KENYA LAW REFORM COMMISSION

A dynamic and responsive agency for progressive law reform

A GUIDE TO THE LEGISLATIVE PROCESS IN KENYA

SECOND EDITION

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CONTENTS

Acronyms & Abbreviations

ACT	Act Change Transform
AG	Attorney General
CAP	Chapter
CBOs	Community-Based Organisations
CEC	County Executive Committee
CIC	Commission for the Implementation of the Constitution
CoG	Council of Governors
CS	Cabinet Secretary
UK Gov	United Kingdom Government
KDP	Kenya Devolution Programme – *Timiza Ugatuzi*
KIPPRA	Kenya Institute of Public Policy and Research Analysis
KLRC	Kenya Law Reform Commission
K-NICE	Kenya National Integrated Civic Education Programme
LSK	Law Society of Kenya
MDACs	Ministries, Departments, Agencies and Counties
NCLR	National Council for Law Reporting
NGOs	Non-Governmental Organisations
RIA	Regulatory Impact Assessment

FOREWORD

I am delighted to be associated with the publication of the second edition of *the Guide to the Legislative Process* in Kenya. This Guide provides a comprehensive and consolidated resource on the procedural and substantive aspects of law making in Kenya at both levels of government.

Last year, Kenya celebrated 10 years since the devolved system of government was instituted. With it came a myriad of devolution successes, challenges and learning. The second edition of the Guide addresses these challenges by succinctly covering issues related to policy initiation, formulation, approval, and translation into legislation. It emphasises the importance of transparency, accountability, and public participation, in line with the principles enunciated in the Constitution of Kenya (the Constitution). This Guide serves as a valuable tool for legislative quality control, with a clear delineation of the roles and responsibilities of key players and the manner of stakeholder engagement. I laud its rich array of information and analysis and recommend it to all who might be interested in policy formulation and its translation into legislation.

I appreciate the lead that the Kenya Law Reform Commission (KLRC) has taken in the authorship of this Guide. It cements the reputation of KLRC as a centre of reference for law reform in Kenya. As a state agency, KLRC remains committed to providing technical assistance to both levels of government for the development and reform of Kenya's laws as exemplified by this Guide. I therefore urge all ministries, departments, agencies and counties (MDACs) at both levels of government to support KLRC and leverage its professional and technical resources for the advancement of our nation.

Finally, my office sincerely commends all individuals, institutions and partners for their invaluable contributions and feedback, which no doubt enriched the contents of this second edition of the Guide at the different stages of its development. Their dedication to the progress of our nation is truly commendable. Thank you all for your continued commitment to advancing the legislative process in Kenya. It is my sincere hope that what is contained in this Guide will inspire, inform and, most importantly, empower our policymakers, legislators and the general public.

GOD BLESS KENYA

DORCAS ODUOR, EBS, OGW, SC

Attorney-General
Republic of Kenya

PREFACE

The KLRC is established by the Kenya Law Reform Commission Act, (the Act). KLRC is a body corporate and serves both the national and county governments in matters of law reform.

With the responsibility of keeping law in Kenya under review and making recommendation for its reform, the Act also mandates KLRC to provide advice and offer technical assistance and information to the national and county governments with regard to the reform or amendment of the law. In addition, the County Governments Act, Cap. 265, anticipates that KLRC will assist county governments in the development and reform of their legislation.

The Commission is pleased to publish this second edition of *the Guide to the Legislative Process*. The Guide was first published by KLRC in 2015 to equip policymakers, legislative drafters and legislators, who are key actors in the development of legislation at both levels of government, with the necessary tools to enhance the quality of legislation. It was in response to inadequate public information on the development of legislation and lack of clarity on the roles of policy makers, those responsible for law reform, drafters and the legislators, which hindered the efficiency in development and quality of legislation produced.

This Guide aims to ensure that legislative proposals for new law, the amendment of law or for subsidiary legislation are well founded and evidence based. The Guide further seeks to empower all citizens of Kenya with knowledge on the legislative process, enabling them to participate meaningfully as stakeholders in policy formulation and development of legislation.

The Guide delves into crucial principles, with special focus on public participation as a central tenet in decision-making at all levels by state actors and provides direction on the conduct of legislative scrutiny, taking into account good practices.

This second edition of the Guide builds upon the knowledge gained from the experience in law-making during the implementation of the Constitution and that of county governments in the implementation of their mandate since the promulgation of the Constitution. It is further informed by the experience of and the role that KLRC has played in Kenya's broad legislative development and in supporting legal reforms necessary for the implementation of the Constitution. The KLRC continues to be instrumental in the review and systematic development of law with a great sense of responsibility.

On behalf of the Commission, I extend my heartfelt gratitude to the Steering Committee, various stakeholders and partners and the staff at KLRC, who actively participated in the consultation, development and validation processes. Their dedication and contributions were vital to achieving this milestone.

We urge all actors to use this Guide as a tool to ensure the legislative process will result in the development of high quality policy and legislation and promote transparency and inclusive governance.

CHRISTINE AGIMBA

Chairperson
KLRC

ACKNOWLEDGEMENTS

The successful development and publication of the second edition of this Guide would not have been possible without the remarkable dedication and selfless commitment of numerous individuals and institutions.

Our profound appreciation goes out to the members of the Steering Committee and the stakeholders drawn from the Office of the Attorney-General and Department of Justice, the State Department for Devolution, the Inter-governmental Relations Technical Committee, the Senate, the National Council for Law Reporting (NCLR), the Council of Governors, County Speakers Forum, County Attorneys' Forum and the County Assemblies Forum among many others. The unwavering enthusiasm, hard work and commitment of the members of the Committee were paramount in accomplishing this mission.

Various members of staff of the KLRC played an instrumental role in bringing this project to fruition through their efforts and dedication throughout the process. Special recognition goes to Ms. Mercy Muthuuri, Deputy Director and Mr. Matthew Kimanzi, Assistant Director in charge of Public Education, for their indispensable guidance, which contributed significantly to the successful accomplishment of this project. Equally commended are Ms. Susan Kamau, Principal Law Reform Counsel; Mr. James Nombi, Principal Law Reform Counsel; and Mr. Anthony Otieno, Senior Law Reform Counsel, for their work in reviewing the substantive and technical content of this publication. We also appreciate Ms. Sophie Hamisi, Ms. Shallon Kaguli and Ms. Bertha Omari, who offered exceptional administrative services, as well as Ms. Catherine Gatetua and Mr. Collins Lwangu, Communications Officers, for their outstanding editorial, design and coordination services.

KLRC would be remiss not to express gratitude to the UK Government for their generous financial support through the Kenya Devolution Programme (KDP) - Timiza Ugatuzi implemented by Act Change Transform (Act!). Their backing played a critical role in bringing this edition of the Guide to fruition.

Furthermore, heartfelt gratitude is extended to all the stakeholders who actively participated in the various forums and shared their valuable insights on how to improve the Guide. This input has been immensely valuable in shaping the content and enhancing its overall quality. We also acknowledge and appreciate the efforts of the consultant, Gad Awuonda, who worked with the Steering Committee in the revision of the Guide.

Last but certainly not least, KLRC pays tribute to all those who made significant contributions when the Guide was published in 2015. Your pioneering efforts laid a strong foundation upon which this second edition stands and we are profoundly indebted to you for the enduring impact.

JOASH DACHE, MBS

Secretary / CEO
KLRC

EXECUTIVE SUMMARY

The second edition of *The Guide to the Legislative Process in Kenya* serves as a comprehensive resource, explaining the entire spectrum of law making, from policy conception to the implementation of resultant legislation. It aims to assist readers to understand the steps and requirements involved in the legislative process in Kenya, to ensure the development of quality legislation that supports the nation's social, economic and political development.

The 2010 Constitution ushered in significant changes to the legislative process in Kenya, with the establishment of a Bicameral Parliament comprising the National Assembly and the Senate, as well as the creation of 47 county assemblies in each of the 47 county governments. The constitutional requirement for public participation in policy-making and the development and enactment of legislation is also a significant introduction to the Kenyan governance and accountability environment.

Quality legislation is a fundamental aspect of a modern democratic society grounded in the rule of law. The process of developing such legislation is as critical as the outcome. Therefore, it is crucial for duty bearers and stakeholders involved in the process to have sufficient knowledge and meaningful participation, contributing to the realisation of effective legislation. For legislation to have a highly beneficial impact on national development, it must be well conceived and properly drafted, considering constitutional principles, legislative requirements and drafting tenets throughout the legislative continuum.

The second edition of *The Guide to the Legislative Process in Kenya* is divided into five chapters. It delves into various aspects of the legislative process. It discusses the institutional framework of KLRC, highlighting its mandate and role in the implementation of the Constitution, review of all laws in Kenya and providing technical assistance to county governments. Further, the chapters cover essential topics, such as policy development, the relationship between policy and legislation, legislation as one of the channels of implementing policy, legislative drafting principles, legislative scrutiny as an emerging practice in our legal system (which includes Regulatory Impact Assessment (RIA) and evaluation of legislation post-enactment), the significance of public participation, the legislative enactment process and the publication and assent of enacted legislation.

The Guide should be read alongside the Constitution, the respective Standing Orders of the Senate and the National Assembly, as well as the Standing Orders of each county assembly. Other relevant official guidelines and publications, such as the Office of the President Circular on the Role of Government Institutions and the Office of the Attorney-General and Department of Justice Circular on Proposed Legislation, are also important references.

This Guide is a valuable tool for all involved in the policy and legislative process, be it legislative drafters, policymakers, or citizens seeking to ensure transparent and efficient lawmaking that aligns with the principles of good governance and public participation.

CHAPTER 1

THE KENYA LAW REFORM COMMISSION AND ITS ROLE IN THE LEGISLATIVE PROCESS

Global Map showing the countries with law reform agencies

Australia
Bahamas
Bangladesh
Canada
Cayman Islands
Cyprus
Dominica
Falkland Islands
Fiji
Ghana
India
Jamaica
Kenya
Lesotho
Malawi
Malaysia
Malta
Mauritius
Namibia
New Zealand
Nigeria
Pakistan
Papua New Guinea
Rwanda
Samoa
Sierra Leone
Singapore
Solomon Islands
South Africa
Sri Lanka
Tanzania
Trinidad and Tobago
Uganda
United Kingdom
Vanuatu
Zambia

1.0 INTRODUCTION

This chapter discusses the mandate and functions of the KLRC. Law reform is integral to legislative development and the importance of a well-functioning law reform agency in the process of the development of legislation cannot be over-emphasized.

Established as a statutory body, the KLRC has the primary mandate, inter alia, to keep all law in Kenya under review and make recommendations for its reform and also assists the National and County Governments to reform and develop legislation.

The KLRC aims to provide leadership as the premier law reform agency in Kenya to ensure the progressive reform and systematic development of law, in line with constitutional principles and statutory parameters. KLRC also draws on comparative research and other law reform best practices from the Commonwealth and other jurisdictions to do so. This chapter seeks to aid the reader in understanding the mandate of and the role of KLRC in the legislative process in Kenya.

1.1 KLRC AS A LAW REFORM AGENCY

The existence of a law reform agency is based on the justification that "the law", like any other human invention, is prone to defects and imperfections. It is in constant need of improvement. The need for reform arises from various factors, among them;

(a) institutions fashioned in the distant past no longer meeting the demands placed on them by the law due to, among other things, a growing population that is increasingly global;

(b) developments in technology that may spawn problems that humanity has not previously encountered and;

(c) social attitudes and values that may change in a manner that needs to be reflected in the law; and old laws needing to be refreshed to modernise their language and remove obsolete provisions.

Since the whole body of the law stands potentially in need of reform, KLRC is established to serve as the standing agency with appropriate professional expertise to consider, advise on and undertake continuous reform of the law.

The responsibility for conducting of law reform should, as has been adopted across the Commonwealth, repose in a dedicated entity with at least seven distinguishing characteristics: it should be permanent, authoritative, full-time, independent, facilitative, consultative and implementation-minded.

1.2 SALIENT FEATURES OF THE KENYA LAW REFORM COMMISSION

KLRC measures well with other Commonwealth countries in regard to the seven attributes discussed below.

A. Permanence

According to section 4 of the KLRC Act, Cap. 3, KLRC is a permanent entity with perpetual existence. The permanent nature of a law reform agency provides inherent advantages over *ad hoc* arrangements in furthering progressive law reform. These include retention of process expertise, ability to engage in long-term projects and publicity.

B. Authoritative

The KLRC is authoritative in the areas of its competence, as Section 9 demands highly qualified and experienced professionals to sit at the apex of the agency. A critical factor in winning and maintaining respect for a law reform commission is ensuring that its scholarship is absolutely first-class. Law reform work must always proceed from a meticulous treatment of law and a clear understanding of the continuous processes.

Only after that is it possible to consider intelligently the possibilities for reform and to make recommendations that are authoritative, realistic and achievable so that, even where they are not acted on immediately, they may serve to shape attitudes and values into the future, laying the groundwork for reform at a later time.

C. Full-Time

The KLRC comprises a full-time chairperson and both full time and part time members of the commission (commissioners).

KLRC is supported by a full time secretariat under the leadership of the secretary who is also the Chief Executive Officer, with responsibility for the day to day operations of the Commission. The composition of the Commission as set out in section 8(1) of the Act ensures members are drawn from key stakeholders which brings diverse expertise and perspectives in discharge of the functions of the Commission.

This is aligned to the models that have emerged in the Commonwealth and elsewhere on how to structure and manage the operations of law reform commissions.

D. Independent

Section 4(2) confirms that KLRC is not subject to the direction or control of any person or authority while carrying out its functions. This secures KLRC's functional independence as it is not to be directed or controlled by any interests or person external to it. KLRC is only subject to legally prescribed channels of accountability and exercises its autonomy through carrying out its functions, without receiving any instructions or orders from other state organs or agencies.

It is fundamental to the success of a law reform agency, that it maintains its intellectual independence, the willingness to make findings and offer non-partisan advice and recommendations to government without fear or favour. Without this essential quality, a law reform agency would be no different from a government department operating under political direction, or from a consultant contracted to deliver a desired result.

