

13 AUGUST 2012
THIS POLICY BRIEF IS
JOINTLY ISSUED BY:



HAKIJAMII



Kenya Land Alliance



CLARION



The printing of this brief was made possible through the generous support of Africog.

Public Participation Under Kenya's New Public Financial Management Law and Beyond

EXECUTIVE SUMMARY

This Brief reflects the concerns of a broad range of civil society organizations about the implementation of Kenya's new Public Financial Management Act, signed into law by the President in July 2012. The goal of this Brief is to inform the drafting of the regulations needed to implement the law, specifically those related to public participation in financial matters.

The Brief looks first at the County Budget and Economic Forum (CBEF), a new body created by the PFM Act. In our view, the principal role of the CBEF should be to convene public consultations, rather than to represent the public. This body should not become simply an extension of the Governor's power, but should be used to facilitate genuine citizen participation. We have proposed a number of regulations to ensure this, including: vetting of members, term limits, and open and transparent meetings. In addition, we would like to see the CBEF mandated to release budget information, and to hold meetings at different points during the budget cycle to both explain plans and budgets and get feedback on budget implementation from the public.

The second section of the Brief synthesizes the broader principles of public participation implicit in the discussion of the CBEF. We propose 10 principles of public participation that should apply to matters of public finance, and but also to participation in decision making more broadly.

1. Public consultations should be open to all citizens and taxpayers, without discrimination.
2. Safeguards should be established to prevent consultative forums from being dominated by any one political group, organized interest, or politician.
3. Public consultations must have clear and specific purposes.
4. The timeline and venues for public consultations should be made known at least two weeks in advance of the consultation.
5. Public consultations must set aside dedicated time for public feedback and questions.
6. Public participation in the planning and budget process should occur at all stages in this process.
7. The public must have access to all relevant plan and budget documents in a timely fashion.
8. All plan and budget documents should contain an executive summary and a narrative.
9. Citizens should be able to provide input into public consultations through direct participation, through representatives, and through written comments.
10. There should be a feedback mechanism so that citizens know their inputs were considered.

INTRODUCTION

This Brief reflects the concerns of a number of civil society organizations in Kenya about the legal and regulatory regime that will define public participation in matters of finance under the new Public Financial Management Act signed by the President in July. Although no announcement has been made seeking input into draft regulations for this Act, it is not too early to consider the implications of the new dispensation for public participation. Indeed, it is important that citizens clearly articulate their views on what constitutes genuine public participation, and how this should be organized, before the regulations are drawn up and the new order is firmly established.

The Brief first highlights areas of the new law that are related to public participation and that will require further regulations. We then offer our views on minimum standards, principles, and regulatory language that we think should be drafted to ensure that public participation is genuine and robust. Although the Act was signed by the President on 23 July 2012, it still has not been made available to the public. We, therefore, refer to the last available printed copy of the PFM Bill, and to the amendments passed in parliament and reflected in the Hansard of 27 June.

WHAT DOES THE NEW LAW SAY ABOUT PUBLIC PARTICIPATION?

The Bill makes numerous references to the need to incorporate public participation into different financial management processes. For example, the Parliamentary Budget Office is exhorted to “observe the principle of public participation in budgetary matters” (10:2), and the Treasury is required to “seek and take into account the views of...the public” in preparing the Budget Policy Statement each year (25:5). The repeated references to public participation suggest that the drafters of the Bill recognized that Article 201 of the Constitution must be respected in the PFM Bill. However, the precise meaning of public participation is left to be defined through regulations in most cases, sometimes explicitly so. Article 36:5, for example, instructs the Cabinet Secretary for Finance to draft regulations concerning public participation in the budget process at national level.

The Bill also attempts to create a novel structure at the county level known as the County Budget and Economic Forum (CBEF). The purpose of this body is (137:2):

“to provide a means for consultation by the county government on—

- a) Preparation of county plans, the County Fiscal Strategy Paper, and the Budget Review and Outlook Paper for the county; and
- b) Matters relating to budgeting, the economy and financial management at the county level.”

When the Bill was amended on 27 June 2012, further details were provided about the membership of this body, as follows:

“137(1A) The County Budget and Economic Forum shall consist of –

- a) the Governor of the county who shall be the chairperson;
- b) other members of the county executive committee;
- c) a number of representatives not county officers equal to the number of executive committee members appointed by the Governor from persons nominated by organizations representing professionals, business, labour issues, women, persons with disabilities, the elderly and faith based groups at the county level.”

There is no other detail about how the CBEF will function or exactly what its role is.

In the next section, we offer some suggestions for how the CBEF should function, based on both principle and some experience with other participatory processes in Kenya. We then proceed to generalize from the CBEF to the broader issue of public participation throughout the PFM law.

