Public Participation and Parliamentary Oversight

Legal Reforms and Policy Options
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**Introduction**

**The policy question**
One of the most important changes introduced by the 2010 Constitution is the enhanced role of the public in governance generally and in parliamentary processes in particular. There are specific provisions mandating openness and public inclusion in the preamble to the constitution, explicit affirmation of the constituent power of the public in the sovereignty clause and requirements for involvement and consultations foreground most of the chapters. How will this openness and participation be given effect, in general? More specifically, how will parliamentary committees fulfil the transparency guarantees and public participation requirements of the constitution?

This policy brief analyses the key questions and issues that need to be addressed. Globally, there is growing recognition that public participation improves policy outcomes. 71 of 88 parliaments reviewed in a World Bank study arranged public hearings. But these are of variable depth, scope and quality. Some parliaments routinely conduct hearings with those affected and with experts; other parliaments arrange hearings with government officials and yet another group typically invites the public to hearings. Sometimes even though hearings are required they are not held. In some parliaments, there is a presumption of the right to be heard and in others the matter is at the discretion of the National Assembly. But hearings are not the only means of public participation in parliamentary matters. Other forms of public involvement include:

- transmission and (re)broadcasts of parliamentary proceedings;
- observation of hearings;
- written submissions;
- public petitions and open proceedings.

In Kenya, the new constitution mandates openness, transparency and public involvement. But the achievement of this depends on effective implementing legislation; proper administrative structures; nature, number, powers and capacities of committees, and leadership and technical capabilities of parliamentary committees.

This brief is in four parts: the first part provides the legal and political context of this question; the second part looks at the constitutional foundation and nature of the committee system; part 3 at the factors that affect public participation and part 4 at the legal and policy reforms needed to improve public participation.

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1 Lines 7 and 8 of the Preamble.
2 Article 10.
Part 1: Context and diagnosis

The Context: The post-election crisis in 2008 drove home the point that Kenya’s political problems were structurally embedded in the constitution as it had been implemented and denatured through various amendments from independence. These problems were identified as the country’s winner-take-all electoral system; frail institutions unable to mediate intense political competition and unaccountable security sector institutions. These problems pointed to the need for urgent review of the country’s constitution. Under a process embedded in the old constitution, a new constitution was drafted and ratified in a referendum on August 4, 2010. With a turnout of 72.1%, the referendum recorded the highest turnout of any election in the history of Kenya.

The new constitution provides a framework for undoing Kenya’s 40 year authoritarian legacy: powers are split and balanced under a fully presidential system and between a national and local government structure based on counties; the bill of rights has been strengthened to expand on the previous bill of rights and civil and political rights have been introduced; the electoral system remains constituency-based but there is greater inclusion of women, marginalised groups and the youth; the security machinery have been placed under greater constitutional and popular scrutiny through the elected branches of government; oversight institutions such as Auditor General, Controller of Budget, Ethics and Integrity Commission and the Human Rights Commission have not only been recognised but have also been given wider powers; revenues are given a sounder footing through the constitutional recognition of the Revenue Allocation Commission; amendments to the constitution require much higher threshold and some must be approved by referendum. These sweeping changes are buttressed by broad principles that guarantee openness and scrutiny and public access to governance institutions. Going forward, two key challenges need to be addressed:

- the first is the recognition that there is a big difference between the authority that the constitution asserts- as a matter of drafting- and that which it will eventually exert- as a matter of implementation;
- the second is that many of the changes proposed by the constitution are not self-executing, they depend on the enactment of enabling legislation.

Diagnosis: The 2010 Constitution radically altered the Kenyan constitutional system from a dysfunctional hybrid of the British parliamentary and the American presidential systems to an explicitly presidential system. The new system is a radical break from what we have had: a president with an electoral mandate independent of the electoral mandate of parliament; a bicameral parliament with a National Assembly with representatives chosen from single member constituencies supplemented by special seats for discrete and insular groups that are traditionally under-represented and a Senate that represents counties. These changes mean that the use of the tools and mechanisms that Parliament uses to hold government to account must also change. The tools for parliamentary scrutiny of the executive under the new constitution are a combination of some old and new tools. They include:

- the parliamentary inquiry;
- ad hoc investigations by specially constituted committees;
- regular scrutiny by standing committees;
- the parliamentary motions of censure;
- the parliamentary debate;
- the power to approve or reject appointments;
- the power to impeach the President and Vice-President; and
- the power to amend the budget.

