

Introduction

The Constitution of Kenya establishes public participation as a fundamental value and a cornerstone for effective governance. Currently, the Office of the Attorney General and Department of Justice is developing legislation on Public Participation in Kenya: the Public Participation Bill (the “Bill”). The purpose of this Bill is to give effect to the Constitutional provisions on public participation (Article 10(2), 69(1)(d), 118, 184(1)(c), 196, 201(a) and 232(1)(d)). The Bill seeks to provide a framework for public participation by defining the parameters for assessing its effectiveness and defining the obligations of state organs and public offices when conducting public participation. This is an important step in the right direction considering the practical challenges the citizenry face when participating in decision-making processes on matters affecting them.

Below is a summary of the key elements of the Bill and recommendations aimed at refining its provisions submitted by SUSO BNG:

1. Preliminary - Title, Interpretation and objects of the Bill

The Bill aims to enhance, promote, and facilitate public participation in governance processes. In particular, it aims to give effect to the principles of public participation espoused in the Constitution, promote democracy and participation of the people in accordance with Article 10, promote transparency and accountability in decision-making, and enhance public awareness in governance processes.

The Bill however lacks emphasis on the role of civic education in supporting effective public participation in governance. For meaningful public engagement to thrive, the public must first be aware of their roles. Then, they require the know-how and capacity on how to undertake the roles. Awareness without knowledge on participation does have an effect on public engagement as it hinders the capacity of the public to meaningfully participate.

To address these gaps, BnG recommended renaming the Bill as the “Public Participation and Civic Engagement Bill, 2024”. In addition, it recommended that the objects of the Bill be expanded to ensure timely access to relevant information, a core value for the practice of public participation. This will not only enhance accountability but also facilitate meaningful participation that reflects the input of the citizenry.

2. Public Participation

The Bill defines its scope to include matters relating to formulation of policies, budgeting and financial management, law making processes, and any other matter as may be prescribed by law. It designates responsible authorities within various institutions, including Parliament, Judiciary, Ministries, Office of the Director of Public Prosecution, Commission, County Assembly, Office of the Attorney General and County Executive Committees.

The list however lacks consistency, for example it names the Chief Justice as the responsible authority in the case of Judiciary while it assigns Parliamentary responsibilities to the relevant committee of each House instead of the Speaker in each House. In addition, the list is not exhaustive as it does not cover all the relevant authorities.

To address the inconsistencies and gaps, BnG recommended that the Bill adopt a standardized approach to listing the responsible authorities. Further, BnG recommended including a comprehensive list of responsible authorities as an annex to the Bill to prevent any ambiguity or confusion.

3. General and Specific Guidelines for Public Participation

Part III of the Bill prescribes the general guidelines for public participation, listing considerations that responsible authorities should take into account. These include the nature of the matter under consideration, the urgency of the matter, the impact of the matter to the public, the need for effective and inclusive representation, the number of people likely to be affected, the ability of the members of the public to access the necessary information and the public participation forum and the integrity and transparency of the process. However, the Bill overlooks the importance of civic education and electronic governance as key elements for effective public participation. BNG therefore recommended the establishment of context specific pre-education programmes and utilization of digital tools and platforms, to facilitate safe public input.

The Bill also requires the responsible authority to provide the public with adequate notice to make their input on an issue. It requires the establishing mechanisms for wide reach including publication of notices in television stations, ICT centers, websites, community radio stations, public meetings, or newspapers, detailing the purposes of consultation, groups to be consulted, lengths of the consultation, manner of making submissions and the issues for consultation.

To promote fair and equal access to public participation processes, the Bill emphasizes the inclusion of diverse groups -women, persons with disabilities, youth, minorities and marginalized communities- and requires that interpretation be provided where necessary. To further improve accessibility to the processes and participation, specifically by persons with disabilities, BnG recommended the inclusion of braille sign language, audio formats and other assistive devices during public participation meetings.

The Bill requires the responsible authority to allocate adequate time for consultation during public participation without defining specific timelines. It also calls the responsible authority to facilitate access to documents relating to the matter under consideration, to consider and analyze responses received from the public and to make available the reasons for the final decision to the public. Recognising that “adequate time” can vary, BnG recommended a minimum of 30 days consultation period. In line with the spirit and purpose of Article 35 of the Constitution on the right to information and the Access to Information Act, 2016, and to ensure affordability, BnG recommended that access to relevant documents be provided at reasonable cost. Additionally, BnG recommended the establishment of a feedback mechanism showing how public input influenced the final decision to enhance the process of transparency.

Part IV of the Bill mandates the responsible authority to develop specific guidelines for undertaking public participation. However, it does not define a timeline for doing so. To address this gap and ensure compliance, BnG has recommended a six month timeline from the commencement of the Act for the development of these specific guidelines.

4. Miscellaneous Provisions

The Bill provides a general penalty to any person failing to adhere to the principles and obligations set out, when conducting public participation. For natural persons, the Bill prescribes a fine not exceeding three hundred thousand Kenya shillings, while for juristic persons, the Bill prescribes a fine not exceeding five hundred thousand shillings.

While penalties are an effective way to deter violations or non-compliance, a blanket penalty provision may prove an unfair and ineffective way to address diverse offenses. To address this gap, BnG recommended that the Bill specify distinct offenses and penalties to reflect the varying degrees of non-compliance and based on the severity of the offense.

The Bill includes a transitional provision stating that public participation exercises already underway at the time the Act is enacted should, to the extent possible, comply with the new provisions. This is a positive provision as it encourages immediate compliance with the law, regardless of the status of an ongoing public participation process.

Conclusion

While the development of this Bill is progressive, it falls short of providing specifics. Several previous public participation bills have been proposed, yet they have not progressed. Acknowledging that this represents the initial phase of the Bill's development, we commend the Office of the Attorney General and Department of Justice for creating an opportunity for public input. We look forward to further opportunities for engagement as the process unfolds.