

**RIGHT TO PUBLIC PARTICIPATION IN DEVOLVED GOVERNANCE IN KENYA; A
MYTH OR A REALITY**

BY

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**A THESIS REPORT SUBMITTED IN PARTIAL FULFILLMENT OF THE
REQUIREMENTS FOR THE AWARD OF THE DEGREE OF MASTER OF LAWS OF
UNIVERSITY OF NAIROBI**

Declaration

This thesis report is my original work and has not been presented for a degree or any other award in any University.

Signature _____

Date_____

Name _____

Date_____

This thesis report has been submitted for examination to the University of Nairobi, School of law

Signature_____

Date_____

Name _____

Date_____

Dedication

I dedicate this piece of work to my lovely Family

To my wife Lucy, I thank you for the moral support and encouragement you always rendered to me

To my two sons' Ryan and Eddie, I thank you for being understanding and patient when I was busy writing this work

To my parents, Ephraim and Pauline, may the Lord bless you abundantly for your encouragement

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List of Abbreviations

❖	CSOs	-	Civil Society Organisations
❖	GOK	-	Government of Kenya
❖	ICCPR	-	International Covenant on Civil and Political Rights
❖	ICESCR	-	International Covenant on Economic Social and Cultural Rights
❖	NGO	-	Non Governmental Organizations
❖	UDHR	-	Universal Declaration of Human Rights
❖	UNDP	-	United Nations Development Programme
❖	WFP	-	World Food Program

Abstract

This study examines the right to public participation at the county governance. It provides an in-depth examination of the legal framework on the right to public participation in devolved governance in Kenya. Based on the constitutional requirement to engage the public in matters of governance and in making decisions that affect the citizens, laws geared towards engaging public at the county governance have been developed at the national level as a prerequisite in county governance. However there is no specific law at the national level on public participation apart from county public participation guidelines. Only three counties legislated on public participation laws within the constitutional timeframe of five years. This study further examines the structures and processes available in regulating public participation. The study finds that there are minimal meaningful structures and processes of public participation developed by county governments. It therefore recommends that all counties should immediately and effectively create meaningful legal framework to facilitate public participation in matters of governance in the counties. It also recommends that counties that have legislated on public participation to amend their laws borrowing on best practice and consider recommendations made by county public participation guidelines.

List of Legal Instruments

International Instruments

African Charter on Democracy, Elections and Governance, 2007 African Commission on Human and Peoples Rights.

African Charter on Human and Peoples Rights adopted 27th June 1981 OAU Doc CAB/LEG/67/3 rev 5, 21 (1982) 58 International Legal Materials.

Declaration on the Right to Development GA/RES/41/128, 1986.

East African Community, The Treaty for the Establishment of the East African Community, Arusha, EAC: 2002 xiv, 111p.,; 230mm (EAC Publication, No. 1).

Universal Declaration of Human Rights GA Res 217 (III), 1948.

International Covenant on Civil and Political Rights, 1966.

List of National Laws and Statutes

Constitution of Kenya, 2010.

County Government Act No. 17 of 2012.

Elgeyo/Marakwet County Public Participation Act 2014.

Access to Information Act no 31 of 2016.

Meru County Public Participation Act 2014.

Machakos County Public Participation Act 2014.

Public Finance Management Act No. 18 of 2012.

Urban Areas and Cities Act no. 13 of 2011.

Other Instruments

Constitution of South Africa, 1996.

Local Government Authorities Act no. 7 of 1982 laws of Tanzania

Municipal Finance Management Act laws of South Africa

Municipal Systems Act laws of South Africa.

Municipal Structures Act, 1998 of South Africa.

Urban Authorities Act laws of Tanzania.

US Constitution.

CHAPTER ONE

1.1 Background to the Study

The Constitution of Kenya, 2010 restructured the previous form of governance to usher in the devolved system. Among other things the Constitution devolved political, fiscal and administrative powers from the central government to the county governments. However the actual devolution came into effect in 2013 when the first general elections under the 2010 Constitution were conducted. Unlike other countries like Uganda, Ghana, Columbia, and Argentina where political, fiscal and administrative decentralization occurred in leaps and sequentially,¹ the Kenyan case was peculiar in the sense that all the three types of decentralization occurred at once.

The system of devolved governance in Kenya came up with concepts and principles that were not in the former Constitution. More importantly the Constitution provided participation of citizens in the exercise of the powers of the state when making decisions affecting them.² Further the Constitution provides in Article 1 (1) that, “people may exercise their sovereign power either directly or through their democratically elected representatives.” However even in instances where they exercise their powers through representatives’, measures and mechanisms must be established to facilitate the involvement of those potentially affected by or interested in a decision.

The key objectives of decentralization are spelt out in Article 174 of the Constitution which among others includes; “promoting democratic and accountable exercise of power, to give powers of self-governance to the people and enhance participation of the people in the exercise of the powers of the state in making decisions affecting them.” Article 10 of the Constitution requires the principle of public participation to be observed in all matters of governance. Article 196 also provides that, “every county assembly shall facilitate public participation and involvement in the legislative and other business of the assembly.” Article 201 (a) of the Constitution further provides that public participation will be one of the principles guiding all

¹ Kauzya J. (2007). Political Decentralization in Africa: Experiences of Uganda, Rwanda and South Africa. *Discussion Paper*. New York: United Nations Department of Economic and Social Affairs.

² Constitution of Kenya, 2010 Article 174 (c).

aspects of public finance. The 4th Schedule to the Constitution also obligates the county government to ensure and coordinate participation of communities and locations in governance at the local level. The Constitution also has a robust bill of rights that enhances public participation in matters of governance.

To actualize self-governance and participation of people in matters to do with county governance, the legislature at the national level has enacted laws to enhance these processes. This is by enactment of the County Government Act no. 17 of 2012, Public Finance Management Act 18 of 2012 and the Urban Areas and Cities Act no. 13 of 2011 among other laws.³ However these laws are not exhaustive in enhancing public participation. Further, county governments are obligated to come up with legal, policy and administrative measures to enhance public participation. Operationally all counties have come up with policy guidelines but legislatively only three counties had enacted laws to facilitate participation of people in the decision making process within constitutional timeline of five years.⁴ This study will therefore mainly proceed in reviewing these three legislations in light of right to public participation.

Looking elsewhere in the world, the right to public participation has been conceived differently. According to the Advisory Commission on Intergovernmental Relations, citizen participation in USA is deeply rooted.⁵ Rimmerman argues that public participation in USA takes different perspectives like citizen groups, committees and special interest groups among others.⁶ Roberts claims that although public participation is more frequent at local levels in USA there are strong mechanism at the state level where they rely on federal structures in incorporating citizens' views in their operations.⁷

The right to public participation in Africa is also perceived differently depending on peculiar circumstances of states. For example, the South African Constitution contains a bill of rights that embraces ideals of democracy and commitment to public participation.⁸ The preamble to the

³ <http://kenyalaw.org/kl/index.php?id=4997> accessed on 5th December 2016.

⁴ <http://kenyalaw.org/kl/index.php?id=4997> accessed on 8th December 2016.

⁵ Advisory commission on Intergovernmental Relations, Citizen Participation in the American Federal System (B3), In Brief Washington, DC 20575, 1979. Available at <http://www.library.unt.edu/gpo/acir/Reports/brief/B-3.pdf> accessed on 8th December 2016.

⁶ Rimmerman C. (2010). *The New Citizenship: Unconventional Politics, Activism, and Service*. Westview Press.

⁷ Roberts N. (2015). *The Age of Direct Citizen Participation*. Routledge.

⁸ Constitution of the Republic of South Africa, 1996.

South Africa Constitution provides that, “the basis of the state is a democratic and open society recognising the will of the people.”⁹ To enhance closer involvement of people in governance, the Constitution gives the local government extensive powers in legislative and executive spheres.¹⁰ According to Reddy, public participation in South Africa is an indispensable requirement for local governance.¹¹ This has been confirmed by the Constitutional Court in the case of City of Cape Town & Others versus Robertson & Others.¹² The court held that municipalities may pursue development agendas but must comply with the Constitution and legislations made in South Africa. The court clearly stated that the government has a general duty to facilitate public participation in law making processes and in policy formulation.¹³

Typically the objective of legal and policy framework on public participation is to maximize the collective efforts of all people involved in the decision making and to minimize the risk of implementing unpopular projects.¹⁴ According to Sebugwago public participation enhances beliefs about the trustworthiness and responsiveness of a public agency and the value of including different viewpoints.¹⁵

According to Devas & Delay the essence of public participation is promotion and co-ordination of good governance, peace building, conflict resolution and community response to disaster and emergencies; and coordination of activities of various development committees at the local level.¹⁶ It is on this basis that the study intends to examine the right to public participation in county governance.

⁹ Constitution of the Republic of South Africa, 1996.

¹⁰ Ibid section 151 (2) and (3).

¹¹ Reddy P. Democratic Decentralization and Local Democracy in South Africa Re-Examined: Quo vadis (2010) 29 (3) Politeia 66.

¹² 2005 (2) SA 323 (CC) Para 60

¹³ Ibid

¹⁴ Guertz C. & Van de Wiljdeven T. ‘Making Citizen Participation Work: The Challenging Search for the New Forms of Local Democracy in the Netherlands’ (2010) 36 (4) Local Government Studies 531.

¹⁵ Sebugwago M. Advancing Participatory democracy And Development in South Africa: Towards a New Strategy of Governance’ (2012) (18 2) Transformer 5.

¹⁶ Devas N. and Delay S. ‘Local Democracy and The Challenges of Decentralizing the State: An International Perspective’ (2006) (32) 5 Local Government Studies 677.

1.2 Statement of the Problem

The Constitution of Kenya rightly provides that public participation is a national value and principle that must always be adhered to in all decision making. Under Article 10 of the 2010 Constitution of Kenya, “the national values and principles of governance bind all state organs, officers, public officers and all persons whenever any of them makes or implements public policy decisions among others areas.” The provision therefore requires public managers to include the members of the public in making decisions that affect them. However, despite this constitutional requirement, there have been minimal steps taken to realize laws and policy regulating public participation in devolved governance. Laws and decisions made by county governments are unilateral and not inclusive. The existing legal framework fails to resolve the expectations of the citizens in regard to their involvement in decision making.

Since the establishment of county governments, it is only Meru,¹⁷ Machakos and Elgeyo Marakwet counties that legislated law to regulate public participation within the constitutional timeframe. The provisions of these legislations do not adequately cater for the right to public participation. The intention of the Constitution therefore in service delivery through public participation has not been significant in county governance as it faces various legal and policy challenges. This study therefore sets out to analyze the right to public participation in devolved governance in Kenya.

1.3 Objectives of the study

1.3.1 Main Objective

To critically examine the right to public participation in devolved governance in Kenya.

1.3.2 Specific Objectives

The study is guided by the following objectives:

- i. To identify how county governments have incorporated the members of the public in their governance structure.

¹⁷ <http://kenyalaw.org/kl/index.php?id=4997> accessed on 8th December 2016.

- ii. To investigate on laws and policies in place on public participation and their effectiveness in county governance.
- iii. To suggest appropriate recommendations on legal and policy framework for effective public participation in county governance.

1.4 Research Questions

- i. How have county governments incorporated the members of the public in their governance structures?
- ii. Which laws or policy guidelines have been enacted to enhance public participation in county governance?
- iii. What possible solutions could be suggested on the legal framework to improve effectiveness of public participation in county governance?

1.5 Significance of the Study

Public participation is an important principle of good governance. It gives citizens an opportunity to air their views and participate in decision making. To enhance effective public participation in the county governance there must be proper and implementable legal framework and policy guidelines. This study will enhance formulation of specific guidelines, policy and laws to regulate and enhance meaningful public participation. This will curb unilateral decision making by county governments on matters affecting citizens. This study also offers recommendations on legal reforms or measures that need to be taken to enhance public participation in county governance. It will have implications on county governance by recommending on the implementation of the constitutional requirement of involving citizens in the decision making processes. On academic grounds, the study represents a modest attempt to understand the right to public participation in county governance.

1.6 Hypothesis of the Study

This study is based on the assumption that county governments legal and policy frameworks do not enhance proper public participation in the exercise of county governance and in decision making processes.

1.7 Theoretical Framework

Several studies have discussed the importance of public participation in matters of governance. Different theories have been adopted to explain such importance and the major ones are in the context of democracy. Notwithstanding democracy as a concept it is important to examine the interplay between public participation and democracy on one hand and its contribution to development in the society on the other hand. This study is guided by modernization and development theories. It thereafter discusses their subset theories that specifically deal with public participation. These subsets are participation theory and normative theory of democracy.

