8</sup> According to Katumanga et al. (2007: 68), by the time Kenyatta passed away in August 1978, Kenya was firmly in the grip of the Lancaster generation leadership that was devoid of horizontal and vertical structures of accountability. These were the leaders that negotiated the independence constitution with the British.

<sup>9</sup> It should be noted here that the legislature at this point in time was already weak and generally worked at the behest of the president. It was what could be described as a rubberstamp legislature.

<sup>10</sup> For more detailed account, read Throup and Hornsby (1998)



control and accountability, notably free and fair elections. This was enhanced by the formulation of an electoral regime with important non-competitive characteristics such as the re-election of the President without opposition, the exclusion of dissenting candidates from the electoral process, a conveniently controlled judiciary aimed at checking election petitions against government-favoured candidates, and manipulated procedures of the National Assembly that undermined the capacity of the institution to control executive decisions and actions. Ultimately, the obligation for government accountability to citizens suffered.”

Some of the characteristics of the second, third and fourth decades of independence was that formal rules and procedures were replaced with Presidential decree, which undermined the institutional foundations of the economy and greatly compromised democratic values (Njeru & Njoka, 2007: 45). Thus, as Njeru and Njoka argue, the consolidation of autocratic rule elevated the institution of the presidency above all others that by the late 1990s, Kenya had reached the apex of authoritarian rule. However, from 1990 onwards, Moi’s personal rule began to receive multi-pronged assault as the campaign for reforms emerged, involving progressive politicians, civil society organizations, the media, foreign diplomats accredited to Kenya as well as multilateral financial institutions<sup>11</sup> (Njeru & Njoka, 2007: 45).

It was also the period that the winds of change started blowing across the globe in what is variously described by Huntington as the “Third Wave of Democracy”. According to (Throup & Hornsby, 1998: 54), four critical events ushered in the new era, provoking popular discontent and encouraging the regimes critics to speak out: these were the fall of communism in Eastern Europe and the ending of the Cold War; the regime’s blatant manipulation of the 1988 national and party elections; the murder of Foreign Minister Dr Robert Ouko in February 1990; and the withholding of Western Aid in November 1991 by the Paris Group of bilateral donors, who were dissatisfied with the slow pace of economic and political liberalization. Nevertheless, the legislature has always had highly experienced legislators in its ranks in every term. In *Kenya’s torturous path to successful legislative development*, (Barkan & Matiangi, 2009: 34) point out the existence within the legislature of a group of reformers, which together with members who support reform because it serves their individual self-interests, formed a “coalition for change” that has been effective at building the capacity of the national assembly to the point that it can perform the core functions that defines legislatures worldwide. Barkan and Matiangi (2009: 34) argue that even though it is harder to measure with precision, this “coalition of change” is probably the largest and most robust of its type in the continent that has also sustained both itself and the process of

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<sup>11</sup> The International Monetary Fund (IMF) and the World bank as well as other bilateral donors employ the governance paradigm to define economic and political prerequisites for foreign aid in Africa (Kanyinga 2007: 82) and the new paradigm began to influence the structure and institutional context of the state, the economy and politics.

legislative development over a period of more than a decade (i.e., over two or more legislative terms).

The constitutional amendments brought forward in Parliament in 1999, brought some changes towards strengthening the national assembly. These changes (introduced) strengthened the committee system, and made Parliament both financially and administratively independent. However, as Barkan and Matiangi (2009: 49) point out, the power relationship between the executive and the national assembly remained unchanged, particularly under the Eighth Parliament. Zambia's situation at this time was similar to Kenya, and as (Momba, 2005: 102) reflects, this dispensation that countries in transition experience the pains of political change, is even more imperative considering that the country emerged from a relatively authoritarian one-party system in which the functioning of the various arms of the state was obscured by the extensive powers of the party and the President. However, we can safely say that with each election, Parliament strength has been enhanced and it has become more emboldened to check executive high handedness. Democratic governance is on cause as tremendous strides have been made now that the country has a pure presidential system and the legislature has been given power to perform its functions undeterred.

## **2.7 The National Accord and Reconciliation Act No. 4 of 2008**

To be able to understand the data and analysis of this thesis - and the dynamics of the former and the new constitution - it is imperative to include the National Accord and reconciliation Act of 2008 and the parameters that were agreed upon. The Accord is an agreement between the two opposing sides in the 2007 presidential Elections in Kenya. These are the Party of national Unity (PNU) and Orange democratic Movement (ODM). The Accord came about as a result of the violence that erupted after the announcement of the election results that were disputed. Through the mediation of Kofi Annan (former secretary general of the United Nations), the two opposing sides, Party of National Unity (PNU) and Orange Democratic Movement (ODM) agreed on two resolutions to end the political crisis occasioned after the disputed elections of 2007<sup>12</sup>. The first resolution, called the Annotated Agenda was to deal with the immediate three short term goals and one long term goal. Of the long term goals and issues were, *inter alia*, undertaking constitutional, legal and institutional reform, among others. The second resolution was the Time Table. On the first resolution, the parties agreed

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<sup>12</sup> The Independent Review Commission (IREC) report found out that there was no clear winner in the disputed general election held on the 27<sup>th</sup> December 2007

that the short term goals, agenda items 1, 2 and 3 would be resolved within a period of 7 and 15 days from the date of the commencement of the Dialogue, while the long term goal, agenda item 4 would be resolved within a period of one year after the commencement of the Dialogue (launched 28 January 2008).

On the 20<sup>th</sup> of March, 2008 through a special issue, Kenya Gazette Supplement No. 20 (Acts No. 4), Parliament enacted the National Accord and Reconciliation Act to give effect to the Agreement on the Principles of Partnership of the Coalition Government. This Act was entrenched in the Constitution (former) in Section 15A, 41A, 41B, 41C and 47A and is also recognized in the new constitution. The Agreement was to foster national accord and reconciliation, to provide for the formation of a coalition Government and the establishment of the offices of Prime Minister, Deputy Prime Ministers and Ministers of the Government of Kenya, their functions and various matters. Section 8 of this Act provided that the “Act shall cease to apply upon dissolution of the Tenth Parliament, if the coalition is dissolved, or a new constitution is enacted, whichever is earlier”.

On the longer-term issues and solutions, parties to the Kenya National Dialogue and Reconciliation agreed on the need for the establishment of a constitutional review process in consultation with stakeholders in five stages. This included: An inclusive process initiated and completed within 8 weeks to establish a statutory Constitutional Review including a timetable. It was envisaged that the review process would be completed within 12 months from the initiation in Parliament; Parliament would enact a special ‘constitutional referendum law’ which would establish the powers and enactment processes for approval by the people in the referendum; the statutory process would provide for the preparation of a comprehensive draft by stakeholders and with the assistance of expert advisers; Parliament would consider and approve the resulting proposals for a new constitution and; the new constitution would be put to the people for their consideration and enactment in a referendum.

All these five requirements were followed. Section 12 of the Sixth Schedule of the New Constitution temporarily constitutionalizes the National Accord and Reconciliation Act. Under the National Accord, the Standing Orders of the House were also repealed and changed to conform to the new reality. In effect, the Accord, while fixing a political crisis, gave Parliament under the former constitution more powers and with the new changes, Parliament adopted new Standing adopted on 10<sup>th</sup> December 2008. The other effect is that with a new constitution, Parliament’s powers were further enhanced. This will be discussed in chapter five and six.

## 2.8 The New Constitution

On the 4<sup>th</sup> of August 2010, Kenyan voters went to the polls to decide whether to adopt the new constitution and 66.91 percent voted in favor of adopting. The President officially promulgated the new constitution on the 27<sup>th</sup> of August 2010. With the new constitution in place, bringing about sweeping changes in the governance of the country, the biggest challenge is its implementation. The new constitution introduces a new devolved structure of governance and a new system of public finance, expands the Bill of Rights among other changes. What the new constitution has done is that it has laid out guidelines around which these changes are to be affected and imposes to Parliament the huge task of enacting legislation to bring about these expected changes in the law. It also empowers the citizens to take the legislators to court if the said laws are not enacted within the period the constitution prescribes<sup>13</sup>.

Time is treated to be of critical importance in the implementation timetable and Chapter 18 compels Parliament to enact the legislation required within the timelines set out in Schedule 5 (see Appendix). Parliament may extend the timeframes stipulated by passing a vote supported by at least two thirds of the MPs for a period not exceeding one year and this power to extend can only be exercised in circumstances certified to be exceptional by the Speaker of the National Assembly. To enforce the timeframes, the constitution creates a mechanism with the aim that all the necessary laws will be tabled and passed in a timely<sup>14</sup> manner. The Sixth Schedule of the new constitution creates two institutions to guide and drive the process of implementation. These are the Constitutional Implementation Oversight Committee (CIOOC) and the Commission for the Implementation of the Constitution (CIC). The CIOOC is composed of MPs and is responsible for general oversight over implementation schedule and ensures that the laws necessary are passed on time. The CIC on the other hand is a nine member independent body composed of persons with experience in public administration, human rights and government and has the responsibility of facilitating the development of legislative and administrative procedures necessary to implement the new constitution. The Commissions' mandate would expire five years after it has been established

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<sup>13</sup> This law was put in place by the drafters of the constitution intentionally as a check on politicians who could not be trusted to implement the constitution unchecked. There are many examples of politicians stalling the process in the 2 decades search for a new constitution. In such a situation, the High Court may issue an order directing Parliament and the Attorney general to take steps to ensure that the laws are enacted within a specified time frame. A third step applies if parliament still fails to enact a law within the timeframe given by the court order. In such a scenario, the Chief Justice "shall advise the President to dissolve Parliament and the President shall dissolve Parliament." If a new parliament has been elected and assumed office, it will be required to pass the outstanding legislation within the timeframes laid out in the Fifth Schedule.

<sup>14</sup> The legislators have been forced to extend sitting time into the night to be able to work on the laws and to be able to beat the deadlines.

or if earlier, the time which the full implementation of the new constitution shall be deemed by Parliament to have occurred.

Some provisions in the new constitution are suspended and will only come into effect when the country holds its first general elections under the new constitution in March 2013. These provisions are: Chapter 7 (on the electoral system and process), Chapter 8 (on the legislature) and Articles 129 to 155 of Chapter 9 (on the role and functions of the executive including the Office of the President, deputy Presidents and the composition of the Executive). The other provisions is on the devolved government which governs the transfer of power from the central government to the devolved government, shall take effect once the country holds its first elections for the county assemblies and governors. This means that there are some provisions of the former constitution that are still in operation and run concurrently with the new until the full implementation of the new constitution. Another notable thing after the constitution became effective, is that it demanded the removal and appointment of new heads of specific institutions within a time frame and the previous holders were not required to vie for those posts. Some of these are the positions of Chief Justice, Attorney-General and the Head of Police. The heads of these institutions were deemed to be of the old order and might use their offices to stall the implementation process. A thorough comparison of the two constitutions is discussed in the data and analysis chapter.

## **2.9 Kenyan Parliament in Previous Research**

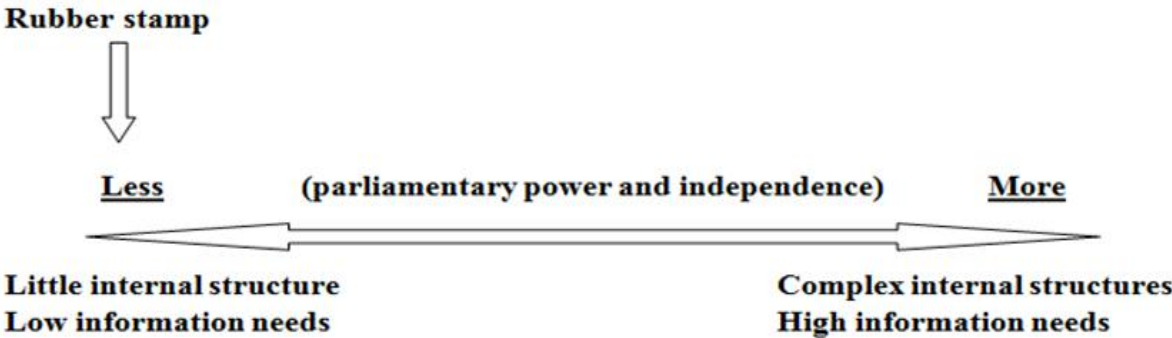
The present Parliament is the Tenth elected Parliament in Kenya since the attainment of Independence in 1963 and also the third Parliament since the return of multiparty political dispensation in 1991 (Ruszkowski & Draman, 2011: 82). There are different forms of legislatures according to leading scholars. These vary from rubberstamp legislatures, emerging legislatures, to transformative legislatures (see figure 1, 2 and 3). Kenya's legislature had since transformed from being a rubberstamp legislature to an emerging legislature under the former constitution (Barkan & Matiangi, 2009).

Has Kenya's legislature transformed past an emerging legislature and evolving towards the next phase of being a transformative legislature? This thesis contends that it has evolved. According to Barkan and Matiangi (2009: 33), Kenya's Parliament is arguably one of the two most significant national legislatures on the African continent. (Barkan & Matiangi, 2009: 33) point out that it is the most independent in terms of degree of formal and real autonomy it enjoys from the executive branch, and also the most active legislature in Africa with respect to the deliberation and amendment of legislation. However, the title of

their analysis speaks volumes about the Kenyan Parliament. It is titled “Kenya’s Torturous Path to Successful Legislative Development”. As can be seen from section 2.3 to 2.5 of this chapter, this statement is indeed true. Most of the real reforms in the legislature started in the final years of the 1990s, that is, under the term of the Eighth Parliament (1998-2002) – the second Parliament after the reintroduction of multi-party politics in 1992. Before multipartism, backbenchers were the unofficial opposition in Parliament and the introduction of multipartism brought in other parties to Parliament who took the role of the opposition.

In its pursuit to seek answer to the research question, this thesis categorizes the Kenyan Parliament with regard to its level of independence, the extent to which it exercises power relative to the executive, its specified powers and its institutional capacity. The period after the first Amendments to the constitution (that changed the system of government from Parliamentary to Presidential in 1964), to the period after the second multiparty elections in 1998, I refer to the Kenyan legislature as a rubber stamp legislature as shown in figure 1 below. This is similar to Polsby’s (1975 in Norton, 1990b: 127) identity of legislative forms - that where the system is closed and specialized, legislatures are of the rubberstamping variety. The Kenyan Parliament did not have the relative autonomy that it enjoyed by the legislature vis-à-vis the executive that it did at the dawn of independence. According to Johnson (2005: 4) it is possible to think of parliamentary power as moving along a continuum from little independence and power to very influential and active legislatures. The simplest of them, that he refers to as rubber stamp legislatures, simply endorse decisions made elsewhere in the political system, usually by parties or by the executive branch. In the Kenyan case during these decades, and the various amendments that were done on the constitution, Parliament simply endorsed everything the executive wanted. During these periods, the legislature had little internal structure including the employment of administrative staff and salaries which were handled by the executive.

**Figure 2: Rubber Stamp Legislatures**

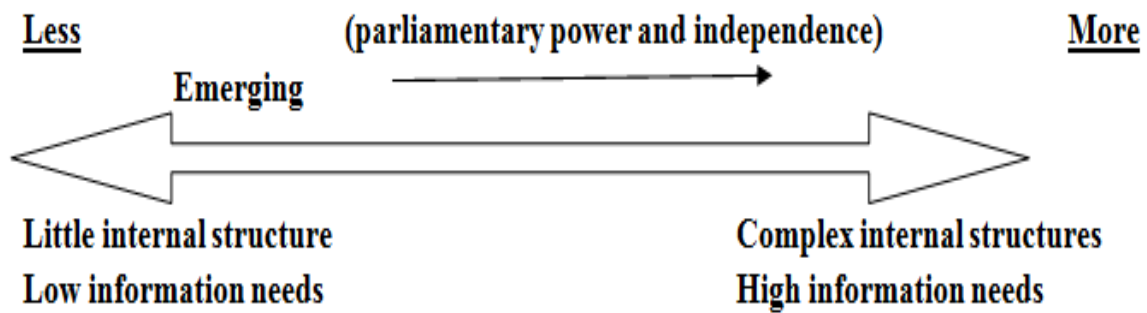


**Source: Johnson (2005: 4)**

Consistent with the experience elsewhere in Africa, the process of legislative development in Kenya did not gain traction until after the country's second multiparty election in 1997 (Barkan & Matiangi, 2009: 34). The period after the enactment of the Constitution of Kenya (Amendment) Act of November 11, 1999, passed on November 17 and accented by President Moi two days later, and the enactment of the Parliamentary Service Act one year later, in November 28, 2000, facilitated the creation of Parliamentary Service. The amendments made Kenya's National Assembly both financially and administratively autonomous from the executive. It is also the period Barkan and Matiangi (2009: 41) refer to as the period of the emergence of "coalition for change" – mostly younger members of opposition parties, who slowly realized that the operations of the assembly were unlikely to change until they seized the initiative to force needed reforms.

This leads us to the other type of legislature called the *emerging legislatures* - which are legislatures in the process of changing from one type to another (Johnson, 2005: 5). According to Johnson, several legislatures in Africa are exercising greater influence over government policies and could be classified as emerging legislatures. Expanding their powers, Johnson (2005: 5) notes, usually requires major legislative changes, among them amending rules and procedures, building stronger committees, expanding professional staff, developed improved information systems, and others (Johnson, 2005: 5). He classifies Kenya's and Uganda's Parliament and Mexico's congress in this category (see figure 2 below). It should be noted that this analysis by Johnson was undertaken in 2005, 7 years ago, during which Kenya's Parliament has undergone several transformations, including the enactment of a new constitution.

**Figure 3: Emerging Legislatures**

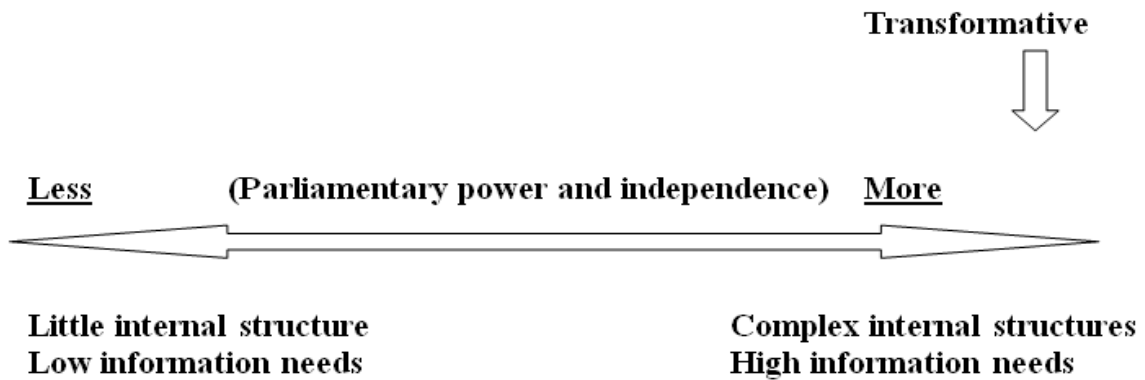


Source: Johnson (2005: 6)

The new constitution promulgated in 2010 has transformed governance structure in Kenya and redistributed power radically to several institutions including expanding the existing powers of Parliament (see the chapter 5). The Kenyan Parliament is without doubt moving, or has moved to the least common type of legislature – *transformative legislatures* as shown on figure 3. This will be understood better as we analyze Parliament under the former constitution (1963-2010) and the new constitution promulgated in August 2010 in the chapter 6. With the powers to shape budget and policies under the new constitution, and even to initiate policies on its own, these Parliaments, according to Johnson (2005: 5) are the most expensive, have highly complex internal structures (including strong committee systems, great information needs, and depend heavily on highly trained professional staff). The evolving of Kenya’s legislature under the new constitution has fundamentally changed these power relations and transformed Parliament into a powerful institution. Whether it will be more effective will remain to be seen. Fish (2006: 5-20) argue; parliamentary effectiveness cannot be satisfactorily treated without confronting issues of power.



**Figure 4: Transformative Legislatures**



**Source: Johnson (2005: 6)**

With powerful committee system, sophisticated information needs and extremely autonomous, the Kenyan Parliament is now at the transformative stage and this will be enhance so long as reforms in the other institutions as mandated by the new constitution. Peaceful upcoming elections will see a purely transformed legislature as envisaged in the constitution.

## **3.0 Theory**

This chapter discusses the three concepts interwoven together in this thesis. These are constitution, accountability – both horizontal and vertical - and legislatures. Every club, party, institution, and country is governed by a set of rules or what we variously call constitutions. And for all these to transact business efficiently through the rules and guidelines as outlined in the constitution, then all and sundry must adhere to accountability for their actions. In our case, the study of Kenyan Parliament especially its role vis-à-vis the executive, the component of accountability becomes crucial and it is one crucial component in democracy. The chapter starts with constitutions and their importance, this is closely followed by a discussion of accountability and it wraps up with a discussion of legislatures.

### **3.1.0 Constitutions**

“The aim of every political constitution is, or ought to be, first to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue, the common good of the society; and in the next place, to take the most effectual precautions for keeping them virtuous while they continue to hold their public trust”

James Madison, Federalist no. 57

According to Johnson (2005: 1), modern democracies are characterized by the shared decision making by the legislative and executive branches and it is a country’s constitution that formally structures this interaction. Johnson (ibid) points out that practicality, precedent and habit then fill in the gaps to create the political system under which a government operates on a daily basis. In most countries after a new government has been elected or the old one re-elected, it is by no accident then, that state officials, whether in the executive, judiciary, or the legislature, or in other independent constitutional offices are mandated to take an oath as prescribed in the constitution of that country. The allegiance is often to the effect that the incoming leaders will be faithful, bear true allegiance, obey, preserve, protect and defend the constitution and other laws. The following section will shed light on why constitutions are so special and important.

### **3.1.1 Constitutionalism in the Third World and Africa in Particular**

According to Lane (1996: 75), decolonisation in Asia and Africa during the period from 1945 to 1965 had profound consequences in that formally democratic constitutions were written and enacted. However, few were really implemented but rather quickly became camouflage constitutions for dictatorships. On the African continent there has been lots of constitution making, but the basic problem is that constitutions generally do not last very long. Actually hardly any of the constitutions introduced when the African states became independent have

survived. For example, the former Kenyan constitution was amended so many times it was hardly recognizable from the one at independence. See also section 2.5 on the dismantling of the Kenyan constitution. Constitutional development has been disrupted, to say the least in all but a few countries such as Botswana and Mauritius (Lane, 1996: 77). Lane points out that the first constitutions put in place when the European powers left were heavily influenced by colonial heritage. However, only a few years after independence these English or French inspired constitutions had been either remodelled or suspended. In some countries dictatorship constituted the real regime while the camouflage constitution had remnants of democratic features. In other countries, authoritarian constitutions were introduced (Lane, 1996: 77). Lane notes that a large number of constitutions have been enacted suspended and omitted. When the first constitutions of the independent African countries were drawn up, there was an attempt to create a constitutional legacy in relation to the constitutional practice of the country to which the newly independent state had been a colony. After a rather short period, however, such constitutions were revised to reflect other constitutional images (Lane, 1996: 78).

### **3.1.2 Constitutional Perspective**

Lane (1996: 5) argues that the word ‘constitution’ is ambiguous and has two senses which are most often mixed up: ‘constitution’ meaning either a compact written document, comprising paragraphs with rules for the governance of the State, or ‘constitution’ standing for the regime, i.e. the real institutions in terms of which the State is actually operated. This chapter will dwell mainly with the formal constitution, that is, the written constitution, while the substantive constitution (which deals with studying the regime and how it is run) is briefly discussed in relation to collection of data in chapter five and the analysis of data in chapter six.

DeSmith and Brazier (1989 in Shane, 2006: 191), point out that constitutions, written or unwritten, are set of rules, practices and customs that polities regard as their fundamental law. According to Lane (1996:7), a constitution as a single written document is regarded as a legal document because it makes up the bulk of the constitutional law in a country. Lane contends however, that a state’s constitutional law comprises more than the written constitution and that besides the written constitution, what is decisive for constitutional practice is an open question, the answer to which depends upon the country studied (Lane, 1996: 7). On the other hand, Rosenfeld (1994 in Shane, 2006: 191) points out that, in modern form, constitutions typically aspire to constrain government power, assure adherence to the rule of law, and protect individual rights. Lane (1996) concurs with this description of

constitution but hastens to point out that whether the rules state activities are supposed to follow are obeyed or implemented is another question altogether (Lane 1996: 5)<sup>15</sup>. According to Shane (2006: 192), the primary human activity through which constitutions are translated into operational authorizations or constraints is *interpretation*. The role of interpretation of the constitution is generally left to the judiciary, which has to be active and independent in its duty.

### 3.1.3 Constitutionalism

To have a better understanding of the political role of constitutions, it is necessary to have an understanding of constitutionalism, better known as constitutional rule or culture. According to Hague and Harrop (2004: 209), constitutional rule is a combination of habits, practices and values which underpin government by law and refers to a political environment in which the equal rights of individuals are not just stated but also respected and that these rights can be defended through the courts, thus converting a dusty document into a political reality. Equally, Hague and Harrop (2004: 209-210) maintain that the mere possession of a written constitution does not guarantee constitutional rule as parchments depend on people for their implementation, insisting that when constitutionalism is absent, a constitution becomes a mere parchment. Lane (1996: 42) agrees with Hague and Harrop and adds that democratic regimes tend to adhere to the doctrine of constitutionalism, that is, the idea that there shall exist institutions that constrain the exercise of state power.