Under the presidential structure in the new constitution, members of the cabinet will not sit in the National Assembly, hence the primary site for scrutiny of the executive will be the parliamentary committee, not, as before, the parliamentary questions asked in plenary sessions.

Foundations of the Committee System: The link between the committees of Parliament and the public participation is Article 94 of the constitution which explicitly says...
that the “legislative authority of the Republic is derived from the people.” The legislative authority is shared between the Senate and the National Assembly which have discrete and conjoint powers to appoint committees to discharge Parliament’s mandate. These committees are established under and regulated by Standing Orders which govern both the orderly conduct of business in the two Chambers and also the proceedings of committees.

2. Standing Non-Legislative Committees: These are also permanent committees but they do not have policy relevant departmental responsibilities. Most of these are committees related to internal affairs of the Parliament. These committees often deal with house-keeping issues or with the internal management of the house. They include, for instance, the Library Committee; the House Business Committee; Parliamentary Pensions Committee; the Catering and Health Club Committee; Procedure and House Rules Committee; the House Broadcasting Committee and the Speaker’s Committee.

3. Ad Hoc Committees of Inquiry: These are need-based committees established by resolution of either house (or both) to address a specific issue under Terms of Reference (ToRs) set out by the house. Though the house does not currently have a committee of inquiry, it is inevitable that at some point committees of inquiry will be established. Since such committees are usually created to deal with pressing public issues the imperative for participation is very high.

4. Special Purpose Committees: The clearest example of such a committee is the optional committee on impeachment. The constitution gives the Senate the option to create a special committee on impeachment. This committee may fall in the generic category of ad hoc committee of inquiry, but given the extra-ordinary nature of the impeachment power as well as the procedural fact that it is, in effect, a trial rather than a parliamentary proceeding, this committee should be treated as an ad hoc committee of inquiry sui generis.

5. Joint Committees: The constitution also gives the National Assembly and the Senate the discretionary power to create joint committees. The mandates of such committees will be in the instrument that cre-
ates them. But examples of joint committees would include mediation committees which are created to resolve issues on which the houses are deadlocked.

6. **Sub-committees of Parliamentary Committees:**
   Under the Standing Orders committees may appoint sub-committees to assist in the discharge of their functions. To pass constitutional muster, such sub-committees should be subject to the same transparency and participation requirements as the main committees.

(b) **Public Participation and the Committee System:**
   Under the centralised, 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. There are four specific areas in which it is mandated and one omnibus transparency requirement:

1. **There is a general constitutional duty on Parliament and County Assemblies to involve the public:** The constitution – under Article 118 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.4

2. **In matters of public finance:** The provisions on public finance articulate principles of “openness and accountability.” Under this, the constitution has imposed a requirement of “public participation in financial management.”5

3. **In the delivery of service by the public service:** Under the values and principles for the management of the public service, the constitution requires “involvement of the people in the process of decision-making” and also “transparency and provision to the public of timely, accurate information.”6

4. **In environmental husbandry:** Provisions on the management of natural resources, contained in the chapter on the management of public land, require the State to “encourage public participation in the management, protection, and conservation of the environment.”7

5. **General transparency guarantees:** The purpose of transparency guarantees is to protect the openness of public decision-making processes. Key to these guarantees is access to information in a relevant and usable form. Access to information is a fundamental human right in Article 35 which provides that every citizen has a right to access information held by the State, and to access information held by another person and required for the exercise or protection of any right or fundamental freedom. The provision also obliges the State to “publish and publicize any important information affecting the nation.” Transparency guarantees are embedded in many other substantive provisions of the constitution: the provisions on the management of public land include

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4 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.

