COMPARATIVE RESEARCH FOR THE PREPARATION OF A LEGISLATIVE GUIDE FOR THE NATIONAL AND COUNTY GOVERNMENTS

1.1 Introduction

The legislative role is at the center of governmental functions that facilitate the enjoyment of the promises of the constitution of Kenya 2010. In the 5th Schedule, the constitution reserves a program for the promulgation of enabling legislation to breathe life into its substantive provisions. It is therefore accurate to state, only in reaffirmation, that Constitutional promises, especially in the area of devolution, are not achievable without a proper exercise of the legislative function at both the County and National levels.

It is often remarked that the constitution of Kenya 2010 heralded the most radical re-engineering of the state in the areas of representation and the exercise of executive power. The most salient feature of this shift is the emphasis, right from the first article of the Constitution that all sovereign power belongs to the people of Kenya[1] and is exercised either directly or through their democratically elected representatives.[2]

The Expanded citizen representation in both the national and county assemblies and the emphasis of public participation further demonstrate the shift in expectation of the constitution on the legislative and other functions of state.[3] A central concern in the design of legislative processes for counties still remains: if devolution was intended to promote public participation in decision-making in local governments, what is the correct procedure in attaining and institutionalizing that objective? In other words, are there objective criteria for assessment of the success of participatory decision-making in counties?

In each of the 47 counties of Kenya, there is now a conspicuous county assembly as well as a county seat of government.[4] The functional assignment of county assemblies in Kenya is comparable to other devolved legislative units on the continent, as shown below.

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[1] Art 1 (1)
[2] Art 1 (2).
[3] Arts 94, 95 and 96 of the Constitution deal with the legislative function at the National Assembly and the Senate.

[4] The provisions of Arts 177 and 178 of the constitution govern the creation of county assemblies while Art 185 creates and delimits their legislative power.

Table: Comparative objectives of devolution and legislative powers in devolved units

Uganda	South Africa	Rwanda
1: The transfer of real power to Local Governments with the aim of reducing the load of work on remote and under- resourced central officials 2: Bringing political and administrative control over services at the point where they are actually delivered, thereby improving accountability and effectiveness, and promoting people's feeling of "ownership" of programmes and projects executed in their Local Governments. 3: Freeing local managers from central constraints and enabling them to develop, effective and sustainable organizational structures tailored to local circumstances in the long-term 4: Improving financial accountability and responsibility by establishing a clear link between the payment of taxes and the provision of services they finance 5: Improving the capacity of local authorities to plan, finance and manage the delivery of services to users	The Constitution of the Republic of South Africa (1996) mandates local government to: 1: Provide democratic and accountable government for local communities 2: Ensure the provision of services to communities in a sustainable manner. 3: Promote social and economic development. 4: Promote a safe and healthy environment. 5: Encourage the involvement of communities and community organizations in the matters of local government	1:To enable and reactivate local people to participate in initiating, making, implementing, and monitoring decisions and plans that concern them taking into consideration their local needs, priorities, capacities and resources by transferring power, authority and resources from central to local government and lower levels. 2: To strengthen accountability and transparency in Rwanda by making local leaders directly accountable to the communities they serve and by establishing a clear linkage between the taxes they pay and the services that are financed by these taxes 3: To enhance the sensitivity and responsiveness of public administration to the local environment by placing the planning, financing, management and control of service provision at the point where services are provided and by enabling local leadership develop organization structures and capacities that take into consideration the local environment and needs 4: To develop sustainable economic planning and management capacity at local levels that will serve as the driving motor for planning, mobilization and implementation of social, political and economic development to alleviate poverty 5: To enhance effectiveness and efficiency in the planning, monitoring and delivery of services by reducing the burden from central government officials who are distanced from the point where needs are felt and services delivered

Upon establishment, county assemblies took up their legislative function with the expected fervor. At the initial stages of their work, the assemblies cast their sights on bills

necessary to secure the funding of county executive work through enactment of finance bills. Of necessity these bills dealt with enlargement of the corpus of taxation and an increase of other levies. Almost unanimously there was a chorus of opposition to these bills.[5]

As significant feature of the first attempts at county legislation was a lack of public participation or inadequate consultation, whenever it was attempted. Across the board, the issue of public participation has become a matter of contestation due to an absence of any known parameters to measure the adequacy of public engagement. Guidance in that critical component of legislation shall no doubt provide relief to county governments that often find themselves in courts defending the legitimacy of their legislation.

The other area that requires a reset is the process of originating and developing bills before they are presented before the assemblies. Whether originating from an assembly member or as an initiative by the executive, every bill needs to be hemmed in by set and known rules. For this reason, the linkage between policy and legislative initiative needs to be clarified to dovetail into the long-term developmental and statutory initiatives of the legislation in question.

It is hoped that this comparative study will guide the embellishment of a legislative guide for use by the national and county governments. We hope to demonstrate, by a comparative presentation, that the quality and efficacy of our legislative measures can benefit and be enriched by adhering to a known criteria and format.

1.2 Justification and context of a comparative analysis

a) Introduction

It may be observed at the outset that devolution has affected an expansion in representation with 3500 plus elected and nominated members of the 47 County assemblies,[6]

[5] Because there had been little or nil consultations on the bills and even less public participation in their promulgation, the public was enraged that devolution threatened the prospect of more taxation on an already impoverished population.

