Africa Centre for Open Governance

Golden Handshakes

The Retirement Benefits of Senior State Officers in Kenya

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About Us

The Africa Centre for Open Governance (AfriCOG) is an independent, non-profit organisation that provides cutting edge research and monitoring on governance and public ethics issues in both the public and private sectors so as to address the structural causes of the crisis of governance in this country. The overall objectives of our programme activities are: to promote the implementation of the Constitution of Kenya 2010; strengthen anti-corruption and good governance in Kenya with objective, high-quality research and advocacy and to build Kenya's capacity to be permanently vigilant and monitor progress on governance issues in the public and private sectors in Kenya. We also work with others at regional and international levels to promote collective efforts towards anti-corruption, accountability, transparency and openness in governance. Our reports, policy briefs and overall work add value to anti-corruption and governance reform processes in Kenya ad the region by stimulating policy discussion and supporting evidence-based advocacy and the mobilisation work of our partners.

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Acronyms and Abbreviations

AfriCOG	Africa Centre for Open Governance
CIC	Commission for the Implementation of the Constitution
CoK	Constitution of Kenya
CFS	Consolidated Fund Services
FPA	Former Presidents Act
GDP	Gross Domestic Product
GoK	Government of Kenya
GSA	General Services Administration
NSSF	National Social Security Fund
PAYGO	Pay As You Go
PSPF	Parliamentary Contributory Pension Fund
PCPS	Parliamentary Contributory Pension Services
PCPF	Pension Contributory Pension Fund
PSPS	Public Service Pension Scheme
RBA	Retirement Benefits Authority
SRC	Salaries and Remuneration Commission
VAT	Value Added Tax

Foreword

This latest report from AfriCOG examines the problem of presidential and senior state officer's retirement benefits in Kenya, a topic which has been the subject of much heated discussion ever since the retirement of Kenya's second President, Daniel arap Moi. Public debate and acrimony between government and the opposition has recently reignited over the President's refusal to sign the Retirement Benefits (Deputy President and Designated State Officers) Bill, 2013.

The government has over time developed multiple policy and legal regimes for the pensions of different state officers, rather than reforming the entire pensions and retirement benefits framework to be more responsive and equitable. This report examines the costs, legality and implications of the Retirement Benefits (Deputy President and Designated State Officers) Bill, 2013 currently under debate in the National Assembly and makes the case for reform. It clearly concludes that the pensions for senior officials as set - and envisioned in the proposed bill, are unconstitutional.

The debate on public sector pensions and in particular those pertaining to senior state officials is placed in the broader context of the structural problems and complexities that compromise financial affordabilityin the current arrangements. The design flaws that open the door to abuse and inequity, endangering economic sustainability are also highlighted.

Through this report AfriCOG raises critical questions around compliance with the constitution and examines the practices in other jurisdictions in order to make some recommendations on how to resolve this controversial issue. AfriCOG also proposes reforms to public sector pensions and adherenece to the constitution with the aim of preventing future predatory runs on the fiscus of the type which have become an unsavoury feature of our public life.

Gladwell Otieno
Executive Director

Executive Summary

This paper reviews the problem of public sector pensions and, in particular, retirement benefits for constitutional and designated state officers, an issue that has become increasingly contentious in Kenya as more and more state officers join the public service. In Kenya, the public debate has focused on the perceived excessiveness of these pensions, which, it is often claimed, contrasts with the pension promises made in the private sector. The paper therefore traces the evolution of this debate, examines whether benefits offered to senior state officials are too high and also provides the bigger picture against which a discussion of the pensions and retirement benefits could be held.

The rationale for providing pensions for government employees was somewhat different from that behind the creation of national pension schemes. Among the objectives particular to schemes for government workers were the following[1]:

- securing the independence of public servants;
- making a career in public service attractive;
- shifting the cost of remunerating public servants into the future; and
- retiring older civil servants in a politically and socially acceptable way.[2]

For varying reasons however, different categories of civil servants have different pensions and retirement benefit schemes, and the government has persisted in this practice. The issue of having multiple benefits schemes across the public service and which do not match those of private sector workers is a central policy question in those countries where such parallel systems remain.

In 2003, the Kenyan Parliament passed a Statutory Law, Act No. 11 of 2003 on Presidential Retirements Benefits. The Act of Parliament provided for the granting of pension and other retirement benefits to the holders of the office of President upon their ceasing to hold office, and for connected purposes. Essentially, this was the first law of its kind in Kenya that targeted retired heads of state and their spouses. In this respect, the Act covered three types of persons; a retired President; or upon the death of a retired President, his/her surviving spouse, or the surviving spouse of a President who dies while holding office.

Article 230(1) of the Kenya Constitution 2010 establishes the Salaries and Remuneration Commission (SRC). This Commission has the mandate and power to set and regularly review the remuneration and benefits of all state officers. In addressing the defects and policy impact of the Presidential Retirement Benefits Bill, a number of key issues both policy and legal, emerge that provide strong grounds for a further review. Some of the key issues include;

Constitutionality and legal compliance: A key policy issue and principle promoted by the SRC in the determination of salaries, remuneration and benefits of state officers is the principle of legal compliance. This principle entails compliance with the Constitution, relevant national legislations, international laws and trea-

1 cf. Robert Palacios and Edward Whitehouse 2006, Civil-service Pension Schemes Around the World, ,p.7

2 Ibid

ties and acceptable standards and benchmarks. According to the CIC, the legal amendment which enacted the Presidential Retirements Benefits (Amendment) Act, 2013 did not meet the required legal and constitutional threshold.

Limitations on public finance: From the recent in-depth research studies commissioned by the Salaries and Remuneration Commission, it has been clear that myriads of allowances introduced in the public service at different times have been responsible for distorting and escalating the wage bill to unsustainable levels. Allowances are thus a main cause of disparities and wage differentials in the public service. The SRC has therefore proposed to standardise all allowances at thirty percent of the total determined pay across the board and also takes cognisance of the need to manage pensions as well as the current best practice. This is however yet to be effected.

Eliminating the problem of policy duality: Kenya like many countries including some of the largest developing economies, such as Brazil, China and India still maintains separate pension schemes for public servants. Kenya further maintains different pension schemes for civil servants and state officers. This is the loophole that has provided the opportunity to propose a 'super' pension scheme for retired presidents and state officers.

Addressing design flaws and the question of economic sustainability: Retirement benefit schemes that have badly designed rules damage incentives and arbitrarily redistribute income between members. For instance, basing entitlements on final salary, as the Retirement Benefit Act does, rather than the average of pay over the lifetime, is unfair and open to abuse. For example, the history of earnings recorded by a scheme can be manipulated so that the final salary, which determines the pension, is high, while pay in earlier years, on which contributions are levied, is lower.

Initiating urgent national dialogue on retirement benefits for state officers: In the context of wider policy reforms in the recent review of salaries of state officers, the Salaries and Remuneration Commission should have first undertaken an extensive review of the current retirement benefits and pensions for all public officers. Even after the Commission for the Implementation of the Constitution (CIC) exposed the illegality of Presidential Retirement Benefits (Amendment) Act, 2013 and the public outcry for the SRC to claim its mandate, not much progress has been realised in this regard. Soon this could become a national catastrophe as politicians make a run on public coffers with last-minute legislative proposals to reward themselves at the expense of the taxpayer.

Perhaps, the best country to borrow from would be the United Kingdom. In the UK, pensions for ministers are provided for by the Supplementary Section of the Parliamentary Pension Contributory Pension Fund (PCPF). The relevant salary used for calculating pension benefits in the Supplementary Section is not the final salary (as for MPs' pensions in the case of the UK) but, effectively, re-valued career average earnings. This takes account of the fact that ministers may be in office for one or several short periods of time, and may revert to being backbenchers for several years before they retire. The UK provides a good example of a highly institutionalised system of pensions and retirement benefits payment that is rational, predictable, transparent and fits all, not just some public offices. Kenya could learn or borrow from this experience.

1.0 Background

In April 2003, barely six months into its tenure, the National Rainbow Coalition (NARC) government in Kenya opened a public row over its proposals for a retirement package for presidents with the outgoing president Daniel arap Moi as the first beneficiary. The president's retirement was something unprecedented in Kenya: President Moi was retired after changes to the constitution limiting the number of presidential terms were introduced in 1991. The republic's first president Jomo Kenyatta had died in office and his spouse only benefited from his death gratuities.