KLRC works in collaboration with other state organs. This is in keeping with the desired goal of the Constitution, that independent institutions should seek collaborative relationships with other state organs for the purpose of supporting good governance.

E. Facilitative

As a law reform agency, KLRC is a facilitative body responsible for assisting both national and county government in any area of law when requested to do so in response to the functions donated under section 6 (c), (d) and (h) of the Act, therefore enabling other institutions to fulfil their mandate.

Critical law reform initiatives are also undertaken through taskforces, inter-ministerial committees and other initiatives set up to review and make recommendations in any area of law reform. KLRC provides its specialised law reform expertise during these initiatives.

F. Consultative

KLRC carries out its mandate in a consultative manner. A law reform agency ought to operate fully in the public domain. A deep commitment to undertaking extensive community consultation as an essential part of research, policy formulation development of legislation is the *sine qua non* of KLRC. It is the attribute that distinguishes it from other bodies that have a law reform aspect to their work.

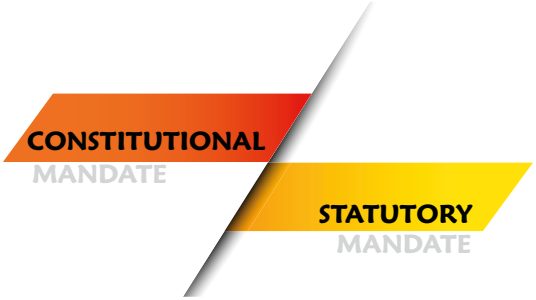
G. Implementation-minded

KLRC is mindful of how implementable its recommendations are and hence strives to craft recommendations that are practical, consistent, harmonized, just, simple, accessible, modern and cost-effective. This is how a law reform agency influences policy and maintains public confidence and the respect of Government, as its reports are not self-executing. By consulting and collaborating with state and non-state organs and MDACs, KLRC is assured that the recommendations will be adopted as there is buy-in from the start.

1.3 MANDATE OF KLRC

The KLRC has both a constitutional and statutory mandate anchored in the Constitution, the Kenya Law Reform

Commission Act, Cap. 3 (the establishing legislation) and the County Governments Act, Cap. 265.



A. Constitutional mandate

Upon the promulgation of the Constitution and in order to enable expeditious implementation of the Constitution, KLRC was mandated, under the Sixth Schedule to the Constitution, to coordinate with the Attorney-General and the Commission for the Implementation of the Constitution (CIC) (*now defunct*) in preparing, for tabling in Parliament, legislation required to implement the Constitution.

The legislation required under the Constitution includes the specific laws listed under the Fifth Schedule to the Constitution and any other law not specifically listed but necessary for the implementation of the Constitution. These laws were expected to be in place not later than five years from the date of the promulgation of the Constitution and while most were enacted within the set timeframe, the mandate of the KLRC subsists with respect to assisting in the preparation of legislation towards the full implementation of the Constitution, which is a cyclic and ever-evolving exercise.

B. Statutory mandate

The KLRC's statutory mandate is drawn from both the Kenya Law Reform Commission Act and the County Governments Act, Cap. 265.

I. The Kenya Law Reform Commission Act

The Kenya Law Reform Commission Act provides the KLRC's functions. Section 6 of the Act mandates KLRC to:

(a) keep under review all the law and recommend its reform to ensure:

(i) that the law conforms to the letter and spirit of the Constitution;

(ii) that the law systematically develops in compliance with the values and principles enshrined in the Constitution;

(iii) that the law is, among others, consistent, harmonised, just, simple, accessible, modern and cost-effective in application;

(iv) the respect for and observance of treaty obligations in relation to international instruments that constitute part of the law of Kenya by virtue of Article 2(5) and (6) of the Constitution;

(v) that the public is informed of review or proposed reviews of any laws and;

(vi) that it keeps an updated database of all laws passed by Parliament and all laws under review;

This mandate gives the KLRC the responsibility to ensure that all the law in the Statute Book is reviewed and aligned with the Constitution.

Further, KLRC also provides advice, technical assistance and information to MDACs, Constitutional Commissions and Independent Offices on policy formulation and translation of policies into proposed legislation.

KLRC has a standing invitation in Parliament to participate in the pre-publication review and scrutiny of all bills, including Private Members' bills.

II. County Governments Act, Cap. 265

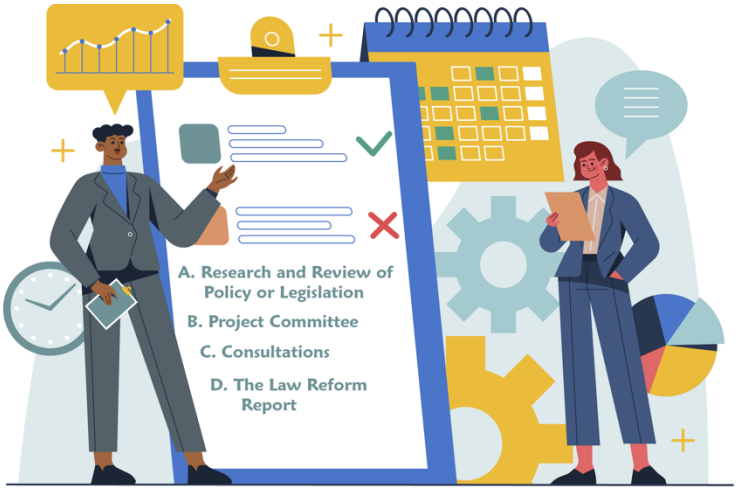
Section 5(3) of the County Governments Act mandates county governments to seek technical assistance from the KLRC in the development or reform of county legislation. The KLRC, in this regard, offers technical assistance to and capacity building for the 47 counties in the preparation and review of their legislation and policies.

Besides assisting county governments in the preparation and review of their legislation, KLRC has developed and disseminated model laws based on the functions of the county governments as envisaged under the Fourth Schedule to the Constitution.

1.4 KLRC'S APPROACH TO LAW REFORM

Section 6 of the KLRC, Cap. 3 requires KLRC to formulate and implement programmes, plans and actions for the effective reform of law and administrative procedures at national and county government levels. In its approach to law reform, KLRC, on its own motion or upon receipt of law reform proposals from

any person or institution, will determine which of the following approaches would be most appropriate:



A. Research and Review of Policy or Legislation

A Reference or Proposal for Reform may ordinarily originate from the Attorney-General or any other person or institution.

KLRC may also, on its own volition, conduct an enquiry.

A Reference or Proposal for Reform should be as concise as possible, disclose a cogent legal problem that necessitates reform and delineates the affected legislation.

A decision is made by KLRC on whether or not to prioritise Reference or Proposal for Reform of the nature described above will be dependent on the urgency of the proposed changes, the running programmes of KLRC, especially as

determined by the obligations in the extant Performance Contract and the available resources, including research personnel.

Where KLRC is, for any reason, unable to take on board such Reference or Proposal for Reform, it will, as soon as practicable, advise the person or institution originating the proposal and the reasons thereof.

B. Project Committee

Where KLRC takes up a Reference or Proposal, a Project Committee comprising a presiding commissioner and one or two legal research officers is constituted.

In assembling the Project Committee, regard is had to specialisation, experience and interest.

It is the responsibility of the Project Committee to: manage and undertake comprehensive research to determine the prevailing legal position and the deficiencies in the law that may require rectification; set time frames for the review; receive, collate and analyse views (including peer review by other legal staff and commissioners); organise the requisite consultative forums; and prepare the necessary reports and draft bill.

A key product of the Project Committee's initial research is an Issue or Discussion (Position) Paper, which must generally include the background information and specific issues identified for examination.

C. Consultations

The Issues Paper is routinely circulated to all Commissioners for discussion and input, which may generate further research on particular issues.

For purposes of adopting best practices, a comparative study of the position in other jurisdictions is undertaken. It is after such excursions that concrete proposals forreform are formulated.

A Discussion Paper, which entails the products of the detailed research that has been taken up to that point, is prepared next. It reveals a range of arguments that may exist on any issue and provides an outline of likely proposals for reform.

It is the Discussion Paper that normally forms the basis of consultations with external stakeholders.

These consultations may take the form of workshops, seminars, retreats, or county-based public meetings.

The stakeholders are also encouraged to make written submissions or memoranda.

The views emanating from these stakeholder consultations constitute the framework for the proposals for reform.

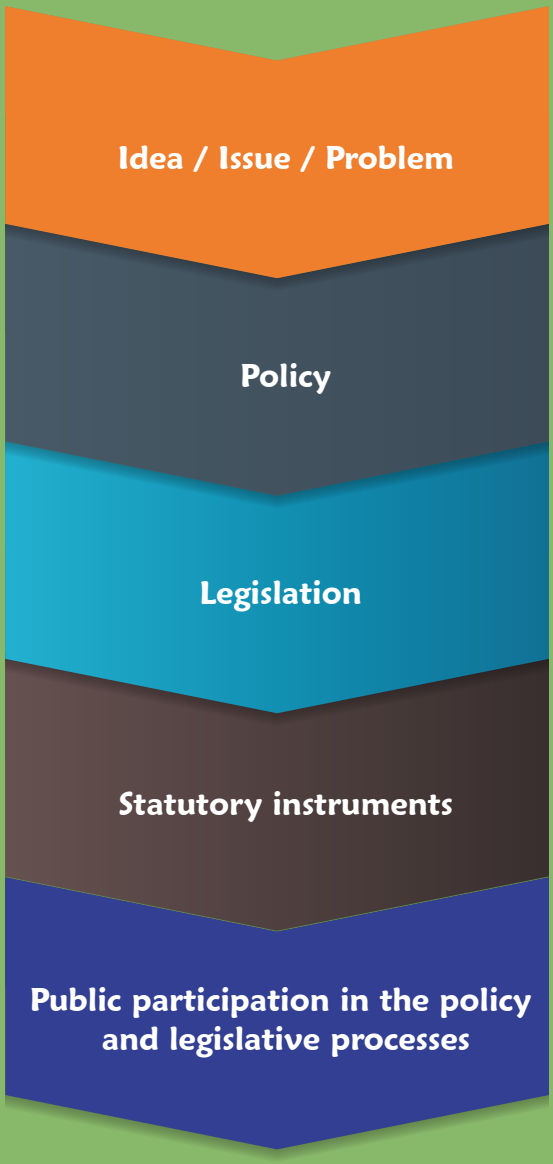
D. The Law Reform Report

After considering and analysing the views and inputs generated as a consequence of stakeholder consultations and conducting further research where necessary, the Project Committee prepares a Report outlining the proposed recommendations for

reform and, in the interest of transparency, the reasons underlying those recommendations.

For purposes of efficiency, KLRC ordinarily formulates the recommendations or proposals for reform by means of a draft bill.

The Final Report, together with recommendations and legislative proposals, are eventually subjected to stakeholder validation and then submitted to the Attorney-General or the instructing Cabinet Secretary or head of MDAC for the requisite action.


Idea / Issue / Problem
Policy
Legislation
Statutory instruments
Public participation in the policy and legislative processes

CHAPTER 2

POLICY DEVELOPMENT

01 Problem Identification

02 Policy Initiation

03 Research

04 Negotiation and Public Participation

05 Finalisation of the Policy

06 Cabinet or County Executive Committee Approval

07 Parliamentary or County Assembly Approval

08 Publication

09 Policy Implementation

10 Monitoring and Evaluation

2.0 INTRODUCTION

This chapter outlines the relationship between policy and legislation. It provides the rationale for policy preceding legislation as a best practice and the circumstances where a statute may precede policy. Also addressed is the policy formulation process and some of the considerations in translating policy into legislation.

2.1 POLICY

A policy may be defined as a course or principle of action adopted or proposed by a government, political party, business, or individual. It is defined by Black's Law Dictionary as "the general principles by which a government is guided in its management of public affairs". A policy, therefore, outlines what the government seeks to achieve and the ways and means to achieve those proposals.

Policy, therefore, sets out the goals and planned activities of a ministry and department. It may, however, be necessary to pass a law to enable the government to put in place the necessary institutional and legal framework to achieve its aims. Laws must be guided by the existing government policy.

Legislations trace their foundation or anchorage on some form of agreed policy framework. It is best practice for a policy to precede a law. This is because it gives the drafter a clear picture of the roadmap in the legislative process and a better

understanding of the practical aspects of the legislative proposals that may be made.

A policy document provides an opportunity to discuss all aspects of an issue and, as a result, helps to bring out interventions that may not be foreseen if the legislation comes before the policy. When legislation precedes policy, certain critical policy considerations may be disregarded or emerge late, resulting in conflict between the policy position and the legislative intervention.

There are often circumstances where there is no formal policy-making process preceding legislation. Such instances include urgent issues of considerable public concern that may need to be addressed as a matter of priority through legislation or in situations where a bill is presented as a Private Member's bill.

2.2 THE CONSTITUTION AND THE POLICY-MAKING PROCESS

The Constitution recognises the need to formulate, debate, approve and implement policies. The National Land Policy, Economic Policy and Health Policy are some of the policies that the national government is mandated to formulate under the Fourth Schedule to the Constitution. Similarly, the county governments have the responsibility to formulate and implement policies in the areas within their mandate as per the Fourth Schedule.

2.3 POLICY MAKING PROCESS

It is important for those participating in the legislative process to appreciate the necessity of formulating policy that will Guide and clearly set out the best approach to dealing with policy

challenges at hand. It is, however, important to note that not all policy problems require a legislative solution. That is to say there are those policies that may be implemented through administrative means and those that require the development of legislation.

Policy development usually starts with the identification of the problem that the proposed policy seeks to address. It is necessary to precisely identify a problem in order to find ways to solve it. When a problem is defined and stated accurately and concretely, it is much easier to find a coherent solution. Far too often, causes and symptoms are confused and the core nature of the problem is not identified. In order to avoid this problem, it is important to ask a number of poignant questions and assess how well the answers lay the groundwork for designing solutions. The following questions exemplify this approach:

(a) What circumstances are causing the problem?

(b) What types of behaviour are the cause of the problem?

(c) Who is responsible for the problem?

(d) Where and under what circumstances does the problem arise?

(e) Who is affected by the problem and in what manner?