[6] There are 1450 county representatives elected to single member constituencies called wards, and about 1500 county representatives nominated to represent youth and disabled people in the various county assemblies from party lists, together with women who were nominated to ensure gender balance.

359 members of the National Assembly and 67 members of the senate.[7] The concomitant result has been an upsurge in the expectations of citizens translating to increased pressure on the governance structures.

The local Government system that devolution replaced was loathed for its wasteful inefficiency and insensitivity to public needs. It is intended that the paradigm shift proposed and anchored by devolution must cure those failures of devolved power in the former dispensation and the legislative function must be the centerpiece of that change.

The fundamental business of a legislative assembly is lawmaking as a means of advancing the developmental goals of the Nation and the 47 County governments. A common lament by the County executives has been lack of laws and regulations to govern certain aspects of their executive functions. A stiff learning curve, the result of a hurried mode of implementation, may be the cause of this jam in the legislative process at the County level.

It is observed that county legislatures have often been tempted to originate and enact legislation in complete absence of an underpinning policy. It is suggested that assemblies be conscious of the need to promulgate policy as an antecedent to legislation.

b) Process of generating law from policy

In ideal circumstances, a policy should always precede law. The enactment and enforcement of law should be guided and be based upon a predetermined policy. A policy outlines what a government ministry hopes to achieve and the steps that need to be taken to that end. It gives a general direction in enforcement and implementation of legislation. Consideration of alternative options is an important part of the policy making process. It is about identifying the range of possible courses of action, and comparing their relative merits, including the costs, benefits and risks that are associated with them, in order to inform selection of the best policy implementation option. This often involves an option appraisal, also known as an 'economic appraisal'.

Option appraisal is a flexible tool and needs to be tailored to the circumstances. However, a typical appraisal will cover the following steps:

[7] Kenya currently runs 47 County assemblies and a bicameral parliament made up of the National Assembly and the Senate.

i. establish the policy need - Identify target populations, quantify problems/demands to be addressed, show how policy intervention will contribute to strategic aims;
ii. define the policy objectives - broadly enough that a range of policy options can be identified. Measurable targets should normally be developed, to provide for detailed appraisal and subsequent measurement of the policy's success;
iii. identify and describe the policy options - a "status quo" or "do minimum" baseline option and a suitably wide range of alternative policy options for consideration;
iv. detail the costs, benefits, risks and other relevant impacts - for each policy option. Consider screening and impact assessment requirements;
v. spell out the funding implications, including the relative priorities for funding - particularly important when appraising a policy with several components, some of which could be taken forward in advance of others;
vi. summarise the findings and recommend the preferred policy option - comparing the relative merits of each option in turn; and
vii. make recommendations for managing, monitoring and evaluating the policy.

The bill stage is a metamorphosis phase through which law is generated from policy. The general process if generating law from a policy in Kenya is as follows;

Stage one: The process of generating policy is usually initiated by government departments or ministries. Once the relevant ministry or department has formulated a policy guideline, it is reduced into writing for discussion purposes within the ministry and other government departments.

Stage two: Stage two is the longest process in the legislative process. It is at this level that the policy is debated and negotiated with various stakeholders, such as opposition parties, the public, non-governmental organizations and all other interest groups. This can take can take some time. During this time, the government ministries will draft discussion documents on the policy or law to allow for debate and comment.

Stakeholder participation may take different forms such as attending parliamentary committee hearings, setting up meetings with department heads or the minister, using the media to put pressure, writing articles and giving contributions during public forums and putting in written opinions.

Stage three: Stage three of the process is when the policy is finalized by the relevant Department and Ministry. Once a policy has been properly debated the Department and Ministry look at the issues and options and draw up a final policy, which is published as a White Paper. The White Paper is a statement of intent and a detailed policy plan, which often forms the basis of legislation. It is debated and adopted by cabinet and approved by parliament.

Stage four: A White Paper often forms the basis of legislation. If the Minister or the Department decides that a new law is necessary to achieve its objectives and implement its policy, the Department will begin the job of drafting the new law. In its early stages before a new law has been tabled in Parliament it is called a draft Bill. Once it has been tabled in Parliament it is called a Bill.

Bills concerning County governments may originate in the national Assembly or the Senate. Wherever they origin, they must be passed by both houses. A Bill not concerning County Governments is considered in the National Assembly only.

c) Rationale for legislative guidelines

The turbulent waters in which county assemblies and executives have operated in the first 18 months of establishment are a pointer to an unsettled regulatory regime. A guide on the legislative functions of the county assemblies shall fill part of that regulatory lacuna.

Commentators often fault county legislative products for lack of quality and rigor in their formulation. Without set parameters it is not possible to gauge the accuracy of such a charge on the role of the legislature at county or national level

Apart from that broad sweep, the case for legislative guidelines is made on the following grounds;

I. The need to tether laws firmly to policy. The laws and regulations should be a product of a well thought out, set and understood policy.
II. The need to entrench public participation in the formulation and passing of laws that affect the community.
III. As a corollary to the need for public participation, the need to ensure seamless obedience and fealty to legislative measures.

IV. The need to observe constitutional limitations and to obey national laws at the county level impels a guide to keep on legal rail legislation emanating from Counties.

V. The need for uniformity of laws in broad terms across the counties and thereby to avoid intra county conflict in application of the laws emanating from County Assemblies.