Developmental theory holds that the internal social process within a country applies the available resources wisely and in a sustainable manner to meet the basic requirements of the people. Pieterse argues that development theory is based on cultural, political and economic context.¹⁸ It therefore concerns itself with problems of transition in a changing society. According to Dhavan development in its character requires regulatory measures of modern law.¹⁹ American scholars argued on the importance of role of law as a support tool and institutional framework for the classic development state as well as a process of economic progress.²⁰

Modernization theory is understood as a theory that employs systematic processes that transform underdeveloped countries to another level of development. It adopts a normative position by proposing a desirable solution to development issues. According to Pieterse, these processes involve dissolution of old regimes to adoption of democratic institutions and practices.²¹ Sen argues that cultures of developing countries may be a response to economic insecurity and poor levels of material well-being.²² Modernization theory requires dissemination of knowledge and information to the people that will enable them improve their standards of living.²³ Moore states

¹⁸ Pieterse J. (2010). *Development Theory*. Sage.

¹⁹ Dhavan R. (1994). Law as Concern: Reflecting on 'Law and Development.'. *Law and Development in the Third World*.

²⁰ Trubek D. (1972) "The New Development: Can American Law and Legal Institutions Help Developing Countries?" in Anthony Carty (ed) *Law and Development*, vol.2, Legal Cultures, New York University Press, USA.

²¹ Pieterse J. (2010). *Development Theory*. Sage.

²² Sen A. (1999) 'Democracy as a Universal Value' 10 *Journal of Democracy*.

²³ Sen 1999.

that for a country to be seen to be modern it undergoes an evolutionary advance in science and technology.²⁴ This in turn leads to improved standard of living for all.²⁵

Relevance to the development theory and modernization theory in relation to the right to public participation in county governance is better understood within participation theory and normative theory of democracy. Participation theory has been discussed by some scholars as the theory of citizen participation. This theory holds that citizens have a voice in public policy decisions and should be accorded an opportunity to influence public decisions. It provides that the principles of collective ownership and responsibility are demonstrated through participation of the people in processes that affect them.²⁶ However, Pateman argues that as it is practically not possible that people will represent themselves directly, they do so through elected representatives.²⁷ According to Sihanya, they however retain the right to participate in and oversee the decision making and representation process.²⁸ This is in agreement with the Constitution that provides that citizens may exercise their sovereignty directly or indirectly but at the same time obligates public participation in matters of governance.

According to Guertz the concept of public participation was not developed simply for communication purposes but to contribute to the normative theory of democracy.²⁹ This theory is premised on the assumption that all that are affected or likely to be affected by a given decision have a right to participate in making such a decision.³⁰ To this extent, normative theory of democracy can be regarded as a good value where members of the public are involved in enhancing an orderly and peaceful society.

²⁴ Falk Moore S. (1979) "Law and Social Change: the Semi-Autonomous Social Field as an Appropriate Subject of Study", *Law as Process*, Routledge and Kegan Paul, London.

²⁵ Moore 1979

²⁶ Andrews R. 'Supporting Effective Citizenship in Local Government: Engaging, Educating and Empowering Local Citizens' (2008) 34(4) *Local Government Studies* 499.

²⁷ Pateman C. (2012) 'Participatory Democracy Revisited, *Perspectives on Politics* 10 (1).

²⁸ Sihanya B. (2013) "Public Participation and Public Interest Litigation under the Kenya Constitution" 9 *The Law Society of Kenya Journal*, Law Africa Publishing Ltd, Nairobi.

²⁹ Guertz C. & Van de Wiljdeven T. 'Making Citizen Participation Work: The Challenging Search for the New Forms of Local Democracy in the Netherlands' (2010) 36 (4) *Local Government Studies* 531.

³⁰ Nabatchi T. & Leighninger M. (2015). *Public Participation for 21st Century Democracy*. Hoboken, New Jersey: John Wiley & Sons, Inc.

In order to realise good governance in county governments, members of the public must be involved in decision making processes. According to Bosire in democratic nations, social conflicts that might become violent are resolved by voting, negotiation, compromise, and mediation.³¹ This means that citizens are part and parcel of what happens in their society or country. The citizens are part of the decision-making process on matters that affect them. Sihanya argues that communication is a two-way consultative process, i.e. bottom-up as well as top-bottom before any decision is reached.³²

Briand claims that the importance of public participation in a democratic state is to provide for mechanisms through which the views of all citizens can be brought on board in line with the dictates of democracy.³³ This is essential in enabling the citizens participate in and own the decision making and governance process.³⁴ While these theories are open for reflection and research, this study is guided by them and examine how the legal framework can be used to promote and facilitate public participation at the county level.

1.8 Literature Review

Public participation is both a citizens' right and a principle of good governance in modern democracy. A growing research of governance issues is documenting the principles of public participation and inclusion of citizens in exercise of state power and in areas of decision making. Numerous scholars in governance studies are of the view that there should be continuous engagement of citizens in matters affecting their lives. However these scholars have not provided for structures and processes that county governments can employ in enhancing participation by citizens in decision making and delivery of services. The idea of public participation is intuitively plausible, then, but seems to have not received appropriate recognition by county

³¹ Bosire C. 'Local Government and Human Rights: Building Institutional Links for the Effective Protection and Realization of Human Rights' (2011) 11 African Human Rights Law journal 147.

³² Sihanya B. (2013) "Public Participation and Public Interest Litigation under the Kenya Constitution" 9 The Law Society of Kenya Journal, Law Africa Publishing Ltd, Nairobi.

³³ Briand M. (2007), 'Democracy at the Core: Recalling Participation's Raison d'être'

<http://www.iap2.org/associations/4748/files/Journal_Issue1_Viewpoint.pdf>

³⁴ Omolo A. (2011). Policy Proposals on Citizen Participation in Devolved Governance in Kenya. *Nairobi: The Institute of Social Accountability.*

governments.³⁵ The concept of public participation in good governance remains a principle that should receive legal backing. Public participation legislation should be formulated in way that it is both applicable and implementable in county governance.

Before the constitution and consolidation of the territory that later came to be known as Kenya, no central government authority existed.³⁶ The origins of structured governance in Kenya however, can be traced from 1895 when Kenya was declared a British East Africa Protectorate.³⁷ Since then, Mbai demonstrates that governance has undergone several developments, which involved changes in both responsibilities and size.³⁸ He goes ahead to provide corruption, nepotism and tribalism as some of the major factors that have contributed to mismanagement of public services after independence.³⁹ Mbai argues that there has been decline on how public affairs are managed since independence.⁴⁰ In this context Mbai seems to be blaming bad governance as the factor contributing to poor delivery of services. Though Mbai's work is very useful in matters of governance and public service accountability, it does not address the issues under investigation in this study as they relate to meaningful public participation in county governance.

According to Ogot, each and every African society had its own system of government.⁴¹ Majority of these systems involved members of such a community participating in decision making. In most cases either adult members of the community or the elders converged at one place where they gave their views.⁴² It is therefore from this period that we can trace the origins and development of county governance and public participation. Ogot claims that the colonial government adopted a centralized system of governance and totally disregarded any views from

³⁵ Odunga D. (2015, June 4) Laws Passed by Most Counties are Unconstitutional, Say Senators. Daily Nation, <http://www.nation.co.ke/counties/Counties-slow-law-making/-/1107872/2739220/-/40e9evz/-/index.html> accessed on 11th December 2016.

³⁶ Huxley E. (1935). *White Man's Country*: 2. London: Chatto and Windus.

³⁷ Ogot B. (2000). *Kenya: the Making of A Nation: A Hundred Years of Kenya's History, 1895-1995*. Maseno: IRPS.

³⁸ Mbai O. (2003). Public Service Accountability and Governance in Kenya since Independence. *African Political Science*. 8 (1) 113 - 145.

³⁹ Mbai (2003).

⁴⁰ Mbai (2003).

⁴¹ Ogot (2000).

⁴² Ogot (2000).

the members of the public.⁴³ According to Ogot the colonial government instead suppressed the natives and any views from them were taken as rebellion.⁴⁴ Ogot states that the regime passed laws that prohibited any form of participation by the natives.⁴⁵ Ogot provides a further account of what transpired after independence. Though his account on governance in Kenya's is very resourceful this literature only limited to duration of 100 years between 1895 and 1995. In addition this account does not specifically deal with public participation concept.

As also demonstrated by Ogot, the system of governance in regard to involving the members of the public did not change much with independence. However at independence the Constitution adopted and recognized regional governance.⁴⁶ According to Ngweno, these regional governance aimed at involving the members of the public in decision making.⁴⁷ Unfortunately according to Ng'weno, this was short-lived and was replaced with a highly centralized system of governance.⁴⁸ He argues that governance that came after independence was driven by personal ambitions and ethnic interests. Though Ngweno provides a good account of Kenya's politics and governance since independence, it falls short of providing how the members of the public in decision making.

Ndegwa provides a similar account like that of Ngweno but on constitutional and electoral context of governance in Kenya. According to Ndegwa, despite several changes in legal, administrative, and institutional structures the system of governance in Kenya has continued to totally disregard the input of the citizens in matters of governance.⁴⁹ A number of changes occurred in 1991 and 1997 in Kenya in regard to governance.⁵⁰ Ndegwa however claims that these developments, which may be described as circumstantial rather than fundamentally

⁴³ Ogot (2000).

⁴⁴ Ogot (2000)

⁴⁵ Ogot (2000).

⁴⁶ Hornsby C. (2013). *Kenya: A History since Independence*. IB Tauris.

⁴⁷ Ngweno H. (2007). *The Making of a Nation: A Political History of Kenya*.

⁴⁸ Ng'weno (2007).

⁴⁹ Ndegwa N. (1998). *The Incomplete Transition: The Constitutional and Electoral Context in Kenya*. *Africa Today*, 45 (2): pp 198-209.

⁵⁰ Ndegwa (1998).

systematic has mainly been on the state governance.⁵¹ According to him despite these reforms, governance lacked transparency, access and voice of people.⁵²

The year 1990 is considered in this study as a major turning point in the politics of Kenya, marking the re-emergence of competitive multi-party politics, and also the development of good governance.⁵³ However, the 2010 Constitution of Kenya expressly ushered in devolved governance together with the principle of public participation. According to Leonard devolution enhances upholding human rights by enhancing self determination.⁵⁴

Similar account of decentralization of governance in Uganda to enhance involvement of citizens in decision making has been given by Ahikire. Arguing on public sector decentralization, Ahikire states that decentralization in Uganda was structured to incorporate local levels where people would have an opportunity to participate in decision making for their respective areas.⁵⁵ Ahikire writing is limited to Uganda decentralization which may not apply to Kenya's situation. This study notes that the type of decentralization in Uganda is different from Kenya's devolved system.

Similar review was done in South Africa for purposes of comparison. Hart cites South Africa as a case where involvement of members of the public in constitution making brought legitimacy in the document. He asserts that the process enabled South Africa to move away from an apartheid regime to a democratic state.⁵⁶ Hart claims that the right to public participation enables citizens to own governmental decisions thereby legitimizing governmental actions.⁵⁷ According to his analysis, he sees Kenya's and Zimbabwe's rejection of draft constitutions at a referendum as an outcome of disregard of public comments in drafting of such documents. Hart discussion on

⁵¹ Ndegwa (1998) 193-211.

⁵² Ndegwa (1998).

⁵³ Mbai (2003).

⁵⁴ Leonard J. Decentralization And Local Governance Enhancement: A Human Rights Checklist' 2003 UNDP <http://www.undp.org/governance/docs/DLGUD%20-%20Guides%20-%20Checklist%20for%20decentralisation%20andHuman%20Ri.pdf> accessed on 14th December 2016.

⁵⁵ Ahikire J. 'Decentralisation in Uganda Today. In The Context of Human Rights 2002) International Council on Human Rights Policy accessed on 14th December 2016 at <http://www.ichrp.org>

⁵⁶ Hart Vivien, "Democratic Constitution Making," <http://www.usip.org/publications/democratic-constitution-making> accessed on 14th December 2016.

⁵⁷ Hart Vivien 2017.

public participation is mainly in the context of democratic process and in general matters of governance.

According to Nabatchi & Leighninger, good governance requires effective and fair legal frameworks that are implemented and enforced impartially. Reddy argues that good governance requires that processes and institutions produce results that meet the needs of society.⁵⁸ According to Mutua increased public participation in decision making in governance matters is now part and parcel of the democratization process and any democratic state must adhere to it.⁵⁹ Briand offers that the value of public participation is tied to the value of democracy, since we value public participation because we value democracy.⁶⁰ Although majority of writers have written on the principle of public participation in the voting process, Pateman claims that there are other processes that enable the public learn and have input in decision making.⁶¹

Ghai argues that, while there may be differences between the people by way of race, religion, descent and culture they rise above such differences and give room for discussion, debate and accommodation of different viewpoints.⁶² According to Sebugwago, the citizens are allowed to attend public meetings and are free to obtain information on what happens in public offices, and who makes what decisions and why.⁶³

The literature reviewed above lacks legal clarification on how counties can adopt meaningful public participation laws. For example most scholars discuss the importance of public participation in enhancing good governance but fail short of providing on the structures and processes to follow.⁶⁴ However this may actually not be the main challenge facing implementation of public involvement in county governance. The literature also lacks current information in regard to how county governance can enhance public participation in decision

⁵⁸ Reddy P. Democratic Decentralization and Local Democracy in South Africa Re-Examined: Quo vadis (2010) 29 (3) *Politeia* 66.