GUIDELINES FOR THE COUNTY BUDGET AND ECONOMIC FORUM

The amended Bill says more about who will sit on the CBEF than what they will do. We begin with the question of membership. **We believe that the regulations governing the CBEF must ensure that the body is professional, representative, and not captured by the interests of either the Governor or the organized groups that are to nominate representatives to it.** As constructed, an ordinary citizen cannot sit on this body unless he or she is nominated by an organized interest group. Moreover, while the list of nominating bodies seems to have been drafted in order to be inclusive, it is not clear which organizations will really be able to nominate, and what will prevent politicians and others connected to the Governor from creating organizations for the purpose of nominating their friends and family to the CBEF.

In order to avoid capture of the CBEF by political or other interests, we propose the following safeguards. **First, we believe that all those nominated to be part of the CBEF should be vetted by a committee of the county assembly.** This would probably fall to the Budget or Finance Committee. The vetting process should be public, and all nominees should make a declaration of assets.

In addition, we think that those who become members of the CBEF should only serve for one, nonrenewable term of no more than five years. Each representative may only represent a single organized interest group, and the list of members and the groups they are supposed to represent should be made public. Where there are multiple organized groups in a county representing a single interest, such as multiple faith-based organizations, the same organization should not be able to nominate a member for two consecutive terms. There should be some limit to the number of representatives that can come from a single ward within a county.

The next matter is what the CBEF is actually going to do. **In our view, the principal role of the CBEF should be to convene public consultations, rather than to represent the public.** The nature of the body, which is composed of government officials and members appointed by the Governor, is inadequate to serve as a deliberative body that could take budget decisions on behalf of, or fully represent, a county's citizens. But it can serve the important function of reaching out to citizens and structuring participatory processes for gathering input on plans and budgets.

The law states that the CBEF is to serve as a means for consultation on plans and budgets, and also broader matters of economy and finance. We believe that the CBEF should be charged with at least two main mandates in this regard. **First, the CBEF should organize forums that allow citizens to comment on government plans, strategies, and budgets.** This will represent an opportunity for citizens to express their views on which areas within county plans and budgets should be priority areas. It should be mandatory for the government to provide justifications for its decisions in these forums, and explanations of the links between plans, strategies, and the budget.

Second, the CBEF should organize quarterly sessions for citizens to receive information on the implementation of plans and budgets throughout the year, and for citizens to provide feedback to government on what they are seeing on the ground in terms of implementation. In these forums, government will be required to explain any implementation delays or failures and to make commitments to investigate further and fix problems in budget execution. The last forum of the year will be used to assess the progress over the full financial year, and the implications for plans and budgets for the coming financial year. There also should be a regular, annual forum to discuss audit reports and specific findings related to the management of county finances.

If these are the primary responsibilities of the CBEF, the next issue is how it will conduct itself in order to achieve these things. **We suggest that each CBEF have a code of conduct.** This can vary from county to county, but it should be based on the core set of 10 principles we lay out in the next section of this Brief.

We suggest that the CBEF be required to liaise with community leaders, elected at ward level, and serving in a volunteer capacity as organizers and conduits of information between the county government and the citizenry.

These leaders will serve several functions. First, they will organize ward-level meetings to disseminate information about county level plans, budgets, and processes. Where appropriate, such as when citizens are asked to provide input into county plans, they will also organize sessions to facilitate citizens to develop priorities. They could serve a representative function, as well, attending meetings on behalf of the ward at county level, as the two representatives elected through LASDAP Consultation Meetings currently do. County-level consultative meetings should be open, but it should be possible for citizens who cannot attend to be represented by these ward members.

At the county meetings, there must be time for at least two important elements. First, government officials must provide an overview of any plans or budgets and a justification of the reasons for emphasizing particular priority areas in these documents, as well as the links between plans and budgets. Second, time (at least 30-60 minutes, or one third of the total meeting length) must be provided for the public to ask questions and provide feedback on these plans and budgets. **These two elements should be written into the regulations to avoid the all too common situation where public meetings turn into long presentations by officials without serious public questioning or discussion.**

The first task of the CBEF each year should be to produce and disseminate a calendar with the dates and venues for all consultations for the coming budget year. **All consultations held by the CBEF should then be preceded (at least two weeks in advance) by a public notice that provides information about the nature of the consultation, an agenda for the meeting, and a summary of the key issues to be discussed. Where the consultation involves choices among priorities or over a particular resource basket, the relevant choices and budget information should be included in the notice, as is the case with LASDAP Public Notices.** The notice should also contain information about how to access all relevant public documents needed for the deliberation, assuming that some of these may be too bulky to post with the notice. The 2009 LASDAP Guidelines provide useful language on where public notices should be posted that can be replicated in the CBEF regulations:

“The Notice must be posted in public areas at least two weeks before the first consultation meeting. It is important to circulate this information as widely as possible to encourage participation. Public areas include the market place, bus stops, health centres, churches, mosques, temples, the district/chief’s offices and educational institutions.”¹

We also feel that the notice should be published in a local newspaper, or mentioned on the radio, to ensure that there is a public record of the actual date on which the notice was posted. The notice should also be posted on the county website.

