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A CRITICAL ANALYSIS OF THE LAWS ON THE REMUNERATION OF MEMBERS  
OF PARLIAMENT IN KENYA

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Submitted in partial fulfilment of the requirements of the Bachelor of Laws Degree,

Strathmore University Law School

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Word count: 9877

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## Declaration

I, MAKAMARA IAN NYANKABARIA, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed: .....

Date:

This Research Proposal has been submitted for examination with my approval as University Supervisor.

Signed: .....

Dr. Antoinette Kankindi

## Abstract

*There are multiple laws in Kenya that govern the roles, responsibilities and remuneration of political representatives. These laws include the Constitution, the Leadership and Integrity Act, the Salaries and Remuneration Act and the National Assembly Remuneration Act. They seem to have made room for loopholes that can be exploited by members of parliament (MPs) pursuing self-enrichment as opposed to the promotion of the welfare of their constituents. To a large extent, it could be said that the constituents have not been efficiently represented as a result of these loopholes in the current legislation. This study discusses these laws and the impact they have on the performance of MPs with regards to their roles in a representative democracy. Additionally, this study made recommendations that are geared towards improving political representation through modifying MP remuneration in Kenya. The theoretical background of this study is rooted in the theory of substantive democracy and the rational choice theory. It also relied on various sets of statute, case law and literature in the establishment of its argument.*

**Key Words:** National Assembly Remuneration Act, Members of Parliament, Substantive Democracy, Rational Choice Theory.

## **List of Abbreviations**

NARA – National Assembly Remuneration Act

SRC – The Salaries and Remunerations Commission

MPs – Members of parliament

CG – Cortes Generales

Act 3/2015 – Act 3/2015, of 30<sup>th</sup> March, Regulating the Exercise of High Office of The General Administration

Act 19/2013 – Act 19/2013, of 9<sup>th</sup> December, on Transparency, Access to Public Information, and Good Governance

EIU – Economist Intelligence Unit

GI – Gini Index

DI – Democracy Index

SDGI – Sustainable Development Goals Index

## **List of Cases**

*The Trusted Society of Human Rights Alliance v Attorney General* [2008] 2 eKLR.

*Njoya & 6 others v Attorney General and 3 others* [2008] 2 eKLR.

*John Onyango Oyoo & 5 others v Zadock Syongo & 2 others* [2005] eKLR.

*Republic v. The Permanent Secretary/Secretary to the Cabinet and Head of Public Service Office of the President and the Permanent Secretary, Ministry of Gender, Culture and Social Services ex parte Stanley Kamanga and the Kenya National Library Services Board* [2006] eKLR.

## **List of Legal Instruments**

### **KENYA:**

Constitution of Kenya (2010)

The National Government Constituencies Development Fund Act (No. 30 of 2015)

Salaries and Remuneration Commission Act (No. 10 of 2011)

National Assembly Remuneration Act (No. 4 of 2012)

Leadership and Integrity Act (No. 19 of 2012)

The Penal Code of Kenya

### **SPAIN:**

Constitution of Spain (Congreso de los Diputados)

The Criminal Code of The Kingdom Spain

Act 3/2015, of 30<sup>th</sup> March, Regulating the Exercise of High Office of The General Administration (Ley 3/2015, de 30 de marzo, reguladora del ejercicio del alto cargo de la Administración General del Estado).

Act 19/2013, of 9th December, on Transparency, Access to Public Information, and Good Governance (Ley 19/2013, de 9 de diciembre, de transparencia, acceso a la información pública y buen gobierno).

Standing Orders of the Congress of Deputies



# 1. INTRODUCTION

## 1.1 Background

The Constitution recognizes political representation as one of the fundamental elements of a democracy.<sup>1</sup> This is because a democracy envisions a government that is formed by the people and works for the people.<sup>2</sup> In Kenya, this role is served by the President, governors, members of parliament(MPs) and other representatives at different levels.

Government representatives do not have regular employment contracts because, instead of going through regular employment processes, they are elected. This necessitated the enactment of laws that govern their terms of employment and remuneration. Thus, the National Assembly Remunerations Act(NARA) was enacted in 1975 to regulate their salaries and allowances.

Since then, multiple amendments have been made to this act. However, from 2002 onwards, the public have viewed these amendments as parliamentarians prioritising their own financial interests rather than those of their constituents.<sup>3</sup> With the coming into power of a new regime that placed a larger emphasis on the separation of powers, one of the first actions of the new parliament was voting to increase their salaries by 700%.<sup>4</sup> This contrasted heavily with the previous regime, where the salary increments provided under the NARA were minimal and at the discretion of the executive.

The abrupt 700% raise seemed to set off a series of actions by MPs to award themselves greater financial privileges and benefits. Parliamentarians refused to pay taxes up until 2010, and only agreed to do so after awarding themselves an additional pay rise of 25%.<sup>5</sup> Thereafter, due to calls from the public for accountability, the Salary and Remuneration Commission(SRC) was formed in 2011.<sup>6</sup>

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<sup>1</sup> Article 1(2), *Constitution of Kenya* (2010).

<sup>2</sup> Wolff J, *An Introduction to Political Philosophy*, Oxford University Press, USA, 2006, 62.

<sup>3</sup> Kimemia D, 'Perception of Public Corruption in Kenya', 2 *African Journal of Governance and Development* 2, 2013, 57.

<sup>4</sup> Blomfiel A, 'Kenyan MPs Get 700 Percent Raise', *The Telegraph*, 27 June 2002. <https://www.telegraph.co.uk/news/worldnews/africaandindianocean/kenya/1398587/Kenyan-MPs-get-700-per-cent-rise.html>

<sup>5</sup> Mbote K and Akech M, *Kenya: Justice Sector and the Rule of Law*, The Open Society Initiative for Eastern Africa, 2011, 69.

<sup>6</sup> Article 230, *Constitution of Kenya* (2010).

In 2012, a new NARA was promulgated in order to supplement the recently formed SRC. However, there was limited change in this matter, as the earnings of members of parliament continued to increase excessively, reaching over ten million shillings per annum in salaries and allowances.<sup>7</sup> The most recent version of the NARA capped off a decade during which MPs in Kenya had dedicated an unprecedented amount of the national budget towards their own salaries.<sup>8</sup>

Not only were the financial awards excessive, they also appear to have been greatly disproportionate to their performance as representatives. This is due to the fact that over 30% of the population they represent currently lives below the poverty line.<sup>9</sup> Moreover, basic amenities such as electricity and water are not easily available in most parts of the country.<sup>10</sup> Additionally, studies have shown that about 17 million people in Kenya do not have access to clean water. This is due to inexistent infrastructure for water storage and inefficient water sanitation policies.<sup>11</sup> Factors such as these show the discrepancy between the growth of MPs' financial gains and their performance as drivers of socio-economic equity at the constituency level.

Recently, The Punguza Mizigo Bill was proposed as a means to amend the laws governing state officials through popular initiative, as provided for under article 257. It highlights the latest efforts being made to hold government officials financially accountable to the people of Kenya. Its main aim was to reduce the financial burden that the operation of parliament had on the country's budget. First, it aimed to do so through eradicating over-representation in the country, by reducing the number of members of parliament to one hundred and forty-seven from four hundred and sixteen.<sup>12</sup> Secondly, it sought to reduce the salaries of MPs to 250,000 shillings in total.<sup>13</sup> Unfortunately, the bill did not receive enough support in government.<sup>14</sup>

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<sup>7</sup> First Schedule, *National Assembly Remuneration Act*, (No. 4 of 2012).

<sup>8</sup> John K, 'Parliamentary Independence in Uganda and Kenya 1962 – 2008' Published PhD Thesis, University at Albany, State University Of New York, 2009, 3.

<sup>9</sup> Ochere M, 'Poverty Dynamics, Income Inequality and Vulnerability to Shocks in Rural Kenya' Published Thesis, Wageningen University, Wageningen University Press, 2011, 16.

<sup>10</sup> Ochere M, 'Poverty Dynamics, Income Inequality and Vulnerability to Shocks in Rural Kenya', 2011, 169.

<sup>11</sup> Marshall S, 'The Water Crisis in Kenya: Causes, Effects and Solutions', 2 *Global Majority e-Journal* 1, 2011, 31-45.

<sup>12</sup> Section 7, (*Constitution of Kenya Amendment*) Bill, 2019.

<sup>13</sup> Section 28, (*Constitution of Kenya Amendment*) Bill, 2019.

<sup>14</sup> Thiong'o J, 'Blow for Aukot as Nairobi MCAs throw out Punguza Mizigo Bill', Standard Digital, 8 October 2019. <https://www.standardmedia.co.ke/article/2001344868/nairobi-county-assembly-rejects-punguza-mizigo-bill>

The above changes would have significantly lessened the cost of running parliament, saving the country approximately 31.8 billion shillings yearly. These funds could thereafter be used to spur development in different areas of the country. The unsuccessful Punguza Mizigo campaign shed light on the dire constraints in which Kenya is in with regards to its leadership by highlighting the selfish motivations of those currently in parliament. If anything, it has shown us the manner in which the golden rule is applied in Kenya: those who make the rules use them to acquire the gold.