⁵⁹ Mutua M. (2008). *Kenya's Quest for Democracy: Taming Leviathan* (p. 247). Boulder and London: Lynne Rienner.

⁶⁰ Briand M. (2007), 'Democracy at the Core: Recalling Participation's Raison d'être' <http://www.iap2.org/associations/4748/files/Journal_Issue1_Viewpoint.pdf> accessed on 14th December 2016.

⁶¹ Pateman C. (2012) 'Participatory Democracy Revisited, Perspectives on Politics 10 (1).

⁶² Ghai Y. (2008). Devolution: Restructuring the Kenyan State. *Journal of Eastern African Studies*, 2(2), 211-226.

⁶³ Sebugwago M. Advancing Participatory Democracy and Development in South Africa: Towards A New Strategy of Governance' (2012) (18 2) *Transformer* 5.

⁶⁴ Warren M. (2002). 'What Can Democratic Participation Mean Today? *Political Theory* 30 (5) 677-701.

making and service delivery. Literature reviewed above reveals disconnect between provision and actual implementation of public participation in county governance.

1.9 Research Methodology

The researcher employed qualitative method of data collection. The type of data collected was secondary data through documentary review of literature and legal instruments. The primary source of material used in this study was existing literature on the right to adequate food of acceptable quality. An analytical approach was employed as a method of data analysis. Constitutional provisions were analyzed together with laws relevant to the study. The researcher employed library research, journals, internet search and newspapers review. The purpose of this was to obtain data that best enriches and explains efficacy of public participation laws in county governance. The study also analysed the situations in other jurisdictions in order to determine how the practice is in such states. A comparative analysis is done on USA and UK for an insight of countries outside Africa and Tanzania and South Africa for countries in Africa. USA is chosen for its continued practice in democratic governance and its role in public awareness processes in state governance. UK is selected as one of the countries that has entrenched governance through public participation without detailed legal framework. South Africa is chosen as it is one of the countries that have made great progress in enacting and creating public participation processes at the municipal level. Tanzania has provided a good platform for engaging citizens at the local level.

1.10 Chapter Breakdown

Chapter one: Introduction

This chapter provides a general discussion on right to public participation in county governance as a problem, objectives of the study and research questions. The chapter also provides significance of the study, theoretical framework, carries out a review of literature by other scholars and explains the methodology that is employed in the study.

Chapter Two: Right to Public participation and county governance

This chapter gives the reader an in-depth meaning and understanding of right to public participation and county governance. The Chapter also discusses international obligations, constitutional provisions and other legal framework in regard to public participation. It further examines county governance processes that involve public participation.

Chapter Three: Regulations enhancing public participation in county governance

This chapter deals with how selected counties deal with public participation in the exercise of county governance and decision making. A comparative analysis is also carried out to develop an insight on how the right to public participation is implemented in other jurisdictions. Legal challenges associated with public participation are also addressed.

Chapter Four: Summary, Conclusion and Recommendation

A conclusion on the study is made in this chapter. It discusses how county governments can enact laws and policies that can enhance participation of citizens in decision making. The researcher draws conclusions from lessons and gives recommendations on the necessary steps to be taken.

CHAPTER TWO

LEGAL FRAMEWORK ON RIGHT TO PUBLIC PARTICIPATION

2.0 Introduction

This chapter examines in detail the right to public participation in decision making and in matters of governance. It considers the right as a general perspective and an analysis is made in regard to the constitutional requirement to involve the citizenry in decision making at the county level governance. The Constitution of Kenya, 2010 provides the right to public participation under different provisions. Notable is Article 10 of the Constitution where it is provided as a principle that must be observed in all matters of governance. The researcher further considers other legal and policy framework on the right, more so in regard to matters of county governance which forms the objective of this study. It is with respect to involving the members of the public in county governance that this chapter reviews the conduct and processes on how the right to public participation is conceptualised. The study analysis some cases that Have been determined in Kenya and outside the county in regard to public participation at the local level. It thereafter discusses generally the county public participation guidelines as developed by national government together with council for governors.

2.1 Right to Public Participation

The right to public participation is premised on the notion that power belongs to the people and the citizenry therefore have to be involved in decision making in matters affecting their lives. The Constitution of Kenya in Article 1 recognizes that “power belongs to the people and should only be exercised in accordance with the Constitution.” Leonard claims that decentralized participatory democracy is a human right as it encompasses the right to self determination.⁶⁵ It is opined by Kairu, Lam & Maneno that public participation is recognized as a right and one of the principles of democracy and good governance.⁶⁶ According to Pateman, the right to public

⁶⁵ Leonard J. Decentralization And Local Governance Enhancement: A Human Rights Checklist' 2003 UNDP <http://www.undp.org.governance.docs.DLGUD%20-%20Guides%20-%20Checklist%20for%20decentralisation%20andHuman%20Ri.pdf> accessed on 14th December 2016.

⁶⁶ Kairu, Lam & Maneno (2012), Public Participation , Kenya's Best Weapon against Graft and Poor Governance. Adili Newsletter 135.

participation has gained wide acceptance overtime as a tool of strengthening good governance in democratic states.⁶⁷ States are obligated to involve the citizens in matters of governance. Article 21 of the Constitution of Kenya provides that “it is a fundamental duty of the state and every state organ to observe, respect, protect, promote and fulfill the rights and fundamental freedoms.” The State is therefore obligated to take legislative, policy and other measures in fulfilling its duties. According to Nabatchi & Leighninger there should be room for constructive criticism and dissenting views in decision making.⁶⁸ Briand (2007) offers the value of public participation as being tied to the value of democracy.⁶⁹ He opines that we value public participation because we value democracy.

The right to public participation has been adopted in most jurisdictions as a principle of governance. It is based on the idea that if a decision affects a significant portion of the public, then the public have a right to participate in making such a decision. Nabatchi & Leighninger argue that in democracies, public participation is naturally more responsive to the needs of the people.⁷⁰ Due to this notion people are prepared to invest in social services to improve the citizens’ quality of life.⁷¹ As suggested by Sihanya, public participation is a consultative process where the communication is two ways- bottom-up as well as top-bottom.⁷²

The principle of public participation is important in the delivery of services and matters of governance as it has unique advantages in advocacy, demand creation and linkage of communities to services.⁷³ Buccus argues that public participation is seen as a means of enhancing development and service delivery, improvement of governance and deepening of democracy.⁷⁴ Similarly Sihanya opines that public participation encompasses a group of

⁶⁷ Pateman C. (2012) ‘Participatory Democracy Revisited, Perspectives on Politics 10 (1).

⁶⁸ Nabatchi T. & Leighninger M. Public Participation for 21st Century Democracy. (Hoboken, New Jersey: John Wiley & Sons, Inc. 2015).

⁶⁹ Briand M. (2007), ‘Democracy at the Core: Recalling Participation’s Raison d’être’ <http://www.iap2.org/associations/4748/files/Journal_Issue1_Viewpoint.pdf> accessed on 14th December 2016.

⁷⁰ Nabatchi T. & Leighninger M. (2015).

⁷¹ Mwenda A. Introduction in Devolution in Kenya: Prospects, Challenges and Future. (Nairobi: Institute of Economic Affairs. IEA Research Paper Series No. 24, 2010) Pp. 8-13

⁷² Sihanya B. (2013). ‘Public Participation and Public Interest Litigation under the Kenyan Constitution’ Vol.9 (1) The Law Society of Kenya Journal 12.

⁷³ Nabatchi T. & Leighninger M. (2015).

⁷⁴ Imraan Buccus, Public Participation & Local Governance. The Centre for Public Participation. 2007.

procedures designed to consult, involve, and inform the public by allowing those affected by a decision to have an input in such decisions.⁷⁵

The right to public participation may involve consulting the citizenry in the development of policies and in decision making, elections among other democratic processes.⁷⁶ According to the International Commission of Jurists, such acts give governments access to important information about the needs and priorities of individuals, and the community at large.⁷⁷ Nabatchi & Leighninger opine that an informed public is able to participate in, belong to, share in and influence development projects in the society. Gathii opines that governments that involve the citizenry will be in a better position to make good decisions and these decisions will enjoy more support once taken into action.⁷⁸ According to Sihanya public participation in administrative process includes the power to advice or to be considered, before administrative conduct may be regarded as legitimate or valid.⁷⁹ Citizens must actively claim and affirm rights and initiate efforts to stimulate broad participation in governance processes.⁸⁰ Local groups closest to citizens are able to voice pressing social, economic and political challenges and opportunities and contribute towards a shared vision for development.⁸¹ This analysis provides a considerable support for meaningful public participation in matters of governance and in service delivery.

2.2 Legal and policy Frameworks on Right to Public Participation

In this section, the researcher examines the legal and policy framework on public participation. The section also carries out case analysis on right to public participation. The review commences by considering international obligations on public participation and thereafter reviews the national framework narrowing down to the county legislation. Cursorily it concludes by discussing some county governance processes in regard to right to public participation.

⁷⁵ Sihanya B. (2013).

⁷⁶ Guide to Good Governance Programming Mercy Corps

<<http://www.mercycorps.org/sites/default/files/mcgoodgovernanceguide.pdf> > accessed July 28 2014.

⁷⁷ ICJ-Kenya Chapter 1999.

⁷⁸ Gathii J. (2016). Assessing the Constitution of Kenya 2010 five years later. *Assessing Constitutional Performance*, 337.

⁷⁹ Sihanya B. (2013).

⁸⁰ Guertz C & Van de Wiljdeven, T (2010).

⁸¹ Devas N. & Grant U. (2003). Local Government Decision-Making—Citizen Participation and Local Accountability: Some Evidence from Kenya and Uganda. *Public Administration and development*, 23(4), 307-316.

2.2.1 International Obligation on Public Participation

At the international platform the International instruments and declarations provides a system and mechanism that advocates participation of citizens in governance issues in a state. The Universal Declaration of Human Rights (UDHR) in Article 25 provides for a participatory government.⁸² The UDHR further provides that the rights and freedoms provided therein are entitled to everyone without any distinction as stated in Article 2. Article 21 of the UDHR clearly states that “everyone has the right to take part in the government of his country and everyone has the right to equal access to public service in his country.” This provision has been adopted and modified in other major international human rights instruments and other documents dealing with governance. Article 25 of the International Convention on Civil and Political Rights (ICCPR) reinforces this position by providing that “everyone has a right to take part in the conduct of public affairs, directly or through freely chosen representatives.”⁸³ Further Article 2 of the ICCPR provides that the enjoyment of such rights and others provided in the covenant shall be “enjoyed equally without any form of discrimination.” The article also requires member states to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the Covenant.

Article 13 of the African Charter on Human and Peoples Rights provides a right for the citizens to participate in government.⁸⁴ Further the Charter under Article 9 provides that “all individuals shall have the right to receive information and the right to express and disseminate their opinions within the law.” The charter also reiterates Article 25 of the ICCPR provision under Article 13 on the right of citizens to participate on matters of governance. The Charter in its form and spirit aims at ensuring that public participation is properly embraced by the member states. The African Charter on Democracy, Elections and Governance (ACDEG) provides principles of good governance among them being the right to public participation.⁸⁵ The Charter under Article 34 provides that the right to public participation is better realized through devolution. Further the

⁸² Universal Declaration of Human Rights, GA Res 217 (III), 1948.

⁸³ International Covenant on Civil and Political Rights, 1966.

⁸⁴ African Charter on Human and Peoples Rights adopted 27th June 1981 OAU Doc CAB/LEG/67/3 rev 5, 21 (1982)

58 International Legal Materials.

⁸⁵ African Charter on Democracy, Elections and Governance, 2007 African Commission on Human and Peoples Rights.

Charter emphasizes on the importance of public participation in several provisions. The East African Community Treaty also has a number of provisions in regard to public participation.⁸⁶ Article 7 of the Treaty provides that the community is both people centered and market driven. Importantly Articles 127 and 128 require public participation through involvement of civil society organisations and the private sector organisations. Member states are obligated to provide an enabling environment for the public to operate and take part in the EAC matters. These provisions impose obligations on the state to take steps to ensure that citizens have an opportunity to participate in governance and public affairs.