An important consideration that is not spelled out in the PFM Bill is what or who will serve as the technical secretariat for the CBEF. We believe that there must be some civil servant who is charged with managing the process of public consultation on behalf of the CBEF and that this should not be left only to the political representatives serving there. In the case of CDF, the role of technical Fund Managers has been an important innovation that restricted the degree to which MPs completely politicized the use of funds. There should be at least one technical staff person playing a similar role for the CBEF consultation process.²

We believe there should be some limits put on the number of times the CBEF can formally meet. It should be limited to no more than four or five sittings per year during which allowances may be paid to those government officials who are members of the CBEF. The CBEF may meet more often without allowances, but this regulation will ensure some limits on the cost of this body to the county governments. There can be multiple opportunities for consultation for which no sitting allowances will be paid. We also believe that these sittings should occur during normal office hours. No allowances should be paid to members of the public.

1 Government of Kenya, *Guidelines for the Preparation, Implementation and Monitoring of the Local Authority Service Delivery Action Plan*, Revised 2009, p. 18.

2 A Fund Manager for CDF to be “recruited on a competitive basis by the commission, based on established professional and technical criteria. Should be competent in both finance and project management” was a key demand of the Social and Public Accountability Network (SPAN) in their 2009 Joint Memorandum on CDF. See http://www.bungelamwananchi.org/index.php?option=com_content&view=article&id=549%3Aauctor-et-sed-at-sodales&Itemid=&catid=132%3A.

The final set of considerations around the functioning of the CBEF relates to the issue of access to information. We already have alluded to relevant public documents, but the regulations should make clear that citizens must have access to key budget and policy information in a timely fashion, and that this should be, as article 10:1(h) of the PFM Bill says of documents produced by the Parliamentary Budget Office, “prepared in a clear, readily understandable, user-friendly form.” **All minutes from all meetings of the CBEF, all meeting agendas, and all draft documents upon which the public is to comment must be made public, and should be provided at least two weeks in advance of meetings.** All budget proposals, enacted budgets, and budget implementation reports at county level must also be made available to the public in a timely fashion. A Citizens Budget, a simplified version of the budget accessible to a lay person and ideally available in multiple languages and formats, should be produced and made available along with the budget to facilitate participation. Finally, citizen input provided during meetings should be catalogued and made available in a separate public document, along with an explanation of how this input was utilized, or why it was not utilized.

These documents can be made available at county offices but should also be distributed at ward level through county councilors and ward representatives. The regulations could specify that each county representative must make available at least 100 copies of all public documents to his or her constituents two weeks before all meetings, that these should be posted on the website, and that any citizen wanting a copy should be able to request one through their ward representative or councilor.

GENERAL OBSERVATIONS ON PUBLIC PARTICIPATION

The preceding sections on the functioning of the CBEF provide us with **10 key principles** that should inform public participation more broadly in matters of public finance.

- 1. Public consultations should be open to the widest spectrum of citizens and taxpayers, without discrimination.** The “public” refers to citizens and taxpayers who are not government officials.
- 2. Safeguards should be established to prevent consultative forums from being dominated by any one political group, organized interest, or politician.** These safeguards should include open and transparent proceedings and competitively selected technical staff empowered to manage procedures. Where appropriate, there may be a need for vetting of participants.
- 3. Public consultations must have clear and specific purposes, and these purposes should generally be to seek feedback on government plans, budgets and budget implementation, to seek specific preferences over a defined set of priorities, such as prioritizing a list of capital investments, and to present and seek feedback on audit reports and queries raised by auditors.** The purpose of the consultation should be made known in advance to the public, along with relevant documentation, so that they can prepare.
- 4. The timeline and venues for public consultations should be made known at least two weeks in advance of the consultation to ensure that people can prepare themselves to participate.** The venue for consultations should be consistent, wherever possible, so people know where they need to be in advance. The venue selection should take into consideration citizen preferences for where they feel most comfortable expressing their views.
- 5. Public consultations must set aside dedicated time for public feedback and questions.** A meeting at which officials simply present to the public without receiving any feedback or questions does not constitute public participation.
- 6. Public participation in the planning and budget process should occur at all stages in this process, including formulation, enactment, implementation, and oversight/evaluation.** This means that there must be consultations on at least a quarterly basis for any ongoing financial management processes.

