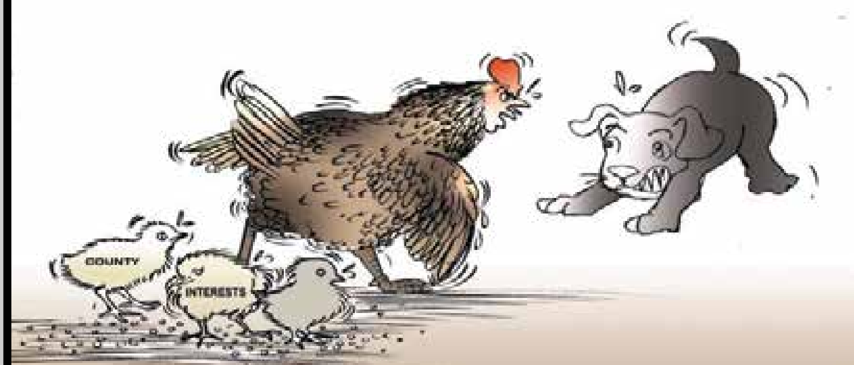
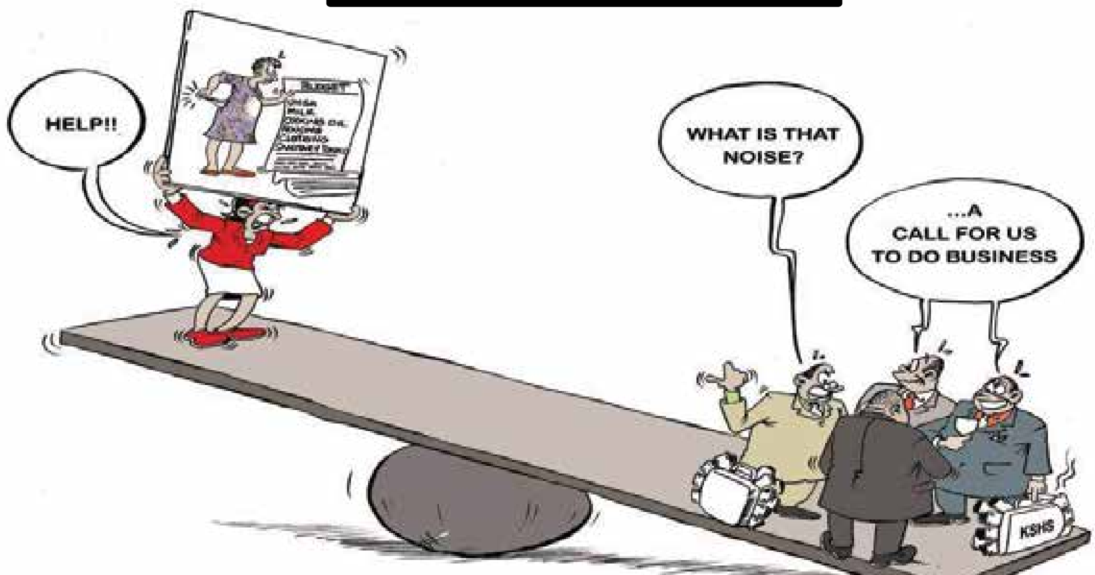
FUNCTIONS OF ELECTED STATE OFFICERS

SENATOR



A Senator's job is to defend County interests

WOMAN REPRESENTATIVE



Since independence, women have been too few in Parliament; and their voices unheard

Making A Complete Shift From The Past

Pamoja Tutetee Haki

KENYA HUMAN RIGHTS COMMISSION

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Functions and Responsibilities of Elected State Officers

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This publication is inspired by the desire to fill the above gap. The KHRC hopes that it will nudge readers' interest in how government both at County and National level ought to run and increase citizen participation which is now a right and duty enshrined in Kenya's Constitution. We hope that this publication will be useful to community based social auditors and other community based trainers in identifying which duty bearer should be held accountable for what function; as well as to curriculum developers, primary and secondary school teachers who determine what and how children should be taught on governance.

The KHRC is greatly indebted to Nduta Kweheria who heeded the call to compile this comprehensive yet simple publication. The KHRC also thanks Grace Mutung'u, Davis Malombe, George Morara, Peter Kibiru, Lillian Kantai, Bill Mureithi, Vincent Musebe, Jamilla Wahome Beryl Aidi, Samwel Oyomo and Charles Ouma for their editorial input on this brief. KHRC also thanks Mathias Botany and Wilson Njenga for their Kiswahili translation and editing of this publication.

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About KHRC

The Kenya Human Rights Commission (KHRC) is a Non-Governmental Organisation (NGO) founded in 1992. Since its founding, KHRC has worked towards entrenching human rights and democratic values in Kenya. KHRC is different from the government's Kenya National Commission on Human Rights (KNCHR) which was established in 2003.

KHRC's strategic planning process is re-directing the KHRC towards the Vision: A human rights state and society; Mission: To foster human rights, democratic values, human dignity and social justice; and to work towards the Goal of: Enhanced human rights centred governance at all levels.

The key objectives of KHRC in the 2013-18 period are to be implemented through four Programmes namely: -

- i) Justice and Governance;
- ii) Equality and Non-Discrimination;
- iii) Economic and Social Rights ; and
- iv) Organisational Development and Institutional Sustainability.

Our Work

KHRC has a long history of capability and tenacity to comprehensively deal with different human rights issues and violations at the different levels of society. This has been achieved through the use of a rights based approach to research; social movement building; documentation of human rights violations, evidence-based advocacy and litigation.

KHRC has been able to identify human rights entry points and provide intellectual leadership that integrates a human rights based approach to various sectors in society thereby expanding the human rights discourse and constituency. Notably, KHRC has undertaken pioneering work in addressing livelihoods and labour rights; sexual minority issues; social auditing through the Peoples' Manifesto and Scorecard Initiative; constitutional reform, electoral governance and transitional justice issues all from a human rights perspective.

KHRC has also built a human rights movement by nurturing community-based Human Rights Networks (HURINETs) and incubation of nascent human rights organisations at all levels; and works with many networks, coalitions and other platforms at local, national, regional and international levels.

KHRC's enduring achievements are credited to a highly passionate, competent and multi-disciplinary human resource base, committed to and capable of dealing with diverse incidents and patterns of human rights violations in the society. Through its work, KHRC has greatly contributed to the production of a pool of nationally and internationally acclaimed human rights workers and scholars within the fields of governance and human rights.

Finally, KHRC also attributes its achievements to sound organizational governance and effective Monitoring and Evaluation (M&E) systems which it is constantly striving to improve.

10. Introduction

Citizens demonstrate against impunity. Source: KHRC

Throughout Kenya's 50years of independence and ten general elections, it has not been clear to most citizens exactly what work Members of Parliament (MPs) and other elective office holders do.

In 2007, KHRC's Peoples' Manifesto and Scorecard Initiative was premised on the fact that political party manifestos and the development performance promises they contain did not mean much to the electorate besides being colours that distinguished one group of voters from another and more from an ethnic perspective rather than ideology[1]. Two major factors have served to illuminate this gap in public awareness on the functions and responsibilities of those elected.

The first is the fact that the 2013 general election is the first to be held under the new Constitution promulgated in August 2010. The Constitution creates eight elective positions to be filled through the use of six ballot papers. This is an increase from the three elective positions that existed since independence. KHRC's February 2013 election monitoring report which also looked at people's awareness of the Constitutional elective positions(yet to be published) finds that over 80% of citizens either do not know or are not sure about the extent of the new electoral boundaries. Further, over 70% cannot clearly articulate the functions of the President despite this elective position having existed since independence; and less than 25% confidently know the functions of the holders of the other elective positions:- Senator (13%), Woman Representative (15%), Governor (24%) and County Representative (16%). The same has been observed in similar studies by other civil society organisations[3].

This is further complicated by the fact that for the first time ever, the Constitution requires voters to look at the integrity and capability of those they elect to office as well as the fact that the March 2013 general elections coincide with Kenya having three suspects indicted by the International Criminal Court (ICC) on charges of crimes against humanity that occurred around the 2007 general elections. There has been great public debate generated on whether or not; those indicted by the ICC met integrity standards for elected state officers or would be able to perform their functions while at the same time attending trial at the ICC in Hague.

1 Nduta Kweheria, Voters Manifestos Key to Genuine Representation Saturday Nation, November 3,2007 , pp 14
2 Countdown to The March 2013 General Elections: Interim Elections Monitoring Report, KHRC, 2013
http://www.khrc.or.ke/resources/publications/doc_download/52-countdown-to-the-march-2013-general-elections-interim-election-report.html

Secondly, the 10th Parliament (2008 and 2013) enjoyed salaries and allowances amounting to Ksh851,000 per month, at a time when Kenya's per capita income was less than Ksh2,000 per month (i.e. 425 times less than MPs' monthly pay and minimum wage at Ksh4,050 per month; hence over 210 times less than MPs monthly pay. The same MPs in the 10th Parliament in October 2012 passed a bill to pay themselves a further 'retirement package' of over Ksh9Million (USD 110,000) each for the 210 MPs. Had this passed, at the time, it would have meant that at Ksh2,000 per month, it would take 61 years for the average Kenyan to earn the Ksh9M bonus that MPs had proposed for each of themselves. In addition to the bonus, the proposed retirement package for MPs included diplomatic passports for them and their spouses, a state funeral and access to the nation's VIP airport lounges. The proposal was thwarted following demonstrations by KHRC and other civil society organizations and public outcry on all media and that resulted in the President slashing the bonuses by half.

In addition, the same 10th Parliament lobbied the then Minister for Finance Hon. Njeru Githae to authorize (on January 2, 2013) the release of over Ksh10Billion to them in the form of Constituency Development Fund (CDF) apparently to implement CDF projects in just eight weeks before the March 4, 2013 General Elections. This was stopped by a court ruling on the matter[4].

Demonstrators protest outside parliament in Nairobi on October 9, 2012 after lawmakers voted themselves a $110,000 bonus. Source: CNN

3 See Africa Centre for Open Governance (AfriCOG) Report on Devolution, June 2012 available at http://www.africog.org/reports/devolution accessed March 14, 2013
4 Petition No.71 of 2013 to determine the constitutionality of disbursement of Ksh10.1Billion to the CDF Management Committee to enable Members of Parliament to complete pending projects. See http://www.tisa.or.ke/uploads/Court-Order.pdf accessed March 14, 2013

The fact that majority of citizens do not know their electoral boundaries or the functions of those that they elect to take office suggests that i) voters do not link elections to rights access through service delivery; ii) voters do not think that the taxes they pay entitle them to demand a certain level of performance, which implies voters' acceptance of poor - mediocre performance from those elected. This ought to be a cause for alarm; more so when one asks the question **"If it is not the expectation of quality and timely service delivery and performance by elected leaders or of voters getting their money's (taxes) worth, that drives Kenyans to vote at general elections, then what does?'** This is clearly an interesting area for further study.

Exactly what mandate, function, duty or responsibility do MPs and the elected state officers serve in order to earn the pay and benefits that they do, and even to think they deserve more?

This brief provides short explanations on the functions that the different elected state officers should perform. It is developed in response to studies[5] that have noted the need to build the capacity of legislators to understand and better perform their role. The brief also takes cognizance of the right to and duty of citizen participation now recognised in the Constitution of Kenya 2010. It is therefore also intended to help citizens to understand what functions each of the elected state officers ought to perform, be aware of how much s/he as a taxpayer is paying each elected state officer to perform these functions and create awareness on the fact that the Constitution now provides for citizens to recall non-performing elected state officers. Finally, this brief provides a breakdown of some of the responsibility that citizens ought to take to fulfil their duty of citizen participation.

1.1 Elected State Officers

The Constitution of Kenya (Art 260) defines "State", as the collectivity of offices, organs and other entities comprising the government of the Republic under the Constitution. It proceeds to list state offices to include all the eight offices that were filled through the first general elections on March 4, 2013 under the devolved system of government in the Constitution of Kenya, 2010. Therefore all the elected politicians serving in both the National government – the President, Deputy President, Senators and Members of the National Assembly and County government – the Governor, Deputy Governor and Members of County Assemblies (MCAs) are all state officers. National legislation can also designate other public servants not listed here as state officers.

Article 73 of the Constitution of Kenya notes that authority assigned to a State officer is a public trust to be exercised in a manner that (i) **is consistent with the purposes and objects of the Constitution;**(ii) **demonstrates respect for the people;**(iii) **brings honour to the nation and dignity to the office; and** (iv) **promotes public confidence in the integrity of the office**. The Constitution of Kenya vests in the State officer the responsibility to serve the people, rather than the power to rule them.

The guiding principles of leadership and integrity include (a) selection on the basis of personal integrity, competence and suitability, or election in free and fair elections;(b) objectivity and impartiality in decision making, and in ensuring that decisions are not influenced by nepotism, favouritism, other improper motives or corrupt practices;(c) selfless service based solely on the public interest, demonstrated by (i) honesty in the execution of public duties; and (ii) the declaration of any personal interest that may conflict with public duties; (d) accountability to the public for decisions and actions; and

5 The Open Budget Survey, 2012, and the Africa Parliamentary Strengthening Program (APSP) for Budget Oversight which develops the African Parliamentary Index (API) have both noted the need to build the capacities of Legislators to be able to effectively perform their core functions. Open Budget Survey is an independent measure of the state of budget transparency, accountability, and participation around the world. See http://www.internationalbudget.org accessed on March 14, 2013.

