

PARLIAMENT
OF KENYA
LIBRARY

REPORT ON THE SEMINAR FOR THE
PARLIAMENTARY COMMITTEES
HELD AT WHITESANDS HOTEL ON
THE 12TH AND 13TH SEPTEMBER 2002

Hosts:
Finance Planning and Trade Committee of Parliament
and
Institute of Economic Affairs.

TABLE OF CONTENTS

RECOMMENDATIONS FROM THE MEETING.....	4
Management of appropriations and budget.....	4
Management of a Deregulated Economy.....	5
Parliamentary Committees.....	6
Representation.....	6
Other Issues.....	6
MAIN OBJECTIVES OF THE SEMINAR.....	8
SESSION 1: INTERROGATING PARLIAMENT'S OVERSIGHT ROLE: CASE OF APPROPRIATIONS TO MINISTRIES AND GOVERNMENT DEPARTMENTS ..	8
Topic 1: INTERROGATING PARLIAMENT'S OVERSIGHT ROLE: THE CASE OF APPROPRIATIONS.....	8
Topic 2: INTERROGATING PARLIAMENT'S OVERSIGHT WORK: Case Of Appropriations To Ministry Of Agriculture And Rural Development.....	11
Topic 3: ENHANCING PARLIAMENT'S EFFECTIVENESS ON SUPPLY/APPROPRIATIONS ISSUES.....	13
DISCUSSIONS.....	16
SESSION 2: INTERROGATING PARLIAMENT'S OVERSIGHT ROLE IN A DEREGULATED ECONOMY.....	20
Topic 4: DEREGULATING THE KENYAN ECONOMY:.....	20
Topic 5: RECENT DEVELOPMENTS IN THE RETIREMENT BENEFITS INDUSTRY & THE ROLE OF PARLIAMENT IN THE PENSIONS SECTOR..	22
Topic 6: RECENT DEVELOPMENTS IN THE EQUITY MARKETS AND THE ROLE OF PARLIAMENT IN AN INCREASINGLY DEREGULATED FINANCIAL SECTOR.....	24
Topic 7: THE ROLE OF PARLIAMENT IN AN INCREASINGLY DEREGULATED POWER INDUSTRY.....	28
Historical Reasons for Government Ownership of Infrastructure Industries	28
Need to Review Industry Ownership and Structure.....	29
Status of Electricity Industry Reforms in Kenya.....	30
Role of Parliament.....	31
Legal Framework.....	32
Regulatory Framework.....	33
Conclusions.....	34
Topic 8: RECENT DEVELOPMENTS IN THE TELECOMMUNICATIONS SECTOR AND THE ROLE OF PARLIAMENT IN AN INCREASINGLY DEREGULATED TELECOMMUNICATION SECTOR.....	34
1. Conceptual Framework.....	34
2. Background.....	35
3. Government Policy Objectives.....	35

4. Global Trends Vs Domestic Privatization Efforts	36
5. Restructuring Strategy.....	36
Cellular Subscribers.....	38
6. Parliament As A Watchdog	40
7. Conclusion.....	41
Topic 9: MSE IN KENYA AND THE PARLIAMENTARY OVERSIGHT ROLE	41
DISCUSSIONS	43
SESSION 3: REFLECTING ON THE PERFORMANCE OF 8 TH PARTLIAMENT AND EXPLORING THE NEXT CYCLE OF PARLIAMENTARY REFORMS	50
Topic 10: REFLECTIONS ON THE 8 TH PARLIAMENT AND ISSUES FOR THE 9 TH	50
Topic 11: PARLIAMENTARY REFORM - STRENGTHENING PARLIAMENTARY DEMOCRACY	52
Introduction	52
The Quality of Government.....	53
Parliament's independence.....	54
Parliamentary Oversight.....	57
What are the implications for the 9 th Parliament?	57
Quality of Representation.....	58
Topic 12: THE NEXT PHASE OF PARLIAMENTARY REFORM.....	62
Parliamentary Reform: The Constitutional Questions	62
Parliamentary Reform: Ordinary Legislation & The Standing Orders	66
Topic 13: REVIEWING THE PROCEDURES OF PARLIAMENT	70
SESSION 4: CONFIRMATION OF RECOMMENDATIONS.....	75
Management of appropriations and budget.....	75
Management of a Deregulated Economy	76
Parliamentary Committees	77
Representation	77
Other Issues.....	77

Background

On the 12 and 13th of September, 26 members of parliament met at the Whitesands Hotel in Mombasa. The meeting was hosted by the Departmental committee on Finance, Planning and Trade and the Institute of Economic Affairs a Kenyan policy think-tank based in Nairobi. The meeting reflected on Parliaments management of the debates on appropriations and made some recommendations intended to sharpen and improve this. The meeting also reflected on the experience of parliament in managing a deregulated economy and especially the case of the pensions industry, capital markets, telecommunications and electricity and also made recommendations on improvements to the relationship of the national assembly with these deregulated industries.

On the second day the meeting discussed the performance of the current parliament and desires for further reform in readiness for future parliaments.

This report captures the proceedings of the two-day meeting and the recommendation made by the parliamentarians who attended.

In terms of presentation, we have presented the recommendations at the beginning of the document. This is followed by the proceedings of the meeting. This incorporates the presentations made by the presenters and discussion verbatim.

RECOMMENDATIONS FROM THE MEETING

Management of appropriations and budget

1. That a Parliamentary Budget Office (PBO) be established as a priority. To safeguard this office, it should not only be set up by the structures of parliament but it would be desirable if it also received constitutional protection. (C)
2. That Parliament is concerned that there is inadequate scrutiny of the estimates and recommends that the executive provides each departmental committee with respective estimates at least 3 months before budget is read. The committees will present its report to the house when the votes are being considered during the committee of supply. (C)
3. That all votes should be discussed on the floor of the house and none guillotined. (SO)
4. The number of allotted days should be increased so that each Ministry's proposed expenditure can be scrutinized. This should also be scrutinized by the relevant departmental committee. (SO)

5. Implement the Sec 16 of the Constitution that Ministries should be created in consultation with parliament and by an Act. {there was a suggestion that this should actually be set up by the constitution}
6. Controller and Auditor General (CAG) should be a constitutional office answerable to parliament with powers to prosecute. (C)
7. Parliament should receive the CAG report within 12 months of the end of the financial year. Parliament should receive the draft accounts before passing the Appropriations for the following financial year.
8. (Paymaster general account should be subjected to an audit)*
9. That SO 101A be amended to allow appropriations for each ministry to be referred to the relevant departmental committee
10. De-consolidate the Appropriations Bill and instead have a Bill for each separate vote to be approved by parliament as presented in the Estimates. Individualize the Bills.
11. Parliament requires timely information during the year on the implementation of the budget and meeting of targets. To this end it should receive quarterly reports on disbursements and performance. To achieve this, the minister should set out at the beginning of the year, the intended targets and goals of public expenditure in the given year. Parliament should have powers to take any action it deems necessary to correct this situation e.g through injunctive powers.
12. That parliament be given powers to withhold a ministry's budget if in its opinion (as reported/advised by the controller and auditor general) it is not being used as approved.
13. Budget must be synchronised with policy papers that have been presented and passed by parliament.
14. Members were concerned about the number of funds that do not come under parliamentary scrutiny and resolved that any fund set up for the collection and appropriation of public funds should be subjected to parliamentary scrutiny.

Management of a Deregulated Economy

Parliament has through legislation set up regulatory authorities to manage various sectors e.g telecommunication and electricity. However, some of the legislation is not robust enough to enable smooth functioning of the sector e.g ERB or not broad enough. Some are also not harmonised with other acts.

15. Parliament should inform itself of the status of the deregulated sectors, confirm if they are in compliance with parliaments intentions and address any short-comings or issues emerging & amend the laws to compel regulatory agencies to submit reports to relevant committees on a regular basis.

16. **Establish a select committee to review the working of regulatory policy.**
17. Parliament should scrutinise proposed legislation more vigorously to avoid creation of weak institutions

Parliamentary Committees

18. That the portfolio of existing committees be reviewed and rationalised to discourage too broad a mandate (SO)
19. Party whips should not hold any committee positions. (SO)
20. That the performance of the committees be evaluated to establish whether their mandates should be limited or expanded. (SO)
21. Members should belong to at least one committee and multiple memberships should be discouraged, and if possible be limited to two.
22. MPs should state their own preference for appointment to committees (through members' lists of interest)

Representation

23. Review of electoral system to include proportional representation (C)
24. Provision of public hearings/sittings of committees
25. Mechanisms for introduction of issues by un-represented constituencies e.g through petitions (C)

Other Issues

26. Harambee system: Members are concerned and frustrated by the abuse of the harambee system and the tendency of government to abdicate its role of provision of social services. They recommend that the role of harambee should be redefined and instead a direct allocations be made in the budget for constituency development funds. The constituency fund comprising 5% of budget should be equitably divided between the constituencies.
27. Parliament should enhance scrutiny of executive compliance with its recommendations via the establishment of an implementation/ assurances committee (SO)
28. Parliament should be informed of all issues that touch on public money e.g debt, agreements the country has signed etc
29. Government should seek parliamentary approval for exceeding levels of domestic borrowing.
30. To promote perception of parliament and integrity, parliamentary salaries and other earnings should be reviewed by an independent body or tribunal. (PSC)
31. That structures within parliament should assist with technical information to reduce the disconnect between policy and executive.

32. Parliament should periodically organise meetings and seminars to equip members with knowledge and skills to enable the MPs to perform their parliamentary functions.
33. Establish a list of members' interests.
34. Explore mechanisms where parliamentary votes of no confidence do not result in dissolution of parliament.
35. Reexamine the "sub judice rule" as applies to parliament.
36. That parliament should regularly organize sessions for parliamentarians to inform them on Economic and Budget issues

MAIN OBJECTIVES OF THE SEMINAR

1. Examine the role of parliament in public finance management, the institutional provisions, the performance (and reasons for it) of the Kenyan Parliament and make proposals for consideration in preparing for the 9th parliament.
2. Examine the relationship of parliament with an increasingly deregulated economy. Many Sectors were deregulated in the 7th and 8th parliament's watch and new regulatory authorities established. This workshop will review the case of telecommunication, electricity, Pensions and Equity markets and using comparative information, explore the role of parliament in stimulating and managing a deregulated economy.
3. Review the performance of the 8th parliament and propose recommendations for further parliamentary reform and guide to the 9th parliament.

DAY 1 THURSDAY, 12TH SEPTEMBER 2002

SESSION 1: INTERROGATING PARLIAMENT'S OVERSIGHT ROLE: CASE OF APPROPRIATIONS TO MINISTRIES AND GOVERNMENT DEPARTMENTS

Session Chair: Hon. Simeon Mkalla, Chairman, Finance, Planning and Trade Committee.

Topic 1: INTERROGATING PARLIAMENT'S OVERSIGHT ROLE: THE CASE OF APPROPRIATIONS

(Presented by Albert Mwenda, Institute of Economic Affairs)

The presenter informed the members that appropriations to ministries and government departments, that parliament approves, has tended to be concentrated on non-productive sectors, with the Office of the President and related expenditure votes consuming 14.8%, general administration, law and justice provision taking up 10% and the public debt servicing accounting for 31%. The economic sector and infrastructure are allocated 14.5% leaving a balance of 25.7% for the social sector. He advised against spending too much on the non-productive sectors. Further, he explained that growth would only be realized if there was efficient spending on the pillars of growth, which he identified as the economic sector, social sector and infrastructure.

Mr. Mwenda observed that despite the growth in levels of public expenditure, the country continued to register economic decline, lower GDP per capita, higher crime levels, less forest acreage etc. The high public spending has also not stemmed the high unemployment levels presently at 30% and rising. Doctors continue to flee the country for greener pastures elsewhere, with 65 doctors leaving the country in 2001. It was explained that only 30.5% of the Kenyan households have access to clean piped water and pending bills keep recurring every fiscal year despite the annual allocations in the printed estimates for supply of water and payment of pending bills.

He said, that public resources were also being allocated to inefficient State Corporations and gave the example of the proposed allocations in the Budget 2002/03 to Kenya National Assurance Company, Kenya Railways, Kenya Meat Commission and Agricultural Finance Corporation.

The following observations were made regarding specific expenditure votes proposals contained in Budget 2002/03:

Office of the President (OP)

- That there were proposals to create new expenditure heads that will certainly result in higher public spending. Apparently the services provided by the proposed expenditure heads (e.g. the new police training schools) could be provided by the existing expenditure heads. It was not clear what necessitated the creation of the new expenditure heads.
- Some departments within OP tended to duplicate efforts e.g. departments dealing with registration of persons, food relief, poverty eradication and disaster management etc.

Ministry of Agriculture and Rural Development

- There was an unrealistic provision for purchase of motor vehicle for Ksh. 87,609.00
- Allocation to National Irrigation Board was reviewed downwards by Ksh. 121 million – this could ground the operation of the organization.
- The Ministry also proposed to create new expenditure heads and sub-votes while at the same time abolishing others. The criteria were not clear.

Ministry of Health

- There was less provision for purchase of drugs for Rural Health Centres (a decline of Ksh. 37.4 million) while the DARE project for the provision of drugs had been withdrawn. This could result in lower access to drugs by the rural poor.

- There was an upward adjustment of allowances for doctors and paramedics and this was perhaps an effort to persuade doctors and paramedics not to flee to other countries.
- Grants to Kenyatta National Hospital and Moi Referral and Teaching Hospital were cut by Ksh. 18.6 million and Ksh. 3.5 million respectively.
- The ministry also proposes to create new expenditure heads – i.e. “Control of Malaria” and “Kenya Expanded Programme on Immunization (KEPI)” with total budget of Ksh. 39 million. Notably the fight against malaria and immunization are not new phenomena. Therefore the ministry should explain why the new heads have become necessary now and after so many lives were lost recently through malaria outbreak.

Ministry of Education Science and Technology

- The allocation for house allowances for the Provincial Administration Services was reduced from Ksh. 28.2 million to Ksh. 2.8 million while staff establishment remained the same. Has the government acquired new houses for the Provincial Administration staff?
- There was no additional allocation for purchase of textbooks.

Ministry of Roads and Public Works

- Funding for utilities (e.g. telephone, electricity, water etc) was cut across all departments. This could result in the escalation of ministry’s pending bills, given that the ministry has provision for electricity pending bill of Ksh. 10 million in Budget 2002/03.

Ministry of Tourism and Wildlife

- The ministry proposes to create a new department “Central Planning Unit” established with a budget of Ksh. 5 million, but rationale is not clear.

Ministry of Local Government

- There is need to ensure that the distribution of the Local Authority Transfer Fund (LATF) is not skewed in favour of certain regions.
- Unlike Kenya Roads Board (KRB), which is governed by the KRB Act in the distribution of Road Maintenance Levy Fund (RMLF), the distribution of KUTIP funds is apparently not based on any known formula.
- The Interim Oversight Board (IOT) with jurisdiction over Nairobi only has a budget, which is 10 times more than that of the Kenya Local Authority Reform Programme (KLGRP). Is there an opportunity to merge these departments?
- Ministry of energy
- Funding to Olkaria Project was reduced from Ksh. 6.3 billion in 2001/2002 to Ksh. 1.8 billion in Ksh. 2002/03, a development that might delay the finalization of the project.

Ministry of Environment and Natural Resources

- Distribution of funds for provision of clean piped water is skewed in favour of certain regions, with Baringo district receiving Ksh. 63 million while Nyando district was allocated Ksh. 1 million.
- The ministry proposes to establish the National Environment Management Authority (NEMA), though with a budget of Ksh. 404.8 million –almost twice that of the departments scrapped to give way to NEMA.

Office of the Vice President and Ministry of Home Affairs, Heritage and Sports

- The ministry proposes to lay off 1,500 warder trainees in 2002/03. This explains the drastic drop in the budget allocation to personnel expenses from Ksh. 113 million in 2001/02 to Ksh. 72 million in 2002/03. But is this feasible? AND why recruit 1,700 warder trainees in the subsequent year?
- Despite the pathetic state of the sport facilities allocations to all the main sporting facilities have been reduced in Budget 2002/03.

Ministry of Finance and Planning

- The Ministry proposes to establish two new departments i.e. “Department of Research Development” and “Central Planning and Co-ordination Department. Once again this translate into additional expenditure and hence need to seek further justification for the establishment of the offices.

In conclusion, the presenter suggested that the anomalies in the handling of appropriations to ministries and government departments were perhaps as a result of the manner in which the debate and approval of appropriations was handled. He therefore proposed the review of parliament’s mandate, approach and oversight role on appropriations.

Topic 2: INTERROGATING PARLIAMENT’S OVERSIGHT WORK: Case Of Appropriations To Ministry Of Agriculture And Rural Development.