- 7. The public must have access to all relevant plan and budget documents in a timely fashion, meaning at least two weeks before any decisions are taken about draft plans or budgets.** Relevant documents include all strategic plans, budget proposals, enacted budgets, quarterly or monthly implementation reports, audit reports, supplementary budgets, project plans and implementation reports, and contract and tender documents.
- 8. All plan and budget documents should contain an executive summary and a narrative explanation of tables and figures.** All of these documents should be written in a user-friendly, simple format, or should be accompanied by simplified versions that are readily accessible.
- 9. Citizens should be able to provide input into public consultations through direct participation, through representatives, and through written comments.** It is not possible for every citizen to participate in every forum, and there must be other ways to provide input besides direct, physical participation.
- 10. Where the public is asked for input, there should be a feedback mechanism so that citizens know whether or not their inputs were received, and whether and why they were or were not incorporated into the relevant plans or budgets.** This mechanism should take the form of a written document and, where possible a, public forum. The feedback must also be made available in a timely fashion so that citizens know before decisions are taken whether they have been heard or not.

CONCLUSION

The 2010 Constitution and the new Public Financial Management Law represent a unique opportunity to enhance the role of citizens in public financial management processes in Kenya. However, in order to ensure that this opportunity is not wasted, citizens must demand that the meaning of public participation is defined, and that laws and regulations governing consultative processes are drafted in a manner that enhances, rather than undermines, the mandates of the Constitution. This Brief represents a starting point for thinking about public participation in financial matters, but it is also relevant to broader discussions around public participation in decision making, such as the debate around a Public Participation law. We hope that our recommendations will be considered by Treasury and Parliament, but also by others interested in the broader implications of the new dispensation for public engagement in the decision-making process.

Key laws relating to public participation in planning and budgeting

THE CONSTITUTION

→ ARTICLE 10 – NATIONAL VALUES

(2) The national values and principles of governance include—

- (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and **participation of the people**;

→ CHAPTER 8 – THE LEGISLATURE

118. (1) Parliament shall—

- (b) facilitate public participation and involvement in the legislative and other business of Parliament and its committees.
- (2) Parliament may not exclude the public, or any media, from any sitting unless in exceptional circumstances the relevant Speaker has determined that there are justifiable reasons for the exclusion.

→ CHAPTER 11 – DEVOLVED GOVERNMENT

174. The objects of the devolution of government are—

- (c) to give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them;

184. (1) National legislation shall provide for the governance and management of urban areas and cities and shall, in particular—

- (c) provide for participation by residents in the governance of urban areas and cities.

196. (1) A county assembly shall—

- (b) facilitate public participation and involvement in the legislative and other business of the assembly and its committees.

→ CHAPTER 12 – PUBLIC FINANCE

201. The following principles shall guide all aspects of public finance in the Republic—

- (a) there shall be openness and accountability, including public participation in financial matters

221. (5) Budget estimates and annual Appropriation Bill

In discussing and reviewing the estimates, the (Parliamentary Budget Committee) committee shall seek representations from the public and the recommendations shall be taken into account when the committee makes its recommendations to the National Assembly.

→ FOURTH SCHEDULE – DISTRIBUTION OF FUNCTIONS BETWEEN THE NATIONAL GOVERNMENT AND THE COUNTY GOVERNMENTS

Part 2—County Governments

The functions and powers of the county are—

- 14.** Ensuring and coordinating the participation of communities and locations in governance at the local level and assisting communities and locations to develop the administrative capacity for the effective exercise of the functions and powers and participation in governance at the local level.

THE COUNTY GOVERNMENTS ACT, 2012

- 3.** The object and purpose of this Act is to—
provide for public participation in the conduct of the activities of the county assembly as required under Article 196 of the Constitution

- 50.** (3) The sub-county administrator shall be responsible for the coordination, management and supervision of the general administrative functions in the sub-county unit, including —
 - (g) facilitation and coordination of citizen participation in the development of policies and plans and delivery of services.

- 51.** (3) The Ward administrator shall coordinate manage and supervise the general administrative functions in the Ward unit, including —
 - (g) coordination and facilitation of citizen participation in the development of policies and plans and delivery of services.

- 53.** (1) There is established, for each village unit, a village council-
 - (2) A village council shall be responsible for-
 - (a) ensuring and coordinating the participation of the village unit in governance;

- 87.** Principles of citizen participation in counties.

- 88.** Citizens right to petition and challenge.

- 89.** Duty to respond to citizen’s petitions or challenges

- 90.** Matters subject to local referenda.

- 91.** Establishment of modalities and platforms for citizen participation.

- 92.** Part to apply to decentralized units.

- 92.** (2) The governor shall submit an annual report to the county assembly on citizen participation in the affairs of the county government

- 95.** (1) A County government shall establish mechanisms to facilitate public communication and access to information in the form of media with the widest public outreach in the county

- 115.** (1) Public participation in the county planning processes shall be mandatory.