(e) discipline and commitment in service to the people.
A State officer shall behave, whether in public and official life, in private life, or in association with other persons, in a manner that avoids (a) any conflict between personal interests and public or official duties; (b) compromising any public or official interest in favour of a personal interest; or (c) demeaning the office the officer holds.

All over the world, citizens vote to put politicians in office as state officers. Every citizen including children, the unemployed, the sick and elderly then pays taxes every time s/he buys any item (such as food, cooking gas or kerosene, soap etc.), pays travel fare in a matatu or other means of transport or pays service charges for water, electricity or even examination fees. These taxes, which government refers to as revenue collected from its people provide the money used pay elected state officers and all public officers involved in service delivery as police, probation and prison officers, labour and education officers, lecturers in public universities and colleges, agriculture, livestock and fisheries officers, doctors, nurses, accountants, judges, magistrates, prosecutor and lawyers working for the state, engineers and clerks) in national and county governments. Revenue raised from citizens' taxes is also used to finance infrastructure such as the building of schools, hospitals, roads etc or to repay loans that government has taken to build costly infrastructure such as roads, railways, air and seaports; and to finance research and technological development.

It is critical that each country is careful about what proportion of the revenue the government raises each year is spent on paying salaries, building new and maintaining existing infrastructure, purchase of essential equipment (such as police vehicles, medical equipment) and supplies (such as medicines, fertilizer and pesticides) and what is used for research and development. Concern has been expressed over Kenya's huge wage bill[6] , as seen through the many industrial strikes by public officers to complain over low pay, understaffing and underequipping of public institutions. Studies[7] have revealed that despite Kenya being only slightly above the Highly Indebted Poor Countries (HIPC) margin; pays its elected state officers much higher than what Members of Parliament in developed countries are paid as seen in the SRC table on page 12.

There is a huge income disparity between what Kenya's elected state officers earn what the average citizens who pay their salaries through their taxes earn. The per capita income of Ksh 2000 per month means that MPs earn 400times more and the president 900times more than the average citizen per month. With Kenya being a largely agricultural economy and the current minimum wage being Ksh 4,350 per month, MPs earn over 200times more and the president over 400times more than the majority of workers and small scale farmers employed by the agricultural sector.

1.2 Pay Determination for State Officers in the Government of Kenya

The table above summarises the amount of money that taxpayers are paying these leaders to perform these functions in the five year term of officer for each. Kenyan taxpayers will in the 2013-2018 period spend a huge amount of money to pay the over 2000 people elected, nominated and appointed following the March 4, 2013 general elections. These include the President and Deputy President (2); at least 350 Members of the National Assembly; at least 68 Members of the Senate; 47 Governors; 47 Deputy Governors and 47 Speakers of County Assemblies; and at least 1450 Ward representatives to County Assemblies. These numbers state the lowest possible as the non-election of women will mean

6 Salaries and Remuneration Commission (SRC), Kenya Gazette Notices No. 2885, 2886, 2827 and 2888 Remuneration and Benefits of State Officers in the Executive, Dated 2th February 2013 and Effective, March 1, 2013
7 *http://visualizingimpact.org/visuals/politicians-salaries accessed on March 19, 2014*
8 The Supreme Court in December 2012 ruled that Article 81 (b) of the constitution which states, "not more than two-thirds of the members of elective public bodies shall be of the same gender," be progressively implemented. However, this ruling exempts County Assemblies as Article 77(2) reads, "A county assembly consists of the number of special seat members necessary to ensure that no more than two-thirds of the membership of the assembly are of the same gender."
9 Salaries and Remuneration Commission, Pay Determination for State Officers in the Government of Kenya, February 2013

nominations, to meet the two thirds gender rule[8] particularly in County Assemblies, where the rule applies immediately after the 2013 General Elections.

According to the Salaries and Remuneration Commission (SRC)[9] , Kenya's wage bill has taken up more than one third (35%) of all taxes / revenue collected annually and is the highest compared to other African Countries (29.5%); Asia (23.1%) and the European Union (16.3%). While a review of the same has been proposed, it remains critical to ensure that both the elected and tax payers are aware of the quality of work they should expect from paying these hefty amounts and are able to constantly monitor performance in order to get their money's worth.

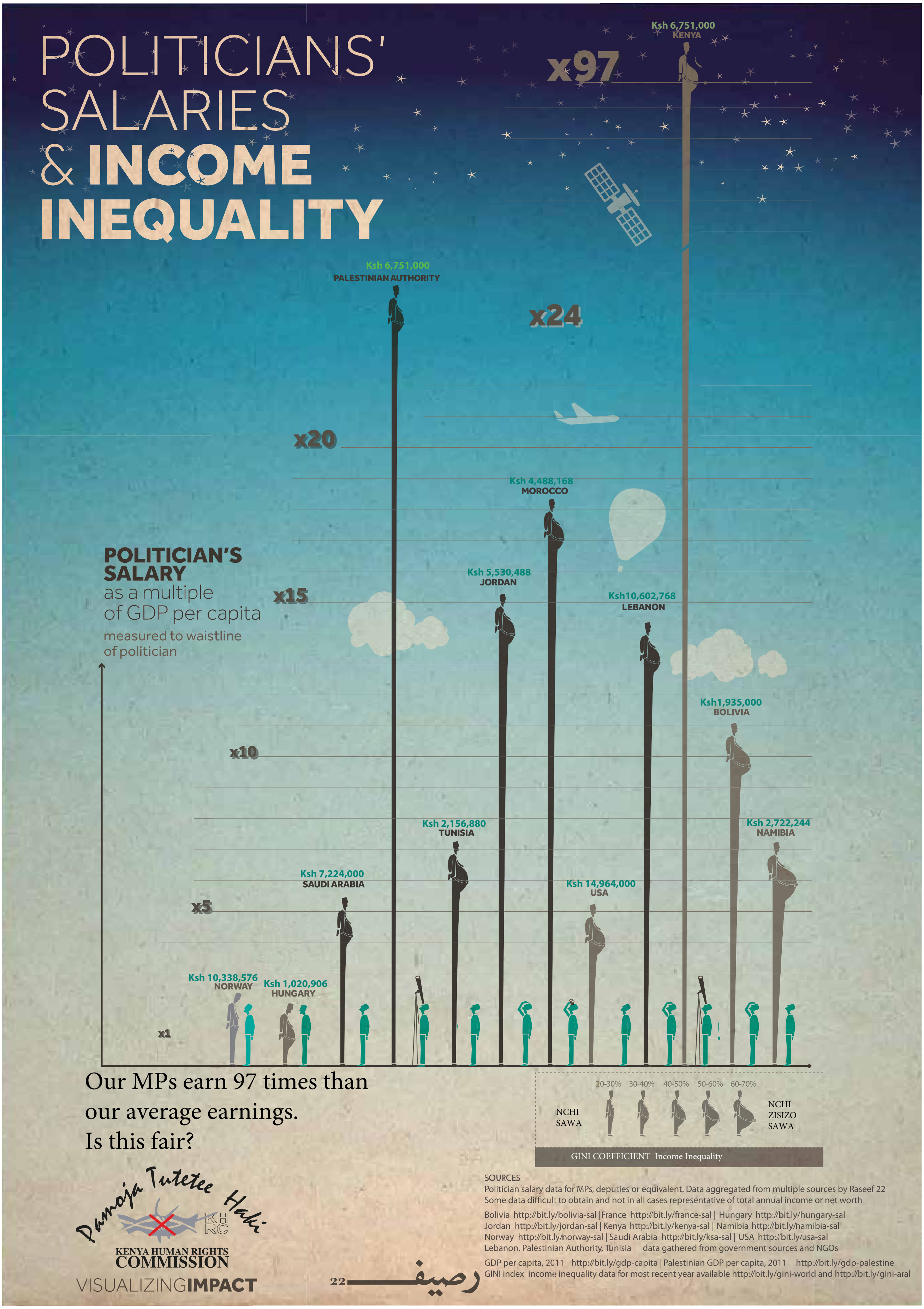
Elective Office	PROPOSED MONTHLY REMUNERATION		TOTAL PER YEAR (MINIMUM)	ANNUAL TOTAL FOR ALL	TOTAL EARNED IN 5YEARS	TOTAL PAID BY TAXPAYERS IN 5YRS
	MINIMUM	MAXIMUM				
1. President (1)	1,237,500	1,650, 000	14,850,000	Ksh 14,850,000	Ksh 74,250, 000	Ksh 74,250,000
2. Deputy President (1)	1,115,625	1,487,500	13,387,500	Ksh 13,387,500	Ksh 66, 937, 500	Ksh 66,937, 500
3. Speaker of National Assembly (1)	990,000	1,155,000	11,880,000	11,880,000	59,400,000	Ksh 59,400,000
4. Deputy Speaker of NA (1)	792,000	1,056,000	9,504,000	Ksh9,504,000	Ksh47,520,000	Ksh47,520,000
5. Member of National Assembly - MP (at least 349)	532,500	710,000	6,390,000	Ksh6,390,000	Ksh31,951,000	Ksh11,150,900,000
6. Speaker of Senate (1)	1,237,500	1,320,000	14,850,000	14,850,000	74,250,000	Ksh 74,250,000
7. Deputy Speaker of Senate (1)	990,000	1,056,000	11,880,000	11,880,000	59,400,000	Ksh 59,400,000
8. Member of Senate (67)	532,500	710,000	6,390,000	Ksh6,390,000	Ksh31,951,000	Ksh2,140,717,000
9. County Governor (47)	640,681	854,241	7,688,172	7,688,172	38,440,860	Ksh1,806,720,420
10. Deputy Governor (47)	461,250	615,000	5,535,000	5,535,000	27,675,000	Ksh, 1,300,725,000
11. Speaker of County Assembly (47)	225,000	00,000	3,600,000	3,600,000	18,000,000	Ksh 846,000,0000
12. Member of County Assembly (at least 1450 + 772 nominated)	180,000	240,000.	2,160,000	4,799,520,000	23,997,600,000	Ksh 23,997,600,000

Source: Salaries and Remuneration Commission (SRC), Kenya Gazette Notices No. 2885, 2886, 2827 and 2888 Remuneration and Benefits of State Officers in the Executive, Dated 2th February 2013 and Effective, March 1, 2013 and revised on 28th September, 2013

Studies[10] have shown that the same voter who jubilantly celebrates the win and coming into office of the leaders that s/he voted for often gets disappointed in their performance within 3-6months after the general elections. This raises questions on why the disappointment with the people that the voter, only 3-6months before passionately believed could do the job that s/he was being elected to do. Could it be because there is a misunderstanding on the role that elected officers are expected to play?

The sections that follow briefly explain the role - key functions, duties or job description of each of the elected state officers.

10 http://mobile.nation.co.ke/news/What-Kenyans-feel-about-the-Jubilee-government/-/1950946/2236636/-/format/xhtml/-/4tplttz Accessed on March 19, 2014



POLITICIANS' SALARIES & INCOME INEQUALITY
Ksh 6,751,000
KENYA
x97
Ksh 6,751,000
PALESTINIAN AUTHORITY
x24
x20
Ksh 4,488,168
MOROCCO
POLITICIAN'S SALARY
as a multiple of GDP per capita
measured to waistline of politician
x15
Ksh 5,530,488
JORDAN
Ksh10,602,768
LEBANON
Ksh1,935,000
BOLIVIA
x10
Ksh 2,156,880
TUNISIA
Ksh 2,722,244
NAMIBIA
Ksh 7,224,000
SAUDI ARABIA
Ksh 14,964,000
USA
x5
Ksh 10,338,576
NORWAY
Ksh 1,020,906
HUNGARY
x1
Our MPs earn 97 times than our average earnings. Is this fair?
20-30%
30-40%
40-50%
50-60%
60-70%
NCHI SAWA
NCHI ZISIZO SAWA
GINI COEFFICIENT Income Inequality
Pamoja Tutetee Haki
KHRC
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VISUALIZINGIMPACT
22 رصيف
SOURCES
Politician salary data for MPs, deputies or equivalent. Data aggregated from multiple sources by Raseef 22
Some data difficult to obtain and not in all cases representative of total annual income or net worth
Bolivia http://bit.ly/bolivia-sal |France http://bit.ly/france-sal | Hungary http://bit.ly/hungary-sal
Jordan http://bit.ly/jordan-sal | Kenya http://bit.ly/kenya-sal | Namibia http://bit.ly/namibia-sal
Norway http://bit.ly/norway-sal | Saudi Arabia http://bit.ly/ksa-sal | USA http://bit.ly/usa-sal
Lebanon, Palestinian Authority, Tunisia data gathered from government sources and NGOs
GDP per capita, 2011 http://bit.ly/gdp-capita | Palestinian GDP per capita, 2011 http://bit.ly/gdp-palestine
GINI index income inequality data for most recent year available http://bit.ly/gini-world and http://bit.ly/gini-aral

2.0 The Principle of Separation of Powers

The World's oldest Parliament is in Iceland (The Althing) that first sat in the 10th Century on 23rd June, 0930. Source: Wikipedia.