At the centre of the controversy was a generous package unveiled by the then Attorney General Amos Wako in the Presidential Retirement Benefits Bill, 2003 containing certain conditions which retiring presidents had to fulfil in order to qualify for their pension - a retired president could only enjoy the benefits if he or she quit active politics. A retiring president could also lose the benefits if he/she left office in disgrace or was jailed for three years or more upon leaving office. In the ensuing debate over the conditions for the qualification for the benefits, the dispute on the meaning of 'quitting active politics' has been the most contentious. How to define 'participation in active politics' has particularly been brought to the fore after the former President Moi openly endorsed the candidature of President Kibaki in 2007 and offered to give advice to the current President Kenyatta. Operationally, this has since been understood as the withdrawal from party politics especially holding of any positions or office in political parties and withdrawal from all forms of elective politics.

In May 2003, the Presidential Retirement Benefits Act, 2003 was passed. Over ten years after the first debate on the presidential retirement benefits, policy discourse on the scope and form of a comprehensive retirement benefits scheme for retired presidents remains as tenuous and inconclusive as ever.

In 2012, significant amendments were made to the Presidential Retirement Benefits[3] Act of 2003 and thereafter, numerous attempts to make further amendments have faltered as this legislation has been dogged by partisan politics, policy drift as well as structural and legal defects. This paper aims at tracing the origin, rationale and evolution of the legislative and policy path of the presidential retirement benefits law, its economic and policy implications in the context of Kenya's retirement benefits policy landscape for state officers in general and the public service as a whole.

3 The amendment of the Act was occasioned by the expiry of President Kibaki's term limit and aimed at extending the benefits of the former president to his children as beneficiaries, increasing the benefits and making a lump sum payment to the former president. The details of these benefits are discussed in greater detail in section 2.3 of this paper.

2.0 The Rationale for Pensions and Retirement Benefits for Public Officers

Articles 22, 23, 24 and 25 of the Universal Declaration of Human Rights, recognise the right of everyone to social security protecting him/her from the consequences of aging and disability which prevents them from obtaining the means to live a decent and dignified life either physically or mentally. Changing the concept of a welfare approach to a concept of rights places older people in a condition of full dignity; but that dignity is not secured until the universal pension becomes a reality. This is the nominal basis of public and private pensions for workers.

According to Robert Palacios (2006), civil servants and other public-sector employees — in the military, education, publicly owned enterprises etc. were often among the first groups of workers to be covered by government-sponsored pension schemes. In a handful of countries such as Bangladesh, Bhutan, Botswana, Eritrea, Lebanon and the Maldives public-sector employees are still the only group covered by a formal pension scheme.

When mandatory pension coverage was expanded to the private sector, there often seemed little point in including civil servants — who already had their own arrangements — in new national schemes. Civil servants have also proved powerful in protecting their own financial interests. Furthermore, while civil-service pension schemes share some of the social-policy goals of national pension programmes, they must also accommodate the government's human-resources policies as an employer.

For these reasons, special retirement-income schemes for the public sector have often persisted. The issue of 'dualism'— whether civil-service schemes are integrated with national schemes covering private sector workers or are separate — is a central policy question in those countries where parallel systems remain. A particular problem that arises from dualism is that, in most cases, pension arrangements for public-sector workers are often ill-equipped to deal with job mobility. They were designed for a situation when people spent all or most of their career in the civil service from their entry until retirement. Pension schemes can penalise mobile workers. As a result, people who leave the public service before their pension rights are vested often receive nothing from the system, or, at best, a modest lump-sum reflecting individual contributions.

The second way in which the system impedes mobility is through the treatment of "early leavers", i.e. people whose pension rights are vested but who leave the civil service before retirement. Problems of mobility arise particularly in direct benefit schemes; mobility is much less of a challenge in direct contributory schemes as every public servant has his or her own account and entitlements are accumulated regardless of the type of employer.

Third, many of the historical rationales for the original public-sector pension arrangements are less relevant now that national pension systems are in place. Pension schemes were often part of approaches to broader reform of the civil service to ensure professionalism and independence of employees from outside influence. This is certainly less relevant today in the world of "revolving doors" between the public and the private sectors.

2.1 Pension Reforms in Africa

At first, pensions may not appear to be the most pressing issue in many countries in Africa. Whilst social security is to some extent discussed, private (or rather funded) pensions are rarely debated. So why address this topic at all, given more critical policy priorities for the region such as education, health, poverty alleviation or agricultural development, and given the lack of demographic pressure?[4]

Most Sub-Saharan African countries do not have meaningful publicly managed pension and social security systems, though some form of pension coverage is available in a limited number of countries. Where benefits are offered to formal sector workers, they are provided either by public service pension schemes, national schemes covering private sector workers or occupational schemes managed by employers other than the government and personal pension schemes, usually offered by insurance companies on a voluntary basis.

For example, universal pension systems operate in Botswana, Mauritius and Namibia. Social pensions also operate in Lesotho and Senegal, whilst pensions are available, albeit for a limited percentage of the population, in countries such as Nigeria and Kenya. However, it should be noted that the majority of people in the region work in the informal sector and are therefore not covered by these schemes, implying that they rely on informal arrangements and their own or family resources.

In addition, there is a vital need for reform of existing pension systems in the region, since their cost is often crowding out spending on other key areas such as health and education. Coverage of these systems is low (under 10 or often under 5 percent of the population) and usually only for civil servants or a minority of relatively highly paid workers in formal sector employment, making for highly regressive systems[5], with cross-subsidies required from indirect taxes (usually VAT) as pension payments from these systems frequently exceed contributions. The need for efficient pension arrangements in the region is undoubted – though the challenges to introducing them remain great, notably because of the large informal sector of workers.

In addition to social pensions not being affordable for many emerging economies, developing funded pension systems can also reduce government expenditure, thereby releasing funds to direct to other important policy challenges and initiatives. The reform of unsustainable pay-as-you-go (PAYGO) pension systems can help reduce the fiscal burden that such schemes place on the population, and indeed avoid burdening future generations.

Such concerns are greatest in countries with high levels of labour market informality such as in Kenya and many African countries, as large groups of the population may not have access to the pension system but

4 The lack of demographic pressures in Africa in most countries are as a result of predominantly young populations in many cases below the age of 35 and very low working populations who are aging which makes pensioners a very small minority.

5 A regressive taxation system is one in which the burden of a tax falls disproportionately on those who are less able to afford it. A progressive one is the opposite.

support it indirectly via the tax system. Spending on pensions, particularly for civil servants and other special schemes, has increased enormously in the region, taking up funds much needed for other priorities.

The potential for major fiscal imbalances and regressive distributional outcomes is compounded when the pension scheme is designed to cover only specific workers with a high degree of political power. In many countries in Africa, for example, Kenya, Uganda and Zambia, this is often the case with civil servants' pension arrangements (See Table 1). In all countries the formula used to calculate the pension for civil servants tends to be more generous than for private sector workers. The impact of a more generous formula and a more mature system along with a lack of reserves results in a build-up of large deficits that are ultimately a burden on the rest of the population, and the crowding out of other important expenditures.

To give an example, civil servants in Uganda[6] are covered by the public service pension scheme, run by the public service pension fund. Despite the name, the system is financed directly from the government budget; there are no statutory contributions. Civil servants can retire at the early age of 45, vesting periods are only 10 years, the benefit accrual rate is 2.4% per year, the reference wage for pension calculations is the last salary and benefits are indexed to wages. A similar scheme covers staff of the armed forces. By contrast, the civil service scheme in Botswana now operates on a fully funded, defined contribution basis, with no burden on the rest of the economy except the contribution rate of the government, which is transparent. In general, there are separate pension schemes for civil servants in about half of the world's countries, including some of the largest developing economies, such as Brazil, China and India. However, there appear to be strong arguments for integration, particularly in smaller and /or low income countries[7].

2.2 Retirements and Pensions Benefits Sector in Kenya: Policy and Legal Landscape

At independence, the question of how best to compensate veterans in the aftermath of the independence struggle was relevant to Kenya just as it was for many independent countries emerging from colonialism. In Kenya, a decree of the Governor General on behalf of Her Majesty the Queen provided for the payment of pensions, gratuities and other allowances in respect of death, disablement or sickness of former members of Her Majesty's Forces who served in any unit raised in Kenya or of Kenya residents who served as members in any other unit of such forces ". The *Her Majesty's Forces Pensions Act, Cap. 201* was the first step in institutionalising the payment of pensions to state officers. For national security reasons, military officers in the post-colonial armed forces were given pensions as a priority to incentivise recruitment and retention in the armed forces.

6 Bogomolova et al. 2006, An Assessment of Reform Options for the Public Pension Fund of Uganda, World Bank Policy Research Working Paper 4091 , December 2006.

