PARLIAMENTARY WATCH REPORT

Volume 1



ENHANCING PARLIAMENT'S COMPLIANCE WITH THE CONSTITUTION OF KENYA, 2010

USAID FROM THE AMERICAN PEOPLE

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icj International Commission of Jurists KENYAN SECTION | Since 1959

The Kenya Parliamentary Strengthening Program

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The Kenyan Section of the
International Commission of Jurists, (ICJ Kenya)

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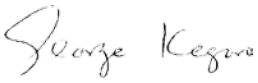
FOREWORD

The role of Parliament in a State is extremely significant and there is need to ensure all its roles and functions are carried out in the most democratic, efficient and enhance a people centered approach. The Constitution of Kenya, 2010 creates this democratic atmosphere and it is for the Kenyan legislature to implement under it to fully realize a democratic legislature.

The Constitution has introduced dynamic and transformative changes to the Kenya's legislature system and institutional character. Such changes include, firstly the transformation of the Kenya legislature from a Unicameral to a Bicameral system, secondly, the Legislature has been devolved from the National level to County level and now includes County Assemblies. Thirdly, the Constitution under Article 10 has introduced a new set of National Values and Principles that mandate all State Organs to uphold and mainstream the Values and Principles in all their work. Some of the Values and Principles include ensuring citizen participation, Transparency, Accountability and Integrity in their procedures and processes. In addition, the Values and Principles reflect the expectations that the Citizens of Kenya have of their elected representatives and enhance their participation in the Legislative process. Lastly the Constitution has ensured the Legislature's autonomy from the Executive, through providing for separation of powers of the State Organs. This therefore allows the Legislature to independently carry out its mandate effectively.

This publication presents research conducted on Building a democratic legislature in Kenya, the Code of Conduct for members of Parliament in Kenya and review of the Senate Standing Orders. Some of the issues discussed in the researches include, the extent to which the Kenyan Legislature is democratic, a history of legislative reforms in Kenya, the new provisions in the Constitution of Kenya, 2010 on the legislature, the various legislation touching on the Kenyan legislature's conduct and a comparative analysis of various countries legislative code of conduct.

ICJ Kenya is therefore pleased to make available this research as an important and timely contribution to the overall discussions now regarding Democratization of the Kenyan Parliament. We hope that the publication will benefit to all.



Mr. George Kegoro
Executive Director
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ACKNOWLEDGEMENTS

This is a report by The Kenyan Section of the International Commission of Jurists (ICJ Kenya), with the support of the State University of New York, SUNY-Kenya, undertook research on the democratic character of the Kenyan Legislature. The research findings suggest various ways in which democracy can be enhanced with a democratic Parliament.

Our gratitude extends to Professor Migai Akech and Mr. Michael Nderitu who authored the contents of this publication. In addition, we appreciate the support and contribution of the Parliamentary Initiative Network (PIN) members in this initiative.

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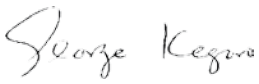
ICJ Kenya makes special acknowledgement to the USAID funded Parliamentary strengthening Programme of the State University of New York, SUNY-Kenya, for its generous support of this publication and of various efforts carried out by ICJ Kenya in its work with Parliament.

We trust that you will find this report a useful resource.



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BUILDING A DEMOCRATIC PARLIAMENT IN KENYA

Prof. Migai Akech

A Paper prepared for ICJ Kenya

ABSTRACT

This paper evaluates the extent to which Kenya's Legislature (which is known as Parliament) is democratic, and suggests how its democratic character can be enhanced. The paper argues that although institutional reforms of the past decade have gone a long way towards enhancing the democratic character of Parliament, a number of significant institutional reforms, which would make Parliament truly democratic, are yet to be implemented.

The paper suggests that in order to enhance democracy in its decision-making processes, Parliament must actively take into account the views of all citizens, by building strong mechanisms for public participation. Secondly, Parliament must reexamine the powers of the Senate vis-à-vis the National Assembly in general, and clarify the roles of the National Assembly and the Senate in the passage of legislation in particular. Third, Parliament must enhance accountability in its legislative processes, ensuring that the rule of law is adhered to in determining matters of remuneration of legislators. Finally, Parliament needs to establish a credible and enforceable ethics regime.

1.0 INTRODUCTION

Over the last two decades, Kenya has made significant progress towards building a Legislature that is not only effective in carrying out its Constitutional responsibilities but also, one that is responsive to the citizenry. Thanks to recent institutional reforms, Kenya's Parliament is now considered "one of the two most significant national legislatures on the African continent."[1] Among other things, it enjoys considerable autonomy from the Executive branch of government, and has become an institution of "genuine countervailing power to the executive branch."[2] Further, the Constitution of Kenya 2010 has enhanced the powers and stature of Parliament in various respects, with a strong requirement to ensure public participation in the legislative process.

The idea of accountability to the public is particularly important since concern is rife amongst the Citizens that Parliament sometimes abuses its powers and fails to act in the public interest. For example, Members of Parliament continue to insist on unilaterally increasing their salaries and allowances thereby undermining the role of the Salaries and Remuneration Commission, a Constitutional Commission mandated to regulate the salaries and allowances of all state officers.

Secondly, the country is emerging from a general election held in March 2013, in which the Jubilee Alliance won the majority of seats in both Houses of Parliament. This majority in Parliament calls for a careful balance of political party power in reference to building the democratic character of Parliament.

Thirdly, it is worth noting at the outset that the Constitution of Kenya, 2010 puts emphasis on devolution, which is seen by many Kenyans as the solution to the perceptions and realities of ethnic marginalization and exclusion in the sharing of national resources. The Constitution of Kenya, 2010 gives the Senate the role of protecting the interests of the Counties and their governments.[3] From this perspective, it is important to evaluate how The Senate will play this role effectively, given that the exercise of its law-making powers requires the concurrence of the National Assembly in significant respects.

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1 Joel D. Barkan & Fred Matiangi, "Kenya's Tortuous Path to Successful Legislative Development," in Legislative Power in Emerging African Democracies 33, 33 (Joel D. Barkan ed., Lynne Rienner Publishers, 2009).

2 Id.

3 Constitution of Kenya 2010, article 96(1).

Fourthly, the Constitution establishes principles of governance, leadership and integrity such as public participation, accountability, and public trust, which bind Parliament.[4] In building a democratic parliament, it is important ensure that these principles are mainstreamed in the operations of Parliament.

This paper deals with the issues highlighted and suggests how the democratic character of Parliament can be further enhanced.

Part 2 of the paper provides a conceptual framework and examines the idea and significance of a democratic legislature. Part 3 gives a brief history of Parliament and how it has been reformed over the years. Part 4 examines the extent to which the new Constitutional order has established an institutional framework that facilitates the sustenance of a democratic parliament. It also makes recommendations on enhancing democracy in the operations of Parliament. Part 5 is a brief conclusion.

[4] Id, articles 10 and 73.

2.0 THE IDEA AND SIGNIFICANCE OF A DEMOCRATIC LEGISLATURE

2.1 Defining Democracy

Democracy is a form of government in which a group of people who belong to a political organization, such as a nation-state, rule themselves.[5] It is a system of rule by the many. Note the departure from Monarchy, which is the rule of one person, Aristocracy, the rule of the best, and Oligarchy, the rule of the few."[6] In more concrete terms, democracy is a process of making collective decisions.[7] In this respect, it requires the participation of the members of a political organization in the making of collective decisions. In particular, democracy mandates "voting equality at the decisive stage," which means that each citizen ought to be given "an equal opportunity to express a choice that will be counted as equal in weight to the choice expressed by any other citizen."[8]

2.2 Citizen Participation in Democratic Parliament

Ensuring direct participation of citizens in governance on the scale of a nation-state.[9] Is not as straightforward as the definition portends. Part of the solution to this problem is found in the idea of representative government.[10] Where the people elect a group of leaders, who govern on their behalf by making or repealing laws, and ensuring the due administration of the law and due application of public resources.[11] This group of leaders otherwise known as legislators forms a legislature, which constitutes one branch of a tripartite system of government, the other two being the executive and the judiciary. In this system of government, the exercise of power is regulated by the separation of powers doctrine, which seeks to avoid "excessive accumulation of power within a single institution of government" by dispersing governmental functions among the three branches, and equipping each branch with devices to protect it.[12]

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5 David Held, Models of Democracy 1 (Stanford University Press, 1996).

6 Marc Plattner, "Liberalism and Democracy: Can't Have One Without the Other," 77 (2) Foreign Affairs 171 at 172 (1998).

7 Robert A. Dahl, Democracy and its Critics 3 (Yale University Press, 1989).

8 Id. at 109-113.

9 Id. at 2.

10 Id. at 27.

11 J. B. Ojwang, Constitutional Development in Kenya: Institutional Adaptation and Social Change 120 (Acts Press, 1990).

12 Elizabeth Magill, "The Real Separation of Powers Law," University of Virginia School of Law, Public Law and Legal Theory Working Papers, Working Paper No. 00-7, May 2000 at 30-31.

Unfortunately, representative government is only a partial solution to the challenge of full citizen participation in governance. Legislators are often "out of the reach or touch" of their electors, which raises doubts as to whether the former actually represent the views, and act in the interests, of the latter.[13] From this perspective, representative democracy must be viewed as a principal-agent relationship, in which the people (the principals) have delegated their sovereignty to popularly elected representatives (the agents).[14] It is important to generate mechanisms for enforcing this contract, so that legislators do in fact represent the views and act in the interests of the electors. Examples of such mechanisms include periodic elections, the right of electors to recall a legislator, and public input into the legislative process. These accountability mechanisms serve the important purpose of keeping legislators aware of the fact that they will be called upon to account for their actions, thereby helping the electorate to prevent abuses of power.

In addition, it is important to appreciate that the challenge of ensuring citizens participation in governance is even more formidable in divided societies, such as Kenya. Through the so-called "tyranny of numbers,"[15] where a coalition of large tribes carries away the election, for example, the general elections of 2013 clearly demonstrated that Kenya's large ethnic groups continue to dominate the smaller ethnic groups, which necessitates a rethinking of the design of the Constitution, if our democracy is to be truly inclusive. In ethnically divided societies such as Kenya, scholars agree that "the successful establishment of a democratic government requires two key elements: *Power sharing* and *Group autonomy.*"[16] While power sharing "denotes the participation of representatives of all significant communal groups in political decision making group autonomy means that these groups have authority to run their own internal affairs."[17] With respect to the design of the legislature in such societies, federalism is perceived as "an excellent way" to provide for group autonomy.[18] Further, it is recommended that the Constitutions of such societies should provide for strong bicameralism.[19] That is, such societies should have a politically powerful second legislative chamber (typically a Senate) in which less populous units of the federation are overrepresented.[20] It is recommended that this second chamber "must have significant power ideally, as much power as the first

[13] Dahl, supra note 7 at 30.
[14] Mark Bovens, "Public Accountability," in The Oxford Handbook of Public Management 182, 192 (Ewan Ferlie et al. eds., 2007).
[15] See, e.g., Oscar Obonyo, "'Small Tribes' Fight to End Tyranny of Numbers, Standard, 31 August 2013.
[16] Arend Lijphart, "Constitutional Design for Divided Societies," 15 Journal of Democracy 96 at 97 (2004).
[17] Id.
[18] Id. at 104.
[19] Arend Lijphart, "Non-Majoritarian Democracy: A Comparison of Federal and Consociational Theories," 15 Piblius: Journal of Federalism 3 at (1985).
[20] Lijphart, "Constitutional Design for Divided Societies," supra note 16 at 105.

[majoritarian] chamber."[21] The idea is to establish mechanisms that can constrain the power of majorities, because without such "demos-constraining"[22] mechanisms, majorities can oppress minorities.

A democratic legislature is one that is genuinely representative of the electorate in its composition and decision-making processes, accessible and accountable to the public, open and transparent in its procedures, and effective in representing the people, making law, and maintaining oversight of the executive.[23] Further, legislatures in divided societies such as Kenya can only be democratic where their second chambers have significant demos-constraining powers. Legislatures that observe these principles are likely to be perceived as legitimate by the electorate. In other words, observing these principles is significant because it promotes public acceptance of, and confidence in, the legislature. Indeed, legitimacy is a quality that every legislature ought to strive for, since the legislature is "the institution through which the will of the people is expressed, and through which popular-self-government is realized in practice."[24]

2.3 Realizing a Democratic Legislature

From these premises, a question arises; how can the ideal of a democratic legislature be realized?

At the international level, there are various initiatives that seek to facilitate the realization of this ideal. One such initiative is the Commonwealth Parliamentary Association's on-going efforts to develop benchmarks for democratic legislatures. This initiative draws on the common practices among countries and the Commonwealth (Latimer House) Principles on the Accountability of and the Relationship between the Three Branches of Government of 2003. The Commonwealth Parliamentary Association (CPA) seeks to develop benchmarks relating to: the representative aspects of the legislature; ensuring the independence, effectiveness and accountability of the legislature; procedures of the legislature; public accountability; the bureaucracy of the legislature (or Parliamentary service); and relations between the legislature and the media.[25]

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21 Lijphart, "Non-Majoritarian Democracy," supra note 19 at 9.

22 Afred Stepan, "Federalism and Democracy: Beyond the U.S. Model," 10 Journal of Democracy 19 at 21 (1999).

23 David Beetham, ed., Parliament and Democracy in the Twenty-First Century: A Guide to Good Practice 2 (Inter-Parliamentary Union, 2006).

24 Id. at 4-5.

25 Commonwealth Parliamentary Association, "Benchmarks for Democratic Legislatures: A Study Group Report" 8 (2006) (Hereinafter "Benchmarks for Democratic Legislatures").

2.4 A Representative Legislature

Concerning the representative aspects of the legislature, the CPA recommends that legislators should be "elected by direct universal and equal suffrage in a free and secret ballot" and that their term lengths should "reflect the need for accountability through regular and periodic legislative elections."[26] The objective of this recommendation is "to ensure that the current opinions of the electorate are represented in the legislature."[27] However, representation does not necessarily ensure that all the citizens who constitute the electorate are heard in the legislature and that their voice counts in decision-making. For this reason, an election, however free and fair, does not guarantee that the legislature will be democratic. Quite simply, majoritarian elections produce winners and losers, and the resulting legislature will typically consist of a majority party or coalition of parties and a minority party or coalition of parties. Accordingly, such a legislature needs to adopt decision-making procedures and practices that ensure that the voice of minorities count if it is to be democratic.

In this respect, the CPA makes five useful recommendations:

2.4.1 Women and other disadvantaged groups should be appointed to prominent legislative positions.[28]

2.4.2 That the "legislature's assignment of committee members on each committee shall include both majority and minority party members and reflect the political composition of the legislature."[29] Further, it recommends that opposition members should have the right to submit minority reports of the committees in which they serve.[30] Minority reports not only give minority committee members an incentive to continue investing their time in committees, but are also a useful means of ensuring that committee reports are cross partisan.[31]

2.4.3 That the legislature should "provide adequate resources and facilities for party groups pursuant to a clear and transparent formula that does not unduly advantage the majority party."[32]

2.4.4 Members of the Legislature should "be able to propose legislation and introduce bills in the public interest, regardless of majority or minority status."[33] Fifth, it recommends that oversight committees should "provide

[26] Id. at 10.
[27] Id.
[28] Id. at 11.
[29] Id. at 12.
[30] Id.
[31] National Democratic Institute, "Toward the Development of International Standards for Democratic Legislatures" 26 (2007).
[32] Commonwealth Parliamentary Association, "Benchmarks for Democratic Legislatures," supra note 25 at 13.
[33] Id. at 21.

meaningful opportunities for minority or opposition parties to engage in effective oversight of government expenditures."[34] For example, it suggests that as best practice, members drawn from the opposition should chair oversight committees such as the Public Accounts Committee should be chaired by a member of the opposition party.[35] It also suggests that oversight committees should act "in as non-partisan a manner as possible."[36]

2.5 Independence, Effectiveness and Accountability of the Legislature

With respect to independence, effectiveness and accountability, the CPA makes several recommendations.

2.5.5 First, legislators should be given "immunity for anything said in the course of the proceedings of the legislature."[37] However, a balance should be struck between the need to protect legislators and the need to ensure that they do not abuse this privilege.[38]

2.5.6 Legislators should be "fairly compensated for their service" in order to enable "any member of the public to enter the legislature regardless of their financial status."[39] The CPA urges that an independent process, not controlled by the executive, determine the remuneration of legislators.[40]

2.5.7 In an effort to enhance the effectiveness of the legislature, it recommends that committees should "have the right to consult and/or employ experts" to help them in their work.[41] In this respect, it commends the Scottish Parliament's practice of requiring the committees to "go through the presiding officer to ensure fair and proper use of financial resources."[42]

2.5.8 A fourth recommendation aimed at enhancing the independence and effectiveness of the legislature is that it should have the power to determine and approve its own budget, unconstrained by the executive.[43] Fifth, it recommends that the legislature should have the right to override an executive veto of proposed legislation, which in most countries is achieved through a supermajority of legislators or a vote of no confidence.[44]

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34 Id. at 24.
35 Id.
36 Id. at 25.
37 Id., at 17.
38 Id.
39 Id., at 18.
40 Id.
41 Id., at 22.
42 Id.
43 Id., at 23.
44 Id., at 24.

2.6 Procedures of the Legislature

On the procedures of the legislature, the CPA recommends that the legislature should "maintain and publish readily accessible records of its proceedings."[45] The goal here is to "facilitate the flow of information to the public, civil society and the media" so as to promote "greater transparency and accountability of the legislature."[46] Accordingly, information such as attendance and voting records, registers of legislators' interests should be made readily available.[47] Further, it requires the legislature to ensure that the media has appropriate access to its proceedings.[48] Another relevant recommendation is that bicameral legislatures should have "clearly defined roles for each chamber in the passage of legislation."[49]

In order to facilitate accountability to the public, the CPA recommends that committee hearings should be in public, and that any exceptions – such as national security and witness protection – should be "clearly defined and provided for in the rules of procedure."[50] In addition, where it is necessary to hold a meeting in private, a decision to that effect should be taken in public and reasons for the decision provided.[51] Second, it recommends that the legislature should provide opportunities for public input into the legislative process.[52] In New Zealand, for example, committees of the House of Representatives hold public hearings when examining draft legislation and endeavor to hear all members of the public who appear before them.[53] Third, it recommends that the legislature should exercise meaningful oversight of the military, security and intelligence services based on the principle of democratic political control of security forces and intelligence services.[54] A fourth recommendation relates to ethical governance, and requires legislators to maintain high standards of accountability, transparency and responsibility in the conduct of all public and parliamentary matters.[55] This recommendation is premised on the idea that the legislature can only maintain the confidence of the public and hold the executive branch accountable if its conduct is above reproach.[56] Among other things, it requires the legislature to establish and enforce a code of conduct, including rules on conflicts of interest and

45 Id., at 27.
46 Id.
47 Id.
48 Id., at 39.
49 Id., at 29.
50 Id., at 31.
51 Id.
52 Id.
53 Id., at 32.
54 Id.
55 Id., at 33.
56 Id., at 34.

the acceptance of gifts.[57] Further, it requires legislators to "fully and publicly" disclose their financial assets and business interests at the time of assuming office, during, and after their term of office.[58] Another important recommendation is that the legislature should establish "mechanisms to prevent, detect, and bring to justice legislators and staff engaged in corrupt practices."[59] In this respect, the CPA reasons that the "public will lose confidence in legislatures whose members are seen as corrupt [which] in turn may ultimately damage the public's confidence in democratic institutions and the democratic process in general."[60]

The CPA also recognizes that the legislature requires an effective bureaucracy (or parliamentary service) if it is to play a meaningful role in governance. It therefore recommends that the legislature should have a non-partisan professional staff to support its operations.[61] And to ensure its independence, the legislature should control the parliamentary service.[62] Further, it recommends that the head of the parliamentary service should have security of tenure to insulate him or her from undue political pressure.[63] It also recommends that the legislature should establish a code of conduct and values for members of the parliamentary service.[64]

Arguably, these benchmarks embody international best practices on the establishment of democratic legislatures. Indeed, the Parliamentary Forum of the Southern African Development Community (SADC) has since embraced them.[65] Let us now examine the extent to which Kenya has adopted the benchmarks.

57 Id.
58 Id.
59 Id.
60 Id., at 35.
61 Id. at 36.
62 Id.
63 Id., at 38.
64 Id.
65 See SADC Parliamentary Plenary Assembly, "Benchmarks for Democratic Legislatures" (2010).