The UNDP has continuously stated that increased synergy between the formal governance system and the community leads to sustainable development.⁸⁷ This has been evidenced through increased support by the international community and actors who pressurize government to engage citizens through legislation. Further The UNDP 2013 Report states that “all men and women should have a voice in decision making, either directly or through legitimate intermediate institutions that represent their intention.”⁸⁸ According to Nabatchi & Leighninger broad participation is built on freedom of association and speech, as well as capacities to participate constructively.⁸⁹

2.2.2 Constitutional Provisions in regard to the Right to Public Participation

The Constitution of Kenya, 2010 is replete with a raft of provisions that seek to enhance public participation in governance. The Constitution is also said to be a robust document as it brought with it major changes ranging from how a state is governed to provision of a detailed bill of rights. Among other rights the Constitution recognizes a citizen’s right to equality and freedom from discrimination, access to information, political rights and fair hearing.⁹⁰ This forms the basis upon which to legislate, adopt measures and mechanism of involving the public in all spheres of governance.

⁸⁶ East African Community, The Treaty for the Establishment of the East African Community, Arusha, EAC: 2002 xiv, 111p.; 230 mm (EAC Publication, No. 1).

⁸⁷ UNDP Report 1997, 2008, 2010.

⁸⁸ UNDP 2013 Report.

⁸⁹ Nabatchi T. & Leighninger (2015).

⁹⁰ Constitution of Kenya, 2010. Articles 27, 35, 38 and 50.

The right to public participation is clearly stated in Article 10 of the Constitution as a national value and principle of governance. Similarly, Article 174 of the Constitution gives the powers of self-governance to the people and enhances the participation of the people in the exercise of the powers of the state and in making decisions affecting them. The Article further recognizes the rights of communities to manage their own affairs and to further their development. Article 184 (1) states that “the national legislation shall provide for governance and management of urban areas and cities and shall in particular provide for participation by residents in the governance in urban areas and cities.” This Article requires that when providing for an urban area or city planning among other decision making processes, the residents of such areas must participate in such decisions.

Article 196 (1) states that a “County Assembly shall conduct its business in an open manner and hold its sittings and those of committees in public and facilitate public participation and involvement in the legislative and other business of the assembly and its committees.” Article 232 (1) provides for the “values and principles of public service which shall include; involvement of the people in the process of policy making and accountability for administrative actions, and transparency and provision to the public of timely and accurate information.”

The 4th Schedule part 2 of the Constitution thereof stipulates that the functions and powers of the county are “to ensure and coordinate the participation of communities in governance at the local level.” This means that counties are to assist communities to develop the administrative capacity for effective exercise of the functions and powers and participation in governance at the local level.

Article 33(1) (a) of the Constitution provides that “every person has the right to freedom of expression which includes freedom to seek, receive or impart information or ideas.” The Constitution clearly provides under Article 232 (1) (d) that among others, the “values and principles of public service include involvement of people in the process of policy making”. The Article further requires that the public be given timely and accurate information.

Article 21 (4) obligates the state “to enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms.” Similarly Article 2 (5) and (6) recognizes and provides for international law enforceability in the country. These obligations

are as stipulated in the international instruments which the state has ratified or has committed herself to.

As stated earlier, the 2010 Constitution of Kenya brought into place a devolved system of government. The system aimed at decentralizing powers and resources and enhances structure and processes that allow public participation in matters of governance. Since 2010 when the Constitution came into effect the task has been restructuring governance and programmes aimed at implementing the constitutional requirement on public participation especially at the county level. It is evident that the framers of the Constitution felt that public participation in county governance was of paramount importance. This legal framework for strengthening governance systems and coordination of activities aimed at enhancing public participation at the county level is subject of in-depth analysis in this study.

2.2.3 National Legislations Giving Effect to Public Participation at the County Governance

Due to the importance of public participation as a constitutional requirement and as a principle of governance there have been national legislations made to give substance to public participation. Parliament at the national level has gone on to legislate laws that are aimed at structuring devolved governance that meets the demands of the citizens. As stated earlier in this study parliament has enacted the County Government Act 2012, Public Finance Management Act 2012 and Urban Areas and Cities Act 2012. The County Government Act is important in improvement of service delivery and is aimed at enhancing use of resources for developmental actions. The Public Finance Management Act provides for participatory governance on the administration and use of public finance. The Urban Areas and Cities Act require involvement of residents on matters of governance in urban areas and cities.

The Public Finance Management Act, 2014 does not solely deal with county governance but the overall management of finances in the country. In regard to county governance, the Act provides county government's responsibilities with respect to the management and control of public finance. Section 207 of the Public Finance Management Act states that, "the county governments are obligated to establish structures, mechanisms and guidelines for citizen participation." Further section 137 provides for the establishment of County Budget and Economic Forums

(CBEFs) for county budget consultation process. This forum is meant to provide a means for consultation by the county government on the preparation of county plans, its fiscal strategy paper, budget review and its outlook paper.

Section 87 of the County Government Act provides a detailed outline of the principles to be followed in realizing public participation. Section 91 states that “the county government shall facilitate the establishment of modalities, and platforms for citizen participation.” Further Sections 94, 95 and 96 require county governments to put in place mechanisms that facilitate public communication and access to information to the widest public outreach. Section 115 of the County Government Act reinforces constitutional provisions in regard to public participation by providing it as a mandatory process in decision making processes for county governance. In addition counties are mandated to designate an office for ensuring access to information.

Sections 21 and 22 of the Urban Areas and Cities Act recognize the importance of participation by the residents in the governance of urban areas and cities. It is important to note that the county governments are the ones constitutionally mandated to manage cities and municipalities within their jurisdictions. Section 11 (d) of the Urban Areas and Cities Act provides a participation framework for residents in affected local areas. The Second Schedule of the Urban Areas and Cities Act reinforces on the right of and participation by residents in affairs of their cities or urban areas. This schedule also requires urban areas and cities to develop systems of governance that encourage participation by residents in their affairs.

Effectiveness of a law depends on its capacity to enhance public participation in the governance process. According to Sen, if a framework, fails to place the citizenry at the centre of the system, disregarding the importance of the end user, thereby ignoring a basis for concrete actions towards strengthening linkages with the members of the public, such system is destined to fail.⁹¹

2.3 Case Analysis on Right to Public Participation

This study also analysis some cases that courts have dealt with in regard to right to involve the public in decision making or matters of governance. Courts in Kenya and outside the country have tried to interpret the right to public participation. As revealed by these cases public

⁹¹ Sen Amartya. (1999) 'Democracy as a Universal Value' 10 Journal of Democracy.

participation does not enjoy the same interpretation everywhere and in all circumstances. It all depends with the question at hand and circumstances of each and every case.

One of the cases in which right to public participation has been analysed widely in the county governance is *Robert N. Gakuru & Others vs Governor Kiambu County & 3 others*.⁹² In this case the petitioners were challenging the enactment of the Finance Act by Kiambu County government as having been passed without public participation. The petitioners argued that the Kiambu Finance Act was enacted without inviting the public and no consultations were made. The respondents were arguing that the enactment of the Act was preceded by consultation and invitation of the public.

In its decision court tried to interpret and analyse the principle of public participation. Court stated that “the yardstick for measuring public participation is by checking whether a reasonable opportunity has been given to citizens and all interested parties to know about the issue and to have an adequate say.”⁹³ Court further stated that it is necessary that the nature of concerns of different sectors of the parties be communicated to the law maker and taken in formulating the final regulations.

Court further found that there may be variations in county governments’ laws on the forms of facilitating public participation but all should be geared towards enhancing meaningful involvement. Court argued that what is important is that “reasonable opportunity be offered to members of the public and all interested parties in knowing the issues at hand and contribute in decision making.” Quoting the decision of the court,

“..... public participation ought to be real and not illusory and ought not to be treated as a mere formalityCounty Assemblies ought to do whatever is reasonable to ensure that as many of their constituents in particular and the Kenyans in general are aware of the intention to pass legislation and where the legislation in question involves such important aspect as payment of taxes and levies, the duty is even more onerous. I hold that it is the duty of the County Assembly in such circumstances to exhort its constituents to participate in the process of the enactment of such legislation by making use of fora as possible such as churches,

⁹² [2014] eKLR

⁹³ Ibid

mosques, temples, public *barazas* national and vernacular radio broadcasting stations and other avenues where the public are known to converge to disseminate information with respect to the intended action.⁹⁴

The court was also very clear that whenever the views of some participants are not considered, it is not a good ground to justify invalidation of an enactment. Court agreed with the decision of Justice Lenaola in *Nairobi Metropolitan PSV Saccos Union Ltd & 25 Others v County of Nairobi Government & 3 Others*.⁹⁵ In that case court authoritatively found that public participation does not necessarily mean public views must prevail.

In *Gakuru's case*, Court went further to define the concept of consultation and participation in enabling a clear understanding of public participation and whether it was observed in enactment of Kiambu Finance Act 2015. Borrowing from Black's Law Dictionary⁹⁶ court defined consultation and participation as; "consultation is the act of asking the advice or opinion of someone,"⁹⁷ and "participation is the act of taking part in something, such as partnership..."⁹⁸ Interpreting public participation from the above definitions, court held that the process of public participation is not meant as a public relations exercise but meant to consider public views in the decision making process and also in forming a product of the legislative process.⁹⁹

Similarly in the case of *Diani Business Welfare Association and others v County Government of Kwale*¹⁰⁰ court emphasized on the importance of public participation. In this case the petitioner, a welfare association whose members were residents and carrying out business in Kwale County challenged the enactment of Kwale County Finance Act No. 1 of 2014 as they felt aggrieved by revision of fees and taxes introduced by the Act. They argued that the Act was passed without participation of the Petitioners who were stakeholders in the county. In their response the county government argued that they informed the public for deliberative meetings that were advertised in the Star newspaper, notice boards of every sub-county and also in a local station "Radio-Kaya" a popular station in the county. The respondents therefore argued that the petitioners were

⁹⁴ Gakuru's case (2014) eKLR.

⁹⁵ *Petition No. 486 of 2013 eKLR*.

⁹⁶ Black's Law Dictionary 9th Edition.

⁹⁷ Black's Law Dictionary P358.

⁹⁸ Black's Law Dictionary P1229.

⁹⁹ Gakuru case (2014) eKLR

¹⁰⁰ [2015] eKLR

“properly informed about the public foras where the issues of fees and taxes were deliberated and therefore chose not to participate.” Finding in favour of the County government that the constituents were involved, court provided a detailed analysis of public participation.

Referring to Section 87 of the County Governments Act court quoted principles provided therein that citizen participation ought to be based include timely access to information, reasonable access to the process of formulating and implementing policies, protection and promotion of the interest and rights of minorities among others.

Court further held that the quantitative and qualitative modalities of public participation provided in the County Government Act are still wanting. Court found that quantitative participation means the amount or extent of information disseminated by a County Government and also to the widest possible extent to the citizens concerned. Qualitative was explained by court to refer to the extent of both the information and the array of citizens who would engage in meaningful debate of the proposals. Court therefore found that County Governments must develop mechanisms through which outcomes of public participation are translated into budget planning processes. It stated that such mechanism must address questions as to how much weight should be attached to public participation, and how to accommodate divergent views.

As discussed earlier in *Robert N. Gakuru & Others v Governor Kiambu County & 3 others*¹⁰¹ court found that where the legislation in question involves such important aspect as payment of taxes and levies, the duty to involve public is even more onerous. Similarly, Justice Lenaola in *Nairobi Metropolitan PSV Saccos Union Limited & 25 others vs. County of Nairobi Government & 3 others*¹⁰² stated that “it is not important how public participation is conducted but according members of the public some reasonable level of participation.” In *Commission for the Implementation of the Constitution vs. Parliament of Kenya & another & 2 Others & 2 Others*¹⁰³ court stated that it must be clear that a reasonable level of participation has been afforded to the public by parliament when making laws.

¹⁰¹ [2014] eKLR

¹⁰² (2013) eKLR

¹⁰³ (2013) eKLR

Courts in other jurisdiction have also made decisions in regard to the importance of involving the members of the public in legislative process and in decision making. For example the South African court in *Doctors for Life International vs. Speaker of the National Assembly and Others*.¹⁰⁴ In this case the applicant Doctors for Life, an advocacy organisation sought nullification of four statutes on grounds that the legislative process followed in their enactment did not invite written submissions and public hearings. They therefore argued that this was inconsistent with the constitutional requirements to facilitate public involvement. The respondents on their part argued that they had complied and had actually facilitated public involvement in their legislative processes.

Court in its determination found that the objective of public participation in the law-making process is to enable legislators to know the concerns of the public. Court further found that this in turn promotes legitimacy and minimizes dangers of arbitrariness and irrationality in legislation. Court noted this as an important principle in strengthening democracy. Court emphasized on the importance of public participation by stating that “facilitate public involvement” places a duty to ensure public participation is adhered to in the law-making process.

In another South Africa case of *Matatiele Municipality and Others vs. President of the Republic of South Africa and Others*,¹⁰⁵ court stated the South African system of government contemplates that people will be given the opportunity to participate in the law-making process in certain circumstances.