VI. The need to use legislation to resolve existing and emerging resource conflicts between the counties.

VII. The need to resolve existing and emerging resource and other intra county conflicts.

VIII. The need to clarify and simplify the process of legislation at the national and county levels of government.

IX. The need to hem in and undergird the legislative process and thereby assure the legality and quality of the bills that comes out of our legislative assemblies.

X. The need to insure the products of legislation against the risk of legal and constitutional flows that trigger litigation and other disputatious processes, to the loss of both time and public resources.

XI. The need to ensure optimal use of time in the legislative circles in the constitutional life circles of the individual legislatures.

XII. The need to create synergy in all aspects of governance from policy through legislation to implementation.

XIII. Properly anchored legislation will ensure the devolution train leaves the station with sufficient steam to deliver on its promises.

XIV. The needs to enable and facilitate the CAS take over and assume their functions in an efficient and effective manner (efficient and effective takeover of devolved functions depends on an effective legislative agenda)

XV. The need to provide closure and validation to public interest issues.

XVI. The need to reframe the relationship between the citizens and government functionaries.

XVII. The need to track, assess and document legislative progress.

1.3 The current Constitutional and Legislative provisions that underpin Legislation in Kenya

The Constitutional premise of legislative power is its facilitative role in the realization of the aspirations of the people of a country.

Constitutional interpretation in the commonwealth and in South Africa points to a bias towards expanding the ken of legislation to spheres of expanding human rights, citizen participation and realization of the promises of an open society that constitutions enable.[8]

There is emerging jurisprudence, which ties legislation to international treaty obligations, especially those emanating from the United Nations system. The duty to give life to the letter and spirit of international treaties is, in Kenya today, triggered by art 2 (6) of the constitution, which incorporates any treaty or convention ratified by Kenya into domestic law.[9] Besides, by operation of art 2 (5) of the constitution, the general rules of international law form part of the law of Kenya. It is therefor important to remember that at the county level, a treaty, like the Nile treaty, for example, has an impact on the resource mobilization and use in the counties that host rivers and water bodies that are important to the Nile ecosystem.

Further, the International Covenant on Civil and Political Rights obligates state parties to observe minimum standards of citizen political participation and involvement in the political decision making processes.[10] This is the international anchor for the emerging template for public participation in policy and legislative matters that affect them. It is predicted that 'the element of public participation, protection of the public sphere in policy and legislative matters will in the early course of this century become universal.'[11] This trend places the citizen at the center of both policy and legislation. This is emphasized by Carolyn Evans and Simon Evans (2006) in the following terms

> *[I]n established democratic States, legislatures perform several distinct functions. They are representative bodies providing a mechanism by which citizens participate in public affairs and government; they are forums in which governments can be held accountable for their conduct; and they are (more or less) deliberative law-making bodies. In discharging each of these functions they can affect the enjoyment of human rights.*[12]

It is against this background that we argue that the Constitution of Kenya 2010 in setting up the National Assembly and the County Assemblies anticipates that the citizens of

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[8] Doctors for Life, 2006 (12) BCLR 1399 (CC) at 104-05 (S. Afr.).

[9] Article 2 (6) 'Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.'

[10] Article 25 of the International Covenant on Civil and Political Rights (ICCPR) is the cornerstone of democratic governance and explicitly grants the right to take part in the conduct of public affairs.

[11] *Supra n 8 at 104-05 (S. Afr)*.

[12] Carolyn Evans & Simon Evans, Evaluating the Human Rights Performance of Legislatures, 6 HUM. RTS. L. REV. 545, 548 (2006).

Kenya benefit from expanded political space and contributes in all endeavors; policy, legislative and whatever other processes that affect the quality of their lives. It should be remembered that the architecture of the constitution of Kenya 2010 bespeaks of a need to use legislative power at national and devolved levels to involve the citizenry in governance.

It is intended that the process of obtaining an agreed legislative guide shall provide a road map for a participatory procedure that incorporates constitutional and statutory requirements in the law making process.

With respect to the national assembly, the constitution provides as follows:

Article 93

(*1) There is established a Parliament of Kenya, which shall consist of the National Assembly and the Senate.*

(2) The National Assembly and the Senate shall perform their respective functions in accordance with this Constitution.

Article 94

(1) The legislative authority of the Republic is derived from the people and, at the national level, is vested in and exercised by Parliament.

(2) Parliament manifests the diversity of the nation, represents the will of the people, and exercises their sovereignty.

(3) Parliament may consider and pass amendments to this Constitution, and alter county boundaries as provided for in this Constitution.

(4) Parliament shall protect this Constitution and promote the democratic governance of the Republic.

(5) No person or body, other than Parliament, has the power to make provision having the force of law in Kenya except under authority conferred by this Constitution or by legislation.

(6) An Act of Parliament, or legislation of a county, that confers on any State organ, State officer or person the authority to make provision having the force of law in Kenya, as contemplated in clause (5), shall expressly specify the purpose and objectives for which that authority is conferred, the limits of the authority, the nature and scope of the law that may be made, and the principles and standards applicable to the law made under the authority. The tenor of this article places the citizenry at the center of legislation. The need to involve and consult stakeholders is at the heart of these constitutional provisions.

Article 95

(1) The National Assembly represents the people of the constituencies and special interests in the National Assembly.