With this background in mind, it is evident that the laws governing the remuneration of Members of Parliament in Kenya need to be analysed. In order to find out the impact that said remuneration has on their performance, this research examined the NARA and suggested a few modifications to the relevant laws as possible solution to this matter.

## **1.2 Problem Statement**

The problem that this study will focus on is the dissociation of the interests of the MPs and the interests of those that they represent, which has occurred as a consequence of the pursuit of financial gain on the part of MPs as opposed to the welfare of their constituents.<sup>15</sup>

A by-product of said dissociation has been a decrease in the confidence and trust that constituents have in their MPs.<sup>16</sup> Additionally, it has served as a contributory factor in the corruption of the nature of politics in Kenya. Due to the large financial benefits given to MPs, only those who have significant amounts of money to spend during campaigns vie for seats in parliament to begin with. Consequently, those who prioritise social welfare over profits have been unable to compete on an equal footing with those who have deeper pockets.<sup>17</sup>

This problem calls for an analysis of the NARA, which provides for salaries and allowances that are too high and do not translate into development at the constituency level.

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<sup>15</sup> Harrington J and Manji A, 'Satire and the Politics of Corruption in Kenya', 22 *Social & Legal Studies* 1, 2013, 3.

<sup>16</sup> Swedish International Centre for Local Democracy, *Devolution, Democracy and Development in Kenya*, 2016, 7.

<sup>17</sup> Tum T, Otieno T and Arusei E, 'Money Culture in Kenyan Politics: Question of Morality Vis a Vis Integrity n Global View', 3 *International Journal of Recent Advances In Multidisciplinary Research* 5, 2016, 1423.

### **1.3 Statement of Objectives**

The following were the objectives of this study:

- To scrutinise the NARA and gauge its impact on the performance of parliamentarians.
- To examine to which extent the NARA could be contributing to the inefficiency of political representation at the constituency level.
- To suggest possible remedies to the remuneration system in the aforementioned NARA.

### **1.4 Hypothesis**

This study was based on the following hypotheses:

- The freedom that MPs have to award themselves salary increments have negatively impacted their performance as representatives and led to fiscal unaccountability in parliament.
- The aforementioned negative impact is a contributory factor to the seemingly inefficient democratic representation in Kenya.

### **1.5 Research Questions**

This study sought to answer the following questions:

- In what way does the current remuneration system for MPs under the NARA influence their performance as representatives?
- How has the NARA contributed to inefficient political representation in the country?
- What recommendations can be made to improve political representation at the constituency level through amending the NARA?

## 1.6 Justification

Seeing as political representation in Kenya at the constituency level seems to be ineffective, the justification of this study is drawn from the principles underpinning Chapter VI of The Constitution of Kenya. This emphasises the need to safeguard the sovereignty of the people of Kenya and promote democracy. It is of great importance as studies have shown that there is a positive relation between democracy and the well-being of people within a society.<sup>18</sup>

Therefore, this study aims at suggesting recommendations that could eventually contribute to a more positive impact on representation in Kenya, following the principles of integrity and accountability, as stated under Article 75 of the Constitution of Kenya.<sup>19</sup>

## 1.7 Literature Review

In the words of Alexander Hamilton, “the fabric of the state ought to rest on the solid basis of the consent of the people and that the streams of national power ought to flow from that pure, original fountain of all legitimate authority.”<sup>20</sup> Justice Ringera supports this view, as he acknowledges, that in a democracy such as Kenya, all government authority originates from the people and should be exercised on their behalf, for they are the sovereign.<sup>21</sup>

These texts are relevant to this study as the 2010 Constitution acknowledges the people’s sovereignty under article 1.<sup>22</sup> This is because sovereignty obliges the political representatives to act and make decisions according to the will and the needs of the people.<sup>23</sup> This view is shared by Adams Oloo, who was one of the authors of the constitutional working papers. He states that one of the key changes brought about by the 2010 Constitution was a transition from an authoritarian to a democratic regime,<sup>24</sup> precisely to safeguard the sovereignty of the people. However, it seems that MPs have instead capitalised on this transition to enrich themselves.

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<sup>18</sup> Dorn D, Fischer J, Kirchgässner G and Sousa-Poza A, ‘Is It Culture or Democracy? The Impact of Democracy and Culture on Happiness’, 82 *Social Indicator Research* 3, 2007, 506.

<sup>19</sup> Article 75, *Constitution of Kenya* (2010).

<sup>20</sup> Alexander Hamilton, *The Federalist Papers*, 1787, Federalist No. 22

<sup>21</sup> *Njoya & 6 others v Attorney General and 3 others* [2008] 2 KLR.

<sup>22</sup> Article 1, *Constitution of Kenya* (2010).

<sup>23</sup> Article 73(2), *Constitution of Kenya* (2010).

<sup>24</sup> Adams O, ‘Elections, Representations and the New Constitution’, Society for International Development, Constitutional Working Paper No.7, 2011, 2, <https://www.sidint.net/content/working-papers> on 14 April 2016.

Previously, majority of the power was vested in the executive.<sup>25</sup> This included matters to do with remuneration as well. With time, the authoritarian regime came to an end, birthing one that was intended to be democratic.<sup>26</sup> However, the reallocation of power from the executive seems to have been done unsatisfactorily. This has led to the institutionalisation of fiscal unaccountability among members of Parliament, as the powers they have over their remuneration are too broad.<sup>27</sup>

We can look to the ruling of Justices Mumbi Ngugi, Joel Ngugi and Odunga on suitability as one of the possible reasons for this in their ruling of *The Trusted Society of Human Rights Alliance v Attorney General*.<sup>28</sup> They made reference to a suitability test for public office holders, of which MPs are part of. The suggested test asks if the person in question possesses the qualities that are necessary to function satisfactorily according to the demands and requirements of the relevant position; or if there exists something in the specific person's previous experience, association, or character that would preclude the person from effectively carrying out the responsibilities that are required by the office.

It is difficult to use similar tests with regards to Members of Parliament due to the fact that they are elected into their roles. However, should it be applied, it would most likely show that a large number of those sitting in parliament are not suitable. This is because their positions demand the pursuit of the welfare of their constituents as opposed to their individual financial interests. According to Kariuki, the pursuit of the office of member of parliament is being sought by people who are unsuitable for the position, as MPs have largely pursued self-enrichment at the expense of the good of their constituents.<sup>29</sup>

Moving on to the SRC, it is evident that it limited powers when it comes to MP remuneration,<sup>30</sup> which only exacerbates the issue at hand. Since MPs are not accountable to the commission, it appears that they are only accountable to themselves with regards to this matter. This only adds

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<sup>25</sup> *Republic v. The Permanent Secretary/Secretary to the Cabinet and Head of Public Service Office of the President and the Permanent Secretary, Ministry of Gender, Culture and Social Services ex parte Stanley Kamanga and the Kenya National Library Services Board*, Nairobi High Court, Misc. Civ. Appl. 612 of 2004, [2006] eKLR.

<sup>26</sup> Murunga G, Okello D and Sjögren A, *Kenya: The Struggle for a New Constitutional Order*, Zed Books, London, 2014, 119.

<sup>27</sup> Akech M, 'Abuse of Power and Corruption in Kenya: Will the New Constitution Enhance Government Accountability?', 18 *Indiana Journal of Global Legal Studies* 1, 2011, 341.

<sup>28</sup> *Trusted Society of Human Rights Alliance v Attorney General & 2 others* [2012] eKLR.

<sup>29</sup> Kariuki K, 'A Faltering Fight on Graft Withers Investor Optimism', 10 *The Nairobi Law Monthly* 2, 2011, 60.

<sup>30</sup> Section 3(2), *Salaries and Remuneration Commission Act*, (No. 10 of 2011).

to the factors that seem to encourage the pursuit of public office for the purposes of self-enrichment.