3.0 A HISTORY OF LEGISLATIVE REFORMS[66]

3.1 The Independence Legislature

At independence, in 1963, the Kenyan Legislature had two chambers, a House of Representatives and a Senate. This bicameral legislature was part of a federalist system, created because political parties representing minority ethnic groups thought such a structure would protect their interests.[67] The Senate had limited powers. For example, unlike the House of Representatives, it could not originate money bills.[68] In practice, it did not even generate any non-money bill.[69] However, the federal system was not sustained. Once the Kenya African National Union (KANU) party, which represented the interests of the majority ethnic groups, assumed power, it undermined and then abolished the federal system and bicameral legislature. On the one hand, the KANU government withheld funds from the regional governments, which soon lost their viability.[70]

Such machinations frustrated the Kenya African Democratic Union (KADU), the opposition party representing minority interests, which then decided to disband and join the ruling party in 1964. Kenya thus became a de facto one-party state.[71] On the other hand, the bicameral legislature was terminated by a Constitutional amendment in 1966 that merged the two chambers into a National Assembly.[72]

The independence of the legislature was further undermined by a series of Constitutional amendments, the effect of which was to consolidate power in the presidency. Some of these amendments gave the President the power to suspend the proceedings of or dissolve the legislature.[73] The legislature therefore had no control of its calendar, and the

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66 This Part is largely drawn from Migai Akech, "Abuse of Power and Corruption in Kenya: Will the New Constitution Enhance Government Accountability," 18 Indiana Journal of Global Legal Studies 341 (2011).

67 See Stephen N. Ndegwa, "Citizenship and Ethnicity: An Examination of Two Transition Moments in Kenyan Politics," 91 American Political Science Review 599, 613 (1997).

68 Constitution of Kenya 1963, art. 59. Money bills were bills which made provision for the imposition, repeal, or alteration of taxation, or for the imposition of any charge upon the Consolidated Fund or other fund of the Government of Kenya. Id, art. 63.

69 J.H. Proctor, Jr., "The Role of the Senate in the Kenyan Political System," 18 Parliamentary Affairs 389 at 397 (1965).

70 Id. at 606.

71 David M. Anderson, "Yours in Struggle for Majimbo'. Nationalism and the Party Politics of Decolonization in Kenya, 1955-64," 40 Journal of Contemporary History 547, 547 (2005)(Explaining why KADU disbanded and joined KANU).

72 Constitution of Kenya 1963, art. 30. Constitution of Kenya (Amendment) Act, No. 40 of 1966.

73 Constitution of Kenya 1963, art. 59(1), (2).

President could simply terminate its proceedings whenever he felt that the legislature was going off course. Additionally, the absence of political party competition enabled the President to control the appointment of the presiding officer, or Speaker, of the legislature. Only individuals who were considered to be loyal to the President could be elected to the office of Speaker, which played a pivotal role in facilitating the agenda of the executive in the legislature.[74]

Therefore, the legislature became a mere appendage of the executive that was administered through the office of the President. For example, the bureaucracy of the legislature was part of the public service. Hence the public service recruited personnel for the legislature's bureaucracy and regulated its terms and conditions of service. The committee system of this legislature was also rudimentary and it therefore had little capacity to hold the executive accountable.[75] Nor did it have sufficient funds, as the Ministry of Finance ensured that it was starved of funds when determining its budget.[76] In addition, legislators were poorly paid and depended on executive patronage for their political survival. For example, those who were deemed loyal were appointed as ministers, assistant ministers, or chairmen of public corporations. Further, the President often gave legislators cash handouts to enable them to meet the demands of their constituents. Due to these constraints, the legislature played only a minimal role in policy making and legislation, even if it provided a useful forum for the ventilation of issues of national concern.

3.2 Changes to the Legislature in the Multi-Party Era

The return to multiparty politics in the 1990s facilitated the growth of the legislature's independence by, among other things, creating a political environment in which the legislature's reform could be meaningfully deliberated. However, it was not until 2000 that the independence of the legislature was guaranteed, following an amendment to the Constitution which unlinked the legislature from the executive by establishing a Parliamentary Service to oversee the legislature's administrative affairs.[77] The enactment of a statutory law further facilitated the implementation of this amendment.[78] In addition, these reforms sought to dilute the powers of the Speaker

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74 See Barkan & Matiangi, supra note 1 at 40 (explaining how one of the mechanisms used by African presidents to control the assembly was by "control[ing] the appointment and approach of its chief presiding officer, the Speaker.").

75 See id. at 37 (revealing that in actuality the legislature was dependent on the executive to assign it many of its resources).

76 See id. (recounting that for nearly fifty years the assembly was understaffed to a point that it did not have its own legal draftsperson).

77 Constitution of Kenya (Amendment) Act, No. 3 of 1999.

78 Parliamentary Service Act, (2000) Chapter 185, Laws of Kenya.

by creating a Parliamentary Service Commission.[79] The legislators also enacted laws which improved their remuneration and terms of service exponentially.[80] Indeed, their emoluments became the highest on the continent.[81] Presumably, their new salaries should have freed them from the financial dependency on the executive that had hampered their effectiveness during the single-party era.

3.2.1 The Parliamentary Service

The Parliamentary Service consisted of the clerk of the National Assembly and other officers appointed by the Parliamentary Service Commission (PaSC).[82] The clerk was the chief executive of the Parliamentary Service, and was responsible for matters of day-to-day administration.[83] Another key function of the clerk was to advise members of the legislature on parliamentary procedure and practice.[84] The clerk was accountable to the PaSC, and could be suspended or removed from office "at any time and in such manner as may be prescribed under [the Parliamentary Service] Act for inability to perform the functions of his office (whether arising from infirmity of body or mind or from any other cause) or for misbehaviour."[85]

On the other hand, the PaSC consisted of the Speaker of National Assembly (who was the chairman), a vice chairman, the leader of government business in the legislature, the leader of the opposition party with the highest number of seats in the legislature, and seven members appointed by the legislature from among its members.[86] Of the seven ordinary members, four were nominated by the parliamentary party (or parties) forming the government, while the other three were nominated by the parliamentary parties forming the opposition.[87] The vice chairman was elected by the PaSC from the lot of these ordinary members.[88] Upon the dissolution of the legislature, all the members of the PaSC remained in office until new members were appointed by the next legislature.[89] The powers of the PaSC included constituting and abolishing offices in the Parliamentary Service and directing and supervising the administration of the Service.[90] As for accountability, the PaSC answered to the legislature; for example, it was required to submit annual audits of its expenditures to

79 Constitution of Kenya 1963, art. 45B.
80 National Assembly Remuneration (Amendment) Act, No. 2 of 2003 (Kenya).
81 Barkan & Matiangi, supra note 1, at 55-57.
82 Constitution of Kenya 1963, arts. 45A, 45B.
83 Parliamentary Service Act, (2000) Cap. 185, section 13 (Kenya).
84 Id., section 14.
85 Id., section 16.
86 Constitution of Kenya 1963, art. 45B(1).
87 Id. art. 45B(1)(e).
88 Id. art. 45B(1)(b).
89 Id. art. 45B(2)(a).
90 Id. art. 45B(5)(a), (d).

the legislature.[91] Furthermore, it was required to annually prepare and present to the legislature a report of its operations.[92]

3.2.2 The Office of the Speaker

The Speaker presided over the legislature and was elected by legislators in accordance with its rules of procedure, also known as "standing orders."[93] The Speaker was assisted by a deputy, who was also elected by the members of the legislature. In keeping with the traditions of the Westminster system, the Speaker was the spokesperson or representative of the legislature.[94] Subject to the provisions of the standing orders, the Speaker wielded considerable power with respect to influencing the agenda and deliberations of the legislature. For example, the Speaker determined who contributed to deliberations, closed debate and determined when matters could be put to vote, and punished members who did not adhere to the established rules of debate and parliamentary behavior.[95] In exercising these powers, the Speaker was under a duty not to "hinder the legitimate expression of all shades of opinion," and to ensure that parliamentary debates ran smoothly.[96] In addition, the Speaker had the power to interpret the standing orders and other regulations governing the functioning of the legislature. Where the standing orders did not resolve a matter in question, the Speaker had the power to resolve such matters[97] and could be guided by the precedents of the legislature.

The Speaker and the Deputy Speaker both answered to the legislature and could be removed from office by a resolution supported by the votes of at least seventy-five percent of all members of the legislature.[98] Although this may seem to have been a high threshold, the record of the legislature demonstrated that legislators could obtain the necessary votes if they deemed it to be in their best interest to get rid of the Speaker. Thus the fact that legislators could dismiss the Speaker limited the ability of the Speaker to regulate the manner in which the legislators exercised their collective power to make policies, laws, and hold the executive to account. In these circumstances, the Speaker had to be mindful of the fact that he or she could be removed from office by legislators. Indeed, the Speaker was only an ex officio member of the legislature. It is therefore arguable that once elected, the Speaker

91 Id. art. 45B(5)(e)(ii).
92 Parliamentary Service Act, section 25.
93 Constitution of Kenya 1963, art. 37.
94 See Marcelo Jenny & Wolfgang C. Müller, "Presidents of Parliament: Neutral Chairmen or Assets of the Majority?", in Parliaments and Majority Rule in Western Europe 326, 330 (Herbert Döring ed., 1995).
95 National Assembly, Standing Orders, (2008), sections 47(3), 53(1)-(2), 75(4), 97(2).
96 Jenny and Muller, supra note 94 at 74.
97 National Assembly, Standing Orders, (2008), section 1.
98 Constitution of Kenya 1963, arts. 37(2)(c), 38(3)(d).

would endeavor to be in the good graces of the legislators. The Speaker was therefore vulnerable to the whims of legislators and the need arose for the establishment of mechanisms that could facilitate the accountability of the exercise of power by the legislature.

Since the relevant laws regarding removal of the Speaker and Clerk did not circumscribe how these wide powers of dismissal were supposed to be exercised, they remained subject to abuse and could serve to make the Speaker and the clerk subservient to the legislature and the PaSC respectively. In the case of the PaSC, it is worth noting that it had a short-term perspective, given that each legislature only had a shelf life of five years.[99] Because it wielded immense power over the clerk, the PaSC arguably could have prevailed upon the clerk to make decisions that only served the short-term objectives of legislators. In these circumstances, it was doubtful whether, for example, the legislature could objectively debate audits of the accounts of the PaSC.

3.2.3 Powers of the Legislature

A different picture of the democratic character of the Legislature also emerged when one examines how legislators exercised their collective power to make policies, laws, and to hold the executive accountable. This power was exercised through debate and voting in plenary sessions of the legislature. Its exercise was facilitated by the establishment of committees, which constituted a mechanism for providing legislators with the information they needed to implement decisions.

3.2.3.1 The Committees System

The committee system enabled the legislature to organize its affairs and to shadow the operations of government ministries, departments, and agencies.[100] Thus the business of the legislature was primarily conducted in, or through, the committees. With respect to holding the executive accountable on a daily basis, the work of the legislature revolved around the so-called departmental committees, which investigated the activities and administration of the government ministries, departments, and agencies assigned to them.[101] There were twelve such committees.[102] Their functions were to investigate and report on the activities and administration of the assigned

[99] Id, art. 59(4).

[100] See Barkan & Matiangi, supra note 1, at 48-49.

[101] National Assembly, Standing Orders, (2008), section 198(3).

[102] These were the committees on (1) Administration and National Security, (2) Agriculture, Livestock and Cooperatives, (3) Defence and Foreign Relations, (4) Education, Research and Technology, (5) Energy, Communication and Information, (6) Finance, Planning and Trade, (7) Health, (8) Justice and Legal Affairs, (9) Labour and Social Welfare, (10) Lands and Natural Resources, (11) Local Authorities, and (12) Transport, Public Works and Housing. Id. sched. 2.

ministries and departments, to study and review legislation referred to them, and to recommend proposed legislation.[103]

Other critical committees were the Public Accounts Committee and the Public Investments Committee, two committees which investigated the expenditures of government ministries and departments.[104] Both had the power to examine public accounts and the reports of the controller and auditor general.[105] They were given significant powers to enable them to carry out their functions, including the power to summon individuals to appear before them.[106] The committees were constituted according to the distribution of seats among the political parties represented in the legislature.[107] While the majority party also had the majority of seats in the committees, in practice the chairperson of the committee was chosen from an opposition party.[108] For example, the head of the official opposition party usually chaired the important Public Accounts Committee.[109] While this practice enhanced the impartiality and legitimacy of the work of the committees, it should be noted that political parties typically used appointments to committees to reward loyalty, which means that committees did not necessarily consist of the most competent legislators.[110]

3.2.3.2 Participation of Citizens in Legislative Processes

The question now arises as to how the legislators exercised their powers to make policies and laws, and hold the executive to account. Arguably, the legislature was unduly influenced by special interest groups in exercising its lawmaking power, as the enactment of the Tobacco Control Act of 2007 illustrated.[111] Furthermore, the legislature not only enacted unconstitutional laws (such as the Constituency Development Fund Act),[112] but also failed to amend laws that had been declared unconstitutional (such as the Kenya Roads Board Act).[113] These examples demonstrate that the legislature was not only prone to the undue influence of special interest groups, but also abused its collective power in significant instances.

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[103] Id., section 198(3).
[104] Barkan & Matiangi, supra note 1, at 49.
[105] Id.
[106] National Assembly, Standing Orders, (2008), section 173.
[107] Id. sections 187(2)-(3), 188(2)-(3).
[108] World Bank, Understanding the Evolving Role of the Kenya National Assembly in Economic Governance in Kenya: An Assessment of Opportunities for Building Capacity of the Tenth Parliament and Beyond, para 78, Report No. 45924-KE (May 2008) (on file with author).
[109] Id.
[110] Id. para 96.
[111] Tobacco Control Act, No. 4 (2007).
[112] Constituencies Development Fund Act, (2003).
[113] Kenya Roads Board Act, (1999).

While it was to be expected that different interest groups would legitimately lobby the legislature to enact favorable policies and laws, there ought to have been mechanisms to ensure that interest groups seeking specific legislative outcomes did not subvert the public interest. Such mechanisms include those that regulate lobbying, conflicts of interest, misconduct, and even corruption in the legislature.

3.2.3.3 Balancing Powers and Privileges of Legislators with the Public Interest

An attempt has been made to establish such mechanisms, as exemplified by the National Assembly (Powers and Privileges) Act.[114] The primary purpose of the Act was to codify the convention of parliamentary privilege, which guarantees legislators the independence and freedom of speech necessary to effectively perform their duties of "honest, unbiased and impartial examination and inquiry and criticism."[115] Thus, according to this Act, "[n]o civil or criminal proceedings shall be instituted against any member for words spoken before, or written in a report to, the Assembly or a committee, or by reason of any matter or thing brought by him therein by petition, Bill, resolution, motion or otherwise."[116] Because these privileges could be abused, the Act also empowered the Speaker to "issue directions in the form of a Code of Conduct regulating the conduct of members of the Assembly whilst *within the precincts of the Assembly* other than the Chamber."[117] These powers of the Speaker were exercised through the Committee of Privileges, which was empowered to inquire into allegations of breaches of the Code of Conduct.[118] The conduct of legislators within the debating chamber was also regulated by the standing orders.[119]

In general, the conduct of legislators outside the debating chamber or the precincts of the legislature was not regulated. In particular, the absence of proper regulation meant that legislators could serve on committees "even though their membership would entail a conflict of interest—either because they faced allegations of corruption, were allegedly allied to corruption cartels, or had commercial interests that were overseen by these committees."[120] It should be noted, however, that the standing orders were amended to provide that when an adverse recommendation had been made against a legislator in a committee report that had been adopted by the House, that legislator was ineligible for election as chairperson or vice chairperson of any committee.[121]

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114 National Assembly (Powers and Privileges) Act, Chapter 5, Laws of Kenya.
115 Graham Zellick, "Bribery of Members of Parliament and the Criminal Law," 1979 Public Law 31, 43.
116 National Assembly (Powers and Privileges) Act, section 4.
117 Id., section 9 (emphasis added).
118 Id., section 10(4).
119 See National Assembly, Standing Orders, (2008), section 97.
120 World Bank, supra note 108, para 81.
121 National Assembly, Standing Orders, (2008), section 162(2).

As far as legitimacy was concerned, the public perceived the legislature as one of the most corrupt public institutions.[122] The general perception was that legislators did not serve the public interest and were only motivated by selfish interests.[123] In particular, this perception had been fueled by the legislator's habit of unilaterally increasing their salaries and emoluments in spite of public disapproval. There were even allegations that legislators had taken bribes from wealthy politicians to influence the deliberations and decisions of the legislature.[124] Therefore, it did not seem that salary increases had enhanced the independence of legislators.

So that although the legislature succeeded in gaining autonomy from the executive, it begun to exercise its new powers in an arbitrary manner and lost a considerable measure of legitimacy as a result.

[122] See, e.g., Cyrus Kinyungu, "MPs Are Most Corrupt," Standard, 6 December 2006, available at http://allafrica.com/stories/200612061243.html; Mugo Njeru, "MPs in 'Most Corrupt' League," Daily Nation, 10 December 2005, available at http://allafrica.com/stories/200512100099.html.

[123] See, e.g., Martin Mutua & Andrew Teyie, "Shame: MPs for Hire," Standard, 18 November 2004, available at http://allafrica.com/stories/200411180875.html; Njeri Rugene, "Bribery Rampant in Kenya's Parliament," Sunday Nation, 16 May 2009, available at http://africanewsonline.blogspot.com/2009/05/bribery-rampant-inkenyas-parliament.html; Editorial, "Put the Voters' Interests First," Daily Nation, 21 November 2004, available at http://allafrica.com/stories/200411220395.html.

[124] Rugene, supra note 122.

4.0 THE CONSTITUTION OF KENYA 2010 AND THE INSTITUTIONAL FRAMEWORK FOR PARLIAMENT

4.1 The Provisions of the Constitution on the Legislature

4.1.1 A Bicameral House

The Constitution of Kenya, 2010 establishes a Parliament with two houses, namely a National Assembly and a Senate.[125] Each House of Parliament is presided over by a Speaker, who is an ex officio member.[126] Unlike the previous position where the Speaker was typically appointed from a pool of current legislators, the Constitution provides that the two Speakers are to be elected by each house "from among persons who are qualified to be elected as [legislators] but are *not* such members."[127] Among other restrictions, each Speaker may be removed from office if the relevant house "so resolves by a resolution supported by the votes of at least two-thirds of its members."[128]

The two Speakers therefore do not enjoy security of tenure, and may not be able to exercise effective control over the manner in which legislators exercise their collective powers of making policies and laws or over the manner in which legislators hold the executive accountable for its actions.

4.1.2 *The Parliamentary Service Commission*

With respect to the administration of Parliament, the Constitution establishes a Parliamentary Service and a Parliamentary Service Commission. The latter consists of the Speaker of the National Assembly as the chairperson, seven members nominated by the party or parties in government and opposition parties, and one man and one woman who are "experienced in public affairs" and appointed by Parliament from among persons who are not legislators.[129] For the first time, persons who are not legislators therefore sit on this Commission. The presence of such outsiders may enhance the public accountability of the Parliamentary Service Commission. Further, the clerk of the Senate serves as the secretary of this commission.[130] The main functions of the Commission are to provide the services and facilities to ensure that

[125] Constitution of Kenya 2010, art. 93(1).
[126] Id., art. 106(1)(a).
[127] Id., (emphasis added).
[128] Id., art. 106(2)(c).
[129] Id., art. 127(2)(a),(c),(d).
[130] Id., art. 127(3).

Parliament does its work efficiently and effectively and to constitute offices in the Parliamentary Service and appoint and supervise office holders.[131] Presumably, the Commission is also responsible for discipline in the Parliamentary Service.