(3) The National Assembly enacts legislation in accordance with Part 4[13] *of this Chapter.*

[13] Part 4—Procedures for Enacting Legislation
109 Exercise of legislative powers.
11F Bills concerning county government.
111—Special Bills concerning county governments.
112—Ordinary Bills concerning county governments.
113—Mediation committees.
114—Money Bills.

Article 109

(1) Parliament shall exercise its legislative power through Bills passed by Parliament and assented to by the President.

(2) Any Bill may originate in the National Assembly.

(3) A Bill not concerning county government is considered only in the National Assembly, and passed in accordance with Article 122 and the Standing Orders of the Assembly.

(4) A Bill concerning county government may originate in the National Assembly or the Senate, and is passed in accordance with Articles 110 to 113, Articles 122 and 123 and the Standing Orders of the Houses.

(5) A Bill may be introduced by any member or committee of the relevant House of Parliament, but a money Bill may be introduced only in the National Assembly in accordance with Article 114.

Article 196

(3) *Parliament shall enact legislation providing for the powers, privileges and immunities of county assemblies, their committees and members.*

The National Assembly (Powers and Privileges) Act, Cap 6

4. *No civil or criminal proceedings shall be instituted against any member for words spoken before, or written in a report to, the Assembly or a committee, or by reason of any matter or thing brought by him therein by petition, Bill, resolution, motion or otherwise.*

12. *No proceedings or decision of the Assembly or the Committee of Privileges acting in accordance with this Act shall be questioned in any court.*

With respect to the county assemblies the constitution provides as follows:

Article 176

(1) *There shall be a county government for each county, consisting of a county assembly and a county executive.*

Article 185

(*1) The legislative authority of a county is vested in, and exercised by, its county assembly.*

(2) A county assembly may make any laws that are necessary for, or incidental to, the effective performance of the functions and exercise of the powers of the county government under the Fourth Schedule.

(3) A county assembly, while respecting the principle of the separation of powers, may exercise oversight over the county executive committee and any other county executive organs.

(4) A county assembly may receive and approve plans and policies for—

a) the management and exploitation of the county's resources; and

b) the development and management of its infrastructure and institutions.

Article 196

(1) A county assembly shall--

115—Presidential assent and referral.

116—Coming into force of laws.

(a) conduct its business in an open manner, and hold its sittings and those of its committees, in public; and

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

Section 5 of The County Governments Act, 2012 provides for the functions of county governments as hereunder:

(1) A county government shall be responsible for any function assigned to it under the Constitution or by an Act of Parliament.

(2) Without prejudice to the generality of subsection (1), a county government shall be responsible for—

(a) county legislation in accordance with Article 185 of the Constitution;

Section 8 sets down the role of the county assembly in the following terms:

(*1) The county assembly shall—*

(b) Perform the roles set out under Article 185 of the Constitution

(2) If a county assembly fails to enact any particular legislation required to give further effect to any provision of this Act, a corresponding national legislation, if any, shall with necessary modifications apply to the matter in question until the county assembly enacts the required legislation.

Section 17

The national law regulating the powers and privileges of Parliament shall, with the necessary modifications, apply to a county assembly.

Section 21

(1) A county assembly shall exercise its legislative power through Bills passed by the county assembly and assented to by the governor.

(2) A Bill may be introduced by any member or committee of the county assembly, but a money Bill may be introduced only in accordance with subsection (4).

(3) In the case of a money Bill, the county assembly may proceed only in accordance with the recommendation of the relevant committee of the county assembly after taking into account the views of the county executive committee member responsible for finance.

(4) For the purposes of this Act, "money Bill" means a Bill that contains provisions dealing with—

(a) taxes;

(b) the imposition of charges on a public fund or the variation or repeal of any of those charges;

(c) the appropriation, receipt, custody, investment or issue of public money;

(d) the raising or guaranteeing of any loan or its repayment; or

(e) matters incidental to any of those matters.

Section 22

A Bill introduced in the county assembly shall be identified by a title placed at the beginning of the Bill and the title shall include the subject matter of the statute to be enacted.

Section 23

A Bill shall be published by including the Bill as a supplement in the county Gazette and the Kenya Gazette.

Section 24 Assenting to a Bill

(1) *The Speaker shall, within fourteen days, forward a Bill passed by the county assembly to the governor.*

(2) The governor shall within fourteen days after receipt of a Bill—

(a) assent to the Bill; or

(b) refer the bill back to the county assembly with a memorandum outlining reasons for the referral.

(3) If the governor refers a Bill back to the county assembly, the county assembly may, following the appropriate procedures under this section—

(a) amend the Bill taking into account the issues raised by the governor; or

(b) pass the Bill without amendment.

(4) If a county assembly amends the Bill taking into consideration the issues raised by the governor, the speaker shall within fourteen days submit the Bill to the governor for assent.

(5) If a county assembly passes the Bill a second time, without amendment, or with amendments which do not accommodate the governor's concerns by a vote supported by two-thirds of members of the county assembly, the speaker shall within seven days re-submit the Bill to the governor and the governor shall within seven days assent to the Bill.

(6) If the governor does not assent to a Bill or refer it back within the period referred to under this section, the Bill shall be taken to have been assented to on the expiry of that period.