According to Lane (1996: 42), even though a constitutional state has a constitution that really constrains the exercise of political power and protects citizens' rights, such a State, need not be a democracy. The constitution would contain the most fundamental rules that structure and restrain state power (Lane, 1996: 43). Lane (1996:50) affirms that 'constitutionalism' stands for an approach to the State that underlines the importance of institutions for limiting State power. According to Lane (1996:50), the restrictions on the capacity of the State to act and employ force derived from a rule of law framework lie at the heart of constitutionalism and it involves a requirement for the following State features: (a) procedural stability; (b) accountability; (c) representation; (d) division of power; (e) openness and disclosure. Colomer (2006: 217) distinguishes two categories of constitutional rules: one, those "to regulate the allocation of functions of government", and; two, those to "define the relationships between these branches and the public", which in democracy are based on elections (Finer 1988 in Colomer, 2006). According to Colomer (2006-221), the first set of

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<sup>15</sup> See more on this on in the accountability part of this chapter.

rules regulates the division of powers among different institutions, while the second set of rules regulates the relationships between citizens and public officers by means of election, in what I can refer to as a form of vertical accountability (own emphasis).

### 3.1.4 Constitutions as a Basis for Governance

Akech (2010) points out four things constitution do as a basis of governance: First, a constitution can facilitate the attainment of a just society – especially in ethically polarized polities – by establishing equality of membership and citizenship for all ethnic groups and individuals that make up the polity: Secondly, a constitution can aid the attainment of a just society by outlining the principles and mechanisms for establishing the truth in relation to past events, including violations of human rights and economic crimes, thereby advancing the interests of victims: Thirdly, a constitution can also establish a framework for the protection of property rights in a manner that does not entrench past inequalities, injustices, and fraud; Finally, a constitution can establish principles and mechanisms that enable the citizenry to hold government accountable daily.

It is often stated that in the present constitutional setting, there are two basic alternatives when new constitutions are to be enacted or old ones reformulated. These are the presidential model and the parliamentary model whilst a third model is the British constitution model of unwritten and less visible (but more and more influential as it spreads Parliamentarism<sup>16</sup>). Shugart (2006: 344) contends that in constitution writing, these two regime types, that is, presidential and parliamentary systems, differ fundamentally through how they structure the relations of the executive to the legislative branch in either a *hierarchical* or a *transactional* fashion. See figure 5 on these relations. Kenya's constitution at independence was hierarchical while the new constitution is transactional. In a hierarchy, one institution derives its authority from another institution, whereas in a transaction, two (or more) institutions derive their authority independently of one another. Shugart contends that the distinction between hierarchies and transactions is critical, because in a democracy, by definition, the legislative power (or at least the most important part of it) is popularly elected. Where parliamentary and presidential systems differ is in how executive power is constituted, either subordinated to the legislative assembly, which may thus terminate its authority (parliamentary democracy), or else itself elected and thus separated from the authority of the assembly (presidential democracy) (Shugart, 2006: 344). The figure below shows the

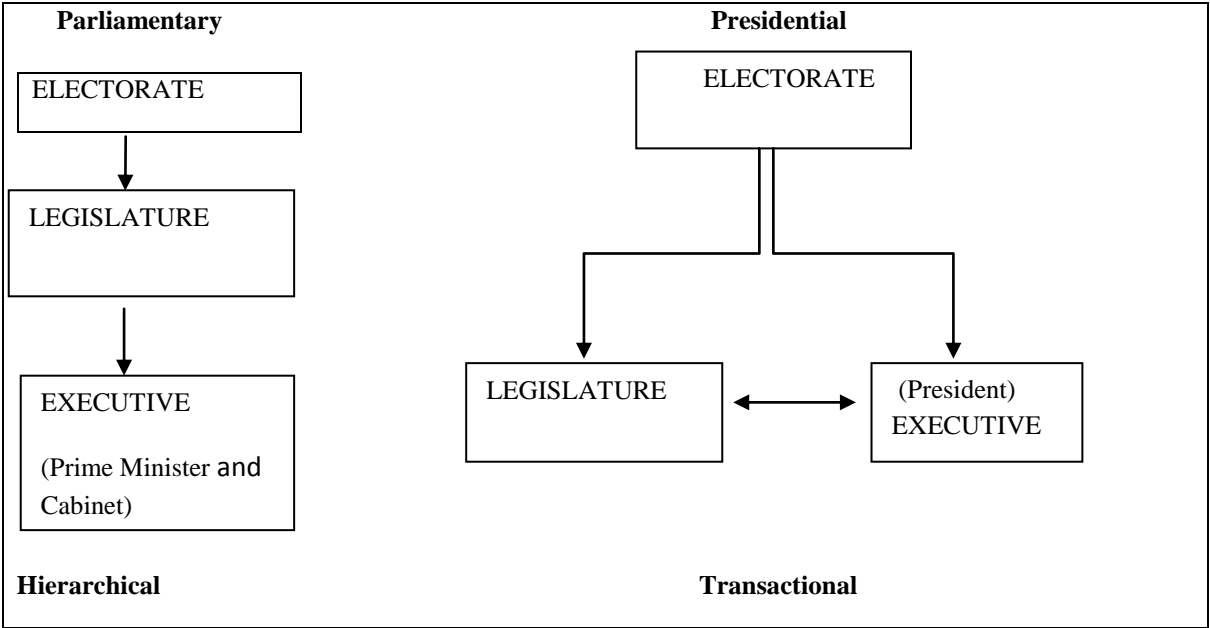
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<sup>16</sup> For a more detailed analysis of these models and their brief histories, see: Lane (1996: 64-69).

relationship that exists between the electorate, the legislature and the executive in both parliamentary system and in a presidential system<sup>17</sup>.

According to Olson (1994: 76), from these two very different constitutional designs flows an important difference; the two sets of offices in a dual-branch structure are occupied by different persons, while in a parliamentary or unitary system they are occupied by the same persons. This means that in a parliamentary system, one can be both in the executive (as a cabinet minister) and in the legislature as a member of parliament. This is the way it is for Kenya under the former constitution. On another front, Shugart (2006: 349) points out that there are numerous regimes that contain elements of both presidential and parliamentary, and are thus hybrids and the most common form of a hybrid is the *semi-presidential* government. According to (Fish, 2009: 197) Fish and Kroenig 2009: 2), such categories, however useful they may be, do not tell us necessarily where power really resides, which may matter most for real life politics and government.

**Figure 5: Basic Hierarchical and Transactional Form of Executive Legislative Relations**



Source: Shugart (2006: 347)

<sup>17</sup> Olson (1994: 75) has a slightly different adjustment to this model. He refers to the presidential model as the presidential-congressional system, whereby instead of a legislature, he has the congress. The functions are more or less the same.

### 3.1.5 Executive – Legislative Relations

Laver (2002: 201) points out that the linkage between the executive and the legislature in every modern regime relies fundamentally upon institutional linkages between a legislature, charged with representing the will of the people in the process of making laws of the land, and an executive, charged with implementing these laws. A key distinction between types of democratic regimes concerns the sources from which these two branches of the government system derive their legitimacy and hence their right to be respected and obeyed by the public at large, even when particular decisions they make are unpopular.

One model can be found in European-style “parliamentary government”. In this model both legislature and executive share the same source of legitimacy – the periodic free elections of public representatives to a legislature which in turn makes and breaks the executive, in what O'Donnell (1999) calls vertical accountability. The executive in a parliamentary government system has no independent source of legitimacy, being indirectly responsible to the electorate via a representative legislature. An alternative model can be found in the U.S – style “presidential government.” In this model both legislature and the executive, each with significant overlapping powers (horizontal accountability), have independent sources of legitimacy - periodic free elections both to the legislature and to the position of chief executive (Laver, 2002: 201)<sup>18</sup>. Kenya has adopted such a system in the new constitution.

### 3.1.6 Amendments

As discussed earlier, rubberstamp legislatures under one-party states or in dominant party states in African legislatures, made amendments to the constitutions primarily to strengthen the hand of the executive (president) and in the process weakening their powers and that of other institutions (Kenya is a good example). Not all African legislatures, according to Salih (2005b: 14) succumbed to the whim of leaders who treated the constitution with contempt or strived to prolong their term of office at any expense (for example Chiluba of Zambia, Mugabe of Zimbabwe, among others). African legislatures responded in a variety of ways, ranging from taking severely dividing partisan positions such as supported constitutional amendments in conformity with the personal ambitions of their political party leaders or

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<sup>18</sup> I have chosen both the British and American methodology for two reasons: First, Kenyan institutions and laws are for the most part adapted from the British and Commonwealth traditions and this is mostly with regards to the Independent constitution; secondly, as regards the new Kenya constitution, American methodology applies because Kenya has adapted an American style presidency and a judicial system.

resisted in defending the constitution (Salih, 2005b: 14). Amendments to the constitution are necessary as constitutions are meant to be dynamic and able to change with the time. In that respect, Salih (2005b: 14) notes, the constitutional amendments that brought about competitive multi-party politics cannot be underestimated, because constitutional amendments made it possible for people to assume their democratic rights that were denied by the one-party states and military or civilian dictatorships.

According to Shane (2006), constitutions explicitly specifies processes for its amendment, the legitimacy of constitutional change effected through other means is open to question. Lane (1996: 114) concurs that written constitutions lay down a specific process for the change of the constitution, the more specific the rules the greater the incidence of constitutional inertia. If constitutional law is considered as a special kind of law, then the constitution will contain rules that require a special decision process for amending the constitution. This is the case for the new constitution in Kenya. It has some special provisions for altering some sections of the constitution. See item 19 in chapter 5. According to Hague and Harrop (2004: 211), procedures for amendment are important components of the constitutional architecture and they contend that most constitutions are rigid (containing a special amendment procedure), thus rendering them more acceptable to the various interests involved in their construction. Lane (1996: 114-117) names six types of institutions guaranteeing constitutional inertia as: (a) no change; (b) referendum; (c) delay; (d) confirmation by a second decision; (e) qualified majorities and (f) confirmation by a sub-national government<sup>19</sup>. A constitution could lay down certain articles that it may consider unalterable (Lane 1996: 114). On the same point, Lane further points out that constitutional rules should only be changed by means of a special procedure that is different from the one used to change the statute law and, more importantly, constitutions should be protected by means of a special court, that is, a constitutional court (Lane 1996: 171).

### **3.1.7 State and Constitution**

Lane (1996: 170) points out two things to look for in the relationship between the constitution and the State: First, we must remember that several States lack a true constitution, that is, a system of rules that in reality limit the power of the State and provide for separation of powers either functionally – executive, legislative and judicial functions – or territorially – decentralisation, regionalisation or in the form of a federation. Most States have a

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<sup>19</sup> For a further analysis of these six types and examples, see Lane (1996: 114-117). At least 3 of them are named in the New Kenyan constitution (a, b, and e). There is also a provision that where there is a pecuniary interest by the legislators in the amendment, it is to be implemented in the next parliament.



constitution, but some of them are either left-wing or right-wing dictatorships, in which often the formally written constitutional document does not correspond to the real constitutional practice. Secondly, that few democratic countries operate without a written constitution. This indicates that the existence of strong institutionalized constitutional practices is necessary for democratic stability and vitality (Lane 1996: 170). Prominent examples are United Kingdom and Israel. Lane (1996: 178-179) argues strongly that a constitution is necessary because it offers the rules in terms of which the State itself is institutionalised. Thus, he argues, any society needs institutions that only the State can uphold in the long run. A constitution is further necessary to regulate the State due to the principal – agent problems that arise in the State. Lane adds that the principal-agent model highlights basic governance problems that exist in any State such as how the population, the citizens in a country, to instruct the rulers of the State about what their interests are and how they are to be protected. Furthermore, how are the rulers of the State to instruct and monitor the organisations of the State so that policies may be implemented? The answer is the constitution, or a set of special institutions that regulate their principal-agent relationships (Lane 1996: 179). Lane (1996: 180) sums up the constitution thus:

“The constitution is a broad long-term contract between those ruled and the rulers that specify the conditions on which the agents may exercise power in order to enhance the interests of the principal. The rules of the constitution identify what the common objectives of the principal and the agent are, what activities the agents may never undertake, how policies are to be enacted and implemented by the principal and the agent, and how conflicts about the interpretation of the constitution are to be resolved.”

This briefly translated, mean that the primary goal of a constitution, in recognizing the overlapping powers of multiple authorities, is to restrain or limit the exercise of government power (be it the legislature, judiciary or executive) by allowing each branch to “check” and “balance” the initiative of the other two branches. Lane (1996:180) notes that just as institutions constitute restrictions on human behaviour, so constitutions put up restrictions on the behaviour of the rulers as they frame and implement them. Whether a constitution really binds or the extent to which it is truly effective depends upon the State and its commitment to the institutionalization of the constitution (Lane 1996: 180). The issue of commitments to the institutionalization is another issue that those in power, especially a powerful presidency in the one-party states in Africa, abuse as they do not respect institutions. It also shows the importance of accountability.

### 3.2 Accountability

Kanyinga (2012), in an opinion piece in the Kenyan newspaper *The Daily Nation*, writes about the period preceding 2007 elections, whereby, the law was applied in a manner that discriminated those outside of the centre and political power was exercised in a manner that was exclusive while ethnic considerations governed the making of decisions by leaders both in the opposition and government. In sum, Kanyinga points out, politicians behaved badly and leaders deepened the culture of impunity by breaking the law without retribution and in the end, narrow interests destabilized the country and violence threatened the existence of Kenya (Kanyinga, 2012).

Kenya's political leadership, as in many other countries in sub-Saharan Africa, suffers from the same fate of accountability, whereby leaders do not respect the rule of law and the executive is not accountable to anyone. As mentioned earlier, a powerful parliament plays a significant role in holding the executive arm of government accountable in the tripartite role of check and balances. According to Salih (2005a: 258), parliamentary accountability is at the heart of political governance, emphasizing the rule of law, accountability, transparency and oversight. Salih (2005a: 258) notes, that it is the instrument through which the legislature's role in holding government accountable to the representatives of the governed is discharged leading to greater efficiency in government performance and service delivery. The focus of this thesis is on the post-1990s Kenya Parliament that has gradually transformed from a rubberstamp Parliament in the mid-1960s to a transformative Parliament to date. In this section I seek to analyse why accountability as a concept is important.

Pastor (1999: 123) points out that the essence of democratic government is accountability, and it has two dimensions: (1) people must have the unfettered right to elect their leaders (vertical accountability) and, (2) institutions of government must not encroach on the legitimate areas of responsibility of other institutions (horizontal accountability). Each axis poses a different democratic challenge<sup>20</sup>. The vertical, transition challenge is to hold elections that are viewed as free, fair and acceptable by the majority political parties. The horizontal, consolidation challenge is to construct barriers or deterrents to encroachments between the key institutions of governance. The impartial and credible conduct of elections is the point that connects the two axes.

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<sup>20</sup> Pastor (1999: 124) adds that with greater awareness and a deliberate strategy, the international community could do much more to facilitate and solidify democratic transitions, prevent the destabilization of democracy, and restore democracy when one institution in a country intrudes on another. This would constitute a third dimension of accountability: enhancing vertical accountability by making sure elections are successful and strengthening horizontal axis by calling encroaching institutions to account for their actions.

According to Schedler (1999: 14), one encyclopaedic definition tells us that accountability is "the ability to ensure that officials in government are answerable for their actions". This entails subjecting power to the threat of sanctions; obliging it to be exercised in transparent ways; and forcing it to justify its acts (Schedler, 1999:14). Sklar (1999: 53), on the other hand, sees accountability as an elusive conception which implies the right of people who are affected by a decision to receive an explanation of what has been done and to render judgment on the conduct of those who were found for doing it. These two scholars agree on the concept of accountability but Sklar does not include the threat of sanction as a means of deterrence from breaking the law.

Schedler (1999: 14-15) contends that there are two essential connotations to the concept of political accountability that is, answerability and enforcement and defines answerability as "the obligation of public officials to inform about and explain what they are doing" which "involves the element of monitoring and oversight". In principle, Schedler argues, accounting agencies may ask accountable actors for two things: to inform about their decisions by providing reliable facts and to explain their decisions by giving valid reasons (Schedler, 1999: 14-15). In addition to answerability in political accountability, there is the element of enforcement. According to Schedler, enforcement implies the idea that not only accounting officers "call into question" but also "eventually punish" improper behaviour and, accordingly, that accountable persons not only tell what they have done and why, but bear the consequences for it, including eventual sanctions (Schedler, 1999: 15). Citizens "punish" leaders through the ballot or through recall if their constitutions allow. But the elections must be free and fair and the results acceptable to all for the element of enforcement to have true meaning. Schedler (1999: 16) points out that, whereas academic writers are emphatic in stating that the capacity to punish forms an integral part of political accountability, political actors too, usually have a keen sense for the vital importance of effective enforcement mechanisms that will enable agencies of accountability to act forcefully. This could be the Standing Committees of Parliament like the Parliamentary Oversight Committees, or the Auditor General, the courts, and even the media.

In addition to identifying answerability and enforcement as different connotations of accountability, Schedler (1999) identifies two major forms of accountability and refers to them as vertical and horizontal accountability. On the one hand, vertical accountability describes a relationship between unequals; whereby some powerful "superior" actor holds some less powerful "inferior" actor accountable or vice versa (Schedler, 1999:23). Sklar (1999: 53) simplifies vertical accountability, as "the right of persons who are affected by the

actions or decisions of officeholders or leaders to renew, rescind, or revise the mandates of those who exercise authority”. O’Donnell (1999: 29-30), points out electoral dimension of vertical accountability, whereby citizens can punish or reward incumbents by voting for or against them, or the candidates they endorse, in the next elections. O’Donnell contends that while elections are the main facet of vertical accountability:

“the impact of social demands and of the media insofar as they denounce and/or demand restitution and punishment for alleged wrongdoings on the part of public authorities, depends to a large extent on the actions that properly authorized state agencies may undertake in order to investigate and eventually sanction the wrongdoings” (O’Donnell, 1999: 30).

This means that those entrusted with power must use it wisely and should they deviate, then the people who put them there have the capacity to remove or punish them for wrongdoings. Vertical accountability can also be a normal exercise of power whereby high-ranking public officials (“principals”) try to control their low-ranking subordinates (“agents”) (Schedler, 1999:23).

On the other hand, horizontal accountability concerns a relationship between equals on a level playing field whereby someone holds someone else of equal power accountable, and in democracies this happens through the separation of power between the executive, the judiciary and the legislature (Schedler, 1999: 23). Sklar (1999: 53) call it the obligation of officeholders to answer for their actions to one another. O’Donnell’s definition is broad and contends that horizontal accountability:

“is the existence of state agencies that are legally enabled and empowered, and factually willing and able, to take actions that span from the routine oversight to criminal sanctions or impeachment in relation to actions or omissions by other agents or agencies of the state that may be qualified as unlawful” (O’Donnell, 1999: 38).

These three meanings, in my view, are similar and simply translated mean that the three arms of government (executive, judiciary and legislature) are not necessarily equal in power, but at least have a slice of power which others need in order to function. Each institution has some veto power over the others and is able to enforce a system of checks and balances on one another. This means that Parliament can hold the Executive accountable for its actions, the Judiciary can hold Parliament accountable, and vice versa. These actors are essentially equal and answerable for their actions and have among others, the capability for enforcement through the use of veto, impeachment, overruling and dissolution.

O’Donnell (1999: 39) recognizes that if agencies are to be effective, they rarely operate in isolation as they can shake public opinion with their proceedings and that their effectiveness depends on decisions by courts, or eventually by legislatures willing to consider impeachment, especially in cases that involve highly placed officials. O’Donnell (1999: 41)

further points out that there are two main directions in which horizontal accountability can be violated; one consists of the unlawful encroachment by one state agency upon the proper authority of the other while the second consists of unlawful advantages that public officials obtain for themselves and/or their associates. This relates to a situation where a powerful executive controls the legislature and the judiciary. For this to truly function, each of the three arms must be independent from the other. In the past in Kenya, the judiciary and the legislature were controlled by a powerful presidency.

O'Donnell (1999: 43) comes up with several suggestions of enhancing horizontal accountability. First, he points out, is to give opposition parties the main role of directing agencies that are in charge of investigating alleged cases of corruption<sup>21</sup>. This can be done in the various house (legislature) committees, for example the parliamentary committee for finance, among others. Second, agencies performing an essentially pre-emptive role, such as accounting officers are highly professionalized and endowed with resources that are both sufficient and independent of the whim of the executive<sup>22</sup> (O'Donnell, 1999: 44). This could be an independent watchdog, for example the Office of the Ombudsman or the Revenue Authority, among others. Third, is having a judiciary that is highly professionalized and well-endowed with a budget that is independent of the executive and congress, and highly autonomous in its decisions with respect to both (O'Donnell, 1999: 44). Fourth, there is a lot of work to be done in societies marked not only by pervasive poverty but also by deep inequalities and how to ensure that agents of horizontal accountability at least decently treat the weak and the poor (O'Donnell, 1999: 44). Fifth, reliable and timely information is essential and reasonably independent media and various research and dissemination institutes should also play a role (O'Donnell, 1999: 44). Sixth, lively and persistent participation of the domestic actors (the media, civil society groups, religious leaders, NGOs and various actors of vertical accountability) (O'Donnell, 1999: 45); and finally, individuals, especially political and other institutional leaders do matter (O'Donnell, 1999: 45).

According to Sklar (1999: 53), conceptions of horizontal and vertical accountability correspond to the ideas of constitutionalism and democracy, respectively. In practice, he adds, the processes associated with the later set of ideas are closely related as those processes are often conflictual and mutually reinforcing at one and the same time (Sklar, 1999: 53). He

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<sup>21</sup> In Kenyan context, the composition and the chair of all House Committees are headed by the opposition and the total composition of each committee is tilted in favor of the opposition.

<sup>22</sup> In the Kenyan context, independent offices are the Auditor General's office, Revenue Authority, Office of the Ombudsman, while in parliament there are house committees in charge of finance, like the Public Accounts Committee and the Public Investment Committees.

argues that as an ample example, constitutional checks and balances are designed to repel threats to democracy by demagogic politicians (Sklar, 1999: 53). Phillip C. Schmitter (1999: 59) contends that accountability is central to virtually all “procedural” definitions of democracy and points out that horizontal accountability belongs to a widely populated class of arguments that asserts the necessity for democracy to protect itself from its own potential for self-destruction (Schmitter, 1999: 59). He submits that, just as vertical accountability is not restricted to “throwing the bastards out” after they have disappointed the voters, the horizontal variety should also have the capacity to set and restrict agendas and not just react to whatever authorities have already done (Schmitter, 1999: 61). Plattner (1999: 63) points out that in liberal democracy:

“the fundamental law to which government officials are held accountable is the constitution, which in turn draws its authority from the explicit consent of its people and it is this democratic dimension, that the notion that governments are simply agents and trustees of the people, that gives the concept of accountability its centrality in contemporary discussions of democracy”. Plattner firmly adds that “it is precisely because the people do not rule directly but are the source of all political authority that accountability - ultimately meaning accountability to the people - can be seen as a defining feature of modern liberal democracy” (Plattner 1999: 66).

### 3.3 Legislatures

One key institution that occupies a central place in minimal and liberal democracies around the world is parliament (Hout, 2005: 25) and its cardinal role in democratic governance should be viewed within the context of the need for separation of powers for the full realization of democracy (Momba, 2005: 101). Interchangeably used, legislatures, parliaments or assemblies are mirrors of the nature of the state (either democratic or authoritarian), party systems (one-party, multiparty, or dominant party), and political culture (Salih, 2005b: 3). Legislatures, according to Johnson (2005: 2), vary in size in how members are elected, how long they hold office, in their ways of relating to political parties and to constituents, in their relations with executive powers, in their responsibilities in lawmaking and budgeting, in how they oversee executive spending and dozens other ways. Of the two types of legislatures, the one composed of only one chamber is called unicameral legislature and one that has two chambers is called bicameral legislature. Unicameralism is the dominant parliamentary system in Africa where 39 African Parliaments are unicameral and 16 are bicameral (Salih, 2005b: 16-17).

Kenya under the former constitution (1963-2010) is a unicameral legislature that started at independence as a bicameral legislature. Under the new constitution (August 2010-), the legislature reverted to bicameralism albeit with different composition. It is difficult to

generalize whether bicameralism offers a better foundation for stability, delegation and accountability than unicameralism, according to Salih (2005b: 19). Salih argues though, that constitutional structures that protect legislatures from executive dominance are generally better served by bicameralism than unicameralism. However, this section will discuss legislatures and describe some of the three common functions found in all legislatures among other attributes. Once a rubberstamp legislature to an emerging one and, owing to the new constitution, firmly transformed into a transformational legislature, what does this new power of the legislature portend for the nascent democracy that Kenya is? To answer this, let us first look at what weak legislatures portend for democracy.