With regards to accountability to the public, the measures that have been put in place are equally ineffective. The success of accountability measures that are to be carried out by the public are heavily dependent on the right of access to information.<sup>31</sup> The constitution recognises this in the bill of rights.<sup>32</sup> Additionally, the Access to Information Act was legislated to give this right further protection.<sup>33</sup> However, the enactment of various other sets of legislation such as the Official Secrets Act have been used to thwart the exercise of the right of the access to information for purposes of accountability.<sup>34</sup>

When it comes to the remuneration packages available to MPs, the current legal regime in Spain contrasts heavily to that of Kenya. The systems of accountability in Spain are more effective institutionally and on the public front as well.<sup>35</sup> The first sign of this is in legislation that imposes taxation of the basic salary of their MPs.<sup>36</sup> Moreover, there are various bodies that are charged with ensuring fiscal responsibility, including the Ministry of Finance, which are well equipped and sufficiently independent.<sup>37</sup> The result of this has been MPs being awarded salaries that are only marginally higher than the average worker's and consequently,<sup>38</sup> a state that ranks as one of the twenty full democracies in the latest democracy index.<sup>39</sup>

These two states provide a perfect contrasting example of Coleman's assertion on legal rules being elements within a scheme of a rational framework. This means that they serve as a means of dictating human behaviour as well as maintaining order in society.<sup>40</sup> He adds that some laws

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<sup>31</sup> Bruce E, Russell J and Susan E, *Democracy Transformed?: Expanding Political Opportunities in Advanced Industrial Democracies*, Oxford University Press, 2004, 16.

<sup>32</sup> Article 35, *Constitution of Kenya* (2010).

<sup>33</sup> Commission on Administrative Justice Nairobi, *Handbook on Best Practices on Implementation of Access to Information in Kenya*, 27 August 2018, 9.

<sup>34</sup> Gathu P and Kahindi H, *Access to information in Kenya*, Transparency International-Kenya, Adili Newsletters, Issue 155, 2014, 6.

<sup>35</sup> Van Der Hulst M, *The Parliamentary Mandate: A Global Comparative Study*, Inter-Parliamentary Union Geneva, 2000, 35.

<sup>36</sup> Section 8(3), Standing Orders of The Congress of Deputies, 19 June 2018.

<sup>37</sup> Mocan N and Altindag D, 'Salaries and Work Effort: An Analysis of The European Union Parliamentarians', 123 *The Economic Journal* 573, 2013, 1134.

<sup>38</sup> Parrado S, Rewards for High Public Offices in Spain (1990–2009): Incremental Changes Following the Pattern of the Civil Service in *Rewards for High Public Office in Europe and North America*, Routledge, 2012, 112

<sup>39</sup> The Economist Intelligence Unit, *Democracy Index 2018: Me too? Political participation, protest and democracy*, 2018, 14.

<sup>40</sup> Coleman L, 'The Rational Choice Approach to Legal Rules', 'The Rational Choice Approach to Legal Rules', 65 *Chicago-Kent Law Review* 1, 1989, 178.

are enacted in a way that improve the welfare of some at the expense of others.<sup>41</sup> The scenario evident in Kenya is similar to this, as the salary increments that have been given to MPs over time have been made disproportionately and at the expense of the public.

Following the principles of the rational choice theory, Kenneth Shepsle states that one of the means that is used to influence the behaviour of citizens is the use of incentives and sanctions.<sup>42</sup> He adds that people are often more responsive to incentives than sanctions.<sup>43</sup> Therefore, the problem of MPS having the latitude to increase their own salaries disproportionately is not one that can be solved by merely reducing their salaries.

There remains a need to ensure that those who pursue the position of Member of Parliament not only have the desire to achieve the welfare of the people, but the capability to do so as well. This brings out the need to balance the socio-economic rights of the MPs and the welfare of their constituents.<sup>44</sup>

Thus, within the context of political representation in Kenya, it seems that the best way to ensure MPs comply with their responsibility towards their constituents, and actually remain accountable to them, would be by improving the NARA in a way that would base their salaries and allowances on quantifiable measures of the socio-economic development of their constituents.

## **1.8 Research Design**

### **1.8.1 Research Design & Methodology**

This study mainly relied on qualitative research. In this study, the current laws on MP remuneration in Kenya were critically analysed in light of the Constitution and Leadership and Integrity Act. Additionally, this study made use of available statistics and reports from Transparency International, the OECD, the Economy Intelligence Unit and the Democracy Index in determining questions to do with economic development and the link it has to democracy. For the purposes of the acquisition of statistics that are contextual to the Kenya, this study cited various credible newspaper articles.

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<sup>41</sup> Coleman L, 'The Rational Choice Approach to Legal Rules', 179.

<sup>42</sup> Shepsle K, *Rational Choice Institutionalism*, The Oxford Handbook of Political Institutions, 2009, 2.

<sup>43</sup> Shepsle K, *Rational Choice Institutionalism*, 3.

<sup>44</sup> Article 43, *Constitution of Kenya* (2010).



Secondary resources such as journals, articles and books were also used in this study. These works included but were not limited to the fields of criminal law, constitutional law, behavioural law and social and political sciences. The reason for this being that all matters to do with representation are far reaching and cannot be properly captured by exclusively using a legal perspective.

For the theoretical framework, this study delved into the theories of substantive democracy and rational choice. These two theories made it possible to specify the key variables being examined in this research. Lastly, the research employed a comparative study. It juxtaposed the legal regime in Kenya and Spain concerning the effectiveness of representation in the respective states vis-à-vis MP remuneration. The choice of Spain for this study is justified with its similarity to Kenya in terms of population size and number of parliamentarians. Furthermore, Spain's legal regime seems to have yielded positive results when it comes to MP remuneration.

### **1.8.2 Assumptions**

While conducting this research it was assumed that:

- In the spirit of the 2010 Constitution, substantive democracy is the type of democracy that Kenya is meant to practice; and
- The amount of work an MP has is proportionate to the number of constituents they have and the geographical area they preside over.

### **1.8.3 Limitations**

This study was limited by financial and time constraints that prevented the researcher from carrying out wide-range surveys, interviews and accessing certain documents online. It was also limited by the nature of the topic, as some of the information behind the inflation of the remuneration of MPs is not be easily inaccessible.

#### **1.8.4 Chapter Breakdown**

There will be five chapters in this study, as listed below:

- Chapter 1 – Introduction

This chapter will serve as an introduction to the dissertation. It is composed of the background, the problem statement, the objectives of the study, the research questions, the hypothesis, the justification of the research, the literature review and the research design.

- Chapter 2 – Theoretical Framework

In this chapter, there is a discussion based on the Rational Choice Theory and the theory of Substantive Democracy.

- Chapter 3 – Legal Framework

This chapter discussed the current legal framework on MP remuneration in Kenya.

- Chapter 4 – Comparative Study

This Chapter consisted of a comparative study between Kenya and Spain with regards to laws concerning MP remuneration.

- Chapter 5 – Conclusions and Recommendations

This chapter provided a conclusion to the study. It consisted of recommendations on how more effective representation can be attained in Kenya and the potential effects

#### **1.8.5 Duration**

This study spanned for a period of 4 months, beginning in August 2019 and concluding in November 2019.

## 2. THEORETICAL FRAMEWORK

The two theories this research employed are the theory of substantive democracy and the rational choice theory.

### 2.1 The Theory of Substantive Democracy

#### 2.1.1 Definition and Relevance to Kenyan Law

The theory of substantive democracy presents itself as an amalgamation of various democratic theories that have been developed over time. The first component of this theory is based on previous conceptions of the contents of democracy, which tilted towards a procedural point of view. In so doing, theorists such as Dahl equated democracy to the presence and adherence to various rights that are based on procedural governance, such as: the right to vote; the right to be elected; the right of political leaders to compete for support and votes; elections that are free and fair; freedom of association; freedom of expression; alternative sources of information; and institutions that depend on votes and other expressions of preference.<sup>45</sup>

However, the institutional/procedural definition of democracy can only serve as a minimum measure of a democratic system.<sup>46</sup> Unfortunately, this definition has been relied upon by many African states, including Kenya. Many African countries adopted democratic systems of governance simply because such systems are endorsed globally and were implemented by their colonial masters. Consequently, development in Africa remains impeded because many African leaders are ignorant and negligent of the philosophical principles upon which a democracy is formed.<sup>47</sup>

The second component that has been used in defining substantive democracy is the political aspect, which focus on the goals and outcomes of it. Based on this, democracy places a heavy emphasis on freedom and liberty as its essential goals, with the institutions of democracy a way to achieve said goals.<sup>48</sup> Lastly, various scholars have argued that the social dimensions of democracy have to be taken into account, especially with regards to developing countries such

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<sup>45</sup> Dahl R, *Polyarchy*, New Haven: Yale University Press, 1971, 3-8.

<sup>46</sup> Schumpeter J, *Capitalism, Socialism, and Democracy*, New York: Harper, 1943, 243-249.

<sup>47</sup> Ugochukwu M, 'Democracy and Development in Africa: What Africans Require', 1 *Young African Leaders Journal of Development* 1, 2016, 54.