4.1.3 *The Office of the Clerk*

Each House of Parliament is headed by a clerk appointed by the Commission with the approval of the relevant house.[132] The clerks do not enjoy security of tenure, and are subject to supervision by the Commission, as they are "offices in the Parliamentary Service."[133]

4.1.4 *Powers, Privileges and Immunities*

The Constitution provides for the Powers, Privileges, and Immunities of the legislature, including "freedom of speech and debate in Parliament."[134] However, it makes no attempt to circumscribe the exercise of these powers. Nevertheless, it imposes a duty on Parliament to facilitate public participation and involvement in its business, including that of its committees.[135] It also gives every person the right to petition Parliament "to consider any matter within its authority."[136] Further, it gives the electorate the right to recall the legislator representing their constituency before the end of the term of the relevant House of Parliament, and imposes a duty on Parliament to enact legislation that will establish the grounds and procedures according to which a Member of Parliament (MP) may be recalled.[137]

4.1.5 *The Salaries and Remuneration Commission (SRC)*

In addition, the Constitution of Kenya, 2010 establishes a Salaries and Remuneration Commission, whose mandate is to set and review the remuneration and benefits of all State officers, and advise the national and county governments on the remuneration and benefits of all other public officers.[138] Since legislators are state officers,[139] the Salaries and Remuneration Commission now has exclusive jurisdiction over the establishment and review of their remuneration. Accordingly, Parliament no longer has the power to increase the remuneration of legislators, as it did in the past. In this

[131] Id., art. 127(6)(a)-(b).
[132] Id., art. 128(1).
[133] Id., art. 128(2).
[134] Id., art. 117(1).
[135] Id., art. 118(1)(b).
[136] Id., art. 119(1).
[137] Id., art. 104.
[138] Id., art. 230 (4).
[139] Id., art. 260.

respect, the Constitution also prohibits legislators from voting on any question in which they have a pecuniary interest.[140] Clearly, legislators have a pecuniary interest in any bill that proposes to increase their remuneration and must not therefore vote on it. In addition, the Constitution provides that an act of Parliament that confers a direct pecuniary interest on legislators "shall not come into force until after the next general election of members of Parliament."[141]

4.1.6 Values and Principles of Governance

The Constitution of Kenya, 2010 establishes values and principles of governance that ought to be reflected in the procedures and operations of Parliament. First, it establishes values and principles of governance, which include national unity, sharing and devolution of power, the rule of law, democracy, participation of the people, integrity, transparency and accountability.[142] Further, these values and principles bind all state organs, state officers, public officers and all persons whenever they enact, apply or interpret the Constitution or written law, or make or implement public policy decisions. These values and principles bind Parliament, legislators, and the officers of the Parliamentary Service. Second, the Constitution views the authority assigned to a state officer as a "public trust," which, among other things, must be exercised in a manner that demonstrates respect for the people, brings honor to the nation and dignity of the office, and promotes public confidence and integrity in the office.[143] Among other things, the public trust doctrine requires state officers to be objective and impartial in making decisions, and account to the public for their decisions and actions. Third, the Constitution provides that legislative authority belongs to the people, and Parliament only exercises this power as an agent of the people.[144] As in any agency relationship, the implication of this provision is that Parliament must account to the people how it is exercising the authority entrusted to it. Finally, the Constitution gives every person "the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair."[145] In particular, this provision should guide the work of the committees of the National Assembly. In this respect, it can be argued that in performing their functions such as approving nominees to public offices or checking agencies of the executive, the committees of the National Assembly are in fact performing what the Constitution terms as administrative action. Accordingly, they should adhere to the requirements of Article 47, including providing and publishing reasons for their decisions. This means that, unless considerations

[140] Id., art. 122 (3).
[141] Id., art. 116 (3).
[142] Id., art. 10.
[143] Id., art. 73.
[144] Id., art. 94.
[145] Id., art. 47.

such as national security reasonably dictate, the reports of the committees must be accessible to the public. And to facilitate uniformity, the Standing Orders should establish a minimum set of procedures that the committees should follow as they perform their duties.

Although these provisions constitute useful mechanisms for regulating the collective powers of the legislature, they need to be accompanied by mechanisms that regulate lobbying, conflicts of interest, misconduct, and abuse of power in Parliament. The absence of such mechanisms has made legislators vulnerable to capture by special interests, which jeopardizes the ability of the legislature to safeguard the public interest. It has also brought into question the legislature's ability to hold the executive accountable because its committees, which form a critical part of its arsenal of oversight instruments, often consist of legislators against whom credible allegations of corruption have been made, and who cannot therefore be expected to be genuine champions of the public interest. The provisions of the Constitution dealing with leadership and integrity, including those governing conflicts of interest, therefore provide a much-needed framework for regulating the conduct of legislators.

It is arguable that the foregoing provisions of the Constitution, which consolidate the institutional reforms of the past decade, have gone a long way in enhancing the democratic character of Parliament. However, a number of significant institutional reforms, which would make Parliament truly democratic, are yet to be implemented. First, there is a need to enhance democracy in the decision-making processes of Parliament so that the views of all citizens are taken into account. Second, there is a need to re examine the powers of the Senate vis-à-vis the National Assembly in general, and to clarify the roles of the National Assembly and the Senate in the passage of legislation in particular. Third, Parliament should establish effective procedures for public participation in, and accountability of, legislative processes. Fourth, there is a need to observe the rule of law in the determination of the remuneration of legislators. Above all, Parliament needs to establish a credible and enforceable ethics regime.

4.2 Enhancing Democracy in Parliamentary Decision-Making Processes

4.2.1 Balancing Majority and Minority Interests

In the past, elections in Kenya were held under a first-past-the-post electoral system in which the person who gained the plurality of the vote (or was the first to cross the finish line) was declared the winner. The effect of this system was that even if 80% of the electorate did not vote for the "winning" candidate, they would consequently not be represented in government. As the general elections of 1992 and 1997 illustrated, this system often produced minority governments.

The Constitution of 2010 seeks to mitigate this problem in two ways.

First, it provides for the nomination of twelve members to the National Assembly and twenty members to the Senate on "the basis of proportional representation by use of party lists."[146] It envisages that each political party taking part in a general election will submit to the Independent Electoral and Boundaries Commission (IEBC) a list of all the individuals who would stand elected if the party were to be entitled to all the proportional representation seats. The party lists should consist of alternates between male and female candidates "in the priority in which they are listed," and except in the case of the county assembly seats, each party list should reflect the regional and ethnic diversity of the people of Kenya.[147] Once an election has been held and the results announced, the task of the IEBC is then to allocate these special seats to political parties "in proportion to the total number of seats won by the candidates of the political party."[148] Second, the Constitution reserves forty seven special seats for women in the National Assembly. Here, it is envisaged that during a general election the voters of each county acting as a single member constituency will elect a woman to represent them in the National Assembly. The Constitution therefore introduces the principle of proportional representation with the aim of promoting the representation of women and other special interest groups (such as the youth and persons with disabilities), which is to be achieved through party nominations.

But what happens once these special representatives become members of Parliament? For example, do they participate effectively in the decision-making processes of the two houses? Further, what roles do minority parties have in the governance of Parliament? And what are the rights of members who are not affiliated to political parties? To answer these questions, we need to look at the standing orders of the National Assembly and the Senate.

4.2.2 The Role of Standing Orders

On the one hand, the Standing Orders of both houses have provisions that enhance democracy in parliamentary decision-making processes. First, the both embrace the principle of gender equity in the composition of organs of the House such as the Speaker, chairperson's panel, the leader of the majority party, the leader of the minority party and committees.[149] As a result, the women members of both houses now participate meaningfully in the governance of Parliament, including chairing important committees.

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[146] Id., art. 90.
[147] Id.
[148] Id.
[149] National Assembly, Standing Orders, sections 16, 19, 20, 173 and 214; Senate, Standing Orders, sections 16, 19, 175, and 214.

The Standing Orders of the National Assembly and of The Senate give legislators the right to propose legislation, regardless of their majority or minority status.[150] Essentially, any legislator can propose legislation, although the challenge is to ensure that such proposals become part of the agenda of the House. But once they become the agenda of the House, private members' legislative proposals (or bills) are for all intents and purposes treated as public bills. They are therefore committed to the relevant Departmental Committee, or a select committee, after the first reading.[151] Thereafter, it becomes the responsibility of the committee to ensure that the relevant house processes the bills. These provisions of the standing orders remedy a deficiency in the old regime. In the past, a private bill was the property of a member, and therefore lapsed if he or she died, lost his or her seat, or otherwise ceased to be a Member of Parliament. In the current standing orders, however, a bill that has been sponsored by a member essentially becomes the property of the House once the House Business Committee has made it an agenda of the House. Fourth, the standing orders of the National Assembly require that the interests of independents should be taken into consideration in the composition of important committees of the house, such as the House Business Committee.[152] However, the standing orders of the Senate do not contain a similar safeguard for independents.[153] Finally, the standing orders of both houses give the opposition members of committees the right to submit "minority or dissenting" reports.[154]

On the other hand, both sets of Standing Orders contain provisions that could undermine democracy in parliamentary decision-making. In the first place, the standing orders take a majoritarian approach to the leadership of critical oversight committees such as the Public Accounts Committee and the Public Investments Committee in the case of the National Assembly, and the Committee on Devolved Government in the case of the Senate. They both provide that once members of a select committee have been appointed, they shall elect their chairpersons and vice-chairpersons from amongst their members.[155] In the case of the National Assembly, the standing orders merely state that both the Public Accounts Committee and the Public Investments Committee "shall consist of a chairperson and not more than sixteen other members."[156] In essence, it leaves it up to the governing and opposition parties to agree on the composition of these committees. In effect, where the governing party or coalition controls the legislature, it would therefore not only chair but also dominate

[150] National Assembly, Standing Orders, Part XX; Senate, Standing Orders, Part XXI.
[151] National Assembly, Standing Orders, section 127; Senate, Standing Orders, section 128.
[152] National Assembly, Standing Orders, section 171 (1) (d).
[153] Senate, Standing Orders, section 174 (1).
[154] National Assembly, Standing Orders, section 199 (5); Senate, Standing Orders, section 201 (5).
[155] National Assembly, Standing Orders, sections 178 (1) (a) & 205 (5); Senate, Standing Orders, section 180 (1).
[156] National Assembly, Standing Orders, sections 205 (3) & 206 (3).

committees that are meant to act as a check on its excesses. Put differently, it would mean that the dominant governing party would be performing the impossible task of checking itself. This scenario recently played out in the National Assembly when the Jubilee Coalition, the majority party, insisted not only on chairing these oversight committees, but also having the majority membership. Although it finally reached a compromise with the Cord Coalition, which now chairs these committees, it retained the majority membership. In order to preempt such disagreements in future, and to embrace international best practice, the Standing Orders should be amended to provide that these key committees must be chaired by members of the opposition. It is also arguable that because the function of these committees is to hold the executive to account, their membership should be dominated by the opposition.

A second drawback is that the Standing Orders do not provide suitable decision-making procedures for the committees. The essence of committees is that they provide a forum where reflective and deliberative decision-making can occur, and where legislators should therefore adopt informed opinions as opposed to merely parroting the parochial positions of their parties. However, the standing orders do not encourage deliberative decision-making in the committees since they merely provide that questions arising in select committees "shall be decided by vote and the resolution on any such vote shall constitute the decision of the select committee."[157]

A need therefore arises to require committees to endeavor to make decisions by consensus, and only resort to majority voting if consensus cannot be reached. Such an approach would serve to important but related goals. First, it would enhance the negotiating leverage of minority parties, thereby enhancing the democratic quality of legislative decision-making. Second, it would enable Parliament to fulfill its Constitutional mandate of manifesting the diversity of the nation, representing the collective will of the people, and exercising their sovereignty.[158]

4.2.3 The Role of the Majority and Minority Leaders

Although the Constitution only establishes the positions of leader of the majority party and leader of the minority party, the standing orders of both houses recognize these offices.[159] The office of leader of the minority party is particularly important from the viewpoint of enhancing democracy in parliamentary affairs. In the United States, for example, the minority leader speaks for the minority party and its policies, protects its rights, and organizes and leads criticism of the majority party. To enable the minority leader play these important roles, he or she is often accorded special

[157] National Assembly, standing Orders, section 196 (2); Senate, Standing Orders, section 198 (2).
[158] Constitution, art. 94 (2).
[159] National Assembly, Standing Orders, sections 19 and 20; Senate Standing Orders, sections 19 and 20.

privileges. For example, the minority leader has a "right of recognition," which means that he or she must be recognized by the Speaker before other members of the House seeking recognition to speak. This privilege is useful in ensuring that the collective views of the minority party or parties are voiced on the floor of the House, in light of the Speaker's challenge of recognizing all members who want to speak in a context in which time is often in short supply. In Kenya's case, however, the two sets of standing orders do not specify the rights and responsibilities of the minority leader. Nevertheless, the recognition of this office is a significant step towards enhancing the effective participation of minority parties in the governance of Parliament.

4.2.4 Voting in the Legislature

The Constitution of Kenya, 2010 provides that when the Senate is to vote on a matter other than a bill, the Speaker shall determine whether or not the matter affects counties.[160] Presumably, senators can therefore cast individual votes whenever the Senate is considering bills. Further, each senator has one vote when the Senate votes on a matter that does not affect counties.[161]

However, when the Senate votes on a matter that affects counties, senators vote as delegations, meaning that each county delegation has one vote, and its vote is cast by the head of the county delegation or his/her designate after consulting the other members of the delegation.[162] For this purpose, all the senators who were registered as voters in a particular county constitute a particular delegation.[163]

These provisions of the Constitution have two implications. First, an individual is not required to be registered as a voter in a particular county to seek election as a senator for that county.[164] It therefore means that when such a person is elected to Senate, he or she will not be a member of the delegation of that county for purposes of voting on matters that affect counties. Secondly, the Speaker of the Senate determines whether or not a matter affects counties. Where the Speaker determines that a matter does not concern counties, more senators would be involved in the decision-making process. However, where the Speaker determines that a matter concerns counties, fewer senators would be involved in the decision-making process. So that although the objective of these provisions is to ensure equal representation of all counties in Senate decision-making, it could serve to undermine the representation of special interests (such as women, youth and persons with disabilities) which transcend

[160] Id., art. 123 (2).
[161] Id., art. 123 (3).
[162] Id., art. 123 (4).
[163] Id., art. 123 (1).
[164] Id., art. 99 (1).

counties. Arguably, the representation of such special interests in decision-making would be more effective if the special members of Senate were allowed to aggregate their votes.

4.3 Re Examining the Powers of Senate and its Role in the Passage of Legislation

This paper now examines the extent to which The Senate as established by the Constitution of Kenya, 2010 has "significant power" or as much power as the National Assembly.

4.3.1 Comparing the Roles of the Senate and National Assembly

On the one hand, the Constitution grants the National Assembly the following roles: representing the people of the constituencies and special interests in the National Assembly; deliberating on and resolving issues of concern to the people; enacting legislation; determining the allocation of revenue between the levels of government; appropriating funds for expenditure by the national government and other national state organs; exercising oversight over national revenue and its expenditure; reviewing the conduct in office of the President, the Deputy President and other state officers and initiating the process of removing them from office; exercising oversight of state organs; and, approving declarations of war and extensions of states of emergency.[165] On the other hand, the Constitution grants the Senate the following roles: representing the counties and protecting the interests of counties and their governments; participating in law-making by considering, debating and approving bills concerning counties; determining the allocation of revenue among counties; and, participating in the oversight of state officers by considering and determining resolutions to remove the President or Deputy President from office.[166]

4.3.2 Conflict of Roles

In practice, this division of responsibilities is already causing friction between the two houses, with the National Assembly seeking to assert its supremacy and the Senate struggling to establish relevance. This contest has played out with respect to the consideration of the division of revenue bill. Initially, and as required by its standing orders and the Public Finance Management Act, the National Assembly originated and passed a division of revenue bill, which it then referred to the Senate for its

[165] Id., art. 95.
[166] Id., art. 96.

input.[167] Upon receiving the bill, the Senate considered it and amended it by raising the budgetary allocations of the county governments. Upon receiving the amended bill, the National Assembly referred it to its Budget and Appropriations Committee, which asserted that the Senate had no role to play in the consideration of this bill, and recommended that the National Assembly should send its version of the bill to the President for assent. In the meantime, the Speakers of the two houses issued contradictory rulings on the matter. On the one hand, the Speaker of the National Assembly ruled that under the Constitution the passage of the division of revenue bill was the sole prerogative of the National Assembly.[168] Conversely, the Speaker of the Senate ruled that the division of revenue bill could commence in either house of parliament, and the Senate had an important role to play in its consideration because it was at the heart of the devolved system of government.[169] Thereafter, the National Assembly referred its version of the bill to the President who assented to it, sparking uproar from the Senate, which threatened to take the matter to the Supreme Court for determination.

From the provisions of the Constitution, it is clear that the Senate plays a limited role in governance in comparison to the National Assembly. Accordingly, the Senate does not have significant power; indeed, it has little power compared to National Assembly. First, the National Assembly is exclusively responsible for determining the allocation of national revenue between the levels of government.[170] In practical terms, this means that once the National Assembly has determined the respective shares of the annual national revenue of the National Government and the County Governments, the Senate then determines how much of the annual national revenue is allocated to each county. This division of responsibility has two implications.

4.3.3 Examples from the Law Making Process

First, consideration of the Division of Revenue Bill (which divides the revenue raised by the national government between the two levels of government) is the preserve of the National Assembly. It should be noted, however, that the Constitution also provides that the Division of Revenue Bill "shall be introduced in Parliament" at least two months before the end of each financial year.[171] There are therefore two provisions of the Constitution, which deal with the consideration of the Division of Revenue Bill. One is a general provision which merely requires this bill to be "introduced in

[167] National Assembly, Standing Orders, section 233 (4).
[168] National Assembly, "Communication from the Chair, Division of Revenue Bill, 2013," 22 May 2013.
[169] Senate, "Communication from the Chair on the Disposal of the Division of Revenue Bill, 2013 by the Senate," 23 May 2013.
[170] Constitution, article 95 (4) (a).
[171] Id., art. 218 (1) (a).

Parliament" without indicating which House should originate the bill. The second is a specific provision, which clearly indicates that the National Assembly "determines the allocation of national revenue between the levels of government." At one level, it is arguable that the specific provision should prevail over the general one, which would mean that the Senate would play no role in the consideration of this bill that has implications for the resources of counties and their governments. At another level, it could be argued that since the primary role of the Senate is to "protect the interests of the counties and their governments" it ought to have a "say in the Bill determining how much money goes to the Counties."[172] From this perspective, we should therefore interpret the Constitution in a manner that furthers the objects of devolution, including ensuring "equitable sharing of national and local resources throughout Kenya."[173] Accordingly, the standing orders of the two Houses could provide that the National Assembly should originate the Division of Revenue Bill and send it to the Senate for its consideration. Thereafter, the Senate would send the bill back to the National Assembly.

The dilemma, however, is that the Constitution classifies the Division of Revenue Bill as an "ordinary bill" even if it concerns county governments.[174] The procedure for the consideration of ordinary bills is as follows. If one House, say, the National Assembly, passes an ordinary bill, and the second House, say, the Senate rejects the bill, it shall be referred to a mediation committee.[175] But if, in this example, the Senate passes the bill in an amended form, the Constitution requires that bill to be referred back to the National Assembly for reconsideration.[176] If after reconsideration the National Assembly passes the bill as amended by the Senate, it shall be referred to the President for assent.[177] However, if the National Assembly rejects the bill as amended by the Senate, the bill shall be referred to the mediation committee.[178] And where a bill has been referred to the mediation committee, it can only become law if both Houses approve (presumably by simple majority vote) the version of the bill proposed by the mediation committee, otherwise the bill is defeated.[179]

This is a dilemma because the Constitution gives the National Assembly the exclusive responsibility of "determining" the allocation of national revenue between the levels

[172] Commission for the Implementation of the Constitution, "CIC Statement on the Role of the Senate in Revenue Bills and on Salaries of MPs," Sunday Nation, May 26, 2013 at 39.
[173] Constitution of Kenya 201, art. 174, (g).
[174] Id., art. 110.
[175] Id., art. 112 (1) (a).
[176] Id., art. 112 (1) (b).
[177] Id., art. 112 (2) (a).
[178] Id., art. 112 (2) (b).
[179] Id., art. 113.

of government.[180] The word "determine" means to "decide", or "fix conclusively or authoritatively," or "settle," or "resolve."[181] It would therefore seem that the Constitution precludes resort to the mediation committee as far as the Division of Revenue Bill is concerned. This would mean that once the Senate sends the Division of Revenue Bill back to the National Assembly, the latter would have the final say and send it to the President for assent.

On the other hand, the consideration of the County Allocation of Revenue Bill (which divides the revenue allocated to the county level of government among the counties) is a mandate shared by the two Houses.[182] In my view, the standing orders of the two Houses should give the Senate the responsibility of originating this bill. Further, the Senate is responsible for overseeing how each County Government spends and accounts for the national revenue allocated to it. Again, this mandate is shared with the National Assembly, whose roles include exercising oversight over national revenue and its expenditure.[183]

Secondly, the exercise of the law-making power of the Senate requires the concurrence of the National Assembly in a number of significant respects. One example is the determination of the basis for the allocation of national revenue among the counties.[184] The Constitution gives the senate the responsibility of making this determination by passing a resolution once every five years. However, in making this determination, the Senate must: (i) consider certain criteria on equitable sharing of revenue; (ii) consider the recommendations of the Commission on Revenue Allocation; (iii) consult county governors, the Cabinet Secretary responsible for finance and any organization of county governments; and (iv) consider the views of the public, including professional bodies. More significantly, the resolution of the Senate cannot take effect before the National Assembly, which can either approve or reject it, considers it. Where the National Assembly rejects the Senate's resolution, the matter should then be referred to a joint committee of the two houses of Parliament for mediation.[185]

The second example relates to the consideration of bills concerning county governments, which the Constitution classifies into the two categories of special and ordinary bills. Special bills are the annual County Allocation of Revenue Bill, and bills relating to the election of members of a county assembly or a county executive.[186]

[180] Id., art. 95 (4) (a).
[181] Merriam-Webster's Collegiate Dictionary.
[182] Id., art. 218 (1) (b).
[183] Id., art. 95 (4) (c).
[184] Id., art. 217 (4).
[185] Id., art. 113, 217 (6) (b).
[186] Id., art. 110 (2) (a).