### **3.3.1. Legislatures and Patterns of Democratization**

As noted in section 2.5, weak legislatures inhibit democratization. Kenya's legislature, as in many other legislatures in Africa, was very weak until the start of the 1990s. While legislatures strive to deliver on their constitutionally prescribed functions, the executive struggles tirelessly to control the legislature (Salih, 2005a: 252). According to Wang (2005: 184), the inner workings and structure of parliament are significant for its ability to influence policy outcomes and also for its ability to hold the executive accountable. Fish (2006: 12) argues that a weak legislature undermines "horizontal accountability". Fish notes that in polities where authoritarian regimes have broken down and new regimes are taking their place, the temptation to concentrate power in the executive is great. This was the case in Kenya. In December 2002, the opposition finally managed to remove the ruling party KANU from power. It is argued that whereas there was political change from one administration to another in terms of electing a new government, it was not necessarily a political transition from one regime to another as there was no break from past practices (Nyong'o, 2007: xv). As (Kanyinga, 2007: 101) points out, as an election tool the NARC alliance was motivated by the need to stem authoritarianism and create conditions through which presidential powers would be reduced and decentralized across institutions. However, Kanyinga adds, the new political elite radically changed course and reneged on the pre-election agreements over the distribution of political power (Kanyinga, 2007: 83).

As mentioned in chapter two, the judiciary<sup>23</sup> could not counter-balance executive power in the early years of transition and under such circumstances, Fish (2006: 12) argues, the legislature is the only agency at the national level that is potentially capable of controlling the chief executive. Where the legislature lacks muscle, presidential abuses of power –

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<sup>23</sup> The judiciary service commission was under a ministry, and it did not enjoy autonomy.

including interference in the media, societal organization, and elections - frequently ensue, even under presidents who take office with reputations as democrats (Fish 2006: 12-13). Fish argues further that legislative weakness also inhibits democratization by undermining the development of political parties by pointing that in weak polities with weak legislatures, political parties drift and stagnate rather than develop and mature (Fish 2006: 13). In Kenyan context, the transition from authoritarian one-party state political system to a multiparty system ushered in the formation of more than sixty political parties, though fewer than a dozen are active and most have fragmented along ethnic lines (Kanyinga, 2007: 83). According to Fish (2006: 13), parties<sup>24</sup> are the main vehicles for structuring political competition and for linking the people and their elected officials and their underdevelopment saps political competition of its substance and vigor and checks the growth of “vertical accountability” – meaning the ability of the people to control their representatives.

### 3.3.2. Conceptual Framework

According to Norton (1990a: 10), the essential paradigm for legislative studies in the twentieth century received a significant contribution from Baron de Montesquieu’s work in *The Spirit of the Laws* (1748), who distinguished and defined legislatures by his delineation of a separation - or division - of powers (governmental trinity) between legislature, executive, and judiciary and was to provide a framework for much constitution-writing since. This model of separation of powers, according to Bosley (2007: 4), is tempered by a system of checks and balances that ensures that each branch is able to exercise restraints on the powers exerted by other branches<sup>25</sup>. Legislatures in the world are, according to Polsby (1990), modelled or adapted more often from either the British or the American legislative system. Norton (1990a: 1) and Olson (1994: 3) points out that the word ‘legislature’ constitutes a broad term for an institution that goes by many different names<sup>26</sup>. However, Norton (1990: 1) adds that what such bodies have in common is that they are constitutionally designated institutions for giving assent to binding measures of public policy; that assent being given on behalf of a political community that extends beyond the government elite responsible for formulating those measures. As Norton puts it, this is an encompassing definition which

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<sup>24</sup> The survey by Fish (2006: 16) noted, in Bulgaria, the strength of the legislature spurred the formation of parties that structured political competition and injected vigor in elections and parliaments robustness also encouraged public participation.

<sup>25</sup> See *Accountability* on this chapter and *oversight* on this section. See Figure 1.

<sup>26</sup> They are variously called congress, parliament, national assembly, general court among other names and in different languages.



includes those institutions – like the House of Lords and the Canadian Senate – that do not stipulate the requirement of election, which is not a defining characteristic (Norton, 1990: 1).

Olson (1994: 1), on the other hand, asserts that parliaments – or legislatures – not only the keystone of a democratic political system, but are also the most fragile component of any state with law making, save for constitutional law, emanating from the legislature. Carey (2006: 431) sees legislatures as, at least according to the formal rules set out by constitutions as the principle policy-making institutions in modern democracies. Mezey (1979: 3) and Olson (1994: xiii) contends that there have been definitional problems which has become more complex as our knowledge about legislatures become more sophisticated. However, (Mezey, 1979: 6) terms legislatures as predominantly elected body of people that acts collegially and has the formal, but not necessarily the exclusive power, to enact laws binding on all members of a specific geopolitical entity. Important policy decisions, Carey (2006: 431) maintains, must be approved by legislatures among other tasks and he summarises these tasks as: representing diversity; deliberation; cultivating information and expertise; decisiveness; checking majority and executive power<sup>27</sup>. Barkan (2008: 126) adds another function that he sees as the legislature’s principal task; that is, constituency service<sup>28</sup>. African legislatures perform other tasks. See also section 2.2. However, as Beer (1990: 62) puts it, the tasks of legislatures change with the times, while Pakenham (1990: 86) contends, that different functions may be more important in different political systems. As Pakenham (1990: 95-96)) correctly puts it:

“The foregoing account of functions...is designed to indicate the variety, and the relative importance of the functions. They are not ‘functional requisites’ for any legislature, although they are probably found in most of them. More importantly, most of the legislatures of the world seem to have functions which do not fit at all closely the assumptions about functions adopted by most studies of legislatures.”

One aim of the thesis is to assess horizontal accountability role especially the executive-legislative relations. I will start by highlighting this relation.

### **3.3.3 Legislative – Executive Relations**

The three general ways in which a legislature may control the bureaucracy in a separation of powers system is through oversight, legislation, and budget-making, and for these to work, Remington (2004: 9) notes, some conditions must be met: There needs to be a certain degree of cooperation between the branches in policy making (each side must be willing to bargain and compromise in order to get some policy benefits); The legislature must have some

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<sup>27</sup> This is what is variously referred to as oversight; or calling the executive to account.

<sup>28</sup> He argues that in countries where legislators are elected by proportional representation (PR), constituency service is a lesser priority (Barkan 2008: 126).

capacity to monitor the executive, and; The executive needs to be willing to comply with legislative enactments. As Beer (1990: 71) mentions, one of the oldest conceptions of the role of parliament is that of controlling and restraining the executive. In nearly all democracies, leaders of the executive branch typically command much of the political power, control the financial resources, possess staff dedicated to developing policies and implementing laws, produce the bulk of legislation, and manage government contracts and administer government programs (Johnson 2005: 1).

In the Kenyan experience, Kenya remained a country where the preponderance of power was concentrated in an imperial presidency at the expense of the legislature and the judiciary (Barkan & Matiangi, 2009: 49). According to Johnson, despite executive dominance in many countries, the relative balance of power between the legislative and executive branches in country can be changed (Johnson, 2005). Johnson argues that if new legislatures are going to have a central role in a nation's governance, it is up to legislatures themselves to build strong legislative institutions by asserting themselves in the regular law-making or oversight functions, or through specific structural changes via constitutional amendment, legislation or rules of procedure (Johnson, 2005). In the Kenyan context, the constitutional amendment of 1999 established the financial and administrative independence of the National Assembly, but the judiciary remained firmly under presidential control (Barkan & Matiangi, 2009: 49-50). However, Olson (1994: 74) points out, that since the legislative/parliamentary interaction with the executive - is the single most important relationship in the policy process of democracies - the key question for legislatures concerns their independence from the executive<sup>29</sup>. However, as there are many questions arising from this relationship, among them being the extent the legislature could act independently of the chief executive on legislation - amongst other questions - depends also entirely upon the democratic political system existing in a State.

The constitution plays a decisive role by defining the political system a State will have. See figure 5 and also section 3.3. According to Olson (1994: 93), the relative positions of executive and legislature are always subject to change and criticism whatever the constitutional design and however detailed the written constitution. Olson (1994: 93) argues that the relationship is one of the big questions of politics and has no clear answer that the main participants are willing to accept. As Beer (1990: 64-66, 73) rightly points out,

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<sup>29</sup> Most authoritarian states, especially authoritarian states in Africa, the executive or the presidency have been known to emasculate the powers of the legislature and the judiciary. See: Barkan (2009), Ake (2000), and Polsby (1990).

strengthening of the executive against the legislature has been a general development in the modern world and as government gets deeply engaged in the management of economic and social affairs, it must increasingly rely less upon general laws and more upon specific managerial decisions. Largely because of these reasons, the practice of delegating legislative power to the executive has grown immensely in recent times.

### **3.3.4 The members: Representatives and Legislators**

As Olson (1994: 13) puts it, the human beings who populate the legislative institution are its essential raw material and their skills, their expectations and the hopes and fears they bring with them help shape what they do as members. This human dimension, Olson argues, is particularly visible and acute in the newly democratized countries. In the Kenyan case, the emergence of a vocal and politically astute coalition for change contributed in the reforms that the legislature underwent in the early years of the introduction of multipartism (Barkan, 2009: 20). According to Olson (1994: 16), different length of experience is itself a source of differing degrees of power and that within the legislature; the experienced members are more active and effective than are newer and less experienced members. However, Polsby (1990: 131) maintains that a politician's bearing, his personality, eloquence, debating power, prestige, might weigh heavily, but these are personal, not organisational, attributes.

### **3.3.5 Representation**

Given the demographics and history of African countries, both citizens and MPs place a much higher emphasis on representation and constituency service than on legislating and oversight<sup>30</sup> (Barkan et al., 2010: ii). "Representation", however, according to Przeworski et al (1999: 8), is a relation between interests and outcomes. Barkan (2008: 125) asserts that legislatures are the institutional mechanism through which societies make representative governance real on a day to day basis; and the first function of individual legislators and the body to which they belong, is to represent the varied and conflicting interests in society as a whole. Carey (2006: 432) agrees with Barkan but is more specific by pointing out that legislatures are plural bodies with larger membership than executives, and so offer the possibility both to represent more accurately the range of diversity in the polity, and to foster closer connections between representatives and voters. The stumbling block in both cases, according to Carey (2006: 432), is to identify what sort of diversity ought to be privileged in

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<sup>30</sup> According to findings on the working paper by Barkan et al (2010: ii), this poses a dilemma for MPs in most African Legislatures-do they emphasize representation and constituency service with the result that the legislature of which they are members will not develop into a sufficiently powerful institution capable of holding the executive accountable to the public? Or do they devote more time to legislating and oversight at the risk of displeasing the electorate and suffering defeat when running for reelection.

legislative representation. Various dimensions of representation - including geography, ethnicity, religion, and gender - have been prominently on the table in each case (Carey 2006: 434). According to Loewenberg (1971: 3), equality of status also determines that members of parliament work collectively, either in meetings of the entire membership or in committees of members and concepts of representation affects the composition of parliament and the roles which their members play. To Pitkin (1967: 60), true representation require that the legislature be so selected that its composition corresponds accurately to that of the whole nation; only then is it really a representative body. Leiserson (1949 in Pitkin, 1967: 116)(1949) points out that the substance of representing is activity and argues that this is what a political scientist means when he says that the test of representation is not whether the leader is elected, but how well he acts to further the objectives of those he represents.

The legislator, therefore, according to Pitkin (1967: 148), has a multiple role: he has to represent the party that sponsored him to parliament and its programs; along with the constituents that voted him in, he has to be cognisant of the national interest which could be different from the constituency or party interest. Furthermore, Pitkin (1967: 215) adds that the representative who is an elected legislator does not represent his constituents on just any business, and by himself in isolation; he works with other representatives in an institutionalised context at a specific task - the governing of a nation or state. As Przeworski, Stokes, and Manin (1999: 3-4) rightly puts it; while individuals who offer themselves for public service differ in their interests, motivations, and competence, citizens use their votes effectively to select either candidates whose interests are identical to those of voters or those who are and remain devoted to the public service while holding office. Bosley (2007: 4), on the other hand, sees the need to formalize consultation with the citizenry, as there are unforeseen circumstances or issues that parliament may not have the moral mandate to resolve on their own without consulting with the electorate. Preferences of citizens, according to Przeworski et al. (1999: 8) and Wahlke (1990: 100) are signalled to politicians through a variety of mechanisms such as elections, public opinion polls, or other forms of political expression.

### **3.3.6 Law Making/ Deliberation**

Law making is one of the principal functions of legislatures, and according to Bosley (2007: 4); its most challenging role. The general practice, Bosley argues, is that the Executive initiates draft legislation and parliament debates and scrutinizes the same prior to passage, although in theory, parliamentarians too can initiate bills. This is becoming a reality in the

more upcoming emerging and transformative legislatures mentioned earlier. In the Kenyan context under the new constitution, all bills will be initiated by parliament. According to Carey (2006: 432), legislatures are forums for debate and reasoned consideration of the diverse viewpoints they embrace and that their internal workings are supposed to be subject to monitoring from outside actors. Carey (2006: 432) contends that by forcing debate into an open setting, legislatures may limit admissible arguments on behalf of interests or policy positions to those that can be defended in public. Polsby (1990: 131), on the other hand, sees debate as the ventilation of opinion for the education of the country at large which functions to mobilise interest groups and to proclaim loyalties within and outside the chamber. Carey (2006: 434) argues further that once representatives, of whatever type, are selected; they must establish procedures to consider alternative policy proposals and in this instance, the legislative process is very much a part of the product; democratic legislatures are *public* forums of debate and deliberation. Because the constitution under which the legislation operates must endow it with law-making capability, Mezey (1979: 6; Beer, 1990: 73) argues that the legislature need not hold this power exclusively and recognises the fact that other institutions in the political system like the courts, bureaucracies, and presidents, can make laws in the form of judgement, rules, and decrees. In the Kenyan context, citizens, through a process, have been empowered under the new constitution to initiate bills for legislation in parliament. Any proposed legislation must also have public participation and input. Barkan (2008: 125) points out that legislatures legislate, but at two levels; at minimum they pass laws, in some cases merely rubber-stamping legislation handed down by the executive, while in other cases, legislatures shape public policy by crafting legislation-in partnership with or independent of the executive branch and then passing that legislation into law.

### **3.3.7 Checks/ Oversight**

Checks or oversight is one of the most important roles of legislature in exercising horizontal accountability. Barkan (2008: 125-126) contends that this core function, is to exercise oversight of the executive branch, thereby ensuring that policies agreed upon and passed into law are in fact implemented by the state. He argues that oversight is essential in any democracy because it ensures both the vertical accountability of rulers to the ruled as well as the horizontal accountability of all other government agencies to the one branch-the legislature-whose primary function is to represent the citizens. Such scrutiny, he points out, requires a measure of transparency in governmental operations. According to Carey (2006: 433), the capacity of checking majority action within legislatures depends on the distribution

of procedural rights among members; the capacity for checking external actors depends on the distribution of policy-making authorities across branches and across legislative chambers in bicameral systems. He further argues, that checks should reveal information about policies and about the motivations of their advocates that might not be disclosed otherwise and in doing so, checks should encourage deliberation and foster accountability (ibid). Demand for checking function, according to Carey (2006: 447), rests in part on the distrust of the executive and is based in part on the expectation that checks reveal information about policy options, and about the motivations of their champions, thus, enhancing the informational role.

### **3.8 Summary**

As discussed in this chapter, there is indeed a symbiotic relationship between constitutionalism, accountability and the legislature. The constitution, basically a supreme legal document in a country, structures and limits the exercise of power and defines how a country is to be governed. I have discussed political accountability as a function in itself and why it is a key component in democracies. In separation of powers between the legislature, the judiciary and the executive, accountability in accordance with the constitution ensures that none should encroach on the territorial independence of the other. These three arms of state are supposed to be accountable to each other for their actions. Accountability then becomes crucial to the running of State: this could be between institutions, or between principal and agent, or between the citizenry and the state institutions. Finally, I have also looked at the legislature as an institution that makes and unmakes laws that govern a country.

## **4.0 Methodology**

### **“The content is the method” (King, Keohane, & Verba, 1994)**

In this chapter I discuss the method that I use to inquire how and whether the constitutional revisions in Kenya will affect Parliament’s position in the system. In addition, I discuss the choice of method, the advantages and disadvantages of the methods chosen and the goals. Further in this chapter, I discuss the means of measurement, data and its sources and introduce the thirty two items that will be used to operationalize the data.

### **4.1 The Choice of Case Study Method**

In seeking to answer questions about Kenya Parliament’s culture and its functions, I have found quantitative methods to be insufficient on their own in explaining the phenomenon the research question seeks to answer. To be able to explore my research question rigorously, case study method present an appropriate and unique non-experimental way as it enables a very close examination, scrutiny and collection of detailed material or information for the study that could be missed by quantitative research methods. Case study also allows for the use of different techniques to get the necessary information that could not have been revealed if the case had involved two or more countries. Hence it is a richer way of getting more account of what is occurring not accessible through other methods. Such an in-depth study of Kenya also allows directions or offer suggestions for further studies.

### **4.2 Choices of Method**

As King et al. (1994: 9) point out; the content of “science” is primarily the methods and rules, not the subject matter, since we can use these methods to study virtually anything. For the effective study of the effects of the new constitution in Kenya on the Parliament, it would not be possible to use quantitative method and hence the choice of qualitative method which entails an in-depth analysis of information. Since the academic question is *about* Kenya, I have chosen to use qualitative research and in particular a within-case or case study method.

#### **4.2.1 Qualitative Study versus Quantitative Method**

King et al. (1994: 3-4) argue that even though qualitative and quantitative research seems to be at war, their differences are mainly ones of style and specific technique. In their view, the same underlying logic provides the framework for each research approach and is clarified and formalized clearly in quantitative research methods discussions, but the same logic also underlies the best qualitative research. Whereas quantitative research uses numbers and statistical methods, King et al. (1994: 3) state that it tends to be based on numerical

measurements of specific aspects of phenomena, it abstracts from particular instances to seek general description or to test causal hypotheses. In contrast, qualitative research covers a wide range of approaches, which by definition could and not necessarily rely on numerical measurements (King et al., 1994: 4). And as is also the case with quantitative research, King et al. (1994: 4) point out that qualitative researchers generally unearth enormous amounts of information from their studies, and sometimes this kind of work in social sciences is linked with area or case studies where the focus is a particular event, decision, institution, location, issue or piece of legislation.

As King et al. (1994: 46) argue, inference is the process of using the facts we know to learn about the facts we do not know. The facts we do not know are the subjects of our research questions, theories, and hypothesis while the facts we do know form our (qualitative or quantitative) data or observations. The thesis main goal is to assess the strength of the Kenyan Parliament in the new constitution in comparison to the former constitution. Accordingly, this research project hopes to satisfy the two criteria in the social sciences as proposed by King et al., (1994: 15) namely: posing a question that is “important” in the real world. The topic to be researched is consequential as it gives an understanding on the direction of the Kenyan Parliament in relation to the new constitution and might give an understanding how beneficial a stronger Kenyan Parliament would be for democratization and/or offer suggestions on “areas” that could be improved. It also investigates the performance of the new constitution in four key areas, that is: Parliament’s influence over the executive; Parliament’s institutional autonomy; Parliament’s specified powers and; Parliament’s institutional capacity.

The second criterion this research project hopes to achieve is “to make a specific contribution to an identifiable scholarly literature by increasing our collective ability to construct verified scientific explanations of some aspects of the world” (King et al., 1994: 15). This criterion can be achieved through researching further on the Fish and Kroenig’s survey on Kenya from 2009 by observing changes and new observations in the Kenyan system not captured in the survey, either because some events occurred after the survey had long been published or some questions asked in the survey had been understood differently in the larger context (of the survey Fish and Kroenig (2009) undertook). Therefore, the research seeks to investigate differently the survey questions and review some “answers” given in the 32 items by Fish and Kroenig (2009) with regards to the former Kenyan constitution. See table 8 for the list of the 32 items. The research will use the 32 items to measure the former constitution and the new constitution and investigate which of the constitutions scores better and on which



indicator or category. This way, we can determine whether the new constitution has provided the Kenyan Parliament with more powers. To put it differently, we can determine whether the new constitution has strengthened the Kenyan Parliament. As Steven Fish (2006: 12) points out, the Parliamentary Powers Index is an excellent predictor of how countries fare in democratization after they adopt their constitutions.

### 4.3 Case study and Its Goals

Before conducting a case study, it is important to conceptualize it and understand case study is. For methodological purposes, Gerring (2007: 19) writes that case connotes a spatially delimited phenomenon (a unit) observed at a single point in time or over some period of time and comprises the kind of phenomenon that an inference attempts to explain. This is conversant with my study of Kenyan Parliament which is analyzed from the period from independence under the former constitution (amended through time) to the current period with a new constitution (promulgated in 2010). A case study may be understood as the intensive study of a single case where the purpose of that study is – at least in part – to shed light on a larger class of cases (a population) (Gerring, 2007: 20). Case study research, according to Gerring (2007: 20), may incorporate several cases; however, at a certain point it will no longer be possible to investigate those cases intensively.

To be able to examine the development of Kenya's Parliament intensively, no other cases will be included in the analysis. Rather, more time periods are included. As Gerring (2007: 1) points out, sometimes, in-depth knowledge of an individual example is more helpful than fleeting knowledge about a larger number of examples. This way, he contends, we gain better understanding of the whole by focusing on a key part. A second factor militating towards case-based analysis, according to Gerring (2007:4), is the development of a series of alternatives to the standard linear/addictive model of cross-case analysis. Thus establishing a more variegated set of tools to capture the complexity of social behavior and as they move closer to a case-based understanding of causation insofar as they aim to preserve the texture and detail of individual cases - features that are often lost in large-N cross-case analysis (Gerring, 2007: 4). The other factor for case-based methods is the marriage of rational-choice tools with single-case analysis, sometimes referred to as an analytic narrative and this is used to test the theoretical predictions of a general model, to investigate causal mechanisms, and/or explain the features of a key case (Gerring, 2007: 5).

At the same time, Gerring (2007: 6) argues that case study is viewed by most methodologists with extreme circumspection, whereby a work focusing its attention on a

single example (“mere” case study), is often identified with loosely framed and non-generalizable theories, biased case selection, informal and undisciplined research designs, weak empirical leverage (too many variables and too few cases), subject conclusions, non-replicability, and causal determinism. The paradox of it all, Gerring (2007: 8) points out, is that although much of what we know about the empirical world has been generated by case studies, the case study method is generally unappreciated – arguably because it is poorly understood. Gerring (2007: 10-11) writes that case study research may be either quantitative or qualitative, or some combination of both, and there is no reason that case study work cannot accommodate formal mathematical models, which may help to elucidate the relevant parameters operative within a given case. King et al. (1994: 44) state that case studies are essential for description, and are therefore, fundamental to social sciences.

This thesis, though based on a single case, will use the “quantitative” items used by M. Steven Fish and Mathew Kroenig’s Parliamentary Power Index to analyze and study the Kenyan Parliament. As Gerring (2007: 11) rightly observes, if the within-case evidence drawn from a case study can be profitably addressed with quantitative techniques, these techniques must be assimilated into the case study method. King et al. (1994: 5) points that to be able to understand the rapid changing world; we will need to use information that cannot be easily quantified as well as that which can, and in addition all social sciences requires comparison which entails judgments of which phenomena are more or less alike in degree or in kind (that is, qualitative differences). At the same time, Gerring (2007: 12-13) maintains, that the process of case selection involves a consideration of cross-case characteristics of a group of potential cases and reflection upon cross-case patterns, should be a helpful tool as it helps one to formulate useful insights, by separating those that are limited in range from those that might travel to other regions. Kenya is, indeed, an interesting case to study as it provides some useful insights into the consolidation of democracy in Africa in general. Firstly, it has undergone some form of transition to democracy from one-party dictatorship to a multiparty democracy, from hybrid system and soon embracing pure presidential system. Secondly, it is a test-case and a first in Africa, to have a coalition government. Thirdly, it has successfully changed governance system through a new constitution. It is this changes, or revisions in its constitution among other factors that has motivated me to seek to inquire how the new constitutional dispensation affects Parliament’s role in governance.

King et al. (1994: 10) points out that one way to understand events is by seeking generalizations whereby conceptualizing each case as a member of a class of events about

which meaningful generalizations can be made. These generalizations, as discussed in the previous chapter touches on concepts of constitutions, accountability and legislatures.