(Presented By James K. Nyoro, Tegemeo Institute, Egerton University)

Potential in Agriculture

The presenter noted that there was huge potential in the agricultural sector in terms of

- Contribution to Gross Domestic Product, employment, exports earnings and food security.
- Invigorating effects on the economy

- Multiplier effects
- Farm spurs off-farm
- Creation of demand for industries
- Facilitating the trickle down of benefits to the urban areas and not vice versa
- Investment in agriculture has the highest poverty reduction potential and that this is also underscored in the Poverty Reduction Strategy Paper (PRSP)

Economic and Agricultural Growth rates

The following observations were made regarding the performance and resource allocation by the Ministry of Agriculture and Rural Development

- That there was limited public investment in agriculture - About 3.5% of national budget with a large proportion being allocated to non productive sectors
- Sustained low growth rate
 - Low productivity
 - Reduced earning
- Loss in Domestic competitiveness
 - High costs of production
 - Low returns
 - Poor linkages to agro processing
 - High compliance costs

The speaker reiterated the need to reconsider and develop a vision for the country. Issues requiring immediate attention include:

- Do we have a vision for the economy?
- Is the Budget allocation consistent with:
 - Economic Growth
 - Poverty reduction
 - Human resource development
 - Sustainable physical environment

Appropriations Strategies to Revitalize Agriculture and Rural Development
 Increase budgetary allocations to agriculture (Through Public-Private sector community partnership)

- Provide Rural finance
 - Micro credit schemes
 - Collaterised credit Investment in Rural infrastructure
- Investment in Production Technology Development
 - Seed development
- Investment in Extension Services

- Provide for Food price stabilization
- Combating contagious livestock diseases
- Reduce allocations to parastatals and speed up privatisation of inefficient parastatals
- Increase allocations to productive sectors
- Reduce recurrent Expenditure
- Civil Service Reform
- Introduce Accountability
- Monitoring and Evaluation

Topic 3: ENHANCING PARLIAMENT'S EFFECTIVENESS ON SUPPLY/APPROPRIATIONS ISSUES

(Presented by Duncan Okello, Institute of Economic Affairs)

INTRODUCTION

The presenter started by pointing out "the basis of parliamentary engagement with appropriations"

1. That the *Authorization Power* springs from the 'no taxation without representation' principle; This he noted is the reason why the constitution bars any withdrawals from the Consolidated Fund except by parliamentary approval.
2. *Oversight*: The laws of Kenya also bestows certain power on the National Assembly to **Monitor** public spending and to oversee the **audit** of public accounts

Minimum Conditions For Effective Parliamentary Engagement In Appropriations Issues

1. INFORMATION - must be credible, timely and user-friendly
2. EFFECTIVE POWER - depends on the existence of amendment and injunctive powers
3. RESTRICTED EXECUTIVE DISCRETION -
4. ENABLING MECHANISMS

Reference was made to the a study on Fiscal Transparency in 5 African Countries, the findings of which were published in 2002. An important finding and relevant to the topic under discussion was 'In order to reap the better spending benefits of enabled legislative checks and broader public debate, transparency and meaningful participation in the legislative phase of the budget process therefore requires appropriate amendment powers, clarity of roles and responsibilities and sufficient information, time and independent legislative capacity to scrutinize budget proposals. Formalized processes for legislative debate of and intervention in the

budget and for citizen access to budgetary decision making in the legislature maximise the role of the legislature as a gateway for the public to the budget process'. (See P.21)

Key Stages In Appropriations & Critical Issues Of Concern To Effective Parliamentary Engagement

- Stage 1: Release of Estimates
- Stage 2: Vote on Account
- Stage 3: Appropriations Bill (Committee of Supply)
- Stage 4: Supplementary Appropriations Bill

STAGE 1: THE PRINTED ESTIMATES

By practice Treasury releases the Printed Estimates to public about 1 week before budget day. Notably parliament does not enjoy exclusive or privileged access. Standing Order 151 (1)(4)(a) allows the Committees to scrutinize estimates. However, it is expected of the Parliamentary Committees to Report on this aspect of its mandate without providing the mechanism for doing so, especially before the budget or debate of the estimates.

STAGE 2: VOTE ON ACCOUNT

- Based on Sec. 101 of the Constitution
- It grants up to 50% of proposed expenditures
- The Vote on Account is expected to enable govt. continue providing service until the Appropriation Bill comes into operation
- It has to be passed by 26th June following a 1-day debate, notwithstanding the fact that parliament encounters the budget documents for the first time a week before the budget day.

STAGE 3: COMMITTEE OF SUPPLY

- Sits between July 1 and October 31(20 days of Supply) as stipulated by procedures of the House - SO 142 (1).
- Considers Ministerial Appropriations on Vote Basis with two days being allotted to each expenditure vote.
- Only 10 expenditure votes are debated with the balance being subjected to guillotine - SO 142 (7).
- SO 142 (3) allows a reduction of the Vote but only when the subhead is being considered.
- No condition is to be attached to any Vote.
- Appropriations Bill is normally passed in October to give legal effect to these expenditures (This is a special issue of the Kenya Gazette Supplement). The Bill covers total estimates including money already withdrawn from the Vote on Account. The Bill has a schedule that describes for both recurrent and development expenditures, the vote

number, a paragraph describing the service or purpose, the supply amount and the appropriations in aid.

STAGE 4: SUPPLEMENTARY ESTIMATES

- An amendment to Appropriations Act
- Used to facilitate reallocations
- No new items not included in the annual budget should be entertained in the Supplementary Estimates.
- Usually passed in March /April; restricted only to reallocating existing votes and where necessary reduction and addition to the existing votes.
- Concludes by the passing of Supplementary Appropriations Bill.

Constraints To Parliament On Supply Issues

- The Vote on Account takes one day, without parliament not having had the benefit of scrutinizing the printed estimates in the first place. The *policy and not the estimates* debate is interrupted to pass the Vote on Account. Thus parliament passes the Vote on the basis of an on going policy debate.
- Whereas Vote on Account grants 50% advance to Ministries and Government Departments, save for refusing to pass the Appropriations Bill in October, there is no parliamentary mechanism to correct irregular expenditure midstream.
- The Printed Estimates are made public too close to the budget day to enable parliament to scrutinize them before debate. Powers of scrutiny granted by SO 151(4) (a) are nullified in practice.
- SO 101A (4) which shields the Appropriations and Supplementary Appropriations Bills from Departmental Scrutiny, leaves Parliament with an unwieldy Committee of the Whole House to consider a rather detailed and confusing appropriations.
- Parliament has weak amendment powers. Thus, Votes cannot be shifted between ministries. Which means that, a policy mandate granted by parliament can be deliberately under resourced and parliament has no powers to align allocations to its policy mandate. In other words, parliament may have passed a Sessional paper on Poverty but, if it feels that the estimates are not prioritizing poverty (in favor of security for instance, it has no wriggle room. It cannot reallocate resources).
- Consolidated Appropriations Bill is limiting ministerial scrutiny.
- Guillotine also undermines scrutiny.

Possible Remedies

- Printed Estimates should be released early (probably March) and can be considered by Departmental Committees or the Finance Committee or both and a Report made to the House. Early tabling gives time for negotiation between the Executive and the Legislature.

- This would require amendment to the Standing Orders, Exchequer and Audit Act or enactment of a Parliamentary Budget Office (PBO). Whereas Committees can invoke Standing Order 151 (4)(a) powers to scrutinize Estimates at any time, Treasury may rightly plead that they are not ready; they are being prepared according to the Executive budget-making calendar. The two calendars - Parliamentary and Executive - need to be synchronized through formal provisions.
- Amend SO 101A so as to allow appropriations for each ministry to be referred to the relevant committee
- De-consolidate the Appropriations Bill and instead have a Bill for each ministry. Individualize the Bills.
- Give parliament powers to shift votes especially if it seeks to align resource allocation with a particular policy mandate it has granted. BUT this requires a culture of negotiation and mutual respect.
- Give parliament powers to withhold an expenditure vote if in its opinion (as reported/advised by the controller and auditor general) it is not being used as approved. This requires that the CAG be Parliament's auditor with closer structural ties to the House and relevant committees.
- The SO to require that ministers give quarterly reports on budget implementation status to the relevant committees. The House powers to recommend withholding of ministerial resources should emanate from the decision of this committee
- Remove guillotine procedure
- Establish mechanisms for action on Audit Reports

DISCUSSIONS

Hon. Oloo Aringo observed that the some of the problems afflicting parliament were self-inflicted. According to him, if the Parliamentary Budget Office was implemented some of the problems would be resolved. If the PBO Bill was passed into law, it would create a Budget Committee to conduct and interrogate the consolidated fund. He noted that there was need to provide sufficient days to interrogate the estimates. He explained that he had presented the motion to the House but there has been a delay and that there is need to exert pressure on parliament to bring back the Bill.

Hon Basil Mwakiringo wondered the technocrats charged with the responsibility of drafting the budget had a vision and they did not question politicians when they erred.

Dr. James Karuga, Chairman-Institute of Economic Affairs, advised that what was required was the harmonisation of tax collection measures. He added that

unless parliament safeguarded the revenue collected, no meaningful development would be achieved. Further, he explained that the Vote on Account, for example, has been taken out of context from the British parliament. According to him the creation of PBO is an important beginning.

Hon. Otula took Mr. Nyoro to task on his suggestion that the allocation to the Ministry of Agriculture and Rural Development be increased from the current 3.25% of the total government expenditure. He argued that the dismal performance of the agricultural sector was due to inefficient spending, with 60% of the Ministry's allocation going to parastatals. The solutions to the problems afflicting the sector, he argued, lay elsewhere and not in increased allocations to the Ministry.

Mr. Nyoro responded to Hon. Otula by pointing out that the increased allocation is necessary but is not sufficient. Even with an allocation of 3.25 % of total public expenditure, if we can remove those parasitic parastatals we can make a difference. He added that what is needed is civil service reform and we need other things too because allocation alone will not make a difference. When agriculture performs well the economy performs well. The economy is "rain fed" typically. We need to move away from the dependency on rain. He underscored the importance of a Vision for the agricultural sector.

Hon Kimetto praised the good work being done by the Kenya Roads Board and recommended the same approach in the utilization and monitoring of LATF funds and other funds be adopted.

Hon. Eng. Toro lamented that the some committees were frustrating the efforts of Members of Parliament to move motions/Bills. He particularly singled out Members who doubled as party whips and chairmen of committees who supported the motions/Bills at committee level but lobbied to defeat motions/Bills when introduced in the House. He therefore sought an assurance from the Chairman of the Finance, Planning and Trade Committtee that he would support Hon. Oloo Aringo's motion on the establishment of the PBO when it is re-introduced.

Hon Otula noted that the time remaining was too short for the incumbent MPs to see through some of the envisaged Bills and suggested that a similar seminar be organised for the ninth parliament.

Hon. Mwalulu stressed the need for entrenching the separation of the powers of the three arms of government (i.e. parliament, judiciary and executive) in the Kenyan laws, if the crisis in leadership is to be resolved. He suggested that the

best way to resolve the conflict between the three arms of government is the constitution review.

Hon. Ayoki proposed that similar seminars be facilitated for those in the ministries.

Mr. Arthur Namu, Director of the Institute of Economic Affairs argued that underlying all the contributions was the issue of strengthening institutions. He gave the example of Italy where frequency of change of governments was very high but the strong institutions facilitated economic growth. He added that there was need to put in place a system of reward and punishment that is incorporated into institutions in Kenya.

Hon. Gatabaki observed that the president has impunity to direct the finance minister without reference to anyone and with total disregard for parliament. Unless parliament is given teeth to defend these institutions, these anomalies will continue take place. He therefore suggested an impeachment process to separate these powers.

Hon Ndwiga said that the parliamentary committees were dormant during the 7th parliament and that some never sat even once to conduct any business. However, the committees were rejuvenated during the 8th parliament and that they were now causing ripples within the cabinet with Ministers complaining that they were hindrance to their work. But this was only because they were pointing out anomalies

Hon. Angwenyi asked members not to give up. He urged members to propose methods of empowering parliament.

Hon. Khamasi noted that MPs do not have sufficient time effective debate on estimates and this probably called for amendments to standing orders.

Mr Dancun Okello of the Institute of Economic Affairs explained that the timing of the seminar was deliberate since parliament was set to review the standing orders before the end of the current parliament term. He said, when parliament says the ministers are feeling the heat from the committees then they are working and that MPs owe it to themselves to maintain those committees. Should whips of political parties chair committees? There might be a conflict of interest so whips of political parties should not chair committees.

Hon. Aringo told members that Kenya's is probably the only parliament in the world with no legislative drafting support. This government only listens to laws you have sanctioned. He told members that they had the power and hence they should participate in the making of legislation but they need to budget for this.

He suggested that Ministers who failed to turn up for debates be locked out for one month.

Hon. Joe Donde said that his experience is that it is not possible to discuss all expenditure votes in twenty days allotted for debate on appropriations. If the presentations were made in March parliament can examine and critique them and they can be aligned with parliaments work.

Hon Omolo: MPs should insist that government plays its role. It is the executive that needs to come to parliament and it cannot be the other way around. For example, the Ministry of Transport and Communication is not established by any law but all the parastatals under it are established by laws.

Betty informed members that the 20 days allotted for the committee of supply were set up when there were only 10 ministries and these served them well.

Proposed Recommendations from the Floor:

- Creation of PBO as a priority
- Ability by parliament to pass a motion of no confidence without dissolving itself.
- That party whips should not be chairmen of committees
- Respective ministry budget to be presented to respective committees 3 months before budget is read.
- Creation of ministries should be by an act of parliament.
- CAG should be office holder of parliament and given powers to prosecute.
- Abolish passing of expenditure votes by guillotine procedure.
- Paymaster general account should be subjected to an audit.
- Need to have thorough review of government expenditure to harmonise them with legislation. Consolidate – paymaster general and exchequer. Need for closer scrutiny of amounts and procedures of authorisation of exchequer.
- CAG audit report should be presented to respective committees 12 months following the end of financial year.
- Quarterly reports on parliament, performance indicator
- Harmonise and rationalise the expenditure of government in financial year.
- Need performance criteria or targets.
- No hiding of debts e.g. paying of contractors after the financial year.
- Budget must be synchronised with policy papers.
- Formula for revenue sharing; 5% of budget should divided equitably to all constituency for development and start with constitutional development fund.

- Give parliament power to monitor the funds.
- Enhance power of parliament to censure ministers.
- Structure within parliament to assist with technical information and reduce disconnect between policy and executive.
- Generate habit of reading

SESSION 2: INTERROGATING PARLIAMENT'S OVERSIGHT ROLE IN A DEREGULATED ECONOMY

Session Chair: Hon. Basil Mwakiringo, Member of Energy, Communication & Public Works Committee

Topic 4: DEREGULATING THE KENYAN ECONOMY:

(Presented By, Kwame Owino, Institute of Economic Affairs)

History of Deregulation

The presenter defined Regulation as government sanctioned activity that provides benefits or imposes restrictions. He explained that the history of the policy on deregulation dates back to early 1990s and commenced with sector liberalization, privatization and suspension of price controls in 1994 (see Fiscal Strategy Paper, 1996). Regulation was partly informed by pressure for economic liberalization and this led to the creation of regulatory institutions.

Primary Considerations in Deregulation

1. Regulatory Goals varied according to sectors.
2. Regulatory Instruments include Acts of Parliament, regulations by Regulatory Agencies and subsidiary legislation by minister.

The Case of 5 Institutions - RBA, CMA, CCK, MPD and ERB

1. Monopolies and Prices Department (MPD)
 - Was established under CAP 504
 - Act of Parliament is necessary to encourage Competition in the economy by prohibiting Restrictive Trade Practices, controlling monopolies, concentrations of economic power and for connected purposes.
 - Annual Budget for MPD is approximately US \$235,892.
 - Commissioner is a ministerial appointee.
2. Finance
 - Capital Markets Authority-CAP 485A

- Act of Parliament established CMA for the purpose of promoting and facilitating the development of an orderly, fair and efficient capital market in Kenya and for connected purposes.
 - Annual Budget for CMA was US \$1 M
3. Retirement Benefits Authority (RBA).
- Retirement Benefits Authority (RBA) was established under Act No.3 of 1997.
 - The Act of Parliament was established for the regulation, supervision & promotion of retirement benefits schemes, the development of the sector and for connected purposes.
 - Annual Budget of RBA is approximately \$1.5M (2001)
 - Government Grant stands at Kshs.48M
4. Utilities
- Communications Commission of Kenya was established under the Kenya Communications Act, 1998.
 - Act of Parliament was aimed at providing for the transfer of functions, powers and liabilities of KPTC & for connected purposes".
 - ERB- Electric Power Act 1998.
 - Act of Parliament is required to amend & consolidate the law relating to the generation, transmission, transformation, distribution, supply and use of electrical energy for lighting and other connected purposes.

Issues for Legislature

- Legislative oversight especially in subsidiary rules
- Status of the MPD-macro-level regulatory agency
- Audit and financial reporting
- Relationship between Sectoral Regulatory Authorities (SRA) and MPD
- Regulatory Capture
- Autonomy, independence & accountability
- Regulation through litigation
- Danger of reversion & Rollback
- Cost-Benefit Analysis
- Conflict of interest
- Consistent principles for Regulatory Policy

Topic 5: RECENT DEVELOPMENTS IN THE RETIREMENT BENEFITS INDUSTRY & THE ROLE OF PARLIAMENT IN THE PENSIONS SECTOR

(Presentation by Edward Odundo, CEO, Retirement Benefits Authority)

It is a great honour for me to be invited to be part of this distinguished assembly to discuss the recent developments in the retirement Benefits industry, and the role of parliament in the pensions sector. Mr. Chairman, I will give an exposition of the economic contribution of the retirement benefits industry and then proceed to touch on the role of parliament in the pensions sector, for effective actualization of the full potential of Kenya's retirement benefits industry.

Before touching on this important issue, however, I would be abdicating my duty, Mr. Chairman, if I failed to give a little background on some of the reasons and objectives underlying the enactment of the Retirement Benefits Act and the creation of the Retirement Benefits Authority. I shall therefore first offer a brief recap of the same.

In tandem with the global acceptance that state-provided pension is inadequate and unsustainable in the long run, and the realization that a well-managed retirement benefits industry is imperative for enhanced mobilization of domestic savings and faster economic growth and development, Kenya made the first deliberate and conclusive effort toward the development of the retirement benefits industry with the enactment of the Retirement Benefits Act in 1997.

Mr. Chairman, prior to the enactment of this Act, the retirement benefits industry was characterized by the lack of a harmonized legislative framework and a discordant regulatory environment. This led to well documented cases of poor investments, delays and denials in payment of due benefits to members, misuse and outright theft of members funds and a myriad of other problems the ultimate cost of which was a poor standard of living, and in some cases abject poverty for workers on retirement.

The Retirement Benefits Act, Mr. Chairman, was enacted in August 1997 in order to try and address some of these problems afflicting the retirement benefits industry. The Act created the Retirement Benefits Authority as the regulatory institution charged with; the management, promotion and development of the industry, the protection of the interests of scheme members and sponsors, and an advisory role to the Government on policy formulation and implementation with regard to the retirement benefits industry. The Act also mandated a clear separation of roles, with schemes being required to use the services of separate professional investment managers and custodians.