The earliest forms of government concentrated power in one person; the absolute monarch. This person was the head of state, commanding his nation's armies and with his personal opinion essentially being the nation's foreign policy. The absolute monarch was also the chief law maker (legislature) whose opinion and that of those close to him determined what was legal or illegal, tried offenders and determined who was guilty or innocent and what punishment should be meted to those found to have broken the law. The absolute monarch was also the chief executor / implementer. S/he determined what taxes should be paid and how they should be collected and by whom. The absolute monarch also said who should be employed in the armed forces or police and determined if they should be paid and if so how much. All those working for monarch and by extension the state also reported to him directly or to those that s/he had personally appointed. Citizens' role in an absolute monarchy was to pay taxes and obey the law without questioning or complaining about the conduct of their leaders.

Unsurprisingly, abuse of the power of the absolute monarch was common, often through the influence of those closest to the monarch. Various historical texts including the bible cite numerous examples of abuse of power in stories such as the making of laws that required all citizens to worship the king with non-compliance being punished through death in a lions' den, guillotine or beheading. Many also died in prisons.

Today, the term 'absolute monarch' who was often not elected but inherited his/her throne has been replaced by the term 'dictator' which captures the same concentration of power in one person, with the only difference being that dictators often come into power through elections and are often quite popular when at elections and hence their words have great influence on the national psyche. An example of this is Germany's Adolf Hitler who came into power through elections and was extremely popular at the start of his reign. However, because it is very easy for citizens to let a popular leader to go unchecked, it is often such leaders that easily become dictators if there is no clear system of checking their power or if the system is not strictly adhered to.

After thousands of years of trying out various forms of government, it has become clear that the concentration of power in one person can turn even good people into bad leaders or cause them to leave a legacy of unjust, tyrannical leadership that impoverishes any nation as his/ her cronies abuse power in the absolute leader's name. Ethiopia's Haile Selassie is a recent African example of such a situation. This realisation is best expressed in the adage "Power corrupts and absolute power corrupts absolutely".

The functions of the government are many and diverse. It is necessary to divide these functions amongst specific organs, so that the responsibility for performing them is clear and does not result in concentration of power in one organ. Over the years, the principle of separation of powers has evolved as a preventive and curative measure against the adverse effects of concentration of power in one person or centre. The division of governmental power under any constitution is done in two ways - vertically and horizontally.

Kenya's history acknowledges that the many amendments to the independence constitution resulted in the concentration of powers in the presidency. The Constitution of Kenya, 2010 therefore reinforces the principle of separation of powers and seeks to completely avoid concentrating power in one centre or person.

In the Constitution of Kenya, 2010, cutting down the powers of the absolute monarch or dictator is achieved by horizontally dispersing power to the three arms of government; Legislature, Executive and Judiciary is in Kenya. This is a well-known concept in Kenya because it existed in the independence constitution. However, because it was greatly abused and watered down in the first fifty years of Kenya's independence there remains a need for intense civic education on its ideal application.

The Constitution has used a tool or system called devolution to disperse power vertically by creating two levels of government - national and county.

Article 6 (2) of the Constitution states that "the governments at the national and county levels are distinct and inter-dependent and shall conduct their mutual relations on the basis of consultation and cooperation." Article 191 which addresses conflicts between county and national governments makes it clear that County governments are not subordinate to national government. This is through the fact that article 191 (4) contemplates and recognizes that there can instances where county legislation would prevails over national legislation.

Consultation and cooperation are also critical as see through the fact that County assemblies will enact legislation which will be enforced at county level. In order to do so, there will be a need to build capacity for prosecution for the violation of county legislation. This implies the need for consultation between counties and that Director of Public Prosecutions (DPP) and even a possible negotiation for transfer under article 187 of prosecutorial functions if it is found these functions are best performed by county governments. Transfer would still mean that ultimately quality control would remain the duty of the DPP.

2.1 Checks and balances through the three Arms of Government

The Constitution of Kenya applies the principle of separation of powers both horizontally and vertically. It disperses power vertically through devolution which creates two levels of government – national and county.

Horizontally, government consists of three arms each with specific functions – the Legislature which makes law or legislation especially on the use of national revenue ; the Executive which implements the by making and spending on budgets approved in law by the legislature; and the Judiciary, which resolves disputes by interpreting laws[11]. Each arm has separate and independent powers and areas of responsibility so that no arm has more power than the other branches. Each arm acts as a check and balance on the other.

Without a system of checks and balances each institution can literally become too powerful; a law unto itself and in the process stifle the other two arms to revert in an absolute monarchy or dictatorship. Separation of powers ensures that each arm exercises a constitutional authority over the other.

For example, the executive drafts the national and ministerial budgets but cannot use a nation's revenue to implement this budget unless the legislature approves the budget by passing the Appropriations Bill into a law that allows spending. This way, the legislative arm acts as a check on how government uses its people's taxes. This means that the executive (Kenya Revenue Authority, ministries and county governments that collect taxes e.g. though levies, licences, service charges etc) cannot be the collect taxes and use this revenue without being checked by parliament through the appropriations bill and other mechanisms such as the Controller of Budgets, the Auditor General, parliament's the Public Accounts Comminute etc that hold the executive accountable for the use of state resources.

Another example of the three arms of government serving as checks and balances on each other is when parliament (legislature) votes to initiate disciplinary proceedings against the Judicial Service Commission (JSC) members (judiciary) and the president – the executive constitutes such a tribunal to vet or discipline judges. Or when parliament votes to expand or contract the authority of the courts or of the executive. Similarly when courts make orders directed against the executive and the judiciary as for example when the courts declared that the degazzetment of the SRC gazette notice is unconstitutional, that is not interference with the work of the other arm but an important manifestation of a system of checks and balances. All of the above are manifestation s of the doctrine of separation of powers.

Under the Constitution of Kenya, 2010 the Legislative and Executive arms of government will now be at the two levels – National and County. This means that of the eight state officers elected following the March 2013 elections, four; namely The President, Deputy President and the Governor and Deputy Governor will serve in the Executive arm of government; while the other four will serve in the Legislative arm of government namely the Constituency Representative (MP) and Woman Representatives to the National assembly, the Senator and the Ward Representative to the County Assembly (County Representative).
The functions and responsibilities of those serving in the Executive are different from those of elected leaders serving in the Legislature. This brief therefore summarizes:-

i) The general function and responsibilities of the four legislators elected in Kenya; then explains the slight differences in the roles each legislator will play.
ii) The specific function and responsibilities of the President and deputy president; and separately the role of the Governor and deputy governor, who serve in the Executive arm of government.

11 Baron Montesquieu was a French philosopher who asserted that concentrated power is dangerous and leads to despotism of government and is credited as the originator of the theory of separation of powers.

2.2 Key Functions of All Legislators – Regional, National, Senate and County Assembly

One of the major changes that the Constitution of Kenya 2010 introduced is in the definition and composition of 'Parliament'. Article 93 (1) states that the Parliament of Kenya now consists of two houses; the National Assembly and the Senate. This means that the term 'Member of Parliament' or MP now refers to all the elected state officers who will sit in both the National Assembly and the Senate.

At national level, the Legislative arm of government refers to Parliament i.e. the National Assembly and Senate. Kenya is part of the East African Community (EAC) which also has three arms of government – the Executive, Legislature and Judicial arms. The legislators that voters elect into the Parliament in Kenya are the ones that appoint legislators to the East African Legislative Assembly (EALA). This means that the peoples' choices at the national general elections also influence Kenya's strength at regional level.

At county level, the Legislative arm of government refers to representatives elected from each ward to serve in County Assemblies in each of the 47 Counties. The term legislators therefore refers to all members sitting not only in the three houses – Senate, National Assembly and County Assembly, but also to legislators that will be appointed by political parties to the East African Legislative Assembly (EALA).

The Constitution of Kenya, 2010 in line with international best practice identifies eight key functions that at national and county level should perform which are also largely the same as those of members of the East African Legislative Assembly (EALA); save for differentiations arising from the level of government. With the exception of function of approving the declaration of war or a state of emergency, which only applies to national level legislators, the other seven functions apply to all legislators. It is also important to note that legislators at County, National and Regional level can only perform these functions within their sphere of influence. That is Members of County Assemblies (MCAs) or County Representatives check the performance of and can remove the Governor from office; while Parliament checks the performance of and can remove the President from office. The legislators at regional level – the East African Legislative Assembly (EALA) check the performance of the regional executive.

Globally[12] , there are six key functions that legislators at whatever level must undertake. These are:-

1. **Representation[13]: Legislators** have a duty to represent the people, that is; to listen to and express the will of the people in Parliament. To do this, legislators must:-
    - Listen to the people; interact constantly with the different groups they represent to know their views on different issues.
    - **Special interests: Equality/ Non-Discrimination:** The people of Kenya are not homogeneous; neither are the 47 counties. The needs of all women, or all poor people, minorities or marginalised people are not the same. All legislators have a duty to ensure that the diverse needs of different groups they represent are addressed in decision-making, law and budgeting. In particular women representatives and MPs who are in Parliament to represent special interests must be particularly firm in ensuring that the needs of those they represent are addressed.
    - Articulate citizens' concerns to implementing institutions.

12 See African Parliamentary index and the Open Budget Survey, 2012 available at www.parlcent.org/en/.../API-African-Parliamentary-Index.pdf accessed 14, March 2013
13 Articles 3 (a) and 95(20 , Constitution of Kenya
14 Articles 94 (5-6) and 2(5), Constitution of Kenya

- Be accessible to the people and always act in the peoples' best interests both locally and internationally.
- Ensure that Parliamentary proceedings are open to the public and the media.
- Ensure that citizens always know what their legislator is doing, what position or opinion s/he holds on crucial issues and why.

2. **Legislation[14] :** Legislators have a duty to make laws by researching, considering, debating then passing bills introduced by the Executive or by private members. They can also repeal or amend laws. Some of the critical aspects about legislators duty and power to make laws include:-
    - **International Agreements and Treaties:** Legislators have a duty to authorize or prevent the Executive arm of government from entering into international agreements / treaties that do not favour the interests of Kenyans.
    - **Laws on compliance with international Law:** Under Article 2 (5) Parliament has a duty to make laws that facilitate compliance with international laws and commitments that Kenya has entered into e.g. Millennium Development Goals (MDGs); the Rome Statutes etc.
    - **Constitutional amendment and County Boundaries:** Article 94 (3) allows that Parliament may consider and pass amendments to the Constitution including the alteration of county boundaries but only if such amendments are in the best interests of the people including special interest groups; and is in line with the Constitution- However, it is important to note that power of legislators at national level to amend the constitution is highly limited. This is because constitutional provisions such as the entire Bill of Rights (and thus by extension other provisions that relate to it) are embedded and can therefore only be amended through a referendum.
    - Legislators must act responsibly because they have the power to overrule the President in law making. Under Article 115 (4) of the Constitution, a bill that the President has expressed reservations on can still become law without the President's assent if two thirds of the National Assembly and two thirds of Senate vote to have the bill become law irrespective of the President's reservations. A bill that has gone through all the constitutional requirements becomes law if the President does not sign it within seven days of it being presented to her/him for assent.
    - Make laws on how government will raise money from taxes and approve government spending.

3. **Power of the Purse and Fiscal Oversight:** The people of Kenya finance government through their taxes[15].
    - **Citizen participation in budget making:** Ensure that the people (including minorities) are aware of and participate within the stipulated time each year in community level budget making processes and ensure that the Executive publishes the simplified / Citizen Budget and has adequate time to give their views on the budget.
    - **Vertical division of revenue:** Determine how national revenue (public funds) will be divided between National and County Governments
    - **Horizontal division of revenue:** Decide how much money will be allocated to different development priorities / cabinet portfolios to meet constitutional obligations e.g. on economic, social and cultural rights[16]. This is a function of legislators in the National Assembly.
    - **The Appropriation Act** is one of the most critical laws that Parliament makes each year because it authorizes the Executive to spend public funds as proposed in the Executive Budget Proposal. Legislators have a duty to scrutinize the national budget (Pre-Budget statement and executive Budget proposal) to check that budget responds to her/his peoples' needs or interests; ask the Executive to make changes to the budget

15Taxes include the CESS paid by farmers, business license fees paid by traders (including fisher folk and herders), Value Added Tax (VAT) and other taxes paid on all goods and services; excise duty paid on all imports; property tax such as rates on leased land and fees for processing title deeds etc
16Article 43, Constitution of Kenya
17Article 95 (4),Constitution of Kenya;

proposal (supplementary budget) and only if satisfied that the peoples' needs have been addressed, pass the Appropriations Bill into that will allow government to spend public funds (ex-Ante approval).

- **Taxation:** By approving the Finance Bill which outlines how the Executive proposes to raise national revenue, legislators have the responsibility and power to determine the taxation regime.
- Monitor government's use of public funds by scrutinizing the quarterly reports of the Controller of Budgets and the annual Auditor General's report to ensure that spending has complied with approved budget.
- Prevent waste and corruption by demanding explanations on complaints about any government spending that does not comply with the approved budget.
- **Prevent Poverty:** Research / study economic indicators, understand the effect of taxation and how inflation, recession and unemployment happen and make laws to prevent these adverse economic effects or poverty.
- Ensure that laws made create budget support offices that have adequate authority and money to properly do their work. These include the Public accounts Committee of Parliament, the Office of the Auditor General, Controller of Budgets, the Commission for Revenue Allocation (CRA) and the Salaries and Remuneration Commission (SRC) etc.
- **Wealth declaration:** In order to assure the citizens that they have the good will and integrity to undertake the above, legislators have a duty or responsibility to open themselves up to scrutiny by publicly declaring their wealth as a measure that facilitates transparency and accountability. While this is not function of the legislature, but of the executive to provide a mechanism for wealth declaration, legislators should be aware that the public expects it of them and therefore they must comply with the mechanism put in place for them to declare their wealth.