All other bills concerning county governments, including bills affecting the finances of county governments, are ordinary bills.[187] The Constitution gives the National Assembly power to amend or veto special bills that have been passed by the Senate.[188] In effect, the President can only assent to Senate versions of special bills if the National Assembly fails to marshal the support of at least two-thirds of its members.[189] But the concurrence of the National Assembly is required even in the case of ordinary county government bills. The only difference here is that where the National Assembly rejects the bill, it shall be referred to a joint committee of the two houses of Parliament for mediation.[190] Ultimately, therefore, all bills passed by the Senate can only become law after the National Assembly has considered them.

Thirdly, money bills can only be introduced in the National Assembly.[191] These are bills whose provisions deal with taxes, the imposition of charges on a public fund or the appropriation of public money, or the raising or guaranteeing of loans.[192] However, the Division of Revenue Bill is not deemed to be a money bill.[193]

Fourth, the National Assembly is exclusively responsible for approving the appointment of cabinet secretaries and principal secretaries.[194]

4.3.4 Managing Conflict of Roles in a Bicameral Parliament

In view of the foregoing allocation of responsibilities, a need arises for the two Houses to coordinate their operations if they are to fulfill their mandates. In this respect, they should establish joint committees on critical matters, particularly the implementation of devolution. Further, the two Houses need to negotiate and agree on how they will perform their roles, particularly where the Constitution does not stipulate which House has the primary responsibility of originating bills. For example, the National Assembly and the Senate could agree that the National Assembly originates the Division of Revenue Bill, while the Senate originates the County Allocation of Revenue Bill. Such agreements would then be expressed in their respective standing orders, and would enable the two Houses to utilize their resources efficiently.

In the longer run, however, it will be necessary to rethink the foregoing Constitutional allocation of powers, with a view to giving the Senate significant power. A good

[187] Id., art. 110 (2) (b).
[188] Id., art. 111 (2).
[189] Id., art. 111 (3).
[190] Id., art. 112.
[191] Id., art. 109 (5).
[192] Id., art. 114 (3).
[193] Id.
[194] Id., art. 152 (2), 155 (3) (b).

starting point here is to establish the intention of the people in recommending a bicameral legislature. To answer this question, we need to look at the records of the Constitution of Kenya Review Commission (CKRC). According to the CKRC, the principal role of the Senate was to "provide an institutional framework through which the devolved levels of government share and participate in legislation, governance, administration and decision- making at the national level."[195] From this premise, the CKRC draft Constitution vested legislative authority in Parliament, and envisaged that the two houses would collectively exercise the powers of, among other things, enacting legislation, considering and passing amendments to the Constitution, approving the sharing of revenue between the levels of government, and approving appointments.[196] The CKRC draft Constitution was therefore clear that the Senate would, save for a few exceptions, have as much power as the National Assembly. From this perspective, empowering the Senate to participate in determining the allocation of national revenue between the two levels of government would make much sense, and in particular enable it to effectively protect the interests of counties as envisaged by the Constitution of 2010. Arguably, the equitable sharing of national resources will only occur if the Senate is involved in the consideration of the division of revenue bill. Similarly, the manner in which the national government exercises power impacts on county governments and a need arises to involve the Senate in approving the appointment of public officers such as cabinet secretaries and principal secretaries. In a nutshell, devolution will not provide a solution to the long-held perceptions and realities of ethnic marginalization and exclusion in the sharing of national resources if Senate is a feeble institution.

We should also view the need to enhance the powers of the Senate from the perspective of countering majoritarian democracy. As things stand today, we have a powerful National Assembly that is dominated by the governing coalition of parties, which also represents two of the most populous ethnic groups in Kenya. The result is that the Jubilee government can, for example, pass any law it desires, or appoint any public officer it fancies, without being constrained by the opposition in the National Assembly. Because the Senate is arguably more representative of Kenya's ethnic groups, enhancing its powers would enable the meaningful protection of group autonomy.

4.4 Establishing Effective Procedures and Mechanisms for Public Participation and Accountability

The Constitution of Kenya, 2010 requires Parliament to facilitate public participation and involvement in its business. It also empowers the people to petition Parliament

[195] Constitution of Kenya Review Commission, Report of the Technical Working Group on Devolution of Power 14-15 (2005).

[196] Constitution of Kenya Review Commission National Constitutional Conference, Draft Constitution of Kenya 2004, Adopted by the National Constitutional Conference, 15th March 2004, article 121.

on any matter within its authority, and to recall legislators before the end of the term of the relevant house. Parliament has made an effort to implement these provisions of the Constitution through legislation and the standing orders.

4.4.1 Provisions of Standing Orders

On the question of public participation, the standing orders of both houses now give the public a unique and timely opportunity to participate in law-making by requiring committees which bills have been committed to facilitate public participation and take into account the views and recommendations of the public when they make their reports on the bills to the house.[197] This requirement promises to remedy a deficiency that characterized the law-making process in the past. Typically, there were different versions of bills, which made it quite difficult for the public to contribute to law making, as they did not know whether they were contributing to the definitive bill. Indeed, they were often dismissed for contributing to the "wrong" version of a bill. In addition, vested interests within government and other quarters often sought to control the process of preparing bills. They could then send to Parliament bills that had not been subjected to public scrutiny. And since parliament did not always have sufficient time or the expertise to scrutinize such bills, these vested interests invariably got such bills enacted into law.

The standing orders may now preclude this possibility, although their effectiveness will depend on the establishment of appropriate procedures that the committees can use to obtain the views and recommendations of the public. As framed currently, the standing orders also do not contain procedure for accounting to the public, so that it can know whether or not, and how, its views and recommendations on a bill have been considered. Accordingly, there is a need to establish procedures for ensuring public participation, such as "notice and comment" and public hearings. Under the notice and comment procedure, the public would be given, say, thirty days to submit comments on the draft bill. Alternatively, the committee could hold a public hearing over a stipulate period, if this procedure is deemed to be more appropriate to the particular bill. In either case, the committee would then be required to demonstrate, in its report to the House, how it has considered the views of the public in revising the bill for the consideration of the House. Essentially, the standing orders of both houses should therefore be revised to incorporate procedures such as notice and comment and public hearings, and time-lines for public participation and involvement in the consideration of bills.

[197] National Assembly, Standing Orders, section 127 (3); Senate, Standing Orders, section 128 (4).

4.4.2 Vetting and Approval of Public Officers

Parliament has also enacted the Public Appointments (Parliamentary Approval) Act[198] which establishes procedures for parliamentary approval of Constitutional and statutory appointments. It requires appointing authorities (such as the President in the case of Cabinet Secretaries and Principal Secretaries) to notify the relevant house of Parliament through the office of the Clerk once they have nominated a person for appointment.[199] The Clerk then invites the relevant committee of Parliament to hold an approval hearing, and notify the candidate of the time and place for the hearing.[200] It also requires the Committee to notify the public of the time and place for the hearing at least seven days before the hearing.[201] All approval hearings shall be open and transparent, although the committee has the discretion to hold the whole of part of the hearing in private.[202] In keeping with the recommendations of the Commonwealth Parliamentary Association, however, the decision to hold approval hearings, or part thereof, in private should be taken in public and reasons for the decision provided.

Prior to the approval hearing, candidates are required to fill a questionnaire, and submit it to the relevant committee of Parliament.[203] Among other things, nominees are required to provide information on their education, employment record, potential conflicts of interest, and to state their sources of income and financial net worth.[204] The Act makes it an offence to submit false information in the questionnaire, and stipulates that any form of canvassing by nominees shall lead to disqualification.[205] At the same time, it provides for public input in the approval hearing. It gives any member of the public the right, prior to the hearing, to furnish the Clerk with a written statement on oath containing evidence contesting the suitability of a candidate to hold the office to which the candidate has been nominated.[206]

The Act requires the committee to vet the candidates taking into account their academic credentials, professional training and experience, and personal integrity and background.[207] After vetting a candidate, the committee is required to table a report on the suitability of the candidate in the relevant House within fourteen days

198 Public Appointments (Parliamentary Approval) Act, No 23 of 2011.
199 Id., section 5.
200 Id., section 6.
201 Id.
202 Id.
203 Id., section 6 (8), Schedule.
204 Id., Schedule.
205 Id.
206 Id., section 6 (9).
207 Id., section 6 (7).

from the date on which the notification of the nomination was given.[208] And once the relevant House of Parliament is seized of the matter, it shall determine the suitability of the candidate "having regard to whether the nominee's abilities, experience and qualities meet the needs of the body to which the nomination is being made."[209]

So far, this Act has been applied in the vetting of the President's nominees for the positions of Cabinet Secretary and Secretary to the Cabinet. From these hearings, it emerges that Parliament is also adopting the practice of seeking the views of institutions such as the Ethics and Anti-Corruption Commission, the Kenya Revenue Authority and the Higher Education Loans Board on the suitability of nominees for public office.[210] Although the process of vetting Cabinet Secretaries has been criticized in some quarters as merely rubberstamping the choices of the executive, it can be a valuable mechanism for ensuring that only suitable candidates assume public office. For it to work effectively, however, Parliament needs to respect the recommendations of its committees. In the recent vetting exercise, for example, the National Assembly's Committee on Appointments rejected the President's Cabinet Secretary nominee for the Ministry of East African Affairs, Commerce and Tourism. The Committee was not satisfied "with the capacity of the nominee to handle functions of the Ministry she was nominated for and therefore found the nominee not suitable for appointment."[211] However, the National Assembly approved this nominee. At any rate, the rejection of a nominee by a committee may serve the salutary purpose of discouraging future unsuitable persons from offering their candidature out of the fear of public embarrassment. Further, such a rejection undermines the authority of the nominee and ought to be taken seriously by Parliament and the appointing authority. Secondly, the process can only work if more members of the public participate in the approval hearings by submitting evidence contesting the suitability of candidates to hold office. But given the ineffectiveness of existing laws dealing with witness protection, for example, it could be the case that potential witnesses fear victimization by nominees and their nominators. Thirdly, the relevant committees of Parliament only have fourteen days to vet candidates for public office. A need therefore arises to resource these committees adequately if they are to do their work effectively within this short duration. For example, these committees should have sufficient resources to hire competent investigators.

[208] Id., section 8.
[209] Id., section 7.
[210] See, e.g., National Assembly, "First Report of the Committee on Appointments on the Vetting of the Cabinet Secretaries Nominees," 14 May 2013.
[211] Id. at 67.

4.4.3 Publication of Committee Reports

Parliament is also enhancing public participation in its processes by publishing the reports of its committees in a timely manner. The standing orders of both houses require the Clerk to publish reports of committees in the parliamentary website within forty eight hours after the reports have been tabled in the relevant house.[212]

4.4.4 Petitions

The rules governing the right of the public to petition Parliament and to recall legislators are not appropriate. On the subject of public petitions, the standing orders of both houses provide that a petition can be submitted to the Clerk by a petitioner or, where the Speaker consents, by a Member of Parliament on behalf of the petitioner.[213] Upon receiving the petition, the Clerk is required to ascertain that it meets the requirements of the standing orders and the law before forwarding it to the Speaker for tabling in the relevant House. These requirements are quite formal and elaborate. For example, the petition must be free of alterations and interlineations, indicate whether any efforts have been made to have the matter addressed by a relevant body and whether there has been any response from that body or whether the response has been unsatisfactory, indicate whether the issues in respect of which the petition is made are pending before any court of law or other Constitutional or legal body, and state the petitioner's prayer.[214] The standing orders also require the Clerk to inform the petitioner of the decision of the House within fifteen days after the decision is made. Further, they require the Clerk to keep and maintain a register of all petitions and the decisions of the House. This register is accessible to the public. These requirements are drawn from the Petition to Parliament (Procedure) Act of 2012.[215] But these requirements are unduly formalistic, and may force potential petitioners to seek the services of lawyers before they can submit petitions to Parliament. Those who cannot afford the services of lawyers would therefore be discouraged from accessing Parliament. The role of Parliament is to represent the people, who should therefore approach it unrestrained by technicalities of procedure. For example, when a citizen wants an issue addressed, it really should not matter whether they have made efforts to have the matter addressed by a body other than Parliament for the simple reason that many citizens just do not know where to go to have their issues resolved. Given prevalent levels of poverty and ignorance, a simple letter stating the petitioner's request should suffice. It would then be up to Parliament to establish the required mechanisms to enable the office of the Clerk to sieve petitions, with a view to placing

[212] National Assembly, Standing Orders, section 199 (7); Senate, Standing Orders, section 201 (7).
[213] National Assembly, Standing Orders, section 220; Senate, Standing Orders, section 217.
[214] National Assembly, Standing Orders, section 223; Senate, Standing Orders, section 220.
[215] Petition to Parliament (Procedure) Act, No. 22 of 2012.

relevant petitions before the House and referring the rest to other competent bodies. While such an approach would increase the work of the office of the Clerk, it would greatly enhance public access to Parliament.

4.4.5 The Right of Recall

On the right of recall, the Elections Act 2011 provides for the grounds on which a member of Parliament may be recalled and the procedure to be followed.[216] Under this Act, the electorate of a county or constituency may recall their Member of Parliament (MP) before the end of the term of the relevant House on three grounds.[217] First, that the MP has been found, after due process of law, to have violated the provisions of Chapter Six of the Constitution, which deals with leadership and integrity. Second, that the MP has been found, after due process of law, to have mismanaged public resources. Finally, that the MP has been convicted of an offence under the Elections Act. Where such a ground is established, a recall of the MP can only be initiated where the following four conditions are met. First, there must be a judgment or finding of the High Court confirming the ground forming the basis for the petition. Second, a recall can only be initiated twenty four months after the election of the MP and not later than twelve months before the next general election. Third, the electorate can only file one petition during the term of the MP. And fourth, the petitioner must not be a person who unsuccessfully contested an election under the Act. Where these conditions are met, the petition is filed with the IEBC.

But in order for the IEBC to receive the petition, it must adhere to the following conditions.[218] First, it must be signed by a petitioner who is a voter in the constituency or county and was registered to vote in the election in respect of which the recall is sought. Second, the petition must be accompanied by an order of the High Court confirming the ground for the recall, which must be specified in the petition. Third, the petition must contain a list of the names of at least 30% of the registered voters. Further, this list must contain the names and contact details of at least 15% of the voters in more than half of the wards in the county or constituency. And the voters supporting the petition must represent the diversity of the people in the county or constituency. Fourth, the petition must be accompanied by the prescribed fee. After verifying that these requirements have been met, the IEBC issues a notice of recall to the Speaker of the relevant House. Thereafter, the IEBC holds two successive elections, namely a recall election and a by-election. First, it holds a recall election, which can only be valid if the number of voters who concur in the recall election

[216] Elections Act, No. 24 of 2011.
[217] Id., section 45.
[218] Id., section 46.

consists of at least 50% of the total number of registered voters in the affected county or constituency.[219] If the recall election is valid and results in the removal of the MP (by a simple majority of the voters voting in the recall election), the IEBC holds a by-election at which the MP who has been recalled may run.[220]

These are stringent requirements, and it is doubtful whether they facilitate the attainment of the object of the right of recall. The grounds upon which this right can be exercised are also quite limited. But what exactly is the object of the right of recall? In answering this question, we need to figure out the intention of the people in including this provision in the Constitution. According to the Final Report of the Constitutional of Kenya Review Commission, the people wanted a Parliament that was more accountable to them and expressed the view that "the Constitution should create a mechanism to enable people to monitor the performance of elected representatives and to recall them if their performance is not up to standard."[221] Further, the people saw the right of recall as a manifestation of their sovereignty.[222] At the same time, however, the people sought to protect this right from abuse, which would among other things encourage frivolous harassment of MPs and discourage qualified persons from seeking public office.[223]

Essentially, a balance is therefore required between giving MPs the freedom they no doubt require to do their work without the threat of unwarranted recalls, and ensuring that they remain accountable to the electorate during their term of office. Arguably, the Elections Act tilts this balance in favor of MPs. First, the grounds on which the right of recall can be exercised are limited. For example, they exclude non-performance, which is the primary reason the people gave in support of the inclusion of the right of recall in the Constitution. In this respect, we can learn from the experience of other countries, which provide for the right of recall. In the United States of America, for example, most states give registered voters the right to initiate the recall of public officials on broad grounds, such as lack of fitness, incompetence, neglect of duties, corruption, or failure to perform duties prescribed by law.[224] Arguably, serious violations of ethical rules for legislators should also constitute a ground for recall.

Second, it is arguable that the grounds stipulated by the Act should, by operation of the law, disqualify MPs from continuing to hold office. Once it has been established

[219] Id., section 48.
[220] Id., section 47.
[221] Constitution of Kenya Review Commission, Final Report of the Constitution of Kenya Review Commission 164 (2005).
[222] Id. at 172.
[223] Id. at 173.
[224] See, e.g., National Conference of State Legislatures, "Recall of State Officials" (2011) available at <http://www.ncsl.org/legislatures-elections/elections/recall-of-state-officials.aspx>

by the due process of law that an MP has violated the Leadership and Integrity Act, or has mismanaged public resources, or has been convicted of an offence under the Elections Act, the tenure of the MP should end automatically. In such a case, the Speaker of the relevant House should simply declare the office of such an MP vacant and ask the IEBC to hold a by-election. Indeed, it would be absurd for an MP who has been found guilty of committing these offences to subject taxpayers to the unnecessary expense of a recall election and a by-election. In other words, the grounds specified in the Elections Act are not relevant to the issue of recall, which essentially concerns the performance of MP affected MP.

Third, the requirement that the ground for the recall petition must be certified by the High Court is unduly restrictive of what is essentially a political process. It could be that this stringent requirement seeks to free MPs from an ever-present threat of recall so that they can work without hindrance.[225] This might also explain why the Act regulates the periods in the term of an MP when a recall petition may be entertained. Nevertheless, the electorate should be given the freedom to recall an MP who is not performing, if the petitioners can persuade a representative segment of the electorate of the merits of a petition. And it should not matter that the petitioner unsuccessfully contested an election under the Act, for the simple reason that the focus should be on the performance of the MP in question. In other words, incompetence will not acquire a different identity because the person raising it was a competitor of the affected MP. Indeed, this provision of the Election Act is arguably un-Constitutional because it restricts who can file a recall petition, while the Constitution extends the right to "the electorate," which logically includes persons who have unsuccessfully contested elections in the past. The recall process should therefore be left to the vagaries of politics, once sufficient thresholds have been established to ensure that the voters supporting the petition represent the majority of the electorate in the county or constituency.

It is important to evaluate the thresholds established by the Act. In essence, the Act provides that a recall petition must be supported by at least 30% of the registered voters, and that a recall election can only be valid if the number of voters who concur in it consists of at least 50% of the total number of registered voters in the affected county or constituency. These are very high thresholds, considering that voter turnouts rarely consist of 100% of the registered voters. Therefore, MPs are invariably elected only by a segment of registered voters in practice. It therefore seems absurd to base the removal of MPs on thresholds based on registered voters when in fact they are elected only by a section of the registered voters. In a constituency of 5000 registered voters, for example, it would mean that the recall of an MP elected by 40% (or 2000

[225] See Jack Maskell, "Recall of Legislators and the Removal of Members of Congress from Office" 12 (2012).

votes) of the registered voters would require the support of 30% (or 1500 votes) of the registered voters. Further, it would mean that the recall election would only be valid if 2500 voters (that is 50% of the registered voters) concur in it. In other words, the recall petition would need to have been supported by nearly the same number of people who voted the MP into office, and if it were to be valid the recall election would need the support of 500 more votes than the votes that took the MP to Parliament in the first place. This perhaps explains why in some countries, the requirement is that the petition should be based on a percentage of the vote in the last election for the office in question.[226] In California, for example, the requirement is that a recall petition must be supported by at least 12% of the last vote for the office.[227]

4.5 Observing the Rule of Law in the Determination of the Remuneration of Legislators

Kenya recently witnessed a conflict concerning the remuneration of legislators that pitted the National Assembly against the Salaries and Remuneration Commission (SRC). Although this conflict now seems to have abated, following the conclusion of a deal that was mediated by the Deputy President,[228] it raises a fundamental issue concerning the observation of the rule of law by both parties in the determination of the remuneration of legislators.