Policy ideas may originate from the executive and the executive entities, political parties, parliamentarians, business associations, organised groups or individual citizens. Any person may originate a policy idea since, according to the Constitution, any person has a right to petition Parliament or a county assembly to consider any matter within its authority.

Government policy lending itself to legislation may also emanate from the government's statement of its legislative agenda. The legislative agenda is set from an outline of policy priorities made in the President's speech or a Governor's speech at the opening of a new session of Parliament or county assembly. The agenda is set as follows:

(a) the President's or the Governor's speech at the opening of each session of Parliament or county assembly outlines in broad terms what the government hopes to achieve and the necessary legislative measures that may be required for the tasks set out;

(b) the priorities in the legislative program are set for the ensuing legislative cycle of the House;

(c) the number of bills and their relative urgency is set by the Executive and managed through the office of the Leader of Majority;

(d) the government legislative agenda may also be set by the budget outline for the coming financial year. However, to fulfil some aspects of the budget, it may be necessary to legislate; and

(e) the coming into operation of international treaties and conventions and obligations that arise therefrom may influence the legislative agenda.

2.4 STAGES IN THE POLICY FORMULATION PROCESS

In formulating a policy framework, the following stages are pertinent:

Step I: Problem Identification

According to KIPPRA, public policymaking starts by clearly defining the policy question or problem. A problem is identifiable when there exists an unsatisfactory set of conditions for which relief is sought from the Government. Usually, the problem is identified by MDACs, the Presidency, Cabinet, Parliament, academia and think tanks, civil society organisations or citizens. At this stage, the following questions should be answered:

(a) What is the nature and magnitude of the problem?

(b) What groups in the population suffer from the identified problem?

(c) How did the problem come about and why does it continue?

(d) What are the immediate and underlying causes?

(e) What should be done about the problem?[1]

Step II: Policy Initiation

This is a function of a number of players, including government MDACs, citizens, institutions and stakeholder groups, among others. The relevant MDAC formulates the policy, which is reduced into writing for discussion purposes within the relevant government departments and other forums.

[1] Adopted from "Public Policy Formulation Process In Kenya"— KIPPRA, at https://kippra.or.ke/download/publicpolicy-formulation-in-kenya-pdf

Step III: Research

During this stage, it is expected that the respective initiator will undertake comparative research on the matter to be regulated. The initiator may undertake study visits within or outside the Country or County in order to ensure that the policy benefits from international or national best practices. Expert opinion on the problem at hand should be sought. The National or County entity should work closely with state agencies tasked with the obligation of assisting the two levels of government in the process of formulation of policies and legislation. KLRC and KIPPRA are very instrumental in this regard. MDACs should take advantage and use these entities as they are statutorily tasked to assist with these specialised competencies.

It is at this stage where task forces, committees and other consultative machinery may be constituted with a view to ensuring that all entities likely to be affected by the policy contribute to the policy process at the formative stages. This approach will facilitate acceptability and ownership of the final product by all relevant MDACs and other actors.

Step IV: Negotiation and Public Participation

This stage is the longest in the process. It is at this level that substantive contents of the draft policy framework are debated and negotiated with various stakeholders, such as opposition parties, the public, non-governmental organisations and all other interest groups. During this time, the MDACs prepare discussion documents on the policy to facilitate debate, comment and feedback.

Stakeholder participation may take different forms, as elucidated in Chapter five of this Guide.

Step V: Finalisation of the Policy

Step five of the process is the finalisation of the policy by the relevant MDAC. This comes after the policy has been properly debated, whereupon the concerned MDAC crystallises the issues and options available and draws up a final policy document.

Step VI: Cabinet or County Executive Committee Approval

Once the cabinet secretary or county executive committee member is satisfied that proper analysis has been carried out, different approaches have been identified and discussed and that the policy document speaks to the best option available to address a situation, the cabinet secretary or county executive committee member submits the policy to the cabinet or the county executive committee, respectively, for approval.

The cabinet secretary or county executive committee member presents to the cabinet or the county executive committee, with adequate background information, the salient features of the policy and justification. They must ensure that fiscal, constitutional and other possible implications of the policy are clearly brought out to enable the cabinet or the county executive committee to make an informed decision.

Step VII: Parliamentary or County Assembly Approval

Upon approval by the cabinet or the county executive committee, the policy document is published.

In some instances, the policy paper is tabled in the respective House for debate and approval. In that case, it is referred to as a Sessional Paper. The introduction of a policy document before Parliament is often done where it is considered important to

have the relevant House be apprised and adopt in principle the positions contained in the policy document so that the legislative proposals made pursuant to it, if any, may receive expedient attention when they are finally made. The term 'Sessional Paper' is a parliamentary term and includes documents presented and produced by the legislature.

The respective legislative body shall, in accordance with the Standing Orders, introduce the policy document in the House and refer it to the relevant House Committee for scrutiny and further consideration. The Committee thereafter reports back to the whole House. The policy document may be approved with or without amendments.

Step VIII: Publication

Upon approval, the policy is published as a Sessional Paper. The Executive is expected to widely circulate the Sessional Paper and to keep the public informed of its implications. The Sessional Paper often forms the basis of legislation.

Step IX: Policy Implementation

Once the policy is approved and subsequently published, it is incumbent upon the responsible organs and entities to ensure its implementation. Policy implementation may take many approaches. However, the main means of implementation is through legislative action in the respective legislative organs of the two levels of government.

The following are the other means that are available for policy implementation:

(a) Administrative decision-making;

(b) Programme operation;

(c) Education and public awareness generally and;

(d) Institutional or administrative structures.

Policy implementation involves translating the objectives of a policy into actions. Implementation may be carried out by either formal or informal actors, including legislators, courts and executive arms of government, pressure groups, community organisations and even individuals.

Step X: Monitoring and Evaluation

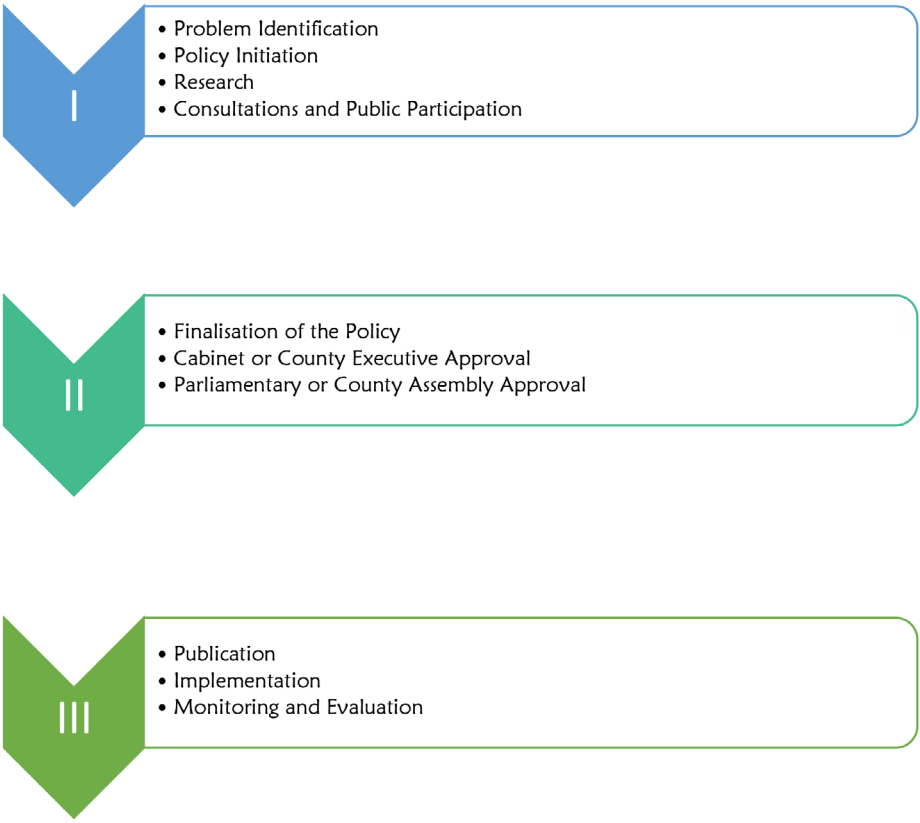
Monitoring is a continuous process of assessment of the policy, while evaluation, on the other hand, is an assessment of the impact and responsiveness of the policy interventions. Monitoring provides immediate information on how the policy is working and allows policymakers or interested actors to systematically steer and adjust the policy as it is being implemented. Evaluation appraises information during the implementation period that may be useful in designing the next policy cycle.

Evaluation helps to make conclusions about five main aspects of the policy, namely;

(a) relevance
(b) effectiveness
(c) efficiency
(d) impact and
(e) sustainability

Information gathered in relation to these aspects during the monitoring process provides the basis for the evaluation.

These stages are summarised in Fig 1 as follows:



2.5 STRUCTURE AND CONTENT OF A POLICY

The structure and content of a policy framework may not necessarily be uniform across the various sectors. However, it is important that those developing policy documents in Kenya adhere to a generic or uniform style of structure and contents.

The structure of a policy framework should include:

(a) Introduction;

(b) Situational analysis;

(i) Challenges or problems or issues to be addressed;

(ii) An analysis of the existing legal framework, including international law governing the matter, if any;

(c) Strategies for its implementation;

(d) Actors or stakeholders, including their roles and responsibilities;

(e) Monitoring and evaluation mechanism;

(f) Implementation matrix

2.6 FACTORS TO CONSIDER IN POLICY-MAKING

The policy-maker must consider the following factors in policy development:

(a) Need-based analysis, that is, the necessity to formulate a policy based on an emerging need or possible change that may be anticipated.

(b) How the proposed policy will be managed and resourced from formulation to the point of implementation. This includes the personnel and specialised resources necessary for the full implementation of the policy.

(c) The time it will take to formulate the policy, work out its means of implementation and factor in the period it may require to develop the enabling legislation, if necessary.

(d) Information requirements for the full understanding and implementation of the policy, that is, analytical information on the situation, if available; official surveys and data on population and other factors form a necessary background to policy formulation.

(e) Public participation – where and how to involve the public in developing policy.

(f) The principle of subsidiarity, that is, policy development, must be devolved to those at the frontline of service delivery.

(g) The practical aspects of the implementation of the policy.

(h) The connection between the expected outcomes (goals) and public policy: an example of such a policy is the need to balance the sustainability of the ecosystem of a lake and the policy regulating access and fishing.

(i) Tailor the policy framework to local needs by ensuring the policy answers to local questions and dilemmas and is not an imposition from outside the community. For example, in developing a Wildlife Policy, communities in surrounding areas must be consulted to propose solutions that are best suited for the area.

(j) Ensure that the policy is forward-looking; that is, it must have a long-term view of the problem and offer a long-term solution.

(k) Benefit from the experience of others who have resolved similar situations.

(l) Seek new solutions to old problems by being clear on objectives and outcomes.

(m) Be based on a study or current analysis of the problem at hand.

(n) Offer an inclusive solution to all the segments of the community in which it will be implemented.

(o) Fit into the current policies being implemented by other agencies.

(p) Borrow from best practices and learn from implementation mistakes and successes elsewhere.

(q) Must have an in-built communication strategy for dissemination to the public and all stakeholders.

(r) Should have evaluation and review mechanisms as one of it's features.

2.7 NATIONAL POLICY & LEGISLATIVE PROCESSES OF COUNTY GOVERNMENTS

All national policies apply in the entire Republic and should be implemented by entities mentioned in them or in laws subsequently enacted in pursuance of the policy. A policy framework should, however, respect and uphold the constitutional assignment of functions to either level of Government.

The Constitution assigns functions to each level of government and categorises those functions as exclusive, concurrent, or residual. Exclusive functions are functions specifically assigned to either national government or county government. Concurrent functions are the shared functions that are implemented by both levels of government, while residual functions are functions that are not assigned to either level of government. The Constitution presumes that the residual functions are, unless transferred by law, executed by the national government.

The national government may formulate policies in relation to the exclusive, concurrent and residual functions. If the national government is, however, minded to formulate policies on functions that are exclusive to the county government, the national government should be alive to the principles of conflict of laws set out in Article 191 of the Constitution.

Further, either level of government is required to, besides undertaking its functions as provided for in the Constitution, subscribe to the principles of cooperative, consultative and interdependent governance as provided for in Articles 6 and 189. Citizens and all stakeholders are reminded to remain vigilant to detect and highlight any possible excesses. Where any such excess is established to have occurred or is impending, one may formally petition the relevant constitutional commission or state organ for appropriate redress or seek any of the remedies provided for in law.

2.8 TRANSLATING POLICY INTO LEGISLATIVE PROPOSALS

Legislation is one of the most important instruments of government in organising society and protecting the populace. It determines, amongst others, the rights and obligations of individuals and authorities to whom the legislation applies.

Legislation should be informed by a policy, which becomes its basis and implementation framework. A person or organisation that spearheads the development of a bill starts from the point of generating policy. A policy framework lays out in detail, how best a matter or a challenge at hand is to be addressed.

On most occasions and especially owing to cost and time constraints, it is not always possible to commence the legislative process by first appreciating and embracing the requisite policy platform. This may entail challenges, beginning with implementation difficulties of the just enacted law, coupled with demands for immediate amendments to rectify anomalies that could have been forestalled or foreseen if the ideal process had been followed.

2.9 CONSIDERATIONS FOR LEGISLATION AND THE FACTORS TO CONSIDER PRIOR TO INITIATING LEGISLATION

Before taking the legislative approach, the person responsible for drafting the relevant legislation should undertake an analysis of the options available. The legislative drafter should advise the Executive on the constraints that adopting the legislative approach could engender. These include the cost, both fiscal and time related and inflexibilities occasioned by stringent demands that an Act of Parliament or a county legislation may bring about, amongst others.

Owing to their significance, certain matters can only be executed through legislative measures. In making this determination, the Executive should respond to the following questions:

(a) What are the legal consequences of not formulating a law to regulate the matter in question?

(b) What does the Constitution demand, for example, if it is a question of limitation of rights?

(c) What are the enforcement mechanisms necessary to give full effect to the policy?

(d) Will there be a need to create criminal sanctions to enforce the law?