The subsequent gazetting of the Retirement Benefits Regulations 2000, a subsidiary legislation to the Act, put in place further and indeed more precise provisions aimed at achieving the core objectives of protecting member's benefits and developing the retirement benefits industry. These regulations have served us well in the regulation and supervision of the establishment and management of retirement benefits schemes.

Mr. Chairman, we at the Retirement Benefits Authority envisage, and are therefore working tirelessly towards, a dawn when there will be a blanket proper administration and record keeping within schemes, properly funded schemes and more importantly a situation where there will be an educated public within schemes that is keen to save for retirement and also able to provide the necessary social audit to the industry in terms of whistle blowing.

Turning to the economic contribution of the retirement benefits industry, it is worth noting that currently there are 1,300 pension schemes in Kenya with a portfolio totalling about Kshs 140 billion, or 20 % of the country's GDP. This industry contributes to economic development in several ways, which include but are not limited to the following;

Firstly, The retirement benefit industry encourages greater savings. It is expected that the industry as it develops will continue to play a key role in increasing the country's savings rate from the current 8% to over 25% of GDP to finance investment to the required 25%-30% of GDP on a sustained basis to accelerate economic growth.

Secondly, the retirement benefit industry contributes to the development of capital markets and capital markets instruments through the use of prudent professional investment of scheme funds. This will in effect precipitate accelerated capital market integration, reduction in the cost of long-term debt and improved monitoring of corporations, coupled with a significantly improved quality of the information provided by firms to the market.

Thirdly, the industry has been a key contributor towards fiscal policy, a key component in good economic management that influences economic development. Lately with the withholding of donor aid to Kenya by our development partners, the Government has resorted to increased domestic borrowing to finance budget deficit. The retirement benefits industry provides a very high percent of surplus funds for this purpose through their investment in Government debt instruments.

Fourthly, the industry provides a base for the necessary shareholders activism to ensure capital markets regulations that impact on corporate governance. The collectiveness in ownership of equities and debt securities achieves the bargaining power for schemes in demanding for best practices.

Finally, the retirement benefit industry contributes towards foreign direct investment. With the recent improvements and regulatory provisions within the industry, the financial sector has already witnessed the creation of subsidiaries of key international financial firms providing services such as fund management, actuarial services and administrative services to the industry.

In view of the above Mr. Chairman, there is credence in ensuring that the full potential of the industry is realized. It is important, therefore, that all stakeholders effectively play their roles to the full. In this regard, the Retirement Benefits Authority is grateful to Parliament for the passing the Retirement Benefits Act, giving the RBA a mandate to exist as a regulatory institutions and for supporting the Authority in its regulatory functions, including providing funding to the Authority through the Ministry of Finance budget vote.

There are, however, Mr. Chairman, two areas where the Authority would like to seek the further indulgence of the august National Assembly.

Firstly, Mr. Chairman, whereas we applaud the government for the various concession that have been given to the retirement benefits industry, it remains our considered view that there is need for greater tax incentives to retirement benefits scheme. In this regard, the increase in tax rates on lump sum payments out of schemes that was effected by the Minister for Finance during the budget speech is most unfortunate. Taxing benefits at the PAYE rates will only Act to unduly punish retirees and discourage saving for retirement. Similarly, Mr. Chairman the Authority continues to maintain that there is need for substantial upward revision of the shs 17,500.00 tax relief limit on contributions to registered retirement benefits schemes.

Secondly, Mr. Chairman the Authority would like to appeal to Members of Parliament to expeditiously support the Retirement Benefits Amendment Bill 2002 which is due to be tabled in the House soon. This bill seeks to strengthen the regulatory powers of the Authority by, inter allia, giving the Authority powers to directly prosecute persons who commit offences under the Act, as is the case with other regulatory bodies.

**Topic 6: RECENT DEVELOPMENTS IN THE EQUITY MARKETS
AND THE ROLE OF PARLIAMENT IN AN INCREASINGLY**

DEREGULATED FINANCIAL SECTOR

(Presented By, Kibuga Kariithi, Chief Executive, The Nairobi Stock Exchange)

The speaker explained that the Capital Markets offer regulated Securities and Derivative markets and that the primary role of Capital Markets is;

1. To establish asset values through efficient price discovery;
2. Enabling the public to know how much companies are worth according to the latest news and the most recent economic outlook.

Capital Markets face a number of challenges, among them:

- Pursuit of market neutrality position;
- Fairness and transparency in the conduct of trading;
- Overall efficiency is measured in increased volume and reduced spreads. This requires the assurance of regulatory services.
- Public policy agenda in most markets is skewed towards banking and insurance;
- There is a need for independence and freedom to operate within the rules of the regulatory environment.

The speaker noted that operators in the capital markets were appreciative of parliament's role in enacting the following laws:

- The Central Depositories Act, 2000
- The CMA Act, 2000.

And for facilitating the establishment of a regulatory framework for Collective Investment Vehicles.

These changes have led to the automation of a clearing, settlement, depository and registry system and an automated trading system, to facilitate trading and cross listing of financial securities in Kenya, Uganda and Tanzania; Creating an East African Stock Exchange with physical presence in the 3 EAC States.

Further he added that a virtual network will create Africa wide linkages connecting the 3 EAC States to:

- the Nigeria stock exchange;
- Cairo and Alexandria Stock Exchange;
- and the Abidjan stock Exchange, among other leading stock exchanges.

For Kenya's Capital Markets to effectively compete deregulation of telecoms would be a necessity (i.e. VSAT and large bandwidth connectivity for Internet Service Providers).

To enhance the performance of Capital markets, it was suggested that the following be done:

- Establish consolidated regulatory framework encompassing retirement benefits, capital markets, and insurance and a Regulators' Forum be established for purposes of sharing information and experiences.
- An Arbiter between the Capital Markets Authority (K) and the Nairobi Stock Exchange be provided.
- An Information Technology Bill to Promote E-commerce be passed covering the following:
 - Electronic Signatures and Electronic Contracts.
 - Privacy and consumer protection
 - Security and Encryption Standards
 - Network and Communication Standards
 - Promotion of schemes for authenticating users
 - Public Information Programmes
- Policy on Participation of East Africans should ensure that East African investors are accorded the same treatment as domestic investors e.g.:
 - a) **Taxation:** Apply same rates to East African Investors as domestic investors for dividends.
 - b) **Minimum Reserve of issued share capital:** Same treatment to all East African Investors as local investors.

Some Unfinished Business for the Equity Markets

1. *Demutualisation and eventual listing of the Exchange.*

For profit entities with external ownership there is need to facilitate commercial oriented competition among exchanges or trading systems for the following 3 main reasons:

- Fresh capital;
 - Diversification in the shareholder base;
 - Splitting the owner from the user function.
2. It is also important to note that exchanges ability to respond to new threats and opportunities, and to profit, depends on the support of a diversified shareholder base, a faster decision making process, and a greater ability to raise new capital.
3. There is need to provide incentives for introduction of new products e.g.:
- Special Bonds to facilitate investment in Healthcare, Education, Micro-finance, Environmental Conservation and Infrastructure;
 - Money Exchange
 - Over the Counter (OTC) Market;
 - Futures and Options
 - Commodities Market to facilitate Online Auctions.

- Forex Market.
- Short Selling of securities.
- Municipal Bonds.
- Primary Dealers.
- Repo Market.

Changing role of Government

- Increasing emphasis on *fiscal rectitude* and *privatisation* in the West is reducing public sector presence in these financial markets
- Opposite is true in Asia as governments borrow to repair bank balance-sheets post-crisis and try to stimulate economies
- Reform of regulatory frameworks in both developed and developing economies in response to market developments
- Increasing international standardisation/co-ordination of regulatory approaches and policies.

Key trends and developments in the equities markets can be summarized by 4C's:

Consolidation

- Mergers amongst balance-sheet intermediaries rationalize capital
 - Merge to reap scale and scope economies on both cost and revenue sides to raise expected rates of return and lower risk through diversification and to facilitate access to larger deals.
- Mergers/alliances amongst stock exchanges
 - Facilitate 24hr trading
 - Link & deepen pools of liquidity
 - Share high development and technology costs

Convergence

- Blurring of traditional boundaries between banking, insurance and funds management
- Balance-sheet intermediaries need the skills of the dealer and market traders need big balance sheets to underwrite ever larger securities issues
- Bank relationships and reputation count underlying techniques for defining and managing risk also converge

Connectedness

- On-going globalisation of financial services facilitated by rollout of internet connectivity, especially evident in growth of Electronic Communication Networks (ECN's) and on-line share trading. ECN's account for 30% of all trades in NASDAQ securities.

- "Supply side" and "demand side" economies of scale are too powerful for information-intensive industries to resist digitization.

Co-ordination

The response from financial regulators to these developments is increasing co-ordination and especially regulation of banking, insurance and funds management.

- UK, Canada, Japan, Korea, Singapore and Australia already have integrated regulators and Germany is expected to follow soon

International co-ordination through peak bodies.

BCBS, IOSCO & IAIS

- A growing emphasis on disclosure and market discipline in regulatory practice, e.g., Basle 2.

Topic 7: THE ROLE OF PARLIAMENT IN AN INCREASINGLY DEREGULATED POWER INDUSTRY

(By Dr. Kevin K. Kariuki, Chief Power Engineer/Consumer Affairs Manager,
Electricity Regulatory Board)

Historical Reasons for Government Ownership of Infrastructure Industries

In the United States and other Western European countries, government ownership of industry and commerce began during the great depression of the 1920s and 1930s and expanded after the World War II¹. Then, the Western governments advanced the following as the main reasons by for the creation of state owned enterprises;

- Natural monopolies, especially in utilities sector, appeared to justify state regulation. The best form of regulation, the corollary went, would be direct ownership of industry by government.
- National Security, not only for the defense industry but also in other "strategic" sectors, required and justified government ownership.
- Troubled and failing industries had to be rescued to protect jobs and income.
- Profitable enterprise provided revenue for Government. This could be used to cross-subsidize other desirable objective.

¹ Organization for Economic Co-operation and Development (OECD), *Financial Market Trends*, Paris, 1995

Suffice it to say that these reasons subsequently found favour in developing countries²:

An analysis of the characteristics of the resulting entities indicates that the enterprises were mainly funded by governments (through taxes, borrowing on concessionary terms or guaranteeing loan facilities to the companies). The governments therefore bore all investment risks. Other features include that the public enterprises were usually vertically integrated for reasons of economies of scale, improved co-ordination, larger and longer-term projects, etc.; had regulatory functions, thereby combining the functions of defendant, judge, jury and prosecutor; customers or more appropriately consumers were captive and uninformed; and that they (public enterprises) were increasingly unable to raise resources either in domestic or international capital markets because they were perceived unable to earn a return sufficient to attract private debt or equity investment.

As a result of these characteristics the following market outcomes resulted; low, if any, profitability; poor service delivery due to inadequate capacity (e.g. load-shedding is a common feature in all the EAC states); poor efficiency, including bloated workforce(s) as the entities were perceived to further government social obligations, in this case providing employment; high losses (water leakage and high technical and non-technical in electricity industry); relatively high prices, considering the quality of service received; low access to services, e.g. in Eastern Africa less than 10% of the population have access to electricity; and low customer dissatisfaction

Need to Review Industry Ownership and Structure

In order to redress these undesirable market outcomes, policy makers have tried to intervene by reforming the respective sectors. Principal drivers for the reforms include needs to protect consumers (in terms of price and quality of service), introduce or increase competition, attract alternative (read private) sources of capital, improve efficiency in production, introduce new technologies and attract technical and managerial expertise. These drivers are somewhat interrelated as aptly captured by the House of Commons Energy Committee Report which stated that the underlying philosophy for electricity privatisation in the UK was that *"greater competition will create downward pressure on costs and prices and ensure that the customer, not the producer or distributor, comes first"*.³

² Michael P. McLindon, *Privatisation & Capital Market Development: Strategies to Promote Economic Growth*, Praeger Publishers 1996

³ House of Commons energy Committee Report, *Consequences of Electricity Privatisation*, Vol.1, Para 31 (1982)

In some areas the need to adopt regional wide norms on the respective industries has also been a key driver for reforms, e.g. "Common Rules for Internal Market in Electricity" which came into effect on 19 February 1997⁴ has had, and continues to have, a significant bearing on electricity industry reforms in Europe.

In the developing countries however, the overriding concerns would however seem to be the need attract private capital and improve efficiency in order to enhance access to services and improve quality of service. Indeed the speed of electricity industry reforms in countries such as Pakistan, Philippines and Malaysia was hastened by widespread blackouts and load shedding.

In Kenya the thrust of the restructuring of the power sub-sector which started in 1996 was to separate commercial, policy setting and regulatory functions.

Whether it is for purposes of increasing greater competition, expanding capacity in the respective infrastructure industry, improving reliability or supplementing, in some cases supplanting, government budget support, the private sector is deemed to best suited to furthering these objectives. This is testimony to the private sector's recognized capacity in improving efficiency, both in operating performance as well as mobilization and application capital.

Therefore although industry reforms or deregulation cannot be homogeneous, with needs to reflect history of industry, stage of development of industry, ownership and organizational structure, size of industry, etc., it is imperative that any meaningful reform efforts must identify (and unbundled either by account or legally) areas with potential for competition and ensure that competitive pressures are introduced or enhanced through private sector participation. At the same time naturally monopolistic businesses must be regulated, with the regulator being surrogate to competition.

Status of Electricity Industry Reforms in Kenya

As stated earlier the thrust of the restructuring of the power sub-sector which started in 1996 was to separate commercial, policy setting and regulatory functions. Reasonable progress has been realised through attempted separation policy and regulatory functions, establishment of arm's length commercial type-relationships between the sector entities and creation of legal and regulatory frameworks that facilitate the restructuring of the sub-sector and encourage private sector participation. These achievements are manifest through the following milestones:

⁴ *Guide to Electricity Directive* Published by the Directorate General of Energy of the European Commission

- a) Repeal of Caps 314 and 315 of the Laws of Kenya and their replacement with the Electric Power Act, 1997 which was promulgated in January 1998. This Act allowed private sector participation in the power sub-sector and also established the Electricity Regulatory Board.
- b) Separation of the generation function from those of dispatch, transmission, distribution and supply.
- c) Licensing and commencement of commercial operation of four Independent Power Producers (IPPs)⁵ with a combined capacity of 185 MW which is 16% of the current interconnected generation capacity.
- d) Appointment of the members of the Board and establishment of the secretariat of the Electricity Regulatory Board.

The outcomes of the reforms are that,

- Ministry of Energy's remit is (or should) be limited to policy formulation including updating of the national power development plan;
- ERB is responsible for the regulating the generation, dispatch, transmission and distribution of electric power;
- KenGen, took over the generating assets (except reservoirs where relevant) of KPC, TRDC, TARDA, KVDA and KPLC;
- KenGen and the IPPs generate and sell the power in bulk to KPLC under long-term power purchase agreements; and
- Central control and all interconnected transmission and distribution networks have been consolidated under KPLC. KPLC is also responsible for updating the least cost power development plan.

Role of Parliament

The Bill that led to January 1998 promulgation of the Electric Power Act, 1997 was to some extent subject to public debate towards the end of 1997. The extent of debate by Parliament is however unclear. This notwithstanding, to the extent that the Act endeavoured to separate commercial, policy setting and regulatory functions, its promulgation can therefore be considered a significant milestone and further discussions will therefore dwell on the way forward. In particular focus will be maintained on the *Role of Parliament in an Increasingly Deregulated Power Industry*. Further, discussion is limited to legal and regulatory frameworks. This is because these frameworks are the basis for the enabling environment upon which private sector participation in power industry, and indeed in other infrastructure services is premised.

⁵ Iberafrica (E.A) Ltd, Orpower 4 Inc., Tsavo Power Company and Westmont (K) Ltd.

This focus is also consistent with the general worldwide paradigm with respect to the provision of infrastructure services in which governments' role is confined to creation of the requisite enabling environment rather than provision of these services.

Legal Framework

It has been recognized, and rightfully so, that the promulgation of the Electric Power Act, 1997 constituted a significant milestone in reforming the power industry in Kenya. In its present form, its application has however revealed serious shortcomings, which must be redressed if the objectives of industry reforms are to be achieved and access to electricity amongst the population enhanced. ERB is aware of the shortcomings and has commissioned a consultant to *Assist with the Drafting of Regulations, Rules, Procedures, Licences and Operational Guidelines under the Act*, of which legal audit of the Act is a key component. The recommendations thereof will subsequently be forwarded to Parliament as proposed amendments to the Act.

Some selected areas with respect to which Parliament is expected to contribute significantly are highlighted here below:

a) Harmonisation of the Act with other relevant statutes

In a number of instances, the Electric Power Act, 1997 may be perceived to be in conflict with the other statutes e.g. the Environment Management and Coordination Act (1999), the State Corporations Act, the Factories Act, and the Standards Act to name but a few. Consequently, ERB's mandate may be perceived to overlap with other government agencies, including NEMA, KEBS and Ministry of Labour (Factory Inspectorate), etc..

From an investor perspective the need to harmonise the Electric Power Act with other statutes cannot be overstated as this would result in clear demarcation of responsibilities by government agencies.

b) Strengthening the Independence of ERB

In general the three principal requirements for effective regulation are statute or permitting legislation, regulatory institutions and rules. Of these, Parliament has a significant role to play in ensuring that the statute, which both creates the regulatory institution(s) and provides the legal mandate to regulate, safeguards the institution's independence.

Independence is important institutional issue as it bestows on a regulatory process legitimacy and credibility. The concept of independence has three separate but related notions namely, independence from regulated firms and

other private interests, independence from political authorities and institutional autonomy.

As evidenced by recent (2001) happenings the concept of independence needs to be strengthened through enactment of relevant provisions in the Electric Power Act, 1997.

c) Enacting Provisions Promoting Enhanced Electrification to the population

In this regard the Act should be reviewed to ensure more comprehensive coverage of pertinent issues such as grid and off-grid rural electrification, subsidies, taxation regime, new renewable technologies, the role of government vis-à-vis other players, e.g. donors and private sector, etc.