<sup>48</sup> Dalton R, Shin D and Jou W, 'Popular Conceptions of the Meaning of Democracy: Democratic Understanding in Unlikely Places, Center for the Study of Democracy, 2007, 4-6, <https://escholarship.org/uc/item/2j74b860> on 18 May 2007.

as Kenya. This is because the absence of sufficient resources to meet one's basic social and economic needs renders democratic principles of political equality and participation meaningless.<sup>49</sup>

The amalgamation of these three conceptions birthed the theory of substantive democracy in the field of constitutional law. This theory advocates for a symbiotic relationship between fundamental rights, dignity and the autonomy of people and political, social, cultural and economic power.<sup>50</sup>

With regards to this study, this theory stipulates that the role of an MP, as an agent of democracy, consists of the pursuit of the welfare and development of those they represent; the generation of socio-economic equity, promoting the participation of the people in public affairs, the creation of mechanisms that work for the people as opposed to the representative's personal interest and promoting social order.<sup>51</sup> This much is reiterated under the Constitution in its description of the national values and principles of governance to be adhered to.<sup>52</sup>

The means through which this is to be achieved, as per this theory, is through the establishment of what Edmund Burke calls a strict union, defined by direct correspondence and frequent communication with one's constituents.<sup>53</sup> The relevance of this theory to the study is in the examination of the first hypothesis i.e. how the current laws have contributed to inefficient performance by the MPs.

### **2.1.2 Examining the Compatibility of the Salary Increments under The NARA and Substantive Democracy**

In the analysis of the prospects of democracy in Africa, Mazrui makes a distinction between the ultimate goals of democracy and the instruments that are required for their actualisation. He illustrates this point by using the right to vote, arguing that the right to vote is instrumental in helping the state achieve a more fundamental right of government by consent.<sup>54</sup> In a similar fashion, this research analysed the instrumentality of the NARA in the actualisation of the

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<sup>49</sup> Huber E, Dietrich R, and Stephens J, 'The paradoxes of contemporary democracy: Formal, Participatory and Social Democracy', 29 *Comparative Politics* 3, 1997, 323-342.

<sup>50</sup> Montufar C, *Constitutional State of Law and Substantive Democracy*, Abya-Yala Editions, 2008, 394.

<sup>51</sup> Przeworski A, *Democracy and the Limits of Self-Government*, Cambridge University Press, 2010, 1.

<sup>52</sup> Article 10, *Constitution of Kenya* (2010).

<sup>53</sup> Burke E, *The Works of the Right Honourable Edmund Burke. Volume I*, London, Henry G. Bohn, 1854, 446.

<sup>54</sup> Mazrui A, *Who killed Democracy in Africa? Clues of Their Past, Concerns of the Future*, New York: Institute of Global Cultural Studies, 2008, 15-23.

ultimate goals of democracy. This was done by questioning whether the salary increments have enabled the MPs to carry out their roles with greater efficiency or diminished their performance.

Conceptually, the theory of substantive democracy and the act of increasing one's own salary are contradictory. The reason being that, under such a regime of democracy, anyone holding the title of representative is called to act in a manner that embodies selflessness.<sup>55</sup> Although, the actions of Kenyan MPs with regards to their salary have instead been indicative of a self-serving government and hindered the economic development in Kenya.<sup>56</sup>

Moreover, due to the fact that MPs exercise their power as a public trust on behalf of their constituents, this theory demands that they are held to a higher standard of accountability.<sup>57</sup> This is because their decisions, as representatives of the people, have wide-ranging and significant consequences for their constituents. Thus, the nature of the jobs of members of parliament call for them to act with selflessness, because they must consider the effects that their decisions will have not only on themselves but on thousands of other people as well.<sup>58</sup>

### **2.1.3 Analysing the Union Between MPs and Their Constituents**

One of the four basic goals which are sought through democracy includes the active participation of citizens.<sup>59</sup> This is only possible if members of parliament actively seek to involve their constituents in matters that concern them. Additionally, MPs need to ensure that they have established a relationship with their constituents and cultivate an environment that encourages consistent correspondence on all relevant matters.<sup>60</sup>

The theory of substantive democracy only provides a blueprint for how the relationship of an MP and their constituents should be. This study analysed this relationship in Chapter 4, while contrasting it to that of the members of parliament in Spain and their constituents. The rational choice theory was used simultaneously to analyse the relevant relationships in the two states and the reasons why these relationships exist as they currently do.

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<sup>55</sup> Jent H, Watchwords & Catchwords of Democracy, 48 *The Phi Delta Kappan* 1, 1966, 37.

<sup>56</sup> Agashi P, 'Towards A Functional Democracy with African Values', 1 *Journal of African Studies* 1, 2012, 5.

<sup>57</sup> Section 3, *Leadership and Integrity Act* (No. 19 of 2012)

<sup>58</sup> Plato, *Plato's The Republic*, New York: Books, Inc., 1943, Book V, 336.

<sup>59</sup> Stromberg R, *Democracy: A Short, Analytical History*, M.E. Sharpe, 1996, 207.

<sup>60</sup> Newman J, Barnes M, Sullivan H and Knops A, 'Public Participation and Collaborative Governance', 33 *Journal of Social Policy* 2, 2004, 203-211.

## 2.2 The Rational Choice Theory

### 2.2.1 Definition and Relevance to The Study

The rational choice theory originated in the field of economics, providing a framework to understand and model social and economic behaviour.<sup>61</sup> It holds that the aggregate social behaviour is the outcome of multiple individuals acting or choosing not to, based on their individual interests and wants.<sup>62</sup>

The operative word in this theory is choice. It presumes that all actors have a set of options from which they will make a choice based on their personal preferences.<sup>63</sup> The methodological determination of said preferences is based on the following factors:<sup>64</sup>

- The availability and utilisation of information by the actor;
- The probabilities of events and all foreseeable outcomes;
- The potential costs associated with each choice; and
- The potential benefits associated with each choice.

Due to the universal applicability of this theory to everyday life, it has been consistently adapted to fit other fields of study. Within law, it was initially and most popularly used to analyse the economics behind criminal activity.<sup>65</sup> This led to the birth of the deterrence theory of criminal law, which has been used to make legislation that deters specific crimes by increasing the probability of arrest and increasing the potential costs of committing said crimes.<sup>66</sup>

The rational choice theory employs a similar methodological approach. However, it incorporates factors that go beyond economics. In the realm of law, the rational choice theory holds that the assignment of legal rules and sanctions will yield efficient results only under three conditions: the presence of complete information, rationality and the absence of any

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<sup>61</sup> Jolls C, Sunstein C and Thaler R, 'A Behavioral Approach to Law and Economics', 50 *Stanford Law Review* 1, 1998, 174.

<sup>62</sup> Bicchieri C, Rationality and Coordination, 9 *Cambridge University Press* 2, 1993, 247-250.

<sup>63</sup> Shepsle K, *Rational Choice Institutionalism*, 8.

<sup>64</sup> Coleman J, Fararo J, *Rational Choice Theory*, Sage Publications, 1992, 6.

<sup>65</sup> Coleman J, Fararo J, *Rational Choice Theory*, 8.

<sup>66</sup> Akers R, 'Rational Choice, Deterrence, and Social Learning Theory in Criminology: The Path Not Taken', 81 *The Journal of Criminal Law and Criminology* 5, 1990, 654.

transaction costs.<sup>67</sup> However, it is rare that these three conditions are fully present at the same time. Therefore, the law needs to be fashioned in a way that will compensate for the absence or paucity of any one of these conditions.<sup>68</sup>

The application of this theory with regards to this study is be two-fold. It was used to test the hypotheses and, together with the theory of substantive democracy, to suggest recommendations that can be made in relation to the National Assembly Remuneration Act.

### **2.2.2 The Insufficiency of the Deterrence Theory and The Application of the Theory to NARA**

Even though the field of law has largely relied upon the deterrence theory, for this study the it will not suffice. The deterrence theory is insufficient in that it incorporates a purely economic view to the adjustment of potential costs and benefits of certain choices.<sup>69</sup> In this instance, using the deterrence theory so as to further democratic development in Kenya, by modifying the NARA, would be limited to reducing the salaries of members of parliament.

Even though it is desirable to deter the unbridled salary increments being given to MPs, more needs to be done so as to positively affect the performance of MPs. This is because there remains a need to ensure that the pursuit of social and economic development by MPs is highly incentivised.<sup>70</sup> In order to do this, focus will need to be placed on the on the potential costs and benefits related to vying for a seat in parliament. The reason being that the availability and utilisation of information and the probable outcomes of political aspiration are factors that cannot be modified by improving the NARA.<sup>71</sup> The former is entirely dependent on the diligence and resources available to the individual and with regards to the latter, regardless of content of the law, the probable outcomes of political aspiration will always be either winning or losing.<sup>72</sup>

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<sup>67</sup> Coleman L, 'The Rational Choice Approach to Legal Rules', 177.

<sup>68</sup> Bennet W, 'Mere Rationality in Constitutional Law: Judicial Review and Democratic Theory', 67 *California Law Review* 1, 1979, 1049.