7 Ibid.

Working for the state: A special relationship

From Kenya's colonial history through independence, working for the government or the state has generally had a special status as military personnel or civil servants represented the will of the Crown or the government of the day. As in many other countries, it has also been associated with certain privileges.

In many ways, the relationship between the government and its workers in Kenya has also been defined by the role of the state which has gone beyond funding and providing public goods and services or regulating the private sector to do so. Kenya has developed over time an elaborate welfare system for its workers, much of which has been in the form of financial transfers (housing allowances, state pensions etc.) and as such has a great effect on public sector employment and hence public sector pensions.

For example, during the colonial era, civil servants worked at "Her Majesty's pleasure" and as such enjoyed special "privilege days" and status. Upon attainment of independence, this privileged status included an earning for life; attractive working conditions in terms of hours worked or job flexibility; a generous pension and generous sickness pay.

As mentioned earlier, the first group of individuals to receive a pension were soldiers, with the state providing a care function for those who had served their country. These pensions were initially seen as disability payments rather than retirement payments. Upon independence, the state eventually widened the group eligible for a public sector pension to include civil servants and later still other public sector workers. There were a number of reasons for doing this, including to[8]:

- Secure the independence of public servants (minimise corruption and bribery);
- Make a career in public service attractive (attract and retain skilled staff);
- Shift the cost of remunerating public servants into the future; and
- Retire older civil servants in a politically and socially acceptable way.

The Kenyatta government at independence also offered pensions to gain the goodwill of the staff they relied on to develop and implement their policies. In return for the privileges they might enjoy, public sector workers and especially civil servants often also were required to give up certain rights, which many would consider to be non-negotiable in a democracy.

For example after the major political and policy reforms in 1964, civil servants had to adhere to the Civil Service Code and were barred from standing for election as Members of Parliament or any other political office, while senior civil servants were not allowed to hold office in a political party or express their views on political or policy issues in public.

Over the years however, national debates concerning pensions and retirement reform have been triggered by significant shifts widening the beneficiaries of public pensions from just the military to civil servants and state officers. The Constitution of Kenya 2010 in Article 230 set up the Salaries and Remuneration Com-

8 Palacios and Whitehouse, 2006, page 7

mission (SRC) whose constitutional mandate, among others, included setting and regularly reviewing the remuneration and benefits of all State officers and advising the national and county governments on the remuneration and benefits of all other public officers. This constitutional provision provides the first ground for the challenge against the legality of the amendments to the Presidential Retirement Benefits Act, 2003.

In Article 230(5), the Constitution sets out the key principles for the SRC to take into account in the performance of its functions. In particular, it states;

In performing its functions, the Commission shall take the following principles into account —

- *(a) the need to ensure that the total public compensation bill is fiscally sustainable;*
- *(b) the need to ensure that the public services are able to attract and retain the skills required to execute their functions;*
- *(c) the need to recognise productivity and performance; and*
- *(d) transparency and fairness.*

Article 230(5),

Box 1: Mandate of the Retirement Benefits Authority:

The object and functions of the Authority shall be to—

- (a) regulate and supervise the establishment and management of retirement benefits schemes;
- (b) protect the interests of members and sponsors of retirement benefits schemes;
- (c) promote the development of the retirement benefits sector;
- (d) advise the Minister on the national policy to be followed with regard to retirement benefits schemes and to implement all Government policies relating thereto; and
- (e) perform such other functions as are conferred on it by this Act or by any other written law.

Source: Retirement Benefits Authority Act, 1997

The retirement benefits sector in Kenya is composed of the civil service scheme, the National Social Security Fund (NSSF), occupational schemes and individual pension schemes, with a coverage rate of around 15% of the workforce (10% or 800,000 members of the NSSF, 3% in the civil service scheme in 1.5% occupational schemes and 0.5% covered by individual retirement benefit schemes). The Civil Service Pension Scheme covers all members of the civil service, and is established under an Act of Parliament as a PAYGO system. It is currently non-contributory, although plans are underway to make it a contributory system[9].

Until 1997, the pension industry in Kenya was by and large unregulated. Only a few regulations relevant to retirement benefits were scattered in the Income Tax Act and the Trustees Act governed the industry. There were no specific regulations on investments, other than that exempting all those schemes registered with income tax authorities from the withholding tax imposed on investment income.

9 PAYGO and non-contributory means there are no deductions from current pay and allocations to settle payments are made from the national budget on a recurrent basis.

In 1997, the government enacted the Retirement Benefits Act and, in 2000, approved the Retirement Benefits Regulation to provide a legal framework to govern the entire management and administration of the pension industry. Whereas the primary motivation for reform of pension systems in many countries worldwide has been to address the growing fiscal burden of pension liabilities, in Kenya the major driver for reform was to strengthen the governance, management and effectiveness of the existing pensions system.

The core purpose of constituting the Retirement Benefits Act and Retirement Benefits Regulations therefore, was to deal with the problems the industry was facing. The pension industry was unprofessionally run. Though members made their contributions as required, schemes remained underfunded and unable to fulfil their promises to retirees. The very guardians of the funds, the trustees, openly and consciously misappropriated and embezzled retirement funds under the eyes of members who mostly lacked knowledge and awareness and there was no recourse system.

The Retirement Benefits Act enacted in 1997 created a comprehensive framework of regulations, a regulatory authority, the Retirement Benefits Authority (RBA), to regulate, supervise and promote the retirement benefits sector in Kenya. To date, efforts are still on-going to reform the National Social Security Fund (NSSF) which is the mandatory scheme for all formal sector employees in Kenya (other than public service employees).

Table 1: Summary of Scheme Types in Kenya

Scheme Type	National Social Security Fund	Public Service Pension Schemes	Occupational Schemes	Individual Schemes
Legal Structure	Act of Parliament	Act of Parliament	Established under Trust	Established under Trust
Membership	Formal sector Employees Establishments with 5+employees excluding public service employees	All public service employees, including civil servants, teachers and disciplined forces. Separate scheme for armed forces. State officers do not fall into this category.	Formal sector workers in companies that operate retirement schemes	Open to All on voluntary basis
Funding	Funded	Non-Funded	Funded	Funded
Regulation	**RBA**	**Act of Parliament**	**RBA**	**RBA**

2.2.1 The pension scheme for public service employees and armed forces

After a long period of bearing high costs of public pensions, in 2012, the enactment of the Public Service Superannuation Act 2012 gave the government the necessary legal backing, making it possible to push through the changes that would help the Treasury cut the costs of pensions which had risen to Kshs.38 billion for the 2013/14 financial year. However, the government indefinitely postponed commencement of the civil servants contributory retirement scheme as the Treasury put in place plans to manage the funds.

Establishment: The provision and management of retirement benefits for public service employees was for a long time governed under a Pensions Act and Regulations.

Coverage: The Public Service Pension Scheme (PSPS) covers approximately 406,000 civil servants, teachers and police and prison staff and just over 180,000 pensioners. Separate arrangements apply for the armed forces, other military personnel as well as state officers.

Contributions: The PSPS operates on a defined benefits basis[10] and is non-contributory, other than modest contributions at 2% of salaries by male employees towards widows' and orphans' benefits. The new pension scheme, called a 'defined contribution scheme', is set to replace the current defined benefit scheme, which is fully funded by the Treasury.

Civil servants will be expected to contribute two per cent of their salary to the new pension scheme in the first year, rising to five per cent in the second year and 7.5 per cent from the third year onwards. The contributory scheme will ease the government's pension burden, which is deemed to be growing at an unsustainable rate.

Civil servants have been bracing for the conversion of the scheme for the past five years, but the government attempts to effect the changes have been hampered by a lack of requisite laws and administrative structures to guide the process. The conversion of the scheme in an environment of frequent public sector wage disputes also makes it a politically sensitive policy measure, which has made the government hesitant to implement it.

Benefits: The Scheme provides a pension of 2.5% of final basic salary for each year of service on retirement from service at 55. Unreduced pensions are payable on retirement at or after 50 with the parent ministry's consent or earlier on retirement due to ill health. The pension fraction targets a retirement pension of 75% of basic salary after thirty years of service (or an average of 50% of total remuneration for all categories of public service employees). A higher pension fraction applies for armed forces and military personnel.

No guaranteed pension increases have applied in the past; there have only been four pension increases in the forty years to 2004 with the last increase having been in 1991. Modest pension increases at 3% every two years have been introduced since 2005. Benefits vest after ten years of service and there is no portability of benefits and individuals who resign from service before retirement are not entitled to any benefits.

