



**A Quick Guide to
Public Participation and
Parliamentary Oversight
Under the New Constitution**



Contents

A quick guide to public participation and parliamentary oversight	3
The constitution and public participation	3
What type of government does Kenya have?	3
What sort of committees are there? What do they do? How can the public get involved	4
What is preventing effective public participation?	4
How can public participation be improved?	4

A Quick Guide to Public Participation and Parliamentary Oversight

The post-election violence of 2008, resulting from the blatant mishandling of election results, was a glaring example of what can happen when public opinion is disregarded. Tired of being at best ignored and at worst, manipulated, the Kenyan public took matters into their own hands with dire consequences.

After the dead were buried, the debris collected and the dust settled, it was acknowledged that the political problems that led to the violence were structurally embedded in the constitution drawn up at Independence in 1963. With input from the public (at last) a new constitution was drafted by national and international experts and ratified by nearly three quarters of the population in a 2010 referendum.

The constitution and public participation

The preamble to the Constitution of Kenya 2010 starts with the phrase: “We, the people of Kenya ...” followed by eight lines. Line 7 and 8 state that, “We the people of Kenya -

- EXERCISING our sovereign and inalienable right to determine the form of governance of our country.
- ADOPT, ENACT and give this Constitution to ourselves and to our future generations.”

Thus the most significant legal document in Kenya since independence acknowledges the right of the people to participate in the governance of Kenya. This right is further stressed throughout the document and specifically in Article 10.

However, writing the constitution is one thing, implementing it another. The latter depends on available legislation, administrative capacity and the power and remit of Parliamentary committees.

What type of government does Kenya now have?

The 2010 Constitution brought in a new form of presidential government consisting of a President

and cabinet secretaries (the Executive), a National Assembly representing constituencies (with allocated seats for minorities) and a Senate representing counties, all elected by Kenya’s eligible citizens. Cabinet members cannot be members of the National Assembly. This allows for scrutiny of the Executive by Parliament through the traditional channels of debates and inquiries and also through oversight committees.

At national level, the various ways in which the public can participate include attending Parliament as observers (or watching it on TV), reading, or listening to, transcripts of proceedings, making written submissions or public petitions and attending public hearings. In addition, the decentralization of government to county level aims to create and encourage public participation through the decision-making process and new powers of self-governance.

Under the new constitution public participation is mandatory in the following:

- Parliament and County Assemblies¹ – they are required to facilitate public participation, including committee hearings, by not only ensuring that the public is able to participate, but also safeguarding the public’s right to attend, (except in special circumstances determined by the Speaker).²
- Public finance³, which is meant to be transparent
- The public service⁴ – in decision making and information provision
- The management of natural resources⁵
- Access to information such as land tenure, procurement etc.

¹ Articles 118 a. and b. and 196 a. and b.

² Articles 118 and 196 subsection 2

³ Article 201a

⁴ Article 232d

⁵ Article 69

What sort of committees are there? What do they do? How can the public get involved?

Type of committee	Nature of mandate	Scope of public involvement	Tools for public participation
Standing Legislative Committees	Scrutiny of departmental policies, budgets and bills	<ul style="list-style-type: none"> • Open hearings • Right to observe, give evidence and offer views 	<ul style="list-style-type: none"> • Written submissions • Oral presentations; expert opinions; public petitions; • Public broadcasts.
Standing Non-Legislative Committees	Internal parliamentary business	<ul style="list-style-type: none"> • Open hearings; right to observe and offer views 	<ul style="list-style-type: none"> • Written submissions; oral presentations • Public broadcasts
Ad Hoc Committees of Inquiry	Determined by resolution of the house	<ul style="list-style-type: none"> • Open hearings; limited closed hearings 	<ul style="list-style-type: none"> • Written submissions; expert opinion; public petitions; public broadcasts (or rebroadcasts with redactions in case of closed hearings)
Special Purpose Committees	Detailed in law e.g. Constitutional Implementation Oversight Committee Optional Committee on Impeachment	<ul style="list-style-type: none"> • Open hearings; right to observe and offer views • Open hearings; right to observe limited closed hearings 	<ul style="list-style-type: none"> • Written submissions; expert opinion; public broadcasting; public petitions • Public broadcasting • Rebroadcast with redactions in the case of closed hearings
Joint Committees	Determined by joint resolution establishing the committee	<ul style="list-style-type: none"> • Open hearings; right to observe and offer views 	<ul style="list-style-type: none"> • Public broadcasting; written submissions; expert opinions; public petitions.
Sub-Committees of Parliamentary Committees	Determined by decision of parent committee	<ul style="list-style-type: none"> • Presumption that same rules of participation as parent committee apply 	<ul style="list-style-type: none"> • Presumption that same tools as those for parent committee apply. • May vary according to subject matter (say public security)

What is preventing effective public participation?