4.5.1 The Salaries and Remuneration Commission (SRC)

The mandate of the SRC is to set and regularly review the remuneration and benefits of state officers, and advise national and county governments on the remuneration and benefits of all other public officers. In performing these functions, the Constitution requires the SRC to take four principles into account: the need to ensure that the total public compensation bill is fiscally sustainable, the need to ensure that the public services attract and retain skilled personnel, the need to recognize productivity and performance, and transparency and fairness.[229] Further, the Salaries and Remuneration Commission Act requires the SRC to be "guided by the principle of equal remuneration to persons for work of equal value," and to "take into account the recommendations of previous commissions established to inquire into the matter of remuneration in the public service." [230]

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[226] National Conference of State Legislatures, supra note 223.
[227] State of California, "Procedure for Recalling State and Local Officials" 11 (2007).
[228] See, e.g., Alex Ndegwa, "Members of Parliament Agree to Pay Set by Salaries and Remuneration Commission," Standard, 12 June 2013.
[229] Constitution of Kenya 2010, art. 230 (1).
[230] Salaries and Remuneration Commission Act, No. 10 of 2011, section 12.

Sometime in 2012, the SRC carried out a job evaluation exercise, in which it was assisted by the World Bank and PricewaterhouseCoopers Limited, a consultancy firm.[231] The legislature was represented at this exercise by an officer of the Parliamentary Service Commission.[232] It is from this exercise that the SRC established a new pay structure which it proceeded to publish in the Kenya Gazette. But upon assuming office in March 2013, legislators expressed the view that their salaries were not sufficient, and that the SRC's job evaluation had been wrong and unconstitutional.[233] Second, they alleged that the SRC had not taken into account previous reports on the remuneration of MPs, contrary to the requirements of the Salaries and Remuneration Act. Third, they alleged that the SRC's pay structure would occasion a large disparity in remuneration between the decision-making organs of the three arms of government and would in particular disadvantage the legislature.[234] Fourth, they alleged that the pay structure established by the SRC would undermine the independence of the legislature, and undermine its ability to attract individuals of high professional caliber and integrity to vie for the office of MP.[235] Last but not least, they claimed that they had not been given an opportunity to participate in the job evaluation exercise which formed the basis of the pay structure established by the SRC.[236] For these and other reasons, the National Assembly purported to annul the SRC's gazette notices and declared that the remuneration of MPs would continue to be governed by the National Assembly (Remuneration Act) and the Parliamentary Pensions Act.[237]

4.5.2 Responses of the Legislature and Reaction of Citizens to SRC Recommendations

The approach of the legislature in handling this dispute is contrary to the rule of law, and does not endear legislators to the public. In effect, by annulling the SRC's gazette notices and threatening to disband it, the National Assembly refused to submit to the jurisdiction of the SRC. This may explain why the majority of Kenyans favored the SRC in this dispute.[238] Indeed, it is arguable that legislators had genuine issues against the SRC. For example, the SRC has not explained whether or how it complied with the requirement that it must take into account the recommendations of previous

[231] National Assembly, "First Report of the Committee on Delegated Legislation on the Constitutionality of the Kenya Gazette Notice Nos. 2885, 2886, 2887 and 2888 Published in the Kenya Gazette of 1st March, 2013 by the Salaries and Remuneration Commission," 23 May 2013 at 13 (hereinafter, Report of Committee on Delegated Legislation).
[232] Id., at 14.
[233] Id., at 15.
[234] Id., at 18.
[235] Id., at 19.
[236] Id., at 20.
[237] Report of Committee on Delegated Legislation, supra note 231 at 32.
[238] See, e.g., Charles Mwaniki, "Kenyans Support SRC in Salary Row," Business Daily, 15 May 2013.

commissions established to inquire into the remuneration of MPs, such as the Report of the Akiwumi Commission to Review the Terms and Conditions of Service for Members of the National Assembly of 2010. Second, the Salaries and Remuneration Commission Act does not repeal the legislation governing the remuneration of legislators, such as the National Assembly (Remuneration Act)[239] and the Parliamentary Pensions Act.[240] Therefore, the legislators' argument that their benefits are saved by the Sixth Schedule of the Constitution – meaning that their terms of service are to be determined in accordance with existing legal provisions – has some merit.[241] Third, it is arguable that the SRC exceeded its powers in establishing the disputed pay structure. In one of its gazette notices, the SRC provided that MPs would be entitled to sitting allowances for a maximum of four sittings per week.[242] Its effect, as the legislators pointed out, was to "regulate the number of sittings a committee of Parliament may have, in violation of the independence of Parliament."[243]

From the foregoing, there is a need to harmonize the provisions of the National Assembly (Remuneration Act) and the Parliamentary Pensions Act governing the benefits of MPs with the Salaries and Remuneration Commission Act. Second, the SRC needs to establish clear and transparent procedures that will enable it to adhere to the provisions of the Constitution and the Salaries and Remuneration Commission Act in the performance of its functions. In this respect, it should be emphasized that the SRC is an administrative agency which must ensure that its decisions are lawful, reasonable and procedurally fair. Third, Parliament needs to submit to the jurisdiction of the SRC, if only because doing so would enhance its legitimacy. Submitting to the SRC would also contribute to strengthening this new institution. As we have seen, it is arguable that Parliament had legitimate grievances against the SRC. But these grievances have not been ventilated, to the detriment of both institutions.

4.6 Establishing a Credible and Enforceable Ethics Regime

By far the most challenging task that Parliament faces today is to establish a credible ethics regime and enforce it. Due to lax ethics rules and the absence of effective enforcement mechanisms, legislators remain vulnerable to corrupt influence, which only serves to undermine the effectiveness, credibility and legitimacy of Parliament. In addition, an effective ethics regime is necessary because it is an important safeguard for the democratic system.[244]

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239 National Assembly (Remuneration) Act, Chapter 5, Laws of Kenya.
240 Parliamentary Pensions Act, Chapter 196, Laws of Kenya.
241 Report of Committee on Delegated Legislation, supra note 231 at 26.
242 Id., at 31.
243 Id.
244 Riccardo Pelizzo & Rick Stapenhurst, "Legislative Ethics and Codes of Conduct," in The Role of

4.6.1 The Purpose of an Ethics Regime

An ethics regime serves two purposes. First, in ensures that "each citizen has the right to exercise as much influence on the political process as any other citizen."[245] It does so by preventing wealthier citizens from corrupting legislators with a view to acquiring additional influence over the political process.[246] Secondly, it prevents corrupt politicians from utilizing "illicitly obtained resources for their electoral campaigns, thus acquiring an advantage over the other candidates and improving their chances of being elected."[247] Where this happens, corrupt candidates "distort electoral competition and prevent the people's will from being properly expressed," thereby posing a threat to democracy.[248] A credible ethics regime is also an instrument for maintaining public confidence in the legislature.[249]

4.6.2 Kenya's Parliamentary Ethics Regime

Currently, the parliamentary ethics regime consists of the standing orders, the Code of Conduct and Ethics for members of the National Assembly, and the Leadership and Integrity Act.[250]

4.6.2.1 The Standing Orders

The standing orders require members who wish to speak on matters in which they have a personal interest to declare that interest before they speak.[251] Personal interests are defined broadly to include pecuniary interests, proprietary interests, personal relationships and business relationships.[252] However, the standing orders do not provide mechanisms for administering the declaration of personal interests, or the sanctions to be imposed where legislators violate this rule. The Standing Orders also provide that "A member against whom an adverse recommendation has been made in a report of a select committee that has been adopted by a House of Parliament shall be ineligible for nomination as a member of *that* committee."[253] In my view, this provision is unduly restrictive. It literally means that a legislator against whom an

Parliament in Curbing Corruption 197 at 198 (Rick Stapenhurst et al, eds., World Bank, 2006).

245 Id.

246 Id.

247 Id.

248 Id.

249 Id.

250 Leadership and Integrity Act, No. 19 of 2012.

251 National Assembly, Standing Orders, section 90 (1); Senate, Standing Orders, section 91 (1).

252 National Assembly, Standing Orders, section 90 (2); Senate, Standing Orders, section 91 (2).

253 National Assembly, Standing Orders, section 173 (4); Senate, Standing Orders, section 175 (4) (Emphasis supplied).

adverse recommendation has been made in a report of one select committee is free to serve as a member in all other select committees. However, adverse recommendations would arguably undermine the competence of such a legislator to serve on any select committee. Perhaps the concern of this standing order is to ensure that Parliament has sufficient numbers of legislators who can serve on its committees, since numerous adverse recommendations would greatly reduce the pool of committee members if such recommendations were to constitute a bar to membership of committees. However, this concern could be addressed by requiring that the Parliament or the affected legislators should first resolve the adverse recommendations before they can become eligible to serve on committees.

4.6.2.2 The Code of Conduct and Ethics

The Powers and Privileges Committee of the National Assembly, pursuant to the provisions of the National Assembly (Powers and Privileges) Act, establishes a Code of Conduct for Members of the National Assembly. This Code requires legislators to act with integrity and objectivity when voting, asking questions, or carrying out any other parliamentary duties.[254] Second, it prohibits legislators from allowing "any personal benefit or interest, including the benefits or interests of relatives or friends" to influence how they perform their duties.[255] Third, it prohibits legislators from incurring financial or other obligations that might unduly influence the performance of their duties.[256] It also states that legislators "shall not tolerate corruption in any form."[257] But as far as the enforcement of these rules is concerned, the Code of Conduct merely provides that where a legislator has committed a breach of the code, appropriate action will be taken in accordance with the National Assembly (Powers and Privileges) Act. Under this Act, the Powers and Privileges Committee is responsible for enforcing violations of the Code of Conduct, either of its own motion, or pursuant to a complaint made by any person.[258] After inquiring into the alleged breach of the code, the committee reports its findings to the Assembly, which considers the report and takes disciplinary action (including suspending the legislator in question) if it so desires.[259] This Act also prohibits members from accepting or receiving bribes or gifts in order to promote or oppose a matter submitted for the consideration of the Assembly or its committees. The penalty for violating this requirement is imprisonment for a term of up to two years or a fine not exceeding KES 10,000, or both.[260] The offending legislator may also be required to forfeit the bribe or gift.[261]

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[254] Code of Conduct and Ethics for Members of the National Assembly, section 14.
[255] Id.
[256] Id., section 15.
[257] Id,, section 19.
[258] National Assembly (Powers and Privileges) Act, section 10.
[259] Id.
[260] Id,, section 24.
[261] Id.

4.6.2.3 Leadership and Integrity Act, 2012

The Leadership and Integrity Act gives effect to Chapter Six of the Constitution of Kenya, 2010, which establishes principles of leadership and integrity. It requires state officers, such as legislators, to declare personal interests and to "use the best efforts to avoid being in a situation where personal interests conflict or appear to conflict with official duties."[262] In particular, the Act imposes a duty on legislators to declare any pecuniary interest or benefit in any debate or proceeding of the Parliament or its committees, or transactions or communication between the legislator and other public officials.[263] To facilitate the enforcement of these requirements, it requires the Clerk to maintain a register of conflicts of interest, and open it to the public for inspection.[264] The idea here is to give legislators "some discretion to decide when there is a risk of conflict" but then use the public (including the media and civil society) to "scrutinize the disclosed interests and judge whether conflicts have occurred."[265] It should be noted that even where a legislator has declared that they have a personal interest in a matter under consideration by the Parliament or its committees, he or she might still contribute to debate on the matter. However, legislators who have a personal interest in a matter should either be required to recuse themselves or be prohibited from voting on such a matter.

Secondly, the Act requires public entities (presumably including Parliament) to establish specific Leadership and Integrity Codes, and to require state officers to sign and commit to this Code at the time of assuming office.[266] In this respect, a need arises to harmonize the requirements of the National Assembly (Powers and Privileges) Act and the Leadership and Integrity Act. This includes revising the Code of Conduct and Ethics for Members of the National Assembly so that it not only adheres to the requirements of the Leadership and Integrity act, but also applies to members of the Senate. And to facilitate compliance with the ethics regime, the revised code of conduct should collate "the legal and regulatory obligations of MPs and their staff in one place."[267] Doing so would make "it easier for MPs to find the rules pertaining to any particular situation in which they find themselves and also [help] the media and the public to check whether Mps are living up to expectations."[268] Compliance with the code would also be enhanced if MPs were trained regularly on the requirements of the ethics regime.[269]

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[262] Leadership and Integrity Act, section 16.
[263] Id,, section 9.
[264] Id,, section 10.
[265] OSCE/ODIHR, "Background Study: Professional Ethics and Ethical Standards for Parliamentarians" 43 (2012).
[266] Leadership and Integrity Act, section 40.
[267] OSCE/ODIHR, supra note 264 at 34.
[268] Id,.
[269] Pelizzo & Stapenhurst, supra note 244 at 204.

Another interesting feature of the Leadership and Integrity Act is that it seeks to regulate the private conduct of legislators by requiring state officers to "conduct private affairs in a manner that maintains public confidence in the integrity of the office."[270] Finally, the Act requires former state officers to observe a two-year "cooling off period" before they can "be engaged by or act for a person or entity in a matter in which the officer was originally engaged in as a state officer."[271] This is an important requirement since "an MP's plans for his or her future career can influence how he or she behaves while in Parliament."[272] On the one hand, "MPs might abuse their power to favor a certain company, with a view to ingratiating themselves and gaining future employment."[273] Conversely, "once working in the private sector, they might influence former colleagues to favour their new employer."[274] The cooling off period diminishes their "capacity to exercise undue influence or use information learned while in office."[275]

However, a credible mechanism for enforcing the ethics regime is required. In this respect, we can learn from the experience of other countries, where three approaches have been deployed in enforcing ethics regime.[276] Under the first approach, which has been adopted in Taiwan and India, a regulatory commission that is external to, and independent from, the legislature administers the ethics regime. This commission investigates accusations of misbehavior, reports back its findings to the legislature, and in some cases is empowered to punish violators.[277] A second approach involves establishing a regulatory mechanism within the legislature, as in Ireland and the United Kingdom. In these countries, the regulatory mechanism is created through the standing orders, and "takes the form of a parliamentary committee composed of members, combined with an independent parliamentary commissioner or commission."[278] In the UK, for example, the Parliamentary Commissioner for Standards maintains the Register of Members' Interests, and investigates alleged violations before reporting to the Select Committee on Members' Interests. It is then up to this Committee to determine whether to report the case to the full House. The third approach is one under which members police themselves, as happens in the case of the United States Congress. Here, a special committee comprised of legislators receives complaints on

[270] Leadership and Integrity Act, section 32.
[271] Id., section 28.
[272] OSCE/ODIHR, supra note 265 at 58.
[273] Id.
[274] Id.
[275] Id.
[276] National Democratic Institute for International Affairs, "Legislative Ethics: A Comparative Analysis," Legislative Research Series Paper #4 at 18-20 (1999).
[277] Id., at 18.
[278] Id., at 19.

ethics violation, investigates, and recommends appropriate sanctions to the House.[279] But this model is problematic, since it depends on legislators to investigate and sanction their fellow members.[280] It has thus been noted in the jurisdictions where this model has been adopted that legislators "rarely report improprieties of their colleague and they even more rarely criticize colleagues in public for neglecting their legislative duties."[281] Accordingly, the other two approaches may offer better options for our Parliament since they include actors external to the legislature.

[279] Id., at 20.
[280] Id.
[281] Id., citing Dennis F. Thompson, Political Ethics and Public Office 108 (Harvard University Press, 1987).

5.0 CONCLUSION

It is quite evident that Kenya's Parliament has become an effective, and increasingly democratic, legislature. As we have seen, however, a number of significant institutional reforms are now required, if Parliament is to become truly democratic and legitimate. First, there is a need to enhance democracy in the decision-making processes of Parliament so that the views of all citizens are taken into account. In this respect, Parliament requires procedural rules that will promote deliberation and consensus-building in its decision-making processes, as opposed to encouraging a majoritarian approach to the resolution of issues, which is often divisive. Second, there is a need to clarify the roles of the National Assembly and the Senate in the passage of legislation. The two Houses need to negotiate and agree on how they will perform their roles, particularly where the Constitution does not stipulate which House has the primary responsibility of originating bills. Third, Parliament should establish effective procedures for public participation in, and accountability of, legislative processes. In particular, Parliament needs to adopt a permissive approach to public petitions, so that the majority of citizens, who are poor and uneducated, can access it unhindered by technicalities of procedure.

The grounds for exercising the right of recall should also be expanded, and the procedural thresholds reviewed, so that the people can assert control over non-performing legislators. Fourth, there is a need to observe the rule of law in the determination of the remuneration of legislators. Here, there is a need to harmonize the applicable laws and establish clear and transparent procedures to regulate how the SRC exercises its powers. In addition, Parliament needs to appreciate that it would greatly enhance its legitimacy by submitting to the jurisdiction of the SRC. Above all, Parliament needs to establish a credible and enforceable ethics regime. This entails harmonizing the laws regulating the conduct of legislators and establishing a mechanism for enforcing the ethics regime that is transparent and accountable to the public.

CODE OF CONDUCT FOR MEMBERS OF PARLIAMENT IN KENYA

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A Paper prepared for ICJ Kenya

1.0 INTRODUCTION

For Parliament to function in the manner intended by the Constitution, various mechanisms must be in place that facilitates the development of requisite technical capacity of members and staff. When this capacity is visible to Citizens, Parliament's legitimacy is enhanced and public confidence grows. Public confidence is further inspired by the view that the members of Parliament are acting in public interest and that integrity standards are enforced to ensure ethical behavior in the political class. The extent to which the Kenyan Parliament inspired public confidence is debatable, going by the numerous headlines highlighting rampant cases of impropriety by members of Parliament and the view that the members often pursue a selfish agenda to the detriment of the public.

The research analyses the Code of Conduct for MPs in Kenya and evaluates the effectiveness of the Code of Conduct in managing unethical and corrupt behavior for MPs. The analysis recognizes that the Code is supported by other mechanisms aimed at combating corruption including an anti-corruption commission and the courts. Further, the research captures the comparative analysis of implementation of Codes of Conduct for MPs in other countries. Lastly, the research makes recommendations on strengthening the enforcement of the Code to ensure its objectives are achieved.

2.0 FRAMEWORK OF A CODE OF CONDUCT

Countries adopt different strategies of ensuring that the conduct of public officials is above board and that the private interests of public officers do not impede delivery of public services. The strategies includes enactment of anti-corruption laws criminalizing unethical conduct, establishment of anti-corruption commissions, prosecutions of persons suspected of corruption, public education campaigns, wealth declaration mechanisms and codes of ethics. In Kenya, one of the strategies adopted to induce ethical behavior among MPs is the Code of Conduct. The Code is formulated as part of the Public Officers Ethics Act, 2003.

A code of conduct is essentially a set of guidelines intended to inspire or improve the conduct or ethical behavior among an identifiable group . It is a set of ethical principles, ideals or values of an organisation or profession . Such a code of conduct for Members of Parliament MPs may be mandated by law. However, its administration, in the first instance, falls under the authority of Parliament, not the courts. Codes of conduct are meant to address behavior that may not be criminal but is odious or damaging to the institution of Parliament.

2.2 The Role of Codes of Conduct

Codes of conduct exist alongside criminal provisions dealing with office holders' misbehavior. The code supplements rather than substitutes the criminal law relating to abuse of office. The codes of conduct are usually preventative, aiming primarily to inspire good behavior and prevent misbehavior before it happens. Criminal law aims at halting and punishing behavior.

Codes of conduct outline the principles of proper conduct. They are aspirational and general in nature. A legislative code of conduct regulates behavior of legislators by establishing acceptable behavior. The code promotes a political culture that emphasizes propriety, correctness, transparency, and honesty. The code requires members to disclose their interests in assets and liabilities and impose additional restrictions. The disclosure of conflict of interests protects the public.

The aim of formulating a code of conduct is to regain the public confidence and trust in Parliament. The codes are publicized to demonstrate commitment by Parliament to adhere and enforce to the code and clarify to voters the appropriate behavior for MPs. Parliament creates structures for enforcing the code to prevent legislative

misconduct, punish cases of misconduct and improves the conduct of legislators. Corruption undermines the democratic process since the citizens with financial resources use the resources to influence and corrupt the electorate and the electoral system. The people's will is not expressed freely and is undermined . Legislative misconduct dissipates public trust in the democratic system. The success of an ethics regime is a function of the severity of the sanctions designed for the violations.