5 Article 201 (c).

6 Article 232 (1).

7 Article 69 (1) (d).
principles of “transparency and accountability and cost effective administration,”8 those on representation of the people require elections to be “transparent,”9 procurement is required to be “transparent”10 and there is a general duty on Parliament to enact laws that ensure “both expenditure control and transparency” in all governments.11

6. In addition, devolution is a means of enabling participation: In terms of institutional design, the constitution mandates decentralisation and explicitly states the objectives of devolution to include “the democratic and accountable exercise of power” and the desire “to give powers of self governance to the people and enhance the participation of the people in the exercise of power of the State and in making decisions affecting them.”12 A related objective is to “recognize the right of communities to manage their own affairs”13 and “to protect and promote the interests and rights of minorities.”14

Part 3: Factors that affect the capacities of committees to meaningfully engage the public

(a) Internal capacities of committees: Parliamentary committees suffer from inadequate staffing levels. Though the Parliamentary Service Commission has been implementing reforms to strengthen the research and analysis capabilities of parliamentary committees, staffing levels remain low. Without adequate staff – in numbers and skills- committee work tends to be slow, which undermines overall effectiveness and erodes the meaningfulness of public participation, since public input cannot be processed sufficiently or effectively. Improved staffing needs to be rigorously linked to size, typologies, membership, composition, mandate and investigatory requirements of specific committees. In addition, changes in the reporting mechanisms, the drafting of quality reports and implementation of parliamentary resolutions are also necessary.

(b) Infrastructure of committees: The physical infrastructure available to committees has had a constraining effect on public participation. Only the Public Accounts Committee and Public Investments Committee have designated meeting rooms, the other committees have to share the few committee rooms available. The expanded nature of the legislature will put more strain on the physical infrastructure, although expansion to meet the needs of the new constitution will also provide opportunities for addressing the infrastructure needs of the legislature.

(c) Number of committees: Kenya’s legislature has more than 30 committees, some of which were created out of previously larger committees. For example, 1983 amendments to the Standing Orders split the Public Accounts Committee into two: a leaner, 10 member Public Accounts Committee and a new Public Investments Committee. However, in light of the new constitution, new standing orders are being prepared and the committee system needs to be rationalised to reflect the wider powers of Parliament as well as the new functions and roles. Comparative information from other jurisdictions can inform decision-making in Kenya: the House of Commons has 34 Select Committees and between them, the
two houses of the United Kingdom’s Parliament have 100 committees of which fourteen are Joint Committees. The US House of Representatives has 25 committees while the Uganda Parliament has 25. The South Africa National Assembly has a total of 34 committees whilst the National Council of Provinces has 13, for a total of 47 committees. Thus, numbers vary widely across legislatures and it would seem that the key issue is to make sure that all aspects of parliamentary work are covered. However, it is clear that more committees will definitely be necessary and, as important, under the new dispensation more committees will create more opportunities for public participation.

(d) Support and cooperation of government agencies:
One factor that has sapped the performance of parliamentary committees has been lack of support from the government. However, the new constitution has transformed the role of Parliament and given it more powers than before especially in the areas of oversight and budget. Now, more than before, Parliament will rely heavily on the co-operation of government agencies if it is to play its rightful role in relation to, especially, the budget process. Changes to existing laws, especially the Official Secrets Act and the National Assembly (Privileges and Immunities) Act are necessary. Both laws bar public officials from disclosing information to Parliament. However, it is clear that the omnibus and vague provisions of the Official Secrets Act do not square with the transparency guarantees of the new constitution and, whilst there may be a legitimate national security interest in certain non-disclosure, it is evident that the Official Secrets Act goes too far.

(e) Integrity issues: An effective committee system depends on effective leadership and strong ethical grounding. The current committee system of the National Assembly of Kenya and the Assembly itself have been described as “prone to kickbacks”\(^{15}\), and the process of the writing and adopting of key committee reports, “the most lucrative”\(^{16}\) part of this kick-back system. A recent report of a study by the Kenya chapter of Transparency International singles out “abuse of committee trips”\(^{17}\) citing the large sizes of delegations, poor management of the trips, illogical and expensive routing and the sheer embarrassment these trips have occasioned to the Assembly and the country.\(^{18}\) The report also cites an existing ‘reward system’ in the composition of committees and abuse of office by members of investigatory committees through harassing public officials and soliciting favours. There have been allegations of too much flirtation between some chairs of committees and representatives of special interests and officials of transnational corporations when legislative measures affecting the interests of the latter are before Parliament.\(^{19}\) There are also allegations of rampant horse-trading in these committees where MPs agree to do one thing or another to further their personal, business or other vested interests. Complaints and allegations of impropriety within committees and threats on lives of members are arising more from legislators than from the public. Members are publicly alleging that colleagues are openly engaging in bribe-taking and illicit relations with individuals being probed by committees of the House. This seems to lend credence to the adverse media reports and may have a negative impact on the integrity of the committees and Parliament as a whole.