10 A defined benefit pension plan is a type of pension plan in which an employer/sponsor promises a specified monthly benefit on retirement that is predetermined by a formula based on the employee's earnings history, tenure of service and age, rather than depending directly on individual investment returns. In Kenya, the Scheme provides a pension of 2.5% of final basic salary for each year of service on retirement from service at 55. Unreduced pensions are then payable on retirement at or after 50 with the parent ministry's consent or earlier on ill health retirement.

Benefit Expenditure

There is no pre-funding of liabilities; the scheme is financed on a pay as you go basis with pension costs met from government revenues. The level of benefit expenditure has been increasing at an average of 19% per annum over the last 10 years and is shown in the graph above.

In 2007 alone, benefit expenditure totalled 1.4% of GDP. The pension obligations already incurred would need to be quantified, but are expected to be a significant proportion of GDP. In cash terms, the increase in expenditure over the last decade is only the start of a trend which would be expected to continue for the next two decades even if the existing scheme is closed to new entrants. A significant portion of the benefit expenditure is in respect of lump sum pay-outs of pensions. The cash flows also show the impact on benefit expenditure of salary increases and corresponding increases in average new pensions coming through in pay-outs.

2.3 The Presidential Retirement Benefits Act, 2003

In 2003, the Kenyan Parliament passed a Statutory Law, Act No. 11 of 2003 on the Presidential Retirements Benefits. The Act of Parliament provided for the granting of pension and other retirement benefits to the holders of the office of president upon their ceasing to hold office as such, and for connected purposes. Essentially, this was the first law of its kind in Kenya that targeted retired heads of state and their spouses. In this respect, the Act covered three types of persons; a retired president; or upon the death of a retired president, his/her surviving spouse; or the surviving spouse of a president who dies while holding office.

Box 2: Schedule of selected additional retirement benefits for retired presidents;

(a) Two personal assistants;
(b) four secretaries;
(c) four messengers;
(d) four drivers;
(e) a maximum of six security guards;
(f) two cooks;
(g) two housekeepers;
(h) two gardeners;
(i) two laundry persons;
(j) four house cleaners;
(k) office maintenance;
(1) maintenance and running expenses of vehicles;
(n) local travel;
(o) international travel allowance of up to four trips a year not exceeding two weeks each;

In 2013 and upon the retirement of the former President Mwai Kibaki, the Presidential Retirements Benefits Act was amended to, among other things, extend the benefits of the former presidents to their children, ensuring there are benefits to eligible children where an entitled person dies. In this amendment, the retirement package was further enhanced by providing for an unlimited number of security guards and doubling the number of professional and other staff from two to four, leading to an increase in the number of cooks, housekeepers, gardeners and laundry persons. The amendments also increased various allowances from fixed sums to peg them at specific ratios to the salary of the serving president.

2.3.1 Summary of the Presidential Retirement Benefits Act 2003

A retired President shall, during his lifetime, be entitled to—

a) a lump sum payment on retirement, calculated as a sum equal to one year's salary for each term served as President;
b) a monthly pension equal to eighty per cent of the monthly salary currently paid to the President;
c) an entertainment allowance of two hundred thousand shillings per month;
d) a housing allowance of three hundred thousand shillings per month to cater for both an urban and a rural dwelling;
e) suitable office space, not exceeding one thousand square metres, with furniture, furnishings, office machines, equipment and office supplies, to be provided and maintained by the Government;
f) two new cars of the retired President's choice, replaceable every three years, each car having an engine capacity of at least three thousand cubic centimetres;
g) two four-wheel drive motor vehicles of the retired President's choice, replaceable every three years, each vehicle having an engine capacity of three thousand, four hundred cubic centimetres;
h) a fuel allowance of two hundred thousand shillings per month;
i) an allowance of three hundred thousand shillings per month for electricity, water and telephone facilities;
j) full medical and hospital cover, providing for local and overseas treatment, with a reputable insurance company for the retired President and his spouse and his children under the age of eighteen years;
k) the additional benefits set out in the First Schedule.

Amendments to the Presidential Retirement Benefits Act 2003

In 2012, Parliament made five legislative proposals to amend various laws all related to the retirement benefits of state officers including MPs themselves. The first amendment was made to the Salaries and Remuneration Act that allowed MPs to award themselves a severance pay. In this proposed amendment, Section 26 of the Salaries and Remuneration Act was amended, technically allowing Parliament to determine the pay perks of its members and those of other public officers. The second amendment was made to the National Assembly Remuneration Act pegging their gratuities at 31% of the salary for each year served.

Third, the MPs passed amendments to Section 25 of the Commission on Revenue Allocation Act barring the commission from making any regulations unless a draft of the same has been approved by Parliament. These two proposed amendments paved the way for the third legislative proposal which was to amend the Finance Act to expand the number of eligible former state officers eligible from this scheme to include the former Prime Minister, former Vice Presidents, Speakers of the Senate, National Assembly, Chief Justice and their spouses as well as the Attorney General and Members of Parliament, which would have meant that the 222 MPs would take home 31 per cent of their salary for every year in service i.e, a total Sh9.3 million (USD. 109,411) each. All the four proposed amendments were rejected by the president on the grounds that they were economically untenable at the time.

However, in the fifth legislative proposal to amend the Presidential Retirement Benefits Act 2012, which sought to improve his own retirement benefits, the president gave his assent. The legal amendments of 2012 in particular made the following improvements to the retirement package for President Mwai Kibaki;

Table 2: Summary of the amendments to the Presidential Retirement benefits in 2012

Key Element	Presidential Benefits Act 2003 – Actual Costs		Presidential Retirement Benefits Amendment Act 2012	Actual Costs	
	(Ksh 000)	USD		(Ksh 000)	USD
Lump sum Payment equivalent to one year's salary per term	8,400	98,000	Lump sum equivalent to one and a half year's salary per term		294,118
Monthly pension at 80% of the last salary	560	6,588	Monthly pension at 80% of the last salary	560	6,588
Entertainment allowance at 40%	280	3,294	15% of the monthly salary currently paid to the serving President	186	2,188
Housing allowance	300	3,529	23% of the monthly salary currently paid to the serving President	285	3,353
Fuel allowance	200	2,353	15% of the monthly salary currently paid to the serving President	186	2,188
Electricity, water and telephone	300	3,529	23% of the monthly salary currently paid to the serving President	285	3,353

Other Key benefits	Presidential Retirement Benefits Amendment Act 2012
Fully furnished office space not exceeding 1,000sq mtrs	Same
Two new cars and two 4WD vehicles with engine capacity of 3,400cc	Two 4WD vehicles with engine capacity of at least 3,400cc
Medical cover with spouse and children under 18yrs	Eligibility of child extended to under 24 yrs in case a child is a student and any other children dependents
Benefits in Schedule 1	Unlimited guards; four cooks; four housekeepers; four gardeners and four laundry persons
All office expenses paid	Same

2.3.2 Summary of current and projected salaries and benefits

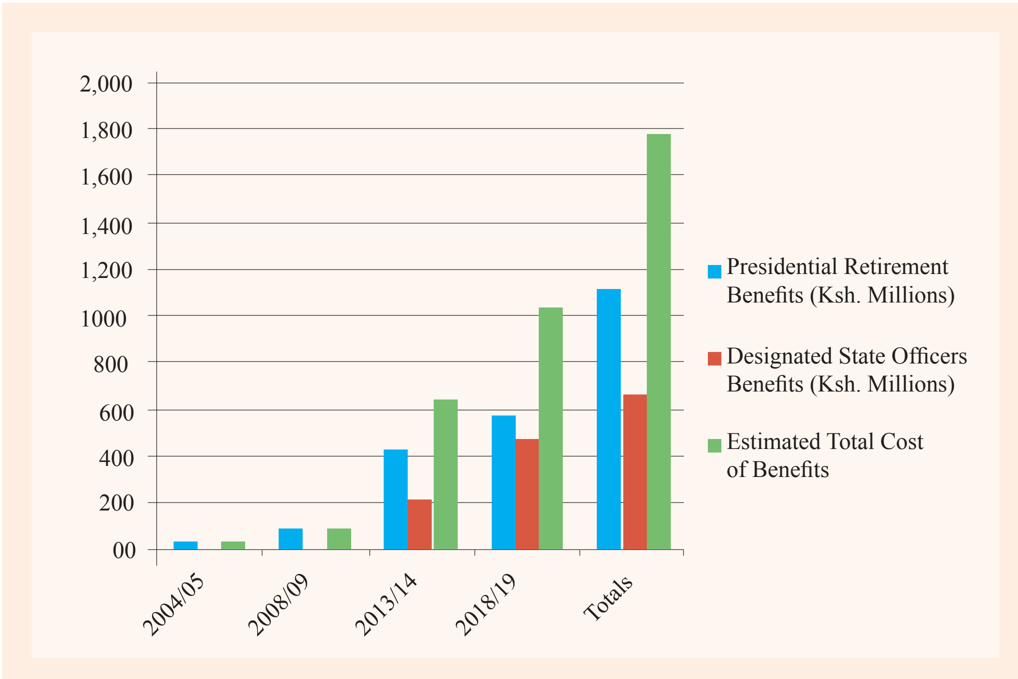
According to revenue estimates, over the last ten (10) years, gross expenditures on the retired presidents have been rising steadily from Ksh. 28.7 million in 2002/3, to Ksh. 84.6 million in the 2008/09 FY and Ksh.330Million in 2013/14 for the two retired presidents, H.E Hon Daniel arap Moi and H.E Hon. Mwai Kibaki.