Section 25 Coming into force of a law

(1) *A legislation passed by the county assembly and assented to by the governor shall be published in the county Gazette and Kenya Gazette within seven days after assent.*

(2) Subject to subsection (3), the county assembly legislation shall come into force on the fourteenth day after its publication in the county Gazette and Kenya Gazette, whichever comes earlier, unless the legislation stipulates a different date on or time at which it shall come into force.

(3) A county assembly legislation that confers a direct benefit whether financial or in kind on members of the county assembly shall come into force after the next general election of members of the county assembly.

(4) Subsection (3) does not apply to an interest that members of county assembly have as members of the public.

The provisions of the Constitution and law set out above may be considered as the basis and guidance to legislation in Kenya. The provisions capture in a broad sweep the legal limits and parameters within which legislation has been undertaken in the short life of the current constitution.

In the short term of their existence, the exercise of legislative authority at the County level has been plagued by disputes that, in some counties, have ended up in court as disputes on either the power to legislate or the manner of legislation. The *content* and the *process of legislative authority have thus been* impugned in the disputes that have come before the

constitutional courts. The reported disputes point to a need to provide guidance to the legislative process especially at the county assembly level.[14]

2. Comparative analysis

a) Introduction

It has been observed that the trend in emerging democracies is to "[O]pt for a more expansive role of the public in the conduct of public affairs by placing a higher value on public participation in the law-making process.[15]

The methodology in this engagement must come out the best global practice. In the words of the South African court

> *Public involvement might include public participation through the submission of commentary and representations: but that is neither definitive nor exhaustive of its content. The public may become 'involved' in the business of the National Assembly as much by understanding and being informed of what it is doing as by participating directly in those processes. It is plain that by imposing on Parliament the obligation to facilitate public involvement in its processes, the Constitution sets a base standard, but then leaves Parliament significant leeway in fulfilling it.*[16]

It is clear that public participation, apart from its canvassing advantages set out above, is a prominent pillar as a ventilation mechanism, of the anticipated shift in governance. The promoters of legislation in the assembly, as well as the purveyors of policy outside it,

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[14] A sample of the disputes reported in the area of legislation in the counties include:

- 17/1/2014 the CIC points out in communication to all counties the need to involve the public in the finance and budget making process and resultant bills.
- 27/1/2014 Traders in Baringo County reject the finance bill and levies made pursuant to its provisions. The dispute was over involvement.
- 28/4/2014 County representatives in stalemate over legislation with the assembly leadership in Kakamega County.
- June 2014 the business community in Naivasha rejects finance regualtions and levies made pursuant to the Nakuru County Finance bill 2013. Matter ends up in the Constitutional court at Nakuru as the County executive suspends regulations.
- 2014 Speakers of Kiambu, Nyamira and other counties impeached or threatened with impeachment on the basis of legislative disputes.
- 25/1/2014 Governor Nakuru admits that there was no consultation for the bills generated in 2013 has there was no mechanism/regulations to guide the same.

Source: Daily Nation.

[15] Supra n 12.

[16] Supra n 8 citing King & Others v Attorneys Fidelity Fund Bd. of Control & Another 2006 (4) BCLR 462 (SCA) at 23-24 (S. Afr.).

must from the outset ensure that proposals are sound with the full knowledge that they shall be canvassed and ventilated in public fora.

b) Structure of legislative guides in other jurisdictions with devolved systems of government

The structure of a legislative guide is largely dictated and modeled along the legislative processes in a given country. There is no universal way of doing a legislative guide. Ultimately though, a good legislative guide must accurately outline the legislative process and be fashioned in a way that makes logical sense. Given the utility value of a legislative guide, it is imperative to ensure that it is as user friendly as it can get.

For instance, the UK legislative guide begins with an introduction to the legislative process and bidding in the UK. In this introductory part the guide deals with a several issues including, how to use the guide, a summary of the legislative process, key players in making legislation, securing a slot in the legislative program, bill and bill management team, and collective agreement.

The second part of the guide deals with preparing the bill for introduction. At this stage the guide outlines all preliminary issues that must be addressed before a bill is introduced in parliament. Such issues include; checklists of tasks to be completed by the sponsor, drafting the bill, the structure of drafting instructions, explanatory notes, legislative impact assessments, budgetary considerations among others.

The third part of the UK guide deals with guidance to the bill teams. The part deals with issues the drafting team should look out for during and after drafting to ensure the process flows smoothly without unnecessary delays. It deals with management of amendments to the drafts as well as explanatory statements.

The forth part of the guide deals with the parliamentary stage of the legislative process. The guide outlines the various stages that a bill goes through after introduction to parliament. The guide tracks the legislative process from the point when the bill is introduced in the House of Commons, through the House of Lords, all the way to the Royal Assent.

The legislative process for bills in not always uniform; some legislative processes are unique to certain types of bills. The next part of the UK guideline deals with the different types of bills and their peculiar requirements in the legislative process.

A United States of America legislative guide for federal legislation will largely mirror the UK guide save for the unique features such as the legislative process in Congress, Senate and Presidential as opposed to Royal Assent.

b) South Africa

South Africa has a bicameral Parliament. The National Assembly is the House directly elected by the voters, while the National Council of Provinces is elected by the provinces and represents them to ensure that provincial interests are taken into account in the national sphere of government.

The National Assembly and the National Council of Provinces have their own distinct functions and powers. The National Assembly is responsible for choosing the President, passing laws, ensuring that the members of the executive perform their work properly and providing a forum where the representatives of the people can publicly debate issues. The Speaker is the head and spokesperson of the National Assembly.

