

# **HOW TO DEAL WITH INTER-CHAMBER DEADLOCK CAUSED BY ARTICLE 113?**

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**By**

**Nyamai Abel Mwangela**

**076436**

**Prepared under the supervision of**

**Ms. Mukami Wangai**

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**DECLARATION.**

I, **ABEL MWONGELA NYAMAI** 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: Abel Mwangela  
Date: 27<sup>th</sup> April 2017

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

Signed: Mukami Wangai  
[Mukami Wangai]

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## **ABSTRACT.**

This paper critically examines the inadequacy of Article 113 of the Constitution of Kenya, 2010. Article 113 of the Constitution states that if the National Assembly and Senate do not agree on a certain version of a bill then a mediation committee is appointed by the speakers of both houses to attempt to develop a version of the Bill that both houses will pass. Article 113(4) contemplates that in the event the mediation committee fails to agree on a version of the bill within thirty days or if either house rejects the version proposed by the committee, the Bill is defeated. In the advisory opinion of the Supreme Court in *Speaker of the Senate & another v Attorney-General & 4 others* former Chief Justice Dr Willy Mutunga noted that the process of dealing with inter chamber deadlock that is prescribed is not suitable for important bills such as the Division of Revenue Bill. This is because such a bill is set to divide money between the national government and the counties. The failure of such a bill will cause a systemic failure that would paralyse the health sector, the education sector, the security machinery and almost all sectors that rely on funds from the national government and the county governments.

The objective of this dissertation is to explore the specific solutions to the problem of inter chamber deadlock as there indeed exists a problem. The paper examines a number of countries such as Ireland, Australia, India and the United Kingdom in order to see what we can borrow from them. In chapter three the paper explores the various methods of dealing with inter-chamber deadlock. I analyse which method would work for Kenya in Chapter four, I carried out a comparative study of the United Kingdom which uses the suspensive veto system and India which uses the joint session method.

## LIST OF ABBREVIATIONS

BEIC	British East India Company.
IEBC	Independent Electoral and Boundaries Commission.

## LIST OF CASES

*Speaker of the Senate & another v Attorney-General & 4 others [2013] eKLR.*

*Cormack v Cope (1974) 131 CLR 432.*

*R v Amkeyo[1917] eKLR.*

*Nyali Ltd v Attorney-General [1955] eKLR.*

## CHAPTER ONE: INTRODUCTION TO THE STUDY

### 1.1 Background

The senate of the 1<sup>st</sup> parliament was disbanded in 1966<sup>1</sup> and after almost half a century it was formed in 2013 in the 11<sup>th</sup> parliament. The Lancaster Constitution introduced the Senate and the House of Representatives. The senate of the time was made up of representative from each district<sup>2</sup>. The role of the senate was to protect the interests of the districts. The senate also had the power to legislate all other bills apart from money bills could originate from the senate. According to Article 61(1) of the Lancaster Constitution when a money bill has been sent to the senate and has not been passed after one month of receiving the bill the House of Representatives shall present the bill to the Governor-General for assent. The House of Representatives of the time possessed veto with regard to money bills.<sup>3</sup> There are many reasons given for the disbandment of the senate but the most noteworthy was given by Proctor J in 1964 when he undermined the senate legislative contribution as being of 'sight value', its control over the executive to be 'insignificant', its influence on public opinion to be 'negligible', and its protection of the constitution to be 'irresolute'.<sup>4</sup> The Constitution of Kenya 2010 then reintroduces the senate after almost 40 years. Chapter eight of the Constitution of Kenya 2010 establishes Parliament, which is comprised of the national assembly and the senate<sup>5</sup>. Articles 95(4) and (5) of the Constitution spell out the different functions of the National Assembly. Whereas Article 96 of the constitution then goes ahead to illuminate the different roles of the Senate.<sup>6</sup>

Article 113 of the Constitution 2010 provides that if the two houses do not agree on a certain version of a bill then a mediation committee is appointed by the speakers of both houses to attempt to develop a version of the Bill that both houses will pass.

<sup>7</sup>Article 113(4) contemplates that in the event the mediation committee fails to agree on a version of the bill within thirty days or if either house rejects the version

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<sup>1</sup> Okoth-Ogendo H, 'The Politics of Constitutional change in Kenya since Independence', *African Affairs*, 1963, 9-34.

<sup>2</sup> Article 36(1), *Constitution of Kenya*, 1963.

<sup>3</sup> Article 61(1), *Constitution of Kenya*, 1963.

<sup>4</sup> Proctor J, 'The Role of the Senate in the Kenyan Political System', 1964, *Institute for Development Studies*, 389-415.

<sup>5</sup> Article 93(1), *Constitution of Kenya* (2010)

<sup>6</sup> Article 96, *Constitution of Kenya* (2010)

<sup>7</sup> Article 113(4), *Constitution of Kenya* (2010)

proposed by the committee, the Bill is defeated. This then raises the question, what if the bill in question is of such great importance that the Bill has to be passed? It is to be observed that the process of dealing with inter-chamber deadlocks as applies to other Bills under Article 113 is not suitable for bills such as the Division of Revenue Bill as the mediation process under Article 113 presupposes a Bill that reaches deadlocks between the two houses, can fail, with the possibility of reintroduction after six months. For instance, this cannot be done with regard to the Division of Revenue Bill,<sup>8</sup> as it is not a Bill that can be dropped without causing a constitutional financial crisis that would paralyze the workings of the entire Government and even cause its collapse.<sup>9</sup>

### **1.2 Statement of problem**

There indeed exists a problem in Article 113 of the constitution, in the event that the two houses of parliament do not agree on a version of the bill that both houses can pass, the bill may fail. What this means is that however important the bill may be then it has no future in parliament. The problem is that this creates a deadlock that could eventually cause a crisis in our country if the bill relates to important matters such as security, health and division of revenue.<sup>10</sup>

### **1.3 Justification of the study**

This study is important, as it will look into the deadlock problem caused by Article 113 of the constitution. The paper will then give a solution to the problem caused by the same.

### **1.4 Statement of Objective**

To investigate how Kenya can deal with inter-chamber deadlock caused by the inadequacy of Article 113 of the constitution.

