



TREATY-MAKING PROCESS IN KENYA AND THE ROLE OF PARLIAMENT

TREATY-MAKING IN KENYA IS GOVERNED BY THE FOLLOWING LAWS:

- 1 Constitution of Kenya, 2010
- 2 Treaty Making and Ratification Act, 2012
- 3 Statutory Instruments Act, 2013
- 4 Vienna Convention on Law of Treaties

According to the Treaty Making and Ratification Act, 2012 a treaty is defined as “**an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation and includes a convention.**” This definition is similar to that found in the Vienna Convention on Law of Treaties with the exception of the words “and includes a convention.”

Treaties can be concluded between two or more states. A treaty concluded between Kenya and any other State is referred to as a **bilateral treaty** while a treaty concluded between Kenya and two or more States is known as a **multilateral treaty**. They are used to govern the parties in several areas including trade and investment, environment and climate, maritime, human rights and conflicts.

The constitutional foundation of treaties in Kenya is prescribed in Article 2(6) of the Constitution of Kenya which states; “**Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.**”

Ratification as per the Treaty Making and Ratification Act means “**the international act by which the State signifies its consent to be bound by a treaty and includes acceptance, approval and accession where the treaty so provides.**”

ISSUE:

If Kenya ratifies a treaty with another State without following the procedures under the Treaty Making and Ratification Act, domestically the actions will be illegal however, in terms of the Constitution and International laws, the actions will be legal and bona fide.

THE PROCESS OF TREATY MAKING AND RATIFICATION

Under the Fourth Schedule of the Constitution of Kenya, matters to do with foreign affairs, foreign policy, international trade, and the use of international waters and water resources fall within the functions of the National Government.

Section 4 of the Treaty Making and Ratification Act provides the process of treaty making including the responsible arms of the National Government.

The process is as follows:



1 INITIATION

The executive or relevant State department to whom full powers have been granted to under international law is responsible for initiating the treaty making process in such manner as may be prescribed by the Cabinet Secretary. Several issues are considered during the initiation including, among others;

- i. the need that the new treaty is to meet;
- ii. any relevant legislative efforts related to the perceived problem;
- iii. the likelihood that the proposed treaty shall be accepted by a sufficient number of states, where the treaty is multilateral;
- iv. the expected costs of formulating and adopting the treaty.



2 NEGOTIATION

The executive or relevant State department will the appoint persons who are competent to undertake such negotiations in the interest of Kenyans and will be bound by the values and principles of the Constitution as well as take into account the regulatory impact of any proposed treaty.



3 RATIFICATION

This process involves both the Executive and the National Assembly as well the public although at different stages

I. APPROVAL BY CABINET

When there is an intention to ratify a treaty, the Cabinet Secretary of the relevant State department shall, in consultation with the Attorney-General, submit to the Cabinet the treaty, together with a memorandum outlining the objects and subject matter of the treaty, the national interests which may be affected by the ratification of the treaty, obligations imposed on Kenya by the treaty and requirements for implementation of the treaty among others. (Article 7 of the Treaty Making and Ratification Act lays out the issues to be considered in the memorandum to the Cabinet)

II. CONSIDERATION BY THE NATIONAL ASSEMBLY

Once the Cabinet approves the ratification of the treaty, The Cabinet Secretary of the relevant State department shall submit the treaty and a memorandum on the treaty to the Speaker of the National Assembly. At this point, the National Assembly is **not obligated to accept the treaty**. However, if it is accepted, the National Assembly then proceeds to interrogate whether the treaty or part of its provisions are in line with the Constitution and any other treaty to which Kenya is bound. **Under Article 8(3) of the Treaty Making and Ratification Act, the relevant committee shall, during its consideration of the Treaty, ensure public participation in the ratification process** in accordance with laid down parliamentary procedures. Following interrogation of the treaty, where there are no violations of the Constitution or any other treaty, the National Assembly may approve the ratification of a treaty with or without reservations to specific provisions of the treaty. However, if the proposed treaty violates the

Constitution or any other treaty, the National Assembly shall not approve ratification of a treaty or part of it if its provisions, nor shall the House approve a reservation to a treaty or part of the reservations. If the National Assembly refuses to approve the ratification of the treaty, the Government shall not ratify the treaty. Here it is important to note that, as per the definition of a reservation in the Treaty Making and Ratification Act, **a reservation is not an amendment.**

RESERVATION:

The Act defines this as “a unilateral statement made by a State when signing, ratifying, accepting, approving or acceding to a treaty, whereby it **purports** to exclude or to modify the legal effect of certain provisions of the treaty in their application to the State.”

III. APPROVAL FOR RATIFICATION

When the National Assembly approves the treaty, the relevant Cabinet Secretary will prepare the instruments of ratification of the treaty. Where there are reservations to some provisions of the treaty, the treaty will be ratified with those reservations. The instruments of ratification shall be signed and sealed by both parties and subsequently deposited by the Cabinet Secretary to the Registry of Treaties. The treaty will then enter into force and Kenya will be bound by its terms.

Given the implications that a treaty can have on a state, the process that can take several years from its initiation to eventual ratification and the duration will depend on the political will and buy-in of the parties involved.

SHORTCOMINGS OF THE PROCESS

Evidently, the treaty making process has some deficiencies that could affect the final agreement to which Kenya is bound.

Some of the shortcomings are described below.

1. As it stands, **the role of National Assembly is limited to a rubber-stamping role.** The National Assembly is **not involved in the initiation** of the process to determine relevance and need of the Treaty for Kenya among other considerations, and they are also not **involved in the negotiation of the Treaty.**

2. Further, the National Assembly can debate the treaty but has **no powers to amend the treaty or propose amendments to the treaty.** They can only approve the treaty, approve the treaty with reservations or reject the treaty.
3. **Public participation in the process is also very limited.** Interest groups are not included in some of the processes particularly in negotiations where, under article 7 of the Act, the public is not mentioned yet it is critical for these groups to have representation during negotiations.
4. The most concerning of all is the **exclusion of Senate from the Act** particularly since the Constitution envisages the involvement of Senate. This is particularly worrying given that some treaties like trade agreements may have implications on sectors of the Kenyan economy such as agriculture which, under the Constitution, is a function devolved to the County governments.

WHAT NEEDS TO BE DONE?

Based on the aforementioned shortcomings of the process, there is certainly need to amend the Treaty Making and Ratification Act so as to strengthen the process of treaty making. The reforms to the Act should be undertaken to ensure that;

- 1) **Both the National Assembly and the Senate are involved all stages of the treaty-making process** from the initiation, negotiation and ratification of the Treaty.
- 2) The National Assembly and the Senate can have **powers to make amendments to the treaty** such that they are not limited to only making reservations.
- 3) **Public participation is expanded beyond the current scope.** Simply sending in submissions/comments to the Executive and National Assembly will not suffice. And even if parliamentary committees hold public participation, at times critical interest groups such as farmers are unable to attend this forum thereby limiting the efficacy of the forum. Here, there is also need for the critical groups to have a seat at the table during negotiations.

FOR MORE INFORMATION, PLEASE CONTACT

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