4. **General Oversight:** Legislators have an oversight duty with respect to:-
   - **Compliance with the Constitution:** Ensure that all state officers perform their duties in line with the Constitution, recognize that all state organs exist to serve citizens and treat citizens with respect. Where a complaint is made on the conduct of any public officer, legislators can raise questions and motions in Parliament which the Executive must answer.
   - **Vetting public appointments by Executive:** Legislators have a duty to vet and approve candidates being considered for appointment before they are appointed to serve in other state offices created by the Constitution.
   - **Natural resources:** Under Article 71 of the Constitution, Parliament has a duty to consider and only if satisfied, ratify or authorize a transaction that involves the grant of rights or concessions by or on behalf of national government, for the exploitation of any natural resource of Kenya; and to enact legislation on the extraction of natural resources.
   - **Check the President's and Executive's performance:** Article 132 of the Constitution requires the President to report once a year in an address to the nation on all the measures taken and the progress achieved in the realisation of the national values, referred to in Article 10; and report on progress made in realisation of international obligations. Legislators have a duty to scrutinize and debate this report and on behalf of the people hold the Executive accountable for its performance.
   - **Constitutional commissions:** Parliament has a duty to receive, consider and act on petitions for the removal from office of any member of independent constitutional commissions on the grounds of violating the constitution, gross misconduct, incompetence, bankruptcy or physical or mental incapacity.
   - **Public access to parliamentary proceedings**[18]**:** Legislators have a duty to ensure that they conduct

18 Article 118 of the constitution of Kenya

Parliament's business in an open manner, and its sittings and those of its committees shall be open to the public; facilitate public participation and involvement in the legislative and other business of Parliament and its Committees and ensure that the public and any media are not excluded from any sitting unless in exceptional circumstances the relevant Speaker has determined that there are justifiable reasons for the exclusion.

5. **Review and remove President from office:** Legislators have a duty to review or evaluate the work and conduct or behaviour of the Executive. If unsatisfactory, Parliament can initiate a process to remove the President and Deputy President from office. Under article 152 (6-10) a member of the National Assembly, supported by one-quarter of the members can propose a motion requiring the President to dismiss a Cabinet Secretary for violation of the Constitution, crimes under national or international law or gross misconduct. County Assemblies too can remove their Governor from office but only after the Senate approves their decision to do so.

6. **Declare war; extend state of emergency and term of Parliament:** Parliament / MPs in both the National Assembly and Senate have a duty to approve declarations of war and the extension of state of emergency. MPs can reverse the President's decision to go to war by recommending a withdrawal of Kenyan troops. They can also bring to a stop the suspension of freedom of movement, information and other rights that are suspended during a state of emergency in an area where there is internal insecurity. When Kenya is at war, Parliament can by a two thirds majority vote extend the term of Parliament; but not by more than twelve months.

2.2 Functions and Responsibilities of Legislators at Regional Level – East African Community (EAC)

Source: EALA website http://www.eala.org/ - accessed on March 10, 2014

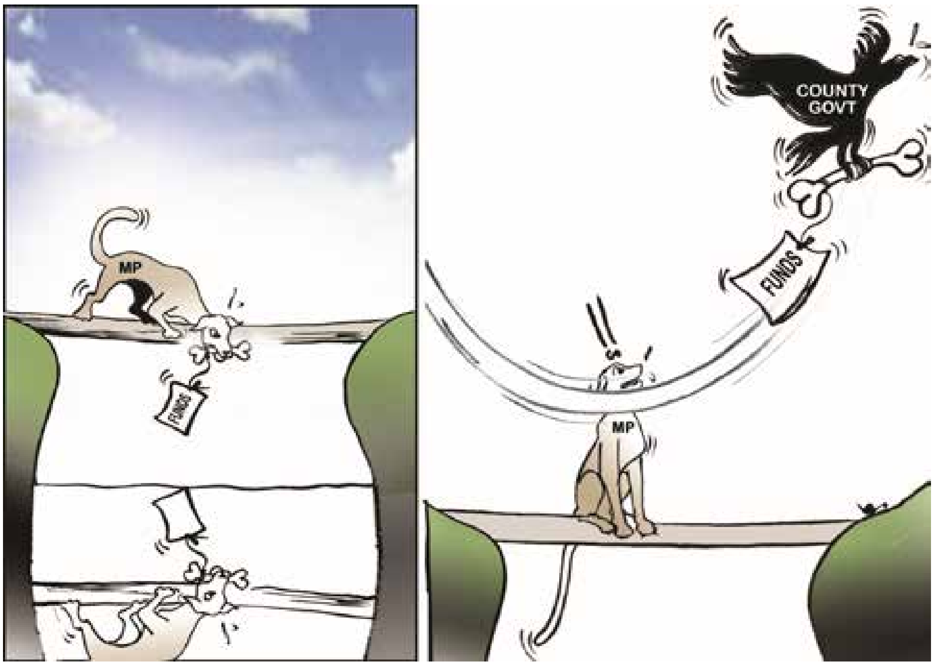
Kuria, Iteso and Maasai into being citizens of different countries. Formal relations started with the construction of the Kenya-Uganda Railway in 1897 – 1901, the establishment of the Customs Collection Centre 1900, the East African Currency Board 1905, the Postal union 1905, the Court of Appeal for Eastern Africa 1909, the Customs Union 1919, the East African Governors Conference 1926, the East African Income Tax Board 1940 and the Joint Economic Council 1940; Boundaries notwithstanding, the people of East Africa have continued to trade, intermarry and even own property across the borders.

Following independence, the East African community was formally re-established by the three heads of state for Kenya, Uganda and Tanzania in 1967. Unfortunately, the political relations fell apart in 1977. However, relations were re-established again in in 1994 through the Treaty for the Establishment of the East African Community. The Treaty was signed on 30th November 1999 by Kenya, Uganda and Tanzania. Burundi and Rwanda acceded to the Treaty and became full members in 2007, thus expanding the number of the Community Partner States to five.

The East African Legislative Assembly (EALA) is an organ of the East African Community; established under Article 9 of the Treaty for the Establishment of the East African Community.
Under the treaty, the assembly - EALA has nine members from each of the five East African Countries, thus making 45elected members. The 2012-2017 Assembly has a total of 52 members (including the Ministers for East African affairs in each country, the Secretary General and the Counsel to the Assembly in an ex-officio capacity. The nine members representing Kenya in EALA's 3rd house – 2012-17 are:- Hon. Nancy Abisai, Hon. Zein Abubakar, Hon. Sarah Talaso Bonaya, Hon. Mutuku Mathuki, Hon. Mumbi Ng'aru, Hon. Saole Ole Nkanae, Hon. Abdi Abubakar
D. Ogle,
Kenya's nine representatives to the EALA and all the staff and activities of the East African Community are ultimately financed by tax payers in the five member states. Any budgets developed by the executive arm of EAC and approved by its legislative arm – the EALA and loans or financing agreements entered into are paid for by taxpayers in the five member countries. It is therefore critical that taxpayers know what these legislators do and how it advances the interests of Kenyans living in Kenya and throughout East Africa.

Legislators in EALA undertake the same six functions outlined on page performed by all legislators. However, they perform these functions in order to further the East African Community's objectives mainly relating to making it easier for East African people to travel within the region, trade with each other and enjoy the benefits of trading as a block of five countries while trading with other parts of the world. Kenya's representatives to EALA therefore perform their functions by liaising with all legislators in Kenya on matters relating to the Community. They also debate and approve the budget of the East African Community.

2.3 Functions and Responsibilities of Legislators in National Government



Separation of powers means that the 290 Constituency Representatives to the National Assembly (MPs) should no longer manage CDF

2.2.1 Constituency Representative to the National Assembly (MPs)

Article 95 (1) of the Constitution states that the National Assembly represents the people of the constituencies and special interests. This means that the 290 constituency representatives, the 47 women representatives and the 12 nominated women and men representing other special interests are all referred to as Members of Parliament (MPs) who sit in the National Assembly. The key functions of legislators enumerated earlier apply to all the members of the National Assembly.

However, it is critical to note that under the CDF Act, 2002-3, a Members of the National Assembly did for the 2003 – 2014 decade perform an executive function which rightfully should have been performed by local authorities or government officers working for the various ministries and departments at ward and district level at the time. Even when the CDF Act first came into effect, its lack of separation of powers was noted and flagged of as an issue that needed to be addressed. However, with the ineffectiveness of the most Local Authorities and the poor service delivery that resulted from national government's inability to effectively decentralise the services which have now been assigned to counties, it was easy to obscure this constitutional anomaly and whip up public support for it. A decade of CDF has left useful lessons for the Kenyan public – in the form of many incomplete or white elephant projects, law suits that have challenged both the misappropriation of CDF funds, raised the cost of building or purchasing capital equipment at community level and political patronage that has seen CDF projects mostly being located in the ward or specific village from which the MP hails or in areas where the MP got or would like to entice votes from.

Separation of Powers is a principle and best practice in democratic governance that requires that those who make laws e.g. to approve the national budget and monitor its use (Legislative role) are not the same ones that implement or use the money (Executive role); as this would mean that they are monitoring themselves. The strict application of this principle of separation of powers means that the 290 constituency representatives to the National Assembly should no longer be involved in project implementation using CDF or other public funds. The continued existence of CDF as initially structured and even with its various amendments still results in spending public finance in a manner that is inconsistent with the Public Finance Management Act enacted pursuant to Article 225 of the Constitution.

Following the promulgation of the Constitution of Kenya, 2010 and the establishment of County Governments, all the functions that used to be performed by CDF were constitutionally assigned to County Governments under Schedule IV, with the exception of education, which is a national function. Article 174 (1) (h) of the Constitution of Kenya, 2010 identifies one of the objectives of devolution as to facilitate the decentralisation of State organs, their functions and services, from the capital of Kenya. This suggests that the state should decentralise its projects through the devolved government structure.

While it has been argued that CDF should continue to exist but be dedicated to education because it a national government function, Article 201 of the Constitution requires adherence to principles of prudence, accountability, ensuring that fiscal reporting is clear and the need to lower the burden of taxation.

The continued management of CDF by legislators poses accountability challenges because of the conflict of interest created MPs annually approving the national budget, with 2.5% of national revenue being allocated to essentially to themselves through CDF. It also means that it would be difficult for the National Assembly or any of its committees to summon an MP or hold the National CDF Board accountable where misappropriation of funds occurs. Prosecuting cases of alleged CDF misappropriation also aggravates the already sour relations between the legislative and judicial arms of government because the central role that MPs play in CDF means that it would not only be the CDF committee being prosecuted but also the MP in his personal capacity.

It also poses a prudence challenge because it pays with taxpayer's money, CDF managers employed by MPs, to perform a job for which national and county governments are already paying other more competent staff to perform in the form of two County Directors for Education (CDEs) in each County (for quality assurance and TSC) coupled with the area education officers (AEOs) under them. These staff can at no extra cost to the taxpayer supervise head teachers to implement the projects that CDF has been performing in schools. County governments which have constitutionally been assigned the function of managing Early Childhood Education (ECD) under schedule IV can supervise head teachers to implement any projects formerly done by CDF in nursery schools.

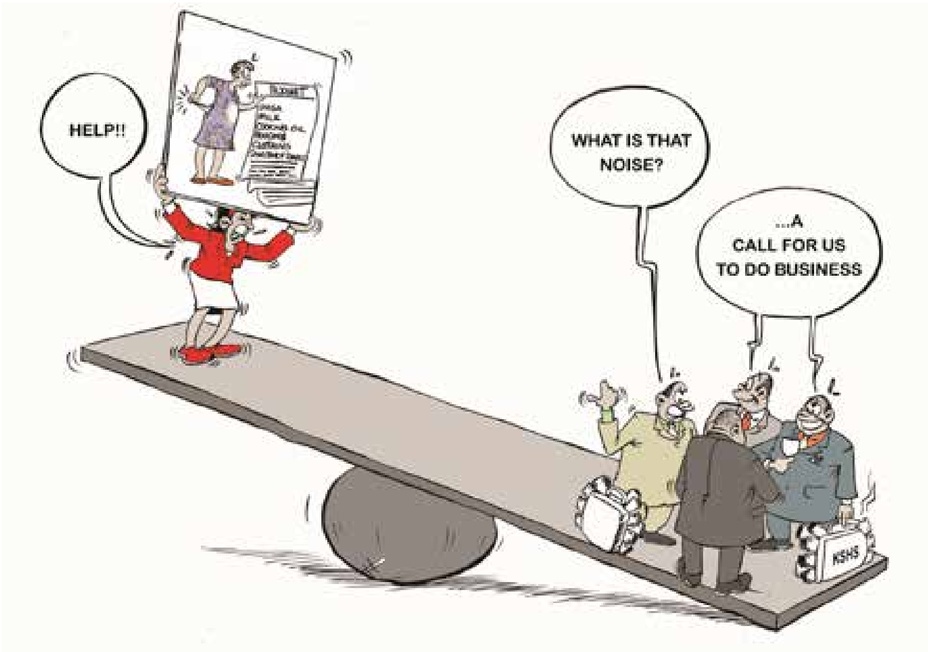
The constitution establishes County Governments with the competence and capacity to manage 15% of the national revenue, together with the 0.5% that some counties will receive under the equalisation fund and it is expected that this percentage will with time rise. Through this, It therefore not fiscally prudent for taxpayers to continue foot the additional burden of paying for ward and constituency managers' employed by each MP and the National CDF Board which could put to other use.