### **1.5 Research Questions**

The study seeks to find answers to the following research questions:

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<sup>8</sup> Article 218, *Constitution of Kenya* (2010)

<sup>9</sup> *Speaker of the Senate & another v Attorney-General & 4 others* [2013] eKLR

<sup>10</sup> *Speaker of the Senate & another v Attorney-General & 4 others* [2013] eKLR

- a) How can Kenya deal with inter-chamber deadlock?
- b) What can be done to correct the inadequacy of Article 113?

### **1.6 Hypothesis**

Article 113 is inadequate in the way it deals with the disagreements between the two houses of parliament. According to Article 113 of the Constitution of Kenya, 2010 if the mediation committee does not come up with a version of the bill that both houses can agree on then the bill may fail with possible reintroduction after six months. Deadlock in parliament could cause a systemic failure that would paralyze the affairs of the state. A functional parliament is important as the citizens exercise their sovereignty through their elected members of parliament.

### **1.7 Assumption**

Our bicameral parliament is less than three years old and the assumption made is that, the two houses of parliament will not be able to solve their internal conflicts using the mechanism given by Article 113 of the constitution.<sup>11</sup>

### **1.8 Research Design & Methodology**

I will examine the inadequacy of Article 113 of the constitution and look into how best to resolve inter chamber deadlocks. I will do this by conducting a comparative study with countries that have bicameral parliaments such as the United Kingdom. Primary sources and secondary sources such as books and authoritative scholarly articles will heavily be used in the research.

### **1.9 Limitations**

The limitation that I encountered is that our constitution is still very young and there is lack of jurisprudence from within the country to support my findings and research.

### **1.10 Chapter Breakdown**

Chapter one seeks to introduce the reader to the study. The literature review, theoretical framework and the objectives and questions form the main parts of this section. Chapter two critically discusses the theories that I rely on in my paper. I discuss theories by Thomas Aquinas, Mahmood Mamdani and Montesquieu. Chapter three then explores the different ways of dealing with inter-chamber deadlock in the world. This chapter also examines how to correct the inadequacy of Article 113 of the Constitution of Kenya, 2010. Chapter four borrows the best practices of dealing with

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<sup>11</sup> Article 113(4), *Constitution of Kenya* (2010)

inter-chamber deadlock from the United Kingdom and India. Finally, chapter four concludes the entire study and gives recommendations to the problem caused by Article 113 of the constitution.

## CHAPTER TWO: THEORETICAL FRAMEWORK

Given the nature of politics, political contests and supremacy battles it is important that the law is effective in managing deadlocks and the mediation process between the two houses of parliament. Lack or the inadequacy of the law will mean that politics takes its way, which may be harmful to the ordinary citizen. Law seeks to protect the interests of the people and it is important that law intervenes in political processes such as mediation between the two houses in order to have sanity in parliament.<sup>12</sup>

This paper relies on Thomas Aquinas theory that human legislation is important in the regulation of human conduct. Thomas Aquinas recognizes that because of the nature of political regimes and the failing of natural law, it is important that human legislation is enacted to regulate human conduct.

Thomas Aquinas asserts that natural law leaves some missing details that can only be filled by positive laws. He argues that human law is necessary to enforce the moral and political requirements of the natural law. Not all human beings use their practical reason to its fullest capacity and some act maliciously even when they happen to know better. Kenyan parliamentarians are a classic example of malicious human beings. Natural law does not enforce itself and thus human laws must be used to enforce organization and civilization in society.<sup>13</sup>

Thomas Aquinas notes in the *Summa Theologiae* that there are two reasons for changes in human laws, first human laws need to be changed because of reason. Secondly, because of human conduct. He asserts that the law should be rightly changed because of the changed condition of man. Thomas Aquinas argues that it is imperative to change law because of the changing personality of man. He notes that in the establishment of new laws or changes to the law there should be clear evidence of the benefit that the change brings.<sup>14</sup>

The problem of politics of underdeveloped countries as articulated by Mahmood Mamdani is the traditional set up of the regulation and the politics of these countries. This necessitated the concept of dualism whereby traditional politics is merged with

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<sup>12</sup> Aketch M, *Privatization and Democracy in East Africa: The promise of Administrative law*. Nairobi: East African Educational Publishers Ltd, 2009,35.

<sup>13</sup> <http://www.newadvent.org/summa/2097.htm> on 7 January 2016.

<sup>14</sup> <http://www.newadvent.org/summa/2097.htm> on 7 January 2016.

modern politics from developed nations<sup>15</sup>. Ordinarily the modern is progressive and ultimately offers the best solution to political problems that are created by legal loopholes such as deadlock, which is created by Article 113 of the constitution.<sup>16</sup>

Article 113 creates a deadlock problem in the event that both houses of parliament do not pass a bill. This problem has been encountered by more advanced states and have solved this problem in various ways which will be discussed later. The concept of dualism as proposed by Mahmood Mamdani basically states that an incorporation of what is modern to the basic traditional model will solve some of our problems such as the deadlock created by Article 113<sup>17</sup>.

The deadlock problem caused by Article 113 may sometimes lead to the fusion of power where the executive can use its powers to influence the decisions of the two houses of parliament. There are two ways of looking at this, first the executive may use this loophole to ensure that certain bills do not see the light of day, secondly the executive may use its power to push parliament to pass some bills that are quite critical. In order to prevent an instance where the executive may use this loophole to maliciously influence the decisions of parliament, it is important to deal with inter-chamber deadlock. Montesquieu (1748) who is the father of 'separation of powers' proposes that the three arms of government should be divided not only in person but also in order. This safeguards the people against oppression. Montesquieu in 1748 gave a clear statement on separation of powers. He said 'when the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty... there is no liberty if the powers of judging are not separated from the legislative and executive... there would be an end to everything, if the same man or the same body... were to exercise those three powers'.<sup>18</sup>

One of the principles of the devolved government is to enhance checks and balances and the separation of powers.<sup>19</sup> An authoritarian interpretation of the separation of powers means that none of the three arms of government should interfere with the other unless it's to check and balance the other.

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<sup>15</sup> Mahmood M, *Politics and Class formation*, Monthly Review Press, 1976, 1

<sup>16</sup> Article 113, *Constitution of Kenya* (2010)

<sup>17</sup> Mahmood M, *Politics and Class formation*, 2.