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\(^{18}\) Ibid

(f) **Time available for consideration of matters under-mines quality:** The number of legislative and policy measures that committees have to address is immense, reducing the amount of time available for doing so effectively. There is, therefore, inadequate scrutiny of bills and policy proposals going before committees. Consequently, their quality cannot always be assured. Shortage of time impairs the ability of committees to effectively engage the public. Though many of the challenges related to time are a result of growing workload, some are a result of a poorly structured committee system in terms of how the work and hearings are organised. Many committee hearings are too focused on scoring political points. Allegations of corruption against a government agency in the media are often the occasion for the immediate launch of committee investigations. Given that allowances are paid for these sittings, the incentive structure clearly encourages more rather than less of these “fishing investigations.” A more effective approach would entail an expert investigation—say undertaken by the Auditor General—followed by a committee hearing with public participation on the findings of such an expert investigation.

(g) **Gaps in the infrastructure of participation:** The case of delegated legislation: Delegated legislation saves on parliamentary time by vesting executive agencies with rule-making powers. Delegating rule-making powers to such agencies allows them to address technical or detailed issues not appropriate for primary legislation; it provides flexibility for amendment especially if the measures proposed are of a short-term nature and promotes experimentation, since the rules can be easily amended if dysfunctional. However, there is a major democratic deficit in the process of delegated legislation: firstly, there is less parliamentary scrutiny of delegated legislation; secondly, delegated legislation, in effect, transfers legislative authority to the executive, potentially eroding separation of powers and finally, it provides opportunities to circumvent the will of the legislature.

Under the old constitution, no specific provision for parliamentary scrutiny of delegated legislation existed. Article 94 (6) of the new constitution cures this defect. It provides for the control of delegated legislation by requiring any “Act of Parliament or county legislation delegating the power to make binding legislation” to “expressly specify the purpose and objectives for which that authority is conferred, the limits of the authority, the nature and scope of the law that may be made, and the principles and standards applicable to the law made under the authority.” This provision meets the criticism around the democratic deficit inherent in delegated legislation. Unlike the South African constitution which specifically requires that delegated legislation be accessible and that it be tabled in Parliament, the Kenyan constitution does not specifically require accessibility of subsidiary legislation, but this requirement is nevertheless implicit in the requirements for transparency and public participation.

There are three key issues involving delegated legislation:

1. There is no systematic mechanism for review of subsidiary legislation to ensure that it complies with the primary legislation. The implication is that the constitutionality of delegated legislative powers cannot be assured.

2. There is no constitutional provision on the scrutiny of subsidiary legislation. An inherent review power is the requirement that all subsidiary legislation must comport with the primary legislation. The Interpretation and General Provisions Act, however, provides that if a resolution is passed by the Assembly, within twenty days on which it next sits after the rule or regulation is laid before it, that the rule or regulation be annulled, it shall thenceforth be void. However, this will not affect anything already done under the rule or the power to make fresh rules.

3. There is no statutory definition of delegated legislation. In South Africa, for instance, the constitution requires the scrutiny of proclamations, regulations, and rules. Questions have arisen whether proclamations form part of delegated legislation. This is im-
important because ministers have been appointing persons to public office through proclamations in the Kenya Gazette. If the proclamations form part of subsidiary legislation, it follows that they can be reviewed by the legislature. If not, there is no obvious mechanism for their review.

**Part 4: Policy and legal reforms to promote public participation in oversight committees**

Parts 1 to 3 have identified the issues that impact on public participation in the work of committees of Parliament. This part looks at the different forms that participation takes and the reforms needed to improve that participation.

What the appropriate type of participation is, depends on the nature and purpose of the committee. Committees with a general legislative and policy mandate, such as departmental committees, will be different from special purposes committees such as a senatorial committee on impeachment, which is in effect a trial. Participation may entail submissions, evidence giving and observation in the former, but perhaps only observation in the latter. The table below outlines the various forms that participation takes in different types of committees.