#### 4.4 Means of Measurement

To measure or estimate the strength of Kenya Parliament, I will use the means of measurement created by M. Steven Fish and Mathew Kroenig (2009). Fish and Kroenig, hereafter to be referred to as Fish-Kroenig, attempted in their study to measure the powers of legislatures and encompasses a richer array of dimensions of power and its distribution, and checks and balances across world's polities. Their main tool for measurement is the Legislative Powers Survey (LPS) which is a list of thirty-two items that gauge separate indicators of the legislature's strength. This analysis will be different from the Fish- Kroenig survey in two respects. First, it will be comparing the strength of Kenya Parliament using two constitutions. It will gauge the score marks that measure the strength of Parliament under the former constitution (1963-2010) with the score marks under new constitution (2010- ). Secondly, while Fish & Kroenig used a "yes" or "no" check mark next to each statement, with a score of 32 indicating an all-powerful legislature and very low score indicating a weak legislature, I will assign check marks **0** to **1** for affirmation of each statement (see table 6). This Boolean algebra has two conditions, according to Ragin (1987: 86), one is "true" (or present) and the other is "false" (or absent). These two conditions are represented in base 2: 1 indicates presence; 0 indicates absence (Ragin, 1987: 86). These are indeed the means of measurements employed by Fish and Kroenig. To avoid the pitfall of these procedures which entails loss of information, which Ragin (1987: 86) argues is typically not great, I have employed a middle condition that can capture lost information. According to Goertz (2006: 45-46) the absence of one dimension can be compensated by the presence of other dimensions in what he calls fuzzy logic. Fuzzy logic plays a key role in permitting us to give mathematical and formal representation of the ways in which most scholars have thought about concepts (Goertz, 2006: 46). As Goertz (2006: 46) argue, concept builder should theorize the substitutability between dimensions and one can choose anything from no substitutability to complete substitutability.

In the list of 32 items under survey, losing information in at least half of the items will not give an accurate measurement. Should an item appear clearly in the constitution or is clearly practiced in the country, I will assign a check mark **1**. If an item in the survey is neither mentioned anywhere in the constitution, nor in practice, I assign a **0** check mark. However, should answers to each item be ambiguous, vague, and ambivalent, or what is

practiced is different from what is demanded by the constitution or at the minimum appear somewhere, a score mark **0.5** will be assigned. I will then use the sum of the score marks under each of the constitutions to generate a Parliamentary Powers Index similar to the Fish-Kroenig PPI, albeit with one country under study. The final score is continual and reflects a legislature’s overall aggregate strength and ranges from **zero** (least powerful) to **one** (most powerful). Of the 2006-2007 survey by Fish-Kroenig (2009), Kenya got 0.31 score marks (see results and break down on table 7). This score marks underpin the weakness of the Kenyan legislature at that time.

**Table 6: Categories of Measurements**

<b>Means of measurements: Old constitution vs. new constitution (32 items)</b>		
Unambiguous <b>(“Yes” – Fish &amp; Kroenig)</b> <b>Score marks 1</b>	Ambiguous/ambivalent vaguely in constitution or in practice (middle) <b>Score marks 0.5</b>	Absent <b>(“No” - Fish &amp; Kroenig)</b> <b>Score marks 0</b>

**Table 1 shows the three categories of measurement**

To avoid systematic measurement error which, according to King et al. (1994: 155), is the consistent overestimate for certain types of units that sometimes can cause bias and inconsistency in estimating causal effects, I choose to divide the answers to each item in three categories for precision. Table 6 above shows the three categories of measurements. Obviously, as King et al (1994: 152) point out, a universally right answer does not exist: all measurement depends on the problem that the investigator seeks to understand.

According to Fish-Kroenig (2009: 14), some weighting of issues is built in the survey itself. On the assignment of equal weight to each item, Fish-Kroenig (2009: 13) argue that it would involve difficult and arbitrary distinctions and as each item cannot be equally important, the importance of an item may vary from country to country and from time to time. This research will give the same equal weight to each item for both validity and reliability. To increase reliability however, I have used multiple sources of information which increases representability while at the same time eliminating observations or data that are unclear. By giving all the items equal weight standardizes the conditions for taking the test and maintaining a consistent scoring procedure – this is in line with the Fish-Kroenig Survey. The total number of check marks awarded for the 32 items will then be divided by 32 to give the final results. According to the Fish-Kroenig Survey of 2009, Kenya had 0.31 scores. This means that Kenya had only 10 items “yes” out of the 32 items.

#### 4.5 Data (Research Sources)

The two main sources of information for this thesis are the two constitutions of Kenya. For clarity, the former constitution means the constitution that was in place before the promulgation of the new one on the 4<sup>th</sup> of August 2010. The former constitution (with amendments) (F. Constitution, 2010), was enacted in 1969 after a series of fundamental amendments to the independence constitution that came partly in force on 1<sup>st</sup> of June 1963 and partly on 12<sup>th</sup> of December 1963. Instead of engaging experts on Kenya as was the case with the Fish and Kroenig survey, due to time and resource constraints, I use relevant excerpts from the new constitution (N. Constitution, 2010), the former constitution, Parliamentary Standing Orders<sup>31</sup>, Parliamentary Hansard, Bills, relevant press and journalistic accounts, secondary sources and other relevant scholarly work as my source of information/data. The use of other sources apart from the two constitutions is because not all items in the Parliamentary Powers Index by Fish & Kroenig are addressed in constitutions (some of these are items 15, 26, 28, 29, 31 and 32. See Table 8 for a list of the 32 items). It is four years since the book by Fish and Kroenig (2009) was published and a lot of information has been gathered or recorded with regards to the Parliament in Kenya and for other Parliaments in the world at large. There have also been more parliamentary reforms. Therefore, there is new information that would change the Kenya Parliament score marks for the former constitution. The research will not rely on the prior research and conclusions done by the Fish and Kroenig (2009) due to reliability and validity of their data. What we have in the Handbook of Legislative Studies by Fish and Kroenig are final answers to the questions that were posted to the various experts. However, the material they gathered is not available nor is it possible to replicate the questions to the experts. See the table below for the results of the Fish and Kroenig Survey for Kenya. Questions posted and answers are not included.

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<sup>31</sup> Standing Orders, Hansard, Bills, Parliamentary Magazine can be found at [www.parliament.go.ke](http://www.parliament.go.ke)

**Table 7: Fish-Kroenig Results for Kenya**

<b>NATIONAL ASSEMBLY OF KENYA (BUNGE)</b>			
<b>Expert consultants:</b> June Gachui, Nairobi legis, David K. Leonard, Gideon Ochanda, Bjarte Tørå			
<b>Score: .31</b>			
<b>Influence over executive (3/9)</b>	<b>Institutional autonomy (1/9)</b>	<b>Specified powers (1/8)</b>	<b>Institutional capacity (5/6)</b>
1. replace	10. no dissolution	19. amendments <b>X</b>	27. sessions <b>X</b>
2. serve as minister <b>X</b>	11. no decree	20. war	28. secretary <b>X</b>
3. interpellate <b>X</b>	12. no veto	21. treaties	29. staff
4. investigate	13. no review	22. amnesty	30. no term limits <b>X</b>
5. oversee police	14. no gatekeeping	23. pardon	31. seek re-election <b>X</b>
6. appoint ministers	15. no impoundment	24. judiciary	32. experience <b>X</b>
7. lack president	16. control resources <b>X</b>	25. central bank	
9 no confidence <b>X</b>	17. immunity	26. media	
	18. all elected		

Source: Fish and Kroenig (2009: 362)

#### **4.6 Operationalization of the survey items (Indicators) & the questions posed**

Each item affects legislative power and Fish and Kroenig (2009) further divided each elements of the list into four sub categories. These are Influence over Executive, items 1-9; Institutional Autonomy, items 10-18; Specified Powers, items 19-26; and Institutional Capacity, items 27-32. Table 6 shows the score marks for Kenya by Fish and Kroenig survey published in 2009 and the indicators of the different items. The results show the National Assembly as being weak on the three indicators and its strength is only on the last indicator. Due to lack of space and to avoid repetition, operationalization of the **thirty two - survey items and the questions posed** (written in italics) will be presented in the next chapter concurrently with the operationalization of the data gathered for each item. The original Fish and Kroenig Legislative Powers Survey is shown on Table 7.

**Table 8: Fish-Kroenig Legislative Power Survey**

<b>Indicator</b>	<b>1-9: Influence over executive/ 10-18: institutional autonomy/ 19-26: specified powers/ 27-32 institutional capacity</b>
<b>Item</b>	<b>Survey questions</b>
1	Can the legislature control executive power by unseating, or threatening to unseat, the executive?
2	May legislators staff the cabinet themselves?
3	Can the legislature question the executive and force it to explain its policies?
4	Can the legislature probe the executive?
5	Can the legislature monitor the state's coercive agencies?
6	Does the legislature appoint the head of government?
7	Does the legislature influence the composition of cabinet?
8	Does the legislature select the president – or need it not contend with one?
9	Can the legislators express their opposition to the government with a vote of no confidence?
10	Is the legislature's term fixed even in the event of executive displeasure?
11	Does the legislature have a monopoly on lawmaking authority?
12	Can the legislature make laws without great concern for executive defiance?
13	Are the legislature's laws the final word?
14	May the legislature make laws in any areas it wishes?
15	Must the government spend the money the legislature appropriates?
16	Does the legislature enjoy financial autonomy?
17	Are legislators free from fear of punishment?
18	Is the legislature free of executive appointees?
19	Can the legislature by itself change the fundamental law?
20	Is action by the legislature needed to declare war?
21	Is action by the legislature needed to ratify treaties?
22	May the legislature grant amnesty?
23	May the legislature grant pardon?
24	Does the legislature have a hand in the appointment of members of the judiciary?
25	Does the legislature appoint the chief of the central bank?
26	Does the legislature influence the state-owned media?
27	Is the legislature regularly in session?
28	Does each member of the legislature have a secretary?
29	Does each member of the legislature have at least one staffer who helps with policy matters?
30	Are legislators free from restrictions of term limits?
31	Do legislators sincerely hope to keep their jobs?
32	Does the legislature have a cohort of members who know the ropes?

Source: Fish and Kroenig (2009)

## 5.0 Data

As can be corroborated by Fish (2006) survey of democratization in post-Communist states, it is not so much the type of constitutional system (presidential, ‘semi-presidential’ or parliamentary) that determines the level and quality of a country’s democratization, but the power and effectiveness of its legislature. As his paper titled ‘Stronger Legislatures, Stronger Democracy’ concludes, stronger legislatures serve as a weightier check on executives, and also provides stronger stimulus to party building, whereas weaker legislatures need to make constitutional reforms a top priority to strengthen the legislature. In this chapter, data is collected for the Kenyan Parliament using two different constitutions as a means of measurement. The two constitutions under study vary in the type of constitutional system and in how they distribute power.

In this chapter, data is gathered on the 32 items within four categories with regards to the Kenyan Parliament using two constitutions as benchmarks. However, to avoid double repetition, operationalization of data will be done concurrently while gathering data on each of the 32 survey items. The 32 items have been divided into four categories or indicators. These are: influence over executive; institutional autonomy; specified powers; and institutional capacity. In each indicator are the survey items that fall under it. The items are in form of statements and are written in italics. Questions for each item appear on Table 8 in the previous chapter. Operationalization of each of the items comes after the statements (also written in italics). Under each item is the data collected for the Kenyan Parliament. First to appear is the data for the Kenya Parliament under the former constitution followed by data for the Kenyan Parliament under the new constitution. For ease of reference, in the former constitution, “Section” is used to describe a particular law, while in the new constitution “Article” is used to describe the particular law etc. “Former” constitution refers to the constitution before the new one was promulgated on the 27<sup>th</sup> of August 2010.

### 5.1 Influence over Executive (Items 1-9)

The first nine items, according to Fish and Kroenig (2009: 4), gauge the legislature’s influence over the executive. The items ask whether the legislature can oust the executive, have its own members serve in the government, question officials from the executive, oversee the agencies of coercion, appoint the prime minister, appoint or at least confirm ministers, elect the president, and express no confidence in government.



**1. *The legislature alone, without the involvement of any other agencies, can impeach the president or replace the prime minister***

*If the legislature has the power to impeach or remove the most powerful executive, be it the president, the prime minister or someone else, then I will assign a score mark 1. Should the legislature require the support of another institution or be part of the process of removing the executive, then I assign a score mark 0.5. If there is no provision for the removal of the executive in parliament or other institutions, then I assign a score mark 0.*

The former constitution has no provision for the removal of the President through impeachment. However, the closest there is to impeachment, is a provision that Parliament can pass a vote of no confidence against the Cabinet. Ironically, it is in the section 59 of *summoning prorogation and dissolution of Parliament*, which gives the President powers to either dissolve or prorogate Parliament. Subsection (3) provides that “if the National Assembly passes a resolution which is supported by the votes of majority of all members of the Assembly, declaring that it has no confidence in the government of Kenya, and the President does not within three days of passing of that resolution either resign from his office or dissolve Parliament, Parliament shall stand dissolved on the fourth day following the day on which that resolution was passed”. Now, because Parliament consists of the President and the national assembly, the removal of one affects the life of the other.

However, in terms of section 12 (2), the President can be removed on the grounds of incapacity, i.e. being unable by reason of physical or mental infirmity to exercise the functions of the office of the President. In such a scenario, the national assembly’s term is not affected. But in the case of incapacity, the Chief Justice shall appoint a tribunal of medical practitioners to inquire into the matter and report back to him, and conveys the result to the Speaker of Parliament. If, within three months, the President is unable to discharge his duties, he shall cease to hold office. The Vice-President assumes presidency in acting capacity. Other than that, Section 14 stipulates that no criminal or civil proceedings whatsoever shall be instituted or continued against the President while he still holds office or against any person while he is exercising the functions of the office of the President. However, with the enactment of the National Accord and Reconciliation Act in 2008 and enacted as Section 15A, provides that there shall be a Prime Minister and two Deputy Prime Ministers and Ministers of the Government of Kenya. Sub section (3) provides that “Parliament may, by an Act of Parliament and notwithstanding any other provision of this Constitution, provide for the appointment and termination of office of the Prime Minister, Deputy Prime Ministers and

Ministers<sup>32</sup>.” Having no provision for removal of the executive in Parliament, but one to appoint and terminate that of the Prime Minister, I assign a score mark **0.5** for the former constitution.

One role of the National Assembly in the new constitution in chapter 8, Article 95 (5a) states that the National Assembly “reviews the conduct in office of the President, the Deputy President and other State officers and initiates the process of removing them from office.” Apart from the National Assembly, Article 96 (4) on the role of the senate provides that the “Senate participates in the oversight of State officers by considering any resolution to remove the President or Deputy President from office in accordance with Article 145.” Grounds for removal of the President are laid on Article 145 (1) (a) to (c). Article 145 (1) states that “a member of the National Assembly, supported by at least a third of all the members, may move a motion of impeachment of the President”; and if a motion under clause (1) is supported by at least two-thirds of all members of the National Assembly, the Speaker shall inform the Speaker of the Senate who shall convene a meeting of the senate to hear the charges against the President. The senate, by resolution, may appoint a special committee comprising eleven of its members to investigate the matter and report within seven days. If the charges are substantiated, then a vote of at least two-thirds of all members of the Senate will uphold any impeachment charge, the President shall cease to hold office. I assign a score mark **1** for the new constitution as the legislature has the power to impeach the President.

## **2. *Ministers may serve simultaneously as members of the legislature***

*If ministers may serve simultaneously as members of legislature and member of the government, I assign a check mark 1. If a cabinet minister serves in the executive and still remain a member of legislature but forfeits his voting right, I assign a check mark 0.5. However, if a member of legislature cannot serve as a cabinet minister, I assign a check mark 0.*

According to Chapter two in the former constitution, Section 16 provides that “there shall be such offices of Minister of the Government of Kenya as may be established by Parliament or, subject to any provisions made by Parliament, by the President,” while subsection Section 16 (2) provides that “the President shall, subject to the provisions of any written law, appoint the Ministers from among the members of the National Assembly.” Section 15 (1) and (2) provides that there shall be a Vice-President of Kenya, who shall be

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<sup>32</sup> As this is a constitutional Amendment put in place in 2008, following the National Accord and Reconciliation Act, Section 15A (5) provides that “the act made pursuant to subsection (3) immediately following the commencement of this section shall, while in force, be read as part of this constitution.

appointed by the President from among members of the National Assembly. Section 19 (1) also provides that, “the President may appoint Assistant Ministers in the performance of their duties.” On this item, I assign a score mark **1** as Ministers may serve simultaneously as members of legislature.

According to the new constitution, Part 3 on the cabinet, Article 152(3) states that “a Cabinet Secretary shall not be a Member of Parliament”. I assign a score mark **0** as the new constitution is specific that a member of the legislature cannot serve as a cabinet minister.

***3. The legislature has powers of summons over executive branch officials and hearings with executive branch officials testifying before the legislature or its committees are regularly held.***

*For the item to receive a check mark **1**, the legislature must be capable in practice of calling or summoning officials from the executive to testify or explain matters regularly. The same marks will be awarded if the legislature can summon ministers to answer questions regularly in the floor of the House during “question time”. The item gets a check mark **0.5** if the legislature has the power to summon executive officials but it is not practiced. The check mark **0** is also awarded if the legislature has no power of summons over the executive officials.*

Items 3 and 5 (the legislature has effective power of oversight over the agencies of coercion) will be assessed together under the former constitution. Nowhere in the former constitution is there mention whether the legislature has the power to summon any executive branch officials. However, other than that, the Standing Orders Section 173 allows departmental committees to summon witnesses, receive evidence and the request for and receipt of papers and documents from the government and the public. Once a report has been compiled and reported in the floor of the House, the minister under whose portfolio the report touches on, according to Standing Orders 183, within 60 days report to the House. Section 193 of the Standing Orders includes the mandate of the departmental Committees as to investigate, to inquire and to report on all matters related to the mandate, management, activities, administration, operations of the assigned ministries and departments. Subsection 198 (e) gives departmental committees powers to investigate and inquire into all matters relating to the assigned ministries and departments as they deem necessary, and as they may be referred to them by the House or a Minister and to make reports and recommendations as often as possible. Taking this into account, I assign a score mark **1** for the former constitution.

Items 3, 4, and 5 under the new constitution will be assessed together. These three basically discuss the oversight or watchdog function of Parliament vis-à-vis the Executive. In the new constitution, Chapter 8 Article 125 (1) states that either House of Parliament and any of its committees, has power to summon any person to appear before it for the purpose of giving evidence or providing information. And (2), for the purpose of clause (1), a House of Parliament and any of its committees has the same powers as the High Court- to enforce the attendance of witnesses and examine them on oath, affirmation or otherwise; to compel the production of documents; and to issue a commission or request to examine witnesses abroad.

Article 153 (3) of the new constitution states that “a Cabinet secretary shall attend before a committee of the National assembly, or the senate, when required by the committee, and answer any question concerning a matter for which the Cabinet Secretary is responsible.” The Standing Orders also covers the new constitution until after the next general elections. I assign a score mark **1** for the new constitution as it has powers to summon ministers regularly.

***4. The legislature can conduct independent investigations of the chief executive and the agencies of the executive***

*If the legislature has the ability to conduct independent investigations of the chief executive and other agencies of the executive, then a checkmark **1** is awarded. A check mark **0.5** is awarded if the legislature only can conduct independent investigations to some agencies of the executive and not all. A checkmark **0** is awarded if the legislature cannot probe the executive or any of its agencies.*

In the former constitution protection of the President in respect to legal proceedings during office is guaranteed in Section 14 (1). It provides that “no criminal proceedings whatsoever 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 President.” And subsection (2) provides that “no civil 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 President.” The President is protected from any investigations while in office. However, with the Standing Orders adopted in December 10, 2008, departmental committees can conduct independent investigations on agencies of the executive. On this, I assign a score mark **0.5** for the former constitution.

In the new constitution, the President is protected from legal proceedings under Article 143 (1) and (2) which stipulate that civil and criminal proceedings shall not be instituted in any court against the President, clause (4) provides that “the immunity of the President under this article shall not extend to a crime for which the President may be prosecuted under any treaty to which Kenya is a party and which prohibits such immunity<sup>33</sup>.” With reference to item 3 on the power of oversight by the legislature in Article 95 (5) (b), Article 95 (5) (a) provides that the National Assembly “reviews the conduct in office of the President, the Deputy President and other State officers and initiates the process of removing them from office.” I assign check mark **1** for the new constitution as it has the ability to conduct independent investigations of the executive and other agencies of the executive. Item 1 on impeachment under new constitution is also relevant here.

**5. *The legislature has effective powers of oversight over the agencies of coercion (the military, organs of law enforcement, intelligent services, and the secret police).***

*This question with the one above hangs together. However, if the legislature has effective powers over the agencies of coercion, that is, the power to oversee these agencies, investigate, regulate and fund for their activities, then I assign a checkmark **1**. Should the legislature only regulate funds and can oversee but has no power to summon, question or investigate or lacks one of the functions, I assign a check mark **0.5**. If the legislature has these powers, but rarely exercises them, then it gets also a checkmark **0.5**. However, a check mark of **0** is awarded if the legislature cannot monitor the state’s coercive agencies.*

As discussed in item 3, the check mark 1 is given to the former constitution. With the adoption of new standing Orders on 10<sup>th</sup> of December 2008, departmental Committees have the powers to summon agencies of coercion. This falls under ambit of the department of Administration and National Security in relations to Internal security and internal security, while the Defence and Foreign Relations Committee has mandate under all matters related to defence, East African Community matters, Pan-African Parliament, regional and international relations, agreements, treaties and conventions.

In the new constitution, Chapter 8, Article 95 (5) (b) stipulates that the National Assembly exercises oversight of State organs, while Article 125 provides for either House of Parliament, and any of its committees has power to summon any person to appear before it for the purpose of giving evidence or providing information, and a House of Parliament and any

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<sup>33</sup> This is for example the Rome Statute that constituted the International Criminal Court. Kenya is signatory to this Protocol, hence, the ICC Constitution is part of the Constitution of Kenya. Thus, the President can be charged for crimes against humanity the same way the President of Sudan has been charged.

of its committees has the same powers as the High Court. I assign a check mark **1** for the new constitution as it has the power to monitor agencies of coercion.

**6. *The legislature appoints the prime minister.***

*If head of state appoints a prime-minister who must seek approval from parliament, I assign a check mark **1**. This is also assigned if the legislature elects the prime minister. However, legislature through one of its committees or sits in a panel that interviews, or check the integrity of the candidates for presidency or prime minister, then I assign a check mark **0.5**. A check mark **0** is given if the legislature does not have the power to appoint the head of government or the prime minister.*

Section 4 of the former constitution stipulates that there shall be a President of Kenya, who shall be the head of State, and Section 23 vests executive authority on the President. There is, however, a provision for a Prime Minister enacted in the National Accord and Reconciliation Act. See item 1 and also 2.7 on The National Accord and Reconciliation Act. Section 15A provides that “Parliament may, by an Act of Parliament and notwithstanding any other provision of the constitution, provide for the appointment and termination of office of the prime minister, deputy prime ministers and ministers.” Section 15A (3) stipulates that Parliament may provide for the function and powers of the prime minister and Deputy Ministers and the establishment of a coalition government. I therefore assign a check mark **1** for the former constitution, that the legislature appoints the Prime Minister. Note that the Prime Minister and the President share power equally under this arrangement.

In the new constitution, there is no provision for the legislature to neither appoint the prime minister nor appoint the head of government. I assign a check mark **0** for the new constitution. The President is elected directly in a pure presidential system.

**7. *The legislature’s approval is required to confirm the appointment of individual ministers; or legislature itself appoints ministers.***

*If the legislature influence the composition of ministers or their approval is required to confirm the appointment of individual ministers, or the legislature itself appoints ministers, then I assign a check mark **1**. If the legislature’s approval is only required under special circumstances then I assign a check mark **0.5**. A check mark **0** is assigned if the executive appoints the ministers without the legislature’s approval.*

In the former constitution, and with reference to item 2, the President does not require the approval to confirm the appointment of individual ministers. The executive (read President) has the powers subject to Section 16(2), 15(2) and 19(1) to appoint ministers, the

Vice-President and assistant ministers. Section 18 is also specific. It stipulates that “responsibility for any business of the government of Kenya, including administration of any of the departments of Government, may be assigned to the Vice-President and the several Ministers as the President may, by directions in writing, determine.” And these offices shall become vacant if the President so determines. I would assign a score mark **0** that the legislature has no influence in the composition of ministers. However, and with reference to item 6 and Section 15A on the former constitution, courtesy of the National Accord and Reconciliation Act of 2008 that established the Coalition Government, Parliament has the power to appoint the Prime Minister, and the Deputy Ministers<sup>34</sup>. With this development, I assign a score mark 0.5 for the former constitution.

In the new Constitution, on functions of the President, Chapter 9 Article 132 (2a) read together with Article 152 (2) on the cabinet, states that the President shall nominate and with the approval of the National Assembly, appoints, and may dismiss- Cabinet Secretaries. While Chapter 8 Article 124 (4a-c) states that when a House of Parliament considers any appointment for which its approval is required under this constitution or an Act of Parliament, the appointment shall be considered by a committee of the relevant House; the committee’s recommendation shall be tabled in the House for approval; and the proceedings of the committee and the House shall be open to the public. Not only are Cabinet Secretaries nominees to be vetted and confirmed by Parliament, Article 250(2) is clear on the role Parliament is to play in the appointment of Chairpersons, members of commissions and holders of independent offices. I will therefore assign a check mark **1** for the new constitution as legislature’s approval is required to confirm the appointment of individual ministers.