Codes of conduct foster trust in Parliament, MPs and system of parliamentary democracy; promote functioning of parliament; should be capable of compliance; refocus public attention from conduct of MPs and their ethics to appropriateness of policy and deliberations; avoids litigation on application and interpretation of the code; improves parliament's position as a creator of law and a check on the Executive; permits parliament to be open and protects privacy; allows for knowledge and acceptance of the code by MPs and citizens; establishes fair stable and public enforcement systems; fits within the existing culture of discipline mechanisms; and must be impartially administered. Formulation of the code in developing countries may be concerned with preventing corruption rather than improving public confidence in the political system.

2.3 Reasons for Formulating a Code of Conduct

Various justifications have been given for the establishment reasons have been given:-

2.3.1 The government may formulate the Code to prevent and detect corruption in public offices.

2.3.2 The code may be formulated to bolster public confidence in politicians and the political system. The code of conduct can be used to detect, investigate and punish wrong doing and to pre-empt wrong doing and assure the public that parliamentarians are not acting out of private interest and broadly foster public trust in the system of government. The code clarifies to voters what is considered misconduct for members of Parliament and creates reassurance that improper actions are not occurring as a matter of course.

2.3.3 The code may be formulated to guide MPs concerning what constitutes acceptable behavior. It helps them avoid unintentional abuse of office and fosters consensus regarding acceptable behavior.

2.3.4 The requirement of the code by international development agencies as part of the necessary governance reforms necessary for funding. For example, countries where corruption is widespread, the World Bank and the International Monetary Fund may demand that a code of conduct be formulated before any funds are released to the state. This reason will often be viewed as a procedural

hurdle to be overcome before receipt of funding, since it is not an internal decision of the government.

2.4 General Features of A Code Of Conduct

As stated, the general objective of a code of conduct is to inspire desirable behavior among MPs. The code has the following features:-

2.4.1 Aspirations

These are general principles, which MPs should aspire to uphold. Examples include requirements for MPs to uphold public trust, act honestly and in public interest, and make decisions objectively.

2.4.2 Prescriptions

The code establishes particular rules that MPs are obliged to follow. Examples include disclosure of private interests, written declaration of assets and liabilities; shares in private companies, property, other assets, and debts. The disclosure allows Parliament and the public have the ability to judge whether a member's private interests have influenced decision making in parliament or in his or her work.

2.4.3 Proscriptions

The code prohibits particular actions or behavior. An example is the limitation of members of Parliament to accept gifts . The code must meet the technical characteristics of any law as spelt out by Lon Fuller . These characteristics are:-

2.4.3.1 The evaluation of the action must be grounded on a rule, and is not ad hoc.

2.4.3.2 The rules must be publicized.

2.4.3.3 The rules must not be retroactive.

2.4.3.4 The rules must be easy to understand.

2.4.3.5 The rules must not be contradictory.

2.4.3.6 The rules must be such that the citizens have the ability to obey. The rules should be capable of compliance.

2.4.3.7 The rules must maintain a degree of stability over time.

2.4.3.8 The rules as formulated and publicized must be in agreement with their actual administration.

2.5 Sanctions by Codes of Conduct

A code of conduct provides sanctions that could be imposed on an MP in the event that he or she contravenes the code. Sanctions will be imposed after the consideration of the complaint by a parliamentary committee and a determination of the action that should be taken. Some examples of the sanctions include as reprimand, withdrawal of privileges, restrictions from participating in proceedings relating to the matter in which the member has a conflict of interest, restrictions from all parliamentary or committee proceedings for a stipulated period, removal from parliamentary positions, or a fine or expulsion from Parliament.

2.6 Enforcement and Administration of the Code

The enforcement and administration of the code has three components.

2.6.1 Administration

The agency collects MPs interest and assets declarations, gift receipts, private interest's disclosure, reviews the declarations, takes action in the cases where there is non- compliance or where the declaration implies wrong doing.

2.6.2 Investigations

The agency establishes if the code has been violated. The investigation may be prompted by the content of an interest or asset declaration or may be initiated in response to a request by an MP, citizen, parliament or the Speaker. An MP may request for an investigation on his or her own motion to clear allegations of wrong doing made against him or her. The investigative powers include powers to call for records from state agencies and possibly records of private institutions and power to summon MPs, state officials and private citizens to give evidence.

2.6.3 Advisory role

The agency may advice on how an action being considered would be viewed. This help MPs avoid objectionable activities and protect the reputation of parliament.

2.7 Enforcement and Oversight of the Code

2.7.1 Parliamentary Oversight

The Code of Conduct may be administered by Parliament through a Standing Ethics Committee. The Committee will have powers to summon and question MPs, public

servants, private organizations and citizens. The second model is where the House Speaker oversees the administration of the code. The Members are likely to accept the two systems because Parliament will have overall control.

The disadvantages of the system is that the enforcement of the Code can be subverted where there is general will by MPs to evade the code; the system can be politicized whereby the political party controlling the system may victimize its political opponents; and that the system may not prioritize the administration of the Code due to the heavy and involving parliamentary schedule and competing responsibilities.

2.7.2 Independent Officer

The code of conduct may be enforced by an ethics commissioner, who will be responsible for enforcing the code. The Commissioner is independent from Parliament and has the mandate and opportunity to examine the parliamentarians' assets, interests and other declarations. The system fosters public confidence due to its independence. The office administers the Code, oversees the conduct of members of legislature and makes reports to the legislature or a committee .If improperly implemented, the position can be impotent or may be seen to be politically biased. The Commissioner is unlikely to have powers to impose sanctions to MPs since it may rely on Parliament or a committee of Parliament to decide and impose sanctions. A clear relationship should be established between the Committee and the commissioner to ensure that their functions are complementary and not competitive.

2.8 Promulgation of the Code of Conduct

There are various ways in which a Code of Conduct may be promulgated:-

2.8.1 Standing Orders or formalized resolution of Parliament

Due to the level of control by MPs for the content of the Code, members are likely to accept the terms of the code. The code is unlikely to inspire confidence of the public in MPs and parliament, especially if the public confidence is already low. The resolutions and Standing Orders are relatively easy for MPs to modify. MPs may politicize and subvert the code.

2.8.2 Enshrined in Law

The code may be formulated as a law. Laws are difficult to amend unlike House resolutions. The inclusion of the code as part of the enforceable laws enhances public

confidence that the code will be implemented. However, the legal status may blur the distinction between the legislative and judicial branches of government since the judiciary will be mandated to enforce the code against MPs. The MPs who are suspected of violating the code may mount legal and procedural challenges to avoid being disciplined under the Code.

2.8.3 Hybrid Approach

Law may mandate the code of conduct but the details of the code may be established as parliamentary resolutions or House orders. The law will outline the minimum terms of the code.

2.9 Criticism Leveled Against Codes of Conduct

Codes of conduct have been criticized as an ineffective method of enforcing ethical behavior in Parliament. The codes are unsuitable for parliamentary vetting since members are sourced from diverse backgrounds and lack shared values. The codes are inappropriate given the institutional nature of Parliament . This argument is flawed since parliament can have shared values sourced from the democratic system. The codes promote the functioning of Parliament and the democratic process. Another criticism is that Parliamentarians require independence to perform their duties properly and that codes restrict that independence. The counter argument is that the codes do not restrict parliamentary independence but promote transparency and accountability, which is compatible to the role of MPs. Further, it is argued that the codes are unlikely to be implemented thereby increasing public cynicism. Lastly, the majority political party may misuse the code to attack opponents. Political opponents will insulate a well-designed code of conduct from misuse.

3.0 THE LEGAL FRAMEWORK AND THE CODE OF ETHICS FOR MEMBERS OF PARLIAMENT IN KENYA

3.1 The National Values and Principles and Chapter 6 of the Constitution

Kenya ratified a Constitution in a referendum in 2010. The Constitution creates a new governance framework that places integrity as a fundamental qualification for holders of state and public offices. The Constitution stipulates the national values and principles that bind all state organs, public officers and all persons. These national values include the rule of law, democracy, participation of the people, human rights, non-discrimination, good governance, integrity, accountability, and transparency among others. The Constitution established the two-chamber Parliament comprising the National Assembly and the Senate, in place of the unicameral National Assembly. The Constitution separates membership and functions of the Executive from the Legislature. The national values and principles lay the basis for a national integrity framework that regulates the conduct of state and public officers. Previously, the National Assembly was required under the Public Officers Ethics Act to formulate a code of conduct for the MPs. The higher Constitutional standard of ethics means that members of the National Assembly and the Senate must formulate and comply with the provisions of an elaborate Code of Conduct and Ethics.

The Constitution provides that the authority assigned to a state officer is a public trust that must be exercised in a manner that is consistent with the purpose and objects of the Constitution, demonstrates respect for the people; brings honor to the nation and dignity to the office; and promotes public confidence in the integrity of the public office; and vests in the state officer the responsibility to serve the people, rather than power to rule over them . A state officer shall behave, whether in public and official life, in private life, or in association with other persons, in a manner that avoids any conflict between personal interests and public or official duties; compromising any public or official interest in favor of personal interest; or demeaning the office the officer holds.

The Constitution provides that Parliament shall enact legislation to establish an independent ethics and anti-corruption commission for the purposes of compliance with and enforcement of leadership and integrity provisions contained in chapter 6 of the Constitution. The legislation shall provide for procedures and mechanisms for effective administration of Chapter 6, prescribing penalties that may be imposed for contravention; providing for application of Chapter 6 to public officers; and making any other provisions necessary for ensuring the promotion of the principles

of leadership and integrity. Chapter 6 of the Constitution mandates Parliament to enact laws to establish an independent ethics and anti-corruption commission and to establish mechanisms and procedures for the effective administration of the Chapter. Parliament enacted the Ethics and Anti-Corruption Commission Act and the Leadership and Integrity Act. In 2003, the government enacted the Anti-Corruption and Economic Crimes Act and the Public Officers Ethics Act. At the time, the two statutes were the key laws relating to corruption and ethics of public officers.

The Constitution demands ethical behavior from members of Parliament by providing that an Act of Parliament that confers a direct pecuniary interest on members of Parliament shall not come into force until after the general election for members of Parliament . This provision has the net effect of prohibiting members of Parliament from unilaterally increasing their pay and benefits.

3.2 Ethics and Anti-Corruption Commission Act

The Ethics and Anti-Corruption Commission (EACC) is intended to vet public and State officers to ensure compliance with Chapter 6 of the Constitution. EACC shall comprise of a Chairperson and 2 Commissioners , who shall be appointed for a single term of 7 years and shall serve on a full time basis. The functions of EACC are to develop and promote standards and best practices in integrity and corruption and a code of ethics for state officers; receive complaints on breach of the code of ethics by public officers; investigate and recommend the prosecution of acts of corruption or violation of code of ethics to the Director of Public Prosecutions; recommend action that should be taken against a state or public officer alleged to have engaged in unethical conduct; public awareness; advisory services; and institute proceedings for purposes of recovery and protection of public property . EACC shall carry out investigation on its own initiative or upon a complaint and undertake preventive measures against unethical or corrupt practices.

3.3 Public Officers Ethics Act

The Act enforces ethical and integrity standards among public officers. It assigns the duty of monitoring compliance with the Act by state and public officers to responsible Commissions. These Commissions have formulated codes of conduct. The responsible Commission for the purposes of formulating and ensuring compliance with the Code of Conduct and Ethics for Members of Parliament is the Committee of Privileges while the Parliamentary Service Commission is the responsible Commission for employees for Parliament. The Committee of Privileges is established under the National Assembly (Powers and Privileges) Act. The Committee is the responsible entity for members

of the National Assembly, the President, the Speaker and the Attorney General. The Committee has formulated a Code of Conduct and Ethics for Members of Parliament as mandated by law.

The provisions of the Public Officers Ethics Act do not comply with the New Constitution and should be amended. For example, under the Repealed Constitution, the President, Cabinet Ministers and the Attorney General, were members of Parliament and were therefore subject to the guidelines issued by the Committee. Under the New Constitution, these State Officers are not members of Parliament. Further, the unicameral parliament under the Repealed Constitution was re-modeled into a bicameral Parliament. Whereas the Code formulated under the Act may apply to members of the National Assembly, a Code of Conduct for Senators has not been formulated.

Under the Act, the information collected from public officers in the declarations of wealth and liabilities must be kept confidential. Such information can be accessed by authorized staff of the responsible Commission; by a person authorized by an order of a High Court judge; by the police or any other law enforcement agency; or by the person who submitted the information or his or her representative. This provision restricts access to information and undermines the very purpose why the declarations were required in the first place. The provision contravenes article 35 (1) (a) of the Constitution which provides that all citizens of Kenya are entitled to access information held by the State as of right. No legitimate aim has been established in the Act justifying why access to information should be restricted.

The Committee has powers to investigate whether a public officer has contravened the Code of Conduct and Ethics . Such investigation may be commenced on the Committee's own motion or pursuant to a complaint . The Committee may delegate investigation powers to another body that shall conduct the investigations and report within a prescribed time. If the Committee finds that a person has contravened the Code, the Committee may take appropriate disciplinary action, or refer the matter to another person or body with the powers to take the appropriate action.

3.4 Anti- Corruption and Economic Crimes Act

The Act provides for prevention, investigation and punishment of corruption, economic crime and related offences. The Act is binding on members of Parliament. Corruption is defined as bribery, fraud, embezzlement or misappropriation of public funds, abuse of office, breach of trust or office involving dishonesty in connection with any tax, rate or impost levied under any law, or under any written law relating to elections to persons to public office.

Economic crime means the offence of fraudulently or unlawfully acquiring public property or public service or benefit; mortgaging, charging or disposing of any public property; damaging public property including using a computer or any other electronic machinery to perform any function that directly or indirectly results in loss or adversely affects any public service or revenue; or fails to pay taxes or fees, levies or charges payable to any public body or effects or obtains any exemption, remission, reduction or abatement from payment of taxes, fees, levies or charges. Any public officer who fraudulently makes payment or excessive payment from public revenues for sub-standard or defective goods, goods not supplied in full, or services not rendered or adequately rendered; willfully or carelessly fails to comply with any law or applicable procedures and guidelines relating to procurement, allocation, sale or disposal of property, tendering of contracts, management of funds or incurring expenditure shall be guilty of an offence.

Members of Parliament can commit offences under the Act while executing parliamentary duties of oversight, legislation and representation or in the management of funds allocated under the Constituency Development Fund. MPs serve as patrons of the Constituency Development Fund Committees. A Petition has been filed in the High Court of Kenya to determine the Constitutionality of the Constituency Development Fund. The basis of the challenge is that members of Parliament, opted to serve in the legislature are part of the legislative arm of the government. The lawmakers cannot purport to implement or execute the laws they have legislated. The execution is vested with the Executive. Further, the Constituency Development Fund as designed, conflicts with the function and role of the County Governments.

3.5 National Assembly (Powers and Privileges) Act

The Speaker may issue directions in the form of a Code of Conduct regulating the conduct of MPs while within the precincts of Parliament . The Act establishes the Committee of Privileges, chaired by the Speaker and consisting of ten other members. The members of the Committee other than the Speaker shall be nominated by the Sessional Committee of the Assembly. The quorum of the Committee shall be six including the chairman.

The Committee shall, either on its own motion or as a result of a complaint inquire into any alleged breach by any member of the code of Conduct or into any conduct of any member within the precincts of the Assembly (other than the Chamber) which is alleged to have been intended or likely to reflect adversely on the dignity or integrity of the Assembly or the member thereof, or is contrary to the best interests of the Assembly or the members.

The Committee shall, report its findings to the Assembly, after inquiry together with such recommendations as it thinks appropriate. The Assembly shall, in accordance with rules made by it, consider the report and the recommendations and may take such disciplinary action against the member concerned as provided by the rules. Any disciplinary action may include suspension from the service of the Assembly. This provision empowers the Committee to enforce the provisions of the Code. However, most of the complaints that have been considered by the Committee relate to unruly conduct of MPs and not ethical behavior.

3.6 The Standing Orders of the National Assembly and Senate Standing Orders

Standing Order Number 107 of the Standing Orders of the National Assembly relates to disorderly conduct in the Assembly. Conduct is grossly disorderly if the Member concerned creates actual disorder; knowingly raises a false point of order; uses or threatens to use violence against a member or another person; persists in making serious allegations without adequate substantiation in the Speakers opinion; deliberately gives false information to the House; otherwise abuses his or her privilege; votes more than once; or acts in a way that is detrimental to the dignity and orderly procedure of the House. The Speaker or the Chairperson of the Committee shall order any member whose conduct is grossly disorderly to withdraw immediately from the precincts of the Assembly, on the first occasion for the remainder of that day's sitting and on second or subsequent occasion during the same session, for a maximum of three sitting days, including the day of suspension.

Where the Speaker deems that the procedure is inadequate, the Speaker may name the Member for gross disorderly conduct on the invitation of a member of the House on a point of order. A member who is named shall be ordered by the Speaker to immediately withdraw from the Chamber and the precincts of the Assembly and shall during the period of suspension forfeit the right to access the Assembly and shall forfeit all the allowances payable during the period of suspension.

The provisions of the Standing Orders and the Senate aim to control conduct that interferes with proceedings in the House but not unethical behavior of members.

3.7 The Code of Ethics for the National Assembly

The Public Officer Ethics Act required the statutory and Constitutional commissions responsible for public officers to formulate Codes of Conduct that would be observed

by the state and public officers under their watch . As the chair of the Committee of Privileges, the Speaker of the Assembly published a Code of Ethics . The Code established standards of ethical conduct and behavior for members of the National Assembly. The Code is construed in a manner that does not interfere with the independence of Parliament or limits its legal rights.

The Code provides that it does not replace or repeal the laws and rules relating to the conduct of members of the National Assembly Members, who are expected to obey all applicable laws and rules.

A member of the National Assembly shall comply with the requirements imposed on a public officer under the General Code of Conduct and Ethics set out in the Public Officers Ethics Act . The Code provides that a member of the National Assembly shall:

3.7.1.1 Be true and faithful to the oaths or affirmations taken by the members required under the Constitution or other laws.

3.7.1.2 Uphold the Constitution and the rule of law.

3.7.1.3 Uphold the dignity and integrity of the National Assembly and act in a manner that promotes respect for the National Assembly and its institutions.

3.7.1.4 Treat other members with respect and strive to have cordial relations with other members .

3.7.1.5 Be open and transparent in the member's actions.

3.7.1.6 Be accountable to the public for the actions and decisions and submit to open scrutiny .

3.7.1.7 Act in the interests of the country.

3.7.1.8 Promote unity among Kenyans, irrespective of race, tribe, clan, color, creed or sex.

3.7.1.9 Ensure that the official duties of the member take precedence over other activities.

3.7.1.10 Act with integrity and objectivity when voting, asking questions, or carrying out any other duties as a member.

3.7.1.11 Not allow any personal benefit or interest, including benefits or interests of relatives or friends, to influence the carrying out of the member's duties.

3.7.1.12 Not incur a financial or other obligation that might result in the member being unduly influenced in the performance of the member's duties.

3.7.1.13 Ensure that the member's non-parliamentary activities do not interfere with or compromise the member's official duties or bring the National Assembly into disrepute.

3.7.1.14 Not make improper use of public property or resources, including payments or contributions made for public purposes.

3.7.1.15 Not make improper use of any allowance paid to the member.

3.7.1.16 Treat Kenyans equally and shall not discriminate against anyone on the basis of race, tribe, clan, colour, creed, sex or disability.

3.7.1.17 Not tolerate corruption and shall fight against corruption both in the private and public sectors.

In case of breach of the Code, appropriate action will be taken in accordance with the Act and other applicable laws.

The Code for Members of the National Assembly incorporates General Code of Conduct and Ethics, which is incorporated the Public Officers Ethics Act. The General Code requires that a public officer shall:-

3.7.2.1 Carry out the member's duties in a way that maintains public confidence in the integrity of the member's office.

3.7.2.2 Treat the public and other public officers with courtesy and respect.

3.7.2.3 seek to improve the standards of performance and level of professionalism in the member's organization.

3.7.2.4 Observe the ethical and professional requirements.

3.7.2.5 Observe official working hours and not be absent without proper authorization or reasonable cause.

3.7.2.6 Maintain an appropriate standard of dress and personal hygiene.

3.7.2.7 Discharge any professional responsibilities in a professional manner.

3.7.2.8 Carry out his or her duties in accordance with the law.

3.7.2.9 Not violate the rights and freedoms of any person.

3.7.2.10 Not use the member's office to improperly enrich himself or herself or others

3.7.2.11 Accept or request gifts or favours from a person who has an interest that may be affected by the carrying out, or not carrying out, of the public officer's duties; carries on regulated activities with respect to which the public officer's organization has a role; or has a contractual or similar relationship with the public officer's organization;

3.7.2.12 Improperly use his or her office to acquire land or other property for himself, herself or another person, whether or not the land or property is paid for ;

3.7.2.13 No to use or allow the use of information that is acquired in connection with

the public officer's duties and that is not public for the personal benefit of himself or another, except the use of information for educational or literary purposes, research purposes or other similar purposes.