Additionally, considering the regionalisation of economies, the Act must also be revised to facilitate cross-border trading in power through bilateral interconnections e.g. with Uganda and Tanzania (and by extension the South African Power Pool).

d) Definition of Future Market Structure

Although the current industry structure has some distinct advantages, a structure that fosters greater competition in electricity supply and enhances customer choice may be more desirable in future. Parliament must therefore ensure that any amendments to the Act support alternative power industry models.

Regulatory Framework

As intimated earlier the three principal requirements for effective regulation are statute or permitting legislation, regulatory institutions and rules. Further, the role of Parliament with respect to improving the Act and in strengthening ERB's independence has already been discussed hereinabove. This sub-section will therefore discuss the role of Parliament in promulgation of rules.

Rules define the boundaries of permissible conduct and the consequences for non-compliance. Rules may cover issues associated with tariffs, quality of service standards, obligations to supply, anti-competition tendencies, etc. Rules would normally be contained in licences and concession agreements, which are the instruments with the real powers to control the utilities. The consequences of non-compliance with these rules may include fines, requirements to compensate injured parties, cancellation of licenses or concessions, even imprisonment of corporate officers.

Considering that application of rules leaves room for interpretation, a key challenge in the design of regulatory institutions is to manage the exercise of

discretion in a way that minimises the risks for misuse. As public representatives it should therefore incumbent upon Parliamentarians to be familiarize with, and in application of, relevant rules. The Electric Power Act, 1997 allows for public debate on draft rules, which provides Parliament with an opportunity to actively participate in the process of making rules.

Another subject that Parliament must grapple with is the issue of efficiency of the regulatory process(s). Specifically, the efficiency of alternative approaches to regulation namely, industry specific, sector-wide and multi-sectoral must be considered and informed decision made. Issues to be considered in such analysis include resource utilization, which of the approaches confers greatest independence and issues arising from increasing blurring of traditional boundaries between utility industries.

Conclusions

Reasonable progress has been realised in the separation commercial, policy and regulatory functions in the power industry in Kenya. However, even as the industry becomes increasingly deregulated Parliament still has a major role to play in ensuring that the principles of deregulation are espoused and the benefits thereof realised. In this regard it is envisaged that as deregulation continues Parliament will be involved in harmonization of the Electric Power Act, 1997 with other statutes, strengthening the independence of ERB and in the enactment of provisions that promote enhanced access to electricity by the population as well as those that are supportive of alternative industry structures. Parliament must also actively engage in debate on formulation of rules and grapple with issues concerning the efficiency of regulation.

Topic 8: RECENT DEVELOPMENTS IN THE TELECOMMUNICATIONS SECTOR AND THE ROLE OF PARLIAMENT IN AN INCREASINGLY DEREGULATED TELECOMMUNICATION SECTOR

(Presented by, Mr. Aloys Ochieng, Director, Competition, Tariffs & Market Analysis, CCK)

1. Conceptual Framework

For purposes of enriching these discussions, the scope of this presentation will focus on the telecommunications sector as requested by organizers of this workshop. Affordable and equitable access to Information Communication Technologies provide a sound basis for democratic

discretion in a way that minimises the risks for misuse. As public representatives it should therefore incumbent upon Parliamentarians to be familiarize with, and in application of, relevant rules. The Electric Power Act, 1997 allows for public debate on draft rules, which provides Parliament with an opportunity to actively participate in the process of making rules.

Another subject that Parliament must grapple with is the issue of efficiency of the regulatory process(s). Specifically, the efficiency of alternative approaches to regulation namely, industry specific, sector-wide and multi-sectoral must be considered and informed decision made. Issues to be considered in such analysis include resource utilization, which of the approaches confers greatest independence and issues arising from increasing blurring of traditional boundaries between utility industries.

Conclusions

Reasonable progress has been realised in the separation commercial, policy and regulatory functions in the power industry in Kenya. However, even as the industry becomes increasingly deregulated Parliament still has a major role to play in ensuring that the principles of deregulation are espoused and the benefits thereof realised. In this regard it is envisaged that as deregulation continues Parliament will be involved in harmonization of the Electric Power Act, 1997 with other statutes, strengthening the independence of ERB and in the enactment of provisions that promote enhanced access to electricity by the population as well as those that are supportive of alternative industry structures. Parliament must also actively engage in debate on formulation of rules and grapple with issues concerning the efficiency of regulation.

Topic 8: RECENT DEVELOPMENTS IN THE TELECOMMUNICATIONS SECTOR AND THE ROLE OF PARLIAMENT IN AN INCREASINGLY DEREGULATED TELECOMMUNICATION SECTOR

(Presented by, Mr. Aloys Ochieng, Director, Competition, Tariffs & Market Analysis, CCK)

1. Conceptual Framework

For purposes of enriching these discussions, the scope of this presentation will focus on the telecommunications sector as requested by organizers of this workshop. Affordable and equitable access to Information Communication Technologies provide a sound basis for democratic

governance, sustainable development, poverty reduction, public safety and opportunities for both individual and communities in a country.

While mainstream Government shoulders the responsibility of streamlining the policy, institutional and regulatory environment that influence the risks and returns associated with investment in the ICT sector, parliament carries an even bigger responsibility-that of selecting, lobbying and strengthening the best initiatives for sector reforms and in taking positive action to overcome the obstacles fronted by vested interests.

2. Background

Kenya's total population is about thirty million, two and a half million of who live in the capital city, Nairobi, while the rest live in the other parts of the country. Telephone service density (*teledensity*) stands at about 0.16 fixed lines per 100 people in the rural areas and about 4 lines per 100 people in the urban areas. In terms of telephone penetration factors (percentage of households/offices with a telephone), nationally, about 4.2% of the households have a telephone line. This factor, however, varies widely from 0.1% in the very remote districts to 27.7% in the city of Nairobi. However, most of the telephones in the urban areas are within offices rather than households.

3. Government Policy Objectives

The Government's objective is to improve telephone penetration in the rural areas from the present 0.16 lines to 1 line per 100 people and in the urban areas from the present 4 lines to 20 lines per 100 people by the year 2015. These targets translate to the installation of over 375,000 lines in the rural areas and 2 million lines in the urban areas. At an estimated cost of between 800 and 1,250 US dollars per line, the total investment is estimated to cost between US \$ 2 billion and US \$ 3 billion, an enormous investment requirement, which has called for new initiatives to attract capital into the sector. It is in this context that a step-by-step liberalization of the sector is being undertaken with a view to attracting capital from the private sector. The government also intends to make cellular mobile networks accessible from all parts of the country in order to supplement the fixed network services.

The socio-economic benefits associated with the development of affordable and accessible telecommunications services are many and varied. These include the potential benefits such as reduction in costs of production, increase in productivity and overall economic well being of all citizens. Telecommunications are fundamental to service industries as well as to rural economic diversification strategies.

4. Global Trends Vs Domestic Privatization Efforts

Telecommunications became one of the leading engines of economic growth in the 1990s; fuelling activity in all sectors, from manufacturing to the provision of financial services. Now, as the sector evolves into a broader "information and communications technology" (ICT) sector that includes telecommunications, broadcasting and computing, it has become not only an economic engine but also an enabler of social, educational and healthcare progress, so much so that policy makers are increasingly focusing on transforming the digital divide into digital opportunities.

Against this background the Government decided to restructure the sector through privatization and undertaking step-by-step liberalization within a defined market structure with a view to attracting capital from the private sector.

Notwithstanding the foregoing developments, the shift in global economic outlook, characterized by recession in the telecommunications markets, caught most governments at a strategically sensitive time when they were attempting to undertake major reforms in their respective telecoms markets. Telkom Kenya was poised for privatization in 2001. The aims towards this move included attraction of financing for network development, gaining general government revenues, or building managerial and technical expertise within the network operator.

However, the failure of Telkom's privatization negotiations were not at all peculiar to Kenya. Several state-owned companies were put up for sale in countries such as Egypt and Belgium in 2001, only to be taken off the market after unsatisfactory offers. Many governments cited poor market conditions as their reason for calling off or delaying privatizations. As a result, few successful privatizations were conducted in 2001. When the sale of Telkom is re-opened, parliamentarians will have to lobby government to adjust its expectations and ensure that the price tag leaves the would-be strategic partner some room to build infrastructure and roll out services successfully.

5. Restructuring Strategy

5.1 Regulatory and Operational Status

The telecommunications sector in Kenya currently falls under the Ministry of Transport and Communications (MOTC). The Kenya Communications Act, 1998, which replaced the Kenya Posts and Telecommunications Corporation Act Cap 411, came in to full operation which effect from 1st July 1999. The Act provided for the establishment of the National Communications Secretariat (NCS) within the Ministry to serve as the policy advisory arm of the government on matters pertaining to the info-communications sector. The Communications

Commission of Kenya (CCK) serves as the regulator for the sector, the Appeals Tribunal serves as the independent arbitrator, Telkom Kenya Limited and other licensed network operators serve as public telecommunications operators.

The Communications Commission of Kenya (CCK) is the regulatory body for the sector, established by Kenya Communications Act 1998, to discharge functions such as licensing, price regulation, type approval of equipment, manage radio frequencies, interconnection, universal service obligations etc.

Telkom Kenya Limited (TKL) was established in 1999, following the split of Kenya Posts and Telecommunications Corporation (KP&TC) into three legal entities, namely Telkom Kenya Limited, Postal Corporation of Kenya (PCK) and the Communications Commission of Kenya (CCK). Telkom Kenya took over all the telecommunication functions of the parent organization, KP&TC. Telkom Kenya is therefore a public Telecommunications Company registered under the companies Act with the Government being the only shareholder at present.

Telkom Kenya holds licenses for the operators all the services previously offered by its predecessor, KP&TC. These include; Local Telephone Services, National Long Distance Telephone Service, International Gateway Service, Global Mobile Personal Communication by Satellite (GMPCS), Mobile Radio Services, VSAT Services, Internet Node and Backbone Services, Value Added Services (VAS), Customer Premises Equipment (CPE) vending, and Internal & External Wiring services. TKL has however been facing stiff competition in almost all of these market segments from new market entrants following.

The mobile cellular phone market is in the meantime operating in a duopoly environment. Two service providers currently provide mobile cellular telephone services. They are; Safaricom Company Limited with 60% of its share held by Telkom Kenya and 40% by Vodafone UK, and Kencell Communications Limited, which was licensed as the second mobile cellular operator on the 28th January, 1999. Kencell Communications Limited is a Franco-Kenyan consortium made up of Vivendi International (40%) and Sameer Investments Group (60%). The awarding of the 2nd license was carried out through a competitive tendering process. These two operators currently have combined connected lines of approximately 1,000,000 mobile cellular subscribers.

Following the liberalization of the non-strategic portion of the telecommunications network in 1991 and the opening up of the value added service market; the number of private telecommunications service providers has increased considerably. There are over 800 registered companies dealing with Customer Premises Equipment (CPE) vending, installation, and maintenance and also customer premises internal & external wiring. There are about 70 licensed

Internet Service Providers (ISPs) and other value added service providers such as Paging Service Providers (PSPs) and Cyber cafes. Many privately operated telephone call offices and Internet cyber cafes have lately sprung up throughout the country's urban centres.

Kenya has given considerable attention to the development of telecommunication services. Since 1981, telephone exchange capacity has increased at an average growth rate of 15 per cent per annum rising from 112,861 lines in 1981 to about 450,000 lines at present. The annual growth rate of the rural component of total telephone exchange capacity increased from 16.6% in 1981 to 24.3% in 1990 before declining to 15% in 1997. The most outstanding achievement during this period, however, was the expansion of public telephone service. The number of telephone public booths increased from 588 in 1981 to about 10,000 at present.

Table 1 below shows the growth of the operational mainlines (fixed) from 1993 while Table 2 gives the growth of Cellular mobile subscribers since 1997.

Table 1: Growth in Number of Mainlines in Operations (1993 to 2000)

1993	1994	1995	1996	1997	1998	1999	2000	2001
214,759	228,522	256,434	266,780	271,816	288,251	296,400	310,000	321,482

Table 2: Growth in Cellular Subscribers (from 1997 to date)

Cellular Subscribers						
Period	Dec	Dec	Dec	Dec	Jul	Jul
	1997	1998	1999	2000	2001	2002
Provider						
Safaricom Ltd	3,000	6,000	15,000	54,000	240,000	550,000
Kencell Com Ltd	-	-	-	60,000	193,000	450,000
Total Subscribers	3,000	6,000	15,000	114,000	433,000	1,000,000

*The Figures in the last column of table 2 are estimates rounded to the nearest thousand.

5.2 Privatization of Kenya's Fixed Network Telco

In a bid to encourage the much-needed private sector investment in the telecommunications sector in Kenya, the Government has been trying to privatize Telkom Kenya Ltd by selling 49% of its equity stake to a strategic private external investor through a competitive tendering process. As stated herein above, the privatization of Telkom Kenya shall attract quality management skills from the private sector besides the much-needed foreign capital investment.

Once privatized Telkom Kenya will be required to increase its installed network to meet the community access targets consistent with Government's Universal Access targets which will be spelt out in its operating licence. As is the case currently, Telkom Kenya will continue to be obliged to provide interconnection to other duly licensed operators.

5.3 Introduction of Competition in the Fixed Network Market

Some of the benefits generally associated with competition include realigning prices to costs, improvements in quality and responsiveness to customer demands, increased pace of innovation, improved efficiency with which resources are allocated, stimulation of market growth, etc. In recognition of this, the Government intends to introduce competition in the fixed network through the awarding of tenders to three Regional Operators. The awarding of these tenders followed a competitive bidding process and the winners shall, through license conditions, be required to meet network roll-out and universal access targets.

The failure of these operators to start up operations as expected should also be viewed in the wider context of the global recession in the telecommunications industry during which time investible capital resources have been scarce. However, one operator has been able to make partial payment and should start deploying its network soon. It is expected that the other would be licensees shall also follow suit as the license fee payment mechanisms have been modified.

5.4 Introduction of a 3rd Cellular Mobile Operator

Two cellular mobile Operators currently serve the Cellular Mobile Phone market. The introduction of competition in the mobile cellular market segment received positive response from the market, with the subscription rising from 20,000 in September 1999 to 1,000,000 by July 2002. The two Mobile Operators have an almost equal share of the market and have surpassed their subscriber projections as set out in their business plans.

The government is currently considering the introduction of more competition in this market segment by licensing a third cellular mobile Operator. The introduction of a third Mobile Operator to compete with the existing ones is likely to result in a further expansion of the cellular mobile network and a reduction in prices as a result of increased competition.

In considering the option to open up the mobile services market to further competition, the Government has taken cognizance of the need to provide

adequate guarantees to the existing operators to recoup their investments as this strategy shall encourage any other would be investor to consider the Kenyan investment climate as predictable enough and with less risks.

6. Parliament As A Watchdog

No doubt an accessible and affordable telecommunications network is a bedrock of economic development. It is therefore incumbent upon parliamentarians to prepare and defend bills that are geared towards improving the investment climate. More specifically, the investment climate clearly depends on many different aspects of public and private action. Factors that characterize the investment climate can be grouped into three broad categories. First are macroeconomic stability and openness; these embody the usual sound and sensible, if standard, prescriptions for macroeconomic and trade policy. Second are issues that can be grouped under good governance and strong institutions. Third is the quality of basic infrastructure as the development of telecommunications is also variously reliant on availability of power and transport.

While the Commission will continue to implement government policy towards fostering competition and investment in the sector, it is incumbent upon parliamentarians to understand that competition cannot, by itself, achieve all social or economic objectives of universal access. Rather, competition is just one important element of a comprehensive strategy for economic and social development. Nor can market forces parse ensure fair competition in the ICT market in Kenya today. Parliamentarians should therefore seek to assist regulators by fostering legislation that seeks to promote competition in a fair and transparent fashion. Schemes geared towards development of universal service programmes that bring networks and affordable services to rural and urban populations alike for promotion of education, healthcare and macro enterprise programmes must be supported.

In the recent past, the Commission has held meaningful discussions with the Parliamentary Committee on Energy, Communications and Public Works. This has greatly enhanced understanding among parliamentarians of the role of both the Commission and the various operators in the sector.

It should therefore be noted that regulators, policy makers and operators (both in the public and private sectors) are interdependent entities working towards similar goals. Parliament has the onerous responsibility of identifying roles that create harmony and minimize conflict between players.

Parliamentarians should therefore continue utilizing the floor of the House to foster questions and bills that help towards increasing both the stock and quality of telecommunications resources in the country

At a more general level, parliamentarians may now refocus the spirit of Harambee towards promoting investments in the ICT sector through organized community and civil society groups by promoting the development of community Telecentres, e-learning and e-government.

It is noteworthy that Telkom Kenya's exclusivity will come to end in the year 2004. Parliamentarians will have to provide proposals on how best to ensure that ownership patterns in further benefit the Kenyan public more through co-operative societies, women's groups, civil society groups, farmers groups, fishing groups etc. Another method would be through fostering relevant studies (through relevant institutions) geared towards identifying the numerous linkages between ICT and general socio-economic development.

7. Conclusion

The foregoing trends in our country's telecoms market reveal tremendous growth in the sector. However, much remains to be done in order to ensure that the country's capital markets develop enough capacity to make available adequate capital/financial resources for investments in the sector. Ownership patterns are also still, by and large, skewed towards foreign direct investments. While this has enormous benefits, there's need to develop local capacity to start and operate major telecommunications companies in Kenya.

As a regulator, the Commission has been in the forefront in promoting competition, stimulating private investment, and ensuring universal provision of and access to services. Parliament is therefore called upon to continue enacting requisite legislation that will help in sustaining regulatory efforts and reduce the telecommunications development imbalance between rural and urban areas.

Topic 9: MSE IN KENYA AND THE PARLIAMENTARY OVERSIGHT ROLE

(Presented by, Aleke Dondo, K-Rep)

Importance of MSE,s in Kenya

- It contributes 72.6% of all employment excluding small holder agriculture and pastoralist

- It comprises of 95% of all enterprises
- It is growing at 11.4% as opposed to less than 1% by modern private sector
- Over 95% of all new jobs are generated by the sector
- It employs 4.6 million Kenyans
- It contributes about 20% of Kenyan GDP.