*Minister of Health vs. New Clicks South (PTY) Limited*¹⁰⁶, reasonable opportunity is also determined by the manner (quality) of presentation of both the opportunity and the material of the proposals to be considered. Court further stated that it is important that apart from extensively providing for participation of the members of the public, the county government should also provide information to the citizens on the role of such participation.

¹⁰⁴ (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC).

¹⁰⁵ (2) (CCT73/05A) [2006] ZACC 12; 2007 (1) BCLR 47 (CC).

¹⁰⁶ CCT 59/2004 [2005] ZACC 14; 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC).

2.4 County Public Participation Guidelines

Due to the need to develop legal framework on public participation that may be meaningful and meets the constitutional requirement, the national government in collaboration with council of governors have developed some guidelines to enable county governments adhere to this important principle.¹⁰⁷ Though the guidelines came very late outside the constitutional timeframe of implementing the Constitution, it acts as an important guide towards participatory governance. Some of the counties as discussed earlier had already legislated on public participation before these guidelines came into place. The guidelines are very clear that they are not there to replace the county legislations on public participation but to complement them. However, such counties still have an opportunity to amend their Acts to be in line with the recommendation of the guidelines where they deem necessary.

The guidelines were developed as an attempt to develop a structured system of conducting public participation. The guidelines provide a strong direction on creation of structures processes and recommendations of public participation in county governance. As stated earlier it is not mandatory for a county government to comply with the guidelines, however they offer a standard guide to support public participation in decision making in policy, legislation, planning, budgeting and service delivery in the county governance. Some of the processes and structures provided in the guidelines include policy making and planning, budgeting, implementation, monitoring and evaluation and seeking redress through public petitions and referenda. The guidelines recognizes that “all members of the public have a right to participate either individually or through self organized groups that are legally recognised in decision making.” It specifically states that no one may be denied this right on any basis. Among other provisions the guidelines also recommends some of the conditions that must be observed for meaningful public participation. Some of these conditions include clarity of the subject matter, clear structure and process, access to information, inclusivity among others.

¹⁰⁷ County Public Participation Guidelines, 2016.

2.4 Conclusion in Regard to Right to Public Participation

This chapter has discussed extensively on the content and legal framework of the right to public participation. The discussion has revealed that right to public participation is protected by law and is an important principle in good governance. It also legitimizes government and facilitates participatory democracy and observance of the international law on the right to political participation.

This chapter has also discussed global perspective on the right to public participation as provided under international instruments and law. Instruments discussed include the Universal Declaration of Human Rights and International Covenant on Civil and Political Rights which provides that every citizen shall have the right and opportunity to take part in the conduct of public affairs. Declaration on the Right to Development, African Charter on Human and Peoples Rights and the African Charter on Democracy, Elections and Governance also recognizes the importance of the public in democratic and development processes in public affairs.

The Constitution requires public participation in governance including the budgetary process, the County Government Act provides for the involvement of citizens in development planning, the Urban Areas and Cities Act requires participation of residents in the affairs of their areas and the Public Finance Management Act provides for establishment of structures, mechanism for budgetary consultation, its review and expenditure. Cases analysed demonstrates how counties can make use of the principle of public participation in decision making and in matters of governance. Courts give a detailed analysis on the criteria that counties should strive to achieve in order to comply with the legal framework in place.

The general finding is that in a democratic state everyone is supposed to be involved in decision making. However due to the inability to get everyone on board to make their contribution, people choose leaders or representatives who are supposed to make decisions on their behalf. This example of indirect democracy is the kind of democracy practiced in majority of modern states where citizens who qualify to vote do vote for representatives such as legislators to make decisions on their behalf. In most cases these people do not represent the people's will hence the principle that the public should be involved in decision making. The state and in this case county

governments are obligated to develop mechanisms to facilitate public participation in the public affairs.

This participation as shown in the previous discussion may be through creation of a structured mechanism for engaging the public. This may be through establishment of an effective office of public participation at the county government, capacity building, integrated development planning, public participation in budgetary processes, monitoring and evaluation of service delivery, citizens' forums among others.

Despite the emphasis that is there on participatory governance in Kenya the situation and practice may be different. The success depends on how those in government give effect to the legal framework and facilitate public participation. As discussed above there exist legal and policy framework on public participation. There is need for adequate engagement with and empowerment of the members of the public to participate in governance issues at the county level.

Generally public involvement includes: public access to information, public participation whether directly or indirectly in decision making processes and public access to judicial and administrative justice. Ultimately government processes and implementation are improved through public involvement. However, according to Mill public participation is not all about involvement but engaging citizens through decision making.¹⁰⁸ Failure to make use of structures and mechanisms of enhancing public participation in county governance negates the main objective of participatory governance.

The next chapter therefore discusses the county government structures and processes of the right to public participation. In so doing it carries out a critique of the laws and a comparative analysis on legal framework and practices in other jurisdiction.

¹⁰⁸ J. S Mill "From Considerations on Representative Government; in P Green (ed) Key Concepts in Critical Theory: Democracy (1993) 32.

CHAPTER THREE

REGULATORY FRAMEWORK ON PROCESSES AND STRUCTURES OF PUBLIC PARTICIPATION IN COUNTY GOVERNANCE

3.0 Introduction

Since 2010 when the Constitution came into effect one of the tasks has been restructuring local governance at the county level and programmes aimed at implementing linkage frameworks for strengthening public participation. As discussed in the previous chapter public participation in county governance is characterized by a robust legal framework in the Constitution and national legislations. Courts have gone further to interpret the right to public participation and how it should be applied by county government. Further some county governments have developed laws to actualise this constitutional requirement. More importantly the chapter reviews public participation county legislations of Machakos, Meru and Elgeyo Marakwet counties being the only counties that adhered to constitutional timeframe. According to Archon, effective frameworks must address the issues of who participates, how do they participate and do their participation influence decision making.¹⁰⁹ This chapter therefore addresses these questions by considering the different structures and processes available in public participation in county governance.

It is important to point out that this study concentrated on the three counties that met the constitutional implementation window by enacting legislations to enhance public participation in county governance. This chapter proceeds to discuss the structures and processes provided therein and carry out a comparative analysis for better understanding on the right to public participation. The jurisdictions discussed do not portray the position in their region but are selected to offer the framework in such states.

The requirement for public participation in the Constitution is not for mere formality but to enhance proper and effective engagement of the public in decision making and matters of governance. It therefore means this participation is not mere consultation but actual engagement of the citizenry in decision making. The participation should not be in vain but should be

¹⁰⁹ Archon Fung, 'Varieties of Participation in Complex Governance' (2000) Public Administration Review.

productive in improving the citizens' standards of life. According to Andrews success of public participation is dependent on strong structures and real processes.¹¹⁰

However it is noteworthy that these structures have different characteristics, impact and degree of success. Further these structures and processes differ from one county to the other. Various mechanisms and structures have been developed to enhance public participation. It is on this account that it becomes important to consider such structures and processes in detail. Notable of the structures and processes discussed hereinafter are the office of public participation, public hearings, public petitions, participation in budgetary processes, and participation in planning, monitoring and evaluation of public participation among others. This study does not discuss county assembly and county executive organs though they are the two main structures created by the Constitution.

3.1 County Legislations on the Right to Public Participation

In addition to national legislations on county governance, various counties have developed regulatory framework to enhance public participation in county governance. This study reveals that by 2015 only three counties had developed county legislation to give effect to the right to public participation in county governance. The Constitution provided that all legislations to give effect to its constitutional provisions were to be enacted within five years from its promulgation. These counties that met constitutional framework in regard to enactment on the right to public participation are Meru County, Machakos County and Elgeyo Marakwet County. This study will therefore proceed to analyse these Acts in order to develop an insight on the extent of legal framework on right to public participation at the county governance. Close analysis of these laws reveals that they have similar provisions to a certain extent. However notable differences are also evident as discussed herein later.

Public participation is defined by the Meru County Public Participation Act as “including the process and the methods designed to consult, involve and inform the public so that they may have some form of input in the process of decision making and governance.”¹¹¹ On the other

¹¹⁰ Andrews R. 'Supporting Effective Citizenship in Local Government: Engaging, Educating and Empowering Local Citizens' (2008) 34(4) Local Government Studies 499.

¹¹¹ Section 2 of the Meru County Public Participation Act

hand the Machakos County Public Participation Act defines it to mean “an open democratic and accountable process of engaging a representative sector of the public in formulating policies and developing laws that affect them.”¹¹² Elgeyo Marakwet Public Participation Act does not provide definition of public participation.

The Meru County Public Participation Act provides for the establishment of a public participation office and outlines its functions. This office is provided to be at the county assembly service. Further the Meru Act makes provisions for public petition, which include the procedure, the consideration of the petition, and the process of publication of decisions and how the petitions shall be registered. Further the Meru County public participation law provides various processes of public participation in county governance like citizen forums, advisory committees amongst others.

The Elgeyo Marakwet County Public Participation Act, 2014 generally provides modalities for creating a platform for public participation in the governance of the county. Section 23 of the Act creates an office of public participation with the responsibilities of “establishing public participation structures, enhancing inclusivity of public participation activities, informing the public on public participation processes including financial resources, timelines, establishing a feedback mechanism and any other public participation related function.” This office is also tasked with constituting county public participation forums every three months.

Section 4 (a) of the Machakos County Public Participation Act of 2014 provides that “the communities, organizations and citizens affected by any policy decision of the government shall have the right to be consulted and shall be accorded an opportunity to participate in the process of formulating policy.” Unfortunately the Machakos County Public Participation Act gives the office of the County Assembly clerk and the County Secretary power to make guidelines on public participation instead of setting out detailed guidelines.

The Acts of Meru County and Elgeyo Marakwet County create institutional support by establishing a public participation office. The Meru County Public Participation Act is more elaborate than that of Machakos County when it comes to processes and conduct of public

¹¹² Section 2 of Machakos County Public Participation Act

participation. For example the Meru County Public Participation Act provides for coordination of public participation in the County Assembly and the County Executive in Part II and Part III of the Act respectively. The three Counties Acts provide a framework of instituting petitions by citizens within their counties. Also the three counties public participation laws provide for public fora although their conduct varies. More importantly the Acts also provide for procedures of reporting and evaluating public participation.

According to Sihanya participation is a process whereby enactment of laws, policy making, prioritizing issues, accessibility to public goods and services and also allocating resources is influenced by key stakeholders.¹¹³ Despite formulation of public participation laws by these counties there are major challenges in realizing full public participation. Further the laws have been enacted without the national guidelines on public participation in the county governance as contemplated in the County Government Act. This explains the reason why legislation like Machakos County Public Participation Act ignored the importance of creating an office of public participation and instead placed the process within the county government structures and offices.

Citizen participation is not a favour but a constitutional obligation that the county governments must adhere to. It must however be clearly defined by the county government in agreement with the citizens to achieve satisfactory results. The county governments must agree with the citizens on processes, procedures, entry levels, safeguards to citizens' decisions and guarantees that their needs and priorities will come first.¹¹⁴ A decision arrived at through consultation or by involving the citizens is seen to be more legitimate.¹¹⁵ According to Gathii the citizens at every county level should therefore take part in the budget making process by giving their opinions as well as taking time to go through their proposed budgets in order to know how resources are being distributed in their respective counties.

Devolution, which takes not only the transfer of political power but also administrative and economic or fiscal power from the central government to local communities, promotes popular

¹¹³ Sihanya B. (2013).

¹¹⁴ Omolo A. (2011). Policy Proposals on Citizen Participation in Devolved Governance in Kenya. *Nairobi: The Institute of Social Accountability.*

¹¹⁵ Gathii J. (2016).

participation, empowers local people to make decisions, enhances accountability, efficiency and effectiveness.¹¹⁶

3.2 Regulations on Structures and Processes on Public Participation in County Governance

3.2.1 Office of Public Participation

An office of public participation is important in coordinating and facilitating public participation in a county. This is not a requirement in the national legislations on county governance; however it remains an important institutional support in offering meaningful public participation.¹¹⁷

Elgeyo Marakwet and Meru counties create this important office as the centre of coordinating public participation in the two counties. However in Meru the office of public participation is placed at the county assembly service while coordination of public participation at the executive level is by a department of public participation established at the county public service.¹¹⁸ To strengthen the right to public participation the Meru County further creates a public participation advisory committee. The centre of public participation activities in Elgeyo Marakwet County is in the office of public participation. This office in Elgeyo Marakwet County is “mandated in establishing public participation structures, ensuring the inclusivity of public participation activities, informing the public on public participation processes like financial resources, timelines, establishing a feedback mechanism and any other public participation role that they may deem fit.” Machakos County seems to take a different approach where its Act provides that public participation will be carried out through the institutions created by the Constitution. That is through the county assembly and the county executive. The challenge with such an arrangement is that though public participation may be conducted through these structures, there may be no guarantee of considering the concerns raised by the public. The county government may still go ahead and carry out their resolutions, policies or legislation as they intended. To this

¹¹⁶ Leonard J. Decentralization And Local Governance Enhancement: A Human Rights Checklist’ 2003 UNDP <http://www.undp.org/governance/docs/DLGUD%20-%20Guides%20-%20Checklist%20for%20decentralisation%20andHuman%20Ri.pdf> accessed on 14th December 2016. See also Bosire C. ‘Local Government and Human Rights: Building Institutional Links for the Effective Protection and Realization of Human Rights’ (2011) 11 African Human Rights Law journal 147.