(e) Are there fees, charges, or other fiscal penalties to be imposed?

(f) What procedural and process matters are needed? and

(g) Are there strict timelines to be adhered to in implementing the policy and if so, what are the chances that they may not be complied with if a different option were adopted?

Upon giving consideration to the above questions, some of the factors to be considered include:

A. Nature of the Contingency

A complicated long-term situation that affects a large part of the population may need a legislative solution by the respective House. An issue that regulates a temporal situation such as, for example, accommodation of railway construction workers in a county or the movement of large or noxious cargo, may require regulations from the Ministry or Department of Transport.

B. Regulatory Options

The existence of another regulatory option in an existing law that may be activated to deal with the mischief may also suffice. A legal extension to cover the issue and area may become necessary in that instance.

C. Cost

The cost of legislation and implementation of the proposed instrument must be weighed against the mischief sought to be addressed. For instance, if the biomass of fish in a lake is too low in economic value, the policy initiative could be restocking and conserving rather than varying the mode of fishing.

D. Macro-economic Factors

Macro-economic factors and the projected impact of the legislative instrument on the larger society in socio-economic terms may influence the choice to be made.

E. Environmental Factors

Environmental factors and other common concerns that impact the living environment of the community affected by the proposal are useful in determining issues that motivate the legislative proponent.

F. Possible Limitation of Human Rights and Fundamental Freedoms

Article 3(1) of the Constitution mandates every person to respect, uphold and defend the letter and spirit of the Constitution. Chapter 4 of the Constitution bestows fundamental rights and freedoms on the people of Kenya. Further, Article 24 restates that a right or fundamental freedom

in the Bill of Rights shall not be limited except by law and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including:

(a) the nature of the right or fundamental freedom;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

If the policy directive is likely to limit a right or a fundamental freedom enshrined in Chapter 4 of the Constitution, such limitation may only be effected in accordance with Article 24 of the Constitution.

In deciding whether to adopt general administrative procedures to implement a policy, one has to be persuaded that the content and nature of policy directives and basic guidelines to be adhered to, do not necessarily attract criminal or other legal penalties or other consequences.

One should be able to appreciate the impact of the directive in determining what instrument is best placed to implement the policy. In other words, the appropriate instrument to use after settling the policy question depends on the nature of the problem at hand.

CHAPTER 3

DEVELOPMENT OF LEGISLATION

3.0 INTRODUCTION

The outcome of a law reform process is usually a recommendation that the law be improved depending on prevailing circumstances. For law reform to be complete, therefore, the recommendation to be implemented will either require new legislation, or a review of existing ones.

A government's legislative policy will derive from a number of sources, among which are the governing party's campaign manifesto; policy priorities of MDACs; and the prevailing environment.

3.1 FACTORS TO CONSIDER IN THE LEGISLATIVE PROCESS

When engaging in the drafting of legislation, careful consideration of the following essential factors is of utmost importance:

A. Constitutional Considerations

To navigate the intricate constitutional landscape, a profound understanding of the Constitution's role in advancing overarching national objectives is crucial. The Constitution not only establishes mechanisms for its own realisation but also champions democratic principles. These principles include:

(a) strengthening institutions and democratising electoral and legislative procedures;

(b) safeguarding individual rights and freedoms;

(c) upholding the rule of law;

(d) fostering integrity and ethical leadership in public service;

(e) establishing governance structures, positions and offices;

(f) encouraging people's participation in government;

(g) ensuring transparency and accountability in public affairs;

(h) distributing powers and providing checks and balances;

(i) promoting separation of powers and delineating governmental roles;

(j) setting national goals and objectives;

(k) reinforcing the judiciary's role;

(l) facilitating equitable resource distribution;

(m) providing a framework for land administration;

(n) recognising the nation's diverse identities while fostering unity; and

(o) enshrining equality, affirmative action and more.

As the supreme law binding all individuals and state organs, any law conflicting with the Constitution is nullified to the extent of the inconsistency. Thus, those involved in the legislative process must acquaint themselves with the Constitution's content and principles.

It is essential that policies, bills and statutory instruments align with the Constitution's letter and spirit, promoting purposive interpretation and conforming to functional assignments in the Fourth Schedule. Furthermore, adherence to legislative competencies, constitutional values, principles under Article 10, roles specified in Articles 129, 174, 175, 201 and 232 and respect for the Bill of Rights are mandatory. Limiting fundamental rights

or freedoms should be judicious and constitutionally compliant, adhering to the parameters set forth in Article 24.

B. International Treaties and Conventions ratified by Kenya

Treaties and conventions ratified by Kenya, together with international legal norms, constitute part of Kenyan law as provided for under Art. 2 (6) of the Constitution. It is imperative that policies and legislation adhere to these agreements. The implementation mechanisms for ratified instruments must be incorporated into legislation, considering potential conflicts with constitutional provisions.

The Treaty Making and Ratification Act, Cap. 4D outlines procedures for treaty negotiation and ratification. These steps should encompass formulating measures for effective implementation of international instruments. Prior to ratification, the constitutionality of the treaty's contents should be evaluated.

C. Territorial Jurisdiction

Ordinarily, a state legislates within its territorial confines. However, exceptions, like extraterritorial application in transnational crimes, exist. When formulating policies or drafting legislation with extraterritorial effects, it is necessary to anticipate implementation challenges and, therefore, have in place administrative options to enable implementation.

D. Conflict of Laws and Statutory Harmony

Thorough research is vital to ascertain whether legislative proposals overlap with existing legislation. Harmonisation of laws is crucial to avoid internal conflicts and incongruities. Adherence to Limitation of Actions Act Cap. 22 and Interpretation and General Provisions Act Cap. 2 is essential. Respect for constitutional, functional and institutional integrity is

pivotal to preventing conflict in laws. Parliament and county assemblies possess distinct legislative mandates under specific areas of constitutional competence.

E. National Law and Policy and Implications for County Legislative Processes

National policy and legislation apply uniformly throughout Kenya. National legislation addresses matters impeding county actions detrimental to national interests or impeding national economic policy. It is vital for national legislation to cover issues not effectively regulated through county legislation, ensuring regulatory uniformity. National legislation supersedes county legislation in areas like national security, economic unity and market protection as provided for under Art. 191 of the Constitution.

F. Policy Parameters

Prior to drafting legislation, policy-makers, drafters and legislators should adhere to several key principles. Policies should precede laws and outline clear objectives and solutions. The drafting process should likewise emanate from well-established policy positions. The legislation should align with the intended policy objectives and be informed by preferred policy options.

G. Technical Soundness or Practicality Concerns

Legislative instruments must be implementable and technically sound. Implementing administrative mechanisms necessitates cost effectiveness and efficiency considerations.

H. Judicial Precedent

Judicial decisions hold substantial weight in Kenyan law. Courts evaluate legislative and administrative actions' legality,

constitutionality and utility. Judicial observations can trigger reform efforts if legal or administrative aspects require rectification. Policy-makers and law reform agencies should stay abreast of relevant judicial decisions, integrating necessary legal or administrative modifications into their reform initiatives.

I. Regulatory Impact Assessment

This is elaborated on further in chapter four of this Guide.

3.2 LEGISLATIVE DEVELOPMENT PROCESSES

A. Research and Drafting

The initial phase of a law reform undertaking encompasses the commencement of comprehensive research into the legal landscape, social dynamics and economic milieu pertinent to the subject matter. This phase lays the foundation for the creation of various vital documents, including research papers and issue papers, which serve the purpose of providing essential contextual information regarding the subject under examination. They include descriptive accounts of the existing legal framework and a meticulous analysis of the underlying problem. The content produced in this preliminary stage is influenced by factors such as the allocated timeframe for the inquiry and the available resources. In certain instances, constraints in time might render the generation of comprehensive background or informational papers impractical.

The process of legislative drafting entails the transformation of policies, declarations or pronouncements into precise legislative instruments. The role of a legislative drafter is to provide specialised technical drafting expertise and to construct the

necessary legislative instruments. This professional takes the agreed-upon policy framework and translates it into draft bills or legislative proposals that are presented to the legislative body for approval.

In Kenya, the capacity for legislative drafting is housed within institutions such as KLRC, the Office of the Attorney-General, Parliament, county assemblies and the offices of county attorneys. The augmentation of legislative drafting capacity has been a gradual process and though the precise extent of capacity at the county level remains uncertain, endeavours have been made in the past to bolster capacity through short courses facilitated by the Kenya School of Law and KLRC.

The cultivation of legislative drafting skills necessitates a combination of training and hands-on experience under the mentorship of seasoned drafters. Given the imperative to uphold the rule of law, meticulous attention is required during the drafting process. Modern drafting adheres to principles of plain language drafting, where laws are framed in a manner that is comprehensible to those subject to their provisions. The aspiration is to make the legal framework accessible, reducing convoluted legal jargon and lengthy sentences.

Legislative drafters should strive to simplify technical intricacies, reserving detailed technical matters for subsidiary legislation or other administrative mechanisms. The drafter's ultimate audience – the end-users of the law – must be kept in mind.

The language of the law should also effectively resonate with the intended users' understanding. For instance, a variance in the language may be noted in legislation that is intended for use by specialised and technically trained individuals as opposed to

legislation that is meant for the general public. Achieving this balance while accurately conveying the law's intent underscores the skill of a proficient drafter.

In the realm of legislative drafting, meticulous attention must be accorded to the structure of sentences, linguistic choices and syntactical arrangement to ensure the resulting legislation is cogent and effective.

B. The Legislative Sentence

The legislative sentence involves the meticulous arrangement of words to articulate directives or impose restrictions. It is a construct that necessitates the inclusion of specific components to effectively communicate commands or prohibitions. A well-constructed legislative sentence comprises the following essential elements:

(a) **The Legal Subject**: This refers to the individual or entity to which the law's provisions are applicable. The sentence must precisely delineate the scope of the law's reach.

(b) **The Legal Action**: This component encapsulates the legal provision or requirement that is being established. It forms the core of the legislative sentence, outlining the desired outcome or effect.

(c) **The Circumstances**: This encompasses the contextual conditions under which the law is intended to be operative. These conditions are crucial for understanding the appropriate application of the law.

The legislative sentence elucidates several key aspects:

(a) **How**: It outlines the procedural or operational methods through which the law is to be implemented.

(b) **What**: It expounds on the specific nature of the legal action being prescribed, defining the legal obligations or entitlements.

(c) **When**: It stipulates the conditions under which the law becomes operative, indicating the temporal context for its application.

(d) **Where**: It delineates the specific circumstances or contexts in which the law is intended to operate.

(e) **Who**: This pertains to the legal subjects who are either entrusted with responsibilities or are obligated to adhere to certain prohibitions outlined by the law.

(f) **Why**: This element delves into the underlying policy considerations and objectives that underpin the enactment of the law.

In essence, the legislative sentence is a comprehensive construct that synthesises these critical elements, ensuring that the law's provisions are clear, comprehensive and cogent. The meticulous arrangement of these components within the legislative sentence is essential for the effective communication of legal directives and restrictions.

C. Language and Syntax

In legislative drafting, language serves as the conduit for conveying the law's message, while syntax pertains to the strategic arrangement of words and phrases to formulate coherent and well-structured sentences in a language. The drafting process necessitates strict adherence to the following rules of language and syntax:

(a) Familiarity: Drafters should opt for concise and familiar words and phrases, facilitating easy comprehension by all stakeholders.

(b) Brevity: Effective drafting employs succinct sentences that singularly convey a specific message, enhancing clarity.

(c) Consistency: Consistent terminology ensures that a single term is employed to convey a uniform meaning throughout the entire bill.

(d) Spelling: Demonstrating consistency in word spelling across the bill ensures accuracy and reliability.

(e) Standard Language: Adherence to the standard language employed by the drafting office, such as the house drafting style in Kenya overseen by the Office of the Attorney-General, promotes uniformity and precision.

(f) Clarity: A bill should contain lucid, simple and precise language. The drafted bill must be explicit regarding its intended audience, those subject to regulation and those entrusted with its implementation.

(g) Harmony: The drafted bill should align with existing laws addressing similar subject matters in order to establish a coherent legislative framework.

(h) Logic: Logical flow is pivotal, necessitating the logical separation and sequential treatment of similar subjects within the proposed law.

Drafters must be vigilant to eliminate archaic terms like "aforesaid," "before-mentioned," and "herein before-mentioned," as well as unnecessary Latin expressions. Additionally, cautious consideration should be given when employing the following terms:

(a) "Shall": Conveys an obligation or duty.

(b) "Any": Signifies one or some but is misapplied in reference to individuals or entities.

(c) "Each" and "Every": "Each" pertains to two or more in a numerical context, while "every" implies a collective category.

(d) "All": Often redundant and should be used judiciously.

(e) "On or after": Appropriate when the designated day is to be inclusive.

(f) "And" or "Or": "And" signifies conjunction, implying unity, while "or" is disjunctive, implying choice between options.

(g) "Which" or "That": "Which" is non-restrictive, whereas "that" is employed in restrictive contexts.

Furthermore, proper tenses must be maintained, as legislation endures in perpetuity, necessitating its formulation in the present tense. Equally vital is the accurate use of punctuation, which fosters readers' comprehension of the law.

In sum, meticulous adherence to language and syntax principles is pivotal in legislative drafting, enhancing the law's accessibility, applicability and comprehensibility to a broad spectrum of stakeholders.

D. Drafting Instructions

In the preliminary stages of a drafting assignment, it is paramount that a drafter possesses a comprehensive understanding of the deficiency or imperfection within the law that necessitates rectification. Such comprehension is contingent upon the availability of meticulous drafting instructions. The drafting process entails the drafter's sustained collaboration with the instructing entity, guaranteeing that the forthcoming legislation rests upon solid legal foundations, effectively translates intended policies into action and maintains lucidity and feasibility. For seamless communication and clarification, it is advisable for a senior technical officer from the instructing agency to be designated to work closely with the legislative drafter during the drafting process.

It is noteworthy that, on numerous occasions, drafting instructions materialise in the form of a lay draft of the proposed bill. In such instances, the drafter is tasked with delving into the underlying policy rationale behind the proposals, with caution against presuming the accuracy of the lay draft in capturing the precise policy stance. The drafter bears the sole responsibility of ensuring that the drafted bill accurately reflects the policy objectives.