<sup>69</sup> Farbert D, 'Toward a New Legal Realism', 68 *The University of Chicago Law Review* 279, 2001, 286.

<sup>70</sup> Knight J and Johnson J, 'Inquiry into Democracy: What Might a Pragmatist Make of Rational Choice Theories?', 43 *American Journal of Political Science* 2, 1999, 586-589.

<sup>71</sup> Meltzer A and Richard S, A Rational Theory of the Size of Government, 89 *Journal of Political Economy* 5, 1981, 914-920.

<sup>72</sup> Chong D, *Degrees of Rationality in Politics*, Oxford University Press, 2013, 101.

In this matter, adjusting the potential costs related to political representation will be difficult. The costs associated with political aspiration are almost completely economic, time and effort based.<sup>73</sup> The expenditure of the same is restricted to their availability and the willingness of the individual to spend them and thus, would barely be affected by any modification to the NARA. Therefore, the most suitable approach would involve focusing on the potential benefits associated with obtaining a seat in parliament.

This change would be done not only by changing the quantity of salaries and allowances given to MPs, but by changing the way in they are obtained as well. As currently written, the benefits that are accorded to them under the NARA are very easily obtainable and not tied to their performance in any way.<sup>74</sup> This can be remedied by using the rational choice theory by directly linking MPs salaries to quantifiable indicators of social and economic development. This would ensure that the welfare of the people would be a priority.

### **2.2.3 Compensating for the Lack of Information and Rationality Among Kenyan Voters**

The voters' side of the equation must also be considered. The allowances and benefits under the NARA influence who is willing and able to run for a seat in parliament. This means that the NARA is instrumental in determining the available choices of political aspirants that people will choose from during the elections.

Therefore, any modification to the NARA will have an impact on the pool of candidates from which voters will be choosing from. Finding a way to link the salaries of MPs to the welfare of their constituents will indirectly filter the pool of candidates vying for the relevant posts, by eliminating those who pursue these seats for the purposes of financial gain.

The two factors that this would compensate for are the lack of information and flawed rationality used in elections by voters in Kenya. It is an established fact in Kenya that voter education is insufficient.<sup>75</sup> Procedurally, voters are properly and adequately equipped with the relevant information. However, they are not properly informed when it comes to the reasons

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<sup>73</sup> Fiorina P and Noll R, 'Voters, Legislators and Bureaucracy: Institutional Design in the Public Sector', 68 *The American Economic Review* 2, 1978, 256-60.

<sup>74</sup> Section 2, *National Assembly Remuneration Act* (No. 4 of 2012)

<sup>75</sup> Finkel B, Horowitz S and Rojo-Mendoza R, 'Civic Education and Democratic Backsliding in the Wake of Kenya's Post-2007 Election Violence'. 74 *The Journal of Politics* 1, 2012, 52-65.



why one should choose a particular aspirant as a member of parliament.<sup>76</sup> Therefore, they do not make rational choices when it comes to the elections of MPs. This is because they are not properly equipped to do so and even if they were, there would not be many rational options for them to choose from.

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<sup>76</sup> GSDRC Helpdesk Research Report, *Approaches to Civic Education in Africa*, 2012, 772.

### **3. ANALYSING THE LEGAL FRAMEWORK AROUND MP REMUNERATION IN KENYA**

Legislation in Kenya with regards to MP remuneration has always yielded a consistent increase in salaries for parliamentarians. These increments have been a great topic of debate in parliament and seem to be based on whims rather than reason.<sup>77</sup> They also appear to be unlikely to end any time soon, given that the instruments for the control of parliamentary salaries appear to be inefficient. The main instruments are the Constitution, the Leadership and Integrity Act, the Salaries and Remunerations Act and The National Assembly Remuneration Act. A brief analysis of each of these laws shows the means that have been used to augment their salaries, the constitutional principles they have gone against as well as assist in identifying potential areas for improvement.

#### **3.1 The Constitution and The Leadership and Integrity Act**

Chapter VI of the Constitution is the main source of law on the expected conduct of all state officials, including MPs.<sup>78</sup> This chapter is to be read conjunctively with the Leadership and Integrity Act, as it provides more detail as to the conduct that is expected of a member of parliament.<sup>79</sup>

The principles of substantive democracy are present in chapter VI of the constitution, in that its provisions demand a spirit of selflessness and service to the people by all public officials, including MPs. Additionally, article 118 imposes a duty on Parliament to facilitate public participation and involvement in the business of Parliament and its committees;<sup>80</sup> while article 119 gives every person the right to petition Parliament to consider any matter within its authority.<sup>81</sup> Article 104 also gives the electorate the right to potentially recall the MP representing their constituency on grounds of gross misconduct.<sup>82</sup> Furthermore, article 116 stipulates that legislation conferring a direct pecuniary interest on members of Parliament

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<sup>77</sup> National Assembly Hansard Report, 27 November 2018, 35.

<sup>78</sup> Chapter VI, *Constitution of Kenya* (2010).

<sup>79</sup> Kivuva J, 'Restructuring the Kenyan State', Society for International Development, Constitutional Working Paper No.1, 2011, 8, <https://www.sidint.net/content/working-papers> on 14 April 2016.

<sup>80</sup> Article 118, *Constitution of Kenya* (2010).

<sup>81</sup> Article 119, *Constitution of Kenya* (2010).

<sup>82</sup> Article 104, *Constitution of Kenya* (2010).

cannot take effect during the life of the parliament that enacts it,<sup>83</sup> taking away the power of MPs to enact legislation that unduly raises their salaries and benefits.

The Leadership and Integrity Act adds on to constitutional provisions by requiring all state officials to abide to a code of integrity. It demands that parliamentarians act responsibly and with respect to the public trust,<sup>84</sup> as guided by the rule of law.<sup>85</sup> However, these provisions have proved to be ineffective despite the fact that they have the potential to be useful mechanisms for constituents to hold their MPs accountable and limit the level of financial control they have.

Given that the constitution demands that MPs should respect the public trust, their salaries should only be awarded in a manner that displays responsible expenditure of public funds. This is because a large proportion of government revenue is funded by the citizens. Thus, MPs have a legal obligation to spend public funds for the purposes of promoting the welfare of their constituents and addressing the needs of the country.<sup>86</sup> The disproportionate salary increments have therefore come at the expense of the economic and social development of their constituents.

The principle of financial integrity is also brought out in the Leadership and Integrity Act. Section 12 provides that MPs are not to unlawfully or wrongfully enrich themselves or any other person.<sup>87</sup> However, undeserved enrichment has been a staple of Kenyan parliament since the turn of the century and should be categorised as unlawful. The reason for this has persisted is because before 2011, there was no independent body that held the responsibility of determining what the salaries of MPs would be and upon the establishment of such a commission, it was not given sufficient independence nor resources to properly carry out its functions.

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<sup>83</sup> Article 116, *Constitution of Kenya* (2010).

<sup>84</sup> Section 8, *Leadership and Integrity Act* (No. 19 of 2012).

<sup>85</sup> Section 7, *Leadership and Integrity Act* (No. 19 of 2012).

<sup>86</sup> Kirira N, 'Public Finance under Kenya's new Constitution', Society for International Development, Constitutional Working Paper No.5, 2011, 8, <https://www.sidint.net/content/working-papers> on 14 April 2016.

<sup>87</sup> Section 12, *Leadership and Integrity Act* (No. 19 of 2012).

### 3.2 The Salaries and Remuneration Commission Act

The Salaries and Remuneration Commission was established in 2012 under Article 230 of the Constitution.<sup>88</sup> The principles underpinning the functions of the SRC are fiscal sustainability, recognition of productivity, performance and transparency and fairness.<sup>89</sup>

The efforts made by MPs to arbitrarily raise their salaries go against the above principles. Currently, Kenya's economy is unable to sustain the grand salaries and allowances being awarded to parliamentarians. Furthermore, there are no records showing that the awarding of greater salaries has coincided with increased levels of productivity and performance of MPs. In fact, legislation in Kenya has never identified a clear and quantifiable way of measuring the effectiveness or performance of MPs. Lastly, the use of the term fairness is in and of itself problematic. Neither the constitution nor the SRC Act define what the term fair means. Therefore, as long as MPs vote to enhance their salaries and said enhancement is approved by the SRC, whose hands are tied by parliament itself, it would be difficult to challenge the fairness of any such enhancement. The undefined use of the word fair has consequently precluded legal action against MPs for awarding themselves greater salaries, as there is no basis one may use to challenge said awards.

The SRC draws its power to determine MPs salaries from the SRC Act. It states that one of the roles of the SRC is to inquire into and determine the salaries and remuneration to be paid out of public funds to state officers and other public officers.<sup>90</sup> However, MPs still seem to retain all the power when it comes to their salaries because the SRC is not independent. It was established by parliament, while commissioners and chairpersons are selected by the President.<sup>91</sup> Therefore, for the SRC to deny MPs salary increments would be tantamount to biting the hands that feed them. Furthermore, even though MPs have no direct say on who the commissioners and chairpersons are, it is clear that they still influence the President's choices for the said posts due to political reasons of party alignment.