¹¹⁷ Bosire C. ‘Local Government and Human Rights: Building Institutional Links for the Effective Protection and Realization of Human Rights’ (2011) 11 African Human Rights Law journal 147.

¹¹⁸ Meru County Public Participation Act sections 5 and 8.

extent a separate office of public participation from the executive and county assembly may seem to carry some form of independence. This may translate to an independent report on public participation.

Further there may be a challenge of independence of the office of public participation from the two main structures of county governance. That is to say that the county assembly and county executive may opt to manipulate and influence the working of such an office. Therefore it remains unclear the extent to which the recommendations or reports of the office of public participation will be factored into decision making.

3.2.2 Public Hearings

It is important for county leaders to institutionalize processes that enhance reasonable participation of citizens. According to Omollo recognition and protection of people's right to have a say in all decision making processes is the ultimate aim of the Constitution.¹¹⁹ Bosire argues that power to govern ultimately rests with the people and must be exercised with their consent.¹²⁰ Public forums provide an opportunity of direct engagement between the county government and the citizens. It also reinforces the principle of checks and balances at the county level. It is important for the county government to provide strong structures and adequate resources to facilitate public hearings. These structures must address the issue of notice, agenda, place, time and manner in which a forum will be conducted.¹²¹ Further, the conveners must give the participants adequate and reasonable opportunity to participate in deliberations. Yang holds that this also has an impact in future forums as it will give participants motivation and encourage them to participate in future activities.¹²²

The three counties Acts that forms the basis of this study provide for public fora. The Elgeyo Marakwet Public Participation Act requires the office of public participation to organize county citizen participation fora. Public hearings or fora as referred in the Elgeyo Marakwet Public

¹¹⁹ Omollo A. (2011). Policy Proposals on Citizen Participation in Devolved Governance in Kenya. *Nairobi: The Institute of Social Accountability.*

¹²⁰ Bosire C. 'Local Government and Human Rights: Building Institutional Links for the Effective Protection and Realization of Human Rights' (2011) 11 African Human Rights Law journal 147.

¹²¹ Roberts N. (2015). *The Age of Direct Citizen Participation.* Routledge.

¹²² Yang K. & Kallahan K. 'Assessing Citizen Involvement : Efforts by Local Government , Public Performance and Management Review (2005) 29(2) Public Performance and Management Review 191.

Participation Act are to be set up in accordance with the Act. The Act further obligates the office of public participation to publicise and organize a citizen's participation forum every three months. The Act also clearly requires the office to convene forums at the sub-county and city-urban areas. To bring these forums closer to the people the Act requires ward, village administrator or member of county assembly to initiate citizen forums. Pursuant to the Meru County Public Participation Act, "the citizen participation forum is convened by the governor at the county level; at the Sub-county level by the respective Sub-county administrator; at the ward level by the respective ward representative in consultation with the ward administrator; at the village level by the respective village administrator; and in each town by the town manager."¹²³ The Act further requires that the forum must reflect the stakeholders of the county.

Unfortunately the duration provided by the Acts is worrying noting the importance of engaging the public in decision making. For example the Machakos County Public Participation Act provides that public fora are to be held annually whereas the Meru County Act provides it as a quarterly activity, which means there are four public fora to be held in a year. The Elgeyo Marakwet Act provides for organisation of citizen participation forum to be held every 3 months at sub county level and city urban areas.

Sihanya opines that public hearings are organized by government departments, institutions and non-government institutions to provide a forum for the public to express their views and opinions on a particular issue.¹²⁴ The county public participation guidelines state that a government that is open to the citizenry provides an avenue to the public to raise their concerns.¹²⁵ Lakin & Kinuthia argue that hearings are usually afforded to only those citizens who will be affected by a certain determination and hence the participation of citizens is limited by size of venue and the complexity or technicality of the aspect under discussion.¹²⁶

This study opines that public hearings are the most suitable method of public participation as it is open to anyone. Further they give citizens an opportunity to engage their leaders directly. It is

¹²³ Meru County Public Participation Act section 13.

¹²⁴ Sihanya B. (2013). 'Public Participation and Public Interest Litigation under the Kenyan Constitution' Vol.9 (1) The Law Society of Kenya Journal 12.

¹²⁵ County Public Participation Guidelines.

¹²⁶ Lakin J. & Kinuthia J.(2013). 'Budget Transparency in East Africa' Budget Brief No. 17 April 2013 <<http://internationalbudget.org/wp-content/uploads/brief17.pdf>> accessed July 12 2014.

one of the democratic practices advocated by modernization theory in an attempt to transform underdeveloped countries thereby improving people's standards of lives.¹²⁷

3.2.3 Citizen or Public Information

An informed society is an enlightened society. This means the public is aware of major and important decisions affecting their life. The right to information is a constitutional requirement in Article 35. The article states that everyone has a right to any information held by the state. It further provides that the "State shall publish and publicize any important information affecting the nation." This provision can be interpreted to include information relating to public participation. Therefore the right to information is a right on its own and also a right in enforcement of public participation. The Access to Information Act further provides that "every person has the right to access information held by a public entity or a private body expeditiously at a reasonable cost."¹²⁸

For there to be effective participation, the citizens must participate from an informed point. The public needs to know about their rights, interests, means and opportunities of engaging their county government. However, the chances of achieving full participation may be limited by lack of important information in regard to county governance. The County Governments Act provides a number of principles that if followed will enhance meaningful public participation. These are provided in Section 87 and in Part VIII. For example it requires that the county government enable citizens' "timely access to information, data, documents, and other information relevant or related to policy formulation and implementation." The Act also proposes use of ICT in dissemination and collecting important information in regard to public participation. For example the county public participation guidelines recommend use of e-participation. This electronic form of publicizing information is also recognized under the Access to Information Act.¹²⁹

The three counties Acts on public participation provide for the essence of the public accessing information in regard to county governance. The Meru County Public Participation Act requires

¹²⁷ Dhavan R. (1994). Law as Concern: Reflecting on 'Law and Development.'. *Law and Development in the Third World*.

¹²⁸ Access to Information Act no. 31 of 2016, section 4 (3)

¹²⁹ Access to Information Act no. 31 of 2016.

the department or office of public participation to communicate within seven days the precise date of any citizen participation forum to the concerned county residents and stakeholders.¹³⁰ However it is unreasonable for the Act to talk of “within” seven days instead of seven days prior. The Machakos County Public Participation Act provides that the county government must establish mechanisms of availing participants’ access to the information necessary to ensure meaningful participation.¹³¹ The Elgeyo Marakwet Public Participation Act provides for mechanism of informing the public on participation processes. The Act also requires publicizing of citizen participation forum that are supposed to be held every 3 months at sub county level and city urban areas.

Nevertheless these legislated laws fail to establish a structure of enhancing e-participation. However where law has created an office of public participation, the office can opt to make use of this approach.

3.2.4 Focus Group Discussions

The Constitution recognizes that citizens’ wishes may be upheld either directly or indirectly through representatives. The best form of representation is direct one. However, it may sometimes be difficult to involve the public at individual basis. In such instances this can be done through small groups that understands or part of those to be affected by a decision. Prof. Sihanya proposes a small group of five (5) to twelve (12) people being selected to be representatives of the public.¹³² There should be free discussion on a general topic with video or tape recording and little input or direction from the facilitator. It also allows in-depth deliberations of issues affecting the citizenry in a local set-up. It should be balanced in terms of ethnicity, gender and age in order to have more accurate results. The Machakos County Public Participation Act seems to be more of a sectoral representative where it provides for consultation from the public in formulating policies and developing laws that affect them. The challenge with this system is that it may be used by those in authority in selecting those people who are supporting their decisions.

¹³⁰ Meru County Public Participation Act section 13 (3).

¹³¹ Machakos County Public Participation Act section 4 (d).

¹³² Sihanya B. (2013).

3.2.5 Citizen or Public Advisory Committees

A form of indirect representation may also be conducted through citizen advisory committees. According to Prof. Sihanya, it comprises of a small group selected by the sponsor to represent the views of various groups or communities.¹³³ It involves interaction with industry representatives. The Meru County Public Participation Act creates a County Public Participation Advisory Committee in addition to an office of public participation. This structure may also be associated with the Machakos County Public Participation Act that provides for consultation in general sense. Though the Elgeyo Marakwet Act is not clear on citizen advisory committees it clearly provides for creation of structures to enhance public participation.

3.2.6 Participation through the Budget Process

Among other prospects, devolution is associated with fiscal decentralization. It is becoming increasingly important in the globe that allocation of public resources is best done through processes and systems that are done in an open and accountable manner. There is also increased need to have public scrutiny and engagement with strong oversight institutions that are transparent to the public.¹³⁴ Without adequate information and public participation, budgets are likely to be less responsive to citizen needs and priorities. According to Lakin et al, opacity creates greater opportunities for mismanagement and corruption.¹³⁵ It therefore becomes important to check the process of raising resources, spending and the extent to which the administrations are bound and abide by rules.

Article 201 of the Constitution lays down some key public finance principles including the need “to ensure that there is openness and accountability in all public financial matters and that public participation will be emphasized in the whole budget process and decision making processes.” The Constitution further provides that “public finance should promote an equitable society where burdens and benefits from the use of public resources will be shared equitably.” Public money

¹³³ Sihanya B. (2013).

¹³⁴ Omolo A. (2011). Policy Proposals on Citizen Participation in Devolved Governance in Kenya. *Nairobi: The Institute of Social Accountability.*

¹³⁵ Lakin J. & Kinuthia J.(2013). ‘Budget Transparency in East Africa’ Budget Brief No. 17 April 2013 <<http://internationalbudget.org/wp-content/uploads/brief17.pdf>> accessed July 12 2014.

shall be used in a prudent and responsible manner and this should be accompanied by clear financial reporting.

Chapter 12 of the Constitution on public finance and the Act that gives it effect, the Public Financial Management (PFM) Act 2012, have transformed the budget process in Kenya. As stated earlier Article 201(a) Constitution, 2010 requires openness and accountability including participation in financial matters as one of the principles governing public finance. Section 137 of the Public Finance Management Act provides for the establishment of County Budget and Economic Forums (CBEFs) for county budget consultation process. These processes are geared towards engaging the members of the public in the budgetary process. Failure to involve the public renders such budgets invalid as was seen in the case of Kiambu County Finance Bill in 2013.

Article 174 of the Constitution gives the powers of self-governance to the people and enhances the “participation of the people in the exercise of the powers of the state and in making decisions affecting them.” Citizen participation in dealing with raising and allocation of resources in a county government is not a favour but a constitutional obligation that the governor must adhere to. It must however be clearly defined by the county government in agreement with the citizens to achieve satisfactory results. The governor must agree with the citizens on processes, procedures, entry levels, safeguards to citizens’ decisions and guarantees that their needs and priorities will come first. The citizens at every county level should therefore take part in the budget making process by giving their opinions as well as taking time to go through their proposed budgets in order to know how resources are being distributed in their respective counties.

County governance must therefore adhere to the requirement of the Constitution and uphold the right to public participation by promoting popular participation, empowering local people to make decisions, enhances accountability, efficiency and effectiveness in budget allocation and expenditure.

Section 5 (1) d of the Machakos County Public Participation Act provides guidelines for measures “that ensure adequate financial resources are matched to public participation.” Section

38 of the Elgeyo/Marakwet County Public Participation Act provides clear direction on the “sourcing of funds, budget making, borrowing capabilities for the office, the accounting required of the office and auditing.” The Meru County Act is not expressed in regard to budget process but this may be done in regard to Public Finance Management Act.

3.2.7 Public Petitions

The members of the public may also engage in matters of governance through petition. Petition is defined by Black’s Law dictionary as a written address, embodying an application or prayer from the person or persons preferring it (petitioner/petitioners), to the power, body, or person to whom it is presented (county government), for the exercise of his or their authority in redress of some wrong or seeking a favour.¹³⁶ Petition is an important tool by the members of the public in showing their dissatisfaction or if aggrieved by a decision of those in authority at the county government. Reflecting on development theory it is one of the internal processes of pressing governments to use the available resources in a sustainable manner to meet the basic needs of the citizenry.