Drafting instructions must comprehensively encompass the following elements:

(a) **Factual Background**: Provide a comprehensive overview of the current legislative framework's contextual background.

(b) **Problem Resolution**: Enunciate the solutions that the new legislation seeks to deliver for the identified issue.

(c) **Legislative Priority**: Specify the priority status of the proposal as determined by parliamentary or county assembly business committees or executive bodies.

(d) **Procedural Background:** Detail the policy authority's procedural background, including requisite approvals, be it cabinet, county executive committee or other governing bodies.

(e) **Aims of Proposed Legislation**: Present a detailed outline of the intended objectives of the proposed legislation.

(f) **Scenario Analysis**: Outlines potential scenarios for achieving the aims, encompassing legislative solutions,

existing impact analyses, proposed administrative arrangements and associated cost or risk evaluations.

(g) **Implementation Timeline**: Furnish insights into the legislative solution's implementation timeline, accounting for gradual or measured enforcement, retroactive effects and transitional provisions.

(h) **Boundary Clarification**: Define the scope of the legislative solution, elucidating any potential extraterritorial implications, particularly inter-county implications.

(i) **Legal Opinions**: Include relevant legal opinions from authorised entities, such as the Office of the Attorney-General, KLRC and county attorneys.

(j) **Affected Provisions and Consequential Amendments**: Identify and explain the provisions subject to modification along with associated amendments in other legislation to avert subsequent cascading revisions.

(k) **Review Considerations**: Disclose administrative or judicial review implications specifying instances where decisions of an administrative nature are reviewable and designating responsible entities.

(l) **Inter-Departmental Consultations**: Highlight requisite consultations with other departments when legislative proposals impact their legislation or fall under their policy purview.

(m) **Impact on Other Departments**: In cases of interdepartmental impact, delineate consultations held, addressing concerns raised and proposing viable solutions.

(n) **Commencement Mechanisms**: Specify the legislation's commencement date, be it a fixed day, contingent upon a specific event, or subject to a future order.

(o) **Instructor Details**: Include the name and contact information of the instructor.

(p) **Additional Requisite Information**: Allow for the inclusion of any supplementary details essential for the drafter's comprehensive grasp of the issue intended for resolution.

By adhering meticulously to comprehensive drafting instructions, drafters can establish a solid foundation for the subsequent drafting process, facilitating the translation of policy into effective legislation with utmost clarity and precision.

E. Preparing a Legislative Plan

A legislative plan, also known as a legislative scheme, serves as a foundational document that outlines the key aspects of the proposed legislation and offers an initial framework for the drafter. In response to the drafting instructions, the plan addresses essential elements such as:

i. Objects of the Proposed Law

This clearly defines the objectives of the intended legislation.

ii. Proposed Title

While often provided by the instructing agency, the drafter may propose a title that covers the bill's overarching aims, ensuring alignment between the title and the bill's content.

iii. Substantive Issues

This covers substantive matters crucial to the law's content, such as:

- **Structural Elements:** If the legislation proposes the establishment of an entity, the plan outlines the entity's structure and composition.
- **Qualifications:** Specifications regarding individuals eligible to serve within the proposed entity.
- **Appointment Procedures:** Procedures for appointing individuals, including pertinent criteria.
- **Functions and Powers:** Enumerating the institution's functions, responsibilities and powers.

iv. Implications of the Proposed Law

This assesses the proposed legislation's implications by considering:

- impact on existing Law by examining whether the proposed law affects existing legislation or is influenced by it;

- consequential amendments by identifying any necessary amendments to other laws that might arise due to the new legislation; and

- constitutionality, i.e., ensuring the proposed law is in line with constitutional provisions, principles and rights.

v. Standards and Considerations:

This considers the following:

- Competence – by evaluating the competency of the instructing organisation to promulgate the law, ensuring alignment with constitutional and legal mandates.

- Fundamental Rights and Freedoms – by analysing potential effects on fundamental rights and freedoms, upholding constitutional safeguards.

- Retrospective Application – by determining if the law can be applied retrospectively, noting that this is generally admissible in civil but not criminal matters.

- Extraterritorial Jurisdiction – by assessing whether introducing extraterritorial jurisdiction aligns with legal parameters.

The legislative plan serves as a crucial blueprint, ensuring that the drafting process remains well-informed, coherent and in line with policy objectives, legal requirements and constitutional principles.

F. The Stages in the Drafting of a Bill

The process of drafting a bill is a structured endeavour, following a series of defined stages. A drafter, armed with comprehensive instructions from the instructing body, navigates through the following stages to craft the desired legislative instrument:

i. Receipt and Review of Instructions

The drafter receives and reviews the instructions provided by the instructing body. This forms the foundation for the drafting process.

ii. Factual Background Check

Conducting exhaustive factual background research into the subject matter of the legislation and its relevant contexts is imperative. This comprehensive exploration ensures a deep understanding of the subject under consideration.

iii. Clarification and Consultation

Where necessary, the drafter seeks clarification from the instructing body, extending the consultation to other relevant bodies impacted by the policy or responsible for its implementation. This collaborative approach enhances the accuracy and effectiveness of the drafting process.

iv. Comparative Research

Undertaking comparative research is essential to ensure the draft bill benefits from good practice. This enriches the legislation by incorporating proven methodologies and solutions.

v. Drafting with Policy Intentions

Based on the insights gained from consultations, the drafter creates a draft that precisely covers the policy intentions of the instructing body. Clarity and precision are paramount in this phase.

vi. Problem Resolution and Harmonisation

The drafter strategically resolves potential challenges arising from the proposal. Simultaneously, any internal conflicts within the content and policy of different bodies are aligned to ensure coherence.

vii. Committee Review Incorporation

If the draft bill undergoes review by parliamentary or county assembly committees, the drafter integrates any amendments proposed during these reviews. The final draft submitted for assent should accurately reflect the debated and approved version.

viii. Subsidiary Legislation Certification

The drafter certifies that the draft statutory instrument aligns with the cabinet secretary's delegated authority to make a statutory instrument. Accuracy and conformity to established procedures are ensured.

ix. Constitutional Conformity

Prior to finalisation, the drafter conducts a comprehensive assessment to verify that the draft legislative instrument aligns with the letter and spirit of the Constitution.

The drafting of a bill is a rigorous process that demands a deep understanding of policy intentions, legal frameworks and the broader implications of the legislation. Each stage contributes to crafting a legislative instrument that is not only legally sound but also effective in achieving its intended goals.

Salient features of a Bill

After completing the preliminary drafting stages, the drafter moves on to the actual drafting of the bill, focusing on incorporating specific salient features that are essential for the bill's structure and clarity. These features provide the foundation for the bill's overall framework and include:

A. Preliminary Provisions

(i) **Arrangement of Clauses:** This part outlines the structure of the bill, including the parts in the bill. It provides a clear outline for readers and is useful for reference purposes.

(ii) **Bill Titles:** Each bill has a short title and a long title. The long title describes the contents of the bill in a general way, while the short title is used for citation.

(iii) **Preamble:** This is mostly used in constitutions, celebratory or international instruments. It explains the reasons for enacting the legislation and represents the spirit and principles behind the law.

(iv) **Commencement Provisions:** These set out the date when the Act or provision comes into force.

(v) **Definitions:** Definitions provide clarity by labelling words used throughout the legislation. They help eliminate the need for repeating text and ensure consistency in interpretation.

(vi) **Numbering and Lettering:** Arabic and Roman numerals are generally used for easier understanding.

(vii) **Headings:** These act as signposts and labels for sections, aiding readers in quickly locating relevant information.

(viii) **Marginal Notes:** These concise notes on the right-hand side of the section provide a synopsis of the content and assist readers in finding specific sections.

(ix) **Enacting Formula:** This statement indicates the legislative authority enacting the legislation, specifying whether it is Parliament or a county assembly.

(x) **Application Provisions:** These provisions clarify how the new law applies and how the old law ceases to apply. They may include extraterritorial applications and limitations.

(xi) **Instrument Numbers:** Each instrument is assigned a number based on the year of enactment and order within that year; for example, the fifth instrument in a series made in 2023 would be assigned No. 5 of 2023.

(xii) **Portfolio for Signature Page:** The portfolio of the signing authority is indicated on the signature page of Regulations.

B. Principal Provisions

(i) **Substantive Provisions:** These sections set out the main objectives, principles and functions of the law.

(ii) **Administrative Provisions:** These provisions address organisational matters and implementation frameworks.

(iii) **Financial Provisions:** This part covers resources, borrowing powers, partnerships and investment and accounting matters.

(iv) **Miscellaneous Provisions:** These provisions cover aspects such as power to make rules or regulations, penal provisions and enforcement mechanisms.

C. Final Provisions

These include:

(i) **Savings and Transitional Provisions:** These address the transition from old to new laws, specifying how old laws continue to apply and how the new law operates.

(ii) **Repeals and Consequential Amendments:** These provisions indicate which laws are repealed or amended as a result of the new legislation.

(iii) **Schedules:** Schedules are used for presenting details of a less substantial nature, such as forms, tables and other related information.

d. Memorandum of Objects and Reasons

The memorandum provides a summary of the key points and objectives of the bill and it serves as a tool for legislators to quickly grasp the bill's intent and significance.

In conclusion, Acts and Regulations are organised into parts, sections, subsections and other units for effective communication. It is worth noting that each of the above salient features contributes to the overall clarity, structure and effectiveness of the Drafted bill.

3.3 PRINCIPLES AND CONVENTIONS OF LEGISLATIVE DRAFTING

When drafting legislation, several principles and conventions Guide the process to ensure that laws are effectively communicated, interpreted and adhered to. These principles help drafters create legislation that is clear, accurate and accessible to all citizens. Some fundamental aspects that drafters need to consider in their work are set out below:

A. Use of Plain Language

One of the primary objectives of legislative drafting is to ensure that the laws are comprehensible to the public they affect. Drafting in plain language entails crafting legislation that is clear, concise and easily understood by the intended readers. The focus is on communication rather than legal jargon. This approach enhances democratic engagement and empowers citizens to understand and participate in legal matters. By avoiding convoluted language and adopting a straightforward approach, drafters can make legislation more inclusive and transparent.

B. Gender-Neutral Language

Legislation should reflect an inclusive and respectful approach to gender representation. The use of gender-neutral language is crucial in this regard. It involves employing terms that do not favour a specific gender and instead address individuals as equals. This practice not only aligns with modern societal values but also ensures that legislation remains relevant and sensitive to diverse perspectives. By avoiding gender biases and utilising neutral language, drafters contribute to fostering a more equitable legal framework.

C. Use of Various Expressions

Drafting legislation involves a careful selection of expressions and terminology. It is essential to avoid the use of registered trademarks and to consider the appropriateness of borrowed language from other jurisdictions. The drafting process should encompass a thoughtful assessment of the expressions used, ensuring that they accurately convey the intended meanings without ambiguity. This attention to detail helps prevent misunderstandings and promotes consistency in the legal language.

D. Drafting Constitutional Law

Constitutional law holds a special place in legislative drafting due to its fundamental nature. Drafters must ensure that every provision within an Act is grounded in constitutional authority. Additionally, they must be vigilant about complying with constitutional prohibitions. The procedural aspects of drafting constitutional law are equally critical. Matters such as the House of Introduction and the appropriate level of government for specific bills should align with constitutional mandates to ensure the legality and validity of the legislative process.

E. Taxation (Money Bills)

The process of drafting taxation-related bills involves careful adherence to constitutional and procedural requirements. Drafters must consider factors such as the house in which taxation bills are introduced, obtaining necessary notices and using precise language for imposing taxes. Structuring provisions accurately is paramount to avoid unintended legal consequences. By paying attention to these details, drafters contribute to a robust and lawful taxation system.

F. Exercise of Delegated Powers

Delegation of powers is a sensitive aspect of legislative drafting that demands careful consideration. Drafters must exercise caution when conferring powers on individuals or entities. Substantive powers should not be included in definitions and explicit conferrals of power are often more appropriate than implied ones. Delegations of power can be made by authoritative figures like the President, Governor, Attorney-General or Cabinet Secretary through formal notices. These notices come with conditions and qualifications that help maintain accountability and legality in the exercise of powers.

In conclusion, incorporating these principles and conventions into the process of legislative drafting ensures that laws are not only legally sound but also understandable and accessible to the public. By crafting legislation that adheres to these guidelines, drafters contribute to the rule of law, democratic participation and a more transparent legal framework.

G. Consistency in Language and Style

The language and style of the amending Act should remain consistent with the language and style of the principal Act and other related statutes. This consistency ensures that the legal text is clear, coherent and follows established conventions.

H. Consequential Amendments

Amending legislation often has implications on other related laws. Drafters need to study the effects of the proposed amendments on other legislation and make necessary consequential amendments to maintain legal harmony.

I.Commencement, Application and TransitionalProvisions

Amending provisions should be related to the circumstances that exist when the amendments come into force. Specificprovisions may be needed to address when and how theamendments take effect, their applicability and anytransitional issues.

3.4 AMENDMENT OF LEGISLATION

Amending legislation involves making changes to existing legislative text to reflect a new policy position or to clarify the intent of the original legislation. Amendments are aimed at altering the original provisions while maintaining coherence between the principal (original) legislation and the amendments. The process of drafting amendments requires careful consideration of several factors.

When considering extensive amendments to a section, subsection, or paragraph, drafters may choose between two approaches:

(i) **Repeal and Re-enactment:** This approach involves repealing the entire provision and re-enacting it with the desired amendments. It's especially useful when the changes are substantial or when there have been multiple amendments in the past. However, this approach can attract debate on unrelated parts of the provision and might have transitional implications.

(ii) **Direct Amendments:** Instead of repealing and re-enacting the entire provision, drafters can make direct amendments to the existing text. While this approach might be more focused, it could be challenging to follow, especially if the amendments are extensive.

Political and practical considerations play a role in deciding whether to use repeal and re-enactment or direct amendments. If a subject matter is controversial, limiting the scope of amendments might be preferable. Additionally, the application of amendments to existing situations should be considered to avoid potential transitional issues.