Like the National Assembly, the National Council of Provinces is also involved in the law-making process and provides a forum for debate on issues affecting the provinces. Its main focus is to ensure that provincial interests are taken into account in the national sphere of government. This is done by participating in the national legislative process and by providing a national forum for public consideration of issues affecting the provinces. The Chairperson of the National Council of Provinces is the head of and spokesperson for that House.

I. Legal framework for legislative authority

As pointed out above, the national and provincial spheres of government have concurrent legislative competence in accordance with Schedule 4 of the RSA Constitution.[17] Parliament and the provincial legislatures at national and provincial level have the power to make laws for the country in accordance with Section 43(a)[18] and Section 44 of the Constitution.

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[17] Act 108 of 1996.

[18] 43. In the Republic, the legislative authority -

1. (a) of the national sphere of government is vested in Parliament, as set out in section 44; (b) of the provincial sphere of government is vested in the provincial legislatures, as set out in section 104; and (c) of the local sphere of government is vested in the Municipal Councils, as set out in section 156.

In terms of Section 44(1) (a), the National Assembly has the power to:

- Amend the Constitution
- Pass legislation with regard to any matter within the functional areas of concurrent national and provincial legislative competence (Schedule 4 of the Constitution), but excluding (subject to Subsection 2) matters falling within the functional areas of exclusive Provincial Legislative competence (Schedule 5 of the Constitution)
- Assign any of its legislative powers, except the power to amend the Constitution, to any legislative body in another sphere of government.

In terms of Section 44(1) (b), the national legislative authority vested in Parliament confers on the National Council of Provinces (NCOP) the power to:

- Participate in amending the Constitution in accordance with Section 74
- Pass ordinary Bills affecting the provinces (Section 76 of Constitution)
- Consider ordinary Bills not affecting the provinces (Section 75 of the Constitution) but passed by the National Assembly.

Parliament may intervene and pass legislation that falls within the functional areas of exclusive provincial legislative competence, only when it is necessary to:

- Maintain national security
- Maintain economic unity
- Maintain essential national standards
- Establish minimum standards required for the rendering of services
- Prevent unreasonable action taken by a province, which is prejudicial to the interests of another province or to the country as a whole.

II. The national council of provinces (NCOP)

The National Council of Provinces (NCOP) represents the provinces by ensuring that provincial interests are taken into account in the national sphere of government. It consists of nine delegations of ten members from each of the provincial legislatures, six of whom are permanent members (for a five-year period) based at Parliament. Four are special delegates who are based in the provincial legislatures, and who travel to Parliament when necessary. The premier of a province or a person designated by the premier heads each delegation.

In accordance with Section 42(4), the NCOP represents the provinces to ensure that provincial interests are taken into account in the national legislative process. NCOP does this

mainly by participating in the national legislative process and by providing a national forum for the public consideration of issues affecting the provinces. Local government can, through organized formations, participate in proceedings of the NCOP although local government may not vote.

The national and provincial spheres of government have concurrent legislative competence in accordance with Schedule 4 of the Constitution. In terms of Section 155(6) (a), the nine Provincial Legislatures have an obligation to monitor and support the local government in their respective provinces. Furthermore, in terms of Section 155(7), the legislatures have legislative and executive authority to see to the effective performance of municipalities in respect of those competencies. However, the national government's authority is subject to Section (44) (2).

III. The legislative process

The legislative process is initiated by formulating a bill (draft law), which may be introduced in Parliament by a Minister, a Deputy Minister, a parliamentary committee or an individual Member of Parliament (MP). Most bills are drawn up by government departments under the direction of the relevant Minister or Deputy Minister. The Cabinet must approve a bill introduced by a member of the executive before being submitted to Parliament for processing. Bills introduced by individual MPs are called private members' bills.

Before it can become a law, a bill must be passed by both Houses of Parliament. Most bills are introduced in the National Assembly, but certain bills that affect provinces may be introduced in the NCOP. Once it has been introduced, a bill is referred to the relevant committee. Where it is debated in detail and, if necessary, amended. If there is much public interest in a bill, the committee may organise public hearings. Once the committee has finalized its deliberations on a bill, it reports to the corresponding House. After the House has debated the bill, it takes a decision on whether to pass the bill. A bill could be referred back to the committee for further work before the House takes a decision. Once the first House has agreed and passed a bill, it is then referred to the other House. If a bill passes through both the National Assembly and the NCOP, it is sent to the President for assent. Once the President has signed a bill passed by the Houses, it becomes an Act of Parliament – a law of the land.

c) The legislative process in Brazil

The Brazilian Parliament, the National Congress, is a bicameral legislative assembly composed of the Chamber of Deputies and the Federal Senate. A bill laid before any of the

houses must be revised by the other; therefore, apart from subjects within private competence of each house, the legislative process grants both houses participation in the lawmaking process.