**(a) Approaches to participation in Oversight Committees**

<table>
<thead>
<tr>
<th>Type of committee</th>
<th>Nature of mandate</th>
<th>Scope of public involvement</th>
<th>Tools for public participation</th>
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<tr>
<td><strong>Standing Legislative Committees</strong></td>
<td>Scrutiny of departmental policies, budgets and bills</td>
<td>Open hearings; right to observe and offer views</td>
<td>Written submissions; Oral presentations; expert opinions; public petitions; Public broadcasts.</td>
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<tr>
<td><strong>Standing Non-Legislative Committees</strong></td>
<td>Internal parliamentary business</td>
<td>Open hearings; right to observe and offer views</td>
<td>Written submissions; oral presentations; Public broadcasts.</td>
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<tr>
<td><strong>Ad Hoc Committees of Inquiry</strong></td>
<td>Determined by resolution of the house</td>
<td>Open hearings; limited closed hearings</td>
<td>Written submissions; expert opinion; public petitions; public broadcasts (or rebroadcasts with redactions in case of closed hearings)</td>
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<tr>
<td><strong>Special Purpose Committees</strong></td>
<td>Detailed in law e.g. Constitutional Implementation Oversight Committee</td>
<td>Open hearings; right to observe and offer views</td>
<td>Written submissions; expert opinion; public broadcasting; public petitions</td>
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<tr>
<td></td>
<td>Optional Committee on Impeachment;</td>
<td>Open hearings; limited closed hearings</td>
<td>Public broadcasting; Rebroadcast with redactions in the case of closed hearings</td>
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<tr>
<td><strong>Joint Committees</strong></td>
<td>Determined by joint resolution establishing the committee</td>
<td>Open hearings; right to observe and offer views</td>
<td>Public broadcasting; written submissions; expert opinions; public petitions</td>
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<tr>
<td><strong>Sub-Committees of Parliamentary Committees</strong></td>
<td>Determined by decision of parent committee</td>
<td>Presumption that same rules of participation as parent committee apply</td>
<td>Presumption that same tools as those for parent committee apply. May vary according to subject matter (say public security)</td>
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</table>
(b) Reforms to improve participation
As the table above indicates, there is both ample scope for public participation in virtually all committees of Parliament and a wide range of tools for the public to participate. However, for this participation to be effective a number of reforms are necessary.

1. General Principles of Public Access and Participation: In order to ensure that parliamentary processes are open to scrutiny, the ongoing amendments of the Standing Orders ought to include general principles of openness. Such principles would include:

   i. The presumption of open committee hearings: In the absence of specific and compelling constitutional or legal basis for confidentiality or secrecy, all committee hearings shall be open to public observation and participation;

   ii. The principle of limited disclosure of confidential reports: Even committee meetings that are confidential shall be recorded and if appropriate, those recordings shall- to the extent possible- be released to the public with the secret or confidential information redacted as appropriate;

   iii. The presumption of access to minority reports: Where a minority group within a committee writes a minority report dissenting from the conclusions of the majority, the minority report shall be a public document;

   iv. The right to know the basis of classification of information: When a government agency declares certain information classified and therefore not accessible to any committee, Parliament and the public have a legitimate need to know: a) the basis of the classification; b) the duration of the classification and c) the level of the classification (whether “Top Secret,” “Secret” or “Restricted”).

2. Access to information: Public participation and engagement with the legislature depend on the amount and quality of information available to the public, both as to the inner workings of the legislature and the general government. As pointed out earlier, quite apart from the constitutional provisions on access to information, Parliament has specific constitutional obligations to ensure public participation in its affairs. The implicit pre-condition for the discharge of this obligation is the requirement that the administration of Parliament provide the public with the information that will facilitate that participation. With a view to meeting the obligation as to public participation, the legislature needs to address existing limitations on access to information within the legislature. These limitations are both legal and technological.
i. **Legal issues:** The most serious legal limitation on access to information is in the National Assembly (Powers and Privileges Act). Under sections 17\(^{20}\) and 18\(^{21}\) the Act allows withholding of information. Under section 17 a person called to give evidence before a committee may refuse to produce such evidence on the ground that "it is of a private nature". However, Article 35 of the constitution which provides for access to information now allows for access to private information if such information is needed to claim a right. Under section 18, public officers face two types of restrictions on giving evidence to committees. First, they may not produce any evidence in Parliament on military matters without the consent of the president. Second, they may not give out any correspondence or other evidence affecting the public service which the president has directed not to be produced. These provisions as well as section 20 of the Act - which says that questions of admissibility of evidence will be decided on the prevailing practices of the House of Commons - are clearly inconsistent with the clear language in the constitution, its open government ethos and its explicit transparency guarantees; it therefore needs to be amended.