<sup>18</sup> Montesquieu B, 'The Spirit of Laws', 1748, *Translated and edited by Anne Cohler, Basia Miller, Harold Stone*. New York: Cambridge University Press, 1989, 36

<sup>19</sup> Article 174, *Constitution of Kenya* (2010)

Our constitution clearly aims at the separation of the executive and the legislature. In our former constitution the executive and the legislature were entwined as first ministers were appointed from the members of parliament, meaning that ministers who are essentially members of the executive also participated in the legislative process<sup>20</sup>. Our new constitution clearly separates Cabinet Secretaries from Members of Parliament. The constitution 2010 prescribes that Cabinet Secretaries will be technocrats and not politicians. The cabinet Secretaries are nominated by the president and approved by parliament.<sup>21</sup> The constitution in many ways seeks to separate the Executive from the Legislative branch of parliament; the spirit of our constitution 2010 should be embodied in all the Articles of the constitution. Article 113 of the constitution of Kenya, 2010 is subject to a lot of interference from the Executive either positively if the Executive is seeking to resolve statement of a Bill or negatively if the Executive seeks to stop the passing of a Bill as explained above and thus should be reformed.

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<sup>20</sup> Article 16(1) *Constitution of Kenya*, (1963).

<sup>21</sup> Article 152, *Constitution of Kenya* (2010).

## **CHAPTER THREE: VARIOUS WAYS OF DEALING WITH INTER-CHAMBER DEADLOCK AND HOW TO CORRECT THE INADEQUACY OF ARTICLE 113 OF THE CONSTITUTION OF KENYA, 2010.**

### **3.1.Introduction.**

The main issue in this paper is the fact that if the two houses of parliament do not agree on a version of a bill that they can pass then the bill may possibly fail. The reintroduction of the bill to the houses can take up to 6 months, the question is what if the bill is so important that as a country we cannot do without. It may be a bill on health, security or the division of revenue bill that allocates money between the county government and the national government<sup>22</sup>. In this section the paper will delve into how as a country we can deal with inter-chamber deadlock and ultimately how we can correct this inadequacy that is present in our constitution.

### **3.2 How can Kenya deal with inter-chamber deadlock?**

There are for sure many ways of dealing with inter-chamber deadlock in bicameral parliaments. In this section I will analyze ways of dealing with inter-chamber deadlock. Chapter 4 of the paper will then suggest a country that we can learn from when it comes to this matter of inter-chamber deadlock.

#### **3.2.1 Suspensive Veto**

This method of dispute resolution between the two houses is widely practiced in the UK and is specified in the Parliament's Acts 1911 and 1949. The Parliament Act 1911 stripped the absolute veto power from the House of Lords. The House of Lords could only delay a bill for 2 years, this led to the passing of the Parliament Act of 1949 which reduced the delay period from two years to one year<sup>23</sup>. If a bill that originates from the House of Commons is passed in two consecutive sessions in the lower house without the consent of the House of Lords then it may receive Royal Assent if the interval between the first time it was passed and the second time it was passed is at least a year. However there are exceptions to this, a money bill that has been certified by the speaker is only subject to one months delay.<sup>24</sup>

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<sup>22</sup> *Speaker of the Senate & another v Attorney-General & 4 others* [2013] eKLR

<sup>23</sup> <http://e-lawresources.co.uk/Statutes.php> on 7 January 2016.

<sup>24</sup> Meg R, 'Resolving Disputes between the Chambers'. *University College London, at 1.*

In this method, most times the lower house has the final say but the upper house may delay the process in order to convince the lower house to accept some of the amendments of the upper house. There are a number of important factors to consider in this dispute resolution method. First, the period of delay is imperative. This is because some bills cannot be subjected to a long period of delay. Such bills include the division of revenue bill and other money bills.

In Poland, after the Sejm (the Poland lower house) considers and passes a bill then it is forwarded to the senate for consideration; the Marshal (speaker) of the Senate refers the bill to the relevant senate committee in charge with that matter. The Senate committee is given 18 days to examine the bill and come up with a draft position of the Senate concerning the bill. The senate is given a 30-day time line to debate and come up with a decision concerning a regular bill. In the case of a draft budget, the senate is given 20 days to debate the bill. The senate is given 14 days to debate and give amendments or pass an urgent bill. If the senate does not give its amendments or if it does not reject a bill then the bill is considered to be passed. The bill is then referred by the Marshal of the Sejm to the President of the Republic of Poland for assent<sup>25</sup>.

Secondly, the specified majority votes that are required from the lower house in order to pass a Bill is also of great importance. In most cases of suspensive veto the lower house is given the power to pass a bill in the event that they disagree with the upper house, the lower house may override the upper house and pass the bill as is. A certain majority is required in most jurisdictions in order to override the decision of the upper house. For instance in Japan the lower house may overrule the decision of the upper house with a 2/3 majority of the lower house<sup>26</sup>.

This is an effective method, the only problem is that most times the lower house that possesses the veto does not consider the recommendations and suggestions of the senate because at the end of the day as it possesses the veto power. This beats the logic of bicameralism, as the whole point of having two houses is to ensure that bills are reviewed and to improve on the quality of bills passed.<sup>27</sup>

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<sup>25</sup> <http://opis.sejm.gov.pl/en/procesustawodawczy.php> on 7 January 2016.

<sup>26</sup> Meg R, 'Disputes between the Chambers'. *University College London*, at 3.

<sup>27</sup> Norton, P, 'Adding Value? The role of the Second Chambers', *Asia Pacific Law Review*, 2007, at 7

### 3.2.2 Joint session.

This is when the two houses of parliament hold a joint sitting to discuss a bill. This enables the members of the two houses to engage directly to discuss the bill in question. This creates a platform for the members to discuss the matter on a level playing field and none of the houses feels superior to the other.