Sadly, instead of repealing the Act, CDF is being boasted through UWEZO and the ongoing debate aimed at increasing CDF from 2.5 to 5 or 7% of national revenue. There are also bills in several County Assemblies to replicate CDF by assigning Members of County assemblies (MCAs) similar funds for each ward. Woman Representatives to the National Assembly are also deliberating an affirmative action bill that will also seem them in their legislative capacity also assigned a fund to implement or execute. Should these succeed, Kenyans will continue to bear a heavy burden of taxation to pay a huge wage bill and leaving less and less funds for the improvement of service delivery.

The political constituency is not a unit of decentralization. It is crucial that Members of the National Assembly stick to the clear legislative and oversight functions that they ought to be effectively performing instead of appropriating the role of the executive through CDF.

KHRC recommends that CDF be allocated through the county government through the infrastructure provided by the Public Finance Management Act, and as ring fenced conditional grants to be spent in the designated constituencies.

2.2.2 Woman Representative to the National Assembly (MPs)



The very small number of women in Parliament in the five decades prior to the Constitution of Kenya, 2010 meant that women's issues are rarely heard or supported in Parliament which makes decisions through simple majority voting.

Why Women Representatives

- Democracy is about respecting the will of the majority while protecting the interests of minorities and the marginalised.
- It is possible for a large group of people to be marginalised or discriminated against through law making and budget allocation e.g. under the Apartheid laws in South Africa or the Colour Bar in pre-independence Kenya. In the 50 years since independence, the number of women in Kenya's Parliament has not exceeded 10%. This very small number of women has meant that women's issues are rarely supported in Parliament which makes decisions and allocates funds based on simple majority voting.
- Discrimination is expensive and undesirable. For example, despite there being over 7 Million unemployed people in Kenya, today, the culture of most Kenyan communities allows men to decide whether or not to work especially where the family derives its livelihood from agriculture. This means that patriarchy robs Kenya of a huge workforce, which could increase Kenya's agricultural productivity and thus Kenya's revenue that could have been generated if both men and women were working side by side on farms.
- Development is measured not by looking at how wealthy the wealthiest are or the total income a country generates (GNP, GDP, per capita) but by looking at what proportion of the population is poor; how badly off the poorest are; how the wealth is distributed and the gap between the rich and the poor. This means discrimination or the marginalization of any group decreases the chances for a country to be rated as developed or scoring high on the Human Development Index[19] .
- In Kenya, the gap between the rich and the poor is greater today than at independence. This suggests that 50 years of a male dominated Parliament (90% male) has not been able to represent and address the interests of the poor; majority of whom are women and other minorities and marginalised groups.
- Development happens when the poor, marginalised and minorities are involved and speak for themselves.
- In August 2010, the people of Kenya addressed the above challenge by overwhelmingly voting for Constitution of Kenya, 2010 which is categorically against discrimination; recognises Kenya's diversity and promotes equality.

- In the past, at less than 10% of Parliament, the women in Parliament were too few to garner the support or votes needed to advance women's issues because decision making in Parliament in done by voting; where the majority always wins.
- The Constitution specifically tasks the entire Parliament to be embrace diversity and be sensitive to the interests of minorities and marginalised groups.
- The Constitution goes further to provide specific mechanisms to ensure that marginalised groups and minorities are representation in Parliament. Examples of such mechanisms include Article 27which embeds equality in Kenya's Constitution; Article 81 (b) which requires that no more than two thirds of any elective body should be of the same gender; Article 90 that requires the nomination of youth, persons with disabilities and workers as special interest groups; Article 97 which establishes the 47 women representatives to the National Assembly.

Article 95 (1) of the Constitution states that the National Assembly represents the people of the constituencies and special interests. This means that the 290 constituency representatives, the 47 women representatives and the 12 nominated women and men representing other special interests are all referred to as MPs who sit in the National Assembly. The key functions of legislators enumerated earlier apply to the letter to all the 47 women representatives as they too are members of the National Assembly.

This position was created specifically redress the 50year historical injustice of male domination in decision making; to increase the voice of women in Parliament. These particular legislators exist to ensure that the interests of women, who make up 50% of the population, are not overshadowed in the often male dominated Parliament. Voters must therefore carefully monitor Woman Representatives to ensure that they articulate women's interests on each law, budget or any other decision made in the National Assembly.

Woman Representatives (and other legislators) must ask and get Parliament to see how each law, budget or policy will affect women? Has each law and every budget deliberated and passed into an Appropriations

Act taken affirmative action to uplift women? For example, has each year's national budget and each County budget allocated 15% to healthcare as recommended under the Abuja Declaration? Is water accessible; how much time are Kenya's women spending on fetching water? If not, what laws and budgets have been passed to improve access to water and have such budgets taken affirmative action to assign priority and larger budgets to the most water scarce areas? Is water affordable to the poorest, who are mostly the women? Can women in informal settlements safely access toilets, even at night? Is there a housing law that requires all landlords to build houses with safely accessible toilets? Are legislators raising gender specific questions to hold public officers accountable for attainment of gender goals? E.g. what are children officers, police, schools and parents doing to ensure children do not drop out of school due to FGM, early and forced marriages, lack of sanitary towels or child labour?

Women Representatives must push for affirmative action through legislation and their input into national and county budgets through the Appropriations Act, and not by demanding a CDF-like fund to implement. This is because tax payers are already paying other public officers (Governors and their CECs, doctors, water engineers, teachers etc) to do the actual implementation. Legislators' role is oversight, legislation and the approval of budgets to facilitate rights access for all.

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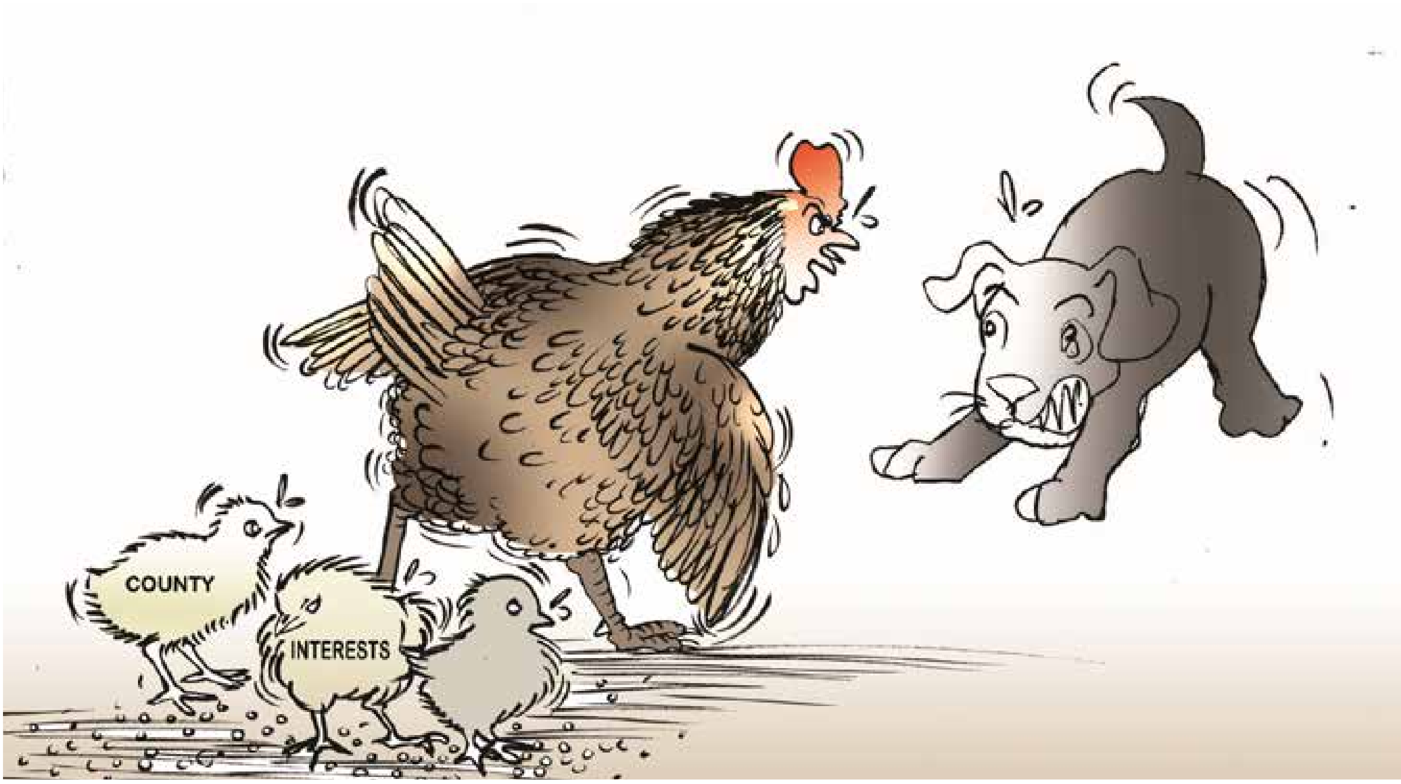
19 The Human Development Index (HDI) is a composite statistic that measures development by looking at of life expectancy (which is influenced by nutrition and food security, health, access to water and sanitation, security, education) and income indices and ranks countries into four tiers of human development. It was created by economists Mahbub ul Haq and Amartya Sen in 1990, and published by the United Nations Development Programme(UNDP).

2.2.3 Senators



The key role of the Senator is to ensure that decisions, laws and budgets made address and protect specific and unique county interests

The term **'Parliament' collectively refers to National Assembly and Senate** - Article 93 (1). The Senate consists of 68 members namely 47 members each elected by registered voters from counties; 16 women members nominated by political parties according to their proportion of Senate members elected; two youth members – one female one male; two persons with disabilities – one female and one male; and the speaker in an ex-officio capacity.

As previously mentioned, the Salaries and Remuneration Commission (SRC) in March 2013 proposed a downward review of MPs salaries from Ksh851,000 per month paid to the 10th Parliament (2008- 2012) to a range of Ksh 532,500 – Ksh710,000 per month. By using the minimum, each Member of the National Assembly would earn from tax payers over Ksh6.3M a year and over Ksh31M in the 5years s/he will be in office. In total, all the 67Senators will in 5years cost Kenyans over Ksh2Billion in salaries and allowances only. Once again, it is critical for Kenyans to know exactly what mandate, functions or job description citizens are paying these hefty amounts for.

Because Senators are also Members of Parliament (MPs) their duties are largely similar to those members of the National Assembly. However, it is critical to make the distinction in the role of Members of National Assembly and Senators.

Senate is designed to act as a bulwark against the tyranny of numbers that democracies sometimes create; to guard against the invisibility of minority interests. Under constitutional theory, the reason for having a bicameral house (two houses of parliament) is to ensure a horizontal check and balance on legislative power and to prevent a dictatorship of the majority.

The National Assembly's composition reflects of the democratic principle 'one man one vote'. Accordingly the population quota is the single most important determinant of the number of members of the national assembly. In the national assembly regions with a higher population routinely have a higher degree of representation. They end up with more members of parliament.

Counties are neither homogeneous in the challenges they face nor are they similarly endowed with resources. However, there are other factors besides population that must be considered in order to ensure effective representation of all the diverse interests that are found in any country. Such factors include geography, ethnic considerations, gender, and other interests. These are the factors that, informed the determination of County and hence senatorial boundaries. Under article 96(1) the primary role of senate is to 'represent the counties, and to protect the interests of the counties and their governments. While in the National Assembly densely populated Counties such as Nairobi, have more members of Parliament, in the Senate, however, a county with a high population density ends up electing the same number of senators,(1) with the sparsely populated county.

This is because the Senate is modelled on the principle of one interest, one vote. The result ideal result is that in the Senate the 'voice' of Mandera, a sparsely populated county, is equal to the 'voice' of Nairobi, the population differences notwithstanding. To emphasise the principle of one interest one vote, counties which end up with more senators by reason of the provisions of Articles 98(1)(c) and (d) vote as a single senatorial delegation. To minimise the dictatorship of the majority in the National Assembly, critical bills, particularly on money require the concurrent support of both houses.

Senators have a duty to ensure that the unique features, opportunities and requirements of their counties are recognised at national level, and accordingly addressed in decision making, law and budgeting. Article 202 states that revenue raised nationally shall be shared equitably among the National and County Governments. County governments may be given additional allocations from the national government's share of the revenue, either conditionally or unconditionally. Whether or not this happens for the benefit of a particular county will depend on how its senator performs her/ his duty or articulating its interests.

Senate also plays a judicial role in when it votes to impeach governors, deputy governors, the president and his deputy. This judicial role is however more political than judicial as political considerations loom large in impeachment hearings. The party that has the numbers in Senate, will prevail in impeachment proceedings. As things stand now, it is virtually impossible to impeach the president and his deputy because their coalition enjoys a comfortable majority in the senate. Senate also exercises oversight over the financial management of counties under Article 96(3) of the Constitution. To facilitate this role, Senate has, under Article 125, the same power as the high court to summon anyone to appear before it to answer questions relating to county finances.