**8. *The country lacks a presidency entirely; or there is a presidency, but the president is elected by the legislature.***

*I assign a check mark **1** if the presidency is elected by the legislature and **0** if he is directly elected by the people.*

In the former constitution, Section 5(1) provides that “the President shall be elected in accordance with this Chapter, subject thereto, with an act of Parliament regulating the election of a President.” Section 5 (3f) provides that “the candidate for President who is elected as a member of the national assembly and who receives a greater number of valid votes cast in the

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<sup>34</sup> It should be noted though, that under the Accord, the respective Principals of the two parties would appoint equal number of ministers and assistant ministers and to appointments to other state departments would be shared on a fifty- fifty basis amongst the two parties. Hence parliament only appoints the PM and his deputies.

Presidential election than any other candidate for the President and who, in addition, receives a minimum of twenty-five percent of the valid votes cast in at least five of the eight provinces shall be declared to be elected as President.” Therefore, the country has a presidency and he is not elected by the legislature. I assign a check mark **0** for the former constitution.

As per Transitional Clause in the new constitution, and considering the National Reconciliation and Peace Accord, the current President and the entire Cabinet are also members of Parliament. However, after the next general elections, Kenya will have a pure Presidential system of government where the President and all his Cabinet Ministers or Secretaries will not be MPs. Article 136 (1) stipulates that “the President shall be elected by registered voters in national elections conducted in accordance with this Constitution and any Act of Parliament regulating presidential elections.” On this item, I assign a check mark **0** for the new constitution as the President is not elected by the legislature.

**9. *The legislature can vote no confidence in the government without jeopardizing its own term (that is without the threat of dissolution).***

*If the legislature can pass a vote of no confidence or a motion of censure on the government without jeopardizing its own term, I assign a checkmark 1. A check mark 0.5 is assigned if the legislature can pass a motion of no confidence but threatens dissolution. This is because if that is the only way to remove a wayward president or executive and it risks its own “life” in the process, then it gets the marks. However, 0.5 check marks can be assigned if the legislature can pass a vote of no confidence in individual ministers. A 0 check mark is assigned if none of the powers is awarded to it.*

Section 59 (3) of the former constitution states that Parliament can pass a vote of no confidence against the Cabinet if:

“the National Assembly passes a resolution which is supported by the votes of the majority of all members of the Assembly (excluding the *ex officio* members), and of which not less than seven days’ notice has been given in according with the standing orders of the Assembly, declaring that it has no confidence in the government of Kenya, and the President does not within three days of the passing of that resolution either resigns from his office or dissolve Parliament, Parliament shall stand dissolved on the fourth day following the day on which that resolution was passed.”

This in effect means that the Parliament can jeopardize its own term as it will stand dissolved if this takes effect. I assign a score mark **0.5** for the former constitution as it risks its own “life”.

In the new constitution, the life of the House is protected by Article 102(1) and only expires on the date of the next general election. I assign a score mark **1** for the new



constitution - read together with Item 1 on impeachment of the President - that the legislature can pass a vote of no confidence or a motion of censure without jeopardizing its own term.

## **5.2 Institutional Autonomy (10-18)**

Items 10-18 according to Fish and Kroenig (2009: 4), evaluate the legislature's institutional autonomy. They ask whether the legislature is immune from dissolution by the executive, vested with exclusive law making authority, free from the threat of an effective executive veto, free from threat of judicial review, able to legislate on any issue, in charge of government expenditures, in control of its own finances, composed of members immune from arrest, and free from executive appointees.

### **10. *The legislature is immune from dissolution from the executive.***

*If the legislature is immune for the displeasure of the executive and has a fixed term, I assign a checkmark 1. By fixed term means that the legislature stands to dissolve itself at the end of their term. The legislature can still be assigned a check mark 1 if, on its own volition, decides to dissolve itself and still immune from dissolution by the executive. However, the legislature gets a checkmark 0.5 if it has a fixed term but the executive has the power to dissolve it only on special conditions. However, a check mark 0 is awarded if the legislature has no fixed term or it has but its survival is dependent on the whims of the executive.*

Section 59 (1) and (2) in the old constitution stipulate that the President may at any time prorogue or dissolve Parliament. On these two subsections, Parliament is not immune from the executive. I assign a check mark 0 for the former constitution.

In the new Constitution, Article 102 (1) stipulate that the term of each House of Parliament expires on the date of the next general election, and clause (2), states that "when Kenya is at war, Parliament may, by a resolution supported in each House by at least two-thirds of all members of the House, from time to time extend the term of Parliament by not more than six months at a time." I assign a check mark 1 for the new constitution that the executive has no power to dissolve it whatsoever.

### **11. *Any executive initiative on legislation requires ratification or approval by the legislature before it takes effect; that is, the executive lack decree power.***

*As one of the supreme functions of the legislature is law-making, then, if the legislature has the monopoly over the lawmaking, I assign a check mark of 1. Should the legislature be a rubber stamp of the executive, meaning they just ratify what the executive has made, I assign a check mark 0. However, in the situation the legislature gives temporary decree powers to*

*the executive on specified areas of authority and can rescind those powers, I assign a check mark 1. If the legislature cannot rescind those powers then I assign a checkmark 0.5. But, should the executive make laws without permission from the executive, a check mark of 0 is awarded. If the executive passes decrees that have the force of law without the legislature enjoying the right to annul the decrees, I assign a check mark 0; and 1 if it has the power to annul.*

Section 30 of the former constitution stipulates that the legislative power is vested in Parliament, which shall consist of the President and the National Assembly. Section 46, states that legislative powers are vested in Parliament through enacted bills. However, Section 48 restricts Parliament from debating any financial matters that touches on taxation, imposition of a charge, payment, issue or withdrawal on the Consolidated Fund except upon the recommendation of the President signaled by a minister. I assign a check mark 0 for the former constitution as the President has authority on certain financial matters. This also refers to item 12. Presidential decrees were also equated for law even though they were illegal (Machuhi, 2012).

Article 94 of the new constitution stipulates that the legislative authority is derived from the people and at the national level is exercised by Parliament, and no person or body, other than Parliament, has the power to make provision having the force of law in Kenya except under authority conferred by the constitution or by legislation. I assign a check mark 1 as the legislature under the new constitution has the monopoly of making laws.

***12. Laws passed by the legislature are veto-proof or essentially veto-proof; that is, the executive lacks veto power, or has veto power but the veto power can be overridden by a simple majority in the legislature.***

*If a bill automatically becomes law once passed without the executive having veto-proof, then I assign a check-mark 1. If the executive has veto power but can be overridden by a simple majority in the legislature, I assign a check mark 1. Fish & Kroenig (2009: 8) argue that if a bill automatically becomes law once the legislature passes it, the executive lacks veto-power, and the answer is affirmative. A check mark 0.5 is assigned if a super majority is required to overturn a veto power from the executive. A simple majority here should be understood to mean the majority of the members present at the House at the time of voting. A super majority means more than three quarters of the total members of the house are present and vote to overrule. A check mark 0 is awarded if the executives veto power cannot be overturned by the house.*

Items 11 and 14 concerning the former constitution is relevant here. Nevertheless, on legislation and procedure in the national assembly, and in exercising of legislative power of Parliament, Section 46 provides that Bills once passed in Parliament, should be presented to the President for his assent and the President has twenty-one days to signify to the Speaker that he assents to the Bill or refuses to assent to the Bill. Section 46 (4) provides that where the President refuses to assent to a Bill he shall, within fourteen days of the refusal, submit a memorandum to the speaker indicating the specific provisions of the Bill which in his opinion should be reconsidered by the National Assembly including his recommendation. Sub-section (5) provides that the National Assembly shall consider a Bill referred to it by the President and shall either approve the recommendations and resubmit it or refuse to accept the recommendations and approve the Bill in its original form by a resolution in that behalf supported by votes of no less than sixty-five per cent of all members of the national assembly in which case the President shall assent to the Bill within fourteen days of the passing of the resolution. I assign a check mark **0.5** for the former constitution as it requires a super majority to overturn a veto from the executive.

Article 94 in the new constitution provides that Parliament's authority is vested in and exercised by Parliament and Article 109 provides that Parliament shall exercise legislative power through Bills passed by Parliament and assented to by the President. The same procedure as in the former constitution is also the same here. The only difference is the shortened duration of time the President has to assent. I assign a check mark **0.5** as a super majority is required to overturn a veto power from the President.

**13. *The legislature's laws are supreme and not subject to judicial review.***

*If the legislature's law are supreme and cannot be rejected by the judiciary, then I assign a score mark 1. If the laws are rejected by the judiciary but the legislature can re-make the laws, I assign a score mark 0.5. But if the legislature does not have the final word and the judiciary can overturn or reject the laws, the item is negative and receives a score mark 0.*

In the former constitution, Chapter 1 Section 3 provide that "this Constitution is the Constitution of the republic of Kenya and shall have the force of law throughout Kenya and, subject to section 47, if any law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of inconsistency, be void". And Section 67 (1) provides that "where a question as to the interpretation of this Constitution arises in proceedings in a subordinate court and the court is of the opinion that the question involves a substantial question of law, the court may, and shall if a party to the proceedings so requests,

refer the question to the high court.” However, Section 47 of the constitution empowers Parliament to amend the constitution. According to Dr. PLO Lumumba (2009: 149) Parliament is subject to jurisdictional factors and the doctrine of Parliamentary Supremacy, as obtains in England, can only apply to Kenya subject to modifications; the modification being that Parliament is only supreme in so far as it acts in accordance with the constitution. I assign a score mark **0.5** for the former constitution as Parliament can make and unmake laws.

In the new constitution, Chapter 8, Article 94, provide that the legislative authority of the Republic is derived from the people and, at the national level, is vested in and exercised by Parliament. Article 94 (5) is clear that “no person or body, other than Parliament, has power to make provision having the force of law in Kenya except under authority conferred by the constitution or by legislation.” Article 165 stipulates, that among others, the high court shall have jurisdiction to hear any question respecting the interpretation of the constitution including determination of the question whether any law is inconsistent with or in contravention of this constitution. With clear distinct roles in the constitution, I assign a score mark **1** for the new constitution as its laws or not subject to judicial review.

**14. *The legislature has the right to initiate bills in all policy jurisdictions; the executive lack gatekeeping authority.***

*If the legislature has the power to initiate bills in all policy jurisdictions, I assign a score mark 1. If the only right reserved for the executive is to introduce budget, I assign a score mark 1. If the executive has gatekeeping authority whereby only the executive has the right to introduce legislation in some/most areas and the role of the legislature as a whole is limited in practice to rejecting or accepting such initiatives, I assign a score mark 0. However, if the executive has authority to introduce legislation on some areas but the legislature alone has the powers to alter or introduce measures on the legislation, I assign a score mark 0.5.*

In the former constitution, Section 48(a) (b) puts restriction with regard to certain financial measures. It stipulates that except upon the recommendation of the President signified by a Minister, the National Assembly shall not proceed upon a Bill (including an amendment to a Bill) that makes provision for any of the following purposes: imposition of taxes or the alteration of taxation; imposition of a charge on the Consolidated Fund; the payment, issue or withdrawal from the Consolidated Fund; the composition or remission of a debt due to the Government of Kenya. This means that the National assembly has no jurisdictions on most money Bills. I assign a score mark **0** for the former constitution.

Chapter 8, Article 109 (1) in the new constitution states that “Parliament shall exercise its executive power through Bills passed by Parliament and assented to by the President”, and Article 109 (2) states that “any Bill may originate in the National Assembly”. However, Article 109 (5) provides that a Bill may be introduced by any member or committee of the relevant House of Parliament, but a money Bill may be introduced only in the National Assembly in accordance with Article 114. In Article 114 clause (1 to 4), explains and defines “a money Bill” and what it involves (for example, taxes, loans, appropriation). In departure from the former constitution, the President has no gatekeeping powers in any jurisdictions. I assign a check mark **1** that the Legislature has right to initiate Bills in all policy jurisdictions.

***15. Expenditure of funds appropriated by the legislature is mandatory; the executive lacks the power to impound funds appropriated by the legislature.***

*I assign a score mark 1 if the executive spends appropriation specified by the legislature. However, if appropriations specified by the legislature can be blocked, redirected or manipulated by the executive, I assign a score mark 0. If the executive must use funds not allocated in the previous budget but must seek approval from the legislature, I assign a score mark 0.5.*

Refer to item 14 for the former constitution Section 48 (a) to (b). All “Money Bills” could be introduced only “upon the recommendation of the President. Hence, the Executive could unilaterally dictate fiscal policy and appropriate to itself any funds it required. I assign a check mark **0** for the former constitution.

The new constitution in Article 95(4 a to c) confers to the National Assembly the role to appropriate funds for expenditure by the national government and other national State organs and also to exercise oversight over national revenue and its expenditure. However, it is Article 220 to 227 that have put a cap on the power of the Executive in relation to the national budget and other financial matters. Article 221 (1) which offers Parliament an opportunity in engaging in budget preparation stipulates that “at least two months before the end of each financial year, the Cabinet Secretary responsible for finance shall submit to the National Assembly estimates of the revenue and expenditure of the national government for the next financial year to be tabled in the National Assembly.” (See appendix on highlights of the budget process). Thus, as mentioned, under the new constitution, Parliament has been transformed into a budget making organ as opposed to budget rubberstamping forum. I therefore assign a check mark **1** as the Funds appropriated are mandatory as specified by the legislature.

**16. *The legislature controls the resources that finances its own internal operations and provides for the perquisites of its own members.***

*If the legislature enjoys financial autonomy from the executive and controls its own resources, I assign a score mark 1. If the executive controls the resources that fund the legislature's operation, I assign a score mark 0. If the legislature must seek approval from the executive to finance some operations, I assign a score mark 0.*

Under the former constitution and the new Constitution, Parliament is accorded fiscal autonomy. The Constitution of Kenya Amendment Act of 1999 was passed by the National Assembly on November 17, 1999 and assented to by former President Moi two days later. The Parliamentary Service Act was enacted in 2002 and it facilitated the creation of a Parliamentary Service Commission, distinct from the Public Service of Kenya. These Amendments made Kenya's National Assembly both financially and administratively independent of the executive as it created a Parliamentary Service Commission (PSC) responsible for, among others, overseeing the National Assembly's budget and administration, preparing Parliament's budget – and providing for yearly audits. And in section 45B (6) of the former constitution, the autonomy of Parliament is guaranteed as it provides that “in the exercise of its powers or the performance of its functions, under this constitution, the Commission shall not be subject to the direction or control of any other person or authority.”

In the new constitution, fiscal independence is acknowledged in Article 221 (1 to 7) that stipulates, inter alia, that the “National Assembly shall consider the estimates submitted by the Cabinet Secretary with estimates submitted by the Parliamentary Service Commission and the Chief Registrar of the Judiciary”. I assign a score mark 1 for both constitutions.

**17. *Members of the legislature are immune from arrest and/or criminal prosecution.***

*Are legislatures free from arrest or punishment in the course of their work, I assign a score mark 1. If the legislature as an institution has the power to lift immunity of legislators, then I will still assign a check mark 1. If the legislators are not free from fear in their work as legislators, I assign a check mark 0 and this also applies to situations where other agencies have the power to lift the immunity of legislators. If the legislators are only free in the precincts of Parliament or during sessions but can be arrested outside, then I assign score mark 0. This includes situations where the legislature is immune only on paper but members are frequently arrested. If the legislature is free from arrest in the course of their work but can be caught in criminal acts, I assign a check mark 0.5.*

Powers, privileges and immunities of the National Assembly and its committees and members are provided in Section 57 of the former constitution for the purpose of orderly and effective discharge of its business and without prejudice to section 56. Section 56 provides for National Assembly to make standing orders regulating the procedure of the Assembly. While in the new constitution, Chapter 8, Article 117 (2) provides for that Parliament may for the purpose of the orderly and effective discharge of the business of Parliament, provide for the powers, privileges and immunities of Parliament, its committees, the leader of majority party, the leader of minority party, the chairpersons of committees and members. The National Assembly (Powers and Privileges) Act (revised 1998) Part II on Privileges and Immunities, which is relevant to date, provide in Section 4 that “no civil or criminal proceedings shall be instituted against any member for words spoken before, or written in a report to, the Assembly or a committee, or by reason of any matter or thing brought by him therein by petition, Bill, resolution, motion or otherwise”. And Section 5 of the Act provides that “no member shall be liable to arrest for any civil debt except a debt the contraction of which constitutes a criminal offence, whilst going to, attending at or returning from a sitting of the Assembly or any committee.” Section 6 protects members from civil or criminal proceedings and provides that “no process issued by any court of Kenya in the exercise of its civil jurisdiction shall be served or executed within the precincts of the Assembly while it is sitting, nor shall any such process be served or executed through the Speaker or any officer of the Assembly unless it relates to a person employed within the precincts of the Assembly or to the attachment of a member’s salary”. But these privileges do not apply to a member during the period of suspension, since such member is deemed to be a stranger. I assign a score mark **0.5** for the former constitution as well as the new constitution as members are immune and only prosecuted if they are involved in criminal activities.

***18. All members of the legislature are elected; the executive lacks the power to appoint any member of the legislature.***

*A check mark 1 is assigned if all the members of the legislature are elected and the executive lack the power to appoint any member of the legislature. A check mark of 1 is also assigned if the number appointed by the executive is less than 2 percent of the total members of the legislature. If the executive appoints members but they do not have voting rights, a check mark 1 is also awarded. If the executive appoints a substantial number of legislators who also have voting rights, I assign a check mark 0. However, if the legislature has two chambers and the members of the upper chamber are appointed by the legislature but do not appoint any in*

*the lower chamber, then I assign a check mark 1. This is because the upper chamber is largely ceremonial and possesses little or no real legislative powers.*

In the former constitution, Parliament consists of 210 elected members and 12 nominated members to represent special interests and nominated by parties according to their parliamentary strength. The list of the nominated members is forwarded to the President by the electoral body to be according to President Section 33 (1) and taking into account the principle of gender equality. I therefore assign a check mark 1 for the former constitution as majority of the members are elected.

In the new constitution, Chapter 8, Article 97 (1) (a to c) states that the National assembly consists of 290 members, each elected by registered voters of single member constituencies; 47 women, each elected by registered voters of the counties; 12 members nominated by Parliamentary political parties according to their proportion of members of the National Assembly in accordance with article 90, to represent special interests including the youth, persons with disabilities and workers. I assign a check mark 1 for the new constitution as most members of the National Assembly and the Senate are elected.

### **5.3 Specified Powers (19-26)**

Items 19-26 focuses on specified powers. Items in this category, according to Fish and Kroenig (2009: 4), inquire about whether the legislature is vested with powers to change the constitution, authorize war, ratify treaties, grant amnesty, grant pardon, influence judicial appointments, appoint the head of the central bank, and influence the stat-owned media.

#### **19. The legislature alone, without the involvement of any other agencies, can change the constitution.**

*If the legislature alone has the power to change the constitution I assign a check mark 1. If the legislature has the power to change the constitution, but other actors too have the some powers, I assign a check mark 0.5. However, if other actors can change the constitution, but such changes must be approved by the legislature, I assign a check mark 0.5. If the legislature does not play any role in changing the constitution, I assign a check mark 0.*

In the former constitution, Section 47(1) and (2) provides that Parliament may alter the constitution by a majority of not less than 65 per cent of all the members of the Assembly. Here, references to the alteration, according to Section 46 (6b), are references to the amendment, modification or reenactment, with or without amendment or modification of any provision of the constitution, the suspension or repeal of that provision and the making of a



different provision in the place of that provision. For the former constitution, I assign a check mark **1** as it has the power to alter the constitution.

In the new constitution, Article 94 (3) provides that Parliament may consider and pass amendments to and alter boundaries as provided in this constitution. Article 255(1) stipulates that a proposed amendment to this constitution shall be enacted in accordance with Article 256 or 257, and approved in accordance with clause (2) by a referendum, if the amendments relates to any of the following matters: the supremacy of this constitution; the territory of Kenya; the sovereignty of the people; the national values and principles of governance; the Bill of Rights; the term of office of the President; the independence of the judiciary and the commissions and Independent offices<sup>35</sup>; the functions of Parliament; the objects, principles and structure of devolved government. Clause (3) on the other hand, provides that an amendment to this Constitution that does not relate to a matter mentioned in clause (1) shall be enacted either by Parliament, in accordance with Article 256 or by the people and Parliament, in accordance with Article 257.

Now, should either House of Parliament fails to pass the Bill, or even to a Bill mentioned in Article 255(1) above, Article 257(10) stipulates that the proposed amendment shall be submitted to the people in a referendum. On this item, I assign a check mark **0.5** as the legislature on itself alone cannot change the constitution.

**20. *The legislature's approval is necessary for the declaration of war.***

*If the legislature's approval is necessary for declaration of war, a check mark of 1 is awarded. If the approval is not required, a check mark 0 is assigned.*

Nowhere in the former constitution is Parliaments' approval necessary or required for the declaration of war. The only place war has been mentioned is concerning the life of Parliament. Section 59(5) provides that at any time Kenya is at war, Parliament may from time to time provide for the extension of the period of five years. I therefore assign a check mark **0** for the former constitution.

In the new constitution, Article 95 (6) stipulates one of the roles of the National Assembly as to approve declarations of war and extensions of states of emergency. Article 132 (4d) states that the President may “with the approval of Parliament, declare war.” However, Article 58 (1) states that “a state of emergency may be declared only under Article 132 (4d) and only when the state is threatened by war, invasion, general insurrection,

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<sup>35</sup> There are 11 Independent offices and among them are, Parliamentary Service Commission, Judicial service Commission, Auditor-General, among others.

disorder, natural disaster or other public emergency; and the declaration is necessary to meet the circumstances for which the emergency is declared”. Consequently, Article 58 (2) states that “ a declaration of a state of emergency, and any legislation enacted or other action taken in consequence of the declaration, shall be effective only prospectively; and for no longer than fourteen days from the date of declaration, unless the National Assembly resolves to extend the declaration”. With this in mind, I assign a check mark **1** for the new constitution for the requirement of approval from the legislature before declaration of war.

**21. *The legislature’s approval is necessary to ratify treaties with foreign countries.***

*If the legislature’s approval is necessary to ratify treaties with foreign countries, a check mark 1 is assigned. A check mark 0 is assigned if ratification is not required from the legislature.*

Nowhere in the former constitution is the approval of the necessary for ratification of treaties with foreign countries. However, there is parliamentary departmental committee on Defence and Foreign Relations whose mandate is on matters of defence, East African Community matters, Pan-African Parliament, regional and international relations, agreements, treaties and conventions. Since, their mandate is not clearly defined and different from, say, the Parliamentary Budget Committee; I assume that its role is to play an oversight role and of ensuring the obligations by the executive are met. I assign a score mark **0** for the former constitution.

In the new constitution, Article 2(5) states that the general rules of international law shall form part of the law of Kenya and Article 132(c iii) states that the President shall “once every year submit a report for debate to the National assembly on the progress made in fulfilling the international obligations of the republic”, while in Article 132(5) provides that the President shall ensure that the international obligations of the republic are fulfilled through the actions of the relevant cabinet secretaries. Article 153 (3) provides that a cabinet secretary shall attend before a committee of the National Assembly, or the Senate, when required by the Committee, and answer any question concerning a matter for which the cabinet secretary is responsible. Clause (4) provides that cabinet secretaries shall act in accordance with this constitution and provide Parliament with full and regular reports concerning matters under their control. Article 95 (5b) provides that the National Assembly exercises oversight of state organs and on this matter, any foreign affairs falls under the Defence and Foreign Relations Committee of Parliament as mentioned earlier. There is also a Private Members Bill pending debate in Parliament called the Ratification of Treaties Bill that requires Parliament’s

approval before ratification of any treaty with foreign countries. Since this is yet to be passed, I assign a score mark **0** for the new constitution.

**22. The legislature has the power to grant amnesty.**

*Here amnesty refers to political offenses; and if the legislature has the power to grant amnesty, a check mark **1** is assigned. If not, a check mark **0** is given.*

Item 22 and item 23 will be considered together.

In the former constitution, there is a Section on the Prerogative of Mercy, which can be translated to mean either amnesty or pardon. Section 27 (a to c) stipulates that “the President may grant to a person convicted of an offence a pardon, either free or subject to lawful conditions; grant to a person a respite, either indefinite or for a specified period, of the execution of a punishment imposed on that person for an offence; substitute a less severe form of punishment for punishment imposed on a person for an offence”. Subsection (e) grants the President power to “remove in whole or in part the non-disqualification or the disqualification of a person, arising out of or in consequence of the report of an election court under the provisions of the National Assembly and Presidential Elections Act, from registration as an elector on a register of electors or from nomination for election as an elected member of the National Assembly”. The President as provided has powers to pardon even court decisions. There is also an Advisory Committee on the Prerogative of Mercy composed of the Attorney General (a Presidential appointee), and at maximum, five other members appointed by the President in the Committee. Under Section 28(2ii), a member of the Committee appointed shall hold the seat thereon for such a period “in any case, if the President in writing so directs.” However, where a person has been sentenced to death for an offence, the President under Section 29(1) after obtaining the advice of the Committee, he shall decide in his own judgment whether to exercise any of his functions under section 27. With Parliament having no powers whatsoever to grant amnesty to political offences, I assign a check mark **0** for the former constitution.