3.7.2.14 Not accept a gift given to him or her in his or her official capacity unless the gift is a non-monetary gift that does not exceed the prescribed value, such a gift shall be deemed to be a gift to the organization. The provision exempts receipt of gifts from a relative or friend given on a special occasion recognized by custom.

3.7.2.15 Use his or her best efforts to avoid being in a position in which his or her personal interests conflict with his or her official duties.

3.7.2.16 Not hold shares or have any other interest in a corporation, partnership or other body, directly or through another person, if holding those shares or having that interest would result in the public officer's personal interests conflicting with his or her official duties.

3.7.2.17 Declare the personal interests to his or her superior or other appropriate body and comply with any directions to avoid the conflict;

3.7.2.18 Refrain from participating in any deliberations with respect to the matter.

3.7.2.19 Not award a contract, or influence the award of a contract, to himself or herself; a spouse or relative; a business associate; or a corporation, partnership or other body in which the officer has an interest.

3.7.2.20 Not use his or her office or place of work as a venue for soliciting or collecting 'harambees'; or either as a collector or promoter of a public collection, obtain money or other property from a person by using his or her official position in any way to exert pressure.

3.7.2.21 Not be an agent for, or further the interests of, a foreign government, organization or individual in a manner that may be detrimental to the security interests of Kenya.

3.7.2.22 Shall take all reasonable steps to ensure that property that is entrusted to his or her care is adequately protected and not misused or misappropriated.

3.7.2.23 Not practice nepotism or favoritism.

3.7.2.24 Give honest and impartial advice without fear or favor.

3.7.2.25 Not knowingly give false or misleading information.

3.7.2.26 Conduct his or her private affairs in a way that maintains public confidence in the integrity of his or her office.

3.7.2.27 Not sexually harass a member of the public or a fellow public officer. The term" sexually harass" includes and means if the person doing it knows or ought to know that it is unwelcome, making a request or exerting pressure for sexual activity or favors; making intentional or careless physical contact

that is sexual in nature; and making gestures, noises jokes or comments, including innuendos, regarding another person's sexuality.

3.7.2.28 Practice and promote the principle that public officers should be selected on the basis of integrity, competence and suitability; or elected in fair elections , and

3.7.2.29 Submit any declaration or clarification required under the Public Officers Ethics Act to be submitted or made by him.

A public officer contravenes the Code of Conduct and Ethics if he or she causes anything to be done through another person that is a contravention of the Code; or he or she allows or directs a person under his or her supervision or control to do anything that is a contravention of the Code. The provision does not apply with respect to anything done without the public officer's knowledge or consent if the public officer took reasonable steps to prevent it. If a public officer considers that anything required of him or her is a contravention of Code of Conduct and Ethics or is otherwise improper or unethical, he or she shall report the matter to the appropriate authority.

3.8 Regulation of MPs unethical behavior in Kenya in the Past

There are few incidents of disciplinary action against MPs in the past in the context of a Code of Ethics in the Parliament of Kenya. This may be attributed partly to the fact that there was no Code of Ethics to enforce and the fact the demand for ethical behavior for state officers is a fairly recent phenomenon. However, in the 1980s, several MPs were charged in court for criminal cases relating to mileage claims lodged in Parliament and some were convicted and jailed. The pattern and the persons targeted by these prosecutions indicate that these cases had little to do with the forged mileage claims as alleged but were part of the persecution of any persons holding dissenting views that was prevalent at the time.

4.0 A COMPARATIVE STUDY OF CODES OF CONDUCT

4.1 United States

The United States has several codes of conduct relating to members of the House of Representatives, Senators, government and public officers and the Executive. The Code of Ethics for Government Service was formulated in 1958. The Code provides for loyalty to the highest moral principles; the requirement to uphold the Constitution, laws and legal regulations; the requirement to put in full days labor for a full day's pay; the duty to find and employ more efficient and economical ways of getting tasks accomplished; non discrimination; the duty not to make private promises; the prohibition against engaging in business with the government; the duty to expose corruption; and the duty to uphold public interest.

The House of Representatives has formulated a Code of Official Conduct. The code provides that members must conduct themselves in a way that reflects well upon the House and they shall follow the spirit and letter of the House rules. Members must not abuse their positions for personal gain or benefit and must not accept gifts or honoraria. Members must separate personal funds from campaign funds and must not use campaign funds for their personal use. The conditions and restrictions on hiring employees are provided for and discrimination on hiring any grounds, excluding political affiliation, is prohibited. Members convicted of crimes for which the sentence can be two or more years of imprisonment are expected to withdraw from participation in the business of House Committees and refrain from voting on business before the committees or the House. The Code has provisions on invoking the official identity of congress in correspondence, accessing classified information and inserting earmarks into Bills. The members of the Congress are bound by the provisions of the Ethics in Government Act, 1978.

The enforcement of the Code is under the jurisdiction of the Committee of Standards of Official Conduct. The committee is a 10 member bipartisan committee with equal representation by all parties. The committee has advisory, enforcement and administrative functions. Members of the House of Representatives and candidates to the House of Representatives are required to file financial disclosure statements. The code formulates rules on receipt of gifts wherein members of the House are prohibited from receiving gifts valued at over US$ 50, unless they are commemorative item, gifts from family or other members or information materials. The rules are complex, lengthy and formalistic. The code restricts acceptance of paid travel and

accommodation. Sponsored travel is allowed but must be reported. Members can volunteer to work for other entities but such work must not conflict with official House duties. Senior staffs are prohibited from receiving honoraria but the sponsors may donate the money to charity. Members are prohibited from voting on matter in which they have a pecuniary interest.

Members must disclose the income earned and unearned, assets, liabilities, transactions in securities and real property, certain gifts, travel expenses, outside positions, agreements. Information relating to spouses and dependent children must be disclosed. If the committee determines that there is reason to believe that an individual has failed to file a statement or has falsified or failed to file information with the Standards Committee, the Committee can refer the case to the Attorney General together with the evidence, pursuant to section 104(b) of the Act.

Senior staff are allowed to earn up to US $ 25, 000 per year in other income but cannot work on matters related to law, real estate, insurance sales, financial services, consultancy or advisory in any firm that provides such services . The financial disclosure statements must be filed with the Standards Committee annually within 30 days from commencement of House employment and within 30 days from departure from House employment.

After departing from employment by the House, the former employee is barred from communicating or appearing before a member, employee or officer of the House of Representatives to try and influence any action or decision. Former employees are barred from advising foreign governments or political parties. Violation of this restriction is a felony that is punishable by a fine or imprisonment.

The Senate has formulated a Code of Official Conduct . The Senate Select Committee on Ethics oversees the implementation of the Code. The Committee is bipartisan with the 6 positions shared between the two dominant political parties. The detailed rules are established in the Senate Ethics Manual . The code criminalizes abuse of office and bribery among other crimes relating to misuse of office of member of either House.

The oversight of the Executive is overseen by the US Office of Government Ethics. The police are responsible for establishing and overseeing the ethics regime for all employees of the government service, including the President and the Cabinet. The system is separate from the rules applicable to the members of the House of Representatives and the Senate. The prescriptions on acceptable behavior and the reporting requirements replicate the standards acceptable to the legislature.

The American system does not appear effective in building public confidence and punishing wrong doing. For example, the Committee on Standards of Official Conduct in the House of Representatives investigated 25 cases between 1997 and 2004 but only one case resulted in action being taken by the House . The member was expelled after being convicted of conspiracy to violate bribery statutes, receipt of illegal gratuity, obstruction of justice, defrauding government, racketeering and tax evasion.

4.2 South Africa

The South African Parliament adopted the Code of Conduct in regard to Financial Interests in 1996. The Code urges members to maintain the highest standards of propriety to ensure that the integrity of the political institutions in which they serve is beyond question . Members of Parliament are required to file the initial disclosure within 30 days of the opening of the Register of Members Interests or their election to Parliament. Members must file updated returns annually. The members must report shareholding and other financial interests; any remunerated employment outside Parliament; directorships and partnerships; consultancies, sponsorships, gifts and hospitality benefits; foreign travel; land, property and pensions. The holdings of spouses, permanent companions and dependent children must also be disclosed. The Register of Members Interests has a confidential and public part. The confidential part may be released to the Committee of Members interests only and includes items that are deemed confidential for a good cause . The Committee shall disseminate the public part in the widest public means.

All gifts valued at more than R350 from a single source in one year must be disclosed. Foreign travel must be disclosed unless the travel costs are self-financed, personal or relate to business dealings that are unrelated to parliamentary work. The code of conduct has established the Joint Committee of the Members Interests. The membership of the Committee is based on proportional party composition of Parliament. The Committee appoints a registrar to administer the Code of Conduct. The Committee members have unlimited access to materials filed by the members, including such material filed in the confidential part of the register. Any person may file a complaint to the Joint Committee, which shall hold a hearing. The complainant and the member are afforded a hearing before the Committee. The Committees makes a determination and files a public report. A member found guilty of violating the code may be subjected to disciplinary action including a fine, two weeks suspension from service or one month suspension.

4.3 India

The Code does not require the registration of financial assets and liabilities. Public officials, including members of Parliament are prohibited from taking any other gratification other than the legal remuneration by the Prevention of Corruption Act, 1988. Members of Parliament may not occupy offices in the armed forces and offices of profit in the public service or as government contractors at the same time when they are serving as members of Parliament. There are restrictions on taking employment on completion of their terms. The enforcement of the Code is through application of criminal law that prohibits bribery. Special judges are appointed to try cases of bribery and the investigations are carried out by the police. A Member of Parliament convicted under the law may be sentenced to a term of imprisonment ranging from 6 months to 5 years.

The Code articulates several aspirations that are worded as prescriptions and proscriptions. Members are expected to maintain high standards of morality and dignity, work diligently for the benefit of the people, uphold the dignity of their office, ensure that private financial interests do not conflict with their public duties, refrain from accepting gifts or fees for executing official duties.

India has a Model Code of Conduct for the Guidance of Political Parties and Candidates. The Code prohibits political parties from engaging in destructive conflict. Parties and candidates are prohibited from increasing hatred or tension among members and criticizing other members on any basis other than policies, past record and work. Procedures for arranging party meetings and processions and polling procedures are also provided for. The party in power should not use state resources in partisan political activities and is prohibited from making certain types of promises during election campaigns. However, this Code is designed for application during political campaigns leading to the elections and it does not regulate the conduct of members of parliament once they are in office.

4.4 United Kingdom

The Code of Conduct for the House of Commons was adopted on 13th July 2005. The purpose of the Code is to give guidance to members in discharge of their parliamentary and public duties and provide for openness and transparency necessary to reinforce public confidence in parliament. The Code imposes duties to uphold the law, to act in the interest of the nation , and to exemplify the tenets of selflessness, integrity, objectivity, accountability, openness, honesty and leadership. Incidents of conflict of interest shall be resolved in favor of public interest. A member shall not accept

payment to advocate for a motion, bill or question in Parliament . Members are prohibited from accepting a bribe. Confidential information accessed by a member in the course of his or her duties shall not be used for financial gain . The code makes provision for registration and declaration of interests . The House of Lords has a Code of Conduct that mirrors the Code for the House of Commons.

The Members shall at all times conduct themselves in a manner that will tend to maintain and strengthen the public trust and confidence in the integrity of Parliament and never undertake any action which would bring the House of Commons or its members generally into disrepute . Members of the House of Commons are required to register pecuniary interests within three months of taking office. Any change in a registerable interest must be filed within four weeks of such change. The interests that a member is required to register under the Code of Conduct include directorships; employment; client and advisees; sponsorship and campaign donations; gifts exceeding £ 125 or benefits exceeding 0.5% of the parliamentary salary; foreign travel; gifts from foreign sources exceeding 0.5% of the parliamentary salary; land and property; shareholding; and other interests that are relevant to the purpose of the register. The interests of the spouses and dependent children in land and property; travel; gifts and shareholding must be declared. The register of members interests is published at the beginning of a new parliament and annually thereafter. The register is available for public inspection.

Any tangible gift exceeding £ 125 to a spouse must be disclosed. The member is exempted from disclosure where the gift or benefit does not relate to the membership to the House . Expenses of members and their spouses for overseas visits that are not wholly borne by the member or public funds must be disclosed. Hospitality and travel expenses within United Kingdom must be disclosed. However, conferences where the organizer meets reasonable travel expenses are exempted. The code designates a Parliamentary Commissioner and establishes the Select Committee on Standards and Privileges. The Commissioner is not a career employee of the House. The Committee is composed of proportional representation of the parties.

A member or a citizen must address their complaints in writing to the Commissioner. Where the Commissioner finds that sufficient evidence has been provided, the Commissioner conduct a preliminary investigation and reports his or her conclusion to the Select Committee. The Committee conducts the formal inquiry and determines when to open the process to the public and recommends further action to the House. The House may sanction the offending member by imposing a loss of salary or suspension from office.

5.0 RECOMMENDATIONS FOR REFORM OF THE CODE OF CONDUCT FOR MEMBERS OF PARLIAMENT

Since its formulation in 2003, the Code of Conduct for MPs has not been effective in improving the conduct of members of Parliament or enhancing the public trust and confidence in Parliament. The Code of Conduct and the enabling legislation must be reformed to ensure that the Code serves its purpose in the wider national integrity system. Some of the recommendations for reform are:-

5.1 Formulation of a Code of Ethics for the Senate and harmonization of the Code of Conduct for the National Assembly with the Constitution

Parliament should amend the Public Officers Ethics Act to provide for the formulation of a Code of Ethics for the Senate. The Act should be amended to reflect the restructuring of Parliament and the Executive. The Code of Conduct for Members of the National Assembly should be amended to inculcate the principles established in the Constitution and ensure that the Code of Conduct mirrors the international best practice on enforcement, sanctions, declaration of interests, and access to information. The use of penal laws to enforce the Code and ensure transparency and integrity reduces the scope of avoiding ethics related problems before they happen.

5.2 Declaration of Interests by MPs should be Made Public

Such interests should be declared at the commencement of the parliamentary term as well as on a need to disclose basis. This may include where a new law being proposed may benefit an MP. This will ensure that the Public Officer Ethics Act respects article 35 of the Constitution that grants citizens a right to access information unless there is a legitimate aim why such information should not be made public. The confidential filing of information undermines the very purpose of declaration of interests since the public is unable to monitor the declared interests vis-à-vis the known interests of the MPs or monitor the actions of the MP in Parliament vis-à-vis the declared interests.

5.3 Enforcement of Sanctions

The Code should be revised to stipulate clear sanctions for each violation of the Code. The Committee of Privileges should be empowered to punish behavior of MPs that breaches the Code but does not escalate to the level of criminality. The mandate of the Committee is more restricted to disruptive conduct of MPs in Parliament but not enforcement of sanctions established in the Code.

5.4 Legislative training on the Code of Conduct

MPs should be trained on the Code. In Kenya, up to 80% of MP are not re-elected to Parliament during the General Elections. Besides training on the Standing Orders and the procedural rules of the House, MPs should be trained on the Code of Conduct, which should indeed be part of the primary rules of the House.

5.5 Political Culture of MPs

The present political culture in Kenya undermines ethical behavior of MPs. The public expects handouts from MPs and the resources to finance such handouts are normally procured corruptly. This has fuelled the demand by MPs for very high and unsustainable remuneration. The public must therefore be educated on the role of MPs in the governance framework while MPs and Senators must be educated on their role and the need to uphold ethical standards and protect the public interest.

5.6 Institution in Charge of Enforcing the Code

The Public Officers Ethics Act should be amended to empower the Ethics and Anti-Corruption Commission to enforce the Code in conjunction with the Committee of Privileges. Often, the Committees are overwhelmed by core parliamentary work of legislation, oversight and representation thereby they ignore the enforcement of ethical standards amongst the members. The enforcement authority should be independent and not controlled by any person or authority. In this regard, the Ethics and Anti-Corruption Commission has the necessary independence expertise and Constitutional protection to monitor enforcement of the Code.

5.7 Content of the Codes

The measures that are provided in the Code of Conduct for Members of the National Assembly are inadequate to the task. The Code is drafted in a general fashion and it is very difficult to implement its provisions. The code has broad provisions which creates a wide scope for deciding what is legitimate and what is not legitimate. Existence of a code adviser will ensure that the meaning of the Code is clear and that its provisions are enforced. The Code of Ethics should be harmonized with the prevailing law on ethics, anti-corruption, leadership and integrity and a common Code should apply to members of National Assembly and the Senate.

5.8 The National Assembly and the Senate should develop a Manual on the Code of Ethics

Provisions relating to integrity and leadership are dispersed in the Constitution, the Public Officers Ethics Act, the Anti-Corruption and Economic Crimes Act, the Ethics and Anti-Corruption Commission Act, the Leadership and Integrity Act, among other laws. Parliament should develop a Manual to assist members to access all the relevant laws and Codes of Conduct in one publication. The Manual will elaborate on ambiguous provisions of the Code to ensure that members are able to comply.

The Code of Ethics should be applied with strict regard to the laws on ethics, integrity and anti-corruption, including the Constitution of Kenya, the Ethics and Anti-corruption Act, the Pubic Officers Ethics Act and the Ethics and Anti-Corruption Commission Act.

6.0 CONCLUSION

Empirical evidence of the effectiveness of the Codes of Conduct is scarce. Codes positively affect behavior and increase public perception of compliance with ethical standards. Codes are not a magic bullet that can transform governance in a state. The codes can discourage but not eliminate corruption in a decision making environment, like Parliament. Political culture inculcates shared values and attitudes among the persons being regulated; shared understanding of problems the code is meant to address and shared understanding of how those problems can be fixed.

Codes do not aim solely at controlling corruption but are part of a wider integrity system. The code should be buttressed by other measures to build a homogeneous political culture that is intolerant of corruption and unethical conduct . The effectiveness of the code depends on the civil society, free media, and integrity of the civil service, the existence and design of the integrity system, the commitment of MPs to the Code. Simplicity and accessibility of the code and an oversight structure are important to ensure proper implementation. The Government of Kenya has demonstrated its unwillingness to implement the provisions of Chapter 6 of the Constitution especially as regards elected leaders in the Executive and the Legislature. This lack of political will to uphold ethics and integrity will undermine Constitutionalism and may imperil the legitimacy of the Constitution due to its selective implementation at the whim of the Executive and the Legislature. The public must be sensitized on the need to create demand on compliance and enforcement of Chapter Six of the Constitution.

The public is ill informed about the legal regime that relates to ethics and behavior of public officers. Indeed, the members of the National Assembly and the Senate, by their conduct, have demonstrated that they have scant knowledge of the Code of Ethics. Besides the enforcement role, the Committee of Privileges, or its successor, should undertake a public education and awareness campaign to ensure that the contents of the code and related legal provisions are widely disseminated. An informed public will be able to effectively monitor the behavior of MPs and ensure that the code is complied with. As stated above, there is no political will in Parliament and the Executive to enforce the Code of Ethics. Such political will must be nurtured and sustained though public demand and constant monitoring of the behavior of state and public officers, including members of Parliament. The Constitution demands that the Ethics and Anti-Corruption Commission be established, which has been completed. The

overall role of ensuring that the provisions on ethics in the Constitution are complied with is bestowed upon the Commission. However, the Public Officer Ethics Act creates responsible Commissions to monitor compliance with the Act and this includes the Committee on Privileges for monitoring members of Parliament. To ensure uniformity and accumulation of skills and expertise on ethics and integrity and further, given that the designated Commissions have not executed their mandates effectively in the past, the role of ensuring compliance with the Code of Ethics for Members of Parliament should be vested in the Ethics and Anti-Corruption Commission. This will ensure that members of the National Assembly and the Senate do not escape scrutiny by the enforcement agency through inaction by the Committee of Privileges. The transfer of the powers will also ensure consistency and uniformity in enforcement.