However, this power under article 125 must be read in context. County assemblies have exactly the same power (see article 195) Read literally article 195 probably empowers county assemblies to summon anybody (including members of the national assembly and senate) to question them say on how national revenue is to be divided and allocated! Since Article 125 empowers 'either house of parliament" it could, if taken literally mean that even members of the National Assembly can summon Governors!

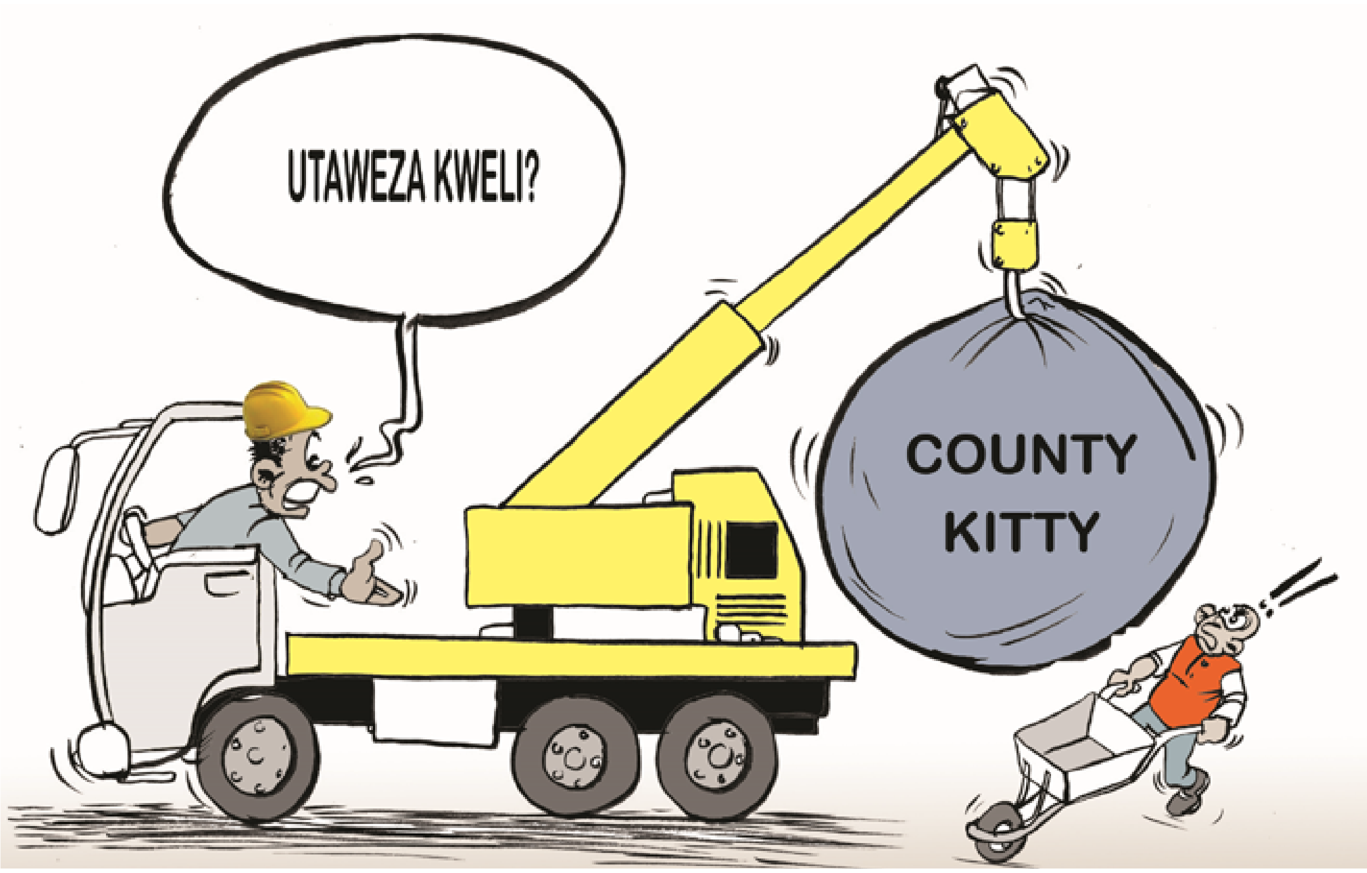
The better way to look at it is to see Senate as the residual authority in matters of public finances and with the power to summon governors when Senate is discussing the allocation of revenue to counties. However, for the day to day and routine issues of accountability, County Assemblies should have primary responsibility to exercise oversight and hold Governors accountable on the spending of public funds. That is consistent with the philosophy of devolution and more specifically with the principles of complementarity, subsidiarity and proportionality.

Ideally, Senate should not intervene where County Assemblies are able and willing to intervene. This is because the principle of subsidiarity which is the key guiding principle with respect to devolution, requires that decision making is done at the lowest level possible. Senate should therefore not intervene where Senatorial intervention is disproportionate to the issues at hand. Unfortunately, within the first year of Kenya's devolved system of government, this principle of subsidiarity was not well understood or practiced, and thus resulted in Senate summoning Governors on disproportionate grounds as it was largely on issues that County Assemblies were best placed to deal with.

However, the introduction of a Ward Development Fund Bill is seen as a way of Governors buying off legislators in county assemblies by bribing them with a fund that keeps them busy and relevant in the ward, hence leaving the governor largely unchecked by MCAs. As long as legislators are busy lording over a constituency or ward development fund, they will have little motivation to play their oversight role over either the Governor or the President and are more likely to bend to the will of these executives, especially if the Governor and majority of the MCAs or the President and majority of the National assembly are from the same political party.

The constitutional allocation of legislative power in Kenya has been faulted for not laying enough emphasis on this important role of diffusing the tyranny of the majority through the 'one interest, one vote principle'. Consequently, this has resulted in unending public debate on the legislative authority of Senate

2.3 Functions of Legislators in County Government



The Ward Representative to the County Assembly will make laws on how the county will be taxed and monitor how the Governor is spending the County's Money

2.3.1 County Representative

In the past elected representatives at sub-national level referred to as councillors were synonymous with unprofessional and uncouth behaviour; were often uneducated violent hooligans who were supposed to monitor the Executive (Town Clerk) but lacked the legal basis to do so resulting in a situation where most of the 175 Local Authorities, more than 80% of all funds allocated to them were spent on administrative expenses not projects to benefit citizens. The Ward Representative to the County Assembly is completely different and a shift from this past.

Ward Representatives to the County Assembly have largely the same eight functions of legislators enumerated earlier but will serve at county level in the County Assembly. The key difference is that instead of considering the performance of the President (executive arm of national assembly); Ward Representatives to the County Assembly will review and remove Governor from office but only with Senate's Approval. Members of the County assembly have a duty to assess the work done by the Governor, the County Executive Committees and county public service and if unsatisfactory hold Governor accountable for the poor performance of the Executive arm of county Government. Further, in recognition of the fact that often technical skills are lacking at the sub-national level, Ward Representatives to the County Assembly are also expected to extend to the County Assembly, professional knowledge, experience or specialized skills on any issue for discussion.

Ward representatives to the 47 County Assemblies will be paid a minimum of Ksh79,200 to a maximum of Ksh105,600 per month. In December 2012, the Supreme Court ruled that the two thirds gender principle in Article 81 (b) of the Constitution be progressively implemented in Senate and the National Assembly. However, this ruling does not apply to County Assemblies because Article 77(2) of the Constitution already provides a formula for achieving the rule in County Assemblies. All 47 Counties have 1450 Wards, but taxpayers who are also the voters will pay salaries and allowances to a higher number of County Representatives because they did not elect women. This price for discriminating against women will be highest in big County Assemblies such as Kiambu which elected only four women out of 60Wards, hence another 24 will have to be nominated and paid by taxpayers (who are also the voters) for five years.

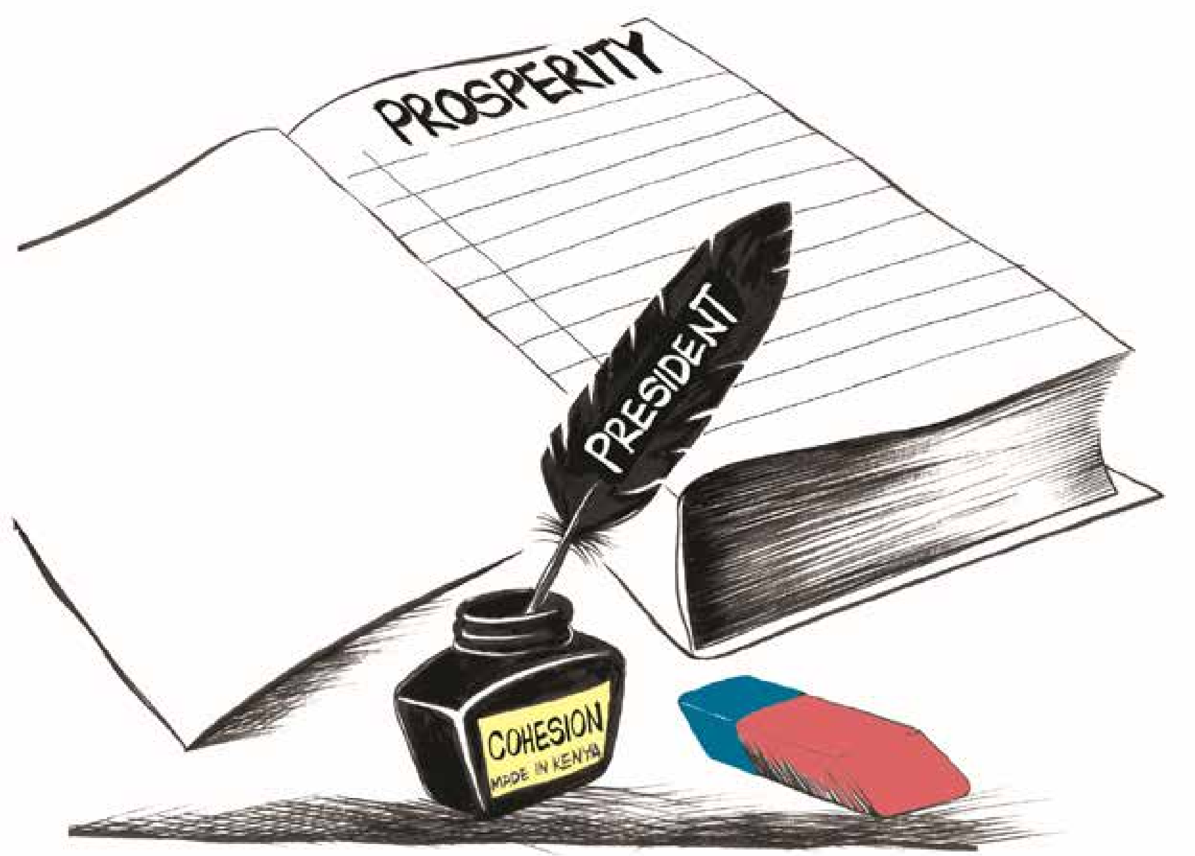
The principle of separation of power is clear that legislators – which are what Members of county Assemblies (MCAs) are, should not implement or execute projects. This means that the CDF-bills in many County Assemblies that are aimed establishing Ward Development Fund that MCAs /County Representatives will have control or patronage over are unconstitutional.

Such bills are also have legal anomalies as they aim to legislate on an area on which there is already existing legislation – the Public Finance Management Act, which applies to all public funds irrespective of whether they are in use at national or county level.

Finally, just like CDF, Ward Development Fund bills if passed will essentially be an 'live and let live; eat and let eat' way of Governors buying off legislators in their County by bribing them with a fund that keeps them busy in the ward but shuts them up on County finance matters, hence leaving the governor largely unchecked by MCAs.

As long as legislators are busy lording over and acting as the lead development officers in their constituency (for MPs in national Assembly) or ward (for MCAs) development fund, they will have little motivation to play their oversight role over either the Governor or the President and are more likely to bend to the will of these executives, especially if the Governor and majority of the MCAs or the President and majority of the National Assembly are from the same political party.

3.0 Elected State Officers in Executive Arm of Government National Government



The President has a duty ensure that i) Kenya is not poor; ii) Kenya is safe / secure; and iii) Kenya is internationally respected for adhering to international laws it has committed to

3.1 President and Deputy President

Kenya's 1963 independence constitution provided for the position of a President and a Vice President, who was appointed by the President and served at the pleasure of the President. It was common to hear in the news that the President had 'dropped' one Vice President and picked another with no explanation as to why. At one time, Kenya even stayed for a year without a vice president, raising questions on whether there was really any role that vice presidents played if the country could run for several months without one.

The Constitution of Kenya 2010 provides for a president of the Republic of Kenya, but this time with a Deputy President. The key departure from the past is that President's job is now requires her /him to lead the national Executive team and focus more externally (regional and international) as County Governors will be playing an executive role locally while Senators, MPs (including women representatives) and County Reps will play a law making and monitoring / watchdog role locally.