In the new constitution, Article 133(2) states that “there shall be an Advisory Committee on the power of Mercy”, comprising the Attorney General, Cabinet Secretary responsible for correctional services and at least five other members as prescribed by the Act of Parliament, none of whom may be a State Officer or in public service. Parliament, according to Article 133(3) shall enact legislation to provide for the tenure, procedure of the members of the Advisory Committee and the criteria that shall be applied in formulating its advice. And Article 133(4) provides that “the Advisory Committee may take into account the

views of the victims of the offence in respect of which it is considering making recommendations to the President”. Article 133(1) provides that “on the petition of any person, the President may exercise a power of mercy in accordance with the advice of the Advisory Committee.” A check mark of **0** is awarded for the new constitution may not grant amnesty or pardon for any offence.

**23. *The legislature has the power of pardon***

*Pardon here refers to nonpolitical criminal offences and a check mark **1** is awarded if the legislature grants pardon and **0** if it cannot.*

See comments on the former and the new constitution on item 22. A check mark of **0** is assigned for both the former and the new constitution as the legislature has no power of pardon.

**24. *The legislature reviews and has the right to reject appointments to the judiciary; or the legislature itself appoints members of the judiciary.***

*According to Fish & Kroenig (2009: 11), the right to influence the composition of the judiciary carries the potential to affect the legal system and the administration of justice and where the legislature appoints members to the judiciary or has a role in the in judicial appointments. If the legislature reviews or has a hand in rejecting or appointment of members of the judiciary, both as single members and the judiciary as a whole, I assign a check mark **1**. If the legislature only appoints a single member of the judiciary and not the rest (national level courts, Supreme Court, or constitutional court), I assign a check mark **0.5**. If the legislature is not involved in any way, I assign a check mark **0**.*

In the former constitution, Section 61(1) provides that the Chief Justice shall be appointed by the President and sub section (2), the other (referred to as puisne judges) judges shall be appointed by the President acting in accordance with the advice of the Judicial Service Commission. Therefore, the legislature has no right to influence the composition of the judiciary as a whole and I assign a check mark **0**.

In the new constitution, Article 166 (1a) stipulates that the President shall appoint “the Chief Justice and the Deputy Chief Justice, in accordance with the recommendation of the Judicial Service Commission and subject to the approval of the National Assembly.” In the establishment of the Judicial Service Commission, the constitution states that the commission shall consists of among others, the Chief Justice, the Attorney General and in Article 171 (h) “one woman and man to represent the public, not being lawyers, appointed by the President with the approval of the National Assembly”. The constitution provides that the other judges

will be vetted by the Judicial Service Commission and appointed by the Chief Justice. I assign a check mark **0** for the old and **0.5** for the new constitution.

**25. The chairman of the central bank is appointed by the legislature.**

*If the legislature appoints the chairman of the central bank, or is included in the appointing, vetting the candidate for the position, or even has the power to dismiss the chairman, I assign a check mark **1**. If the legislature has no role in the appointment of the central bank chairman but has the capacity to dismiss the central bank chairman, I assign a check mark **0.5**. However, if the legislature has no role whatsoever in the appointment or dismissal of the chief of the central bank, I assign a check mark **0**.*

In the Kenyan context, the head of the central bank is called the governor of the bank. The former constitution does not mention the central bank, the governor or its operations. This is mentioned instead in the Central Bank of Kenya Act. However, Section 24 stipulates that “Subject to this Constitution and any other law, powers of constituting and abolishing offices for the Republic of Kenya, of making appointments to any such office and terminating any such appointment, shall vest in the President”. Section 25(1) is more specific by providing that “Save in so far as may be otherwise provided by this Constitution or by any other law, every person who holds office in the service of the Republic of Kenya shall hold that office during the pleasure of the President”. The Central Bank of Kenya Act Chapter 491 Part IV 11 (2) provide that “the Governor, Deputy Governor and the directors under paragraph (d) of subsection (1) shall be appointed by the President and shall hold office for terms of four years each but shall be eligible for re-appointment”. As the legislature has no role in the appointment or dismissal of the central bank chief, I assign a score mark **0** for the former constitution.

Article 231 in the new constitution recognizes the Central Bank of Kenya (CBK) and gives it autonomy to carry out its functions under clause (3). Clause (5) stipulates that “an Act of Parliament shall provide for the composition, powers, functions and operations of the Central Bank of Kenya”. However, Amendment to the Section 11 of the Central Bank of Kenya Act (Hansard 19.04.2011: 83-85) that the directors of CBK shall be appointed by the President with the approval of Parliament and shall hold office for a period of four years but shall be eligible for re-appointment for one further term of four years (Thuku, 2011). A further amendment of the CBK Act, Section 13 (32) (c), provides that “there shall be a governor who shall be appointed by the President in a transparent and competitive process and with the approval of Parliament.” I assign check mark **1** for the new constitution.

**26. *The legislature has a substantial voice in the operation of the state-owned media.***

*To counterbalance the dominance of the executive in the state owned media, the legislature has to have a substantial voice in the operation of the state-owned media. If the legislature, governs, or appoints members that governs the state owned media and therefore has influence, on how the state-owned media is run, a check mark of 1 is assigned. If the legislature does not appoint members but has influence in the operation of the state-owned media, a score mark 0.5 is awarded. If the legislature has no substantial voice or influence on the state-owned media, a check mark 0 is assigned.*

There is nowhere in the former constitution where the national media is mentioned. However, being a state corporation, appointments are done by the respective ministry it falls under, or done by the President who has the powers under Section 24 of constituting and abolishing offices, of making appointments to any such office and terminating such appointment. I assign a score mark 0 for the former constitution.

In the new constitution, Article 34 (5) provides that “Parliament shall enact legislation that provides for the establishment of a body, which shall be independent of control by government, political interests or commercial interests; reflect the interests of all sections of the society; and set media standards and regulate and monitor compliance with those standards.” Article 34 (4) stipulates that “all state-owned media shall be free to determine independently the editorial content of their broadcasts or other communications; be impartial; and afford fair opportunity for the presentation of divergent views and dissenting opinions.” However, on the legislation of political parties, Article 92 provides that Parliament shall enact legislation to provide for the reasonable and equitable allocation of airtime, by state-owned and other mentioned categories of broadcasting media, to political parties either generally or during election campaigns; the regulation of freedom to broadcast in order to ensure fair election campaigning. As the legislature has some influence in so far as legislation in the operationalization of the state-owned media, I assign a score mark **0.5** for the new constitution.

**5.4 Institutional Capacity (27-32)**

Items 27-32 measure the legislature’s institutional capacity. According to Fish and Kroenig (2009: 4), it assesses whether legislators meet regularly, have staff, are eligible for re-election, and number among their own a significant cohort of experienced colleagues.

**27. The legislature is regularly in session.**

*If the legislature holds regular session, at least not less than six months, I assign a score mark 1. If the legislature is rarely in session, I assign a score mark 0. According to Fish & Kroenig (2009: 12) regular session gives a threshold of about six months per year as lengthy enough to enable it to handle the load of responsible, working assembly.*

In the former constitution, Section 58 (1) provides that each session<sup>36</sup> of Parliament shall be held at such a place within Kenya and shall commence at such a time as the President may appoint. Clause (2) provides that there shall be a session of Parliament at least once in every year, so that a period of twelve months shall not intervene between the last sitting of the National Assembly in one session and one sitting thereof in the next session. Clause (3) provides that when Parliament is dissolved, the first session of the new Parliament shall commence within three months after that dissolution. Clause (4) provides that the sittings of the national assembly in a session of Parliament shall be held at such a time and on such days as may be determined in accordance with the standing orders of the Assembly. I assign a score mark **1** for the former constitution.

In the new constitution, according to Article 126 (2) whenever a new House is elected, the first sitting of the new House shall not be more than thirty days after the election. According to the standing orders Part VII Section (1) to (3) provides that the House shall meet at 9.00 a.m. on Wednesday and at, 2.30 p.m. on Tuesday, Wednesday, and Thursday, but more than one sitting may be directed during the same day. The House may also resolve to meet at any other time on a sitting day in order to transact business. Look at the Appendix for the legislative calendar of the fourth session of Parliament. I assign a score mark **1** for the new constitution.

**28. Each legislator has a personal secretary.**

*The availability of a personal secretary may influence the legislator's effectiveness which in might also affect the legislature's capacity. A score mark 1 is given if each legislator has a personal secretary. A score mark 0 is given if the legislators do not have a secretary to assist him or her.*

A score mark **1** for both constitutions is awarded. Explanation is given in item 29 as both are covered with the same legislation.

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<sup>36</sup> According to the standing orders, "session" means a period in which the House is seating continuously without adjournment and includes any period during which the House is in Committee; but two or more period of sittings within the normal period of one sitting, or within an equivalent period shall not rank as more than one sitting (Standing orders 2008: 5).

**29. Each legislator has at least one non-secretarial staff member with policy expertise.**

*According to Fish & Kroenig (2009: 12) use of at least one person with policy expertise irrespective of whether the person is employed by the member's office, committee, or party, boosts legislators' effectiveness and bolster the legislature's capacity. If each legislator has such a resource at their disposal, a score mark 1 is given; if not, a score mark 0 is given.*

Section 45 of the former constitution, repealed in 1999, established in Section 45A and Section 45B, the Parliamentary Service and the Parliamentary Service Commission (PSC) and made the National Assembly financially and administratively independent of the executive. The Parliamentary Service is composed of the Clerk of the National Assembly and other officers and staff as appointed by the PSC. The Parliamentary Service Commission consists of the Speaker as the chairman, a vice-chairman elected among members, the leader of Government business in the National Assembly (traditionally the highest ranking Minister in the government, which is the Vice-President), the leader of the opposition party with the highest number of seats in the National Assembly, seven members (not ministers) with four nominated by the parties forming the government, while three nominated by parties forming the opposition. Section 45B gave the PSC wide ranging powers among them, to appoint competent persons to assist effective and efficient carrying out its functions.

With far ranging powers, the PSC has made changes in Parliament which included transforming the institution, staff, members, facilities, budget and committees. PSC has opened several Departments to offer professional services to MPs including Department of Information and Research, Health Club department, Legislative and Committees Services. The Fiscal Management Act 2009 created the Budget Office which among other duties sensitizes MPs on the budget process. There is also the Centre for Parliamentary Studies and Training whose main role is to enhance the capacity of MPs, staff of Parliaments and others, by offering learning and training opportunities/courses through suitable modules (Parliamentary Service Commission Annual Report 2011: 40).

Section 14 of the PSC Act 2000, according to Njuguna (2010: 16), defines the procedural function of the Clerk of the National Assembly, to include; rendering expert, non-partisan and impartial advice to MPs on Parliamentary procedure and practice. On this item concerning non-secretarial staff with policy expertise, I assign both constitutions check mark **1** each.



**30. Legislators are eligible for reelection without any restriction.**

*If legislators are eligible for reelection without any restriction and are free from term limits, a score mark 1 is given. If there are restrictions with term limits, a score mark 0 is assigned.*

In the former constitution, there was no provision barring legislators running for reelection nor are there term limits. I assign a check mark **1** for the former constitution.

There are no term limits for being a Member of Parliament in the new constitution. I assign a score mark **1** for the new constitution as legislators are eligible for reelection without restriction and are free from term limits.

**31. A seat in the legislature is an attractive enough position that legislators are generally interested in and seek reelection.**

*According to Fish and Kroenig (2009: 13)), a seat in the legislature in most countries is a prestigious position that attracts qualified talent, where as it is seen as a mere stepping stone to another, more attractive position. Members too, may value their positions for perks rather than power. If legislators are normally interested in keeping their jobs, a score mark 1 is given, if not, a score mark 0 is given.*

A seat in the legislature is a prestigious position in Kenya. In the former constitution, having a seat in Parliament was the first step for Members of Parliament who wished to be appointed by the President in the Cabinet as Vice-President, Cabinet Ministers or Assistant Ministers and this opened up opportunities for the MPs to earn more and control resources in the ministry. Moreover, the passage of the National Assembly Remuneration (Amendment) Act of 2003 raised the basic salary for MPs to KSh200, 000 and the total package to KSh485, 000, that is, US\$7,460 a month and over US\$89,000 per year<sup>37</sup> (Barkan & Matiangi, 2009: 57). By 2008, at the beginning of the Tenth Parliament, the total package had risen to a whopping US\$ 13,090 per month or US\$157,080 per year and according to Barkan and Matiangi (2009: 57), second only to Nigeria on the continent, and one of the highest in the world. This is in addition to other perks that MPs get. See Table 2.2 in the Appendix. MPs have since then increased their salaries and perks many times. I assign a check mark **1** for both constitutions as MPs value their positions for perks and also a stepping stone to other attractive positions.

**32. The reelection of the incumbent legislators is common enough that at any given time the legislature contains a significant number of highly experienced members.**

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<sup>37</sup> These are 2008 rate (to find the 2012 rate to the dollar).

*If it is common enough that the legislature at any given time has a significant number of highly experienced members (in terms of policy matters, procedure, and ability to repel executive encroachment), a score mark 1 is given. If the legislature does not have a significant number of highly experienced members, a score mark 0 is given.*

All the previous elections in Kenya have resulted in a high turnover of MPs. However, there have always been some seasoned and experienced legislators who have always made it back to Parliament. The result for the Ninth Parliament (2003-2007), according to Barkan and Matiangi (2009: 53) shows that more than half of the Eighth Parliament (1998-2002) were not returned to the Ninth, and 53 percent of the incoming legislators were beginning their first term. See Table 9 below for composition of the Ninth and the Tenth Parliament.

**Table 9: Composition of the Ninth and the Tenth Parliament**

<b>Term serving in Parliament</b>	<b>Ninth (2003-2007)</b>	<b>Tenth (2008-2012)</b>
First	53.1	64.3
Second	23.2	18.8
Third	12.5	8.9
Fourth	5.4	4.9
Fifth	2.7	1.3
Sixth or more	3.0	1.8
N =	(224)	(224)

Composition of the Ninth and Tenth Parliament (in percentages) and is for 210 directly elected members, 12 nominated members, and 2 ex officio members (the Speaker and the attorney general).<sup>38</sup>

A little over a quarter were elected for their second term (23 percent) and 13 percent for a third term. There is a band of about 25 veterans who were elected for their fourth term or more and this include the President, Vice President, and a host of other MPs and together with some third termers who had not served consecutive terms, they were holdovers from the period of single-party rule who have also seen the House evolve since the return of multi-party politics (Barkan & Matiangi, 2009: 54). On the Tenth Parliament, at least 35 percent were serving more than their first term and were therefore well versed with House Procedures and laws. I assign a score mark **1** for the both the former constitution and for the new constitution as the legislature has a significant number of highly experienced members (see the chapter coming now).

<sup>38</sup> This data is part of a larger data including gender, age and education of members of Parliament in Barkan and Matiangi (2009: 53).

**Table 10: Results for the Former and the New Constitution**

<b>NATIONAL ASSEMBLY OF KENYA (BUNGE)</b>							
<b>Former Constitution (1963 – July 2010)</b>							
<b>Score: 0.52</b>							
<b>Influence over executive (6/9)</b>		<b>Institutional autonomy (3.5/9)</b>		<b>Specified powers (1/8)</b>		<b>Institutional capacity (6/6)</b>	
1. replace	0.5	10. no dissolution	0	19. amendments	1	27. sessions	1
2. serve as minister	1	11. no decree	0	20. war	0	28. secretary	1
3. interpellate	1	12. no veto	0.5	21. treaties	0	29. staff	1
4. investigate	0.5	13. no review	0.5	22. amnesty	0	30. no term limits	1
5. oversee police	1	14. no gatekeeping	0	23. pardon	0	31. seek re-election	1
6. appoint ministers	1	15. no impoundment	0	24. judiciary	0	32. experience	1
7. Approve Ministers	0.5	16. control resources	1	25. central bank	0		
8. lack president	0	17. immunity	0.5	26. media	0		
9 no confidence	0.5	18. all elected	1				
<b>NATIONAL ASSEMBLY OF KENYA (BUNGE)</b>							
<b>New Constitution (August 2010 – to date)</b>							
<b>Score: 0.75</b>							
<b>Influence over executive (6/9)</b>		<b>Institutional autonomy (8/9)</b>		<b>Specified powers (4/8)</b>		<b>Institutional capacity (6/6)</b>	
1. replace	1	10. no dissolution	1	19. amendments	1	27. sessions	1
2. serve as minister	0	11. no decree	1	20. war	1	28. secretary	1
3. interpellate	1	12. no veto	0.5	21. treaties	0	29. staff	1
4. investigate	1	13. no review	1	22. amnesty	0	30. no term limits	1
5. oversee police	1	14. no gatekeeping	1	23. pardon	0	31. seek re-election	1
6. appoint ministers	0	15. no impoundment	1	24. judiciary	0.5	32. experience	1
7. approve ministers	1	16. control resources	1	25. central bank	1		
8. lack president	0	17. immunity	0.5	26. media	0.5		
9 no confidence	1	18. all elected	1				

**Table 5**

## 5.5 Summary of the Chapter

In chapter five, the 32 two indicators by Fish and Kroenig were used as a benchmark for measuring the four different indicators that measures parliament's strength. The four indicators measured the strength of the Kenyan Parliament vis-à-vis the former constitution and the new constitution. The overview of the results of the data is plotted on Table 9. This will form the basis of our analysis in the coming chapter. Using the Fish and Kroenig (2009) legislative Powers Survey (LPS) as the basis for generating a Parliamentary Powers Index PPI which ranges from zero (least powerful) to one (most powerful), the score reflects the legislature's aggregate strength. A check mark next to each item would produce a score of 32, indicating an all-powerful parliament and a low score indicate a weak parliament.

## 6.0 Data Analysis

In this chapter, I will analyze data collected in the previous chapter and the results as plotted in Table 9. The aim of the thesis is to examine how the constitutional revisions in Kenya affect Parliaments position in the political system. The data for measuring parliament's position or strength is primarily collected from two different constitutions, among other sources. One of the constitutions, is the former constitution that served Kenya from independence in 1963 to 2010 and been repealed many times. The other is the new constitution promulgated in August 2010.

### 6.0 General Observation of Data

Table 9 provides results overview of the items and indicators including the aggregate results collected for the former constitution as well as for the new constitution and shows parliaments' strength and weaknesses as per the different indicators or categories under observation. A combination of these indicators would help explain why some legislatures are more independent than others and why some play more significant roles in policymaking than others. Comparing the results of the former constitution on Table 10 with Table 7 (page 48) shows a marked improvement for the former constitution. Table 6 shows survey results conducted by Fish and Kroenig (2009). The overall score in comparison for the former constitution is **0.31** (very weak) for Fish-Kroenig against **0.52** (average) scores in my survey. The 5 year difference between two surveys of the same constitution, and the changes the country and parliament has witnessed, has shown the results of some items improve - my method of operationalization notwithstanding - and that parliament has not been static. The other key component under the former constitution is the role the National Accord and Reconciliation Act of 2008 played in improving the survey results and strength of Parliament vis-à-vis the executive. This gradual improvement – part of the torturous path of Parliament according to Barkan and Matiangi (2009) – relates to Samuel Huntington's "snowballing" or "demonstration effect" as one of the reason for the expansion in the number of democracies in the Third Wave (Huntington, 1991). Such a similar demonstration effect helps explain the growth in independence of parliamentary legislation in Kenya over the years and by looking at the results of the Kenyan Parliament under the new constitution as show in Table nine. The results of the former constitution in Table 9 show Parliament's strength crossed the half way mark, thanks to the Accord introduced in 2008 and other legislations.

The comparison of the two constitutions shows Parliament under the new constitution has come out better (**0.75** against **0.52** for the former constitution), doubling the power it had

when the Fish and Kroenig Survey was taken 5 years back (**0.31** aggregate). This makes the current Kenyan Parliament into a powerful institution as it got score marks on **24** of the 32 items in comparison to **16.5** score marks under the former constitution and a paltry **10** score marks during the Fish-Kroenig survey. The former constitution improved by 6.5 score marks from the Fish-Kroenig survey to the survey I performed. Looking at the results, the Kenyan Parliament has made relative strides or improvement in two of the four indicators in which the former constitution had performed dismally. These indicators are: *institutional autonomy* (which has doubled the score marks for the former constitution from **3.5** to **8**) and *specified powers* (from **1** to **4**). The results for *Influence over executive* and *Institutional capacity* are similar in both constitutions. However, whereas the results for the indicator *institutional capacity* is same for each item, the final results for indicator *influence over executive* though similar in the two constitutions, the score marks for some items are different. It is the indicator where the former constitution gained the most after the enactment of the National Accord and Reconciliation Act of 2008. Another interesting observation is the indicator *institutional capacity*. It is the indicator where Parliament under both constitutions has full capacity and where provisions in the constitution have little or no effect on the results. The improvement of other indicators, especially *institutional autonomy* – which has items such as *control of resources* – occasions the improvement of indicator *institutional capacity*. Some items under this indicator take time to be actualized. An example is item 32 that touch on the experience of legislators. It requires the observation of the re-election and election of legislators over a long period before a score mark can be awarded (depending on the length of election cycle).

Whereas, Parliament under the former constitution managed over half of the total marks per indicator in 3 of the 4 indicators, Parliament performed dismally on 1, that is, in *specified powers*. Parliament it managed 1 score mark on only 1 item in the 8 items that were under survey. It is the indicator where the “powers” of Parliament are seldom used. For example, item 20 (approval of war) – might never be exercised in most parliaments. The new constitution has clear foothold in three indicators and has close to average in one indicator (specified powers). This is a clear improvement on this indicator in relation to the former constitution. Having now looked at the general observations of the Kenya Parliament under the two constitutions, I will now analyze the four indicators and highlight some of the items that touch on the three generic roles of parliament, that is, legislating, oversight and representation. It is indeed clear that power, and how it is distributed has greatly changed under the new constitution.

## 6.1 Influence over Executive (Items 1-9)

*Former constitution 6/9: New constitution 6/9: Fish Kroenig survey 3/9*

In “influence over the Executive”, the nine items assesses how much influence the legislature has over the executive and other state agencies. Together, this indicator estimates the “watchdog” function of parliament. Of the nine items under review, the former constitution posted 6 score marks and the new constitution got 6 score marks. The data also shows that even though the score marks are equal, they are distributed differently in both constitutions. The National Accord and Reconciliation Act of 2008 gave Parliament under the former constitution powers in three items; these are item 1, 5 and 7 which complemented the three that the former constitution gave in this indicator prior to the Accord, that is in item 2, 3 and 9 (note, that the Fish-Kroenig survey gave Parliament under the former constitution the same score marks on the these items). Both constitutions posted full score marks in only two similar items. These are: “*interpellate*” or the powers to summon executive branch officials regularly (item 3) and to “*oversee the agencies of coercion*” (item 5). Both posted no score marks in one item, that is, *president elected by the legislature*<sup>39</sup> (item 9). Due to reasons to be discussed, the two constitutions posted different score marks in different items. Where the former constitution posts 1 score mark in two items, the new constitution posts 0 score marks in the same two items. These are: *MPs could serve as minister* (item 2) and *legislature appoints the prime minister* (item 6). Other than that, the former constitution posts **0.5** score marks in 4 of the 9 items under this indicator: these are item 1, 4, 7, and 9, thanks to some provisions of the Accord. Apart from item 8, the former constitution has posted score marks whether a **1** or a **0.5** score mark in 8 of the 9 items. The new constitutions, on the other hand, posted six **1** score marks under this indicator and **0** scores in 3 items, that is, in item 2, 6 and 8. Why is this so? This will be discussed below together with the other items.

A paradigm shift in the new constitution is the establishment of a balance of power between the Legislature and the Executive which neither the Executive nor Parliament can disturb, contrary to the former constitution.

Item 1 and 6 (*impeachment of the president or prime minister, and; appoints the prime minister*) gives score marks to Parliament under the former constitution (1.5 score marks). The enactment of the National Accord and Reconciliation Act 2008 integrated and created, in the former constitution, the post of Prime Minister and two deputies, and gave Parliament the powers to appoint and/ or dismiss them. However, these positions, created to solve a political

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<sup>39</sup> This item posts negative on both constitution and is not relevant in Kenyan context and will not be discussed.

crisis in a power-sharing deal, were to last only for the life of the Tenth Parliament. It is the role awarded to the former constitution *to appoint and dismiss* the prime minister that has given the former constitution 0.5 score marks on item 1 and 1 score mark on item 6 (approve and appoint prime minister). The presidency under the former constitution could not be removed through impeachment and his or her removal was only possible under indirect and rare circumstance (that is, through a vote of no confidence<sup>40</sup> in the whole cabinet, through death or incapacity). The new constitution, however, is clear on impeachment of the President (item 1). According to Sande (2011: 21), the impeachment proceedings as provided in the new constitution generates significant oversight and is considered the ultimate oversight power that gives strength to Parliaments' lesser powers. Sande argues that Parliament for decades has refrained from applying the vote of confidence on government as was previously provided by various statutes for obvious reasons of its dissolution (see item 9 on chapter 5 under former constitution).