In summary, amending legislation involves making changes to existing laws while maintaining consistency, addressing consequential amendments and considering commencement, application and transitional provisions. Drafters must carefully evaluate the extent of amendments, potential implications and the most appropriate approach for achieving the desired changes.

3.5 ROLE OF THE DRAFTER IN THE LEGISLATIVE PROCESS

The role of a legislative drafter in the legislative process goes beyond technical expertise and involves ethical considerations, policy-making influence and adherence to legal and constitutional principles. The key aspects of the drafter's role in the legislative process are:

A. Advice

Drafters provide guidance to the instructing body on expectations, content and legal matters related to drafting. They ensure that the legislative proposal aligns with the instructing body's objectives and complies with legal standards.

B. Impartiality and Constitutional Compliance

Drafters are subject to codes of ethics and professionalism and are required to remain impartial and true to the Constitution. As drafters, they have a duty of loyalty to the state and the people, which includes upholding the values and principles enshrined in the Constitution, such as the rule of law, integrity, transparency and accountability.

C. Policy Considerations

While the drafter's role is often seen as technical, the drafting process can involve policy-making decisions. Drafters are, therefore, required to be aware of their potential policy-making influence and to preserve the policy choices to the extent possible.

D. Taking Instructions

Drafters receive initial instructions from the instructing body, which are typically broad ideas about the proposed legislation. It is the drafter's responsibility to seek comprehensive information from the client to avoid filling gaps with their own assumptions. Drafters must be cautious not to overstep their role by making policy choices that should be reserved for the client.

E. Evaluating Alternatives

Drafters must evaluate alternatives before drafting. This involves considering factors such as the necessity of the legislation, legal restrictions and potential solutions that may not require new legislation. These considerations can significantly impact the content of the legislation or even determine whether the legislation should be drafted at all.

F. Research

Drafters conduct research to inform the drafting process. This includes seeking expert opinions, reviewing existing legislation and analysing relevant legal enactments. The research methods and sources used can influence the drafter's perspective and decisions during drafting.

G. Analysis

Drafters analyse the information gathered during research and consider various factors before drafting. Their choices during this stage are value-laden and can affect the final content of the legislation. For instance, they may place more weight on certain information, such as a legal opinion, which can change the direction of the legislation.

H. Enactment

The enactment process involves various stages, from the publication of the bill to its publication as an enacted law in the *Gazette*. Drafters ensure that the legislative process follows established procedures, including parliamentary or assembly rules and constitutional provisions.

In summary, the role of a legislative drafter extends beyond technical skills, encompassing ethical responsibilities, policy-making influence, adherence to legal principles and procedural knowledge. Drafters must navigate these aspects while working closely with the instructing body to produce effective and constitutionally compliant legislation.

3.6 KEY REFERENCE LAWS AND OTHER MATERIAL IN DRAFTING (DRAFTING TOOLS)

When engaging in legislative drafting, it's essential to rely on various reference laws and tools that provide the foundational principles and guidelines for creating effective and constitutionally compliant legislation. These reference laws and drafting tools include:

A. The Constitution

Article 2 establishes the supremacy of the Constitution, making it the ultimate law of the land. When drafting, it is essential to ensure that all laws are consistent with the Constitution, given that any inconsistent law is null and void to the extent of the inconsistency.

B. Interpretation and General Provisions Act, Cap. 2

Outlines the fundamental structure of drafting legislation and provides clarity on the rules for interpretation and construction to achieve consistent language and avoid repetition. The Act also addresses amendments and repeal of legislation.

C. Revision of Laws Act, Cap. 1

Deals with the revision of laws to ensure they remain up-to-date. In addition, the Act provides for the basis for allocation of chapter numbers to laws. The Attorney-General has since delegated his powers to revise laws to the NCLR.

D. Public Financial Management Laws

Adhering to the provisions of the different Acts ensures that proposed laws align with requirements of public resource management, which include laws such as the Public Finance Management Act, Cap. 412A, 2012, Public Procurement and Asset Disposal Act, Cap. 412B, 2015 and Public Audit Act, Cap. 412C, 2015.

E. Statutory Instruments Act, Cap. 2A

The Act outlines the procedure for dealing with regulations, rules, guidelines and other statutory instruments.

F. Judicial Decisions

Court rulings provide interpretation and application of the law and help to identify issues and deficiencies in existing laws. Further, case law developments necessitate changes to laws.

G. Legal Reference Materials

Legal dictionaries, books, periodicals, journals, encyclopaedias and case digests offer in-depth commentary and analysis of various legal fields.

H. Online Resources

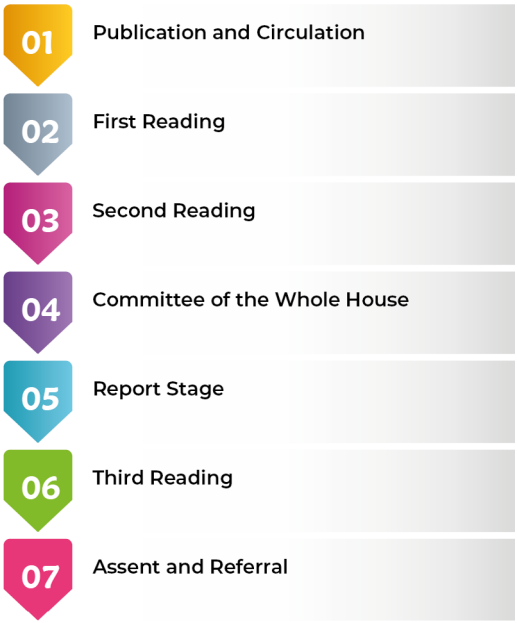
Online resources include a wealth of legal documents, decisions and materials. The NCLR website (www.kenyalaw.org) is also a good source for statutes and legal documents that are available free of charge and help to inform the drafter in their research and drafting process.

I. Additional Written Resources

Numerous written resources cover legislative development implementation and broader legal topics, offering explanations, commentary and expert opinions.

In conclusion, these reference laws and tools form the backbone of effective legislative drafting, ensuring compliance with the Constitution, proper interpretation, consistency in language and alignment with existing laws and regulations. Judicial decisions and scholarly analyses further enrich the process by offering insights into legal interpretations and potential areas of improvement in legislation.

3.7 PROCESS IN THE LEGISLATURE: STAGES IN THE MAKING OF A LAW



As indicated earlier on, for a clear understanding of the details of the enactment process, the reader's attention is drawn to Part 4 of Chapter Eight of the Constitution.

Each Member of Parliament or county assembly, as the case may be, receives a copy of every bill which is for introduction in the House. House Standing Orders require that bills must pass through certain stages. These stages must be undertaken consecutively and not more than one stage of a bill may be taken at the same sitting without the leave of the House.

At the level of Parliament, a bill passes through the following stages:

A. Publication and Circulation

A bill is published in a special or supplementary issue of the Kenya Gazette. The purpose of the publication is to notify the public and invite representations through the elected Members or direct submission of memoranda and petitions.

B. First Reading

This is intended to draw the attention of the Members and the public to the bill. At this stage, the bill may be referred to the relevant Sectorial Committee by the Speaker.

C. Second Reading

The Mover introduces and outlines the main purpose and objectives of the bill, including the details. Members discuss the bill and the views of the Mover together with the report of the Sectorial Committee. At the end of the Second Reading, the only amendment that could be made is to defer its Second Reading for six months.

D. Committee of the Whole House

At this stage, the bill is considered clause by clause. Members may propose amendments, but no amendment is permitted if it implies a direct negative of the original proposal or elimination of its main purpose or objective. The correct way of expressing a contrary opinion is by voting against the Motion.

E. Report Stage

The Committee informs the House sitting in Plenary of their consideration of the bill.

F. Third Reading

Members may again debate the principles of what is already in the bill, but further amendments should not be proposed except to defer its Third Reading for six months.

G. Assent and Referral

Article 109 of the Constitution states that "Parliament shall exercise its legislative power through bills passed by Parliament and assented to by the President." Articles 110 (5), 111 (3), 112 (2) (b) and 113 (3) recognize the mandatory requirements for the President to assent to bills passed by Parliament. Further, the Constitution, under Articles 115 and 116, provides for mandatory assent of bills passed by Parliament.

The Constitution also provides for instances where a bill may, upon publication, acquire force of law without assent. This happens if the President or the Governor has not assented to a bill or referred it back within the period prescribed by the Constitution or assented to it under Article 115 (5) (b). In that case, the bill shall be considered as having been assented to on the expiry of seven days.

For purposes of county government legislation, Section 21 of the County Government Act, Cap. 265 provides that a county assembly shall exercise its legislative power through bills passed by the county assembly and assented to by the governor. Similarly, section 24 of the County Governments Act, Cap. 265 requires all County bills to be assented to by the Governor. It

also sets out other circumstances and conditions in relation to the assent of a bill passed by a County Assembly.

Vellum Copy

A vellum copy of the bill is the document that is assented to. The Government Printer, in consultation with the Speaker and Office of the Attorney General, prepares a vellum copy of the bill. This is the document presented to the President or the Governor for assent. On the last page of the vellum copy is a provision for the President's or Governor's signature.

The page preceding the last page has a provision for the signatures of the Speaker and the Clerk of the National Assembly, the Senate or the County Assembly, as the case may be. Both the Speaker and the Clerk must append their signatures to the vellum copy, certifying its authenticity prior to the President's or Governor's assent.

Timelines Within Which the Assent Must be Made

Upon receipt of the bill from the Speaker of the National Assembly or Senate, the President assents to a bill within 14 days. Similarly, the Governor assents to a bill passed by the county assembly 14 days upon receipt of the bill from the Speaker of the county assembly. Within the 14 days timeline, the President may refer a bill back for reconsideration; Parliament may amend the bill in light of the President's reservations or pass the bill a second time without amendment. Where Parliament has amended the bill fully accommodating the President's reservations, the appropriate Speaker shall resubmit it to the President for assent.

Parliament, after considering the President's reservations, may pass the bill a second time, without amendment, or with amendments that do not fully accommodate the President's reservations, by a vote supported by two-thirds of members of the National Assembly and two-thirds of the delegations in the Senate, if it is a bill that requires the approval of the Senate.

If Parliament has passed a bill without amendments, the appropriate Speaker resubmits it within seven days to the President and the President shall, within seven days, assent to the bill.

If the President does not assent to a bill or refer it back within the period of 14 days, the bill shall be considered as having been assented to on the expiry of that period.

The same procedure applies with necessary modifications to county legislation.

Effect of Failure to Assent

Assent is a constitutional and statutory obligation of the president or governor, respectively. It is an integral part and stage in the legislative process. Inordinate delay or failure to comply with this constitutional and statutory obligation amounts to violation of the Constitution and the law. It is also an abuse of the due legislative process and disregard for other state organs and arms of government.

Grounds for Refusal to Assent

The President, as the Head of state and government of the Republic of Kenya, has an obligation to the people of Kenya to ensure that their best interests are protected, respected and

upheld. The President has an obligation to ensure and assure the people of Kenya of their security, health, protection of their property and environment and economic stability, amongst other overarching responsibilities. Further, the President must also ensure that the laws of the land respect and uphold the Constitution. The president should be sure that laws passed respect general international principles and laws and the treaties ratified by the state.

The President may send back a bill to Parliament for reconsideration or necessary changes citing any of the aforementioned factors.

Prior to the assent of any bill passed by the county assembly, the Governor ascertains that the bill respects and upholds the values and principles enshrined in the Constitution and that it respects the functional jurisdictions or divisions set out in the Fourth Schedule to the Constitution. The administrative framework and other practicality concerns set out in the bill should be realistic and capable of implementation.

3.8 PUBLICATION

The act of publication is what then gives the enacted legislative instrument the force of law. It brings the law to the attention of the public. Publication is a constitutional requirement. According to Article 116 and 199 of the Constitution, all bills passed by Parliament or county assembly must be published for them to acquire the force of law.

A. The Government Press

The Government Press is a state agency charged with the responsibility of publishing official Government communication.

Like all state organs and agencies, the Government Press is required by Article 6 of the Constitution to ensure reasonable access to its services in all parts of the Republic, so far as it is appropriate to do so having regard to the nature of the service.

B. The Kenya Gazette and the Kenya Gazette Supplement

The Kenya Gazette is the official publication of the Government of Kenya. The Gazette publishes notices of new legislation, notices required to be published by law or policy and announcements for general information of the public. The Kenya Gazette Supplement is an annexure to the Kenya Gazette. Owing to their voluminous size and content, all bills and Acts of Parliament are published as Kenya Gazette Supplement. It is also mandatory that county assembly bills are published as Kenya Gazette Supplement for them to accord with Article 199 of the Constitution.

The publication of the Kenya Gazette takes place every week, usually on Fridays, with occasional releases of special or supplementary editions within the week.

C. Submission of Bills after Assent for Publication

After a Bill has been assented to, it is the responsibility of the Executive to ensure that the bill is published in accordance with the timelines set out in the Constitution and the County Governments Act. Upon assent by the President, the bill is handed over to the Attorney-General at the national level and

to the County Attorney at the county level, who ensures that the bill is published within the timelines set out in the Constitution.

Publication is a constitutional obligation and an integral stage in the legislative process. At the County level, the County Attorney is responsible for the publication of the bill. The County Attorney is required to liaise with the Government Printer to ensure that bills passed by the county assembly and assented to by the Governor are published within the timeline set out in the County Governments Act.

D. Timelines Within Which Publication is Done

After a bill has been passed by Parliament and assented to, it is published in the Kenya Gazette as an Act of Parliament or county assembly, as the case may be, within seven days after the assent.

According to Article 116 (2) of the Constitution, an Act of Parliament comes into force on the fourteenth day after its publication in the Gazette, unless the Act stipulates a different date or time when it will come into force. Efforts should be made by those concerned that taxation measures are not made retrospectively as this has often led to legal challenges, hence hampering implementation. As per Article 199 (1) of the Constitution, county legislation does not take effect unless it is published in the Gazette.

3.9 STATUTORY INSTRUMENTS

In order to give further effect to Acts of Parliament or county assembly, the legislative body often delegates powers of making subordinate legislation to the Executive or some other public entity.