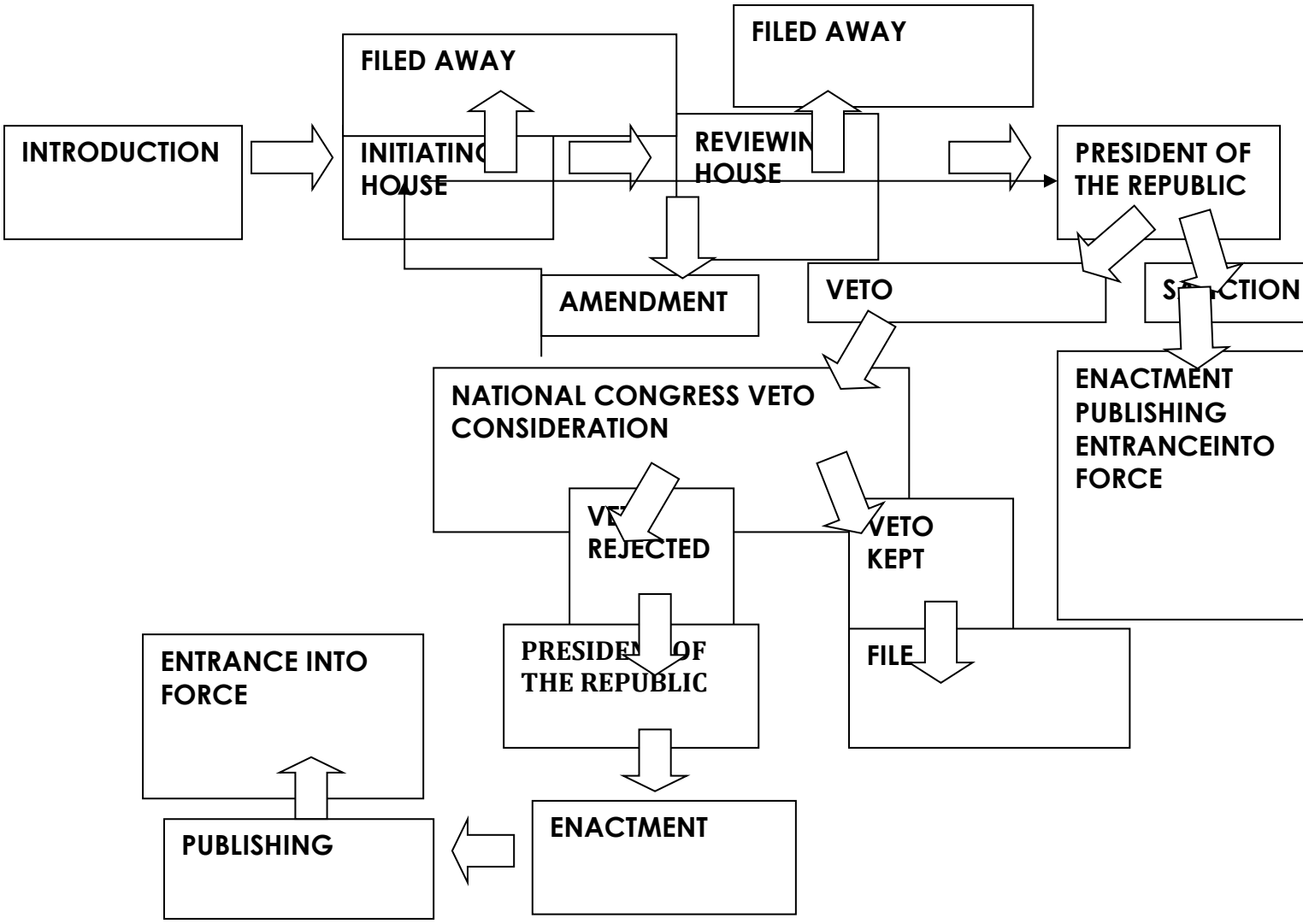
The legislative process in Brazil begins in earnest with the introduction of a bill of law in one of the Houses, the Chamber of Deputies or the Federal Senate, thus called Originating House. Bills originating from the President of the Republic, the Supreme Federal Court, the High Courts, a Federal Deputy, the Federal Prosecutor-General, or citizens begin in the Chamber of Deputies. Those originating from a Senator or a State Legislative Assembly begin in the Federal Senate.

Within the originating House, a bill is submitted to a technical, material, and formal analysis, which is carried out by the corresponding committees of that House. The Chamber of Deputies has 20 standing committees, and the Senate eight. If a bill approved by the competent committees, it is forwarded to the plenary assembly, to be voted on. After being voted on, it is dismissed if rejected, or forwarded to the reviewing House if approved.

The reviewing House is obviously the one that did not originate the bill. If the bill is rejected, it is dismissed; if it is amended, it is returned to the originating House to be appreciated; if it is approved, depending on the object of the bill, it is forwarded to the President of the Republic to be sanctioned or vetoed.

Upon receiving a bill, the President of the Republic may sanction it or veto it in whole or in part – provided that this partial veto regards the whole text of an article, paragraph, item, or sub item. Vetoing isolated words is not permitted. Such veto must be issued within 15 days, and must be expressly based on unconstitutionality or damage to public interest, which is an entirely subjective criterion. Furthermore, a veto is not an absolute decision – rather, it can be overridden by members of the National Congress, who shall analyze it within 30 days counted from the date of receipt. If the veto is overridden, the bill shall be sent to the President of the Republic for promulgation.