In Item 2 (*ministers may serve as members of legislature*), Fish and Kroenig (2009: 6) argue that serving simultaneously as a member of the legislature and a member of cabinet is positive. They argue that the legislature may have more consistent influence over the governments operations where the ministers are themselves working Parliamentarians, and members of Parliament are ministers' colleagues. In the Kenyan context, however, it is seen as negative as the President in power over the years misused this provision to appoint a huge number of legislators in the Cabinet for political expediency. The combination of parliamentary and ministerial duties appears to have been at the expense of parliamentary work as the new ministers' neglect their parliamentary duties as they have to embark on a balancing act. It should also be noted that the former constitution gives no ceiling on the number of ministers to be appointed by the President to serve in government and every government often picks up the best material for ministerial appointment necessary for efficient running of state and in the process depletes Parliament of experienced Parliamentarians. There are examples of what the media variously refer to as "bloated cabinet" whereby some Assistant Ministers have protested that they have no job descriptions and are "just voting machines of the government" while having nothing to do (Kiberenge, 2009). One distinguishing characteristic of it all is that with a huge cabinet, there existed comparatively more ministries than standing committees and this made it difficult for these committees to play their oversight role efficiently. Parliament is comprised of 14 standing

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<sup>40</sup> It is a double edged sword as the Parliament in the event the president dissolves government, also stands dissolved or stands dissolved after 3 days if the president does not resign then.

committees while the cabinet is composed of 44 full cabinet ministers. However, this is set to change under the new constitution after the next general elections whereby the constitution has set a ceiling on ministries commensurate with standing committees.

According to the report by Ikome, Zondi, Ajulu, and Krachai (2006: 16), the overbearing power of the executive, especially powers vested in the head of state, has a detrimental effect on the prudential separation of power required to ensure the independence of institutions. In a study by Ikome et al. on Kenya, Ghana and Senegal, the report found out that state power is concentrated in the office of the President and, by extension, the executive. And as the executive tends to be drawn directly from Parliament, this severely compromises the ability of the legislature to maintain its oversight and law-making function (Ikome et al., 2006: 16). The report mentions further that although enshrined in the constitution, the independence of Parliaments - in the case study of these three countries - is undermined by the influence of the executive, frequently exercised through financial incentives tied to neo-patrimonial arrangements and rent-seeking activities, and this is especially evident in Kenya where the executive provides huge amounts of discretionary constituency development funds to Parliamentarians to underwrite local development projects of their choice<sup>41</sup>. The fact that legislatures are the recruiting grounds for cabinet posts reduces incentives for Parliamentarians to hold the executive to account (Ikome et al., 2006: 17), and for the growth of parties and party discipline (my observation). Another factor was that salaries for legislators were never high, with the result that MPs who were not appointed to positions in the cabinet or as deputy ministers, that is, “backbenchers”, had a very difficult time paying for their living expenses in the capital city while the legislature was in session (Barkan, 2009: 14). The Kenyan context then, score mark zero (0) for this item can be regarded as “positive” and has more weight than a score mark one (1) when looking at the historical context of the Kenyan situation.

Consequently, I agree with Chitere, Ludeki, Masya, Tostensen, and Waiganjo (2006: 7) when they note that in the case of Kenya, the President weakens the formal provision for the removal of President by means of impeachment when he forms large cabinets with a sizable proportion of Parliamentarians as ministers and assistant ministers (of the 224 current Members of Parliament, 96 are in government: Party of National Unity has 48 members while the Orange democratic Movement and its affiliate parties have an equal number). This, Chitere et al. (2006: 7) argue is reasonable to deduce that it is a deliberate tactic on the part of

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<sup>41</sup> Item 31 (As seat in the legislature is an attractive position) is also relevant concerning the former constitution regarding this issue.



the executive to engage in such practices to forestall a vote of no confidence. Given Kenya's history in relation to the President appointing a huge cabinet, I assume this was what motivated Kenya's constitutional drafters to remove in the new constitution the provision that cabinet ministers must be serving MPs. It must be the reason that under Article 152 (1) (d), the drafters put a ceiling on number of ministers that serve in Cabinet by stipulating that "not fewer than fourteen and not more than twenty-two cabinet secretaries." The positions of Assistant Ministers were scrapped. In my view then and considering the Kenyan context, by delinking the Executive from Parliament in terms of item 1 and 2 and item 7 that gives Parliament the power to vet and approve presidential nominees gives Parliament significant power to affect governance. It also gives parliament a free rein to perform its mandated functions and promotes oversight and the nation becomes the winner as it gets the best from their elected representatives who use their experience to in bill-making and parliamentary debates

The other significant role of Parliament in checks and balances is exercised in item 3 (*power to summon executive branch officials*) and item 5 (*oversight over agencies of coercion*). The single most important achievement of the new constitution is the strengthening of Kenya's Parliaments role of 'checks and balances' and redeeming it from the confinement of executive powers that had denied it the freedom of effective oversight. The passage of the new constitution has empowered the bicameral Parliament the responsibility as 'watchdog' institution and this could be exercised at the Committee level and plenary (chamber). As Parliament develops more, oversight work over the executive will shift to committees. The parliamentary committee system and party<sup>42</sup> groups are often seen as the loci of power in legislatures (Strøm 1995 in Wang, 2005: 184). Items 3, 4 and 5 are more relevant in the Committee level because at the plenary, it is only a gathering of MPs and only MPs are allowed to debate. As "strangers," in parliamentary parlance or nomenclature, future cabinet secretaries will not be allowed in the plenary<sup>43</sup>. Committees, then, as practiced in other Commonwealth countries will be the key oversight tools used to conduct Parliamentary oversight and would wield lots of power. The changes to Parliament's standing orders in 1997 established departmental committees with the task of reviewing legislation within their areas

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<sup>42</sup> According to Olson 1980 and Shaw 1979 (in Wang 2005: 184), party and committees are strongly linked and a common assumption is that the more important the parties are, the less important the committees, and vice versa. With committee members chosen according to the strength of parties in parliament, parties tend to grow and become important players in parliament especially in policy matters.

<sup>43</sup> Cabinet Secretaries will no longer be members of parliament and will have to engage Parliament through relevant Committees of Parliament.

of jurisdiction. The Kenyan Legislature at its current form consists of up to 14 active Committees.

According to Gazemba (2011) committees will receive both oral and documentary evidence and where necessary make fact-finding tours to collect additional evidence. Committees, Sande (2011) points out, organize hearings as primary tools in obtaining information related to specific policies or issues under investigations or clarifications. Since public officials cannot be questioned on the floor of the House, they will then be summoned by the relevant committees. Hearings, Sande points out, may involve inviting a specific Cabinet Secretary, government official to appear before the Committee so as to provide evidence regarding an issue under scrutiny. Once the Committee is through with its investigations, Gazemba (2011: 45) points out, it compiles a report and tables it in the House for a resolution and in most cases the reports of the Committees are adopted and the executive is duty bound to implement the Committees recommendations. To further strengthen this oversight mechanism Parliament has established the Committee on Implementation as provided by article 124 (1) of the new constitution, to follow up on the implementation or resolutions of the House. With reference to item 15 (*expenditure of funds appropriated is mandatory*), public pre-eminence is guaranteed in Article 125 (5) in the new constitution which stipulates that “in discussing and reviewing estimates (Budget estimates and annual Appropriation Bill), the committee shall seek representations from the public and the recommendations shall be taken into account when the Committee makes its recommendations to the National Assembly.”

What makes this committee system differ from the former constitution is that, in the new constitution, the committee has been given “teeth to bite”. Either House of Parliament, and any of its committees has power, through Article 125 (1), to summon any person to appear before it for the purpose of giving evidence or providing information. In clause (2); for the purpose of clause (1) a House of Parliament and any of its committees has the same powers as the High Court to enforce the attendance of witnesses and examine them on oath, affirmation or otherwise; to compel the production of documents; to issue a commission or request to examine witnesses abroad.

Another item that deserves mention is item 7 (*approval to confirm appointment of minister*). The appointment to senior positions is another shift from what is provided for in the former constitution where the President had the power to appoint and dismiss ministers and other state officers as he pleases. According to Member of Parliament Namwamba (2011: 27), the new constitutional dispensation has scattered the one man rule where the President reigned

over Kenya like an absolute monarch. The entrenchment of parliamentary vetting as a basic requirement for all appointment to senior public office, Namwamba notes, has caused a seismic shift and ushered in a whole new governance paradigm in the country.

The new constitution, therefore, hands Parliament a fundamental role in enforcing this new governance paradigm, through vetting of nominees picked by the executive arm of government. According to Namwamba (2011: 27), the route is quite simple: the executive (read President) nominates the candidate and submits the name to Parliament. The relevant committee of Parliament then vets the candidate against a set criterion, and makes recommendations to the whole House. Members in the House debate the recommendation and vote to either approve or reject the nomination. If approved, the President proceeds to appoint, and if rejected, the nominee is “returned to sender” and the process is repeated<sup>44</sup>.

With regards to item 8 which is not relevant for Kenya, I perceive, item 2 with a 0 (zero) score mark as a “positive” attribute in the Kenyan context. In item 6, the President is elected through direct elections. However item 1 gives parliament the power to impeach while item 9, gives Parliament power to pass a vote of no confidence in the executive without jeopardizing its life. In general then under this indicator, we can see that Parliament has been strengthened or given more powers under the new constitution. It has received the maximum score marks it could get in this indicator and there is “no room for improvement”. With regards to the former constitution, items 4, 7, 8 and 9 were the *Achilles heel* as the executive had the upper hand. Item 2 on MPs serving also as ministers is not “tangible” enough to give MPs an upper hand to influence the executive as the President in this case is also a Member of Parliament.

## **6.2 Institutional Autonomy (10-18)**

*Former constitution 3.5/9; new constitution 8/9*

One of the main roles of Parliament is to enact legislation, appropriate and exercise oversight over funds for national government and determine allocation of revenue between different levels of government. This oversight role of Parliament is exercised through budget scrutiny, departmental committees, parliamentary questions, legislation scrutiny, and debates amongst others. To play this basic role effectively, institutional independence of Parliament is paramount. The nine items together in this indicator measure the autonomy of Parliament. As

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<sup>44</sup> The reality of this new dispensation was best illustrated in February 2011 when Parliament rejected as unconstitutional nominations made by the President to the four constitutional offices of Chief Justice, Attorney General, Director of Public Prosecutions and Comptroller of Budget. The High Court also found the action of the President unconstitutional. The President had to withdraw the nominees and the proper procedures were followed as stated in the Constitution with parliamentary vetting and approval.

can be seen in the Table 10, the new constitution has a check mark on all the items and it is the indicator where it has full capacity and has performed extremely well. The former constitution guarantees only four of the nine items and its effectiveness in this indicator is below average.

The independence of the Parliament as an institution is guaranteed when the executive has no power or control in the items mentioned in this indicator. Item 10 gives Parliament immunity from dissolution under the new constitution and guarantees its full term of 5 years. The other items where the new constitution give full score marks are; item 11 - any executive initiative on any bill requires ratification by legislature; item 13 - legislatures laws are supreme and not subject to judicial review; item 14 - the legislature has right to initiate Bills in all policy areas; item 15 - funds appropriated by legislature are mandatory; item 16 - legislature controls the resources that finances its own operations; and, item 18 - all members are elected. The new constitution gets 0.5 check marks on item 11 - laws passed by legislature are veto-proof and item 17 - immunity from arrest. In the former constitution, only two items get full score marks. These are items 13 and 16, while items 12 and 17 get 0.5 score marks. I will highlight some items in this indicator that I think are “most important” in the institutional independence of Parliament.

Another paradigm shift in the new constitution is in the “power of the purse” check. In the former constitution, the Executive had gatekeeping powers (item 14) and could impound appropriated funds (item 15). With the amendments to the former constitution in 1999, Parliament could eventually control its own resources. The new constitution has changed some of these “negative” items to guarantee Parliament its institutional autonomy. With regards to the changes that Parliament undertook under the former constitution, the new constitution has made radical changes to the budget process. It has opened the budget process to a wider array of actors by giving citizens and MPs a greater role and reduced the traditional nearly unlimited powers that the Executive held. It has put mechanisms to foster coordination and consultation between the Executive and Parliament.

Under Section 48 of the former constitution, there were restrictions with regard to certain financial measures (item 14), what are referred to as “Money Bills” – such as the appropriation Bills (including an amendment to a Bill) that authorize spending and Bills introducing taxes. These could be introduced only “upon the recommendation of the President signified by a Minister”. This ensured that the President had firm control over the financial matters and if Parliament wished to change a Budget proposal or to allocate or relocate money, it had to seek the approval of the President. The only leverage Parliament had was to

reduce an existing item, or to refuse to pass the budget altogether, bringing government to a standstill (Murray & Wehner, 2012: 38). However, this was a tall order considering that nearly a half of the composition of MPs were in the cabinet (see item 2 and 31) and considering that through the patrimonial tendencies, the President had control over the MPs.

However, the new constitution prescribes a special process for Money Bills in Article 218 (1) with much of the power lying with a Parliamentary Committee and the National Assembly, not the Executive. It has given Parliament a more expanded role in the budget making process and changed the role of Parliament from budget approving legislature (or budget rubber stamping fora) to a budget making one. In strengthening separation of powers<sup>45</sup> and ensuring fiscal parity, three separate sets of “budget estimates” will be submitted to the national assembly to be considered on equal basis. There are those for the expenditure of the national government prepared by the national Treasury (Article 221 (1)); those for the Parliamentary Service (Article 127 (6) (c)); and those for the judiciary (Article 173 (3)). What is interesting here, and subject to various arguments<sup>46</sup>, and in departure from the position under the former constitution, and Section 12 of the Financial Management Act, 5 of 2008, is that the new constitution does not require estimates for the Parliamentary Service or the Judiciary to be considered by the National Treasury before they are submitted to Parliament<sup>47</sup>.

The three sets of Budget estimates will be considered by a potentially very powerful committee<sup>48</sup> of the National assembly which will exercise control over the budget process, and in a radical departure, amend the budget as provided in Article 221 (4) that the committee “shall discuss and review the estimates and make recommendations to the National Assembly”. And in clause (5), in discussing and reviewing the estimates, the committee shall seek representations from the public and this shall be taken into account when the final submissions are made to the National Assembly. Interestingly, this is a departure from Section 48 of the former constitution as the National Assembly is not duty bound by the views of the Executive nor is it obliged to take them into account. However, this informs the need for early

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<sup>45</sup> Financial independence for both the Judiciary and Parliament

<sup>46</sup> According to Murray & Wehner (2012: 39), it would be wise and more efficient to have a process in which the separate Budget proposals are considered together in advance so that what is put in the National Assembly is realistic.

<sup>47</sup> However, the draft Public Finance Management Bill 2011 proposes in Article 76 (2) that “the Chief Registrar of the Judiciary and the Parliamentary Service Commission shall submit copies of the Budget Estimates under section 73 (1)(c) to the Treasury at the same date of submitting the estimates to the National Assembly”, and in Clause (3) “the Cabinet secretary shall submit to the National Assembly no later than the 15<sup>th</sup> May the opinion of the Treasury on the budgets proposed by the Chief Registrar and the Parliamentary Service Commission”.

<sup>48</sup> Article 114 (2) provides that any motion on a matter of “Money Bill”, the Assembly may proceed only in accordance with the recommendation of the relevant Committee of the Assembly after taking into account the views of the Cabinet secretary responsible for finance. This makes the Committee powerful as the Assembly cannot amend the estimates the Committee adopts.

consultation and cooperation between the three branches to ensure that the Appropriated Bill is within realistic limits. As noted in this paradigm shift, much of the work of processing the budget has shifted entirely on Parliament's Budget and Appropriations Committee which has the overwhelming task of giving strategic direction with regards to the allocation of Government resources. In undertaking this task, the PBAC will be required to liaise with other departmental committees<sup>49</sup> as well as the public. This heralds a transformation on how Kenya's public finance are managed and shared.

With relevance to item 29 (*each legislator has at least non-secretarial staff with policy expertise*) Parliamentary Committee(s) will need considerable expertise and wisdom to understand what spending is essential and to manage the process properly through frequent consultation between the Executive and the National Assembly (Barkan & Matiangi, 2009; Murray & Wehner, 2012). In my view, it is only item 12 (*the executive has veto power but can be overridden by a simple majority in the legislature-* and in Kenyan context, by a super majority or two-thirds of members of the National Assembly) that gives the Executive (President) the only leeway (and only influence in this category) in influencing the process by refusing to sign the Appropriation Bill once approved by the National Assembly (Article 115). Another safety net for the executive is given in Article 222 and 223 which allows expenditure before annual budget is passed but with a channel and limitations on how it can be done. However, when partisan control of the legislative and executive branches is divided, Parliamentary approval of interim spending can no longer be taken for granted (Murray & Wehner, 2012: 40) and the political and economic consequences of a failure to adopt a Budget and the resulting government "shutdown" are potentially highly damaging. And to avoid this, Murray and Wehner (2012: 40) argue, the National Assembly ought to take the Executive seriously, and the President's power to veto the Appropriations Bill should influence the way in which the Standing Committee and the National Assembly deal with the estimates and the Bill.

Item 13 (*laws passed by legislature are supreme and not subject to judicial review*) that the Speaker of the Kenya National Assembly argues that, "even if the Supreme Court pronounced itself on a matter, that could not stop Parliament from fulfilling its function of legislation. It does not matter which way the courts decide, it does not take the residual power

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<sup>49</sup> In the new constitution, the Chairs of the various committees shall be the de-facto Ministers and hence they will be expected to verify and validate the issues raised by the Chair of the Budget and Appropriations Committee. The PBAC shall also seek views from other Departmental Committees, the public and other players on the key issues that they deem suitable for inclusion in the budget. See chart on the key highlights of the Budget process on *Kenya Parliament* (National Assembly Vol. 4 issue 1 April 2011 by Martin Masinde: 53)

of Parliament to legislate...Parliament can still enact a law that says something different” (Mugonyi, 2011: 11). However, the speaker argues that the courts still have power to interpret laws made by Parliament and even declare them unconstitutional (ibid).

Item 17 on (immunity of legislators), both constitutions have been awarded **0.5** score marks. Whereas MPs under the *Powers and Privileges Act* and *Standing Orders* of Parliament are free from arrest, they can be arrested and prosecuted if they engage themselves in criminal activities. It is argued too, that if words said in Parliamentary proceedings are repeated elsewhere, the protection of Parliamentary privilege enjoyed does not apply. A case for precedence in the Kenya Parliament, according to Njoroge (2011: 39), occurred on July 10<sup>th</sup>, 1997. Reacting to a question of privilege raised by the Member for Ugenya, where the then Member for Limuru was involved in an incidence with the police, Speaker Kaparo ruled that:

*“Freedom of speech is not conferred for the personal benefit of any individual-even a Member of Parliament. It is conferred for the benefit of the parliamentary system. On the other hand, criminal acts as opposed to speeches and Parliamentary actions committed within Parliament are subject to the jurisdiction of the courts. The only privilege members enjoy in criminal matters is that words used by them in proceedings in Parliament cannot be made the subject of criminal proceedings or be used to support a prosecution. A member convicted of crime is in the same position as any other convicted person...I do not find either in written law or practice any authority for the proposition that a Member is immune from arrest from criminal offence committed either without or within Parliamentary Buildings except for what is either in the Chamber or in Committees of the House.”*

### 6.3 Specified Powers (19-26)

*Former constitution 1/8; new constitution 4/8*

Items in this indicator are rarely exercised by Parliament. It is the indicator where the former constitution has performed dismally. Of the 8 items under the indicator, the former constitution only managed one score mark, that is, in item 19 (legislature can amend the constitution). According to Salih (2005b: 14), the constitutional amendments that brought about competitive multiparty politics under the former constitution cannot be underestimated, because the amendments made it possible for people to exercise their democratic rights that were denied by one-party states. However, was also in exercising this right to amend the constitution that the legislature was used by the executive to pass oppressive laws. Thus, the clamor for change was rightfully directed towards Parliament and Parliamentarians. It is the change of section 2A of the former constitution that took Kenya from a single party state (from *de jure* to *de facto* single party state) into a multiparty state. The other seven items in this indicator were the prerogative of the President. Under the new constitution, however, the score marks are better than the former constitution but below average and there is only one

room for improvement<sup>50</sup>. Of the four indicators, according to the data collected, this is the only indicator under which the new constitution has room for improvement. As has been discussed earlier and relying on the data, the new constitution has received the maximum score marks it could in the three other indicators. Parliament has influence in four items: it can still amend the constitution (item 19), and in addition, it must approve war (item 20), approve or review appointment to the judiciary (item 23) and review and appoint the chairman of the central bank (item 25). On amnesty and on pardon (items 22 and 23 concurrently), the new constitution has established in Article 133(2) an Advisory Committee on the Power of Mercy whereby Parliament shall enact legislation to provide for the tenure of the members, procedure and criteria that shall be applied by the Advisory Committee. This leaves Parliament with no jurisdiction or influence on this item.

The last item on this category is item (26) *influence on state owned media*. Again, the constitution in Article 34 (4) stipulates that “all state-owned media shall be free to determine independently the editorial content of their broadcasts or other communications; be impartial; and afford fair opportunity for the presentation of divergent views and dissenting opinions.” The state-owned media, in my interpretation of this Article means that it should be independent or non-partisan as Article 34 (5) also provides - “Parliament shall enact legislation that provides for the establishment of a body, which shall be independent of control by government, political interests or commercial interests; reflect the interests of all sections of the society; and set media standards and regulate and monitor compliance with those standards.” However, the drafters of the constitution, cognizant of the power wielded by the executive during elections and in controlling the media, have given Parliament some semblance of power through legislation to influence the outcome.

Item 19 – *legislature can alter the constitution*. It is said that the former Kenya constitution was amended so many times that it was barely recognized from its original form (Mutua, 2009). Compare this to the American constitution which has been amended 25/26 times in its existence. During the regimes of both Moi and Kenyatta, Parliament was used as a rubberstamp of the executive and during the first 25 years of independence, the constitution was amended more than 30 times, with most of the amendments made focused on strengthening the political power of the President. Another example is the Fifth Parliament (1983-1988) which amended the constitution five times, once every year (Kamau, 2011: 19) .

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<sup>50</sup> Item 21 (legislature has to ratify treaties) “might” be a score mark 1 in the coming few months. There is legislation in parliament pending debate brought about by nominated MP Millie Odhiambo Mabona which seeks to compel the executive to seek ratification from parliament for any international treaty the government goes into.



The Kenya Parliament over these periods exercised less independence as Presidents Kenyatta and Moi increased their authority (Barkan & Matiangi, 2009; John K. Johnson, 2009). Kenyatta required that the Kenyan legislators approve several amendments limiting their authority and that of their Parliament and simultaneously deepening and broadening the power of the President (John K. Johnson, 2009). An example, among many others, is the amendment of the constitution Act No 19 of 1966 that led to the abolishment of the Senate (Kamathi & Kiriinya, 2011: 29). The two Houses were amalgamated to form one. According to arguments by Fish and Kroenig (2009), parliament being able to alter the constitution is a positive attribute. However, these parliaments must be strong parliaments and not rubberstamping parliaments that amend the constitution at the whims of the Executive and in the process losing more of its powers. They must be parliaments that have power to perform all its generic functions. In the Kenyan context, this item is regarded as a negative under the former constitution if parliament on its own could amend the constitution. The Kenyan Parliament as discussed earlier was weak in the periods preceding the late 1990s (see also 2.5 on this).

#### **6.4 Institutional Capacity (27-32)**

*Former constitution 6/6: new constitution 6/6*

Parliament is not effective in serving the electorate if it does not confront the issue of capacity and a major means of increasing Parliamentary effectiveness has been through building the institutional capacity of the Parliament. The problem of institutional capacity is seen partly in terms of the availability of resources, lack of requisite expertise and staff and lack of facilities necessary for Parliamentary work. Such facilities would include office space for MPs, library or research areas, staff, etc. Infrastructure requirements are necessary if Parliaments are to expand their representation, oversight and lawmaking functions effectively. Even though most parliamentary strengthening activities focus on the technical aspects, institutional capacity here also includes issues such as: *if Parliament is regularly in session; MPs have staff with policy expertise; no term limit for MPs; MP position is prestigious; re-election is common*. As noted, the Parliament of Kenya in the former and the new constitution has relative capacity in these items and are similar in the score for each item. This is partly due to various changes in Parliament over the years leading Parliament to evolve to where it is today. The institutional capacity of Parliament was very much different and weak prior to the period preceding the second multiparty elections that created the Eighth Parliament (1998-2002). The establishment of the Parliamentary service Commission (PSC), with a broad mandate, became

the launch pad for some major developments in institutional matters and also in other key areas. I will briefly look at some of the items.

*Item 27*, which seeks to find out whether Parliament is regularly in session, is affirmative in both constitutions. Even though Parliament has been meeting uninterrupted since independence, the President, in the former constitution, had powers to prorogue or dissolve Parliament at any time he so pleases. This would interrupt Parliamentary Business or Calendar. Announcing the date for elections was also a prerogative of the President and he used this power as “secret weapon” over his opponents. This ambiguity in the constitution that blurred the lines between the executive and the legislature has been removed in the new constitution, with Article 102 stipulating that the term of each House of Parliament expires on the date of the next election. Article 101(1) provides this date to be the second Tuesday in August in every fifth year. In general then, Parliament has been meeting regularly as per its legislative calendar.