The Salaries and Remuneration Commission (SRC) in April 2013 proposed a downward review of the President's salary and allowances from the Ksh2.4M per month paid in the 2008-2012 term to a range of Ksh1,237,500 to a maximum of Ksh1,650,000 per month. By using the minimum, the President will earn from tax payers over Ksh14.8M per year and over Ksh74M in the 5years s/he will be in office. It is therefore critical for Kenyans to know exactly what mandate, functions or job description citizens are paying these hefty amounts for. The key mandate, job description, functions or duties of the President is to ensure that:-

1. **Government respects and adheres to the Constitution** – rule of law: Article 129 (1-2) states that the President's executive authority is derives from the people of Kenya and must be exercised in accordance with the constitution and in a manner compatible to the principle of service to the people of Kenya and for their well-being and benefit. The President is a custodian of the national values outlined in Article 10 of the Constitution. The President also has a duty to chair the Summit, which is a forum comprising for the President to meet with all the 47 Governors to promote inter- governmental relations between national and county governments in a manner that upholds inter- dependence and cooperation. This means that it is the president's job to ensure that he and all public officers adhere and visibly promote at all times to the all the values espoused in the constitution. Each component of article 10 assins the president a specific function namely:-
2. **Kenya is safe (national security) and united;** all peoples are treated fairly and affirmative action measures are taken to address historical injustices. This is captured in article 10 (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; S/he is also a symbol of national unity and3. **Integrity, transparency and accountability:** The president has a duty to ensure good governance, integrity, transparency and accountability. This the President does by ensuring that the he appoints to public office, competent persons of integrity who meet the integrity criteria outlined in Chapter 6 of the Constitution e.g. when appointing, Cabinet Secretaries, the Attorney-General, Secretary to the Cabinet, Principal secretaries, High Commissioners, Ambassadors, Diplomatic and Consular representatives. Parliament vets the persons the President appoints.
4. **Human rights are respected** Ensure compliance with obligations that Kenya has made under international and national laws to facilitate human dignity, equity, social justice, inclusiveness, equality, human rights, non- discrimination and protection of the marginalised. At independence, Kenya voluntarily joined the United Nations (UN) and has successively adopted, signed, ratified and domesticated into local laws many international human rights instruments and laws. There are three main internationally recognized human rights monitoring tools or frameworks through which the human rights performance of all countries is annually measured and recommendations for improvement made. Unfortunately, Kenya has consistently performed dismally on all of these parameters with the exception of 2003 when Kenya scored high on the right to education after the free Primary Education (FPE). The President has a duty to ensure that Kenyans not only access and enjoy human rights, but also that this is visible and measurable through the same performance indicators used to rate all other countries of the world namely:-
    a. **Millennium Development Goals (MDGs):** This is a human rights monitoring tool that each year compares the performance of all countries in the world based on their efforts and success in improving access to human rights captured in the Constitution of Kenya under article 27, 41,43 and numerous other provisions. MDGs measure Kenya's and other countries performance with respect to the eight MDG goals on :- 1) eradication of extreme poverty and hunger (through employment creation, improved food security, access to water and sanitation); 2) access to universal primary education; 3) the promotion of gender equality and empowerment of women; promote access to healthcare through 4) reduction of child mortality; 5) improvement of maternal health; 6) combating HIV/AIDS, Malaria,TB and other diseases; 7)ensuring environmental sustainability and 8) ensuring that Kenya maintains a global partnership for development.
    b. Except for 2003 when Kenya introduced Free Primary Education (FPE), which is today challenged by teachers' strikes over understaffing and low pay, Kenya's performance on this MDG1 indicator has not been impressive. While Asia has managed to reduce poverty by over 24% between 1990 and 2013, most Sub-Saharan countries have only managed a 8% poverty reduction in the same period and even less for Kenya particular due to the effects of the 2007-8 post-election violence. Despite huge allocations of funds to education, water, healthcare etc including through CDF, Kenya's president as the chief executive in Kenya still needs to do a better job of supervising public officers to prevent graft which wastes public finances intended for these functions, promote a proper work ethic and hold public officers personally and collectively accountable for poor service delivery and corruption.

c. **Human Development Index (HDI**) – Each year the United Nations of which Kenya is a member state, compares the performance of all countries with respect to their achievements in reducing inequality – the gap between the rich and the poor. The UN publishes this in bi-annual (July and December) Human Development Reports (HDR) that give information on the level of equality through a tool called a human development index (HDI). This report is therefor able to tell which the most unequal countries in the world are. An example of the data that human development reports produce is provided on page xxx; figure yyy on income inequalities that shows that Kenya's Members of Parliament are the highest paid in the world despite the minimum wage and per capita income being very low. In the past five decades since independence, Kenya has continued to be listed among the most unequal countries in the world with the gap between the rich and poor widening or stagnating instead of closing. There are also gender inequalities in access to rights and for men and women; regional inequalities and increasing poverty and unemployment among the youth and other marginalised groups. These inequalities are what prompted the the approach taken in the Constitution of Kenya, 2010 that places great importance on equality and introduces devolution as a system of government to take resources to parts of Kenya that have in the past five decades been marginalised. Unfortunately, devolution and all equality provisions aimed at reducing inequality continue to face serious challenges including as the expensive duplication of roles through CDF and other mechanisms. The President as a critical leader within the majority party in both Senate and the National Assembly has the power to address many of the obstacles to devolution and other mechanisms to effect equality. However, all the four Presidents of Kenya since independence have shied away from performing this function which falls squarely within their job description.

d. **Corruption Perception Index** – Each year an organisation called Transparency International works through its chapters / branches in different countries including Kenya to compare countries on the basis of how corrupt they are perceived to be by their own citizens and foreigners doing business there. Kenya has consistently performed poorly on this index which is an indication that there is room for the President to perform better his duty of controlling corruption.

e. **Universal Periodic Report (UPR) Mechanism:** Each year, the states of the world evaluate each other's performance and give country specific recommendations on what the head of state in each country should do or ensure is done to improve. It is the President's duty to ensure that the UPR recommendations are given the weight they deserve when Ministries are developing their annual budgets for compilation into the national budget that is submitted to Parliament for approval. It is also the President's responsibility to ensure that funds allocated deliver the expected results and are not wasted through bloated staffing and corruption.

5. **Kenya is not poor[20] but economically viable and competitive in international trade and relations** - This is closely related to (4) above. Article 10 (d) assigns the President as the head of state the duty of ensuring sustainable development. It is the President's job to ensure that government makes and prudently implements policy decisions that ensure the living standards of every citizen measurably improve. The President is expected to do this by ensuring:-

   a. **Employment Creation:** There is employment creation not only through encouraging foreign investors, but largely by encouraging and supporting citizens and particularly the youth to invest and grow their businesses in Kenya;

   b. **Improved Living Standards for all:** All international trade agreements favour not only large scale investors in Kenya, but also local manufacturers, and small scale producers (coffee, tea, milk, sugarcane etc) and recognise workers right not only to be paid a minimum wage but that also that the minimum wage is a living wage that supports a decent stand of living with access to basic rights. The President should also ensure that Labour Cabinet Secretary and Ministry set a minimum wage that facilitates a decent standard of living and

20 Daniel Nyassy and Bozo Jenje , "Poverty amid minerals, world class beaches and arable land" Daily Nation, February 4, 2013 available at http://elections.nation.co.ke/news/Poverty-amid-minerals-world-class-beaches-and-arable-land/-/1631868/1684472/-/12qbghd/-/index.html accessed March 14, 2013

that the cabinet secretary for Trade pushes foreign investors to adhere to the fair minimum wage;

c. **Food security:** Develops and implements national policies that ensure that Kenya is food secure – never starve; and meets international minimum standards on access to rights a such as water, education, healthcare and other service delivery concerns all of which contribute to poverty reduction.

d. **Expanding tax base and ensuring tax justice:** The president and 47 governors as the chief executives at national and county level have a duty to ensure that more people have a job or source of income (e.g. through farming, herding, fishing etc) in order to be able to pay taxes. This in turn pays for improved service delivery and a better standard of living for all. They also have a duty to ensure that taxes are effectively collected from all people so that none evades contributing public finance. The 48 chief executives also have a duty to ensure that taxation is fair - that those that earn and own more should pay higher taxes. This means that in making proposals on what should be taxed, the President and Governors should ensure that taxes on land and property are higher than those on workers (Pay as you earn) because this would encourage owners of idle land to either use it or release it to others who can and that those who have share with the 'have-nots' through taxation. The chief executives also have a duty to control corruption and adopt measures that control inflation. An example of this is ensuring that Kenya does not import food stuff (maize, rice, sugar etc) but instead uses it foreign products that cannot be grown, manufactured or assembled locally.

6. **Public Officers work ethic** and Maintain an effective, efficient, disciplined and motivated civil service that works in a manner compatible to the principle of service to the people of Kenya and for their well-being and benefit
7. **Equitable Benefit sharing on Kenya's natural resources:** The President heads a Cabinet that has portfolios in charge of land, water, minerals, wildlife and many other resources of Kenya. S/he has a duty to ensure that each Ministry hires competent persons capable of formulating policies, laws and budgets that ensure that Kenyans derive the greatest benefit from their national resources and that such benefit is equitably shared. This includes ensuring that international trade agreements with foreign investors pay Kenyans a decent wage, pay commensurate taxes, implement a corporate social responsibility (CSR) policies in favour of Kenya's people and that there is corporate accountability for non-compliance. The president also has a duty to ensure sustained competitiveness of Kenya's goods and services by investing in research, innovation, technology and other infrastructure that makes Kenya's produce more marketable in the international market

8. Kenya is secure both locally and from external aggression

As Commander in Chief of the Kenya Defence Forces (KDF) the President:-

a. Chairs the National Security Council (NSC) and receives regular updates from the National Intelligence Council

b. Appoints and can remove the Chief of Defence Forces, three chief and three service commanders of the army, air force and navy; and is ultimately responsible for the organization and command of the KDF

c. Can declare a state of emergency

d. Can declare war with the approval of Parliament

e. Promotes internal cohesion and internal security by addressing injustices such as impunity, inequality, poverty and unemployment which often lead to civil strife

f. Ensures policing in Kenya meets international standards in recruitment, training, equipment, remuneration and other parameters

g. Ensures that Kenya's foreign policy that maintains good relations with other nations in order to avoid external aggression; while firmly asserting Kenya's interests

h. May suspend a County Government in an emergency arising out of internal conflict, war or other exceptional circumstances

9. **Confer honour in the name of the people and the Republic of Kenya:** Represent Kenya's interests in international affairs / foreign policy including the formulation, ratification and domestication of international laws; and ensure that international trade and other laws advance Kenya's interests and that all Kenyans profit / benefit from the sale of its produce in a competitive international market. The President and Deputy President must also ensure that they and all public officers that represent Kenya negotiate with other States in a manner that advances the best interests of all Kenyans e.g. by ensuring that her/his team negotiates fair prices for goods and services that Kenya exports to other countries.

10. **Annual State of The Nation Report:** Article 132 –c requires the President to each year present to the people the State of The Nation Report as a way of being accountable and transparent to the people of Kenya on her/his functions as outlined in Chapter 9 of the Constitution. Kenya's consistently unimpressive performance on the abovementioned yardsticks of measuring the President's and government's performance on all of the above parameters that directly impact on individual citizens well-being is what prompted Article 132 and 183 of the constitution of Kenya to require that the president as the Chief executive in Kenya and Governors as the chief executives in counties to be constitutionally compelled to give a state of the nation or county address on all of the above parameters.

    This means that the President's address during national days such as Madaraka Jamuhuri and Heroes Days should focus on presenting for public scrutiny and evaluation, a report on his and his government's performance on all of the above parameters. The report presented should be in a format that allows for citizens to judge whether or not there has been improvement recorded on the various international human rights monitoring frameworks. Sadly, because most citizens do not have sufficient civic education to effectively scrutinise and hold these 48 elected stated officers accountable on this, the article 132 and 183 requirement have largely been ignored in the first 3-4years following the promulgation of the Constitution of Kenya, 2010. Yet, the chief Justice has in each of the years following the promulgation of the Constitution presented a State of the judiciary report.

4.0 Elected state officers in executive arm of county government

The Governor must curb corruption in service delivery, local and international trade in order to reduce the gap between the rich and poor

4.1 Functions of Governor and Deputy Governor

Under the Constitution of Kenya, 2010 Kenya now has a Governor and Deputy Governor for each of the 47 Counties. In the past, the term 'the Executive' referred to the President, Ministers (now Cabinet Secretaries) and the Public Service. Under the devolved system of government, the term 'The Executive' extends to county level to also include the **Governor, Deputy Governor, County Executive Committees and the County Public Service**. The 47 Governors are now form part of the Executive, but at County level. Governors are expected to sit with the President in The Summit to identify areas of interdependence and cooperation between The Executive at National level and at County level.