County executives and the county assembly are obligated to engage members of the public in their counties, more so those that are likely to be affected by their decisions. Failure to observe this requirement entitles the public to petition to have such laws or processes quashed or removed. Petitions may be made to the county government organ, department or even to an individual depending on the point of dispute. When the Kiambu County Assembly failed to involve the public in formulating the Kiambu Finance Bill 2013, the High Court quashed the decision of the county government of implementing the budget without the public input.¹³⁷

The County Government Act under Article 88 grants the public the right to petition and challenge the county government on any matter in the county’s jurisdiction. Pursuant to Sections 15 and 88 of the County Government Act citizens have a right to petition the county assembly in any matter within its authority. This is in matters to do with legislation including repealing of

¹³⁶ Bryans G. (2009). Black’s Law dictionary 9th edition.

¹³⁷ Robert Gakuru and Others versus Governor Kiambu County & 3 others (2014) Eklr available at <http://kenyalaw.org/caselaw/cases/view/97000/> accessed on 12th March 2017.

any law. Further the County government is obligated to respond to citizens' petitions and challenges.¹³⁸

Public petition is provided for in all the three public participation Acts considered in this study. According to the Machakos County Public Participation Act, Petitions to the Machakos County Government are submitted to the county secretary, and then to the county executive committee. The Meru County Public Participation Act provides for petitions which provisions include the procedure, the consideration of the petition, and the process of publication of decisions and how the petitions shall be registered.¹³⁹ To ease the role of petitioning the county government the Meru Act provides for sample formats of petitions to both the assembly and the executive in the 1st and 2nd schedule respectively.

The Elgeyo Marakwet Public Participation Act is more pronounced when it comes to public petition. The Act provides that petitions should be submitted to the county secretary. Thereafter they are forwarded to the county executive committee or the relevant body for consideration. The Act also provides for the procedure of carrying out investigations. This is mainly through the body petitioned about or affected by the petitions. The Act specifically mentions the county executive or a committee appointed for a particular matter. The county secretary is obligated to communicate the decision to the petitioner within 14 days. The county secretary is also required by the Act to register petitions and maintain a county register of petitions.

3.2.8 Recognition and Affirmation of Special Interests and Groups

A question may arise in regard to who is supposed to be involved in decision making in form of public participation. Considering the previous discussion there are different structures and processes of public participation. However, all these require inclusivity of all stakeholders. The duty bearers must ensure that all those who are directly or indirectly affected by a decision or undertakings are involved in the public participation process. Such an effect may be having a positive or negative impact.

¹³⁸ County Government Act, section 89.

¹³⁹ Meru County Public Participation Act part V is on petition to the county assembly while part VI is on petition to the county executive.

The right to public participation may also be advanced through equality and group rights. The Constitution in Article 56 provides for the rights of minorities and marginalized groups. Similarly one of the County Government Act principles is that “county governments are obligated to protection and promotion of the interest and rights of minorities, marginalized groups and communities and their access to relevant information.”¹⁴⁰ According to Mbote, the principle of recognition and affirmation of special interests and groups is informed by the concept of equality and non-discrimination.¹⁴¹ Similarly, Article 27 and 81 of the Constitution in regard to the two-thirds gender principle should be observed and other special interests should be fairly represented. Equality relates to the dignity and worth of men and women, young and old, able bodied persons and persons with disabilities in their rights, interests, opportunities to participate in political, economic, social and cultural development and benefit from the results.¹⁴²

In regard to special interests, this study identifies women, youth, persons with disabilities and minorities as some of the special groups. Adopted by consensus in 1992, the United Nations Minorities Declaration in its Article 1 refers to minorities as based on national or ethnic, cultural, religious and linguistic identity, and provides that States should protect their existence.¹⁴³ According to Oloo, over the years, discrimination on the basis of gender has put women in the bracket of minorities (marginalized group).¹⁴⁴ This is because most societies, all over the world, have evolved through a patriarchal system which favoured males against their female counterparts.

Kakwenzire argues that women have been marginalised from their full participation in the integrated social, economic and political aspects of society.¹⁴⁵ Culture has played a big role in the marginalisation of women. Certain cultural practices, customs and traditions in different ethnic groups affect the full participation of women in social, economic and political aspects of

¹⁴⁰ County Government Act.

¹⁴¹ Mbote 2011.

¹⁴² Adjei A. (2010). ‘Customary Tenure Institutions and Good Governance’ International Federation of Surveyors <http://www.fig.net/pub/monthly_articles/september_2010/september_2010_arkoadjei_et_al.pdf> accessed July 5 2014.

¹⁴³ Reilly B. et al “Political Parties in Conflict Prone Societies: Encouraging Inclusive Politics and Democratic Development” <<http://i.unu.edu/media/publication/000/000/771/pb02-08-political-parties-in-conflict-prone-societies.pdf>> accessed on 15th April, 2014.

¹⁴⁴ Oloo A. (2007). ‘Minority Rights and Transition Politics’ in Peter Wanyande, Mary Omosa and Chweya Ludeki (eds) *Governance and Transition Politics in Kenya* (University of Nairobi Press).

¹⁴⁵ Kakwenzire J. ‘Preconditions for Demarginalizing Women and Youth in Ugandan Politics’ (1996): 293-311.

society. For instance, Kakwenzire argues that socialization of women, their social background and cultures in Uganda, as the case is in many African countries, do not prepare women to aspire for higher public responsibilities.¹⁴⁶ This kind of socialization makes it hard for men to accept the idea that they can share the same platform with women. In the event of scarcity of resources, men's demands are given priority; women are often denied educational, professional and economic opportunities. There are also denials of inheritance and property rights and discouragement or refusal of women to take part in public and social life. The Constitution of Kenya, 2010 took recognition of these historical injustices and has provisions to cater for these special categories as marginalised groups in Article 100. This therefore means that men and women, able bodied persons and persons with disabilities, young and old should be given opportunities in public participation processes and structures in county governance without unreasonable conditions.

The Constitution of Kenya in Article 54 recognises the need to protect and recognise persons with disabilities “with special opportunities and treatment in the political, social and economic sectors.” The county public participation guidelines recommend that public participation forums organizers should choose venues and means of engagement that pay attention to the unique needs of persons with disabilities.

Close analysis of the Public Participation Acts of the three counties reveals that all the Acts require inclusivity in the stakeholders for public participation. This can be interpreted in conjunction with the Constitution and other relevant laws to mean recognition and inclusion of persons with special interests. Meru County Acts requires representation of special interest groups in the public participation advisory committee. Section 25 of the Elgeyo Marakwet Public Participation Act provides for affirmative action programmes in regard to the minorities and marginalized groups. Similar provision like that of Elgeyo Marakwet law is in section 8 of the Machakos County Public Participation Act.

3.2.9 Media and Civil Society Organization (CSOs)

Referring to the discussion above on the right to information, the consensus is that information may be disseminated using any method as long as it reaches the intended people. In most cases

¹⁴⁶ Kakwenzire J. (1996).

media is the main channel applied in disseminating information. This requires media to be independent so that it can deliver such messages without any form of influence or bias. Article 34 (1) of the Constitution of Kenya, 2010 guarantees this freedom and independence. The Article prohibits the interference of the state in the broadcasting, circulation and production of any publication. The media has also offered a platform for mass civic education and informing the public in matters of governance.

With advancement in technology it is also possible for leaders to engage the citizens on new forms of online communication like twitter, facebook, whatsapp among other methods. This is one of the recommendations made under the county public participation guidelines.

Further CSO may be used to enhance public participation in the county governance. CSOs have been applied positively in educating and sensitizing the public on their rights and avenues to demand service delivery from their leaders.

CSOs have also played a big role in the participation of special interest groups in political leadership. Beyond engagement in civic education CSOs are instrumental in public interest litigation cases and petitions where rights and interests of citizens and certain special groups are infringed. Section 21 of Machakos County Act requires use of media in promoting public participation.¹⁴⁷

3.2.10 County Referendum

The County Government Act provides for processes like county referendum that should be invoked by allowing universal suffrage in respect to local matters.¹⁴⁸ Pursuant to the Act at Section 70 “a county government may have a local referendum in situations where a petition has been made and duly signed by at least 25 percent of the registered voters in that county.” Some of the issues that may be attended through referendum by virtue of that section are county laws and petitions or planning and investment decisions affecting the county. A referendum though

¹⁴⁷ Machakos County Public Participation Act.

¹⁴⁸ County Government , section 90.

expensive in nature remains the best process of upholding democracy in decision making. The three counties legislation on public participation do not provide for referendum.

3.2.11 Monitoring and Evaluation of Public Participation

There is need to assess the implication of public participation in matters of county governance. It is through monitoring and evaluation that it may be understood whether the concerns raised by the members of the public are considered in decision making.¹⁴⁹ It is through evaluation that it can be determined whether the public was involved at all the crucial levels of decision making. County governments must develop clear frameworks to evaluate the conduct of public participation. County public participation guidelines require monitoring and evaluation reports to be published and availed to the public.

The conveners of public participation must also give feedback to the public. Roberts argues that it is only through such feedback that they may know how their participation shaped governance decisions.¹⁵⁰ Further they may also get to know why some of their recommendations may have not been considered. It is through assessment that citizens will be able to determine the effectiveness of public participation processes and structures. This will enable development of measures and mechanism for mainstreaming public participation activities.

This study noted that county governance lacks tools, mechanism and capacity to conduct monitoring and evaluation processes. County Public Participation guidelines recommend use of “survey, focus group discussions, meetings with the public and use of external assessments processes to enhance meaningful participation of the citizenry in matters of governance.”¹⁵¹ Although reports are not part of monitoring and evaluation they provide an important avenue of assessing public participation activities. The County Government Act requires the county governor to submit an annual report to the county assembly on citizen participation in the affairs of the county government.¹⁵² The three Acts on public participation in the County government considered in this study provide for a reporting and evaluation system. The Machakos County

¹⁴⁹ Yang K. & Kallahan K. ‘Assessing Citizen Involvement : Efforts by Local Government , Public Performance and Management Review (2005) 29(2) Public Performance and Management Review 191.

¹⁵⁰ Roberts N. (2015). *The Age of Direct Citizen Participation*. Routledge.

¹⁵¹ County Public Participation Guidelines 2016, part five.

¹⁵² County Government Act Section 92.

Public Participation Act provides a reporting framework and feedback to the citizens.¹⁵³ The Act further provides that the county government is obligated in giving feedback to the citizens on their input and how it was included in the policy.¹⁵⁴ However the Act does not give express monitoring and evaluation processes of public participation activities. It provides that oversight of public participation is to be done by county executive committee member who may not have an independent position.¹⁵⁵ The Meru County Public Participation Act provides for preparation of an annual report on public participation and its contents.¹⁵⁶ Just like its counterpart of Machakos County, Meru County Public Participation Act does not provide for monitoring and evaluation processes. Elgeyo Marakwet county Act provides that the office of public participation is responsible in facilitating development of an evaluation framework to public participation plan.¹⁵⁷

3.2.12 Other Measures to Enhance Public Participation

There are other measures and processes that may be employed in enhancing public participation other than those discussed above. These measures are provided within and outside the existing legal framework. Scholars have given such examples that may be employed. Further it is important to note that the success of a public participation process may be affected by resources allocated to the process. Inadequate allocation of resources to the process may affect its effectiveness. The Elgeyo Marakwet Public Participation Act provides for a separate budget on public participation. Meru and Machakos Counties provide for expenses of public participation to be within the normal county budget. County Public Participation Guidelines developed at the national level propose that counties use up to 1% of their budget in public participation.

Beyond this scholars have given examples on how citizens can be engaged in matters of governance and in decision making. For example Sihanya, suggests a method of getting the views of a sample of the public in form of public opinion. Though public opinion may not actually give a representative position, in some cases it may be accurate. The use of media which

¹⁵³ Machakos County Public Participation Act Section 18.

¹⁵⁴ Machakos County Public Participation Act section 4 (d).

¹⁵⁵ Machakos County Public Participation Act section 17.

¹⁵⁶ Meru County Public Participation Act section 24.

¹⁵⁷ Elgeyo Marakwet Public Participation Act Section 8

includes social media is one of the forms in which opinion polls can be carried out.¹⁵⁸ In Kenya for example, TV as well as radio stations carry out such opinion polls on several issues. Mercy Corps argues that citizens call in and ask questions which are then responded to by their politicians.¹⁵⁹ Prof. Sihanya, also proposes Market research as entities to be employed.¹⁶⁰ These are researchers that contribute significantly by reporting the public opinion on various matters.