This is practiced in India. The parliament of India is made up of the President of India, Council of States and the House of the People.<sup>28</sup> The Council of States shall consist of not more than two hundred and thirty eight representatives of the states and union territories and twelve nominated members. The twelve nominated members shall be nominated by the president and shall be made up of people with special knowledge or practical experience in the fields of literature, science, art and social science.<sup>29</sup> The House of the People on the other hand shall consist of not more than five hundred and thirty members who are elected from the territorial constituencies, which make up the states and members who represent the union territories shall not be more than 20.<sup>30</sup>

According to Article 108(1) of the Indian constitution if a bill has been passed by one house and transmitted to the other and the Bill is rejected by the other house or the houses finally disagreed as to the amendments to be made in the bill or more than six months elapse from the date of the reception of the Bill by the other Houses without the bill being passed by it, the president may summon both houses by public notification to hold a joint sitting in order to deliberate on the bill. If at the joint sitting the two houses with or without amendments agree in the joint sitting to pass the bill by a majority then it shall be deemed to have been passed by both houses<sup>31</sup>.

It is important to note that the Constitution of India provides that a joint sitting shall not apply to a money bill. A money bill is first discussed in the House of the People and thereafter it is transmitted to the Council of States for its recommendations and the Council of states shall within a period of fourteen days from the date of its receipt of the Bill return the Bill to the House of the People with its recommendations and the House of the People may accept or reject all of the recommendations.<sup>32</sup> If the House of the People accepts any of the recommendations of the Council of States, the Money

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<sup>28</sup> Article 79, *Constitution of India*.

<sup>29</sup> Article 80, *Constitution of India*.

<sup>30</sup> Article 81, *Constitution of India*.

<sup>31</sup> *Article 108(4), Constitution of India*.

<sup>32</sup> *Article 109(2), Constitution of India*

bill shall be deemed to have been passed<sup>33</sup>. If the House of the People does not accept any of the recommendations of the Council of States, the Money Bill shall be deemed to have been passed by both houses in the form, which was passed by the House of the People.<sup>34</sup>

The joint session that is called by the president presents an ideal situation for the two houses to discuss a bill in a less confrontational scenario. This presents a good solution to deal with supremacy battles between the two houses of parliament. Very recently the Senate and National Assembly of Kenya could not agree and this necessitated the senate seeking an advisory opinion from the Supreme Court. The issue was that the Speaker of the National Assembly transmitted a bill to the president for assent before it was debated in the senate.<sup>35</sup> This is an instance of a supremacy battle in our own parliament. A joint session presents an ideal opportunity for the two houses to agree and most importantly pass crucial bills as it prevents fierce political battles.

### **3.2.3 Joint committee with lower house Veto**

Kenya at the moment uses a joint committee to resolve disputes between the two houses. According to Article 112(1) if any one of the houses passes a bill concerning counties and the second house rejects the Bill then the Bill shall be referred to a mediation committee appointed under Article 113. The speakers of the two houses of parliament are in charge of appointing the members of the mediation committee. The committee consists of equal number of members from both houses. The role of the mediation committee is to attempt to develop a version of the bill that both houses can pass<sup>36</sup>. A good example of such a scenario is when the speakers of the two houses of parliament on 28<sup>th</sup> April appointed a mediation committee comprising of the following members Hon. Mutava Musyimi, MP (chairperson), Hon. Sen. Mutahi Kagwe, EGH, MP, Hon. Mary Emaase, MP, Hon. Beatrice Elachi, CBS, MP, Hon. Sen. Boni Khalwale, MP. And Hon. Tom Joseph Kajwang, MP.

The joint committee met five times to deliberate on the Division of Revenue Bill, 2015. The issue was the senate proposed to lower allocation of money to the National government by Ksh 1,766,500,00 from Ksh 978,692,000,000 to Ksh 976,925,500,000.

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<sup>33</sup> *Article 109(3), Constitution of India*

<sup>34</sup> *Article 109(4), Constitution of India*

<sup>35</sup> Speaker of the Senate & another V Attorney-General & 4 others [2013] eKLR

<sup>36</sup> *Article 113(1), Constitution of Kenya 2010.*

The senate wanted to increase the amount of money going to counties to 259,771,500,000. After consultative discussions the committee unanimously observed that the funds given to counties should therefore be increased progressively with time and the additional funds should be reallocations.<sup>37</sup>

A joint committee with veto is quite different from the situation described above where a bill may fail if the mediation committee does not come up with a version of the bill that can be passed by both houses. For instance in France the committee is charged with devising a compromise and ultimately a solution. After the committees decision both houses vote on the matter. If the two houses are not able to decide on the matter then the lower house has the last word. The joint committee system with veto is just like the suspensive veto that has been discussed earlier. The only difference is that in the joint committee with veto, a bill has to be subjected to the joint committee in the event of disagreement.

In this method of resolving deadlock, the joint committee is seen as a rubber stamp and most times the lower house negotiates knowing that in the event of disagreement the bill has to pass. In most instances the upper house is considered just a conveyor belt in this method of resolving deadlock. In France the committee at most times disagreed and the lower house had the last word.<sup>38</sup> The advantage of this method is that an important bill has no possibility of failing, as the decision of the lower houses will stand in the event of deadlock.

Most committees fail because of party politics and 'tyranny of numbers'. In most decisions the government and the opposition hold very different views and the same applies even when a joint committee is formed. The system of voting that applies in parliament is the same system that applies in a joint committee and because of this most discussions end up in deadlock.

This method does not yield success as the upper house lacks the initiative to deliberate on matters as most times the veto power of the lower house applies. The members of the lower house are not encouraged to compromise because at the end of the day they possess veto power.<sup>39</sup>

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<sup>37</sup> The division of revenue bill, 2015, *Mediation Committee Report in Accordance to Article 113 of the constitution.*<sup>3</sup>

<sup>38</sup> Meg R, *Resolving Disputes between the Chambers.* University College London, 6

<sup>39</sup> Meg R, *Resolving Disputes between the Chambers.* University College London, 7

#### 3.2.4 Double dissolution of the two houses.

This is quite a rare method of resolving disputes between the two houses of parliament. This is quite prevalent in Australia, section 57 of the Australian constitution provides that if the senate with an interval of at least three months rejects a proposed law or does not pass it with certain amendments that the House of Representatives will agree on then the Governor General may dissolve both houses simultaneously. It goes ahead to provide that if after such dissolution the House of Representatives passes the proposed law with or without any amendments which have been suggested by the senate and the senate fails to pass the bill again then the Governor-General may convene a joint sitting of the members of the senate and the members of the House of Representatives.<sup>40</sup>

