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Your ref:

Our ref: PARLKEN/03/25

TO: CLERK OF THE NATIONAL ASSEMBLY

C/o S. Njoroge, CBS

P.O. Box 41842-00100, Nairobi

E-mail: cna@parliament.go.ke

Dear Sir,

MEMORANDUM ON KENYAN POLICY ON PUBLIC PARTICIPATION (SESSIONAL PAPER NO. 3 OF 2023)

1. This Memorandum on the Kenyan Policy on Public Participation (Sessional Paper No. 3 of 2023) is submitted to the office of the Clerk of the National Assembly by ALT Advisory. [ALT Advisory](#) is an African-rooted advisory and research organisation, based in South Africa and Kenya. We are a proudly intersectional and feminist organisation with experience in human rights law and policy analysis, and advisory at the international, regional, and domestic levels. Our work in Kenya is led by two highly experienced legal practitioners, Mr Lawrence Mute (Chief Advisor, Kenya), and Mr Andrew Songa (Strategic Advisor, Kenya).
2. It is our considered opinion that public participation is at the essence of realising the national values and principles of governance enshrined in Article 10 of the Constitution of Kenya. More specifically, public participation is essential to realising human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised (Article 10(2) (b)). Public participation is also essential to fostering good governance, integrity, transparency and accountability (Article 10(2) (c)). Therefore, it is our understanding that the proposed policy on public participation should operationalise these national values and principles of governance.

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3. The stated objectives of the policy are to set standards for effective public participation and to establish a framework for the management and coordination of public participation in Kenya. We contend that these objectives will only be met if the provisions of the policy:
 - 3.1. Derive their foundations, nomenclature and parameters from the relevant provisions of the Constitution of Kenya.
 - 3.2. Possess remedial measures that address a history of marginalisation of various groups from governance processes.
 - 3.3. Acknowledge past failings and incorporate the lessons learned from adjudicated public participation disputes, especially as determined by the Supreme Court of Kenya.

4. It is on this basis that we propose as follows:

NO	AREA	PROPOSAL	JUSTIFICATION
Section 1.2.1 at Pg. 2	The Constitution of Kenya	Include Article 56 (a) of the Constitution as among the provisions that lay the foundation for public participation.	Article 56 (a) of the Constitution requires that affirmative action programmes be put in place to ensure that minorities and marginalized groups participate and are represented in governance and other spheres of life.
Section 1.2.3 at Pg. 3	Regional Human Rights Instruments	Change the title of the section to Continental and Regional Human Rights Instruments. Include a discussion on the EAC Treaty with reference to Articles 6 (d); 7(1) (a) and (d); and 127	The change of title for this section would create a distinction between African Union (AU) instruments which are at the continental level and the EAC Treaty which would be the regional level.

			<p>Article 6 (d) of the EAC Treaty requires adherence to the principles of democracy of which public participation is a fundamental one. Article 7(1) (a) emphasizes people-driven cooperation as a principle to be adhered to by EAC partner states and 7 (1) (d) speaks to multi-level participation. Article 127 mandates EAC partner states to establish an enabling environment and foster dialogue with civil society and the private sector.</p>
<p>Section 1.6 at Pg. 6</p>	<p>Guiding Principles</p>	<p>Redraft principle 5 as follows: “Inclusion of minorities, marginalised communities and marginalised groups as guided by Articles 56 and 260 of the Constitution”</p>	<p>This is because Articles 56 and 260 of the Constitution are sufficiently all-encompassing when addressing minorities and marginalised groups as opposed to the risk presented by emphasising some groups and</p>

			excluding others in a non-exhaustive list.
Section 2.2 at Pg. 8	Kenya's Experience with Public Participation	<p>Include as part of the country's experience, the lessons and guidance gained from the jurisprudence of the Supreme Court of Kenya. Specifically:</p> <ul style="list-style-type: none"> • <u>Cabinet Secretary for the National Treasury and Planning & 4 others v Okioti & 52 others (Petition E031, E032 & E033 of 2024 (Consolidated)) [2024]</u>: Notably, the Supreme Court stated that while there is no express obligation on Parliament to provide reasons for accepting and/or rejecting proposals/views made during a public participation exercise, as a matter of good practice, it must nonetheless put in place reasonable measures to ensure it considers the proposals, views, suggestions, and comments received during such an exercise • <u>Petition No. 12 of 2021 (consolidated with Petitions 11 & 13 of 2021 – Building Bridges Initiative)</u>: Among other determinations, this case underscored that the burden of proof to demonstrate adequate public participation rests with State organs. 	These decisions are instructive interpretations on the constitutional principle of public participation as delivered by the country's apex court. Therefore, they are a fundamental part of Kenya's experience with public participation and should be highlighted as such.

		<ul style="list-style-type: none"> • <u>National Land Commission v Attorney-General & 5 others; Kituo Cha Sheria & another (Amicus Curiae) (Advisory Opinion Reference 2 of 2014) [2015] KESC 3 (KLR) (2 December 2015) (Advisory Opinion):</u> Paragraph 348 notably emphasises that public participation must be realised in conjunction with the fundamental right to information, right to equality and the principle of democracy. 	
<p>Section 2.3 (c) at Pg. 11</p>	<p>Ineffective Inclusion of Special Interest Groups</p>	<p>Change title of this section to: “The Ineffective Inclusion of Minorities, Marginalised Communities and Marginalised Groups”</p> <p>The absence of a coherent approach and policy to implement Article 56 (a) of the Constitution should be included as a challenge in this section.</p>	<p>This redrafted title would make it a nomenclature that aligns with the Constitution as opposed to Special Interest Groups which is amorphous to the Constitution and dilutes the critical notion of marginalisation as a disadvantage that undermines public participation.</p> <p>It is important to highlight as a challenge, the failure to effectively introduce the affirmative measures anticipated in</p>

			<p>Article 56 (a) of the Constitution. This would then justify the inclusion of affirmative measures in this policy as a remedy to the historical legacies of marginalisation for various groups in matters of governance.</p>
<p>Section 3.2.5 at Pg. 23</p>	<p>Inclusion of Minorities and Marginalised Groups</p>	<p>Replace “...Often they are incapacitated and not able on their own to effectively participate in development processes and demand for inclusion in participation and provision of services and infrastructure” with “They continue to be undermined by the structural legacies of policy-induced marginalisation and discrimination and the lack of sufficient affirmative measures to remedy these injustices”</p> <p>As part of the policy standards, include: The government at the two levels will acknowledge and in accordance with the Constitution, incorporate the indigenous knowledge and consultation models</p>	<p>This redraft is an accurate depiction of the situational analysis for minorities and marginalised groups, it aligns with the framing of Articles 56 and 260 of the Constitution and creates impetus for remedial measures within the policy- such as requiring affirmative action measures for these groups.</p> <p>A policy standard that recognises the indigenous knowledge and consultation models of marginalised communities as</p>

		of marginalised communities as part of the affirmative measures that accord them recognition and enhance their public participation.	defined under Article 260 of the Constitution would comply with Article 56 (a) of the Constitution.
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We remain available to provide further insights and to engage with this critical process.

With kind regards,

ALT ADVISORY

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(Submitted electronically without signature.)

ENDS.