*Item 28 & 29* seeks to find out whether each MP has a personal staff and also a one non-secretarial staff member with policy expertise. On this point, the PSC has ensured that all members of Parliament has one personal staff and in the Parliamentary Service, employed experts in all policy areas who are at the disposal of all MPS irrespective of party affiliation. Another area where the Kenyan Parliament has benefited is in capacity-building programmes and support staff. In respect to the limited capacity of the Kenya Parliament to perform its core functions, Barkan and Matiangi (2009: 43-45) point out that the Institute for Economic Affairs (IEA) and the Centre for Governance and Development (CGD) was the first to call the MPs to attention through workshops in the early years of the Eighth Parliament to explain the meaning and impact of the budget and the proposed changes in the tax code with the hope that such information would improve the annual budget debate. Other civil society organizations, including the Institute of Certified Public Accountants and several local think tanks, have since joined this exercise to raise the level of economic literacy among MPs.

*Item 31: A seat in Parliament is attractive.* Apart from the extra advantage of an MP appointed into the Cabinet by the President and enjoying all the perks that come with it, as was the case in the former constitution, the Kenya MPs are also among the most well paid legislators in the world (see also table 2.2 in the appendix). Parliamentarians either were, or were anxious to become, government ministers and did not want to jeopardize their chances by questioning government action or policy (Ikome et al., 2006: 30-31), (Barkan & Matiangi, 2009: 14).

And as MPs salaries and benefits have continued to rise, serving as an MP has become increasingly appealing, drawing many of Kenya's brightest, most ambitious, and mostly highly educated citizens<sup>51</sup> (John K. Johnson, 2009: 243) (Barkan & Matiangi, 2009: 53-54). Whereas the new constitution does not allow MPs to be cabinet ministers, the perks and salaries MPs enjoy are still sky high<sup>52</sup>. MPs earn a basic salary of KSh200, 000 and allowances totaling Sh651, 000 bringing their total monthly pay to Sh851, 000. While all this is paid for by taxes, Parliament has paid KSh2 billion to foot tax arrears for all the 224 MPs during 2010/2011 and 2011/2012 financial years. The legislators also made a second amendment to the bill by raising the severance allowance of all members of the National Assembly from KSh300, 000 per year to KSh744, 000 for the entire time they have served as MPs (Hansard, 2011: 83-90). Following the increases, MPs are also eligible for life-long pensions and other retirement benefits. The amount proposed as payment to outgoing MPs is a huge increment from the Sh1.5 million paid out to each member of the last Parliament. On the whole, paying MPs a decent salary may make them less amenable to executive manipulation. However, it is interesting to note that on this instance, regardless that MPs are handsomely paid, it was a case of the executive manipulating MPs to pass the Finance Bill<sup>53</sup> by sneaking in the amendments to drop their quest for interest rate caps after offering them a gratuity of Sh3.72 million each payable at the end of their five-year term. The MPs passed the Bill into law in less than 5 minutes (Rugene & Shiundu, 2012) and considering that they were spoiling for a fight with the executive for several months in the hope of dismissing the bill and amending it (Anyanzwa, 2012). It then becomes a paradox that the MPs are a selfish lot and put their interests first before that of their constituents.

Indeed as a reflection on this and among other factors, Barkan and Matiangi (2009: 59) argue, the rate of reelection (33.8 percent) was the lowest in history, perhaps a backlash against the high salaries MPs provide for themselves during the Ninth Parliament. Already there is uproar over the recent law (Thuku, 2011) with a challenge to it lodged in court as

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<sup>51</sup> Johnson gives example that most of the members of the Kenya's Ninth Parliament's Health, Housing, Labour and Social Welfare Committee were physicians. Barkan and Matiangi (2009: 53-54) on table 2.1 shows that under the Tenth Parliament, 61.6 percent had university degree, 23.2 percent had post graduate degrees – nearly two-thirds of the House, and only 5 percent had a secondary school education while average age of all members was 52.3 years (whereas half of the population is below 18 years of age).

<sup>52</sup> According to Wanyande et al (2007: 3), elected representatives are the purveyors of public resources through corruption, appropriation of public land, self-arrogation of high salaries and high allowances relative to other public officials and through preferential access to opportunities that include tax exemption, trade licensing, credit facilities, and general precedence in public places.

<sup>53</sup> The Finance Bill had been rejected several times by the MPs and it was unpopular. The treasury bribed MPs to pass the new budget and to be nice to the banks with a "gratuity" amounting to almost US\$50,000. This is on top of their already obscene annual salaries which stand at [US\\$ 161,000](#), excluding other shady allowances that are never included under official pay.

illegal given that the new constitution gives mandate of deciding pay and gratuity, and all emoluments, to the Salaries and Remuneration Commission<sup>54</sup> (Juma, 2012).

Item 32: *Reelection of incumbents is common enough.* As seen in the data section on the reelection of incumbents, there has been a high turnover in the past elections of MPs, while at the same time there has been a group of MPs who have made it to Parliament for second, third, or even fourth terms. It is no wonder that when it comes to their perks and salaries, the members are easily swayed to increase their salaries and perks knowing that they probably would not see the inside of Parliament again. Whereas, reelection is common, the electorate, in the new constitution has been empowered in Article 104. The Article provides that the electorate have the right to recall the Member of Parliament before the end of the term of the relevant House of Parliament. This is premised on the belief that an election held once every few years is insufficient for representatives to be genuinely accountable to their electorates. There is a procedure and process for doing this. This is clear form of vertical accountability.

Because parties have remained weak coalitions of local bosses that rarely distinguish themselves on the basis of policy or ideology, elections to Parliament have always been referendums on incumbents' record at delivering goods back to the constituency (Barkan & Matiangi, 2009; Throup & Hornsby, 1998). Under the former constitution, there have been 10 general elections since independence. Four of those have been held after the re-introduction of multipartism in 1992. According to Barkan and Matiangi (2009: 37), under Kenyatta, Parliamentary elections were intraparty contests within the ruling party KANU, but were largely free and fair contests with as many as ten candidates vying for each seat with voters encouraged to evaluate candidates, particularly incumbents on how they had serviced their constituencies. Under Moi though, Barkan and Matiangi (2009: 37) point out, voters were encouraged to vote for candidates considered "loyal" by the President and where they were not, the outcome was often manipulated. Later, leaders perceived not to toe the KANU party's (read: government) line were either denied nomination to Parliament under the only party KANU (Badejo, 2006: 84; Throup & Hornsby, 1998) or disciplined by being disallowed to stand for elections, while others were banned from the then party. In some areas, a handful of politicians were elected in unopposed as the ruling party found ways to bar would-be opponents to stand, while in others, there were outright rigging of election (Throup & Hornsby, 1998). All in all, statistics show that nearly sixty percent of incumbents or sitting

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<sup>54</sup> The new constitution cognizant of the different salaries and perks from different state offices, set up the independent Salaries and Remuneration Commission in Article 230 to among other things, set and regularly review the remuneration and benefits of all State officers.

MPs fail to win back their seats even in free and fair polls. An example is the third General election held on November 8, 1979, the first election of the Moi era: nearly half of members lost their seats (Kamau & Songoro, 2011).

According to the findings of the Infotrak survey conducted between September 23rd and September 26th, 2011 in both rural and urban counties, only 63 per cent of the current legislators would be re-elected to Parliament in the next General Election (Obonyo, 2011). The poll found out that reasons for and against re-election of the current MPs are varied and range from poor service delivery, poor leadership qualities and inactivity in Parliament to arrogance of the legislators. Another survey conducted between December 16th and 17th, 2011 by Infotrak shows 56 percent of Kenyans were of the view that they would not re-elect their MPs, 28 per cent said they would while 16 per cent were undecided (Obonyo, 2011). Of the 210 elected members, there are 55 constituencies in the country that has never returned the MP back to Parliament in the last three elections. According to Ongiri (2011), the re-election “jinx” in those constituencies is such that in the last three elections the incumbents have desperately fought to defend their positions, but faced a humiliating loss and to survive the trend, several MPs serving in those constituencies are chasing other positions in the newly created counties, hoping to benefit from the political shift.

However, since the 1992 elections, there has been a cohort of members popular in their constituencies who have always been elected back to Parliament in whatever party they chose to run on. Others, like the President, have been in Parliament since independence. Kenya being a politically tribal society as it is, most of the parties have a regional following and hence, winning a nomination ticket in those parties is as good as being elected in the Parliament. In Kenya’s politics, and elsewhere for that matter, the party one chooses plays a big role in determining the aspirants’ fortunes. It is this factor that has made dead men wins elections and lacklustre ones make it to Parliament (Ongalo, 2012). An example is a comment about the 1992<sup>55</sup> elections by former KANU secretary general Joseph Kamotho. He once famously said of the 1992 elections, that even if a dog had vied for a Parliamentary seat in Murang’a on a Ford-Asili ticket, it would have won with a landslide (Kwama, 2010). This, according to Kwama was Kamotho’s way of saying Murang’a residents were crazy about Ford-Asili then and would have voted in any dumb head on the party’s ticket.

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<sup>55</sup> 1992 was the year of the first multi-party elections and the country was deeply divided along ethnic lines. Central Province had two candidates, Mwai Kibaki (now President on DP party) and Kenneth Matiba (Ford-Asili). 1992 elections also defined future electoral patterns, that in 1997, Luo’s voted overwhelmingly for Raila Odinga’s party (NDP then), the Bukusu for Michael Wamalwa (Ford Kenya) and the Kikuyu for Kibaki (then under DP).

## 6.5 Summary: Analysis on Kenyan Legislature and Democracy

As can be seen from the results, the two constitutions varied greatly as to how they distributed power. The powers of the legislature in the former constitution have also not remained fixed. It has experienced gradual changes, the latest being the changes to solve the post-election conflict and the introduction of special offices.

Having assessed the changes the Kenya Parliament has undergone with the new constitution, it is clear that it has become a more independent and powerful institution. It has acquired authority over its own management and resources, and more importantly, it now plays a major influential role in budgeting and law-making. As can be seen by the “above average” score-marks on legislative capacity that Parliament has acquired in the new constitution, its role of oversight seems to be expanding as well. Examining the four categories or indicators, shows that the Kenya’s Parliament is becoming more autonomous than it was under the former constitution through financial autonomy and the independent management of its staff and other requirements. The new constitution has also taken from the President, the exclusive power to convene, prorogue and dissolve Parliament. It has expanded the formal powers in several areas making it a powerful institution. This has happened at the cost of the executive which has seen its influence decline.

As it takes over the role of budget allocation from the executive among other roles, the committee system of Parliament is strengthened and the power the committees hold will help constrain the executive. Under the former constitution, Parliament had unassertive influence as it had little say in the formation of the government and scant oversight authority although its resources and staff had improved considerably. The new constitution has strengthened Parliament which has been robust in playing its oversight role. The assertion then, that a strengthened Parliament with a functioning committee system holds the key to ensure governmental accountability, transparency, and in the process, drive democratic consolidation.

## 7.0 Conclusion

With the change of the constitution in 2010, Kenya legislature has transformed from an emerging legislature to become a transformative legislature (this has been demonstrated in the data and analysis). However, even though the implementation of the new constitution has been promising, we cannot give a definite answer until the full operationalization of the whole constitution is accomplished. This will be done by the next elections in March 2013 when the former constitution will cease to function and the new becomes fully operational. However, with the timelines that has been put in place and with the accomplishments already done, including others not mentioned in this thesis, the future seems promising. In theory, and regarding the research question, the new constitution has indeed strengthened the powers of Parliament and made it into an assertive institution. Parliament has near full capacity in the four indicators that were used to gauge the strength of the legislature (as seen from the analysis, the Kenyan Parliament evolved from a rubberstamp legislature, to an emerging legislature). It is now in the transformative phase, owing to small gains through the years and given more impetus by the new constitution such as the power of the purse. In practice, too the legislature has become more eager to protect its independence from an executive that always tries to encroach on the powers on the other institutions. However, for checks and balances to be real, there should be real and effective accountability (horizontal) among the various institutions and respect for the constitution and its provisions. This also requires respect, bargaining and negotiation among the institutions as none can work without the other.

The system of Parliamentary Committees is well developing and in the new dispensation of pure presidential system, Parliamentary Committees that shadows government ministries, departments and agencies is essential for the legislature to perform its key functions of legislating and oversight. This is seen in the budget-making process where there are a number of other portfolio committees that facilitate division of labor that is useful in that it creates specialization amongst MPs and other Parliamentary staff to understand policy and other issues in departments they are responsible for. A key added advantage in such committee system is that the Kenya's Parliament has a rich pool of qualified MPs in nearly all fields (most have high levels of education) and most of these either head the various departments or are members. These committees are augmented by a competent staff. The presence of reformist MPs "who know the ropes" in the Kenyan legislature has enhanced the capacity of the legislature to perform the defining functions of the legislature.

With time and through a combination of factors, the Kenyan legislature will continue to play a more significant role in governance through legislation and performing the other key roles. The new constitution gives a good framework for governance and has given new lease of life by reforming the justice system including the police. It has also changed the way political parties are formed and how they are run. This paper wishes further research in checking legislative assertiveness in the law making process by checking the source and type of legislative bills introduced and passed annually. Since the political parties system in Kenya is more fragmented than in other countries in Africa, the new constitution has come up with threshold for institutionalizing political parties. Thus, further research is needed to assess how the legislature - used to be more independent of party system - will perform its legislating functions in a system where parties will be stronger and stable and based on ideology.



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Hansard, Standing Orders, Finance Bill can be downloaded at: [www.parliament.go.ke](http://www.parliament.go.ke)

## Appendix

### Legislation to be enacted by Parliament

Copied from the new constitution (2010)

#### FIFTH SCHEDULE

(Article 261 (1))

#### LEGISLATION TO BE ENACTED BY PARLIAMENT

<i>Chapter and Article</i>	<i>Time Specification</i>
CHAPTER TWO—REPUBLIC	
Legislation in respect of culture (Article 11 (3))	Five years
CHAPTER THREE— CITIZENSHIP	
Legislation on citizenship (Article 18)	One year
CHAPTER FOUR — THE BILL OF RIGHTS	
Freedom of the media (Article 34)	Three years
Family (Article 45)	Five years
Consumer protection (Article 46)	Four years
Fair administrative action (Article 47)	Four years
Fair hearing (Article 50)	Four years
Rights of persons detained, held in custody or detained (Article 51)	Four years
Kenya National Human Rights and Equality Commission (Article 59)	One year
CHAPTER FIVE—LAND AND ENVIRONMENT	
Community land (Article 63)	Five years
Regulation of land use and property (Article 66)	Five years
Legislation on land (Article 68)	18 months
Agreements relating to natural resources (Article 71)	Five years
Legislation regarding environment (Article 72)	Four years
CHAPTER SIX — LEADERSHIP AND INTEGRITY	
Ethics and anti-corruption commission (Article 79)	One year
Legislation on leadership (Article 80)	Two years
CHAPTER SEVEN — REPRESENTATION OF THE PEOPLE	
Legislation on elections (Article 82)	One year
Electoral disputes (Article 87)	One year
Independent Electoral and Boundaries Commission (Article 88)	One year
Legislation on political parties (Article 92)	One year
CHAPTER EIGHT — THE LEGISLATURE	
Promotion of representation of marginalised groups (Article 100)	Five years
Vacation of office of member of Parliament (Article 103)	One year
Right of recall (Article 104)	Two years

<i>Chapter and Article</i>	<i>Time Specification</i>
Determination of questions of membership of Parliament (Article 105)	Two years
Right to petition Parliament (Article 119)	Two years
CHAPTER NINE—EXECUTIVE	
Power of mercy (Article 133)	One year
Assumption of office of president (Article 141)	Two years
CHAPTER TEN—JUDICIARY	
System of courts (Article 162)	One year
Removal from office (Article 168)	One year
Judiciary Fund (Article 173)	Two years
Vetting of judges and magistrates (Sixth schedule, Section 23)	One year
CHAPTER ELEVEN—DEVOLVED GOVERNMENT	
Speaker of a county assembly (Article 178)	One year
Urban areas and cities (Article 183)	One year
Support for county governments (Article 190)	Three years
Removal of a county governor (Article 181)	18 months
Vacation of office of member of county assembly (Article 194)	18 months
Public participation and county assembly powers, privileges and immunities (Article 196)	Three years
County assembly gender balance and diversity (Article 197)	Three years
Legislation to effect Chapter eleven (Article 200 and Sixth Schedule, section 15) and	18 months
CHAPTER TWELVE—PUBLIC FINANCE	
Revenue Funds for county governments (Article 207)	18 months
Contingencies Fund (Article 208)	One year
Loan guarantees by national government (Article 213)	One year
Financial control (Article 225)	Two years
Accounts and audit of public entities (Article 226)	Four years
Procurement of public goods and services (Article 227)	Four years
CHAPTER THIRTEEN—PUBLIC SERVICE	
Values and principles of public service (Article 232)	Four years
CHAPTER FOURTEEN—NATIONAL SECURITY	
National security organs (Article 239)	Two years
Command of the National Police Service (Article 245)	Two years
GENERAL	
Any other legislation required by this Constitution	Five years



## Key Highlights of the Budget Process

Date of Submission	Document submitted	Mode of engagement
1. February	<p>The Budget Policy Statement</p> <ul style="list-style-type: none"> <li>The Budget Policy Statement is a document prepared by the Ministry of finance and it outlines the fiscal objectives, targets of revenue and expenditure as well as the level of borrowing for the financial year and the two subsequent years.</li> <li>The Purpose of the Budget Policy Statement is to provide a summary of the main policy measures under consideration for the forthcoming national budget and the two subsequent years. Under the new dispensation, it is an important document since once Parliament approves the ceiling of expenditure therein, all the government agencies and departments are supposed to adhere to it.</li> <li>In addition, it includes the revenue performance for the previous year and the forecast which forms the basis for division between the national and the county governments.</li> </ul>	<p>The Budget and Appropriations Committee shall seek views from other Departmental committees on the key policy issues that they deem suitable for inclusion in the budget. In addition, the Budget Committee can also seek views from the public and other players.</p>
2. March / April	<ul style="list-style-type: none"> <li>Annual Division of Revenue Bill is introduced. The Bill seeks to divide revenue raised by the national government among the national and county level of government.</li> </ul>	<ul style="list-style-type: none"> <li>This scenario captures vertical allocation of which the Senate will play a key role in terms of approval.</li> <li>The bill shall be introduced by a relevant committee, preferably the Budget and Appropriations Committee.</li> </ul>
3. March / April	<ul style="list-style-type: none"> <li>A county allocation bill shall be introduced immediately after the annual revenue division bill. The bill details the amount of resources allocated for each county.</li> </ul>	<ul style="list-style-type: none"> <li>In consultation with the Commission on Revenue Allocation, the Senate shall approve the county allocation so as to allow the counties to prepare their respective budgets.</li> </ul>
4. April	<ul style="list-style-type: none"> <li>The estimates of revenue and expenditure shall be submitted to the National Assembly, by the Executive, Judiciary and Parliament, respectively.</li> </ul>	<ul style="list-style-type: none"> <li>The estimates shall stand committed to the Budget and Appropriations Committee.</li> </ul>
5. May	<ul style="list-style-type: none"> <li>Review of the Estimates by the Budget and Appropriations Committee in consultation with other Departmental Committees.</li> </ul>	<ul style="list-style-type: none"> <li>The Committee shall hold public hearings with an aim of seeking views from the public as per the provisions of the Constitution.</li> </ul>
6. June	<ul style="list-style-type: none"> <li>The Budget and Appropriations Committee takes the amended Budget back to the House for approval.</li> </ul>	<ul style="list-style-type: none"> <li>In the new Constitution, the Chairs of the various departmental committees shall be the de-facto Ministers and hence they will be expected to verify and validate the issues raised by the Chair, Budget and Appropriations Committee.</li> </ul>
7. June	<ul style="list-style-type: none"> <li>County Budgets shall be approved by the respective county assemblies.</li> </ul>	<ul style="list-style-type: none"> <li>County Assemblies shall be required to approve their respective county budgets.</li> </ul>
8. July- August	<ul style="list-style-type: none"> <li>Debate and approval of the Finance Bill</li> </ul>	<ul style="list-style-type: none"> <li>It is expected that issues raised during expenditure discussions that have revenue implications shall be incorporated in the finance bill before submission.</li> <li>Given the sensitive nature of Tax issues, it is expected that there shall be extensive consultations between the Cabinet Secretary in charge of Finance and the Budget and Appropriations Committee.</li> </ul>

Copied from Kenya National Assembly Publication: *Kenya Parliament* Vol.4 Issue 1 April 2011 (page 53)

**PARLIAMENTARY LEGISLATIVE CALENDER  
TENTH PARLIAMENT – (FOURTH SESSION)**

**WEEK 01**

Tuesday, 22 <sup>nd</sup> March 2011	<b>Special Sitting</b>
Morning Sitting Wednesday, 23 <sup>rd</sup> March 2011	Private Members Business
Afternoon Sitting Wednesday, 23 <sup>rd</sup> March 2011	Government Business
Thursday, 24 <sup>th</sup> March 2011	Government Business

**WEEK 02**

Tuesday, 29 <sup>th</sup> March 2011	Government Business
Morning Sitting Wednesday, 30 <sup>th</sup> March 2011	Private Members Business
Afternoon Sitting Wednesday, 30 <sup>th</sup> March 2011	Government Business
Thursday, 31 <sup>st</sup> March 2011	Government Business

**WEEK 03**

Tuesday, 5 <sup>th</sup> April 2011	Government Business
Morning Sitting Wednesday, 6 <sup>th</sup> April 2011	Private Members Business
Afternoon Sitting Wednesday, 6 <sup>th</sup> April 2011	Government Business
Thursday, 7 <sup>th</sup> April 2011	Government Business

**WEEK 04**

Tuesday, 12 <sup>th</sup> April 2011	Government Business
Morning Sitting Wednesday, 13 <sup>th</sup> April 2011	Private Members Business
Afternoon Sitting Wednesday, 13 <sup>th</sup> April 2011	Government Business
Thursday, 14 <sup>th</sup> April 2011	Government Business

**WEEK 05**

Tuesday, 19 <sup>th</sup> April 2011	Government Business
Morning Sitting Wednesday, 20 <sup>th</sup> April 2011	Private Members Business
Afternoon Sitting Wednesday, 20 <sup>th</sup> April 2011	Government Business
Thursday, 21 <sup>st</sup> April 2011	Government Business

**WEEK 06**

Tuesday, 26 <sup>th</sup> April 2011	Government Business
Morning Sitting Wednesday, 27 <sup>th</sup> April 2011	Private Members Business
Afternoon Sitting Wednesday, 27 <sup>th</sup> April 2011	Government Business
Thursday, 28 <sup>th</sup> April 2011	Government Business

Source: parliament.go.ke

## History of MP Emoluments per Month, 1993-2008 (in Kenya shillings)

Table 2.2 History of MP Emoluments per Month, 1993-2008 (in Kenyan shillings)

Emoluments	1993-1997	January thru June 1998	July 1998- Sept. 1999	October 1999 thru 2002	2003-2007	2008-present
Basic Salary (taxable)	10,000	10,000	10,000	10,000	200,000	200,000
Car Maintenance allowance					75,000	n.a.
Transport allowance (tax free)	15,000	20,000	45,000	118,000	336,000	n.a.
Extraneous allowance	-	-	-	-	30,000	n.a.
Entertainment allowance	-	-	-	-	60,000	n.a.
Housing allowance (tax free)	33,333	33,333	33,333	33,333	70,000	n.a.
Sitting Allowance (tax free) <sup>1</sup>	3,000	3,000	3,000	3,000	5,000	n.a.
Responsibility Allowance (tax free)	7,500	7,500	7,500	7,500		n.a.
Constituency Allowance	5,200	5,200	5,200	5,200	50,000	n.a.
<b>Grand Total</b>	<b>74,033</b>	<b>79,033</b>	<b>104,033</b>	<b>177,033</b>	<b>485,000</b>	<b>851,000</b>
<b>Grand Total in US dollars<sup>2</sup></b>	<b>1,140</b>	<b>1,220</b>	<b>1,600</b>	<b>2,720</b>	<b>7,460</b>	<b>13,090</b>
<b>Annual Total in US dollars<sup>2</sup></b>	<b>13,680</b>	<b>14,640</b>	<b>19,200</b>	<b>32,640</b>	<b>89,520</b>	<b>157,080</b>

Note: Notwithstanding the substantial increments in basic salary, most of the increases in the total package of compensation are in the form of increasing various allowances which account for 76 percent of all compensation. In addition to the sitting allowance for attending plenary sessions of the house, members of committees receive an additional committee sitting allowance of KShs. 5,000 per month.

<sup>2</sup>The rate of exchange during the period included by the table ranged from 62 to 80 Kenyan Shillings (KShs.) to the dollar. The rate at the end of July, 2008 was \$1=KShs. 65.0. The dollar equivalents indicated in this table are calculated at that rate.

**Copied from Barkan and Matiangi (2009: 56)**