The first ever double dissolution in Australia happened in the year 1914, Joseph Cook's government came into power in 1913 but after the election of a speaker of the House of Representatives lacked a majority. The situation was even worse in the senate where it held 7 out of a possible 36 seats. This situation created a back and forth between the two houses of parliament and many reverses. The Governor-General of the time, Sir Ronald Munro-Ferguson dissolved the two houses of parliament before the Great War broke out later that year. This necessitated a general election where the Joseph Cook government was defeated by the labor party.<sup>41</sup>

The third double dissolution was among the most historic as two opposition senators moved to the high court to object the double dissolution. In 1973 the senate rejected six bills after debate in the House of Representatives, the senate rejected these bills in two instances. The senate refused to pass the Governments revenue appropriation Bills but then after a lot of convincing and of course politics the senate passed the Appropriation bills in order to avoid a financial crisis, the Governor General shortly dissolved the two houses after the disagreement over the two bills.<sup>42</sup>

The two senators moved to court objecting the double dissolution in the case of *Cormack v Cope*<sup>43</sup>. The senators argued that a double dissolution could only be granted with regard to one bill and not a cluster of bills, as was the case in the third

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<sup>40</sup> *Article 57, Constitution of Australia.*

<sup>41</sup> [http://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/rp/rp0001/01RP09](http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp0001/01RP09) on 7 January 2016.

<sup>42</sup> *Final Report of the Constitutional Commission*, AGPS, 1988, Vol. 1, 224.

<sup>43</sup> *Cormack v Cope* (1974) 131 CLR 432

double dissolution. The court held that a double dissolution could apply to a cluster of bills as long as the bills met the requisite requirements<sup>44</sup>

There have been six double dissolutions in Australia, this shows that its a cumbersome procedure that has proved quite in effective in solving inter chamber deadlock. The senate select committee of 1950 noted that the double dissolution mechanism was not effective and recommended that if the senate did not pass an ordinary bill within six months and a money bill within two months then a joint sitting between the two houses should follow in order to resolve the deadlock.<sup>45</sup>

### 3.3 What can be done to correct the inadequacy of Article 113?

The first part of this chapter explores what we can do in order to solve inter-chamber deadlocks. The second part of this chapter I want to discuss what can be done in order to accommodate amendments to Article 113 of the Constitution of Kenya, 2010<sup>46</sup>. Indeed a problem exists, if this inadequacy is to be corrected it can only be done by amending that specific part of the Constitution.

The Constitution of Kenya 2010 is still at its infancy as it is only six years old. However, this does not mean that it lacks discrepancies even this early. Inter-chamber deadlock occurs because of the show of political supremacy and tyranny of numbers either from government or opposition<sup>47</sup>. The Constitution of Kenya, 2010 introduced very many changes and truly it was a new beginning for Kenyans. The Constitution of Kenya 2010 introduced the concept of devolved government and one of the main objectives of devolution is to give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the state and in making decisions affecting them<sup>48</sup>. This also led to the establishment of county governments<sup>49</sup>, which consists primarily of a county assembly and a county executive<sup>50</sup>. A county assembly shall consist of members elected by the people from each ward and shall be elected for a term of five years.<sup>51</sup> The County Executive

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<sup>44</sup>Sawer G, 'Singulars, Plurals and Section 57 of the constitution' (1976) 8 Federal review,45.

<sup>45</sup>[http://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/rp/rp0001/01RP09](http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp0001/01RP09) on 7 January 2016.

<sup>46</sup> Article 113, Constitution of Kenya 2010.

<sup>47</sup>[http://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/rp/rp0001/01RP09](http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp0001/01RP09) on 7 January 2016.

<sup>48</sup> Article 174(c), Constitution of Kenya 2010

<sup>49</sup> Article 175, Constitution of Kenya 2010

<sup>50</sup> Article 176, Constitution of Kenya 2010

<sup>51</sup> Article 177(4), Constitution of Kenya 2010

Committee on the other hand consists of the county Governor, Deputy Governor and members who are appointed by the County Governor with the approval of the county assembly.<sup>52</sup> In order to protect devolution, which is a very new concept in Kenya the constitution of Kenya, 2010 established the Senate to protect the interest of counties and their governments.<sup>53</sup> The Senate does this through a number of functions, first the Senate makes laws by considering and approving Bills that concern counties<sup>54</sup>. Secondly, the Senate also determines the allocation of national revenue among all the 47 counties.<sup>55</sup>

Under the new constitutional dispensation, one house, which is the senate, will have the chance to review laws that have been passed by the National Assembly. This ultimately increases the quality and sanity of legislation that is passed as one-house reviews and may make changes to a law that is passed. All legislations of the Senate are subject to review of the National Assembly under Article 111 and Article 112 of the Constitution.

The role that both houses play is vital and imperative as seen above and thus it is important that the system of resolving deadlock is clear and robust to allow for an effective legislative process. The amendment of this constitution can be done in two ways<sup>56</sup>. First the amendment can be through a parliamentary initiative whereby the bill may be introduced in either the National Assembly or the Senate.<sup>57</sup> Parliament should publicize any bill to amend the constitution in order to ensure that there is public discussion on the bill. In order for a bill to amend the constitution to pass then both houses of parliament should pass the bill in its second and third reading with a two third majority.<sup>58</sup>

After the bill has been passed by both the Senate and the National Assembly the bill is forwarded to the president for assent and publication<sup>59</sup> and also for certification showing that the bill has been passed by parliament in accordance with Article 256 of the constitution.<sup>60</sup> The President shall then assent and the bill will<sup>61</sup> be published

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<sup>52</sup> *Article 179, Constitution of Kenya 2010*