In the debate on the current Retirement Benefits (Deputy President and Designated State Officers) Bill, 2013, in the National Assembly, MPs are considering debate and legislation on the retirement benefits of former Prime Minister Raila Odinga, former Vice-President Kalonzo Musyoka[11] and former National Assembly Speaker Kenneth Marende. The Bill originally sponsored by Suba MP John Mbadi also guarantees current Speakers Justin Muturi (National Assembly) and Ekwee Ethuro (Senate) hefty retirement packages upon completing a single term or more in office. Other beneficiaries of this legislation would also include their spouses and children.

If the Bill is passed, Mr Odinga and Mr Musyoka as well as the current Speakers would be entitled to monthly benefits equal to 80 per cent of their last monthly salary in office. This as a result of the Salaries and Remuneration Commission (SRC) setting the Speaker's salary at Sh990,000 in March 2013. The retirement benefits for Hon. Odinga and Musyoka alone would be a total cost of about Ksh.208M in the 2013/14 financial year with the cost of all the four state officers totaling just about Ksh.462M a year by the FY 2018/19. Cumulatively, the cost of retirement benefits for both these state officers and the retirement benefits will be expected to reach up to Ksh.1.0B in the FY 2018/19 or a total of Ksh.1.8B over the next 5 years once the bill is passed as shown in the graph below.

11 Subject to section 5(3) of the proposed bill, the person entitled to the benefits conferred by the proposed shall be persons who at any time after 15th January 2008 retire as Prime Minister, Vice President, Deputy President or Designated state Officers and do not engage in elective politics.

Graph 1: Current and Projected Estimates of Presidential and State Officers Benefits over the 2014-19 period



Admittedly, of all current and former state officers who have not benefited from the bill, Mr Odinga and Mr. Musyoka who are currently leaders in the opposition and who served as Prime Minister and Vice President respectively from 2008 to 2013 at a salary of about Ksh.1.7M (USD.20,000) each, would be big beneficiaries of the Bill. They would be entitled to a lump sum payment equal to one and a half years salary (Ksh.30 million or USD.360,000) paid for each term served. In addition, they would be entitled to two saloon vehicles with an engine capacity not exceeding 2000cc replaceable every four years, one four-wheel drive vehicle with a maximum engine capacity of 3000 cc, monthly fuel allowance equivalent to 15 per cent of the last monthly salary, medical cover providing local and overseas treatment. Additional benefits include two drivers, a personal assistant, secretary, housekeeper, two armed guards, diplomatic passports, access to VIP lounges at all airports within the country and maintenance expenses for the vehicles as well as an official funeral.

2.4 Implications for the Public Wage Bill and the Economy

Economic classification of expenditure shows that over the last five-year period, expenditure on employees' compensation has grown steadily from 7.7% to 33.2%. This has led to the national debate[12] driven by the Salaries and Remuneration Commission (SRC) on the subject. Among the reasons documented for the growing public wage bill is salary adjustments for teachers and medical personnel, and the increase in the number of commissions.

The Consolidated Fund Service (CFS) comprises mandatory payments or government commitments which are the first to be paid out of the Consolidated Fund before any other public expenditure commitment. Public debt and pensions, at over 95% have over the years comprised the largest components of the Consolidated Fund Services The other items are as indicated in the Table 3 below.

From the table, while CFS is estimated to reduce marginally by 0.5% from Ksh 364.4 billion in 2013/14 to Ksh 362.5 billion in 2014/15, the key drivers to changes in CFS expenditure which has been increasing in absolute terms over the years but remained steady in the last two financial years is public debt and pensions, with by far the larger portion going to the public debt. In 2014/15, pension and salaries to constitutional office holders increased by 15% and 9% respectively on the back of the increase in the number of commissions, denoting that the increase in wages leads to automatic adjustments in pensions since pensions are pegged on wages at the time of exit of public service for constitutional office holders.

It is estimated that the CFS will command 20.4% of the entire budget of Ksh 1.77 trillion and 24% of the national government budget. Changes in debt repayment and in pensions cumulatively reduce the flexibility of the budget or the availability of funds for spending in other areas. The implications of CFS' growth call for strict and prudent management of public debt but also for the firm management of pension liabilities through the public wage policy.[13] The public wage policy in particular helps in setting the appropriate levels of public wages which makes pensions more realistic and affordable in the long term.

12 cf. Media Reports e.g. Business Daily, April 16, 2013

13 cf. IEA Budget Guide, 2014.

Table 3: Trends in Consolidated Fund Services

			Revised		Estimates		
Item	**2009/10**	**2010/11**	**2011/12**	**2012/13**	**2013/14**	**2014/15**	**% age 2014/15 vs. 2013/14**
Public Debt Payment	161.13	157.20	175.39	322.11	331.17	324.92	-1.89
Pensions	26.51	26.73	29.26	28.15	28.15	32.36	14.96
Salaries and Allowances	1.81	2.06	3.30	3.35	3.72	4.07	9.41
Miscellanaous Sercive	1.26	0.06	0.06	0.13	0.13	0.13	0.00
Subscription to International Orgs.	0.06	0.00	0.00	9.16	0.00	0.00	0.00
Guaranteed Debt	0.00	1.36	1.46	1.46	1.18	1.01	-14.41
Total	**190.78**	**187.41**	**209.7**	**364.36**	**364.35**	**362.49**	**-0.51**
Public Debt + pensions as % of CFS	**98.4**	**98.1**	**97.7**	**96.1**	**98.6**	**98.6**	
CFS as % Total Public Spending	18.8	18.2	17.9	23.7	23.2	20.4	

Source: Various Issues of Estimates of Reccurent Expenditure
www.ieakenya.or.ke/publications/doc.../339-budget-guide-2014-15

3.0 Examples from other countries

A key element of the high benefits package of the retired presidents and state officers lies in the defects in the structure of salaries and remuneration. According to the SRC, when comparative research and analysis was conducted to appreciate the international practices in remuneration determination and outcomes for the equivalent of state officers in Kenya, the results of comparator countries revealed that the proportion of presidential remuneration to GDP is less than one (1) in all developed countries and South Africa (See table 7 below). Conversely, the proportion of President remuneration to GDP is close to or above ten (10) only in Kenya and Rwanda. Similarly, the proportion of presidents' remuneration to GDP per capita is very low in advanced countries and South Africa, yet the same is very high (above ten) in other African countries.

To assess sustainability, analysis was done on the relationship between the countries' revenue to GDP ratio. The advanced countries and South Africa have stronger revenue to GDP ratios. The analysis drew upon the experience of nine countries and compared as follows:

Table 4: Economic Aggregates and ratios for comparator countries

	Kenya	Tanzania	Rwanda	South Africa	USA	Canada	UK	Australia
Kenya Revenue to GDP ratio as proportion of others	1.00	0.67	0.78	1.50	1.50	1.78	2.17	1.72
Kenya GDP ratio to countries	1.00	0.67	0.18	11.73	426.15	49.17	68.74	42.04
Pres. annual pay/GDP	8.28	-	15.25	0.74	0.03	0.19	0.14	0.47
Pres. Pay/GDP per capita	*14.13*	*-*	*6.04*	*2.28*	*0.69*	*0.66*	*0.78*	*1.42*
Pres. Pay/GDP per capita	*169.55*	*-*	*72.48*	*27.40*	*8.32*	*7.97*	*9.38*	*17.01*

Pres = Presidential

Kenya's ratio, though low, is better than many other African states whose economies are weak. Despite the ratios falling below desirable levels for the president to draw such large remuneration, the payment for the Kenyan head of state is almost at par with his South African counterpart while the Kenya economy is about twelve (12) times weaker. In line with best practices, analysis was made of the head of states' pay to the GDP per capita of the comparator countries. The advanced countries have an average ratio below ten (10) while African countries have higher levels with South Africa at 27, Rwanda 72.5 and Kenya at the highest level of about 170. This means that the Kenyan situation portrays a wider disparity in salary earnings than all the countries under study when presidential remuneration is weighted against the size of the economies.