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<sup>88</sup> Article 230, *Constitution of Kenya* (2010).

<sup>89</sup> Section 12, *Salaries and Remuneration Commission Act* (No. 10 of 2011)

<sup>90</sup> Section 11, *Salaries and Remuneration Commission Act* (No. 10 of 2011)

<sup>91</sup> Section 4, *Salaries and Remuneration Commission Act* (No. 10 of 2011)

The lack of power to properly perform their functions is captured by the words of the current commissioner Lyn Mengich. After the most recent award of an additional 250,000 shillings to the monthly salaries of MPs, she stated that said award was neither set nor advised by the SRC, and was therefore unconstitutional.<sup>92</sup> A year later, this award has not been overturned despite the fact that it clearly violates the constitution, demonstrating the ineffectiveness and powerlessness of the SRC.

### **3.3 The National Assembly Remuneration Act**

This Act provides for the salaries and allowances to be awarded to all state officials. Under this act there are no provisions whatsoever that are related to the performance of MPs, but there are various inexplicable financial awards that MPs are given under this law. For instance, MPs currently earn a basic salary of 710, 000 Kenyan shillings every month.<sup>93</sup> However, after adding the minimum amount of money they can receive in the form of allowances, that figure rises to 1,378,00 Kenyan shillings.

The most controversial award of all is likely the sitting allowance. According to the act, all members of the National Assembly are awarded a sitting allowance of 5,000 shillings per sitting.<sup>94</sup> This is similar to paying someone simply for their presence at their place of work. Therefore, if an MP was to attend parliamentary sittings, make no meaningful contributions and be stripped of all other salaries and allowances, they would still receive far more than the average Kenyan every month for simply being present.

MPs are also awarded a severance pay that totals to 31% of their basic salary during the five-year term.<sup>95</sup> That means that all MPs collect 1,100,500 shillings at the end of their respective terms. This is unreasonable considering that the purpose of severance pay is to protect workers whose contracts are terminated unwillingly. Additionally, it is usually based on the number of years left on an employment contract at the time of termination. The contracts of MPs are not terminated, they simply lapse and are signed with the understanding that their willingness to

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<sup>92</sup> Awich L, 'New house allowance puts MPs' salary way above world super powers', The Star, 11 May 2019. <https://www.the-star.co.ke/siasa/2019-05-11-new-house-allowance-puts-mps-salary-way-above-world-super-powers/>

<sup>93</sup> First Schedule, *National Assembly Remuneration Act*, (No. 4 of 2012).

<sup>94</sup> Section 2, *National Assembly Remuneration Act*, (No. 4 of 2012).

<sup>95</sup> Second Schedule, *National Assembly Remuneration Act*, (No. 4 of 2012).

remain in the seat is not relevant. Additionally, severance pay is still awarded to those who are re-elected, or in other words, MPs whose employment has technically not been severed.

In addition to the two egregious allowances mentioned above, some of the other allowances given to MPs under the second schedule of the NARA include:<sup>96</sup>

- A mortgage of 20 million shillings, with a measly 3% interest rate;
- A mileage allowance amounting to 109 shillings per kilometre up to 750 kilometres;
- A monthly car maintenance allowance of 356,525 shillings;
- A 5-million-shilling car grant and;
- A medical allowance that covers the MP's family.

These salaries are not only decided arbitrarily, without the consent of the relevant commission (SRC) and are unproportionately high but are also purely irrational.

### **3.4 The Constituency Development Fund(CDF) Act**

The CDF Act governs how MPs are to use public funds for the development of their constituencies.<sup>97</sup> While this act does not have a direct impact on the amount of money MPs earn, it has an impact on the amount of money they control and have access to. As seen earlier, the NARA provides for extravagant amounts of money to be given to MPs, making it such that self-enrichment is the main motivating factor behind parliamentary aspiration. Due to this, it appears legislation has been enacted with an in-built space for greed, and the CDF Act is no exception.

It should be noted at the outset that the CDF Act had noble objectives, as it seeks to enhance the participation of Kenyans in the initiation and implementation of development projects at the constituency level.<sup>98</sup> However, it violates the separation of powers doctrine in a number of aspect by giving MPs the power to expend public resources and account to themselves for such expenditure. Under the CDF Act, there are two principal institutions of accountability: The Constituency Development Committee and the Constituency Fund Committee. The Act

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<sup>96</sup> Second Schedule, *National Assembly Remuneration Act*, (No. 4 of 2012).

<sup>97</sup> Section 23, *Constituency Development Fund Act*, (No. 30 of 2013).

<sup>98</sup> Mbote K and Akech M, *Kenya: Justice Sector and the Rule of Law*, 71.

requires the establishment of a CDC in every constituency.<sup>99</sup> However, this critical organ suffers the same fate as the SRC, since it is constituted, convened and chaired by the respective MP.<sup>100</sup> Even though the Act makes an attempt to regulate who can serve as members of the CDC, the ultimate decision of which individuals are to be appointed is the prerogative of the MP. On the other hand, the CFC is an oversight body whose functions include the implementation the policy framework, the legislative framework and the implementation of the CDF Act.<sup>101</sup> MPs therefore are the auditors of their own work under the Act and account to themselves through the CFC.

In practice, this Act undermines all principles of democracy, integrity and accountability.<sup>102</sup> It creates a situation in which MPs legislate, participate in the implementation of said law and proceed to account for the resulting expenditure to themselves. The CDF Act is not without opposition on the grounds of its contravention of integrity, the rule of law and separation of powers. The judiciary reviewed the Act in the case of *John Onyango Oyoo v Zadock Syongo*, where the applicants complained of inequitable distribution of the funds allocated to the Gwasi constituency.<sup>103</sup> However, the court noted that there is no clear mechanism in the Act to control abusive or excessive use of authority by the sitting member of Parliament, under the powers provided for under section 23.<sup>104</sup> In response to the public outcry, Parliament made some changes to the Act in 2007, but these changes do not address these concerns nor do they significantly alter its provisions, maintaining the kleptocratic status quo.

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<sup>99</sup> Section 12(1), *Constituency Development Fund Act*, (No. 30 of 2013).

<sup>100</sup> Section 27(1), *Constituency Development Fund Act*, (No. 30 of 2013).

<sup>101</sup> Section 27(4), *Constituency Development Fund Act*, (No. 30 of 2013).

<sup>102</sup> Gachomo K, Rule of Law Report ICJ-Kenya, *Management of Devolved Funds: New Bastion for Corruption and Patronage*, 2007, 2-9.

<sup>103</sup> *John Onyango Oyoo & 5 others v Zadock Syongo & 2 others* [2005] ekLR.

<sup>104</sup> Section 23, *The National Government Constituencies Development Fund Act*, (No. 30 of 2015).

#### 4. COMPARATIVE ANALYSIS OF THE RELATIONSHIP BETWEEN MP SALARY AND PERFORMANCE IN KENYA AND SPAIN

This study comparatively analysed the impact that remuneration policies have had in Kenya and Spain. The reason for selecting Spain is based on the similar ratio of MPs to the total number of citizens and area of the country. Therefore, based on the fact that the role of an MP is representative in nature, it can be concluded that these demographic and geographical similarities are indicative of the amount of work an MP has. Among the 20 countries with the highest salaries for their parliamentarians, Spain, with a citizen to MP ration of 142,207:1 and an area of 505,990 km<sup>2</sup>, bears the closest similarity to Kenya, which has a citizen to MP ration of 133,314:1 and an area of 580,367 km<sup>2</sup>.

Additionally, using Spain as a comparative study will eliminate various limitations including:

- Sample size variations. This limitation is associated to differences in population sizes. However, it is mitigated due to the similarity of population sizes between the two countries.<sup>105</sup>
- Work load differences. Work load refers to the amount of work being carried out by a specific person or group of people.<sup>106</sup> Significant differences in the amount of work to be carried out by the respective MPs would greatly hinder this study. Although, as explained with the aforementioned ratios, this will not impact the study due to the size related demographic and geographic similarities that the two states share.

The statistics that this study used correspond with the roles of MPs in promoting pillars of substantive democracy, which are public participation, economic development and social development.<sup>107</sup> These statistics include:

- A comparison between MP salary and the salary of the average citizen. This statistic has been shown to correspond directly to the effective representation of a population's economic interest.<sup>108</sup>

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<sup>105</sup> Deltas G, 'The Small-Sample Bias of the Gini Coefficient: Results and Implications for Empirical Research', 85 *The Review of Economics and Statistics* 1, 2003, 226-234.

<sup>106</sup> Jex M, *Advanced topics in organizational behavior. Stress and job performance: Theory, research, and implications for managerial practice*. Sage Publications Ltd, 1998, 12.