Employment in Kenya 1996 - 2001

	Informal Sector	Modern Sector	Self Employed	Total
1996	2,643,800	1,618,800	63,200	4,325,800
1997	2,986,900	1,647,400	64,100	4,698,400
1998	3,353,500	1,664,900	64,800	5,083,200
1999	3,738,800	1,673,600	65,100	5,477,500
2000	4,150,900	1,695,400	65,300	5,911,600
2001	4,624,400	1,677,100	65,400	6,366,900

New Jobs Created in 1996 - 2000

	Informal Sector	% Informed	Modern Sector	Self Employed	Total
1996	343,100	92%	28,600	900	372,600
1997	366,600	95.2%	17,500	700	384,800
1998	385,300	97.7%	8,700	300	394,300
1999	412,100	94.9%	21,800	200	434,100
2000	473,500	103.9%	-18,300	100	455,300

Other Recent Trends

- Low return MSEs have been growing faster due to Kenyan economic stagnation
- Growth rate in manufacturing MSE has been significant due to decline in real wages and people shopping down market instead of on high street
- Pattern of shifting employment at a time of economic recession has been observed in Europe and other countries
- Increased number of organisations supporting the MSE sector in Provision of credit, training, sheds, technical assistance
- Will these apparently high growth rates be sustained?

- ❑ Are there any policies that the government should be developing to further facilitate this growth?
- ❑ Where will the MSEs be located?
- ❑ Where will they get their capital?
- ❑ Will the urban infrastructure cope with demand?
- ❑ Should they be regulated?

Proposed Recommendations for Consideration by Parliament

- ❑ Urban planning should include zoning off areas for MSEs
- ❑ Pass the Micro-finance Bill
- ❑ Government should wind up Joint Loan Board Scheme. For example the Ksh.300 million in the 2002/03-budget speech , Jua kali equipment leasing facilities should be transferred to the private sector.
- ❑ Government should restructure Kenya Industrial Estates (KIE).
- ❑ Post Bank be allowed to lend (presently its only allowed to receive deposits).

DISCUSSIONS

Contribution by Joe Donde

We are talking about deregulation-yet we see regulators such as RBA. Is there a conflict? In my opinion NSE is the place where one finds a complete deregulation of the market, where there is the free rise and fall of price. I only find this happening at NSE. The fact that RBA was formed to oversee a supposedly deregulated market seems to me to create a conflict. For instance, the WTO is supposed to ensure free trade, but entails more regulations on trade than ever before. I agree with Kariithi's opinion on market capture of regulators, and banks being more powerful than Central Bank. If more markets were like equities market, distortions would be reduced. People can easily withdraw their investment. There is transparency and ordinary shareholders can participate in the running of the company. I would call on the NSE to expand the participation of companies in NSE. Listed companies have more transparency and better governance than those not listed. I do not think there is any such thing as total liberalisation, there must always be rules, so when one talks of deregulation it is difficult to know what one means.

On RBA there was a proposal to bring NSSF under the supervision of RBA.

Mr. Karuga noted that NSE seems to have come out as the market player. However, he sought to know how does NSE deals with insider trading?

Mr. Kwame Owino informed members that conflict of interest is likely to arise if the chairman of CMA board is a banker. As an investment banker, the board may have to discuss his decisions as an investment banker hence conflict of interest.

Regulatory capture arises when market players with a lot of power collude. Deregulation of markets must therefore occur within a proper structure.

Hon. Owino argued that according to the Act establishing Telkom, it was not supposed to be a monopoly, yet it now operated as one. He wondered what the authority was doing to remedy this. He also sought an explanation on why are some stockbrokers were collecting money from the public without buying shares.

Aleke felt that we are creating structures that cater for a small proportion of the population of this country. The financial sector only caters for 3% of the population. Those who sell labour in rural areas often die in poverty, and these are the sort of people whom RBA should be targeting. What can we do to accommodate financial structures catering for the majority?

Hon. Gatabaki -how do you create fairness when a few politically correct stockbrokers have access to state patronage and therefore control a lot of the market-is this truly free?

Hon. Ochuodho argued that the role of co-operative societies had been ignored. He told members that it was possible to regulate in a liberalised market. Telkom Kenya could be partially privatised in a liberalised market, just like Kenya Airways.

Hon Ochuodho also sought to know, what the role of the Monopolies and Price Commission was in the context of sectoral regulation.

Hon. Ndwiga was concerned that that 80% of population has no access to financial services. Isn't it the weakness of your respective bodies that you have not gone to reach those people? Rural SACCOs are performing very well and the common man is saving through them. The problem right now is that front office services are not regulated. No one has told these people where stocks are, about retirement benefits etc.

Hon. Mwakiringo observed that about 15% of Kenyan workforce contribute to retirement benefits. What do you as regulators propose as the way forward? Also what is the way forward so that civil servants are covered by your authority? It has come out clearly that Kenyans do not have a reading culture, as shown in Mr Odundo's example about the word not being added to a statute and no one noticing. Finally, as the Chief executives of these bodies it is important that you establish a rapport with MPs so that we are in a position to legislate effectively, no matter whether some are in the opposition.

Mr. Odundo told members that NSSF controls about 30% of pension portfolio of this country. 80% of this is in buildings. If a market valuation is done they are probably less than half of the value for the balance sheet. The RBA Act says that only 30% should be in buildings, so for them to join us they would have to sell buildings. Furthermore, our act provides that buildings cannot be sold below market price so this is a problem for those buildings bought above market value.

The RBA Act became operational last year. When it was set up it targeted occupational schemes. We introduced it in the last budget to include individual pension plans, so we now have to market it to the public. We have started campaigns in the media. This should change the current small proportion of workers contributing to retirement benefits. We are licensing pool funds, for people to save. Co-operative bank has set up one.

Civil servants pension-work is currently undergoing at the military, judiciary and teachers to establish funded independent pension schemes. I have not received a reply from the speaker of parliament on the proposal to establish a funded independent pension scheme.

Mr. Kariithi in responding to Hon. Joe Donde question about what is deregulation said the opposite of deregulation is not regulation but price control. Regulation is a framework to regulate market participants in a deregulated environment. Regulators are necessary to reduce market distortions created by asymmetries in economic power that lead to political power. Parliaments role is to ask who they are giving power to regulate. If for instance you tell CMA to regulate listings on NSE and give it power, it means no one else has authority, so as NSE we cannot authorise listings. The entire authority in this area is to the CMA so we have no responsibility for instance in insider trading. Parliament should not expect that we will take on this responsibility.

Insider trading is information asymmetry. It can be dealt with by improved disclosure. 70% of all trading is insider trading. It is not bad per se, what is needed is improved disclosure.

We agree that we cater for a small percentage of the population. We would like KREP to involve us in the drafting of the microfinance bill. SACCOs and MFIs are not regulated and if they collapse this will create a crises of confidence from which they may never recover.

Stockbroker transparency is also critical to the vibrancy of the equities market. Brokers used to have agents until 2000. They were the problem, not the broker. There was no way of controlling them, so we removed them. In 1994 when new stockbrokers were licensed, only those that were politically correct were licensed.

The primary problem however was that they then blocked other entrants. Now that investment banks are entering, their influence is waning. Their power arises from their clients.

Mr. Kwame while responding to Hon. Ochuodho's question explained that not all sectors are regulated, so it is important to have an overriding regulator. Secondly, sectoral regulators should not regulate competition.

Regarding the monopoly of Telkom Kenya, he explained that section 5 of the Act establishing the organisation has been suspended- it currently does not apply as the minister was empowered to bring the act into operation in sections.

Discussant-Hon. Shem Ochuodho

I would have wanted to hear more about SACCOs and PRSP from Mr. Dondé's presentation.

We should distinguish between control and regulation. The Energy has been very active in the petroleum bill. The ministry wants to pass it without regulation of prices.

Every constituency is guaranteed money by dint of the Kenya Roads Board.

The committee is pushing for a similar system as regards energy.

Transport also falls under the committee, which is against senseless privatisation. It is possible to have an efficient publicly run organisation. This view is also held as regards Kenya ports authority, and commercialisation rather than privatisation is necessary. Government doesn't seem to follow the rules. The act says the managing director to be appointed by the minister. In the past, the Managing Director has been appointed by someone else.

If we must privatise, shares should be loaded off the stock exchange rather than get a strategic investor.

The main focus in Telkom Kenya should be not privatisation but rather liberalisation such as allowing a competitor.

Regional telephone operators have been licensed but are not operating. What is really needed is a second operator to compete with Telkom Kenya. I would have wished to hear from Communication Commission of Kenya (CCK) why they have not liberalised VSAT.

On energy, apart from Petroleum Amendment Bill there has been a proposal for alternative energy sources. There is a need to liberalise transmission and distribution in addition to generation.

Section 5 of the Act establishing Telkom Kenya has not been brought into effect and this has allowed it to operate as a monopoly and there was an attempt to actually remove it. It is annoying that we have continued to allow a monopoly in fixed lines and a duopoly in mobile lines.

CCK also did not mention affordability, which was one of the reasons for privatisation. Are fixed lines now affordable, especially when govt is raising their charges through taxation.

A third mobile operator should be licensed.

Telkom Kenya, which is supposed to provide the same services as other players in the sector, is now providing for instance ISP services, which is unfair because ISPs are now depending on a competitor.

Hon. Donde while commenting on Microfinance said the lower income people have been locked out in banking operations due to the advent of liberalisation when banks made money from high interest rates. Parliament recognising this problem has brought a bill to allow Post Bank to offer banking services through post office outlets.

Mr. Namu argued that to assist microfinance sector, the publicly owned facilities in urban areas could be used to creatively support e.g. hawkers on maasai market ought to be provided with structures, toilets, etc.

Privatisation using an anchor shareholder is critical so even if we are inviting a foreigner there can be an agreement that he will exit after some time rather than a free for all at the stock exchange with no one driving the business in terms of strategy. The issue of a privatisation law was not raised but IEA has covered it. It is an important thing to enact.

Water management and pollution ought to be considered. Commercial farmers in areas like Naivasha for instance build underground fuel tanks whose contents leak. This should be discouraged.

Mr. Kwame Owino made the following remarks:

What technical problems is CCK having that stop them from allowing other mobile telephone service providers?

What is ERB doing to ensure consumers of electricity in Kenya pay reasonable charges because right now they are not?

Our dams are silting, what is being done about this and are we looking for alternative methods of power production?

Hon. Mwakiringo supported sentiments on siltation and gave the example of masinga dam

Hon. Morogo made the following contribution:

What are your comments on the sentiment that regulators are subject to capture by powerful market players?

Would ERB consider stopping Kenya power from disconnecting customers who have failed to meet bill obligations?

I'd like to thank IEA for support given to eighth parliament.

Hon. Oloo Otula proposed that Kenya Industrial Estates (KIE) be restructured. He noted that Postbank cannot pay its customers and does not effect money transfers promptly since there is no money in Postbank. What will they be able to lend, he asked?

Hon. Gatabaki observed that:

Face of electrification is very slow. Groups have paid millions of shillings in expectation of connectivity and continue to wait. Why is it so difficult to effect this?

Behaviour of microfinance institutions is similar to big banks. Their interest rates are similarly hostile. What has really helped Kenyans is SACCOS. Parliamentarians need to be assured that these institutions will lend at reasonable interest rates.

Hon. Kimetto asked,

Why do we not use the water we have to generate electricity?

Demolition of kiosks yet kiosks were licensed. Is this poverty eradication?

Hon. Kajembe asked why independent power generators like Westmont and Kipevu two are not being paid for power supplied.

Hon. Mwakiringo made the following remarks:

There needs to be a separate authority for complaints other than the regulators. Small-scale enterprise and electricity bodies need to come together and discuss about small hydroelectric generations plants in remote areas, putting up of windmills. I went to Australia and was told that studies were conducted in Kenya and findings indicated that Kenya would be a viable place for electricity generation through windmills.

Customers who pay for transformers are again billed for electricity services. This is unfair.

What has rural electrification levy been doing all these years?

We did not hear any voice from KREP when kiosks were being demolished.

Why?

Dr. Kevin Kariuki of ERB in response to the reactions from the floor said:

On Rural electrification, china despite its huge population has achieved 95% penetration, South Africa about 66%, Zambia 20% and Kenya 15% electrification. We are doing badly even in terms of sub Saharan standards. First reason-we don't have the right policies. The act does support some more innovative methods of electrification. The levy amounts to pocket change, and we do our best. Enhanced electrification is achieved by a combination of enlightened policies. In Uganda for instance private sector has concessions to facilitate rural electrification such as mini grids. The law in Kenya does not allow that. WE are making suggestions that will be forwarded to parliament and we hope it will get a favourable reception. It means some people in remote areas are subsidised, so private power providers cannot compete.

Liberalization of transmission and distribution- we have to look at future market design. We must be able to disaggregate from competitive and non-competitive functions of a power system. Transmission and distribution are non-competitive, unlike supply.

High prices -we are not as well endowed with hydro potential as our neighbours .We will always be hard pressed. We must be able to import power from cheaper sources.

We can regulate KPLC through licences, which contain conditions that must be obeyed.

Disconnection is a commercial issue. As a regulator we would not wish to micromanage these entities.

We actually do receive and consider customer complaints and intercede on behalf of customers.

Aloys, CCK in response to issues regarding telecommunication said:
We have a complaints mechanism, with appeal to a tribunal established under the Communications Act.

We can handle Telkoms Kenya. No other operator has taken us to the appeals tribunal, and there is a case pending.

Licensing of additional operators -in Kenya liberalisation has been in phases. A mobile operator in a neighbouring country has wound up, we do not wish to have this happen here.

There are benefits from using a strategic investor with the necessary capital and technology. All telecommunications infrastructure is imported. They also bring

in management expertise, which combined with shareholding minimises govt. interference.

Mr. Dondo, KREP responded to issues of Micro and Small Enterprises as follows:

We protested at kiosk demolition and wrote to the council. Demolitions affected our portfolio adversely. It is true that some MFIs may have hostile policies and there are now many players. That is why we are calling for a bill to regulate this sort of behaviour. Interest rates charged by many institutions are high, MFIs argue that they must match risk with cost of capital. To the extent that there is demand it means people are able to borrow and they pay well. MFIs generally have a high rate of return. I do agree though that some are too high. Also, most of these loans are for very short periods so high rates do not really matter, and the interest returns to the community.

KIE (Kenya industrial estates) should be privatised even if it is a shell. The same could be said of Agricultural Finance Corporation (AFC).

Postbank -it is true they sometimes do not honour transmissions, but this is mainly in post offices. I agree that public utilities should be provided for SMEs, e.g. blocking off land and also securing tenure in Gikomba for instance. Poverty Reduction Strategy Paper (PRSP) does recognise the role of microfinance, and recognised that more innovative ways of raising credit should be found e.g. matching cash flow of farmers. We see SACCOs as microfinance institutions, and they are very important, though some have collapsed due to mismanagement.

Chair (Hon. Mwakiringo) gave a vote of thanks, closed the session.

DAY 2 FRIDAY, 13TH SEPTEMBER 2002

SESSION 3: REFLECTING ON THE PERFORMANCE OF 8TH PARLIAMENT AND EXPLORING THE NEXT CYCLE OF PARLIAMENTARY REFORMS

Session Chair: Hon. Gitabu Imanyara, Temporary Deputy Speaker, National Assembly.

**Topic 10: REFLECTIONS ON THE 8TH PARLIAMENT AND ISSUES
FOR THE 9TH.**

(Presented By Betty Maina, CEO, Institute of Economic Affairs).

The presentation explored the developments, gains and progress made in the 8th parliament and opportunities for safeguarding gains and expanding parliamentary space and influence in the next parliament.

Developments in the 8th Parl.

- Revitalized Committees
- Some quite active and impact on legislation
- More than 200 sittings
- Revitalized legislative initiative especially by backbenchers (motions and bills)
- Not very good in passing laws. The 8th parliament passed 45 bills but most were routine money bills.
- Highlight was the Parliamentary Service Commission legislation
- Laws to strengthen parliament e.g. setting of parliamentary calendar, budget office suffered the most

Gains and progress made

- More space for participation by members especially in committees. But:
 - How many committees can a member adequately serve in?
 - Should all members be assigned at least one committee?
 - How is the work of the committee presented to the whole house and public?
- Legislative initiative by members, but
 - How can it be enhanced and supported?
 - How do you ensure that private members bills do get debated by the house?
 - How can parliament improve its track record in finalizing bills?

Issues for the 9th Parliament

- Making the committee system more effective
- Staffing, resources, coverage, membership
- Defending space for private member initiated legislation
- Improving parliaments oversight on the economy - e.G management of the deregulated economy
- Improving parliaments oversight on public finance e.G appropriations
- Bill management - ensuring laws are discussed and passed
- Management of motions and introduction of legislation
- Ensuring/promoting executive compliance
- Improving parliaments perception in the eyes of the public
- Research and staffing of committees
- Ensuring Executive compliance
- Could Standing Orders set aside a day to consider private bills

Topic 11: PARLIAMENTARY REFORM - STRENGTHENING PARLIAMENTARY DEMOCRACY

(Presented By, Winluck Wahiu, ICJ Kenya)

The discussion by Winluck was centred around parliament's vision and the responsibility for policy making in Kenya. He suggested transformation in the role of parliament in the arena of policy decision-making and more reliance on parliamentary committees.⁶

Below is the paper presented by Winluck Wahiu.