In **Tanzania,** in keeping with the Political Service Retirement Benefits Act, 1999 and its amendment; The Written Laws (Miscellaneous Amendment) (No. 2) Act, 2005 (No. 11 of 2005) as passed in the national assembly on the 9th June 2005, the benefits to be granted former politicians were spelt out as follows;

- A winding-up allowance calculated on the basis of (as determined by the appropriate authority) the highest salary received in a number of months, and the percentage rate
- Diplomatic passport for president and his spouse/ spouses
- Medical treatment within and outside the United Republic of Tanzania borne by the government
- The service of two motor vehicles to be provided by the government, of not less than three tonnages and replaceable after every five years
- A furnished house with not less than four bedrooms, two to be self contained and to contain a furnished office and a servant quarter
- A monthly maintenance allowance of the sum equal to 80% of the salary granted to the incumbent president
- Necessary security and other protection services to him and his immediate family
- One personal assistant; office secretary; office attendant; cook; laundryman; domestic servant and one gardener
- Two drivers
- Use of VIP lounge
- Burial expenses

However, the practice of the improved hefty retirement rewards introduced in 2012 for the retiring Presidents in Kenya is similar to that in Ghana:

During the sunset period of his presidency in Ghana, the former President John Kufuor in 2009 formed a task force to review the presidential retirement package. The report, which was adopted by Parliament only on the last day of his tenure, awarded him a lump sum ex-gratia[14] payment of US$ 400,000 (approx. Ksh.34Million at the rate of 1USD=Ksh.85) besides the president's normal pension which was guaranteed in the constitution. This was USD.100,000 more than what the MPs in Kenya awarded the retiring president.

In addition, the presidential retirement benefits also included; two houses – one to be in the nation's capital and the other at any place of his choice. The houses were to be furnished and maintained at the state's expense and upon death remain the property of his family; six fully maintained cars - three saloon cars, two cross-country vehicles and one all-purpose vehicle; medical cover for the President and his spouse for life and 24-hours security and police escort to facilitate their movements. Additional benefits included an annual budget for entertainment, retirement benefits equivalent to 18 months consolidated salary, and an additional resettlement grant if two full terms had been served; overseas travel for the couple for a maximum of 65 days annually and a US$1 million for a library modeled along the lines of the US Presidential Library.

In this piece of legislation however, MPs also awarded an end of service award of US$120,000 (Approx. Ksh.9 million Ksh) to the speaker of parliament, plus a saloon car and free medical and dental care for himself and his wife. In addition, the speaker was awarded with a tax-free pension package. The deputy speaker was

14 Ex-gratia "given voluntarily: given as a gift, favor, or gesture of goodwill, rather than because it is owed) award, Encarta.

awarded US$100,000 (or approx. Ksh.7.6 million) plus a saloon car while the majority and minority leaders, their deputies and the chief whip were each awarded between US$90,000 to US$100,000 and a saloon car. Other parliamentarians were also rewarded.

Upon assumption of office and following huge public protests that greeted the report which outlined retirement benefits for Ghana's former presidents and other state functionaries, and claims by some Members of Parliament (MPs) that they never approved such a report, President Atta Mills decided to suspend its implementation, and set up another committee to study the Report.

In **India,** Former Prime Ministers of India are provided with:

- Rent-free accommodation for a lifetime.
- Medical facilities, 14 secretarial staff, office expenses against actual expenditure, six domestic, executive-class flight tickets, and unlimited free train travels for the first five years.
- Special Protection Group cover for one year.
- After five years: one personal assistant and domestic worker, free air and train tickets and Rs. 6,000 (USD.100) for office expenses.

In the **USA**, former presidents currently receive a pension that is equal to pay for cabinet secretaries (Executive Level I), which was $199,700 (Ksh.16.9M) in calendar year 2013. Executive Level I pay is set at $201,700 (Ksh.17.1M) for calendar year 2014. In addition to benefits provided pursuant to the Former Presidents Act they are also provided Secret Service protection and financial "transition" benefits to assist their move to post-presidential life. Pursuant to the FPA, former presidents are eligible for benefits unless they hold "an appointive or elective office or position in or under the Federal Government or the government of the District of Columbia to which is attached a rate of pay other than a nominal rate."

For FY2014, Congress appropriated $3,550,000 (Ksh.301.8M) for expenditures for former presidents, $113,000 (Ksh.10.1M) or (3.1%) less than the $3,663,000 (Ksh.311.1M) appropriated for FY2013. For FY2015, President Obama requested $3,344,000 (Ksh.284M or approximately Ksh.71M on average for each former president) for expenditures for the four living former presidents. On January 10, 2013, President Barack Obama signed the Former Presidents Protection Act of 2012, which extended lifetime Secret Service protection to former presidents and their children. Prior to the Bill's enactment, President George W. Bush would have been the first former president to have his post-presidency Secret Service protection limited to 10 years.

Table 5. Annual allowance for former US presidents

FY2014 Appropriation, in Ksh Equivalent

	Jimmy Carter		George H. W. Bush		Bill Clinton		George W. Bush		TOTALS	
	USD	KSH	USD	KSH	USD	KSH	USD	KSH	USD	KSH
Personnel Compensation	0	0	96	8,160	96	8,160	96	8,160	**288**	**24,480**
Personnel Benefits	0	0	66	5,610	61	5,185	88	7,480	**215**	**18,275**
Pension	201	7,085	201	17,085	201	7,085	201	17,085	**804**	**68,340**
Health benefits	0	0	0	0	8	680	12	1,020	**20**	**1,700**
Travel	0	0	73	6,205	0	0	36	3,060	**109**	**9,265**
Office Space	115	9,775	185	185	450	8,250	440	37,400	**1,190**	**85,610**
Telephone	17	1,445	58	4,930	9	765	102	8,670	**186**	**15,810**
Postage	0	0	0	0	0	0	0	0	**0**	**595**
Printing	6	510	1	85	2	170	27	2,295	**36**	**3,060**
Other Services	129	10,965	117	9,945	123	0,455	150	12,750	**519**	**44,115**
Supplies and materials	2	170	25	2,125	0	0	95	8,075	**122**	**10,370**
Equipment	0	0	15	1,275	0	0	40	3,400	**55**	**4,675**
Totals	**470**	**39,950**	**837**	**55,605**	**950**	**80,750**	**1,287**	**109,395**	**3,551**	**286,295**

Source: https://www.fas.org/sgp/crs/misc/RL34631.pdf

In other words, compared to the United State where there are a total of four eligible former Presidents currently on benefits, in the last financial year Kenya spent a total of Ksh.330 million on the two (2) retired presidents, **approximately Ksh.44 million more than the USA spent on the four (4) former presidents (Ksh.286million) combined**.

In the **United Kingdom** currently, there is a restriction on the pensions increase that may be paid to former office holders. For example, the basic pension of a former Prime Minister is increased under the Pensions (Increase) Act, 1971 until it reaches the level the incumbent Prime Minister is entitled to and there are no further pensions increases unless the sitting Prime Minister's salary rises. This penalises former Prime Ministers who have not received the annual pensions increase uprating received by all other public service pensioners.

The only conditions for payment are that a former Prime Minister or Speaker is not in receipt of any salary payable from the Consolidated Fund or the revenues of the Duchy of Lancaster, or out of monies provided by Parliament other than the Parliamentary salary. Pensions are uprated annually in line with the Retail Price Index. Pensions can therefore be drawn after the individual ceases to hold that office, even if he/she remains in public life as an MP. In 2010/11 the Prime Minister's ministerial salary entitlement was £132,923 or approximately Ksh.18.9M). The Speaker's salary entitlement was £79,754 or approximately Ksh.11.3M.

The Ministerial and other Pensions and Salaries Act 1991 also allowed the Prime Minister and Speaker to participate in the pension scheme for MPs – the Parliamentary Contributory Pension Fund (PCPF). On appointment, the Prime Minister and Speaker may also choose between having all of their net contributions to the PCPF refunded, or those made prior to February 1991. In the former case, no benefits are then payable from the PCPF. In the latter, benefits are paid from the PCPF in respect of service since 1991.