ii. **Technology and transparency:** Over the last decade, the Kenyan Parliament has been implementing measures to improve openness, participation and public scrutiny of parliamentary business. Critical milestones in these efforts include:

- the introduction of the live coverage of parliamentary proceedings by the media;
- the 2008 amendments to open up the proceedings of the committees of the House to public attendance and to introduce a simplified procedure for public petitions; and
- the increased use of technology in the conduct of its business which eventually resulted in a website, onto which important basic information has been uploaded, allowing members of the public easier access to parliamentary business.

These reforms were reinforced in July 2009 when the National Assembly announced an agreement with a service provider to offer digital solutions to Members of Parliament and to train them in the use of information technology. Individual members have set the pace for the future. For instance, when the current Speaker, Kenneth Marende, represented Emuhaya constituency in Parliament he maintained a blog that served as a platform for interaction with his constituents. Today that same blog is now a forum for the public to interact with the Speaker.
Other reforms have moved apace: The National Assembly House Live Broadcast project has expanded with the Kenya Communications Commission granting the National Assembly broadcast licences with the expectation that, eventually, the National Assembly’s own media corps will take responsibility for the live coverage. Though these reforms are steps in the right direction, more needs to be done:

**Make the online resources interactive:** Though the website is up and running, the online resources are not interactive. Parliament can leverage technology to improve the level of interaction between members and committees, on the one side, and the public and Parliament on the other.

**User-friendly access:** Though some good content exists on the National Assembly’s site, these online resources are not always user-friendly to access and content developers, editors and copy-writers need to be recruited to improve access through better navigation aids and easier to digest presentation style. In addition, even though the National Assembly has put out a large amount of information, often the contextual information needed to allow readers and followers to make sense of the posted information is missing. In this regard, more background information, perhaps in a simplified version, would go a long way towards improving public access to and public understanding of the affairs of the legislature.

**Improve outreach and communication:** The open government requirements of the new constitution oblige Parliament to take measures to increase awareness and opportunities for public participation through proactive outreach programmes.

### 3. On integrity issues

Allegations of integrity failures of individual members are a blot on the performance of the Parliament and if not addressed, will eventually sap public confidence in the legislature. Though MPs- and Senators- will have a general immunity from prosecution and no civil or criminal proceedings may be instituted against any member for words spoken before, or written in a report to, the Assembly or a committee, it is a criminal offence for a member or a senator to accept or receive any bribe, gift or reward so as to promote any matter before the Assembly, the Senate or any committee. However, the penal provisions of the Public Officer Ethics Act – which also cover Members of Parliament, are weak. What is currently lacking are effective tools for identifying and rooting out bribery and related claims. Questions of integrity are politicized and the Parliamentary Service Commission is inappropriate as an oversight mechanism for policing integrity. To close the gaps in the current system the following reforms are proposed:

**i. Alignment of relevant laws with Chapter 6 of the Constitution:** In order to comply with Chapter 6 requirements, the Privileges and Immunities Act, the Public Officer Ethics Act and the Standing Orders need to be amended to strengthen disclosures and the way in which members’ interests are reported and scrutinized. These amendments should also specify penalties for non-compliance.

**ii. Register of Members’ Interests:** A register of members’ interests should be opened and all members of the National Assembly and Senators should be obliged to state their assets as well as companies in which they or their interests have interests.

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iii. Gifts to Members: Gifts to members of a specified value should be reportable and of a higher threshold prohibited. In particular, private companies’ sponsorship of parliamentary activities should be prohibited as a “corrupt practice.”

iv. House Ethics Committee: A House as well as Senate Committee on member’s ethics - which is presumptively open to the public - should be established and members of the public should have the right to petition it when there is credible basis for impugning the integrity of a particular Member of Parliament.

4. On physical and institutional infrastructure: The re-organization of Parliament to take account of the new constitution must include the development of physical facilities to meet the needs of the legislature. Two areas are especially critical: provision of adequate facilities for both the National Assembly and the Senate and; provision of suitable and accessible space for all committees as well as sub-committees.