Section 2 of the Statutory Instruments Act, Cap. 2A provides for the meaning of statutory instruments. These include rules, regulations and orders emanating from a court of competent jurisdiction in Kenya.

The Statutory Instruments Act is premised on Article 94(5) of the constitution, which gives parliament exclusive mandate and power to make provisions with the force of law in Kenya. The exception to this rule is where the Constitution otherwise provides or where the legislature itself has delegated power through a statute.

The Statutory Instruments Act and the Standing Orders of Parliament provide for the manner, procedure and criteria for the consideration of statutory instruments. Section 6 of the Act provides that where a proposed statutory instrument is likely to impose significant costs on the community or a part of the community, the regulation-making authority shall, prior to making the statutory instrument, prepare a regulatory impact statement about the instrument for tabling before the committee on delegated legislation in parliament or county assembly.

The drafter, in the preparation, adoption and publication of statutory instruments shall ensure compliance with:

(a) The Constitution – particularly Article 2(4) on the matter of consistency of all laws with the constitution.

(b) the Interpretation and General Provisions Act, Cap. 2 – on the definitions and general interpretation of written laws.

(c) the principal Act – under which the instrument is made, especially on the ultra vires rule.

(d) the Statutory Instruments Act, whose basic requirements may be summarised as follows:

(i) Consultation with stakeholders;

(ii) Preparation of Regulatory Impact Statement;

(iii) Preparation of Explanatory Memorandum;

(iv) Tabling of the statutory instruments in the national assembly.

The Statutory Instruments Act contains further provisions regarding the manner of the consideration of statutory instruments by Parliament and has, in section 13, set out guidelines for scrutiny of statutory instruments.

Prior to the enactment of the Finance Act, 2023, the Act provided that a statutory instrument may be revoked by Parliament or automatically upon the 10th year since such instrument was made, unless earlier repealed or it expires.

3.10 MODEL LAWS

Model legislation refers to a standardised set of laws designed to be customised by legislative bodies to suit their specific needs. The fundamental purpose of model laws is to establish a framework that promotes uniformity in governance, organisation and management within legislative bodies. By adopting model laws, legislative entities can achieve a degree of consistency in their legal and institutional frameworks, thereby facilitating effective governance.

When embracing a model law, it is imperative for a legislative body to make necessary modifications to ensure the relevance and applicability of each provision to the specific context of their jurisdiction. This approach empowers county governments to align and modernise their legal frameworks while taking into account their unique requirements.

Model laws are instrumental in serving several important functions:

A. Harmonisation Within and Across Jurisdictions

Model laws serve as a recognised method to harmonise laws not only within various legislative bodies within a country but also on a regional and international scale. They provide a common ground for legal frameworks.

B. Effective Harmonisation Based on Principles

By adhering to the principles outlined in model legislation, governments can harmonise their laws in an effective and streamlined manner, which promotes consistency and coherence in legal systems.

C. Alignment with National Policies

Model laws aid in identifying principles and providing recommendations that align with overarching national policies, ensuring that local legislation is in line with broader policy objectives.

D. Collective Contribution and Ownership

Model law development benefits from contributions from multiple jurisdictions, fostering a sense of ownership and collaboration, which encourages a shared approach to legal improvement.

E. National Character of Legislation

Laws based on model legislation reflect a national character due to the application of uniform principles, which enhances the identity and coherence of a nation's legal framework.

F. Adaptation to Local Needs

The flexibility of model laws allows every jurisdiction to adapt and customise the model to suit its distinctive characteristics and requirements, which ensures that local contexts are appropriately considered.

KLRC has taken a significant step in this direction by developing a collection of model laws intended for consideration by county governments. These model laws provide a foundation that allows county governments to tailor the legislation to their particular circumstances while maintaining a degree of standardisation and modernisation.

In conclusion, well-crafted legislation should stand the test of time and serve the best interests of the society it impacts. Model laws, in their capacity to offer standardised frameworks while allowing customisation, also contribute significantly to achieving this delicate equilibrium in the legislative process.

CHAPTER 4

LEGISLATIVE SCRUTINY

4.0 INTRODUCTION

The legislative process is characterised by a number of critical exercises meant to ensure that the original intention of the proposer of an instrument is met and, where enacted, that the enactment serves the objective it was originally set out to achieve. In order to ensure that such preciseness is achieved, drafts of legislative instruments are subjected to pre-publication scrutiny, whereas enacted instruments are subjected to post-legislative scrutiny. On regulatory instruments, the conduct of a RIA ensures that sustainable implementation is considered and enshrined in the development or review of such instruments.

This chapter highlights the relevance of such scrutiny and provides a justification for the process to be undertaken diligently in order to achieve progressive and responsive legal or regulatory regimes in the country.

4.1 PRE-PUBLICATION SCRUTINY

Pre-publication scrutiny of legislative proposals stands as a pivotal stride in the legislative process, carrying out its course predominantly within legislative bodies. Within the Kenyan context, this crucial review phase is performed by the Office of the Attorney-General and the KLRC, aligning the proposed legislations with the parameters delineated in the preceding chapters of this Guide. These comprehensive reviews play an indispensable role in ensuring the seamless evolution of proposed legislation, upholding coherence with existing legal frameworks, while maintaining a steadfast commitment to the foundational principles of legislative development. In addition,

the participation of key stakeholders provides an avenue for such scrutiny to be comprehensive.

The primary objectives of pre-publication scrutiny encompass the following facets:

(a) Facilitating transparent parliamentary proceedings, conducive to open deliberations.

(b) Enabling active public participation and fostering engagement from pivotal entities in parliamentary and committee affairs.

(c) Safeguarding the public's right to petition Parliament, encompassing matters within its jurisdiction, encompassing the establishment, amendment, or abrogation of legislations.

(d) Ensuring alignment of all legislative proposals with Kenya's international treaty obligations.

The pre-publication scrutiny process diligently assesses the subsequent key benchmarks:

(a) Adherence to both the literal content and the underlying ethos of the Constitution.

(b) Alignment with Kenya's commitments arising from international treaties.

(c) Alignment with existing statutory frameworks.

(d) Viability for practical implementation.

(e) Soundness in technical and legal constructs.

4.2 POST-LEGISLATIVE SCRUTINY

Post-legislative scrutiny exhibits diverse interpretations across legal jurisdictions, often being carried out without explicit nomenclature. While its recognition is growing, it remains unevenly acknowledged. Furthermore, its scope has expanded beyond the original definitions set forth by the House of Lords Constitution Committee and the UK Law Commission, rendering the term elastic in encompassing both scrutiny and legislative dimensions.

The purposes of scrutiny are twofold: evaluation and monitoring. Evaluation entails confirming that legislative objectives manifest as effective implementation and appraising whether legislative acts have achieved their intended goals. This evaluative role is inherently political, involving the assessment of legislation's impact and its alignment with its intended purpose. Conversely, certain jurisdictions adopt a more legal standpoint, viewing post-legislative scrutiny as a supervisory mechanism to gauge the enforcement of legislation and associated secondary regulations. Such scrutiny becomes pivotal in instances where laws go unimplemented or lack the requisite secondary regulations.

This dichotomy between interpretative and formalistic approaches persists, although they are not mutually exclusive. "Post-legislative scrutiny" covers both facets, yet there is merit in designating "post-legislative oversight" for the formalistic role, enhancing conceptual clarity. This differentiation holds pragmatic and intellectual significance, encouraging more rigorous engagement in assessing enacted measures.

In terms of the legislation under review, the term's scope now encompasses objectives established by external bodies, such as UN Sustainable Development Goals (SDGs). While certain SDGs are realised through domestic legislation, others are achieved independently. Scrutinising the implementation of such goals aligns with post-legislative scrutiny. Adopting a modified term like "post-legislative oversight" for externally set objectives introduces a nuanced distinction.

Distinct bodies undertake post-legislative scrutiny, their engagement patterns influenced by the interpretation adopted. A legal approach is amenable to officials, while the evaluative approach resonates with legislators' roles. Parliamentary committees represent a direct form of engagement, where committees focused on legal or legislative matters oversee enactment review, while thematic committees assess goal attainment. Several parliaments establish specialised committees for post-legislative scrutiny, formalising the process. The formalistic aspect of post-legislative scrutiny might involve various bodies, either independent or appointed by the legislature.

The rationale for post-legislative scrutiny extends to enhancing law quality and government performance, bolstering executive oversight, fostering public involvement and serving as an educational mechanism. Post-legislative scrutiny's growing prominence coincides with streamlined law-making and the demand for comprehensive legislative quality assessments. It empowers well-informed decision-making, ensuring legislative alignment with stakeholder needs.

However, post-legislative scrutiny encounters challenges, including the potential reiteration of arguments, dependency on

political willingness, resource limitations and the recognition that post-legislative scrutiny is an integral component of a broader process. Realising effective outcomes from post-legislative scrutiny necessitates parliamentary dedication, political resolve, sufficient resources and an understanding that post-legislative scrutiny does not denote finality. Rather, it serves as a vehicle for accountability, public engagement and the attainment of legislative objectives.

Effective post-legislative scrutiny involves addressing the following questions:

(a) Have the original objectives of the law been met concerning quality, quantity and timeliness compared to the baseline scenario without the law?

(b) To what extent has the law contributed to achieving its objectives, or has it induced new activities?

(c) Have external factors influenced implementation?

(d) Are there unforeseen side effects?

(e) Have allocated resources been utilised as planned?

(f) Has implementation led to unfairness or disadvantages for specific communities?

(g) Could a more cost-effective approach have been adopted?

(h) Does the law align with its intended objectives?

(i) Have initial assumptions about costs, timing and impact held true?

(j) How has the law impacted different demographic groups?

The legal ideal that post-legislative scrutiny seeks to attain is intricately interwoven with the mandate of the KLRC, which mandates the comprehensive evaluation of all laws and the recommendation of reforms to ensure consistency, harmony, justice, simplicity, accessibility, modernity and cost effectiveness. By addressing the key questions around effective post-legislative scrutiny, KLRC ensures that the legislative environment is not only responsive to societal needs, but progressive enough to promote social, economic and political development in the country. Further, by conducting exhaustive audits of the statute book to ensure conformity with constitutional principles, KLRC continues to provide Parliament with recommendations regarding post-legislative scrutiny. Looking ahead, KLRC envisions collaborating with county governments to establish a standardised framework for conducting post-legislative scrutiny within devolved government structures.

4.3 REGULATORY IMPACT ASSESSMENT

RIA constitutes a systematic evaluation of both the favourable and unfavourable consequences tied to proposed or existing regulatory and non-regulatory options. This practice underscores an empirically substantiated methodology that informs the process of shaping policies. The ambit of RIA requisites encompasses fresh regulatory proposals, revisions to existing regulations and policy propositions that could engender new or revised regulatory frameworks.

Central to RIA is its role as a governing mechanism, enabling the elucidation of the implications and outcomes associated with introducing novel regulatory frameworks. A cardinal objective of RIA resides in fostering meticulous analysis of regulatory

propositions, facilitating meaningful and fitting stakeholder engagement and fostering transparency in procedural protocols. This multifaceted approach contributes to informed decision-making within the policy and regulatory sphere. These objectives are elucidated in sections 6 and 7 of the Statutory Instruments Act, which provides an over-arching framework for the development of statutory instruments in Kenya.

The constitutional framework mandates all state entities to uphold financial prudence and to steward public funds sustainably, while simultaneously accounting for the exigencies of future generations. Accordingly, a logical expectation follows that an assessment of the cost-benefit dynamics surrounding proposed policy or regulatory initiatives transpires. This necessitates a comprehensive evaluation of the net economic value inherent in a given policy or regulation, gauging whether the accruing benefits surpass associated costs. In instances where the equilibrium leans favourably toward public welfare, the rationale for legislative intervention gains traction. Where the same is not quite the case, an exploration of alternative avenues to address the pertinent policy conundrum or regulatory obstacle is warranted.

Moreover, it is imperative to factor in budgetary considerations during the regulatory development process. The overarching objective is to avoid the enactment of regulatory instruments entailing onerous financial implications that could hamper successful implementation. Indeed, the efficacy of regulations and the realisation of broader regulatory agendas hinge on the effective implementation of enactments stemming from each cycle.

CHAPTER 5

PUBLIC PARTICIPATION IN THE POLICY AND LEGISLATIVE PROCESSES

5.0 INTRODUCTION

This Chapter highlights the role of public participation as an overarching principle in the Constitution. It recognises that all sovereign power is derived from the people as enshrined in Article 1 and is binding on all state organs and public officers. An important feature of our constitutional framework is the requirement of public participation in policy formulation, legislation and other aspects of governance and administration.

5.1 PUBLIC PARTICIPATION IN KENYA

According to the Kenya Policy on Public Participation, Sessional Paper No. 3 of 2023, public participation refers to "the process by which citizens as individuals, groups or communities take part in the conduct of public affairs, interact with state and non-state actors to influence decisions, policies, programs, legislation and provide oversight in service delivery, development and other matters concerning their governance and public interest, either directly or indirectly, through freely chosen representatives."

From this perspective, public participation is the process that affords a reasonable opportunity to a person who is interested or will be affected by a proposed policy or legislation to submit their views. The means of conducting public participation may include public hearings, public *barazas* and submission of memoranda to the relevant authority.

The Public Participation Policy further provides the framework for the management and coordination of public participation for the fulfilment of the constitutional requirement on citizen

engagement in development and governance processes in the country.

The Policy also serves as the country's overarching framework for public participation. It identifies the key policy areas as access to information, civic education and citizen awareness, capacity building, planning, budgeting and implementation, funding, state facilitation and inclusion of special interest groups, monitoring, evaluation and learning, feedback and reporting mechanisms, complaints and redress mechanisms.

The state is under a constitutional obligation to publicise policy and legislative proposals widely and to allow all interested groups to express their views on those proposals in a conducive environment. The public participation process, therefore, permits acceptability amongst the key stakeholders, subsequently facilitating efficient and effective implementation of the policy or legislative instrument. In addition, it is expected that a citizenry that is involved in matters that affect them will adhere to government proposals and decisions.