<sup>107</sup> Montufar C, *Constitutional State of Law and Substantive Democracy*, 300-376.

<sup>108</sup> Odhiambo F, 'Assessing the Predictors of Lived Poverty in Kenya: A Secondary Analysis of the Afrobarometer Survey 2016', 54 *Journal of Asian and African Studies* 3, 2019, 1-13.



- The Gini index(GI) – The GI illustrates the gap between the rich and the poor in a particular country. It can therefore be used as a measure of economic development.<sup>109</sup>
- The Sustainable development goal index(SDGI) – The SDGI focuses on the measurement of 17 goals that are directly related to one of the components of substantive democracy i.e. the welfare in society.<sup>110</sup>
- The Democracy index(DI) – This will act as a measure of public participation and government performance as the democracy index takes into account these two figures in its computation.<sup>111</sup>

#### 4.1 MP and Average Citizen Wage Gap

Given that the key element under discussion, with regards to the salary increments of MPs, is disproportionality rather than quantity of salary, the first statistic that this study relied on is a comparison between the salaries of MPs and those of the average citizen in the two countries. While high salaries do not indicate poor performance of MPs, the gap between their salaries and the average salary of their constituents reflects how much MPs are serving themselves versus how much they are serving their constituents.

There is a great disparity between MPs and the salary of average citizens in Kenya, while Spain shows a lower level of disparity between the two. Reports show that in Kenya, MPs earn up to 73,200 dollars per annum, while the average citizen earns approximately 1,300 dollars.<sup>112</sup> In Spain, the numbers are much more even, as MPs earn 37,965 dollars and the average citizen earns 33,565.<sup>113</sup> Statistics that lean towards average representation can be misleading, since a few high earning individuals could tip the scales in a way that does not paint an accurate picture about the earnings of the average man.<sup>114</sup> In order to overcome this limitation, this research used multiple statistics so as to augment the findings derived from MP and average citizen wage gap.

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<sup>109</sup> Gini C, ‘Concentration and dependency ratios’, 1 *Rivista di Politica Economica* 87, 1997, 769-789.

<sup>110</sup> Sustainable Development Solutions Network, *SDG Index and Dashboards Report 2018 IMPLEMENTING THE GOALS*, 2018, 4.

<sup>111</sup> Zeyao L and Zhou Z, ‘The Relationship Between Annual GDP Growth and Income Inequality: Developed and Undeveloped Countries’, Published BSE Thesis, Georgia Institute of Technology, 2017, 6.

<sup>112</sup> International Labor Organization, *Global Wage Report 2018/19*, 2018, 10.

<sup>113</sup> International Labor Organization, *Global Wage Report 2018/19*, 2018, 10.

<sup>114</sup> Raju JK, ‘An Empirical Study on The Effect of Gross Domestic Product on Inflation: Evidence Indian Data’, 22 *Academy of Accounting and Financial Studies Journal* 6, 2018, 6.

## 4.2 The Gini Index

The GI is a measure of statistical dispersion intended to represent the income or wealth distribution of a nation's residents and is the most commonly used measurement of inequality.<sup>115</sup> It has been shown to be an effective determinant of economic development, as there is a direct link between economic growth and a reduction in income inequality.<sup>116</sup> Therefore, GI can be used to measure the economic aspect of MP performance.

This statistic has been used sparingly, with the most recent study in Kenya being done in 2015. However, the country has ranked between the 18<sup>th</sup> and 35<sup>th</sup> most economically unequal countries according to the GI.<sup>117</sup> In the same time frame, Spain has ranked below the 33<sup>rd</sup> percentile when it comes to economic inequality.<sup>118</sup> Additionally, there are various factors that are indicative of low levels of economic inequality, such as high minimum wage, that are present in Spain and absent in Kenya.<sup>119</sup> These factors are indicative of the enactment of policies that favour the citizens of a Nation. Hence, their relative scarcity in Kenya points to the efforts that parliamentarians have put into serving themselves as opposed to serving their constituents.

## 4.3 The Sustainable Development Goal Index

The SDGs are a collection of 17 global goals designed to be a blueprint to achieve a better and more sustainable future for all.<sup>120</sup> These goals are directly linked to social and economic wellbeing and therefore speak to the performance of MPs, with regards to their role as drivers of socio-economic development.

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<sup>115</sup> Gini C, 'Concentration and dependency ratios', 1997, 769-789.

<sup>116</sup> Zeyao L and Zhou Z, 'The Relationship Between Annual GDP Growth and Income Inequality: Developed and Undeveloped Countries', Published BSE Thesis, Georgia Institute of Technology, 2017, 8.

<sup>117</sup> Wanyagathi M, 'The Effect of Consumption Taxes on Poverty and Income Inequality in Kenya', 5 *International Journal of Accounting and Taxation* 2, 2017, 56-82.

<sup>118</sup> López A, Arce G, Morenate M, Monsalve F, 'Assessing the Inequality of Spanish Households through the Carbon Footprint: The 21st Century Great Recession Effect', 20 *Journal of Industrial Ecology* 3, 2016, 574.

<sup>119</sup> Foster J, Gonzalez L, Lopes C, 'Income Inequality, Ethnic Diversity, and State Minimum Wages', 100 *Social Science Quarterly* 3, 2019, 825-837.

<sup>120</sup> Resolution adopted by the General Assembly on 25 September 2015, Seventieth session

According to the most recent SDGI, Kenya ranks 125<sup>th</sup> out of a possible 162 countries, while Spain sits at 21<sup>st</sup>.<sup>121</sup> The contrasting situations in Kenya and Spain highlight the different levels of support that the governments have dedicated towards the SDGs. Naturally, such a resolution requires funding. Given that MPs in Kenya pay undue regard to their salaries at the expense of socio-economic development, it is not surprising that Kenya ranks lowly in this statistic.

Three sectors need to come together in order to achieve sustainable development. These are the economic, socio-political, and environmental sectors in their broadest sense. This requires the promotion of multidisciplinary research across different sectors, which can be difficult, particularly when major governments such as Kenya's fail to support it.<sup>122</sup>

Projections into the future show that many African countries, including Kenya, are lagging behind in the achievement of the SDGs. An example of this can be seen in the fact that Kenya is one of the countries projected to fall short in meeting the Sustainable Development Goal target: to end malnutrition by 2030.<sup>123</sup> Even though SDG achievement is not solely dependent on funding,<sup>124</sup> the lack of fiscal accountability in parliament, as shown by the above statistics, does act as one of the significant roadblocks to their achievement.

#### **4.4 The Democracy Index**

The DI is a tool compiled by the Economist Intelligence Unit (EIU) that is used to measure the state of democracy in 167 countries. The democracy index is a weighted average based on the answers of 60 questions, each one with either two or three permitted alternative answers.<sup>125</sup> The questions are grouped into five categories: electoral process and pluralism, civil liberties, functioning of governmental institutions, political participation, and political culture. These five characteristics are generally considered to be the bedrock of democracy.<sup>126</sup>

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<sup>121</sup> Sustainable Development Solutions Network, *SDG Index and Dashboards Report 2018 IMPLEMENTING THE GOALS*, 2018, 77.

<sup>122</sup> Allena C, Metternichta G and Wiedmann T, 'National pathways to the Sustainable Development Goals (SDGs): A comparative review of scenario modelling tools', 66 *Environmental Science & Policy* 22, 2016, 199-207.

<sup>123</sup> Osgood-Zimmerman A, Anoushka I and Hay S, 'Mapping child growth failure in Africa between 2000 and 2015', 555 *Nature* 7694, 2018, 41-47.

<sup>124</sup> Spangenberg J, 'Hot Air or Comprehensive Progress? A Critical Assessment of the SDGs', 25 *Sustainable Development* 4, 2016, 311-321.

<sup>125</sup> The Economist Intelligence Unit, *Democracy Index 2015: Democracy at a Standstill*, 2015, 16.

<sup>126</sup> The Economist Intelligence Unit, *Democracy Index 2015: Democracy at a Standstill*, 2015, 23.

On this index, Spain ranks 19<sup>th</sup>, as one of the full democracies. Kenya on the other hand, is 98<sup>th</sup> and is categorised as a hybrid regime.<sup>127</sup> Full democracies are nations where civil liberties and basic political freedoms are not only respected but also reinforced by a political culture conducive to the thriving of democratic principles. Hybrid regimes are nations with regular electoral frauds, non-independent judiciaries, widespread corruption, and pronounced faults that point to underdeveloped political culture, low levels of participation in politics, and issues in the functioning of governance.<sup>128</sup> The reason Kenya is poorly ranked on the DI is mainly because there is an apparent difficulty among the citizenry in influencing decision-making; in accessing information on budgets, legislation and projects; and corruption in state offices.<sup>129</sup>

The DI has been criticized for lacking transparency and accountability beyond the numbers. This is because the final report excludes various sets of information about the experts involved, including: their specific expertise, their number, whether the experts are employees of the EIU or independent scholars and their nationalities.<sup>130</sup> There is however no concrete evidence suggesting that the democracy index is biased. Additionally, its findings correspond favourably with other measurements of social development and MP performance, indicating that despite its alleged lack of transparency it does have credibility.