The physical requirements of the House should be supplemented with adequate human and institutional skills. Committees must be supported to effectively receive, analyze and work on the submissions that come from the public, experts and government departments. In particular, committee hearings should include report-back requirements on the nature and scope of public consultations that have taken place on any specific measures considered by each committee.

5. On government support for committees, especially on fiscal matters: The new fiscal management process is modeled on that of the United States of America. This means that, though the formal responsibility for drafting the budget remains with the Minister for Finance, Parliament will drive the budget process. To discharge this burden, Parliament has established the Budget Office, which has a core of technical staff to support parliamentary committees in scrutiny and formulation of counter-proposals. The Speaker will play an important role in regulating this new relationship between the two arms of government and in order to do so on an informed basis, he or she needs to receive specific support in this regard. To ensure that this process works as constitutionally envisioned, the following measures are proposed:

i. Appointment of a high-level advisor for the Speaker: The responsibility of the advisor is to complement the role of the Clerk in assisting the Speaker in understanding and playing a role in the interface between the government and the National Assembly with regard to fiscal management.

ii. Directive to government departments to comply with parliamentary orders: Before the next elections in 2013, the government should issue a general directive to all government departments on the ramifications of the new constitutional dispensation on the budget process and spell out their responsibilities towards Parliament generally and towards parliamentary committees in particular.

iii. Fiscal management focal point: The Parliamentary Budget Office should establish and adequately equip a Fiscal Management Focal Point to lead the process of budget hearings. Working with both the Budget Office and the various departmental committees, the Fiscal Management Focal Point will coordinate the Budget Office’s programme of public consultations and hearings.
6. Improving public and parliamentary scrutiny of delegated legislation: The gaps in the scrutiny of delegated legislation and the resulting democratic deficit highlight the urgent need for a mechanism to systematically review delegated legislation against the law-making powers contained in the relevant primary legislation. The necessary reforms in this regard include the following:

   i. Scope of coverage: The definition of subsidiary legislation is now urgent. Whether this will include ministerial proclamations and directives should be clarified either through the relevant primary legislation or, more generally, through amendments to the Interpretation and General Provisions Act, Chapter 2, the Laws of Kenya.

   ii. Providing access to subsidiary legislation: Though public access to subsidiary legislation is not directly required by the constitution, the Interpretation and General Provisions Act provides that “all rules and regulations made under an Act shall, unless a contrary intention appears in the Act, be laid before the National Assembly without unreasonable delay.” This provision, together with the transparency guarantees of the constitution suggest that it is necessary to furnish a mechanism for public scrutiny of subsidiary legislation. This can be done in two measures:
   a. An appropriate amendment of the Interpretation and General Provisions Act that provides for a one month public commentary period before subsidiary legislation comes into force.
   b. An on-line parliamentary index of all subsidiary legislation as a reference point on the available subsidiary legislation.

   iii. Scrutiny of subsidiary legislation: Though a comprehensive review of all subsidiary legislation is not feasible at this point, a number of intermediate steps short of an overhaul are possible and should be adopted. These would include the following:
   a. Parliament should establish whether the subsidiary legislation currently in force was laid before the House as required by law and if not, require that it be so laid.
   b. On an annual basis, the office of the Clerk, legislative services, should provide an index showing the dates on which subsidiary legislation was laid before the House. This will allow interested people to independently monitor compliance with this legal requirement, and to effect scrutiny.
   c. As in South Africa, the Interpretation and General Provisions Act, should provide for the legislative review of proclamations made under subsidiary legislation. In practice, this issue has arisen when authorities, such as ministers, have purported to exercise powers under primary or subsidiary legislation to make appointments to public office, or decide on dates for the happening of a given event. One such case was the controversial appointment by the President of Mr. Justice Aaron Ringera for his second term as Director of the Kenya Anti-Corruption Authority. Although the Legal Affairs Committee entertained the matter, it had no clear legal mandate to do so. It would be useful if this mandate was clearly provided through an amendment of the Interpretation and General Provisions Act.
   d. Finally, the rules of court made by the Chief Justice or the Rules Committee should be available for wider public scrutiny. A special procedure that preserves the autonomy of the judiciary as an independent institution but also allows parliamentary and public scrutiny of the rules should be designed and operationalized.

7. Public access and participation in devolved governments: The principles of openness and participation as well as the reforms proposed in this brief apply- with appropriate modifications, based on the constitutional mandates of county governments, to committees of County Assemblies.
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