The public must demand that the Ethics and Anti-Corruption Commission be empowered and mandated by law to ensure compliance with the Code of Ethics. The dispersal of the enforcement function among many commissions had caused ineffective administration of the Code, especially for high ranking public officials like MPs and Cabinet Ministers. The demand should extend to exclusion of implicated officials from public appointments. The threshold of integrity should not been equated to conviction of guilt. Indeed, the Anti-Corruption and Economic Crimes Act provides that a public officer who is charged with an offence under the Act is required to vacate his public office until that case is determined. This provision should be extended to include that where there is a finding of lack of integrity or unethical conduct by the Commission against an official, which finding is supported by proof, then such official should vacate the office pending a determination of guilty or otherwise by the court. This will require amendment to the law. The public should keep watch on Parliament to ensure that the provisions proposed in the Acts of Parliament in regard to ethics and integrity are not watered down. The provisions of Leadership and Integrity Act were watered down to ensure that elected officials were not barred from contesting even where they had been involved in unethical conduct.

A REVIEW OF THE KENYAN SENATE STANDING ORDERS

A Memorandum on the Senate Standing Orders
Prepared By Prof. Migai Akech
(27 May 2013)

For
The Parliamentary Initiatives Network (PIN)

PIN
PARLIAMENTARY INITIATIVES NETWORK

1.0 INTRODUCTION

This memorandum is a response of the Parliamentary Initiatives Network to the advertisement of the Rules and Business Committee of the Senate, inviting interested members of the public to submit written memoranda on proposed amendments to the Standing Orders of the Senate. It takes the approach that the Standing Orders of the Senate should be informed by the role that the Constitution gives to the Senate, and by the need for a coordinated approach between the two Houses of Parliament if they are to fulfill their constitutional mandates. Part II of the memorandum consists of an analysis of the provisions of the constitution dealing with the Senate and the National Assembly. Part III consists of evaluations of, and suggested changes to, specific provisions of the Standing Orders. Part IV concludes.

2.0 THE ROLE OF THE SENATE

Standing Orders are a set of rules of procedure whose purpose is to facilitate the work of a legislature. The design of these rules should therefore be informed by the powers and functions of the legislature, which are typically allocated to it by the Constitution.

In the case of the Senate, the Constitution assigns it the following four roles:

a) Representing the counties, and serving to protect the interests of the counties and their governments;

b) Participating in the law-making function of Parliament by considering, debating and approving bills concerning counties;

c) Determining the allocation of national revenue among counties, and exercising oversight over national revenue allocated to the county governments; and

d) Considering and determining resolutions to remove the President or Deputy President from office.

Like other legislatures, the Senate therefore makes laws, holds the (national and county) executive to account, and represents the people in (national and county) governance. However, the Senate shares these roles with the National Assembly.

Indeed, it is important to appreciate that the Senate plays a limited role in governance in comparison to the National Assembly. First, the National Assembly is exclusively responsible for determining the allocation of national revenue between the levels of government.[1] In practical terms, this means that there is a clear division of responsibility between the National Assembly and the Senate. The idea is that once the National Assembly has determined the respective shares of the annual national revenue of the National Government and the County Governments, the Senate then determines how much of the annual national revenue is allocated to each county. This division of responsibility has two implications. On the one hand, consideration of the Division of Revenue Bill (which divides the revenue raised by the national government between the two levels of government) is the exclusive mandate of the National Assembly. It should be noted, however, that the Constitution also provides that the Division of Revenue Bill "shall be introduced in Parliament" at least two months before the end of each financial year.[2] There are therefore two provisions of the Constitution which deal with the consideration of the Division of Revenue Bill. One is a general provision which merely requires this bill to be "introduced in Parliament" without indicating which House should originate the bill. The second is a specific provision, which clearly indicates that the National Assembly "determines the allocation of national revenue between the levels of government." At one level, it is arguable that the specific provision should prevail over the general one, which would mean that the Senate would play no role in the consideration of this bill that has implications for the resources of counties and their governments. At another level, it could be argued that since the primary role of the Senate is to "protect the interests of the counties and their governments" it ought to have a "say in the Bill determining how much money goes to the Counties."[3] From this perspective, we should therefore interpret the constitution in a manner that furthers the objects of devolution, including ensuring "equitable sharing of national and local resources throughout Kenya."[4] Accordingly, the standing orders of the two Houses could provide that the National Assembly should originate the Division of Revenue Bill since it is a money bill (see below), and send it to the Senate for its consideration. Thereafter, the Senate would send the bill back to the National Assembly.

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1 Constitution of Kenya 2010, article 95 (4) (a).

2 Ibid, article 218 (1) (a).

3 Commission for the Implementation of the Constitution, CIC Statement on the Role of the Senate in Revenue Bills and on Salaries of MPs," Sunday Nation, May 26, 2013 at 39.
Constitution of Kenya 201, article 174, (g).

The dilemma, however, is that the Constitution classifies the Division of Revenue Bill as an "ordinary bill" even if it concerns county governments.[5] The procedure for the consideration of ordinary bills is as follows. If one House, say, the National Assembly, passes an ordinary bill, and the second House, say, the Senate rejects the bill, it shall be referred to a mediation committee.[6] But if, in this example, the Senate passes the bill in an amended form, the constitution requires that bill to be referred back to the National Assembly for reconsideration.[7] If after reconsideration the National Assembly passes the bill as amended by the Senate, it shall be referred to the President for assent.[8] However, if the National Assembly rejects the bill as amended by the Senate, the bill shall be referred to the mediation committee.[9] And where a bill has been referred to the mediation committee, it can only become law if both Houses approve (presumably by simple majority vote) the version of the bill proposed by the mediation committee.[10]

This is a dilemma because the Constitution gives the National Assembly the exclusive responsibility of "determining" the allocation of national revenue between the levels of government.[11] The word "determine" means to "decide", or "fix conclusively or authoritatively," or "settle," or "resolve."[12] It would therefore seem that the Constitution precludes resort to the mediation committee as far as the Division of Revenue Bill is concerned. This would mean that once the Senate sends the Division of Revenue Bill back to the National Assembly, the latter would have the final say and send it to the President for assent.

On the other hand, the consideration of the County Allocation of Revenue Bill (which divides the revenue allocated to the county level of government among the counties) is a mandate shared by the two Houses.[13] In our view, the standing orders of the two Houses should give the Senate the responsibility of originating this bill. Further, the Senate is responsible for overseeing how each County Government spends and accounts for the national revenue allocated to it. Again, this mandate is shared with the National Assembly, whose roles include exercising oversight over national revenue and its expenditure.[14]

Ibid, article 110.

6 Ibid, article 112 (1) (a).

7 Ibid, article 112 (1) (b).

8 Ibid, article 112 (2) (a).

9 Ibid, article 112 (2) (b).

10 Ibid, article 113.

11 Ibid, article 95 (4) (a).

12 Merriam-Webster's Collegiate Dictionary.

13 Ibid, article 218 (1) (b).

14 Ibid, article 95 (4) (c).

Secondly, the exercise of the law-making power of the Senate requires the concurrence of the National Assembly in a number of significant respects. One example is the determination of the basis for the allocation of national revenue among the counties.[15] The Constitution gives the senate the responsibility of making this determination by passing a resolution once every five years. However, in making this determination, the Senate must: (i) consider certain criteria on equitable sharing of revenue; (ii) consider the recommendations of the Commission on Revenue Allocation; (iii) consult county governors, the Cabinet Secretary responsible for finance and any organization of county governments; and (iv) consider the views of the public, including professional bodies. More significantly, the resolution of the Senate cannot take effect before it is considered by the National Assembly, which can either approve or reject it. Where the National Assembly rejects the Senate's resolution, the matter should then be referred to a joint committee of the two houses of Parliament for mediation.[16]

The second example concerns the consideration of bills concerning county governments, which the Constitution classifies into the two categories of special and ordinary bills. Special bills are the annual County Allocation of Revenue Bill, and bills relating to the election of members of a county assembly or a county executive.[17] All other bills concerning county governments, including bills affecting the finances of county governments, are ordinary bills.[18] The Constitution gives the National Assembly power to amend or veto special bills that have been passed by the Senate.[19] In effect, the President can only assent to Senate versions of special bills if the National Assembly fails to marshal the support of at least two-thirds of its members.[20] But the concurrence of the National Assembly is required even in the case of ordinary county government bills. The only difference here is that where the National Assembly rejects the bill, it shall be referred to a joint committee of the two houses of Parliament for mediation.[21] Ultimately, therefore, all bills passed by the Senate can only become law after they have been considered by the National Assembly.

Thirdly, money bills such as the Division of Revenue bill can only be introduced in the National Assembly.[22] These are bills whose provisions deal with taxes, the imposition of charges on a public fund or the appropriation of public money, or the raising or guaranteeing of loans.[23]

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15 Ibid, article 217 (4).
16 Ibid, articles 113, 217 (6) (b).
17 Ibid, article 110 (2) (a).
18 Ibid, article 110 (2) (b).
19 Ibid, article 111 (2).
20 Ibid, article 111 (3).
21 Ibid, article 112.
22 Ibid, article 109 (5).
23 Ibid, article 114 (3).

Fourth, the National Assembly is exclusively responsible for approving the appointment of cabinet secretaries and principal secretaries.[24]

In view of the foregoing allocation of responsibilities, the two Houses need to coordinate their operations if they are to fulfill their mandates. In this respect, a need arises to establish joint committees on critical matters, particularly the implementation of devolution. Further, the two Houses need to negotiate and agree on how they will perform their roles, particularly where the Constitution does not stipulate which House has the primary responsibility of originating bills. For example, the National Assembly and the Senate could agree that the National Assembly originates the Division of Revenue Bill, while the Senate originates the County Allocation of Revenue Bill. Such agreements would then be expressed in their respective standing orders, and would enable the two Houses to utilize their resources efficiently.

Let us now examine how the Senate Standing Orders facilitate the work of the Senate, and deal with the allocation of responsibilities between the National Assembly and the Senate.

[24] Ibid, articles 152 (2), 155 (3) (b).

3.0 COMMENTS ON THE STANDING ORDERS

3.1 Overview

Our overall impression is the Senate Standing Orders have largely been aligned to the Constitution, and will facilitate the work of the Senate. Further, it is encouraging that the Senate Standing Orders have by and large been harmonized with the Standing Orders of the National Assembly, which is important from the perspective of ensuring uniformity in the procedures and operations of the two houses of Parliament. However, we remain concerned about the powers of the Speaker, facilitating public participation in the consideration of legislation, ensuring integrity in the conduct of the business of the Senate, facilitating effective representation of independent Senators in the committees of the Senate, facilitating effective participation of the Senate in national governance, and restrictions of access to information and the Senate.

3.2 Part I – Introductory

3.2.1 **SO 1 - Power of the Speaker** – The power of the speaker to decide any procedural question not expressly provided for by the Standing Orders needs to be regulated to prevent it from being abused.

Recommendation – the Standing Orders should permit a Senator dissatisfied with the ruling of the Speaker to challenge it by tabling a motion before the House. In such cases, the Speaker's ruling will only bind the House if it is approved by a majority vote.

3.2.2 **Vacancy in the Office of the Speaker** – SO 4 (2) provides that where the office of the Speaker falls vacant before the expiry of the term of Parliament, the Senate cannot transact any business until a new Speaker is elected. However, it is not clear from this standing order how the determination that the office of the Speaker is vacant will be made. That is, who declares the office of the Speaker vacant? And what procedure is to be used in declaring the office of the Speaker vacant? In addition, who convenes the meeting of the Senate to elect a new Speaker? A literal reading of this standing order would also mean that the Senate is prohibited from conducting any business, including the business of electing a new Speaker.

SO 4 (3) then provides that the Deputy Speaker shall preside over such an election, unless he or she is a candidate, in which case a Senator elected by the Senate shall preside. However, it is not clear from this standing order how and by whom the Senate is to be convened so that it can transact the business of electing the Senator who will preside over the election of a new Speaker.

Recommendations – (1) In cases where the office of the Speaker falls vacant, the Deputy Speaker should convene the House and preside over the election of a new Speaker. However, where the Deputy Speaker is a candidate for the office of Speaker, the Clerk should have the power to convene the Senate to elect the Senator to preside over the election of a new Speaker.

(2) Amend SO 4 (2) to state that "If the office of Speaker falls vacant at any time before the expiry of the term of Parliament, the Senate shall not transact any business other than electing a new Speaker and shall only transact other business once a new Speaker has been elected."

3.3 Senate Minority Leader

3.3.1 SO 20 (1) provides for the election of the Senate Minority Leader and Deputy Senate Minority Leader. These are important offices, and will contribute to ensuring that the views of minority parties or coalition of parties are heard. In particular, these offices speak for the minority parties and their policies, and protect their rights.

Recommendation – In order to enable the Senate Minority Leader and the Deputy Senate Minority Leader to play their roles effectively, the standing orders should give them a "right of recognition," which would require the Speaker to recognize them so that they can speak before other Senators seeking such recognition.

3.4 Part XVI – Rules of Debate

3.4.1 Matters *Sub Judice* or Secret – SO 90 prohibits Senators from referring to matters which are *sub judice* or secret. But while the standing orders clearly stipulate what matters are *sub judice*, it is not clear what matters are to be deemed "secret by the operation of any written law." The danger is that this broad category can be used by the Speaker to frustrate debate of matters that are arguably in the public interest.

Likewise, SO 230 empowers the Speaker to direct the exclusion of matters that are "secret" or "purely personal" from the journals of the Senate and the verbatim reports of the proceedings of the Senate.

Recommendation: The standing orders should indicate what matters are to be considered secret. Examples could be national security and sensitive communications received from the President or other member of the executive. Further, as in the case of *sub judice* matters, a Senator alleging that a matter is secret should provide evidence to that effect.

3.4.2 **Declaration of Interest** – SO 91 provides that a Senator who wishes to speak on a matter in which he or she has a personal interest shall first declare that interest. It then defines "personal interest" to include pecuniary interest, proprietary interest, personal relationships and business relationships. However, the standing orders fail to establish a mechanism for administering the declaration of personal interests, including sanctions.

Recommendations – (1) The standing orders should require members to register their personal interests to facilitate the enforcement of this provision.

(2) The standing orders should provide for the sanctions to be applied where a Senator is found to have spoken on a matter in which he or she had a personal interest.

(3) The Senate should establish a mechanism for enforcing an ethics regime, including the registration of personal interests, investigations of violations of rules of ethics, and imposition of sanctions.

3.5 Part XIX – Public Bills

3.5.1 **Bills Concerning County Government** – SO 124 provide that the Speaker of the National Assembly and the Speaker of the Senate *may* appoint a joint committee to advise them in resolving the question of whether or not a bill concerns county government. This is an important committee, and should help the two Houses to ensure the timely enactment of legislation. However, the National Assembly Standing Orders do not have an equivalent standing order, which could frustrate the appointment of this committee. In addition, this standing order contemplates an ad hoc committee appointed at the discretion of the two Speakers to perform what we consider to be a critical function. In our view, this role requires the establishment of a standing committee.

Recommendation: Amend the Standing Orders of the National Assembly to (1) provide for the appointment of this joint committee and (2) make this committee a standing committee.

3.5.2 **Committal of Bills to Committees and Public Participation** – SO 128 (4) gives the public a unique and timely opportunity to participate in law-making by requiring committees to facilitate public participation and take into account the views and recommendations of the public in their reports on bills. However, the standing orders do not indicate the procedures the committees are to use to obtain the views and recommendations of the public. Further, there is no procedure for accounting to the public, so that it can know whether or not its views and recommendations have been considered. Finally, there is a need to stipulate time-lines for public participation if this provision is to be effective.

Recommendations – (1) The standing orders should require committees to use the "notice and comment" or "public hearing" procedures in fulfilling their obligation to ensure public participation. The "notice and comment" procedure entails giving the public, for example, thirty days to submit comments on a draft bill. On the other hand, the "public hearing" procedure would entail the committee convening a meeting at which the public can present its views on a bill. In either case, however, there should be an accountability procedure. In particular, the standing orders would require each committee to demonstrate, in its report to the Senate, how it has considered the views of the public in revising the bill before it for the consideration of the Senate.

3.6 Part XXIII – Select Committees

3.6.1 **Rules and Business Committee** – SO 174 provides for the composition of the House Business Committee. This committee consists of the Speaker, Majority Leader, Minority Leader and not more than nine Senators "reflecting the relative majorities of the seats held by each of the parliamentary parties in the Senate." Our concern is that this formula excludes independents, even if there are no independent Senators in the current Senate. For the future, however, it will be necessary to ensure that independents are represented in this critical committee.

Recommendation: Amend SO 174 (1) (d) to state as follows: "not more than nine senators, reflecting the relative majorities of the seats held by each of the parliamentary parties in the Senate *while taking into account the interests of independents*."

3.6.2 **Nomination of Members of Select Committees** – SO 175 (4) provides that "A Senator against whom an adverse recommendation has been made in a report of a select committee that has been adopted by a House of Parliament shall be ineligible for nomination as a member of *that* committee." We find this provision unduly restrictive. It literally means that a Senator against whom an adverse recommendation has been made in a report of one select committee is free to serve as a member in all other select committees. However, adverse recommendations would arguably undermine the competence of such a Senator to serve on any select committee. Perhaps the concern of this standing order is to ensure that the Senate has sufficient numbers of Senators who can serve on its committees, since numerous adverse recommendations would greatly reduce the pool of committee members if such recommendations were a bar to membership of committees. However, this concern could be addressed by requiring that the adverse recommendations should first be resolved by the Senate or the Senator in question before they can become eligible to serve on committees.

Recommendation – Amend this standing order to make Senators against whom adverse recommendations have been made in reports of committees ineligible for nomination as members of any committee of the Senate until the adverse recommendation has been resolved by the Senate or the Senator.

3.6.3 **Minutes of Select Committees** – SO 192 provides, *inter alia*, that the minutes of the proceedings of a select committee *may* be published once formal errors and oversights therein have been corrected. However, we are concerned that this standing order leaves the publication of such minutes to the discretion of the Speaker, who can therefore choose not to publish them.

Recommendation: In order to enhance public access to the records of the Senate, there is a need to mandate the speaker to publish the minutes of select committees, but list specific exceptions that would justify the exclusion of such minutes from publication, for example, national security.

3.6.4 **Public Access to the Senate and Meetings of Select Committees** – SO 233 provides that the Senate or a committee of the Senate may exclude any person or media from its sittings in "exceptional circumstances" should the Speaker determine that there are justifiable reasons for the exclusion. Similarly, SO 200 provides that the proceedings of select committees shall be open to the public unless "in exceptional circumstances" the Speaker determines that there are justifiable reasons to exclude the public. These standing orders

give the Speaker wide discretionary powers without stipulating their limits. A need therefore arises to circumscribe the exercise of these powers.

Recommendation – the Standing Orders should provide an indicative list of the "exceptional circumstances" and the reasons that would justify the exclusion of the public from meetings of select committees.

3.6.5 **Engagement of Experts** – SO 205 provides that committees of the Senate may engage experts to facilitate their work. The only regulation is that they should seek the approval of the Speaker. There is a need to regulate the engagement of experts to prevent corruption and to ensure that committees engage competent experts.

Recommendation – Amend this standing order to require adherence to the Public Procurement and Disposal Act in the engagement of experts.

3.6.6 **Joint Committees** – SO 213 (3) establishes two joint committees of Parliament, namely the Joint Committee on National Cohesion and Equal Opportunity and the Joint Committee on Parliamentary Broadcasting and Library. It also empowers the two Houses to establish other joint committees by resolution or by passing a law. While these two committees are no doubt useful, there is a need to establish a joint committee on the implementation of devolution, given the significance of devolution in enhancing national cohesion and equitable regional development. In addition, the Constitution and the laws on devolved government establish a complex structure for the administration of devolved government, which will need the two Houses to work together if they are to ensure meaningful oversight of the executive at the two levels of government.

Recommendation: The standing orders of the two Houses should establish a Joint Committee on the Implementation of Devolution.

4.0 CONCLUSION

It is important to appreciate that the Senate operates in a context in which it shares responsibilities with the National Assembly. Further, it is clear from the Constitution that the Senate plays a significant but limited role in governance in comparison to the National Assembly. In particular, the Constitution gives the Senate the critical role of representing the counties and serving to protect the interests of the counties and their governments. In view of the architecture of the Constitution, which for example dictates that all bills passed by the Senate can only become law after they have been considered by the National Assembly, it will be necessary for the Senate to negotiate with the National Assembly how it should play its role in making law and holding the executive to account. Further, the two Houses need to coordinate their operations if they are to fulfill their mandates. In this respect, a need arises to establish joint committees on critical matters, particularly the implementation of devolution. Further, the two Houses need to negotiate and agree on how they will perform their roles, particularly where the Constitution does not stipulate which House has the primary responsibility of originating bills. For example, the National Assembly and the Senate could agree that the Senate should originate the County Allocation of Revenue Bill. Such agreements would then be expressed in their respective standing orders.

NOTES

NOTES

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