5.2 CONSTITUTIONAL PROVISIONS ON PUBLIC PARTICIPATION

The provisions of the following Articles are relevant in illuminating the significance of the concept of public participation as a principle of governance in Kenya:

(a) Article 1 recognises that all sovereign power belongs to the people of Kenya;

(b) Article 10 recognises public participation as one of the national values;

(c) Article 35 provides for the right of access to information held by the state or another person which is necessary for the exercise of any right or fundamental freedom;

(d) Article 118 requires Parliament to conduct its business in an open manner and to facilitate public participation and involvement in the legislative process and other businesses of Parliament and its committees. It also prohibits Parliament from denying the public and media access to its sittings unless there is a justifiable reason;

(e) Article 119 provides for the right of persons to petition Parliament to consider any matter within its authority, including enacting, amending or repealing any legislation;

(f) Article 124, which opens up the proceedings of Parliament and its committees during considerations of approvals for appointments;

(g) Article 174 (c), which recognises public participation as one of the key objectives of devolution;

(h) Article 196, which requires county assemblies to facilitate public participation and involvement in the legislative process and other business;

(i) Article 221, which directs the parliamentary committees to seek representations from the public and take the recommendations of the public into account in its report to Parliament; and

(j) Article 232 (1) on values and principles of public service requires the involvement of the people in the process of policy-making.

5.3 STATUTORY PROVISIONS ON PUBLIC PARTICIPATION

A number of laws enacted following the promulgation of the Constitution have taken the principle of public participation into consideration. The following are a few of the statutes with provisions on this constitutional principle:

A. County Governments Act, Cap. 265

Public participation is addressed under section 87 of the County Governments Act which, among other things, provides for:

(a) access to information and data relevant to and related to policy formulation;

(b) reasonable access to the process of formulating policy and other government programs;

(c) protection and promotion of minorities within counties; and

(d) recognition of non-state actors in the formulation and implementation of policies.

The following provisions of the County Governments Act are relevant in the consideration of public participation in the legislative process and generally:

(a) Citizen Participation Generally in the Affairs of the County (Part VIII)

This Part sets out the principles of citizen participation in counties, which include:

(i) timely access to information relevant or related to policy formulation and implementation;

(ii) reasonable access to the process of formulating and implementing policies, laws and regulations; and

(iii) protection and promotion of the interest and rights of minorities, marginalised groups and communities and their access to relevant information.

The Act also provides for citizens' right to petition and challenge a county government and imposes a duty to respond to citizens' petitions or challenges.

(b) Public Communication and Access to Information (Part IX)

The Part identifies the three key principles that public communication and access to information should be based on. These are:

(i) integration of communication in all development activities;

(ii) observation of access to information by county media in accordance with Article 35 of the Constitution; and

(iii) observation of media ethics, standards and professionalism.

It also has provisions on a county's communication framework as well as access to information.

In addition, the Part contains a provision on affirmative action for marginalised and minority groups to ensure their enjoyment of equal rights with the rest of the population. These rights include the right of public participation.

(c) Civic Education (Part X)

This Part sets out the purpose of civic education as "to have an informed citizenry that actively participates in governance affairs of the society on the basis of enhanced knowledge, understanding and ownership of the Constitution."

Section 99 of the County Government Act.

It also requires county legislation to provide the requisite institutional framework for purposes of facilitating and implementing civic education programmes.

(d) Institutional Framework for Civic Education (Section 101)

This section requires county legislation to provide the requisite institutional framework for purposes of facilitating and implementing civic education programmes.

(e) Public Participation in County Planning (Section 115)

The section obligates public participation in the county planning processes and requires their facilitation.

It further requires each county assembly to develop laws and regulations giving effect to the requirement for effective citizen participation in development planning and performance management.

Finally, the County Government Act mandates county governments to provide civic education in line with the principles of devolved governance as indicated in the Constitution.

B. Public Service (Values and Principles) Act, Cap. 185A

One of the objects of the Act is to provide for public participation in the promotion of the values and principles of (and policy-making as) public service.

In addition, section 11 requires the public service to facilitate public participation in the promotion of values and principles of public service. The Act also requires the public service to develop guidelines for the involvement of the people in policy-making.

To operationalise the latter provision, the Public Service Commission has published Guidelines on Public Participation in Policy Formulation, 2015 for use in the service of the public. The objective of the guidelines is to ensure that:

(a) communication of scope and impact of public service policy, decision implementation and administrative acts reach the public;

(b) consultation and notification to all persons concerned or likely to be affected by the public service policy, decision, implementation and administrative act is effective;

(c) identification of the public and persons concerned or likely to be affected by a policy, decision or administrative act is accurate and inclusive;

(d) the process and mode of communication and participation, consultation and notification accords the public and persons concerned or likely to be affected an opportunity to input in the process; and

(e) the input of the public is given due consideration.

C. Public Service Commission Act, Cap. 412A

Section 63(1)(c) of the Public Service Commission Act, 2017 requires the Public Service Commission (PSC) to promote within the public service the national values and principles of governance and values and principles of public service in Articles 10 and 232 (1) of the Constitution. It requires this to be done by formulating and implementing programmes intended to inculcate in the public officers and citizens an awareness of their civic responsibilities and appreciation of their duty to uphold the values and principles (which includes public participation). Paragraph (d) of the subsection also obligates PSC to oversee the implementation and effectiveness of the programmes in paragraph (c).

D. Public Finance Management Act, Cap. 412A

The Public Finance Management Act requires public participation in the budget process as follows:

(a) Section 10 (2) obligates the Parliamentary Budget Office, in carrying out its functions, to observe the principle of public participation in budgetary matters.

(b) Section 35 requires the Cabinet Secretary to ensure public participation in the budget process.

(c) Section 125 requires the County Executive Committee member for finance to ensure that there is public participation in the budget process.

(d) Section 175 requires the accounting officer of an urban area or city to conduct public participation in preparing the strategic plan and the annual budget estimates and for that purpose, may publish guidelines for public participation.

E. Petitions to Parliament (Procedure) Act, Cap. 7E

The petitions to Parliament (Procedure) Act seeks to give effect to the constitutional provisions of Article 37 (right to, among others, petition to a public authority) or 119 (right to petition Parliament). The Act provides what should be included in a petition to Parliament and also includes the procedure for presenting a petition to Parliament.

The National Assembly and Senate Standing Orders and the respective county assembly standing orders also provide for public participation in the law-making process in these legislative organs.

F. Public Private Partnerships Act, 2021, Cap. 430

The Act imposes a duty on a contracting authority to ensure there is public participation in a project. The Cabinet Secretary is also required to prescribe standards and procedures for public participation and stakeholder engagement during the project development stages.

G. Sustainable Waste Management Act, Cap. 387C

Part V of the Act is on public participation and access to information. Specifically, section 23 stipulates that public consultation and participation under the Act shall be conducted in accordance with the principles set out in the Second Schedule of the Act. The Schedule sets out the provisions on public consultation with paragraph 5 stating that "where regulations under the Act so require, the respective national or county government entity or private entity shall convene a public meeting relating to the policy, regulation, plan or action before a decision is rendered on the policy, regulation, plan or action".

H. Statutory Instruments Act, Cap. 2A

The Statutory Instruments Act, at section 5, requires a regulation-making authority to, before issuing a statutory instrument, make appropriate consultations with persons who are likely to be affected. It further provides that the public may participate as individuals or as organised groups representing minorities or other interests. Equally, non-state actors have an entry point under the law to engage policy-makers and the government in policy formulation.

5.4 JUDICIAL PRONOUNCEMENTS ON PUBLIC PARTICIPATION

The Kenyan courts have on a number of decisions also pronounced themselves on the issue of public participation and settled that public participation must be accompanied by reasonable notice and reasonable opportunity. The principle of reasonableness is determined by the amount of time a person is accorded to respond to a particular issue of national interest and the accessibility of the issue to which a response is required. Reasonableness is, however, determined on a case-to-case basis.

In **Omwanza Ombati vs. Chief Justice & President of the Supreme Court & the Attorney-General with Kenya National Human Rights and Equality Commission, Law Society of Kenya and Kenya Human Rights Commission as Interested Parties**, in a petition challenging the promulgation of the Supreme Court (Presidential Election Petition) (Amendment) Rules, 2022, the High Court declared the Rules unconstitutional for want of public participation. Justice Mugure Thande then laid down the following principles on the matter of public participation in the promulgation of legislation:

The content and the manner in which legislation is adopted have to conform to the Constitution. National values and principles of governance are binding on all state organs, state officers, public officers and all persons whenever any of them applied or interpreted the Constitution, enacted, applied or interpreted any law, or made or implemented public policy decisions.

Public participation is a constitutional imperative which plays a central role in the legislative, policy and executive functions of the Government. It informs stakeholders and the public of what

is intended and affords them an opportunity to express and have their views taken into account.

Public participation must be accompanied by reasonable notice and reasonable opportunity to interact with the relevant information that will drive public participation. For instance, where public participation is being conducted, the duty bearer has the obligation to ensure that adequate notice is given to the members of the public and that they are provided with the opportunity to submit their views. Reasonableness will be determined on a case-by-case basis.

Public participation binds all state organs when, *inter alia*, enacting law. Regardless of the nature of the impugned Supreme Court (Presidential Election Petition) (Amendment) Rules, 2022 and the fact that the power to make them flowed directly from the Constitution, the letter and spirit of the Constitution have to be upheld in the process of enactment. Rules or regulations made by a state agency have to be in conformity with the Constitution.

In promulgating legislation, a state agency has a duty to facilitate meaningful engagement with the public in a manner that accords with the nature of the legislation. Such engagement should include access to and dissemination of relevant information, providing reasonable opportunity to the public and all interested parties to know about the legislation and to sufficiently ventilate the same even if no guarantee is given that each individual's views would be taken.

Whenever a challenge is raised, every agency is required to demonstrate what it has done in compliance with its duty to facilitate public participation in a given case. Upon a petitioner stating that there was no public participation before legislation

was promulgated, the burden of proof shifts to the state agency to demonstrate that there was.

Failure to conduct public participation in any form or shape is contrary to the requirement under Articles 10 and 232 of the Constitution, which require that reasonable opportunity be afforded to persons likely to be affected by proposed legislation to voice and perhaps have incorporated in the decision making their concerns, needs and values. It is immaterial that previous provisions and amendments had been made without public participation. Any legislation made has to always be in accord with the Constitution, failing which they cannot stand. There is no exemption given under the Constitution from complying with the provisions of Article 10(1).

Participation of the people is not a progressive right to be realised sometime in the future. It is enforceable immediately. Any laws or rules made pursuant to constitutional or statutory provisions must take that into account. The exclusion of the participatory rights of the people before the promulgation of legislation is unlawful and unconstitutional.

It is further recommended that the reader take note of the guidance offered in the case of **Robert Gakuru vs. Governor Kiambu County,** which provides clarification on the conduct of "meaningful public participation". Justice G.V. Odunga, in his judgment, noted that public participation should be "real and not illusory or a mere formality for the purpose of fulfilling a constitutional requirement or dictates." However, it should not be equated with consultations.

Failure to factor in the mandatory requirement of public participation exposes the policy decision or legislative instrument to constitutional challenges.

5.5 PUBLIC EDUCATION AND OTHER ADDITIONAL CONSIDERATIONS FOR PUBLIC PARTICIPATION

Public education on law reform is an essential component in the legislative process. It is a chain of events ranging from providing information and building awareness to partnering in decision making[2]. The purpose of public engagement is to ensure that the law reform process is transparent, inclusive and reflective of societal needs.

To make public participation meaningful, it is important in the context of the matter, that the following should be taken into account; access to information, capacity building of the duty bearers and citizens generally, planning budgeting and implementation, funding, inclusion of special interest groups, feedback and reporting mechanisms, complaints and redress mechanisms and monitoring, research and evaluation.

In a recent **Constitutional Petition E473 of 2023 Joseph Enock Aura VS CS Ministry of Health and 12 others**, the High Court set out the following bare minimum requirements for public participation in law making:

i. Proper sensitization on the nature of legislation to be enacted or policy to be effected;

[2]Ngcobo J in Doctors for Life International vs. Speaker of National Assembly and Others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 {CC}; 2006 (6) sa 416 CC

ii. Adequate notice depending on the circumstances which must however be reasonable;

iii. Facilitation of the public to ensure the members of the public are able to access the information required in a convenient and practical manner, understand the same, have a meaningful opportunity to attend, contribute and provide their views;

iv. The views of the public should be considered and where they are rejected or declined, reason for such rejection and dismissal should be stated; this will obviate the public participation being a cosmetic or a public relations act;

v. Public participation should be inclusive and should reflect a fair representation and diversity of the populace to be affected; and

vi. There must be integrity and transparency of the process,

This was restated in **Aura v Cabinet Secretary, Ministry of Health & 11 others; Kenya Medical Practitioners & Dentist Council & another (Interested Parties) (Constitutional Petition E473 of 2023) [2024] KEHC 8255 (KLR) (Constitutional and Human Rights) (12 July 2024) (Judgment)** where the Judges opined-

"In view of the foregoing, we opine that public participation requires the following bare minimum: -

i. Proper sensitization on the nature of legislation to be enacted or policy to be effected;

ii. Adequate notice depending on the circumstances which must however be reasonable;

iii. Facilitation of the public to ensure that members of the public are able to access the information required in a convenient and practical manner, understand the same, have a meaningful opportunity to attend, contribute and provide their views;

iv. The views of the public should be considered and where they are to be rejected or declined, reason for such rejection and dismissal should be stated; This will obviate the public participation being a cosmetic or a public relations act;

v. Public participation should be inclusive and should reflect a fair representation and diversity of the populace to be affected;

vi. There must be integrity and transparency of the process."

Therefore, to make public participation meaningful, it is important in the context of the matter, that the following should be taken into account; access to information, capacity building of the duty bearers and citizens generally, planning budgeting and implementation, funding, inclusion of special interest groups, feedback and reporting mechanisms, complaints and redress mechanisms and monitoring, research and evaluation.

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for progressive law reform

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A GUIDE TO THE LEGISLATIVE PROCESS IN KENYA

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