Certain factors hinder public participation in Parliamentary committees. These include:

- low staffing levels which slow down committee work and undermine their effectiveness
- lack of committee meeting rooms (currently only two committees have designated meeting rooms)
- a limited number of committees – although this varies across global legislatures, it is clear that to cover all aspects of Parliamentary work Kenya needs more committees, thus creating more opportunities for public involvement
- lack of time for scrutiny of proposed legislation due to the slow working of committees
- poor support from government agencies: for example, the Official Secrets Act and the National Assembly (Privileges and Immunities) Act bar public officials from disclosing information to Parliament - inconsistent with the transparency guarantees of the new constitution
- the dubious integrity of some committee members whereby some members expect 'kickbacks'. A

⁶ "Transparency International (Kenya) , A Report on Integrity: A Study of the Kenyan Parliament" March 2010, p.35.

report from Transparency International (Kenya) specifically cites the "abuse of committee trips", including the large size of delegations, poor management of trips etc.

The issue of delegated legislation – when Executive agencies, for legitimate reasons, are vested with rule-making powers – is also a problem. Despite a supposed separation of powers, delegated legislation provides an opportunity for the Executive to create laws, possibly ignoring the will of the Legislature. In addition, delegated legislation is not systematically reviewed, nor is it legally defined.

How can public participation be improved?

1. On going amendments to standing orders (rules that guide Parliamentary debate) should include general principles of openness such as:
 - Committee hearings open to the public
 - Committee proceedings available on public record
 - Minority reports (those who disagree with conclusions) available on public record
 - The right to know why information may be classified, for how long and at what level (top secret, secret or restricted).

2. Parliament should provide the necessary information to facilitate public participation and address legal and technical obstructions to access. For example, legally, the National Assembly (Power and Privileges) Act and presidential directives allow information to be withheld on the ground that “it is of a private nature”. This is inconsistent with the constitution. On the technical side, although a Parliament website exists it needs to have the capacity for interactivity between committees, the public and Parliament so that the public can ask questions and receive answers.
3. The integrity of members should be addressed by:
 - Strengthening the Public Officer Ethics Act to prevent people receiving bribes/rewards. Currently it is too weak and has no tools to detect bribery.
 - Amending the Privileges and Immunities Act, together with standing orders to strengthen the reporting of members’ interests. The amendments should include appropriate penalties.
 - Initiating a register of members’ assets and listing assets above a designated value, together with any companies in which they have an interest
 - Enforcing members to declare gifts above a certain value and prohibiting private sponsorship of Parliamentary activities
 - Establishing a House Ethics Committee to be open to the public, allowing the public, when the basis is credible, to question a member’s integrity.
4. Physical facilities should be created for Parliament, especially suitable committee meeting rooms.
 - Good administrative staff should be available to members, freeing them upto consider public submissions and to report back on public consultations.
5. Support for the Budget Office (a new department), which itself supports Parliamentary committees by proposing budget amendments, needs to be strengthened. This can be done by:
 - Appointing an expert finance advisor to the Speaker, who in turn will regulate the relationship between the Budget Office and the Finance Ministry
 - Issuing a directive to government departments on the ramifications of the new budget process, including their responsibilities towards committees
 - Facilitating budget hearings through a fiscal management focal point to be appointed by the Budget Office.
6. The scrutiny of delegated legislation by Parliament and by the public should be improved by:
 - Defining clearly what delegated legislation consists of
 - Increasing the transparency of delegated legislation by allowing the public the right of scrutiny, facilitated by an annual online index of subsidiary legislation and a one month public commentary period before enforcement
 - Making the rules of court (made by the Chief Justice or the Rules Committee) available for wider public scrutiny, while preserving the independence of the Judiciary.
7. The same principles of openness and participation, including the above reforms, should also apply to County Assemblies.

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