#### **4.5 Lessons to be Learned from Spain's Legal Framework on MP Remuneration**

In 2011 Spain implemented a national reform process to reinforce the fiscal framework and put in place strict new budgetary rules across all levels of government, including the remuneration of the Cortes Generales.<sup>131</sup> This was done with the goal of meeting European commitments, restoring sound public finances and setting them on a sustainable path.<sup>132</sup> Thus, different forms of spending reviews were introduced to improve flexibility and responsiveness in the budget system.

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<sup>127</sup> The Economist Intelligence Unit, *Democracy Index 2018: Me too? Political participation, protest and democracy*, 2018, 12.

<sup>128</sup> The Economist Intelligence Unit, *Democracy Index 2015: Democracy at a Standstill*, 2015, 38.

<sup>129</sup> Mbithi A, Ndambuki D, Juma FO, 'Determinants of Public Participation in Kenya County Governments', 54 *Journal of Asian and African Studies* 1, 2019, 52-69.

<sup>130</sup> Peter Tasker, 'The flawed 'science' behind democracy rankings', *Nikkei Asian Review*, 25 February 2016. <https://asia.nikkei.com/NAR/Articles/Peter-Tasker-The-flawed-science-behind-democracy-rankings>

<sup>131</sup> OECD, *OECD Labour Force Statistics 2019*, OECD Publishing, 2019, <https://doi.org/10.1787/g2g9fb3e-en>

<sup>132</sup> Section 128(2), *Constitution of Spain*, 1978.

While the Spanish MPs do have a level of control over their remuneration, the system of checks and balances that have been put in place to ensure fiscal responsibility are comprehensive. Furthermore, their fiscal policy is tied to the provisions of the OECD and therefore has ramifications beyond the national level, as they must comply with OECD provisions.<sup>133</sup>

Their fiscal policy consists of a medium-term budgetary plan covering three years, for which any amendment or deviation must be justified.<sup>134</sup> Additionally, all core budget reports and most ancillary reports are produced and made public, so as to further accountability to the respective constituents.<sup>135</sup> Furthermore, there are established budget committees that adopt a decision to hold quarterly hearings to monitor budget implementation and budget trends.<sup>136</sup>

All these measures ensure that, even though the Spanish parliamentarians have a say in what their salary will constitute, they are unable to arbitrarily enforce salary increments.<sup>137</sup> This contrasts with the situation in Kenya, where MP's power to control public funds is regulated only on paper. Also, the punishments for irresponsible use of funds in Spain is more severe, showing proper implementation of the deterrence theory.<sup>138</sup>

All this has culminated in the legislation of a culture of fiscal accountability, which is evident in the actions of the Spanish MPs. They have on several occasions made decisions that put the welfare of their constituents above their own. This is illustrated by their opting to reject their full salaries in a bid to slow down the rate of public spending cuts in 2016,<sup>139</sup> whereas Kenyan MPs seem unsatisfied with a salary that is almost 70 times that of the average Kenyan.

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<sup>133</sup> OECD, *Budgeting and Public Expenditures in OECD Countries 2019: Budgetary Governance in Practice: Spain*, 2019, 239.

<sup>134</sup> Standing Order 8(1) and (4), Standing Orders of the Congress of Deputies.

<sup>135</sup> OECD, *Budgeting and Public Expenditures in OECD Countries 2019: Budgetary Governance in Practice: Spain*, 242.

<sup>136</sup> Act 3/2015, of 30th March, Regulating the Exercise of High Office of The General Administration.

<sup>137</sup> Act 19/2013, of 9th December, on Transparency, Access to Public Information, and Good Governance

<sup>138</sup> Article 187, *The Criminal Code of The Kingdom Spain*, 1994.

<sup>139</sup> Dawber A, 'Spain's Podemos Party MPs Reject Full Salary and Pledge to Slow Rate of Public Spending Cuts', *The Independent*, 5 January 2016, <https://www.independent.co.uk/news/world/europe/spain-s-podemos-party-mps-reject-full-salary-and-pledge-to-slow-rate-of-public-spending-cuts-a6798141.html>.

## 5. SUMMARY OF FINDINGS, RECOMMENDATIONS AND CONCLUSION

### 5.1 Summary of Findings

From the data and the arguments presented above, it is evident that the salary increments that MPs have granted themselves in Kenya over the years have had a negative effect on their performance. The main reason for this is that tying the position of a seat in parliament to such large amounts of money, makes it more likely that these positions will be pursued for the purposes of self-enrichment, as opposed to the welfare of the citizens.<sup>140</sup> Therefore, parliamentary seats tend to attract individuals motivated by greed and self-interest and not necessarily with a clear agenda towards improving the welfare of the citizens.

MPs in Kenya have consistently pursued their own interests as opposed to those of their constituents. This is shown in the low rates of socio-economic development in Kenya,<sup>141</sup> as the MPs would rather use public funds for their own benefit instead of the purpose for which it was intended. Furthermore, MPs have performed poorly in their representative role, as the enactment of some of their legislations have been fuelled by greed.<sup>142</sup> An example of this is the CDF Act which gives them unparalleled control over public funds despite the outlandish salaries they already receive. They are accountable to themselves for all matters pertaining to the CDF.

Lastly, the salary increments have also had a negative impact on the democracy in Kenya, specifically in the dimension public participation. This is because MPs see their constituents as a means to an end that, rather than people who they should be serving.<sup>143</sup> This is shown by the fact that public participation and MP-constituent interaction over development priorities of the constituents is highest during election periods and is extremely low at all other times.<sup>144</sup> Consequently, the constituents are rarely able to communicate their interests to those who represent them let alone hold them accountable for their poor performance.

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<sup>140</sup> Kimemia D, 'Perception of Public Corruption in Kenya', 57.

<sup>141</sup> Ochere M, 'Poverty Dynamics, Income Inequality and Vulnerability to Shocks in Rural Kenya' Published Thesis, Wageningen University, Wageningen University Press, 2011, 16.

<sup>142</sup> Section 23, *Constituency Development Fund Act*, (No. 30 of 2013).

<sup>143</sup> Newman J, Barnes M, Sullivan H and Knops A, 'Public Participation and Collaborative Governance', 208.

<sup>144</sup> Agashi P, 'Towards A Functional Democracy with African Values', 5.

## 5.2 Recommendations

This research has highlighted the need to fashion MP remuneration laws in a manner that encourages integrity, transparency and accountability to the primary sovereign, which is the people as opposed to self-enrichment. This can be done through the incorporation of the principles of the rational choice theory. Based on this, this study suggests a few modifications to the remuneration systems under the NARA. These include:

- Introducing a base salary which is equal to or slightly higher than civil servants of the highest job group (job group T). This salary would range somewhere in between 250,000-400,000 shillings.
- Basing any additional salaries and allowances on measures of MP performance. The measure of performance could be a combination of the statistics used in chapter 4, which are indicative of MP performance. The additional rewards would be percentage-wise and be based on the country's pure ranking and increase in ranking. For example, if the country places in the top ten worldwide, MPs would receive a 25% bonus or; for every five positions the country rises, the MPs would receive a 2.5% bonus in salary.

These salary modifications would have two effects. The first would make the position attractive to individuals who want to serve their constituents as opposed to those who are seeking swift enrichment through a term in parliament. This would, in turn, result in the composition of parliament changing significantly, as it would be composed of individuals who actually want to pursue the public good. The second would be making any increases in parliamentary salary automatic and under very specific conditions. Therefore, MPs would no longer have the power to arbitrarily increase their salaries and would have instead to prove their performance nationally and in the constituency earn any extra benefits.

Additionally, laws such as the CDF Act need to be modified in a way that wrests financial control away from the MPs. This is because, reducing salaries would have little to no effect if the parliamentarians still had control of vast amounts of money granted under the CDF Act. Therefore, section 23 of the CDF Act should remove MPs from the relevant commissions and replace them with independent budget committees composed of experts, as is done in Spain.

### **5.3 Conclusion**

In conclusion, it is evident that in order for democracy and the sovereignty of the people to be protected, all state officers, including members of parliament, must uphold the principles of integrity and accountability. In order to do this, it is paramount that parliament is composed of individuals who recognise that their power is a public trust and must be exercised for the benefit of those who put them in power. Restructuring our remuneration laws would go a long way in achieving this, as it would ensure that the decisions made would be for the benefit of the entire country rather than a few hundred individuals.

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