4.0 Key Economic, Political, Legal and Constitutional Concerns

Article 230(1) of the Kenya Constitution 2010 establishes the Salaries and Remuneration Commission (SRC). This Commission has the mandate and power to set and regularly review the remuneration and benefits of all state officers. However, in clear contravention of this Article, on 9th January, 2013, the National Assembly enacted two very closely related draft laws; the Presidential Retirement Benefits (Amendment) Bill 2012, and the Retirement Benefits (Deputy President and Designated State Officers) Bill 2012. In response, The Constitutional Implementation Commission (CIC) issued an advisory and has requested the relevant state agencies not to implement these laws, which are in contravention of the constitution. The President however assented to the Presidential Retirement Benefits (Amendment) Bill, 2012 but rejected the Deputy President and Designated Officers Bill. In its advisory[15], the CIC said that the SRC should begin the process of setting the benefits of the retired presidents as well as designated state officers. In so doing, the SRC will be required to adhere to a number of key principles and tenets which were not met in the design of the benefits package outlined in the Presidential Retirement Benefits Act.

4.1 The Spectre of a Deluge of Demands

In at least three countries in Africa now – Ghana, Kenya and Mozambique, elected MPs have made spirited attempts to award themselves and their presidents hefty retirement benefits and pensions. In both Ghana and Mozambique, the successor presidents have vetoed these perks after huge public outcry. In Nigeria, in June 2014, some of the 36 state governors met and resolved to establish an independent office that would make objective recommendations on their retirement benefits. The resolution came against the backdrop of a successful attempt in Rivers State, to pass the Public Office Holders Bill into law targeting the payment of pensions and other fringe benefits to public office holders in the state.

Apart from receiving 100 per cent of their basic salaries as pensions, the law provides for two houses each for former Rivers State governors and deputy governors with one of the houses to be built in Abuja, the nation's capital while the other would be constructed in any part of the state. The buildings, according to the document, will be furnished by the state government. Other benefits are three cars each for the ex-governors and their deputies, which will be replaced every three years, free medical treatment for former chief executives and members of their immediate families; provision of cooks, drivers, stewards, gardeners and other domestic workers, who are also expected to earn pensions after retirement. The Rivers state is not alone in the provision of pension for governors and deputies' as the Kwara State House of Assembly also passed into law a similar bill for the benefit of former governors and deputies in the state in 2010.

15 See: CIC Annual Report 2012-2013: Three Years after Promulgation: Tracking Devolution

Box 3: Excerpt of the SRC Press Statement on 3rd January 2013 when the Presidential Benefits Amendment Bill, 2012 was tabled in Parliament;

According to the Constitution, any proposal which seeks to set and review salaries, pension and other payments that a state officer or holder of public office is entitled to should be presented to the Salaries and Remuneration Commission for consideration and further action.

The Constitution further provides that the Commission in implementing any proposal pertaining to the remuneration and benefit of the State officers, shall be guided by the principles for determining and advising on remuneration spelt out under Article 230 (5), namely:

- The need to ensure that the total public compensation bill is fiscally sustainable;
- The need to ensure that the public services are able to attract and retain the skills required to execute their functions
- The need to recognize productivity and performance
- Transparency and fairness

Based on the above, the Commission would like to advise the Legislature to exercise caution when the House debates the two bills today and follow due process of law. It is important that we comply with the Constitution and legal processes and give analysis of the financial implication to the economy in passing such amendments.

In conclusion we would like to restate this latest move violates the Constitution, which vests powers to set salaries and benefits of State officers in an independent institution.

Looking at the Kenyan scenario, the year 2012 provided the first clear indication by MPs that they intend to make legislation for their benefits package sooner or later. Currently, both the National Assembly and Senate have a total of 417 members. The counties in addition have 47 governors and 47 deputy governors in addition to 47 speakers of the county assembly. This is a total of 141 state officers and a total of 558 state officers, according to the Constitution of Kenya 2010 (Article 260). At an estimated retirement package of 80% of their current salaries, all these offices combined would draw in approximately Ksh.233 million every month or Ksh.2.8 billion per year before the inclusion of any additional benefits or administrative expenses.

It is also conceivable that towards the next general elections, the clamour for better pensions for state officers will trickle down to the 1,885 members of the county assemblies. Faced with the multiple challenge of fighting off the campaign by governors and the minority Coalition for Reforms for Democracy (CORD) coalition for a new constitutional referendum, the majority Jubilee Alliance Coalition may be inclined to give in to demands by MCAs for elaborate pension benefits in exchange for rejecting an attempt to pass a referendum initiative through the county assemblies. Effectively, this would stabilize the last phase of the Jubilee Coalition's rule even if at an enormous public cost.

4.2 Equity and Fairness

A key policy issue and principle promoted by the SRC in the determination of salaries, remuneration and benefits of state officers is the principle of equity and fairness. This principle promotes distributive, procedural and social justice. It encourages the use of clearly defined criteria for determining levels of pay packages, thus promoting the honesty and diligence of employees. The Kenyan public pay and pensions structure has, for a long time, been characterized by huge disparities between the highest and lowest paid public officers. As a matter of fact, the current compression ratio (comparison between the highest and lowest paid public officer) using the salary of the President of Kenya and the lowest officer in the civil service is one hundred and thirty seven (137), far above the benchmark of 12 used internationally[16]. This creates inequity, which contradicts Article 230 (5) (d) of the Constitution. The compression ratio for state officers is currently at thirty three (33) when comparison is made of the salary of the President and the lowest level of state officer, the Kadhi II. The remuneration levels that the SRC proposed in 2013 were expected to have the effect of harmonising this ratio downwards to no more than 28 but this has still not been achieved.

4.3 Legal Compliance

Another key policy issue and principle promoted by the SRC in the determination of salaries, remuneration and benefits of state officers is the principle of legal compliance. This principle entails compliance with the Constitution, relevant national legislation, international laws and treaties and acceptable standards and benchmarks. According to the CIC, the legal amendment to enact the Presidential Retirements Benefits did not meet the required legal and constitutional threshold.

4.4 Transparency and Public Participation

In the preparation and debate of the legislative amendments to the Presidential Retirement Benefits Act 2003 and the subsequent amendments in 2013, public participation, as espoused in the Constitution, was given a wide berth. Yet this is a critical constitutional requirement. There is a general constitutional obligation for Parliament and County Assemblies to involve the public. The constitution – under Article 118[17] and 196 - imposes on Parliament and County Assemblies, respectively, both a positive and a negative duty: the positive duty requires the involvement of the public and the negative duty bars the exclusion of the public from proceedings of Parliament and County Assemblies or the proceedings of their committees. Under the centralized, prefectural administration established by the post-independence constitution, public participation and inclusion were virtually non-existent.

The public participation and inclusion requirements of the new constitution are designed to remedy this defect. So central is this public involvement theme to the new dispensation that the constitution makes it clear that public participation is a requirement not merely of the electoral process but an ethos of the entire government system established by law[18].Yet in both the development and amendments to the Presidential Retirement Benefits Act 2003 and 2013, public participation was grossly inadequate.

16 Lindauer David, Barbara Nunberg (eds), 1994 Rehabilitating government : Pay and employment reform in Africa ,World Bank, Washington DC

17 Article 118 specifically provides under sub-section (1) that "Parliament shall conduct its business in an open manner, and its sittings and those of its committees shall be open to the public; and facilitate public participation and involvement in the legislative and other business of Parliament and its committees. Under sub-section (2) the constitution provides that "Parliament may not exclude the public, or any media, from any sitting unless in exceptional circumstances the relevant Speaker has determined that there are justifiable reasons for the exclusion." Article 196 (1) and 2 re-iterate the same strictures with reference to County Assemblies.

Public participation is also a function of transparency and accountability. Essentially, public participation in the legislative process enables the public to hold authorities accountable for implementation. When citizens are given the chance to be part of law making, they can more easily notice misuse or abuse at whichever stage it occurs and raise the alarm for the ill to be corrected. The amendments to the Act in 2013 brought forth several queries on value for money, efficiency in the use of public resources, impartiality and possible elements of misuse of public office. An example of the latter is when the outgoing president signed for himself into law an exaggerated send-off package of up to Ksh. 25M (USD.294,118) while denying his former deputy and the then co-principal and outgoing Prime Minister any send-off benefits by rejecting their retirement bill in total, and this in the face of warnings of illegality by the CIC.