The President of the Federal Senate shall promulgate such bill if the President of the Republic refuses to do so, even though such promulgation is incumbent upon the latter. If the President of the Federal Senate also refuses to promulgate the bill, the Vice-President of the Federal Senate must do so, thus allowing it to be published, which is an essential condition for it to be effective. Promulgation by the President of the Republic and by the President of the Federal Senate must take place within 48 hours.



d) Germany

The legislative process in Germany is relatively complex. The Federal Government or members of either house of the legislature (the Bundestag) may introduce bills. Before a Government bill is formally introduced, it passes through numerous phases of revision and consultation involving civil servants and Ministers at the federal and state levels, affected interest groups and the Chancellor.

The Bundestag generally deals with bills in three readings. The bill is given a First Reading and then referred to a committee. At the Second Reading, it will be considered in detail, together with the committee proposals. A final vote on the bill will be at the Third Reading.

When the Bundestag passes a bill, it is referred to the Bundesrat. Bills affecting vital interests of the states are required to obtain the consent of the Bundesrat. Other bills become

laws unless the Bundesrat raises an objection. If the Bundestrat raises an issue, the Bundestag is required to consider the bill again. If the Bundesrat votes against the bill with a simple majority or two-third majority of its members, the Bundestag needs to overrule the vote by a simple majority or two-third majority.

Decisions of the Bundestag and the Bundesrat need a simple majority, provided a quorum is present. There are some cases (in particular constitutional amendment), which require a two-third majority.

In case of a dispute, the Bundesrat (for laws requiring the agreement of the Bundesrat and the Bundestag) can apply to the Mediation Committee. This Committee consists of 16 members of the Bundestag and 16 members of the Bundesrat. It attempts to find a compromise proposal for submission to both houses.

The President issues and promulgates federal statutes. The President has the right and duty to review the formal constitutionality of the law. If the President decides that a law is materially unconstitutional or that the legislative process has been unconstitutional, he or she has to veto it. It is telling that between 1949 and 1990,only six of 4 389 federal laws were vetoed.

e) The United Kingdom

The experience in England is the most extensive in length and regulation of any parliamentary democracy. With a millennia to tinker and refocus, the triangulation of policy before legislation with an element of public participation is entrenched in the parliamentary process. Appendix 1 provides a detailed summary of the legislative procedures in the UK.[19]

f) **Assessing public participation at the pre-legislative stage**

Before engaging in the process of making laws, different jurisdictions have adopted various ways of engaging the public. In the United Kingdom, Select Committees hold consultations and ministerial events to deliberate over a proposed law. In doing so, they make use of Approach Papers as the basis of the consultations. In the United States, members introducing bills may hold consultations to take public views although it is not mandatory under the law. The practice in Australia, South Africa and India is that policy documents, draft bills and approach papers are published for public comment and discussion before introduction in parliament. In South Africa, it is mandatory to publish draft bills for comment 30 days prior

[19] See Appendix 1

to introduction in parliament. There is no such mandatory requirement in India while in Canada draft bills can only be published after approval by the cabinet.

g) Public participation at the legislative stage

United Kingdom

After a bill has been introduced in UK Parliament, it is mandatory to refer it to the parliamentary a Select committee or Public Bill Committees for scrutiny. It is not mandatory for the committees to engage the public at this stage but they are empowered to take comments from the public if they choose to do so. The Committees may also hold study visits and take oral submissions across the UK.

The committees may put a notice inviting feedback in the newspapers, on radio or website. The public meetings of the committees are telecast and webcast and the submissions before the committees made available within a short period and reports published.

United States

In the United States the government has no direct role in the legislative process. Once a bill has been introduced in parliament it is mandatory to refer it to the bills committees, which are obligated to seek written submissions. No restriction is imposed on the bills committees in holding consultations. The submissions made before the committees are availed for inspection once tabled in parliament.

Australia

In Australia, it is neither mandatory to refer bills to committees nor to consult the public at the legislative stage. Workshops are held at the preliminary stage. However, some bills may be referred to the Committee. In which case, the committee is empowered to take comments from the public.

Canada

Whereas it is not mandatory to refer bills, most of them are usually referred to committees. The committees are empowered to hold consultations but it is not a mandatory requirement. To hold consultations within and outside Canada, the House's permission is required. Where the committees hold public meetings, the submissions are edited, published and made available within 10 days.

South Africa

In South Africa, it is a constitutional requirement to seek consultation with the public. The bills must not be referred to committees though. There is a Parliamentary Democracy Office that collects public comments for parliament. The power of the committee to summon persons and the duty hold public forums is constitutional requirement. All submissions before the committees are forwarded to the speaker of the house. The committee reports are published.

India

In India it is the speaker's prerogative to refer a bill to the committees or not to. It is not mandatory to engage the public at this stage but the committees have power to take comments. Regional consultations are rarely done. The notice inviting feedback can be put in the newspapers internet or broadcast over the radio. The committee sittings are usually held in private. Only submissions tabled in parliament are made available.

h) Public participation at the post legislative stage

Once the laws have been passed by parliament, some countries have post –legislative scrutiny while others do not. In the UK, the laws are usually reviewed within three to five years after promulgation. In the United States, legislative Oversight committees review laws on a continuous basis.

The practice in Australia is to review the laws every three years. Most laws expire after 10 years after promulgation. In Canada most laws have review and sunset clauses while in India special committees may be appointed to conduct review as and when it becomes necessary to do so.

In the post legislative stage, the Australian Law Reform Commission, an equivalent of Kenya's law reform Commission is empowered to take submissions from the public when conducting law review. In the UK, United States India, and Canada it is the parliamentary committees that are empowered to take comments from the public.