<sup>53</sup> *Article 96, Constitution of Kenya 2010*

<sup>54</sup> *Article 96(2), Constitution of Kenya 2010*

<sup>55</sup> *Article 96(3), Constitution of Kenya 2010*

<sup>56</sup> *Article 255, Constitution of Kenya 2010*

<sup>57</sup> *Article 256(1)(a), Constitution of Kenya 2010*

<sup>58</sup> *Article 256(1)(d), Constitution of Kenya 2010*

<sup>59</sup> *Article 256(3), Constitution of Kenya 2010*

<sup>60</sup> *Article 256(3)(b), Constitution of Kenya 2010*

within thirty days after the bill is enacted by Parliament. There are certain amendments that will have to be approved by a referendum. They include: the supremacy of the constitution, the territory of Kenya, the sovereignty of the people, the national values and principles of governance, the bill of rights, the term of the office of the president, the independence of the judiciary and the commissions and independent offices which chapter fifteen of the constitution applies, the functions of parliament, the provisions of chapter sixteen on amendments to the constitution and the objects, principles and structure of the devolved government.<sup>62</sup> If an amendment concerns any of the above issues then the President is compelled by law to request the Independent Electoral and Boundaries Commission (IEBC) to conduct a national referendum within 90 days in order to approve the bill. The President must do this before assenting to the bill in question.<sup>63</sup> The chairperson of the IEBC has to certify to the President within thirty days that the bill has been approved in order for the president to assent to the bill<sup>64</sup>.

Secondly the amendment can be through a popular initiative which has been signed by at least one million registered voters<sup>65</sup> this may occur in two ways, either through a general suggestion or a draft bill on the matter. If the bill is in the form of a general suggestion then the promoters of the popular initiative shall formulate it into a draft bill.<sup>66</sup> The promoters of the popular initiative shall deliver the draft bill to the IEBC, which shall carry out verification to ascertain that the initiative is indeed supported by a million voters.

If the IEBC is convinced that the voters are registered and that the initiative is in line with Article 257 of the constitution the IEBC shall submit the draft bill to all the 47 county assembly's for consideration within three months.<sup>67</sup> The county assembly may approve or reject the bill, if the county assembly approves the bill the speaker of the county assembly shall deliver a copy of the bill jointly to the two houses of parliament, with a certificate showing that the county assembly has approved it.<sup>68</sup>

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<sup>61</sup> Article 256(4), Constitution of Kenya 2010

<sup>62</sup> Article 255(1), Constitution of Kenya 2010

<sup>63</sup> Article 256(5)(a), Constitution of Kenya 2010

<sup>64</sup> Article 256(5)(b), Constitution of Kenya 2010

<sup>65</sup> Article 257, Constitution of Kenya 2010

<sup>66</sup> Article 257(4), Constitution of Kenya 2010

<sup>67</sup> Article 257(5), Constitution of Kenya 2010

<sup>68</sup> Article 257(6), Constitution of Kenya 2010

## CHAPTER FOUR: COMPARATIVE STUDY

### 4.1 Introduction

In this chapter I will use the findings in chapter 3 to recommend the best solution for Kenya. I have analysed a wide array of solutions from joint sessions to double dissolution of both houses in the event of interchamber deadlock. All these solutions have advantages and disadvantages but some are better for our country. I will do this by carrying out a comparative study of the United Kingdom and India.

### 4.2 Why the United Kingdom and India?

In chapter 3 I looked at a wide range of solutions into the deadlock problem caused by Article 113. From all the solutions I analysed above the best solution for Kenya, as a country is either the suspensive veto system or the joint session method that is practised in India.

As a result of British colonisation there has been the implementation of English common law into our legal system and this is why I have chosen UK as a country we can learn from. After independence in 1963 Kenya institutionalised the common law system. The legal system and the Kenyan courts were basically a replica of the common law system. The jurisdiction of the Supreme Court and of the subordinate courts was to be exercised. Most of the English ordinances were direct copies of the English Acts. In order to effectively administer English law the colonial administration established a Supreme Court and different subordinate courts. Lawyers from the United Kingdom were the judges of these court at that time. Africans at that time run their affairs by customary law. The British considered this customary system to be inferior. In the celebrated case of *R V Amkeyo*<sup>73</sup> Judge Hamilton said ‘in my opinion the use of the word ‘marriage’ to describe a relationship entered into by an African initiative with a woman of his tribe according to tribal custom is a misnomer which has led in the past to considerable confusion of ideas. I know of no word that correctly describes it; ‘wife-purchase’ is not altogether satisfactory, but it comes much nearer to the idea than that of ‘marriage’ as generally understood among civilised peoples.’

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<sup>73</sup> *R v Amkeyo*[1917] eKLR.

This clearly shows that the judges at that time were very inclined to English law and regarded customary law as mediocre. The colonial administration failed to adapt the English law to suit the culture of the local inhabitants.<sup>74</sup> As a country we can shy away from the influence of the English common law on our own system of law. It is for this reason that I decided to conduct a comparative study of how the United Kingdom deals with inter-chamber deadlock in its bicameral parliament.

The second reason I chose UK is because its system of resolving inter-chamber deadlock has many advantages and can be adopted in Kenya. The main advantage of the suspensive veto system that is practised by the UK is that there is no possibility that a bill may fail under this system. The inadequacy of Article 113 of the Constitution of Kenya 2010 is that a bill may fail. The danger of a bill failing is that reintroduction takes up to 6 months according to parliaments calendar. This may be catastrophic if the bill in question is a money bill or an important bill. The suspensive veto system practised by the United Kingdom will ensure that a bill cannot fail.

One of the reasons why I chose India is because of the historical background that Kenya and India shares. India was colonized Britain just like our country Kenya. In 1608 the British East India Company (BEIC) established a trading route to India. The country's port of Surat was the main trading port and the British East India Company (BEIC) continued establishing trading posts along the western and Eastern coasts of India. In 1757 after the battle of Plassey the company gained control of Bengal and was given authority by the then Parliament to rule and administer the Indian territory. In 1727 English common Law started being practised, this was after the establishment of English courts in Bombay, Bengal and Madras. The courts were mainly established to adjudicate disputes between English subjects in these three areas. When an English citizen charged an Indian citizen then they would be bound with English common law. There were only three English courts in the country at that time and this meant that at times an Indian citizen would have to traverse long distances in order to appear in court once a complaint was lodged against him/her.<sup>75</sup>

The British East India Company (BEIC) ruled India until the Sepoy Rebellion in 1857. One of the factors that lead to this rebellion was the fact that the British excluded Indians during legislation making.<sup>76</sup> This led to the declaration of India as a

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<sup>74</sup> *Nyali Ltd v Attorney-General* [1955] eKLR.