Introduction

This discussion paper canvasses some arguments in favour of parliamentary and electoral reform as two key factors necessary to exist for the Kenyan Parliament to become and be perceived by citizens as a locus of sovereignty. I argue that the future 9th Parliament like its predecessor, the current one, must face up to challenges that broadly respond to two interrelated goals of any African parliament. These goals are to improve:

- The quality of government
- The quality of representation

We know that parliaments perform several functions the most important being three: **representation, lawmaking** and **oversight**. For each of these three functions, several indicators could be used to test the qualities of government and representation of parliaments depending on how well they perform. Thus, representative parliaments may be measured by the broadness of interests of the body polity represented. Transparency may be measured by the quality of responsiveness to the citizenry. Oversight also will depend on the strength of parliament's capacity to censure the executive. Within a parliamentary hybrid system such as Kenya's the indicators will be affected by internal factors such as the effectiveness of parliamentary political parties, particularly those in the opposition, while external influences will include size of the population and its level of economic development.

⁶ Parliament comprises under Section 30 of the Constitution of Kenya the National Assembly and the President. The role of the President is to assent to bills passed by the National Assembly comprising elected and nominated members. In this discussion paper, the terms 'parliament' and 'national assembly' take the meaning of the National Assembly proper.

This discussion paper looks at performance of the 8th Parliament against the two goals above, on the basis of effectiveness in lawmaking and oversight (quality of government) and quality of representation. The review comes up with some pro-reform proposals targeted at the 9th Parliament for discussion purposes.

The Quality of Government

The 8th Parliament has been a unique product of the constitutional revolution of the 60s and its concomitant counterrevolution of the 1990s. The 1963 republican constitution envisioned a Westminster model of democracy based on adversarial debate in a strong parliament led by the political party with a parliamentary majority, to keep guard against a strong centrist government. We observe the key features of this Constitution to be: Federalism, second chambers, rigid constitutionalism, strong judicial review and an independent central bank. Between 1964 and 1986, these features were assumed to inhibit decisiveness, speed and coherence of the central government's policy making compared with unitary systems, unicameralism, flexible constitutions, weak judicial review and weak central banks. The political administrations of the time espoused the superlative values of the latter features as best suited to produce a cohesive nation that was well defended against external and internal insurgencies. Its theory of social change was carried on populist movements of much major proportions in international politics in Africa, and at the time these carriers happened to be 'nationalism' 'anti-colonialism' and 'anti-neocolonialism'.⁷ The constitutional revolution that developed these features is also the history of the parliaments of this period.

Constitutional counterrevolution started in 1990 and was nourished by formal acceptance of pluralism in 1991. The counterrevolution tended to rise with economic liberalization and the gradual displacement of ideologies designed to strengthen the one party state. The counterrevolution has its populist carriers as well - 'globalisation' 'liberalisation' 'democratisation' 'good governance' 'transparency' and 'accountability'.⁸ The liberal economy requires liberal politics.⁹ One of the ingredients of economic liberalization is central bank

⁷ Sessional Paper No. 10 of 1965 on the role of African Socialism is development.

⁸ In Contrast to the African Socialism Paper, use of any of these terms in government blueprints in this period such as the Social Charter is common.

⁹ The view is prevalent that political liberalization is linked to solution regarding the corrupt and authoritarian state. Morris Szeftel states: 'The misuse of public office or public responsibility for private or sectoral gain has been an important theme of the neo-liberal policies of adjustment, conditionality and democratization in Africa. Having identified the state as 'the problem' and liberalization and democratization as 'the solution' to that problem, it was inevitable that efforts to eradicate and control the widespread corruption characterizing post-colonial politics would be given a high priority by 'the donors'. From the outset, proponents of structural reform linked political corruption to authoritarianism as an explanation of developmental failure, thereby identifying the

Topic 11: PARLIAMENTARY REFORM - STRENGTHENING PARLIAMENTARY DEMOCRACY

(Presented By, Winluck Wahiu, ICJ Kenya)

The discussion by Winluck was centred around parliament's vision and the responsibility for policy making in Kenya. He suggested transformation in the role of parliament in the arena of policy decision-making and more reliance on parliamentary committees.⁶

Below is the paper presented by Winluck Wahiu.

Introduction

This discussion paper canvasses some arguments in favour of parliamentary and electoral reform as two key factors necessary to exist for the Kenyan Parliament to become and be perceived by citizens as a locus of sovereignty. I argue that the future 9th Parliament like its predecessor, the current one, must face up to challenges that broadly respond to two interrelated goals of any African parliament. These goals are to improve:

- The quality of government
- The quality of representation

We know that parliaments perform several functions the most important being three: **representation**, **lawmaking** and **oversight**. For each of these three functions, several indicators could be used to test the qualities of government and representation of parliaments depending on how well they perform. Thus, representative parliaments may be measured by the broadness of interests of the body polity represented. Transparency may be measured by the quality of responsiveness to the citizenry. Oversight also will depend on the strength of parliament's capacity to censure the executive. Within a parliamentary hybrid system such as Kenya's the indicators will be affected by internal factors such as the effectiveness of parliamentary political parties, particularly those in the opposition, while external influences will include size of the population and its level of economic development.

⁶ Parliament comprises under Section 30 of the Constitution of Kenya the National Assembly and the President. The role of the President is to assent to bills passed by the National Assembly comprising elected and nominated members. In this discussion paper, the terms 'parliament' and 'national assembly' take the meaning of the National Assembly proper.

This discussion paper looks at performance of the 8th Parliament against the two goals above, on the basis of effectiveness in lawmaking and oversight (quality of government) and quality of representation. The review comes up with some reform proposals targeted at the 9th Parliament for discussion purposes.

The Quality of Government

The 8th Parliament has been a unique product of the constitutional revolution of the 60s and its concomitant counterrevolution of the 1990s. The 1963 republican constitution envisioned a West Minster model of democracy based on adversarial debate in a strong parliament led by the political party with a parliamentary majority, to keep guard against a strong centrist government. We observe the key features of this Constitution to be: Federalism, second chambers, rigid constitutionalism, strong judicial review and an independent central bank. Between 1964 and 1986, these features were assumed to inhibit decisiveness, speed and coherence of the central government's policy making compared with unitary systems, unicameralism, flexible constitutions, weak judicial review and weak central banks. The political administrations of the time espoused the superlative values of the latter features as best suited to produce a cohesive nation that was well defended against external and internal insurgencies. Its theory of social change was carried on populist movements of much major proportions in international politics in Africa, and at the time these carriers happened to be 'nationalism' 'anti-colonialism' and 'anti-neocolonialism'.⁷ The constitutional revolution that developed these features is also the history of the parliaments of this period.

Constitutional counterrevolution started in 1990 and was nourished by formal acceptance of pluralism in 1991. The counterrevolution tended to rise with economic liberalization and the gradual displacement of ideologies designed to strengthen the one party state. The counterrevolution has its populist carriers as well - 'globalisation' 'liberalisation' 'democratisation' 'good governance' 'transparency' and 'accountability'.⁸ The liberal economy requires liberal politics.⁹ One of the ingredients of economic liberalization is central bank

⁷ Sessional Paper No. 10 of 1965 on the role of African Socialism in development.

⁸ In Contrast to the African Socialism Paper, use of any of these terms in government blueprints in this period such as the Social Charter is common.

⁹ The view is prevalent that political liberalization is linked to solution regarding the corrupt and authoritarian state. Morris Szeftel states: 'The misuse of public office or public responsibility for private or sectoral gain has been an important theme of the neo-liberal policies of adjustment, conditionality and democratization in Africa. Having identified the state as 'the problem' and liberalization and democratization as 'the solution' to that problem, it was inevitable that efforts to eradicate and control the widespread corruption characterizing post-colonial politics would be given a high priority by 'the donors'. From the outset, proponents of structural reform linked political corruption to authoritarianism as an explanation of developmental failure, thereby identifying the

independence, and the most important reason why central banks are made strong and independent is to give them the tools to control inflation. This is a contrary logic to conventional political wisdom of 1964 - 1986: strong and coherent policy making here is posited to flow from the division of power instead of the concentration of power. This new political thought is mirrored perfectly in the clamour for electoral competition of different policies.

Against the first goal then of improving the quality of government, the 8th Parliament has rationally connected the achievement of this goal with two key results; first, the progressive realization of parliament's independence from the executive, and second, its progressively enhanced role of oversight over government.

Parliament's independence

We know that the institutional arrangements under the current constitution subordinate all arms of government to the executive. The three arms are formally not equal *per se*, and this is supported by several constitutional provisions: The president appoints all judicial officers, and may nominate 12 individuals to Parliament without much restriction; Parliament has no formal capacity to cause the removal of any individual who holds a constitutional office therefore it has very little power of enforcement; a vote of no confidence in the government has the direct threat of dissolving Parliament as well. In this scenario, Parliament has hitherto been more effective in identifying individuals who abuse public office by using 'naming and shaming' tactics under parliamentary privilege.

The 8th Parliament has formally de-linked itself from executive domination by creating the Parliamentary Service Commission and a Parliamentary Service to provide legal and technical capacity for MPs. A private member brought the constitutional amendments to give effect to this independence and allow Parliament authority over its budget and management.¹⁰

The PSC is implementing a twelve-year strategic plan to strengthen Parliament's independence and technical capacity. We know that some of the technical units are still in gestation and as yet have no trained staff. Examples are the departments of information, research and legal services. Once completed, which may certainly require bigger parliamentary budgets, these departments will be greatly useful to the 9th Parliament as envisaged, largely because a trained and efficient staff assisting MPs, including newly elected ones, will undoubtedly

arguments for democratization and 'good governance' with those for liberalization.' Review of African political economy, June 1998 'Misunderstanding African politics: Corruption and the Governance Agenda'

¹⁰ Hon. Peter Oloo Aringo, MP, Vice Chairman of the Parliamentary Service Commission. Let the People Govern through and with their Parliament (unpublished) March 25, 2002.

affect its capacity to conduct independent policy analysis and source alternative policy information. Hopefully, the 9th Parliament will benefit by reducing the incidence of flawed laws passed that are subsequently thrown out by the courts, such as the Donde Bill.

At the same time, the extra parliamentary budget has raised eyebrows, particularly because of the higher allowances drawn by MPs. The money will come from taxpayers. Such an arrangement should aim at a better rate of returns – MPs should use it in an ethically and socially responsible way. The public will expect improved Member participation in terms of regular attendance and quality contribution to debate and ministerial Questions. Improvement in this area also needs an overhaul of some procedures. Could Parliament make question time rotational and allow supplementary questions? More fundamentally, should MPs be given more autonomy to pursue constituency questions where this contradicts party stance on the given issue?

A more independent Parliament should embark on prospects of fundamental reform directed primarily at balancing power with the executive. The 8th Parliament, through private and government motions, has made considerable strides by virtue of the following Bills:¹¹

1. The Kenya National Commission of Human Rights Bill (not passed)
2. The Constitution of Kenya Amendment Bill (to entrench the Kenya Anti-Corruption Authority - not passed because Government defeated vote)
3. The Constitution of Kenya Amendment Bill (to entrench Constitution of Kenya Review Commission - not passed)
4. The Constitution of Kenya Amendment Bill (to repeal sections 58 and 59 and allow the House to set its calendar - not passed because Government defeated vote)
5. The Public Service Code Bill (Code of Conduct/Ethics - not passed - 1st reading, referred to committee and died there)
6. The Coffee Bill (shifting power to the farmers) - Passed into law
7. The Sugar Bill ((shifting power to the farmers) - Passed into law
8. The Copyright Bill (Shifting power from AG to industry stakeholders) - passed into law
9. The Universities Amendment Bill - shifting power of legislation from Government to independent body - referred to committee and died there
10. The Anti-Corruption and Economic Crimes Bill - 1st reading, referred to committee and died there

¹¹ Borrowed from USAID Kenya Mission PMP Indicators, 2002

11. The Central Bank Amendment 2000 Bill (Donde) - passed into law, but ruled unconstitutional by High Court
12. The Central Bank Amendment 2001 Bill (anti- Donde by AG) - died after 1st reading

Particularly noteworthy is that this Parliament inaugurated the Constitution of Kenya Review through the Review Act of 1999. It also defeated the Public Service Code Bill on constitutional grounds, a development traced to the upsurge in constitutional reform. Parliament is now not explicitly designed to forestall reform and it has shown that it can withstand Executive pressure when it defeated the Economic Crimes Bill despite the President casting a historic member vote in its favour.

Other indicators for increased independence include:

1. Increase in number of private members Bills, especially those with consequential shifts of power.¹²
2. There is more progress as well with passage of private members bills. One of the most successful were the Constitutional Amendments to establish the PSC and the PS
3. Higher profile for committee activity
4. Increased co-operation among opposition parliamentary parties, without which undoubtedly the government would have had its way on most of the Bills.
5. Backbenchers are increasingly more active compared with ministers¹³
6. Reduced scale of defections.

The above is indicative that the 8th Parliament has mapped a vision for legal transition as well as a vision that wider social change takes place through parliamentary means. For the moment, parliamentary reform is in step with public opinion. What are the implications for the 9th Parliament? Given the move

¹² These Bills include the following in which the private member's motion to introduce the Bill was not approved:

- The Promotion of National Unity Bill (Oloo Aringo)
- The Constitution of Kenya (Amendment) Bill to provide for impeachment of the president for stated grounds (Oloo Aringo)
- The Ministers of Government Bill (Paul Muite)
- The Parliamentary Budget Office (Oloo Aringo)
- The Political Parties Fund Bill (Kiraitu Murungi)
- The Constitution of Kenya (Amendment) Bill to entrench KACA (Musikari Kombo)

¹³ Research statistics of the Institute of Civic Affairs and Development, Kenya's Parliament Members' Participation (1998 – 2001), 2002 at P.181. For instance 29.8% of backbenchers brought motions to Parliament compared with 7.3% assistant ministers. 39.3% of backbenchers contributed to Bills compared with 5.9% of ministers.

to play a bigger and transformative role in policy decision-making, against entrenched ethnic based politics, should the next Parliament take steps to build bipartisan support for reform? What other limitations are identified, especially in relation to more political counteraction against a stronger Parliament (and especially given the level to which resentment of the ruling regime is represented in this Parliament)?

Parliamentary Oversight

As with other Parliaments, the Kenyan one relies on committees to conduct business. We know that because of our parliamentary hybrid system, Parliament's committees have not been very influential and specialized when compared with committees in pure presidentialist systems. While the debate on choice of system, continues, it is clear that for our parliamentary system, the legislative initiative will continue to come from a dominant ruling party. This is not to suggest that committees should remain technical in nature with a circumscribed ability to influence content of policy.

The 8th Parliament's committees have made considerable strides in influencing policy. The work of the public watchdog committees PIC, PAC and Estimates has been influential to identify and target abuse of office.¹⁴ Some of the 16 House Standing Sector Committees have had high success in influencing new legislation.¹⁵ Two Ad hoc Select Committees remain in the public imagination - the Anti Corruption Select Committee chaired by Hon. Musikari Kombo of the List of Shame fame, and the Select Committee on Constitutional Review chaired by Hon. Raila Odinga, which oversees the review process. The 8th Parliament has held more committee sittings in 2001 than in any previous year. Moreover, these sittings have increasingly sought and benefited from expert and stakeholder views.

What are the implications for the 9th Parliament?

As Parliament builds up its ability to participate in policy making, this should be reflected at the committees through more sittings and even broader interest consultations. Both require larger budgets. Parliament should think about giving

¹⁴ For instance the List of Shame of the Kombo Select Committee was actually constructed from reports of PAC following its change of practice to naming responsible accountable officers and individuals.

¹⁵ For instance in 2001, the Committee on Agriculture significantly impacted on the Coffee Act and Sugar Act both of 2001. In relation to the Sugar Act 22 of the Committee's 33 proposals were taken up by the Minister and passed by Parliament. 5 of 13 of the Committee proposals for the Coffee Act were passed. 22 of the Health Committees proposals for the Children's Bill were also taken up by the Minister. Parliament passed over 76% of the 38 proposals of the Finance Committee for the Finance Bill 2001. The Finance Minister now regularly consults with the Finance committee for the budgetary process, an achievement not realized before in the past.

committees a larger role in scrutinizing Bills and overseeing implementation. One of the suggestions is to allow Standing Committees to initiate legislative proposals. Another is to refer automatically to the committees all legislative proposals after a second reading and require the committees to make policy investigations – tasks currently left to civil servants and drafters.

Parliament may also consider de-linking committee chairs from the majority party. Frequently where this is the case, the chairs are reluctant to criticize their party proposals, and in turn these are converted into vehicles of progress from the backbenches. The committees are thereby weakened.

Parliament may also want to review the size and composition of committees. Ideally, every MP should serve in a committee but as in the UK there is no limitation on the number an individual may serve. Multiple membership may dilute the quality of contributions members make to the committee functions. The number of committees is not very high given the size of the House. There are 16 house Standing Committees that parallel government ministries. With a total membership of 231 MPs, excluding the President, the average size of a Committee is around 14. This number may be too high for efficient and speedier decision-making and Parliament may consider raising the number of committees to allow a medium of 9.

Oversight will be considerably strengthened when committee sessions are open to the public. Public hearings will allow the House to solicit opinions of different experts, stakeholders and sectors of the society. They will allow committee members to gauge responsiveness to different policy platforms. They will be a good forum for exchange of ideas. They will sensitize the public and contribute meaningful civic education. Overall they will improve the quality of responsiveness and scope of government and representation.

Quality of Representation

Finally, a great challenge faced by our emergent democracy is to build a parliament that will be perceived by a diverse and ethnically differentiated and unequal citizenry as a legitimate source of democratic authority. We know that as a result of our heterogeneous society our majoritarian democracy is inherently exclusionary and has so far failed to resolve conflicts about domestic power.¹⁶ Because the electoral system is the fundamental determinant of how representative a parliament is, that is, how accurately it translates votes into

¹⁶ In 1992, the President was elected with 36% of the national vote, and 40% in 1997. Both periods were marked by political violence and displacement of populations. See Political Economy of Land Clashes in Kenya, ICJ 2000. A major portion of the disproportionality of elections is caused by small parties that remain underrepresented or unrepresented, and because dissidents are not allowed to try their luck in the major party.

parliamentary seats, decisions regarding the electoral formulae are of utmost importance.