4.5 Sustainability of the Public Wage Bill

The relationship between the wage bill and a country's gross domestic product (GDP) is useful in assessing its long term sustainability. It gives an indication of how much of a country's economic activity goes into paying salaries as opposed to other expenditure and development needs. Comparison of this ratio with other regions and countries gives insights which can be very useful in sounding the alarm on a wage structure which adversely affects the economy of a country. Using recent comparative data, the central government wage bill in Kenya as a share of GDP is estimated at 7.8% compared to 6.5% for Africa. It is also the highest compared with other regions with Asia at 5.1%, Middle East at 7.1% the EU at 5.2%. *(Source: SRC)*

From the recent in-depth studies commissioned by the Salaries and Remuneration Commission[19], it has been clear that multiple allowances introduced in the public service at different times have been responsible for distorting and escalating the wage bill to unsustainable levels. Allowances are thus one main source of creating disparity and wage differentials in the public service.

In the context of international best practice, and as discuseed above, a number of countries indeed pay a pension and other benefits to their former heads of government. For example, since 1937, Britain's former prime ministers have received a pension equal to half of their ministerial salary. They have also received an office, secretarial support, and a car and driver. In November 2012, the Canadian Parliament enacted the Pension Reform Act, which substantially reduced the pension provided to a former prime minister. The new law decreased the pension benefits associated directly with his or her service as prime minister to 3% of his or her salary multiplied by the years of service. Pursuant to the legislation, a former prime minister appears to remain eligible for pension benefits as a former member of Parliament. In all these cases, rationality and affordability in the long term remain outstanding parameters of setting these payment packages. The Kenyan cases simply goes way beyond what the country can afford and sets a dangerous precedent in the settlement of payment packages for retired state officers.

18 Source: http://www.africog.org/content/public-participation-and-parliamentary-oversight-legal-reforms-and-policy-options

19 The Salaries and Remuneration Commission Report on the proposed remuneration structure and pay determination for state officers in the Government of Kenya, February 2013.

5.0 Conclusions and Policy Recommendations

In addressing the defects and policy impact of The Retirement Benefits (Deputy President and Designated State Officers Bill, 2013, a number of key issues both policy and legal, emerge that provide strong grounds for further review;

5.1 Eliminate the problem of policy duality

Kenya like many countries including some of the largest developing economies, such as Brazil, China and India still maintains separate pension schemes for public servants. Even in public service, Kenya further maintains different pension schemes for civil servants and state officers. This is the loophole that has emboldened state officers to go even further to set up a 'super' pension scheme for retired presidents and state officers. Duality in policy has meant that the pension system in Kenya faces structural problems that compromise its financial sustainability, reduce economic efficiency, and create sources of intra- and intergenerational inequalities. All dual systems are a source of inequalities since provisions tend to differ between schemes – with civil servants usually receiving more generous benefits. However in Kenya, state officers now receive separate and generous benefits packages that go way beyond what the country can afford in the long term if the trend continues.

Dualism also increases the costs of managing the pension system and, more importantly, restrains the movement of the labour force (due to lack of transferability of pension rights between different funds), thus precluding an efficient allocation of resources. In Kenya, the introduction of a third retirement benefits scheme for state officers makes an already complicated system more complex by creating a third strand in the government pension system – one for ordinary civil servants, a separate scheme for the armed forces and a third for retired presidents and state officers.

5.2 Address design flaws and the question of economic sustainability

Retirement benefit schemes that have badly designed rules damage incentives and arbitrarily redistribute income between members. Basing retirements such as the Presidential Retirement Benefits Act on entitlements on final salary, rather than the average of pay over the lifetime, is unfair and open to abuse and causes inequity.

The history of earnings recorded by a scheme can be manipulated so that the final salary, which determines the pension, is high, while pay in earlier years, on which contributions are levied, is lower. This has been the case for a number of state officers in Kenya whose salaries have risen astronomically over the last 10 years. And because individuals whose earnings rise rapidly over their career, tend to be relatively well paid, they will receive relatively more from the pension system than those whose earnings rise slowly. As a result, they receive larger benefits relative to their contributions.

In determination of affordability and sustainability however, determination of remuneration and benefits should always be based on the resource capacity of an employer and the Government.

5.3 Ensure constitutional and legal compliance

The Presidential Retirement Benefits (Amendment) Act, 2013 was undertaken with the object "to make amendments to the Presidential Retirement Benefits Act, 2003 and to take into account inflation trends and for connected purposes". In turn, the Retirement Benefits (Deputy President and Designated State Officers) Bill, 2012, sought to "provide for the granting of pension and other retirement benefits to persons who hold the offices of Deputy President and holders of designated state offices upon their ceasing to hold such office, to provide for transitional purposes for the benefits to accrue to persons who have served as Prime Minister, Vice President and Deputy Prime Minister and for connected purposes."

In light of this, and in the clear language of the Constitution, it is the exclusive function of the Salaries and Remuneration Commission established under Article 230(1) of the Constitution, to set and regularly review the remuneration and benefits of all state officers and to advise the National and County Governments on the remuneration and benefits of all other public officers. Therefore, in purporting to pass this Bill and in amending the parent Presidential Retirement Benefits Act of 2003, parliament has acted in contravention of the express provisions of the Constitution[20].

Following assent to the Bill in 2013, the Commission for the Implementation of the Constitution (CIC) also wrote to the Minister for Finance advising on the unconstitutionality of the bill which violated article 230(4) of the Constitution of Kenya 2010. CIC informed the Finance Minister that should the president assent to the bills, the Commission would proceed to court to have the laws declared unconstitutional.

An important step in furtherance to the advisory however was the opinion of the CIC that treasury should not have authorized payments of any benefits under these unconstitutional laws. The authorization of payment of any monies by a state officer or public officer by virtue of complying with an unconstitutional law is a violation of Article 2(2) that requires state authority to be exercised as authorized by the Constitution. And even though the CIC threatened to move to court, to enforce Article 226 (5) against any State or Public Officer involved in making such payment, and seek a declaration that such officer is unfit to hold public office, the Commission did not pursue this matter in the courts. Both the Commission and civil society organizations could and should pursue this option to set precedence.

20 Source: CIC Quarterly Report, Jan-March 2013

5.4 Initiate urgent national dialogue on retirement benefits for state officers

In the context of wider policy reforms in the recent review of salaries of state officers, the Salaries and Remuneration Commission should have undertaken an extensive review of the current retirement benefits and pensions as well. Admittedly, even after the exposure of the glaring illegality of Presidential Retirement Benefits Act, 2013 and the public outcry for the SRC to claim its mandate, not much progress has been realised in this regard. Soon this could become a national catastrophe as politicians, who have rarely demonstrated any restraint in this regard, make a run on public coffers with last-minute legislative proposals to reward themselves at the expense of the tax-payer.

Perhaps, the best example to borrow from would be the United Kingdom. In the UK, pensions for ministers are provided for by the Supplementary Section of the Parliamentary Pension Contributory Pension Fund (PCPF). The relevant salary used for calculating pension benefits in the Supplementary Section is not the final salary (as for MPs' pensions) but, effectively, re-valued career average earnings. This takes account of the fact that ministers may be in office for one or several short periods of time, and may revert to being backbenchers for several years before they retire. The Supplementary Section is also available to several other office-holders such as paid select committee chairmen.

Separate arrangements currently exist for the pensions of the three great offices of the United Kingdom - the Prime Minister, Speaker of the House of Commons and Lord Chancellor. They are entitled to a pension of half their final office-holder's salary, regardless of length of service. However, in January 2008 the Review Body on Senior Salaries recommended that these special pension arrangements should not be extended to new incumbents of these offices. They should instead be covered by the PCPF arrangements in place for ministers. The Government accepted this recommendation with respect to the Prime Minister and Lord Chancellor, but not for the Speaker of the House of Commons (whose position was considered to be "substantially different").

The PCPF is a funded scheme. The costs are met from members' contributions, investment returns and an Exchequer contribution. The scheme is contracted-out of the second tier of the State Pension Scheme. Pensions and deferred pensions are uprated annually in line with price inflation.

The TSRB [Top Salary Review Body in UK] in its 1988 report recommended that instead of the different pension ratios for each of the offices, current and future office holders should be entitled to pensions of one half of their final salary so that the office holders all receive a common pension ratio of one half of final salary.

The UK provides a good example of a highly institutionalized system of pensions and retirement benefits payment that is rational, predictable, transparent and fits all, not just some, public offices. Kenya could learn or borrow from this experience. Certainly, there will be other countries which have similar systems in place but national dialogue must begin to explore these possibilities sooner rather than later.

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