<sup>75</sup> Bannerjee A, *English Law in India, Atlantic Highlands*, Humanities Press Inc,1984, 22.

<sup>76</sup> Bannerjee A, *English Law in India, Atlantic Highlands*,25.

crown colony in 1858 as the British government needed to establish effective control in the region. The Governor-General (the viceroy) was the leading administrator and the responsibility of Indian affairs was given to the Secretary of State for India. The British East India Company (BEIC) lost its political control and commercially declined significantly. In 1873 the British East India Company (BEIC) officially ceased to exist.

The British political institutions were replicated in India as a way of administering India as a colony. After India was declared a crown colony in 1858 there was a replication of the procedure and legal codes of English common law into Indian law.<sup>77</sup> In the 1900s the independence movement began to gain momentum. Lawyers who had been trained in Britain such as Nehru and Gandhi were the main drivers of independence. The National Congress led the independence movement and later formed government after independence in 1947, this followed a ratification of the Indian constitution in 1950, and the Indian constitution was heavily borrowed from English common law.

India has amended its constitution many times since independence but all these times it has done this within the bounds of English common law.<sup>78</sup> India provides a good country to borrow from as we share a common history and secondly it is a country whose laws are based on English common law just like Kenya.

It is also important to note that the joint session method that is practised by India ensures that both houses discuss a bill in the same house and at the same time. This ensures that the two houses of parliament debate the bill in a less confrontational manner and also ensures that both two houses discuss the matter on an equal playing field. The advantage of this method over the suspensive veto practised by the United Kingdom is that in this method no house has veto over the other house creating a situation where one house is superior to the other. The joint session method eliminates supremacy battles between both houses of parliament and thus both houses are able to discuss a bill in an amicable manner<sup>79</sup>.

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<sup>77</sup> Coupland, R, *The Indian Problem: Report on the Constitutional Problem in India*, Oxford University Press, New York, 1944, 42

<sup>78</sup> Coupland, R, *The Indian Problem: Report on the Constitutional Problem in India*, 30.

<sup>79</sup> Meg R, *Resolving Disputes between the Chambers*. University College London, at 7.

#### 4.3 United Kingdom.

The United Kingdom of Great Britain is a collection of England, Scotland, Northern Ireland and Wales. At first all the four countries shared the single Parliament at Westminster. The four countries over the last couple of years have each established a Parliament of their own. The first bicameral parliament in the world was established in England and then in the United States of America.

The United Kingdom parliament is made up of two houses namely the House of Commons and the House of Lords. The House of Commons is elected by the people and the party that has the highest representation in parliament forms government. The house of commons has approximately 650 elected members. The House of Lords on the other hand is made up of 825 members and basically they check the House of Commons.<sup>80</sup>

In the United Kingdom the suspensive veto system applies to money bills and Public bills. Section 1 of the Parliament Act 1911 provides that once a money bill is passed by the House of Commons, the bill shall then be sent to the House of Lords and if the bill is not passed without amendment within one month then the bill shall be considered to have been passed, the bill shall then be presented to His Majesty for Royal Assent. This is set to happen when the House of Lords have not consented to a bill. The House of Commons has veto with regard to money bills because of the importance of such bills. Section 1(2) of the Parliament Act 1911 defines money bills as ‘a Public Bill which in the opinion of the Speaker of the House of Commons contains only provisions dealing with all or any of the following subjects, namely, the imposition, repeal, remission, alteration, or regulation of taxation, the imposition for the payment of debt or other financial purposes of charges on the Consolidated Fund, the National Loans Fund or on money provided by Parliament, or the variation or repeal of any such charges, supply, the appropriation, receipt, custody, issue or audit of accounts of public money, the raising or guarantee of any loan or the repayment thereof, or subordinate matters incidental to those subjects or any of them. In this subsection the expressions “taxation,” “public money,” and “loan” respectively do not include any taxation, money, or loan raised by local authorities or bodies for local purposes.’<sup>81</sup>

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<sup>80</sup> <http://www.parliament.uk/business/lords/work-of-the-house-of-lords/> on 6 February 2017.

<sup>81</sup> Section 1(2) *Parliament Act* 1911.

Section 2(1) of Parliament Act 1911 provides for public bills, it provides that if any other bill is passed by the House of Commons in two successive sessions of either the same parliament or different parliaments and is sent to the House of Lords before the end of one month and is rejected by the House of Lords in the two instances then the bill shall be deemed to have been passed and shall be presented to His majesty for Royal Assent.<sup>82</sup>

In the United Kingdom the House of Commons is the superior of the two when passing legislation and possesses suspensive veto in money bills and in public bills. This prevents a situation where there is a constant shuttle between the two houses of parliament until the two houses find a version of the bill, which they can both pass. In this system there is no possibility of deadlock as the House of Commons has veto power.

#### 4.4 India

The parliament of India is made up of the President of India, Council of states and the House of the People.<sup>83</sup> The president of India is elected by the members of the Electoral College, which is made up of the elected members of the Council of States and the House of the People, members of the legislative assemblies of the states and Union Territories. The president is elected for a five-year term and forms part of Parliament.

The Council of States shall consist of not more than two hundred and thirty eight representatives of the states and union territories and twelve nominated members. The twelve nominated members shall be nominated by the president and shall be made up of people with special knowledge or practical experience in the fields of literature, science, art and social science.<sup>84</sup>

The House of the People on the other hand shall consist of not more than five hundred and thirty members who are elected from the territorial constituencies, which make up the states and members who represent the union territories shall not be more than 20.<sup>85</sup>

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<sup>82</sup> Section 2(1) *Parliament Act 1911*.

<sup>83</sup> Article 79, *Constitution of India*.

<sup>84</sup> Article 80, *Constitution of India*.

<sup>85</sup> Article 81, *Constitution of India*.