The Salaries and Remuneration Commission (SRC) has set the Governor's salary and allowances at Ksh 640,681 to a maximum of Ksh854, 241 per month. This means that in a year, each of the 47 Governors will be paid over Ksh7.6M and in 5years they will each have earned over Ksh38M from tax payers. In total all 47 Governors cost Kenyan taxpayers Ksh1.8Billion, while their deputies will be paid a minimum of Ksh 1.3Billion. It is therefore critical for Kenyans to know exactly what mandate, functions or job description citizens are paying these hefty amounts for. The key mandate, job description, functions or duties of the President is to ensure that:-

1. **Implement both National and County Legislation:** As the chief executive at county level (article 179 (4-6), the Governor is tasked with leading the adherence and implementation of the Constitution and other national legislation (to the extent required at county level) and also implementing County legislation.
2. **Raise money for the County by:**
    - o Understanding finance and taxation laws;
    - o Efficiently collecting taxes
    - o Borrowing loans from both local and international financial institutions with the consent of the national government
    - o Negotiate and receive local and international aid
    - o Enter into local and international trade agreements aimed at enriching the County's people
    - o Negotiate fair prices for agricultural produce, minerals and other resources generated in the county

- o Motivate and empower locals to invest in trade
- o Understanding, and adhering to foreign investment policy and laws in the county
- o Complying with international trade laws that Kenya has committed to
- o Representing county interests in the formulation or review of Kenya's position in formulation of international trade agreements

3. **Use public funds prudently** and in line with public finance principles in the Constitution and various laws, including to:
   - o Maintain, supervise and lead a lean, effective, efficient, disciplined and motivated civil service that works in a manner compatible to the principle of service to the people of Kenya and for their well-being and benefit
   - o Support the county in prudently procuring essentials such as drugs and farm inputs (fertilizers, tractors etc)
   - o Promotes democratic governance which includes preventing corruption and waste of public resources
4. **Ensure that the County is not poor:**

As the County's Chief Executive to whom all County Executives and County public Service reports to, the Governor has a duty to:-

- o Equitably deliver adequate, quality and timely services to the people: Ensure that the county meets international minimum standards on access to human rights such as water, education, healthcare, housing, the right to work, the right to development and other rights that contribute to poverty reduction.
- o Ensure the county is food secure by implementing national policies on agriculture, livestock development and land and natural resource development that ensure that the county is food secure
- o Contribute to control of national inflation by ensuring that the county exports more than it imports
- o Create employment by innovatively and sustainably exploiting the county's resources, while ensuring compliance with national trade and labour laws and international commitments
- o Innovate – Invest in research, innovation, technology and other infrastructure that upscale local, practical ideas on wealth creation
- o Reduce gap between rich and poor

5. **Represent the County at National Level**

The Governor has a duty to:

- o Attend meetings of The Summit (between the President and all 47 Governors)
- o Represent county interests to the National Executive. This includes relaying the peoples' complaints about poor service delivery by National Government on functions national government is performing within the County

6. **Perform any functions of National Government transferred to County level** in compliance with Article 187. These include:-
   - o Performing State functions assigned by the President following mutual consultation.
   - o Negotiating for or a transfer of functions and funds from National Government to County Government if the function or power would be more effectively performed or exercised by the County Government and its transfer is not prohibited by any law. The constitutional implication is that on national days the governor, not the county commissioner should read the president's speech. The transfer of functions envisaged under article 187 also means that counties that lack capacity say in delivering health services can negotiate with Government at national level to continue rendering the service until they counties are able to develop this capacity.
7. **Ensure the County is Secure:**

Article 239 (5) states that 'National security organs are subordinate to civilian authority'. This means as the County's Chief Executive, the Governor has a duty to:-

- o Recognise that while security is a function assigned to the national government under Schedule 4, Article

187 allows individual Governors or jointly through The Summit to negotiate with government at national level to allow the counties to perform certain security functions. In counties where security is a serious challenge, County Governments can therefore negotiate with National Government to ensure that the County has adequate well trained, equipped and remunerated police service to promote order in the County. It is therefore not unconstitutional for County governments to purchase police cars and build police stations but only if this is the result of open well documented negotiations with national government.

- o Governors also have a duty to recognise that peace and security are cross border issues that involve the establishment and maintenance of good inter-governmental relations both with national government and neighbouring counties. Governors therefore have a duty to promote open communication and rapid response to facilitate addressing the county's security needs e.g. for adequate policing

8. **Annual State of the County Report:**

As the chief executive the Governor has a duty to:

a. Recognise that s/he is part of the Executive; and that under Article 132 c, the s/he must contribute to the President's Annual State of the Nation Address by similarly preparing in good time an Annual State of the County Report

b. Lead the county in implementing and reporting on compliance with human rights, democratic principles and commitments under international law (Art 10; Art 132 c)

c. As head of the County Executive Committee, provide the county assembly with full and regular reports on matters relating to the county, including an annual progress report on the implementation of County plans. (Art 183 (3)

9. **Ensure competent Deputy Governor, County Executive Committee and Public Service:**

As the Chief Executive of the County, the Governor has a duty to:

- o Appoint professional and competent County Executive Committee members from among people who are not members of the County assembly; with the approval of the County assembly - Article 179 (2) b.
- o Ensure that the County Executive Committee members do not exceed one third of the total number of the County Assembly and adhere to laws, values and principles of public service.
- o Supervise and motivate County Public Service
- o Identify a competent Deputy Governor who under Article 180 (5), the Governor cannot fire at will

1. **Assent Bills; Publish County Gazette:** Consider, approve and assent bills passed by the County Assembly into law and publish the County Gazette Notice of all policy decisions formally made by the County Executive Committee or Governor. The Governor also has a duty to reject laws that go against the national good, or which are unduly burdensome, or which are unconstitutional and also to reject laws that are made without adequate participation of the people

10. **Ensure that the County is economically viable and competitive in local and international trade and relations. Just like the President the Governor also has a duty** to ensure an expansion of the tax base and tax justice. Practically, this means that the Governor has a duty to ensure that more people have a job or source of income (e.g. through farming, herding, fishing etc) in order for more people in the county to be able to pay for service delivery, entertainment and property taxes which are the main sources of revenue for the county. Governors also have a duty to ensure that taxes are effectively collected from all people so that none evades contributing public finance. Governors' like the President must also ensure that taxation is fair - that those that earn and own more should pay higher taxes. This means that in making proposals (in the form of draft bills presented to the County assembly), Governors must ensure that taxes on land and property are higher than those on service charge because this would encourage owners of idle land to either use it or release it to others who can. It would also ensure that those who have (land, rental properties, entertainment premises etc) distribute their wealth or share with 'have-nots' through taxation. Governors also have a duty to ensure that such proposals on taxation are made in consultation with the people and

with demonstrable citizen participation, not arbitrarily arrived at.

11. The chief executives also have a duty to control corruption and adopt measures that control inflation. An example of this is ensuring that Kenya does not import food stuff (maize, rice, sugar etc) but instead uses it foreign products that cannot be grown, manufactured or assembled locally.

5.0 THE RESPONSIBILITIES / DUTIES OF CITIZENS

Article 1 of the Constitution of Kenya, 2010 recognises that "(1) All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution. (2) The people may exercise their sovereign power either directly or through their democratically elected representatives. (3) Sovereign power under this Constitution is delegated to the following State organs, which shall perform their functions in accordance with this Constitution—

(a) Parliament and the legislative assemblies in the county governments;

(b) the national executive and the executive structures in the county governments; and

(c) the Judiciary and independent tribunals.

(4) The sovereign power of the people is exercised at (a) the national level; and (b) the county level."

This means that Kenya belongs to its people. The money that runs government or is generated from any land and other natural resources all belong to the people of Kenya. When they elect leaders, the people delegate to them the work of running the county on their behalf. However, this does not mean that people who do not hold elective positions abdicate their responsibility to run the county simply because they are not state officers. The people can still exercise their sovereignty directly Article 1 (2) in the following ways:-

1. **Leadership and Integrity:** Citizens have a responsibility not to offer or accept bribes, during elections and at all times. They also have a duty reject through the ballot or not to elect people with integrity issues or who use ethnic or other forms of patronage to ascend to leadership e.g. by insulting the dignity of women or any other group in the society. Citizens must monitor those elected and all public officers to ensure that they not only have a track record of integrity before they are elected, but also act with integrity throughout their term of service.

2. **Paying taxes** and taking an interest in how their money is used. Citizens do not have a choice about paying taxes. They must pay taxes. It is the only way a democracy can function.

3. **The purpose of taxation is to guarantee the taxpayer quality and timely access to rights** through service delivery. Public funds at the disposal of National and County Governments are taxes paid by citizens in order for government to provide services and guarantee access to rights such as the right to clean, safe and adequate water and sanitation, accessible, quality and relevant education; security etc. The responsibility of citizens does not end with paying taxes. Citizens have a duty to participate in the budget making process. They can perform this duty by taking the initiative to study the Public Finance Management Act to identify opportunities for participation in the budget making process whose annual cycle kicks off in August each year. Citizens also have a duty to remain vigilant to monitor how their taxes in the form of public resources are used.

4. **Citizen participation:** Besides the budget making process, citizens must also participate in law and policy making and vetting public officers in all levels of government. Citizens must therefore identify the various mechanisms provided for citizens to express their views especially to articulate their development needs and priorities and be involved in budget making processes. The Constitution places a duty on citizens to participate in governance. Various laws have made provisions for citizen participation e.g. in the budget making process; in the development of County, Constituency and Ward Development Plans etc. Citizens must identify these opportunities and use them to tell County and National Governments and state officers what the peoples' priorities are.

5. **Take Action - Complain:** Using constitutional, legal and non-violent means to assertively complain about poor service delivery. Today, citizens can express their views through social media, telephone calls to radio and television stations, letters and memoranda written and delivered to leaders through Parliament or County Assemblies or the internet, articles in newspapers; press conferences and even by ensuring that 'home coming' parties organised by leaders following their election become a forum to not only celebrate, but also to instruct elected state officers on the work

that voters expect them to do and the time frames for when the work should have been done. The culture of citizen participation in development planning, monitoring, social budgeting and social auditing has started in Kenya through the formulation of documents such as the 5year Constituency Development / Strategic Plan. This can be replicated at any level – Ward, Constituency, county or National and with the elected state officers responsible for each level.

6. **Be the change you wish to see:** Mahatma Gandhi is credited with this renowned quotation. This is a call to each citizen to make the changes s/he wishes to see in Kenya. A citizen who wishes to see Kenya having enough water for all must start by not wasting the water s/he has. A Kenyan, who wants to see an end to corruption, must start by not offering or accepting bribes in cash or kind - preferential treatment. Section 62 of the Elections act, 2011 states that a voter who accepts or takes any food, drink, refreshment, provision, any money or ticket, or adopts other means or devices to enable the procuring of food, drink, refreshment or provision knowing that it is intended to influence them commits the offense of TREATING. One must demand that all public officers do the job that they are paid to do without offering them further incentive / bribes to do so because bribing someone to do the job s/he is already generously paid to do simply turns rights or service delivery that citizens have paid for through taxes into privileges thereby excluding the poor who are not able to pay extra over and above the taxes they have already paid.

7. **Recall Non-Performing Elected State Officers:** Elections provide an opportunity for citizens to advertise a 5year job or work contract, vet various applicants or candidates by listening to them and looking at their political party manifestos and elect one for each position. However, even after rigorous vetting of candidates, there is still the possibility that some of those hired for a job will not perform it to the employers' satisfaction. It is for this reason that the Constitution of Kenya, 2010 provides a way for citizens as the employers of each of these elected State Officers to recall or fire them if after 18-24months of working, there are still no tangible results. This right of recall and the procedure to do so has been provided for citizens to recall all elected State Officer:-
    - Article 104 of the Constitution states that the electorate has the right to recall any Member of Parliament (members of the National Assembly and the Senate) before the end of the term of the relevant House of Parliament. The Elections Act provides the procedure on how to do so. However, Parliament has unconstitutionally provided that this can only be done after 18 months. Citizens have a duty to use courts to challenge this by seeking for constitutional interpretation on the any limits to this right.
    - County Representative members can be recalled on grounds of misconduct that is likely to bring hatred, ridicule, contempt or disrespect to the office, lack of integrity, mismanagement of public resources, desertion of and absence from the electorate without good reasons, failure to adequately represent citizens views, failure to report to voters on the work of the County assembly.
    - Article 144 and 145 of the Constitution provide a procedure for removal of President on the grounds on physical or mental incapacity or impeachment for violation of the Constitution, gross misconduct or where there are serious reasons for believing that the President has committed a crime under national or international law. As these procedures can only be initiated by a Member of the National Assembly, all citizens have a duty to monitor the President's health and conduct and if concerned about either to call upon the representative role of with any Member of the National Assembly to initiate this procedure.
    - Article 181 of the Constitution of Kenya states that the County Governor can be removed from office for violating the Constitution, abuse of power, gross misconduct, where there is serious reason for believing the Governor has committed crimes under national or international law or for physical or mental incapacity.

For Kenya to truly enjoy the transformation that citizens aspired for as they passed the Constitution of Kenya, through a referendum in 2010, each citizen must accept her/his responsibility by taking an interest in governance, knowing how the taxes each citizen pays are used and holding those entrusted with state office accountable to do a job; worth the money that they are paid.

FUNCTIONS OF ELECTED STATE OFFICERS

Making A Complete Shift From The Past

In the period 2008- 2012, Kenyan taxpayers paid Members of Parliament Ksh 851,000 per month and the President Ksh 2.4M per month. In the same period, Kenya's per capita income has been Ksh 2,000 per month, while minimum wage remained Ksh 4,050 per month. This means the President earned over 595 times than the average citizen, while MPs in the 10th Parliament earned over 425 times more than the per capita income and 210 times more than the minimum wage paid to the many workers in the agriculture, plantations and allied sector whose sweat is the backbone of Kenya's economy.

What exactly should to elected state officers be doing to earn this money and are they actually offering Kenyans their money's worth?

Pamoja Tutetee Haki

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