The 8th Parliament should be aware that our electoral formulae is a major institutional source of disproportionality and exclusion because it is a product of some electoral reform carried out in 1997, albeit improperly.¹⁷ In order to resolve the disproportionality, the 9th Parliament will have to seriously review the nature of our electoral formulae looking broadly at four levels:

1. Electoral formula
2. District magnitude
3. District apportionment
4. Total membership of Parliament

1. Electoral formula and district magnitude

Majority formulas like Kenya always have magnitudes of one or single member districts. A candidate only needs a plurality of votes to win here.¹⁸ PR formulas have district magnitudes greater than one i.e. are multimember districts. More than one representative is elected to represent a particular district (constituency) and the exact number is determined according to the population principle.¹⁹

¹⁷ Some electoral boundaries were redrawn prior to the 1997 elections and Kanu thereafter won 107 of 210 seats, just over 50% with 38.6% of the vote. 22 new Constituencies were created but prevalently by splitting smaller districts in Kanu strongholds. Thus, a new constituency was created in Wajir with less than 15000 votes while Mathare remained a single one with 116000 voters.

¹⁸ There are three dominant majority formulas:

- run-off second election – if no majority is reached in the 1st round of elections, a second round is held between the top two candidates. The Ford People party and its allied parties have proposed this formula for the 2002 elections.
- Alternative vote systems – voters indicate 1st, 2nd, 3rd etc preferences among candidates. If no candidate receives an absolute majority in the first round of counting, the candidate with the lowest number in the first round is dropped, preferences remade and so on.
- First past the post – candidate only needs a plurality of votes to win. This method of voting in a society with dominant political cleavages based on ethnic identities is inherently exclusionary. (Arend Lijphart, *Patterns of Democracy*, Yale, 1999)

¹⁹ Again, 3 types are dominant:

- list PR systems – found in 18 of the world's 36 established democracies. Parties nominate lists of candidates in multimember districts (MMDs). Voters cast ballots for one party list or another and seats are allocated to party lists in proportion to the number of votes they received. Even very small parties whose membership may be nationally dispersed should be allowed representation and voice in national Parliaments.
- Mixed member districts – suggested by CGD for Kenya. These combine PR lists with single member districts formulas to achieve a balance between the valued representational goals of proportionality and closer voter

2. District apportionment

The drawing of electoral boundaries is a topical issue. A proposal has been made that if PR formulas are adopted, we can make use of existing provincial boundaries to create MMDs. What do parliamentarians think of the suggestion?

3. Total size of legislative body

The size of parliament in stable democracies tends to be roughly the cube root of the country's population. Although this is an approximation, analysts have found that if the total number of a legislative body falls significantly below this figure, there is a serious impact on the degree of proportionality that can be achieved. Parliament has not grown proportionate to the population. At about 30 million, this rule prescribes about 314 seats, instead of the current 210.

The extent to which competing political interests in Kenya can agree upon institutional formulas that explicitly address these problems and promote two fundamental principles of consensus democracy – the principle of inclusion, and – the principle of proportionality – the greater the likelihood that Kenya's new constitutional order will be durable and democratic.

The benefits of PR formula outweigh their disadvantages. Small parties are allowed representation and parties become issue-based. Decision-making is more consensual. This is especially important in countries undergoing democratic transformation. For instance, the degree of inclusiveness in SA would never have been achieved in a FFP system.

On the other hand, the representational goal of proportionality must be balanced against the equally important goal of preserving the quality of representational link between local constituents and their national representatives. This link is especially important in Kenya where a) communications and transport infrastructure is underdeveloped, b) economy is agrarian based, and c) group interests are geographically concentrated. PR systems can adjust for this problem in several ways: 1st by creating smaller regional constituencies, while still ensuring that district magnitudes are large enough to promote proportionality. For example, provincial based districts. 2nd, by creating two tiered district systems, such that larger districts help compensate for disproportionalities created by smaller districts – like SA today, where 50% of the parliamentary seats are elected from nationwide party lists, and 50% are elected from 9 provincial lists.

representative contact. Each voter has two votes, one for a district candidate, and one for a party list. List PR seats help compensate for disproportionality created by the SMD seats, but the degree of proportionality ultimately depend on how many list PR seats are available. (Lijphart, supra)

Opponents of PR systems argue that they slow down policy decision-making. This is not implausible: concentrating political power in the hands of a narrow majority can promote unified, decisive leadership and hence coherent policies and fast decision-making. But fast decisions are not necessarily wise decisions, in fact, the opposite may be more valid. Secondly, the supposedly coherent policies produced by majoritarian governments may be negated by the alternation of these governments, and this may entail sharp shifts from left to right and vice versa in economic policy. S. E. Finer forcefully argues that successful macroeconomic management requires not so much a strong hand as a steady one and that PR governments are better able to provide steady centrist policy making, as a bonus to better electoral justice.²⁰ Policies supported by a broad consensus are more likely as well to be carried out successfully.

A well-known proposition in comparative politics is that the plurality method favours two-party systems. Conversely, PR encourages multipartism and coalition building. Lijphart finds in his assessment of 36 established democracies that on a measure of cabinet duration (executive dominance over legislature) two party systems fair better. Their cabinets last longer. Cabinet or executive durability is a good measure of government sustainability and political power, but executive strength does not necessarily spell effective policy making. A strong executive mainly means relatively weak legislative power, and an imbalance in executive-legislative power favouring the executive is simply part of the syndrome of majoritarian characteristics.²¹ But he also finds that in relation to macroeconomic management, there are no major differences between PR and non-PR democracies.

Consensus democracy (representational govt.) has a slight edge over majoritarianism: it is positively related to economic growth variables and negatively to strike activity and to deaths from political violence, but the correlations are weak. The big exception is inflation; consensus democracy is uniformly associated with lower levels of inflation.²² Statistics do not show that majoritarian democracies are better governors than consensual democracies. They also do not prove that consensual democracies are better governors. But they have a better quality of democracy, in particular representing majority

²⁰ *Adversarial Politics and Electoral Reform*, London: Antony Wigram

²¹ See essay of Powell Bringham, 1982 *Contemporary Democracies: Participation, Stability and Violence*. Cambridge, Mass.: Harvard University Press.

²² In a survey of OECD states for 1980 - 93, typical consensus democracy has almost 4.8% points less inflation than the typical majoritarian democracy. The level of development and population size are inversely related to inflation, but when these two variables are controlled, the correlations remain strong. Lijphart, *supra*. P. 260 - 1.

groups and minority interests, representing everyone more accurately, and representing people and their interests more inclusively.

Finally, voter participation in elections is better in the representational systems. The problem as Bowen Wells has advised the CKRC is that PR establishes political parties as an essential element in the constitution, and this has the effect of 'enhancing the power of the party at the expense of the freedom of the individual MP and the people of the area or region he or she represents to influence the type of government elected.'²³ Bowen argues that PR will keep the ANC permanently in power with the party dominating its MPs' democracy. He supports the formula suggested above to resolve this problem, but also suggests bicameralism in Kenya, with one chamber elected by FFP and the other by a PR formula 'related to different tribal interests.' He also supports a parliamentary system where the 'president' is elected by parliament or with a collegiate executive supported or tolerated by the confidence of parliament. I raise this issue here, because together with change in the electoral formula, bicameralism and the type of democracy are issues parliamentarians will want to consider in relation to constitutional reform. What I urge parliament to do is find the best most practicable solution for institutionalizing the public interests of representation and accountability, so that the 9th Parliament can become a locus of national sovereignty.

In conclusion, parliamentary reform in the context of political and economic transition needs to empower the state to act, rather than rigidly constraining it in a liberal constitution. The state can act through a representative and democratic parliament, which can check executive power, but whose power is also ideally checked by a constitutional court. But the judiciary cannot play this role where it is largely non-functioning, corrupt and historically has been associated with authoritarianism. The development of a representative parliament is therefore of much greater importance in order for democracy to begin to take root.

Topic 12: THE NEXT PHASE OF PARLIAMENTARY REFORM

(Presented By Wachira Maina, Constitutional Lawyer)

I was asked to talk about the next phase of parliamentary reform. I will address some constitutional issues at the beginning, and then proceed to more legislative and standing order issues.

Parliamentary Reform: The Constitutional Questions

²³ Bowen Wells, 2001 Structure and Composition of Legislatures, unpublished.

Overall context of parliamentary reform: country needs first to make a decision whether it wants to be a presidential system, a parliamentary system or a reformed hybrid of the two. The current one is a failed hybrid.

Key features and differences of the two systems

Parliamentary system	Presidential system
<p>Single democratic legitimacy-only members of parliament have democratic legitimacy. The office of head of government, that is, the prime minister is not independently legitimated democratically. The prime minister is the head of the party or the coalition of parties with the largest number of seats in parliament. He is easily dispatched if the party loses faith and trust in him. No possibility of parliament/executive conflict.</p> <p>Functional separation of the office of head of state and head of government. Executive authority is collegial and vested in the cabinet acting collectively. Cabinet ministers are elected or are at least drawn from elected members of parliament.</p> <p>Government rules so long as it has confidence of parliament and there are usually no term limits on the prime minister. Elections happen once government loses confidence of parliament.</p> <p>Parliaments are not independent of the executive and if the ruling party has large numbers, executive control of parliament can be crushing because of the institution of party whips. System often operates as a form of compulsory mandates. Votes often follow party lines.</p>	<p>Dual democratic legitimacy-both the president and members of parliament are directly elected by the people. In some instances, dual democratic legitimacy leads to conflicts between presidents and parliament. Some of the so-called reforms of Hugo Chavez in Venezuela were in fact designed to resolve this dilemma by centralizing all power in the presidency. Office of head of government and head of state fused into one.</p> <p>Executive authority is personalized and vested in the person of the president. Cabinet ministers are not elected members of the legislature and have no democratic legitimacy whatsoever.</p> <p>There are term limits on the presidency though not usually on legislators. Configuration of term-limits varies: one short (as in Brazil-one 4 year term) or a long term as in Mexico (7 Years) or two shorter terms of either 4 or 5 years each. Sometimes the president can serve for more than one term but such terms may not run consecutively e.g. Bolivia. President stays in office unless impeached. Parliament independent of the executive even if where a majority of the MPs share the President's party. This is because presidential elections and parliamentary elections do not always take place together. MPs operate as if they have free mandates. Vote follows conscience.</p>

Problem of the current Kenyan system is that it combines the worst features of both.

A bad presidential system leads to either immobilism-where the country is bogged down in quarrels between the president and parliament or to dictatorship. Presidential systems tend to err on the side of dictator rather than immobilism.

A bad parliamentary system produces a system that is so fractured that parliament can hardly agree on anything or alternative a parliamentary that is so beholden to the dominant party that the government is not under any serious check. A querulous parliament or one without teeth is often the fate of parliamentary systems. Kenya has adopted the dictatorship of the presidential system and toothlessness of the parliamentary system and written them into law.

In the parliamentary system oversight over the head of government is expressed through prime minister's question time and collective and personal cabinet responsibility. Ministers are collectively responsible for the follies of the government they serve as well as accountable for the monkey business that takes place in their departments. In a presidential system the ministers account to the president and are fired at will if they make the president look bad. Kenya's is neither a collegial administration nor a pure presidential system. The president does not come to parliament to field questions; though his cabinet is parliamentary it in fact functions as a cabinet in a presidential system.

What are the key reform issues entailed in this area. Some of these issues may already be covered in the work of the Ghai commission but they are worth emphasising.

Parliamentary democracies more enduring than presidential democracies: Study after study has now established that parliamentary democracies have a better history of stability than presidential democracies. Only the United States has sustained a democracy for more than 50 years as a presidential system.

Mixed systems have a mixed record: Sri-Lanka's has not resolved the problems of ethnic violence and France's tends to take the character of whoever is more charismatic as between the prime minister and the president.

Parliamentarisation of presidential democracies: Because of the reality that parliamentary systems have had a better record in sustaining democracy, many people, even ardent presidentialists, now accept the need build into the presidential system as many features of the parliamentary system as possible. South Africa, for instance, has a powerful parliamentary president who has no independent democratic legitimacy. The South Africa constitution requires that

at its first sitting parliament should elect one of their own (not necessarily the person from the party with the highest number of seats) as president. The election is presided over by the president of the constitutional court or a judge designated by him. When the MP becomes president he immediately ceases being a member of the National Assembly. In this context, there a number of innovations that South Africa has experimented with that we could look at.

First, the national assembly can only remove the president by a 2/3 vote if he is guilty of serious misconduct, serious violation of the constitution and inability to perform the functions of the office.

Secondly, the vote of no confidence is modified and split into two. On a majority vote the national assembly can pass a vote of no confidence in the cabinet and exclude the president. In that case the cabinet must be reconstituted immediately. If parliament passes a vote of no confidence in the president, the entire government must resign immediately. The acting president then dissolves parliament and elections are held.

This procedure has the potential risk of introducing instability if you have a fractious coalition of parties in Parliament who take joy in collapsing government. For this reason, some countries such as Bolivia and Germany have what is called the **constructive vote of confidence**. In Germany, Parliament cannot simply remove the Chancellor by a vote of confidence. This procedure was abused a great deal during the Weimar Republic and was partly responsible for bringing Hitler to power. The constitution of Germany says that parliament can only remove the chancellor only when it simultaneously agrees on a successor. Opponents of the chancellor must not only disagree with his policies they must also agree on a successor. The bundestag has tried this procedure twice and has succeeded only once. In 1982, CDU persuaded the FDP to dump their coalition partner SPD in order to form a new government with CDU. This felled the government of Helmut Schmidt and brought Helmut Kohl to power.

Making a decision about whether we want to be a presidential system or a parliamentary one resolves some of the important reform issues that are of concern to members. If a parliamentary system is chosen then clearly the on-going battle over the president's power to dissolve parliament ought to disappear. In a parliamentary system the power of dissolution is directly tied to the need for continuing democratic legitimacy. The cabinet has no independent democratic legitimacy and must continually be sure of parliamentary support. In such situations, it is not advisable that parliament should have fixed terms and rigid calendars. If a presidential system is preferred then parliament's terms can be firmly fixed. Even in South Africa where they have tried to hybridize the

parliamentary system, the president has powers to dissolve parliament. It is interesting to look at the situation in which he can do this: 1) if Parliament has passed a resolution demanding its own dissolution 2) there is a vacancy in the office of the president and 3) parliament fails to elect a new President within 30 days after a vacancy occurs in the office of the President.

Though the President has these powers, parliament has control over its own calendar. It determines its recesses, duration and time of its sittings.

Other constitutional issues:

Continuation of Parliamentary tenure even after dissolution: One of the key problems in Kenya is that MPs cease to be MPs once parliament is dissolved. This raises the spectre of the President running the country without legislative sanction for 3 months. One constitutional device that has been used in other countries is to say that parliament is competent to function until the day before the first day of polling. This ensures continued democratic legitimacy for government decisions.

Limiting how soon after elections the President may dissolve Parliament: Assuming we retain a system that is predominantly parliamentary one may want to give a floor as regards how soon the president can dissolve parliament. Some countries say that dissolution can only happen after parliament has served three years. Though Britain does not have a written constitution, this is the practice and South Africa has borrowed it.

Strengthening parliamentary role in the case of presidential inability: the process of removing a president who is unwell or unable to perform the duties of office in Kenya is long, tedious and likely to generate severe crisis. (See section 12 of the Constitution). This process should be shortened. A two-thirds vote by parliament should be all it takes to remove a president incapable of performance. A situation such as happened in the US after the attempted assassination of President Garfield in the US in 1881 is not acceptable. The president lay nearly comatose for 80 days. Again, Woodrow Wilson was not fully operational for nearly a year after suffering a stroke. It is these sorts of problems that eventually prompted the enactment of the 25th amendment in 1967.

Parliamentary Reform: Ordinary Legislation & The Standing Orders

I will not address the gaps of the current constitution on issues like war, defence and foreign relations. I think these issues have been widely covered in the ongoing debates on constitutional reform. Instead I want to turn to internal parliamentary reforms that could be affected through changes in the standing orders of the house. I will divide these reforms into four headings. Parliament is

not only an institution that has capacity building needs but it also has legislative, oversight as well as representational functions. My reform proposals are therefore divided into the four heads of capacity building changes to the legislative function, reforms of the oversight function and strengthening of the representational function.

Capacity building of parliament: Clearly there is need to complete the process of parliamentary reforms now currently underway in terms of strengthening the Parliamentary Service Commission. The arguments for this are familiar and I will not repeat them. I only want to add that deepening the integrity of parliament is critical to enhance its prestige and standing. There are several approaches to doing this. First, the process of reviewing parliamentary salaries needs to be changed. MPs have the power to tax and spend. They should not be seen to be using this power to give themselves salaries and benefits. There are two ways of doing this. One would be to place the issues of MPs salaries and allowances in a neutral body. Such a body can be ad hoc or an already existing institution. Salary reviews should be done at regular intervals not on an ad hoc basis. A second approach would be allowing MPs to review their own salaries but then having those salaries implemented only after an election has subsequently happened. In this way the MPs do not have a direct financial interest in the new salaries. Secondly, and somewhat related to the issue of conflict of interest, the National assembly should open a register of Members Interests. This list could be open or closed or two lists could be open, a closed list and an open list. These lists should be used in the selection of MPs to parliamentary committees.

Strengthening the oversight function of Parliament: I will not deal with the budget reform issues and the amendments to the standing orders already proposed by the Institute of Economic Affairs. I only want to deal with issues that I think have not received parliamentary attention. First, there is a whole range of executive actions that are not subject to parliament oversight even though they are of a compelling public interest. Communiqués between the president and visiting heads of state, treaties, international agreements, reports of commissions of inquiry, consultative documents between government and donors are often never seen by parliament. And whereas the Constitution of Kenya Review Commission may deal with treaties and other international agreements it may not cover the other documents. In the United Kingdom state papers such as communiqués and reports of commissions of inquiry are automatically laid before the house as Command papers. They are called command papers because they used to be presented to parliament in the form of "presented to parliament...by the command of Her (His) Majesty." Another instrument that has been used rather effectively in Sweden is the Constitutional Committee. This is a committee of the Riksdag, the Swedish parliament. It is empowered by the Riksdag Act to investigate government performance over the

year and to report to parliament on ways in which the administration may have violated the constitution. In particular, the Riksdag Law requires that cabinet decisions be in writing, that dissents be recorded and that minutes of cabinet decisions be subject to review by the constitutional committee. The South African Constitution requires that all presidential decisions taken pursuant to law or all decisions that have legal consequence to be in writing. If such a decision affects a particular ministry, the responsible minister is required to countersign. Parliament is then authorized to enact legislation about how these decisions are to be tabled before parliament and approved.