In India a money bill may either originate from the House of the People or the Council of States<sup>86</sup>. The constitution of India provides for money bills and ordinary Bills. If an ordinary Bill has been passed by one house and is sent to the other house there are three things that could happen. First. The other house may reject the Bill. Secondly, the two houses may not be able to agree as to the amendments to be made to the bill. Thirdly, the bill may not be discussed by the other house and more than six months elapse from the date the Bill was sent to the other house.<sup>87</sup>

At this point the president may use his power under Article 86 of the Constitution of India to notify the two houses if they will hold a joint session or not. The president may summon the Council of States and the House of the People to a joint sitting in order to deliberate on a bill which the two houses could not agree on. When the president gives his intention to summon both houses then the two houses are not supposed to deliberate further on the bill in question.<sup>88</sup>

In the joint sitting, if the two houses agree on the Bill with amendments and the Bill is passed with a majority of the total members who are present then the Bill shall be deemed to have been passed.<sup>89</sup>

Money bills in India are treated differently and are not introduced by the Council of States<sup>90</sup>. If a money bill has been passed by the House of the People it is first transmitted to the Council of States for recommendations. The Bill is returned to the House of the People within 14 days with the recommendations of the Council of States. At this point the House of the people may either accept or reject all or any of the recommendations of the Council of States.<sup>91</sup> If the House of the People accepts the recommendations of the council of States then it is deemed to have been passed if the House of the People does not accept any of the recommendations then the bill is deemed to have been passed.<sup>92</sup> If the bill that has been passed by the House of the People within the fourteen-day period then it shall be deemed to have been passed by both houses after the end of the fourteen days.<sup>93</sup>

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<sup>86</sup> Article 107, *Constitution of India*.

<sup>87</sup> Article 108(1), *Constitution of India*.

<sup>88</sup> Article 108(3), *Constitution of India*.

<sup>89</sup> Article 108(4), *Constitution of India*.

<sup>90</sup> Article 109, *Constitution of India*.

<sup>91</sup> Article 109(2), *Constitution of India*.

<sup>92</sup> Article 109(4), *Constitution of India*.

<sup>93</sup> Article 109(5), *Constitution of India*.

The parliament of India resolves disputes in two ways. First, it uses the joint session method where the president calls for a joint session of the House of the People and the Council of States to deliberate on a bill. Secondly the House of the People possesses veto when it comes to money bills, the House of the People can pass a money bill either by accepting or rejecting the recommendations of the Council of States.

## CHAPTER 5. CONCLUSIONS AND RECOMMENDATIONS.

### 5.1 Conclusion

In this section the paper will provide a short conclusion of each of the chapters. I will finally give my recommendations for the Kenyan situation.

Chapter one explored the problem that is presented by Article 113 of the constitution. I looked at the possibility of deadlock that is presented by Article 113. Article 113 of the constitution of Kenya, 2010 provides that in the case of disagreement the speakers of the Senate and the National Assembly shall appoint a mediation committee comprising of an equal number of members from the Senate and National Assembly. This committee is tasked with the function of coming up with a version of the bill that both houses can pass. If the version of the bill that the mediation committee comes up with is not passed by either house then the bill is deemed to have failed and reintroduction of the same bill is after 6 months. This indeed presents a problem, as certain bills such as money bills should be passed within a certain timeline.

Chapter two discussed the theories, which support my idea. I first looked at Mahmood Mamdani who critically examines the problem of the politics of underdeveloped countries. I also discussed the theory of regulation of human conduct through positive laws by Thomas Aquinas, this is important as the conduct of African politicians is wanting and thus their conduct needs to be regulated through human legislation.

Chapter three examined almost all the methods of dispute resolution that are used by bicameral parliaments. I looked at methods such as double dissolution of both houses, which is practised in Australia to joint sessions between the two houses, which is practised in India. I also examined what can be done to correct the inadequacy of Article 113 through an amendment to the constitution.

Chapter 4 used the findings in Chapter 3 to narrow down to two methods, which we can borrow from. I settled on the suspensive veto system, which is practised in the United Kingdom and the joint session, which is practised by India. I also gave reasons why I choose these two countries for the comparative study and the advantages of the two above mentioned methods.

## 5.2 Recommendations

Our system of dispute resolution in Parliament at the moment is based on a joint mediation committee between the two houses of parliament<sup>94</sup>. I would suggest a two phased dispute resolution mechanism. First, money bills such as the division of revenue bill should be passed by both houses but the National Assembly should possess veto power when it comes to such bills. In the event that the Senate accepts or rejects a bill, then the National Assembly should be able to pass the bill with or without the recommendations of the senate as the back and forth between the two houses is not a suitable method of dealing with money bills such as the Division of Revenue Bill. The same should also apply if the Senate refuses to debate a bill within a stipulated time<sup>95</sup>.

Secondly there are many other more important bills on issues such as health, security and education. If the two houses fail to agree on a version to be passed of such bills under Article 113 of the constitution<sup>96</sup> then the president should call a joint session in order for the Senate and the National Assembly to sit in either of the houses and discuss the bill. If the bill is passed with a simple majority then it is then forwarded for presidential assent. This will efficiently reduce political battles between the two houses and the two houses will be able to discuss the bill on pure ideologies that will develop our country. The law cannot force parliamentarians to have political goodwill it is thus imperative that the parliamentarians that we elect possess the initiative and the good will to make the system work.

I will conclude with the words of former Chief Justice Dr Willy Mutunga in the Speaker of the Senate & another v Attorney-General case where the Supreme Court bench was giving an advisory opinion to the national assembly and senate on mediation matters *“mediation is not something one can command – it is all about managing relationships between disputing parties. The law itself, therefore, will have very little to do with a successful mediation outcome. Thus, any hiccups that may occur in the mediation process, including the one defined under Article 110(3), will have to be ironed out through the development of a culture of consultation, the progression of mutual respect between the two chambers and the practice of*

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<sup>94</sup> Article 112(b), Constitution of Kenya 2010

<sup>95</sup> Meg R, *Resolving Disputes between the Chambers*. University College London, 6

<sup>96</sup> Article 113, Constitution of Kenya 2010

*collegiality between the Speakers of each House. This Court, I humbly submit, may not go further than to suggest this, as to delve into further details would border dangerously on giving direction to a different arm of Government on its internal processes. This would fly in the face of the doctrine of separation of powers.<sup>97</sup>*

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<sup>97</sup> Speaker of the Senate & another v Attorney-General & 4 others [2013] eKLR

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