On financial matters: There are already many recommendations provided by the IEA and other bodies about review of parliamentary financial procedure. One of the points of detail I would like to add regards the availability of technical staff when the audit committees, PIC and PAC are meeting. In the UK some staff from the national Audit Office are seconded to the house of commons to support the committees during their deliberations and this might be something that the Kenya parliament may want to consider when the office of the Controller and Auditor General is fully operational.

Strengthening the legislative function of Parliament: The National assembly makes laws through three methods: legislation introduced by government or parties, through legislation introduced by an individual member of parliament and through legislation requested by bodies outside the house, called private bills. The first is over-developed, the second is underdeveloped the third appears almost unknown in Kenya. In strengthening the legislative role of parliament the standing orders should be reviewed to provide support for members who want to bring private members bills. The best approach would be to say that a private member's bill, which is backed by a resolution of the house, will get the logistical support accorded to all government bills. The standing orders should also be changed to elaborate a procedure for private bills. Private bills are laws promoted by organisations outside of parliament e.g. local authorities or companies, which want powers to do things that are of a local nature or things that may conflict with existing laws. The usual approach adopted by local authorities is merely to promulgate by-laws. But there are several reasons why on issues affecting the property rights and other material interests of citizens should be done through private bill rather than by-laws. First, parliament is able to give the matter more scrutiny and hence overall, better legislation is enacted. Since local authorities do not have substantive legal support there are real risks that by-laws will be made which are in conflict with the constitution and other laws.

Secondly, in the case of companies, the absence of legislation leads to a situation where everything becomes regulated by contracts. Consider the

Tiomin case for instance. If the company had opted to follow the route of a private bill, it would get better long run protection but also, stakeholders would also have a better framework for involvement and negotiation. In the UK there is a separate set of standing orders to regulate private bills. Those who wish to promote such bills are required to attach an environmental assessment (if the bills will require works), those who object to the bill must submit a petition drawn up in accordance with the rules of the house. In the house there is in the office of the clerk, examiners who scrutinize the bills for compliance with the standing orders. The promoters of private bills must appear before the examiners. If the bill has not complied with the standing orders, it is referred to the standing order committee that may then recommend that the bill be accepted even though it is not fully compliant. Once laid before parliament the private bill goes through the same procedure as other laws. If it is not opposed the bill goes to an unopposed bills committee and if it is opposed it goes to an opposed bill committee. There are two possible outcomes in the committee: case not proved and case proved. If case is proved the legislation then comes back to the house for consideration and third reading.

Supporting the representational function of parliament: Though parliamentary committees often interact with citizens in terms of evidence gathering and taking views, on the whole citizen involvement in parliamentary affairs tends to be somewhat ad hoc and weakly institutionalized. There are several mechanism that could be used to enhance the representational function of parliament. One that has already been made is making the hearings of parliamentary committees open to the public. The normal procedure in other jurisdictions is that the process of gathering evidence is open but committee deliberations in which the evidence is assessed are not.

More important the standing orders of the house allow for public petitions but citizens have not used this procedure. The right of citizens to petition government is nearly as old as the history of parliament. It is one of the rights explicitly recognised in the Magna Carta and was repeated in the bill of rights in 1688. it is also part of the first amendment to the American constitution. In fact the bill of rights of 1688 specifically state that "*it is the right of subjects to petition the king, and all prosecutions for such petitioning are illegal.*"

Over the years petitioning became the means by which groups that were not represented in Parliament got to air their grievances. In the UK there has been, since the 1980s, a sharp rise in the number of petitions getting to parliament on such issues as proportional representation, abortion, embryo research and capital punishment. As of now about 100 petitions are presented in every session of the House of Commons. Once presented to the office of the Clerk, the petitions are sent to the relevant minister who composes a response to it and lays both

documents before the house. Unusually, under the UK post office regulations a petition may be sent to a member of parliament for presentation to the house in an unsealed envelop and without postal charges being paid.

In the UK there is a comprehensive set of rules governing petitions. Any member of parliament may present petitions and there is no necessary implication that the member supports the petitioners or their arguments.

It is my view that once the Parliamentary Service is fully operational it has the responsibility to ensure that the public has the necessary information needed to effectively petition the House.

Overall conclusion: there is still much to be done before parliamentary reform can be considered complete.

Topic 13: REVIEWING THE PROCEDURES OF PARLIAMENT

(Presentation by Hon. Oloo Aringo, Vice Chairman, Parliamentary Service Commission)

Regarding a theory of government-do we have one? In an absolute monarchy for instance, the theory of government is that the monarch derives his power from God. The question is significant because of Hon Mwalulu's question of who runs this country. We do not have a theory of government. The president has all the power of a monarch, and is above the law. There is no basis (theory) for this and it is a crisis that I have mentioned to the review commission. A theory of government will aid in the separation of powers- i.e. head of state, prime minister-who appoints, etc. Should the leader of government business be under the control of the president? To resolve this question many constitutions begin with this theory of government in the preamble.

We could decide that the prime minister is appointed by parliament, which would strengthen its position *vis-a-vis* the executive. In some jurisdictions when the prime minister is appointed by the president, he has to seek the confidence of parliament.

Parliament in the national conference must lobby to have power to elect the prime minister, who will rise and fall with the confidence of the members elected by the people of Kenya.

Parliament's powers in public finance must be constitutionally enshrined. Parliamentary Service Commission established autonomy with direct withdrawal from consolidated fund. Despite this only 1% of total revenue is

allocated to parliament. The role of committees is to facilitate members to perform constitutional functions-hence our strategic plan 2000-2012. We have increased number of directorates to provide service to members. We have now added research and legal services, Information Technology. The public is not happy with parliament as we are not spending time on the peoples business. We spend time money mongering. Hence we are producing very few bills. This is a tragedy. It is our duty to initiate legislation when the executive fails and to bring it before the house.

We have pointed out our weaknesses in the budgetary process. This is why we need a Parliamentary Budget Office in collaboration with partners like the Institute of Economic Affairs but the office will be internal. If this means overhauling standing orders, then that is the right direction. Departmental committees should take over the role of committee of supply.

We must make public hearing part and parcel of our work in committees. I am very supportive of live broadcasting. Some of our problems are self-inflicted. Members must begin to define their functions. The executive defines us. We must educate Kenyans. We have produced two booklets for use in schools etc.

Hon. Angwenyi asked Hon. Aringo to file a bill on the amendment of section 58 and 59 (on setting of parliamentary calendar) of the constitution as soon as parliament is re-convened in October 2002. He also appealed for the support of Hon. Karues motion?

Hon. Mkalla explained that there were a lot of difficulties having sections 58 and 59 discussed in house committees. He said that he supported the bill but that notwithstanding, he had to exercise his role as party whip.

Hon. Otula observed that some committees headed by speaker and deputy speaker were not active and wondered why they should exist. He also lamented that some committees are frustrated by executive and gave the example of the health committee.

Hon. Gatabaki: Members of Parliament have been paid not to go to parliament so as not to constitute a quorum.

Mr. Njau gitu, Director, Institute of Economic Affairs supported Mr. Wahiu proposal to consider slapping a ban on.

Hon. Ocholla suggested that some funds be set aside for Parliamentary Service Commission to define job descriptions for MPs.

Hon. Kajembe noted that watchdog committees made recommendations, especially on officers of parastatals who have misappropriated funds, but no action is taken. What should be done?

Hon. Kimetto

On abolition of harambees and handouts, the honourable member explained that these are necessitated by poverty and therefore asked members to address the underlying factors. He suggested introduction of a welfare programme.

On the speaker's powers, he said, "We elect the speaker of the national assembly, but after that we are powerless. This is a problem".

Hon. Mwalulu

Is there a way parliament can pass a vote of no confidence without dissolving itself.

We should increase constituencies; have a system of implementing salary adjustments. I oppose constituency development funds; this is not the role of parliament but rather the role of the executive.

Can we redefine role of MPs without abolishing harambees.

On the role of media, the honourable member noted that the media was obsessed with personalities as opposed to issues. Many issues in parliament go unpublished.

Hon. Munyasia

On Representation, he explained that we have 210 constituencies demarcated very badly, with some areas being under represented. There is a proposal that we have a certain number of seats on a proportional distribution basis. Hon. Kirwa proposed that 50% of these go to women, but this is not the only division in society. There are too many interest groups for any of them to have specific representation for them.

It was observed that parliament reviewed an act four times. Did parliament surrender its legislative role to groups outside of parliament?

On the issue frequent "lack of quorum" Hon. Munyasia observed that many MPs are not taking their work seriously. We should consider compelling MPs to do this full time like in Ghana.

Some MPs sit on many committees while others are in none. Hon. Munyasia said this was as a result of appointments being based of party loyalties.

Hon. Katuku

On the Issue of institutional design, the honourable member sought the suggestion of the panellists on how to deal with the issue.

PSC came up with a lot of hope, but we are now losing faith either because of lack of information, or capture by the executive or the speaker. What is the problem?

Hon. Katuku noted that committees were being frustrated due non-implementation of recommendations and asked how this could be fixed.

Hon. Mwakiringo

The honourable member suggested that ministers for finance, home affairs and security should be vetted by parliament.

We as MPs are doing an injustice to the electorate by failing to complete our work. We should extend our working hours.

He suggested that the Chairman of Finance Committee should not be the Chief Whip.

Hon. Githiomi

We should not have a mixed system. I favour a parliamentary system. If we opt for a presidential system, then the president should not be an MP. If a parliamentary system, a Prime Minister should be elected.

Standing orders should be amended giving all members equal opportunities to contribute in debates. Party leaders are given priority, and this is wrong.

Chief whips should never chair any parliamentary committee.

Every MP should serve in a committee, and party chairman should be told not to appoint as a reward to loyalty.

Hon. Munyao

The honourable member suggested that all eligible voters be compelled to vote. This he explained would boost the democratic process.

Hon. Galgallo

Every eve of election we have ethnic cleansing. Kenyans who are a minority in the region are adversely affected. Should we set up committees to ensure those who perpetrated those injustices are brought to task?

Every year funds allocated for development are diverted. Can this be addressed through committees?

RESPONSES FROM PANELLIST

Ms. Betty Maina

- Parliament may need to redefine number of committees in place. Some have a mandate that is too broad. It is also necessary to set criteria for membership e.g technical expertise. I agree we should set aside minimum sitting time.
- There is nothing wrong with hearings being public.

Mr. Winluck Wahiu

- The concept of buying political support is what should be targeted in banning harambees.
- There should be a mechanism for MPs declaring personal assets, if this works properly it can reduce the problem.
- It is not the job of parliament to create constitution, rather the people. The constitution creates parliament not the other way round. Therefore parliament shouldn't have the final say in constitutional review draft document.
- We need to televise parliamentary debates. This will compel attendance, and focus on issues.

Mr. P. C. Omollo

- Speaker is chair of only two committees. I think they meet regularly. It is true that the Liaison committee chaired by deputy speaker hasn't been effective.
- Mr. Omolo informed members that those who receive payment without attending sessions were committing criminal offence and that the issue should be raised before privileges committee.
- PSC and PIC recommendations were not being acted upon by parliament.
- CRCK and outside bodies controlling it-the problem is that the bill did not go to relevant parliamentary committee for scrutiny.
- The speaker has to be trusted in giving members time.
- Vetting cabinet-in congress, there is a committee for congress because congress members are not members of the executive. Parliament cannot vet the cabinet because some cabinet members are MPs.

Kirwa

- Harambees have mushroomed due to poverty, due to mismanagement of this country, failure by executive to implement programmes, and bad manners-the executive gives money to preferred individuals.
- We should have constituency development funds; more important is to define the role of harambee.
- Standing orders need to be amended to expressly allow live coverage.
- Seats-should be allocated to minorities, disabled in a mixed member parliament. It is also a useful addition to the regular allocation of seats in case of a party that has widespread support but does not have winning candidates.
- Disparities in number of persons represented in constituencies-same no. of constituencies should be retained but the balance should be made up by proportional representation.
- I am concerned that women do not vote for women.

Aringo

- Functions of parliament in relation to money bills should be enshrined in the constitution
- I am opposed to a presidential system. It has failed, undermined the power of the judiciary, civil service, etc. I agree with Mr. Maina that we must parliament arise the presidential system.
- Culture of parliament must be cultivated, in terms of quorum especially. The public is getting annoyed. Why should a person be in a committee for purposes of allowances only?
- Chairmen of committees must be strengthened so they can be true managers.

Wachira maina

- Open committees are not a blanket rule, one has to be prudent. There needs to be a set of rules on how committees examine issues related to security, for instance regarding confidentiality.
- In a parliamentary system, it is not advisable that parliament can pass a vote of no confidence without dismissing itself because the Prime Minister does not have democratic legitimacy.
- Regarding compulsory voting Mr. Wachira explained that there would be an affirmative obligation of government. To register voters.

SESSION 4: CONFIRMATION OF RECOMMENDATIONS

Session Chair: Hon. Gitobu Imanyara, Temporary Deputy Speaker, National Assembly.

The meeting resolved as follows:

Management of appropriations and budget

1. That a Parliamentary Budget Office (PBO) be established as a priority. To safeguard this office, it should not only be set up by the structures of parliament but it would be desirable if it also received constitutional protection. (C)
2. That Parliament is concerned that there is inadequate scrutiny of the estimates and recommends that the executive provides each departmental committee with respective estimates at least 3 months before budget is

- read. The committees will present its report to the house when the votes are being considered during the committee of supply. (C)
3. That all votes should be discussed on the floor of the house and none guillotined. (SO)
 4. The number of allotted days should be increased so that each Ministry's proposed expenditure can be scrutinized. This should also be scrutinized by the relevant departmental committee. (SO)
 5. Implement the Sec 16 of the Constitution that Ministries should be created in consultation with parliament and by an Act. {there was a suggestion that this should actually be set up by the constitution}
 6. Controller and Auditor General (CAG) should be a constitutional office answerable to parliament with powers to prosecute. (C)
 7. Parliament should receive the CAG report within 12 months of the end of the financial year. Parliament should receive the draft accounts before passing the Appropriations for the following financial year.
 8. (Paymaster general account should be subjected to an audit)*
 9. That SO 101A be amended to allow appropriations for each ministry to be referred to the relevant departmental committee
 10. De-consolidate the Appropriations Bill and instead have a Bill for each separate vote to be approved by parliament as presented in the Estimates. Individualize the Bills.
 11. Parliament requires timely information during the year on the implementation of the budget and meeting of targets. To this end it should receive quarterly reports on disbursements and performance. To achieve this, the minister should set out at the beginning of the year, the intended targets and goals of public expenditure in the given year. Parliament should have powers to take any action it deems necessary to correct this situation e.g through injunctive powers.
 12. That parliament be given powers to withhold a ministry's budget if in its opinion (as reported/advised by the controller and auditor general) it is not being used as approved.
 13. Budget must be synchronised with policy papers that have been presented and passed by parliament.
 14. Members were concerned about the number of funds that do not come under parliamentary scrutiny and resolved that any fund set up for the collection and appropriation of public funds should be subjected to parliamentary scrutiny.

Management of a Deregulated Economy

Parliament has through legislation set up regulatory authorities to manage various sectors e.g telecommunication and electricity. However, some of the legislation is not robust enough to enable smooth functioning of the sector e.g ERB or not broad enough. Some are also not harmonised with other acts.

15. Parliament should inform itself of the status of the deregulated sectors, confirm if they are in compliance with parliaments intentions and address any short-comings or issues emerging & amend the laws to compel regulatory agencies to submit reports to relevant committees on a regular basis.
16. **Establish a select committee to review the working of regulatory policy.**
17. Parliament should scrutinise proposed legislation more vigorously to avoid creation of weak institutions

Parliamentary Committees

18. That the portfolio of existing committees be reviewed and rationalised to discourage too broad a mandate (SO)
19. Party whips should not hold any committee positions. (SO)
20. That the performance of the committees be evaluated to establish whether their mandates should be limited or expanded. (SO)
21. Members should belong to at least one committee and multiple memberships should be discouraged, and if possible be limited to two.
22. MPs should state their own preference for appointment to committees (through members' lists of interest)

Representation

23. Review of electoral system to include proportional representation (C)
24. Provision of public hearings/sittings of committees
25. Mechanisms for introduction of issues by un-represented constituencies e.g through petitions (C)

Other Issues

26. Harambee system: Members are concerned and frustrated by the abuse of the harambee system and the tendency of government to abdicate its role of provision of social services. They recommend that the role of harambee should be redefined and instead a direct allocations be made in the budget for constituency development funds. The constituency fund comprising 5% of budget should be equitably divided between the constituencies.
27. Parliament should enhance scrutiny of executive compliance with its recommendations via the establishment of an implementation/assurances committee (SO)
28. Parliament should be informed of all issues that touch on public money e.g debt, agreements the country has signed etc
29. Government should seek parliamentary approval for exceeding levels of domestic borrowing.

30. To promote perception of parliament and integrity, parliamentary salaries and other earnings should be reviewed by an independent body or tribunal. (PSC)
31. That structures within parliament should assist with technical information to reduce the disconnect between policy and executive.
32. Parliament should periodically organise meetings and seminars to equip members with knowledge and skills to enable the MPs to perform their parliamentary functions.
33. Establish a list of members' interests.
34. Explore mechanisms where parliamentary votes of no confidence do not result in dissolution of parliament.
35. Reexamine the "sub judice rule" as applies to parliament.
36. That parliament should regularly organize sessions for parliamentarians to inform them on Economic and Budget issues.