3.3 Comparative Experience on Public Participation

In order to have an in-depth understanding of public participation in matters of governance at devolved levels, this study carried out a comparative analysis. Countries discussed in this study are USA and UK to give an outline of public participation at devolved levels of countries outside Africa. USA is chosen for its continued practice in democratic governance and its role in public awareness processes in state governance. UK is selected as one of the country that has entrenched governance through public participation without detailed legal framework. South Africa and Tanzania are also discussed to give an insight of countries in Africa. South Africa is one of the most liberal countries in Africa and has made great strides in democratization process. It has also made great progress in enacting and creating public participation processes at the municipal level. Tanzania has provided a good platform for engaging citizens at the local level. It has also demonstrated that involving the members of the public can be an important tool in alleviating poverty and improving people lives. It is noteworthy however; that these countries public participation framework and processes do not represent the situation in the regions mentioned but have been selected for comparison purposes only. Further there are differences in governance structures in these countries as they have different system and structures of government. Therefore the extent of discussion also differs as the researcher only considers right to public participation in the local levels.

The modern democracy is that public participation is part and parcel of good governance. In some jurisdictions as the case is in Kenya public participation is a constitutional right. Overtime public participation has become a central principle of public policy making in democratic

¹⁵⁸ Sihanya B. (2013).

¹⁵⁹ Guide to Good Governance Programming Mercy Corps

<<http://www.mercycorps.org/sites/default/files/mcgoodgovernanceguide.pdf> > accessed July 28 2014.

¹⁶⁰ Sihanya B. (2013).

governance. Scholars have attributed this as participatory development through people centred decision making.

South Africa has a legal framework that provides for the inclusion of the members of the public in governance at the local levels.¹⁶¹ This is protected and provided for under their 1996 Constitution, the Municipal Structures Act, 1998, the Municipal Systems Act 2000, Municipal Finance Management Act 2003 among others. Just as the case is in Kenya, the South African Constitution 1996 provides a bill of rights that embraces ideals of democracy and commitment to public participation.¹⁶² Contrary to Kenyan system where local level governance is through county governments, in South Africa the Municipal Systems Act provides for an important role of public participation in the governance of local authorities. It further requires local authorities to create an enabling environment for participatory governance.

The legal framework in South Africa thus provides a strong participatory local democracy and ward committees. Ward committees established in the municipality play a major role in informing the government about the needs, aspirations, and problems of the public.¹⁶³ Similarly the County Government Act in Kenya as discussed earlier requires counties to create decentralized levels of governance including at the ward level. Some county legislation in Kenya like Meru County provide for creation of an office of public participation. Such provision in South Africa is in section 16 of the Municipal Systems Act which provides a useful role of the office of the municipal manager in disseminating information regarding public participation to the local community. Further the Municipal Systems Act requires the municipal manager to invite people to discuss an annual report and thereafter avail copies of the report to the citizens. This is important as the citizens will be able to check whether their inputs were considered and if not ask questions as to why they were sidelined. The municipal manager is further mandated to notify and involve the public in matters to do with adoption of an integrated development plan, capacity building and regulatory framework in budgeting process.¹⁶⁴ This study notes that this

¹⁶¹ Kauzya J. (2007). Political Decentralization in Africa: Experiences of Uganda, Rwanda and South Africa. *Discussion Paper*. New York: United Nations Department of Economic and Social Affairs.

¹⁶² Constitution of the Republic of South Africa, 1996.

¹⁶³ Municipal Systems Act, 2000 section 17.

¹⁶⁴ Municipal Systems Act.

office as constituted in South Africa and as structured in some county legislations plays an important role in coordinating public participation activities at the local level.

The state of South Africa has also developed Thusong Service Centres and Youth Advisory Centres as programmes of involving youth and also informing the public about governance issues and programmes. Such centres and programmes are not provided in the Kenyan county government public participation structures. Therefore, this study finds it as an important structure that ought to be incorporated in the county government public participation processes.

The South African regulatory framework requires that a budget be tabled by the end of March of each year.¹⁶⁵ This means that there are three months for the public to be put across their inputs before the budget is ultimately adopted. The duration for publicising draft budget provided by most county legislations in Kenya is duration of one month.

An annual monitoring, measurement and review mechanism of municipal performance is available in South Africa.¹⁶⁶ It is mandatory for the municipal executive mayor and executive committee to submit these assessment reports to the municipal council. Due to some differences on the management of local governance, the system of reporting provided in county legislations in Kenya are a bit different as the reports are made to the county assembly and the executive or as provided by such legislations. The Municipal Finance Management Act in South Africa further requires performance agreements be communicated to the public.

In order to strengthen public participatory governance at the local level in South Africa the Municipal Systems Act requires that those people who cannot write are assisted in putting across their views.¹⁶⁷ This is in line with recognition of all persons especially persons with disabilities. Public participation processes in Kenya are supposed to be open and accessible by all persons likely to be affected by decisions to be made by the county governments including persons with disabilities. Finkel argues that public participation in South Africa has also been credited by use of civic education as a tool in training the public in governance matters.¹⁶⁸ These are some of the

¹⁶⁵ Municipal Finance Management Act Section 42 (5)

¹⁶⁶ Municipal Systems Act Section 41.

¹⁶⁷ Municipal Systems Act section 21 (4).

¹⁶⁸ SE Finkel Civic Education and the Mobilization of Political Participation In Developing Democracies (2002) 24 (4) The Journal of Politics 994- 1020.

processes that county governments ought to incorporate in order to have proper public participation.

Decentralization in Tanzania has been undergoing reform among other objectives one being to increase participation by service users in decision-making processes.¹⁶⁹ This is different from Kenya where decentralisation was brought by the 2010 Constitution and adopted within a short span after the 2013 general elections. In Tanzania participatory development at the ward level is promoted through ward development committees created under the Tanzania District Authorities Act and the Urban Authorities Act. This process is similar to Kenya county government provisions in the counties considered in this study as well as in South Africa municipal level. Similar to South Africa, Tanzania has a regulatory framework for the budgeting process.¹⁷⁰ Public participation in budget making in Tanzania is evident in the bottom-up budgeting approach where ward representatives play an important role in mobilizing the public.¹⁷¹ The county government public participation legislations in Kenya to the contrary provide for a top-down approach. As stated earlier, Tanzania's ward development committee is the body mandated to spearhead public participation. These committees initiate and promote participatory development.¹⁷² The Kenyan situation is that public participation is supposed to be carried out through established county government structures though some counties have established an office of public participation.

Section 86A of the District Authorities Act in Tanzania requires local councils to establish service boards that give residents a say in influencing decisions in service delivery. This is similar to requirement of involving cities and urban residents as provided in the Cities and Urban Areas Act. Further citizens in Tanzania are given an opportunity to influence service provision by joining decision makers like in health committees and school boards. In addition every adult resident in a specified local set-up has an opportunity to participate and discuss local governance issues pursuant to Policy Paper Local Government Reform of 1998.

¹⁶⁹ Masanyiwa Z., Niehof A. & Termeer C. Gender Perspectives on Decentralisation and Service Users' Participation in Rural Tanzania. (2014) *The Journal of Modern African Studies*, 52(01), 95-122.

¹⁷⁰ Local Government Authorities Act no. 7 of 1982 laws of Tanzania.

¹⁷¹ Local Government Authorities Act.

¹⁷² Local Government Authorities Act.

According to Masanyiwa, Niehof & Termeer there are participatory poverty assessment projects carried out in Tanzania in large scale and have been used in identifying priorities of the common citizen and in strengthening capacity of local government staff in enhancing participatory governance.¹⁷³ However a challenge has been noted where many councillors who are supposed to adhere to participatory governance have very poor educational qualifications. This hinders their meaningful contribution to discussions and in taking the views of the citizens.¹⁷⁴ This is the case with a sizeable number of citizens who find it difficult to raise their priority issues affecting them. Though educational requirement is one of the qualifications for one to vie for representative position in Kenya, the same has not been implemented in the past elections. Borrowing from the Tanzania challenge it would be important to put the provision in practice to enhance meaningful public participation.

Public participation in the UK is a principle that all levels of government have to observe in building citizen and stakeholder engagement in policy-making processes.¹⁷⁵ The approach of public participation in UK is different from Kenya in that the system in Kenya is a mandatory requirement of law as opposed to UK where it is a matter of practice. The methods and processes employed in UK include large-scale consultations, focus group research, online discussion forums, or deliberative citizens' forums. Such processes have not been provided by county legislations in Kenya although they are recommended by County public participation guidelines. The structures provided in county legislations have not adequately provided for processes like focus group discussions and online discussion forums. It has been observed that in UK, all levels of government have built citizen and stakeholders' engagement into their policy making processes. As stated earlier this is done mainly through large scale consultations, focus group research, online discussions forums or deliberative citizen journals.

In the US there are many different public participation mechanisms and processes. Advisory Commission on Intergovernmental Relations reports that citizen participation in USA is deeply

¹⁷³ Masanyiwa Z., Niehof A & Termeer C. (2014).

¹⁷⁴ Devas N. and Delay S. 'Local Democracy and the Challenges of Decentralizing the State: An International Perspective' (2006) (32) 5 *Local Government Studies* 677.

¹⁷⁵ Nabatchi T. & Leighninger M. (2015). *Public Participation for 21st Century Democracy*. Hoboken, New Jersey: John Wiley & Sons, Inc.

entrenched.¹⁷⁶ Unlike in Kenya where public participation has been introduced by 2010 Constitution, the right to public participation has been part of the First Amendment of the US Constitution since 1794. For example, in USA public participation in administrative rule making is a process by which proposed rules are subject to public comment for a specified period of time before they are passed. Further, Rimmerman has demonstrated that public participation in the US takes different perspectives like citizen groups, committees and special interest groups among others.¹⁷⁷ This approach is similar to that employed in UK. Close analysis reveals that the right to public participation in the US is mandatory for rules that are formulated by executive agencies of the government. This is similar to the situation in Kenya where public participation is now a requirement in decision making. The nation has enacted statutes and policies that provide for mandatory public hearings. Public hearings have continuously been the main form of public participation partly because the process is open to the public and participants voluntarily avail themselves.

Roberts assertion is that public participation is more frequent at local levels in USA, but there still exist strong mechanism at the state level. At the state level federal structures are used in incorporating citizens' views in their operations.¹⁷⁸ According to Rimmerman there is free exchange of information between citizens and their elected or appointed leaders.¹⁷⁹ This is not the case in South Africa and Tanzania where exchange of such information is mainly a requirement in law. There are well defined procedures in local ordinance and state law for encouraging citizens to participate in decision making. It is also common to have advisory votes in some states and local levels in US. For example, Gilman provides that aldermen and city counsellors in Chicago and New York have used their powers in creating participatory budgeting processes.¹⁸⁰

¹⁷⁶ Advisory commission on Intergovernmental Relations, Citizen participation in the American Federal system (B3), In Brief Washington, DC 20575, 1979. Available at <http://www.library.unt.edu/gpo/acir/Reports/brief/B-3.pdf> accessed on 8th December 2016

¹⁷⁷ Rimmerman C. (2010). *The New Citizenship: Unconventional Politics, Activism, and Service*. Westview Press.

¹⁷⁸ Roberts N. (2015). *The Age of Direct Citizen Participation*. Routledge.

¹⁷⁹ Rimmerman C. (2010).

¹⁸⁰ Russon-Gilman, Hollie. Transformative Deliberations: Participatory Budgeting in the United States. (2012) *Journal of Public Deliberation* 8(2): Article 11 accessed on 14th April 2017 at <http://www.publicdeliberation.net/jpd/v018/iss2/art11>.

To enhance effective public participation in South Africa legislation has clearly stated that municipalities should delegate some of its powers and duties to ward committees.¹⁸¹ This is an important lesson where county governments should adopt similar establishment to enhance meaningful public participation. Close analysis of public participation processes and structures in other jurisdictions shows that public forum is widely used as a public participation tool. County governments can also strengthen public forum by enhancing public participation at the village level as the case is in Tanzania. Such forums should be open to every adult person who is willing and likely to contribute in discussing matters that affect them. This explains partly why the process has remained dominant in US as it is open to the public and participants are not selected.

The office of municipal manager created in municipalities in South Africa is designed to play an important role in public participation. Similarly county governments in Kenya should borrow leaf in regard to such an office. Counties like Meru and Elgeyo Marakwet that have created the office of public participation should utilize them for meaningful involvement of the public. An office of public participation plays an important role in coordinating and managing public participation affairs at the local level.

Public participation mechanism in budget making in South Africa gives the members of the public adequate time to read, review and analyse a draft budget before it is passed. As stated earlier the systems require a draft budget be published three months before it is passed. Further to enhance equality and freedom from discrimination in decision making counties should create mechanisms like assisting those who cannot be able to air their views in meaningful manner. For example Section 21 (4) of the Municipal Systems Act of South Africa requires those who cannot put their views in writing to be assisted in doing so.

It is also important to conduct referendum in cases of important matters within counties to enhance the will of the people. Although this is an expensive process, it has successfully been employed in US where some states give an opportunity to all adults through direct balloting in some public policy issues. It is therefore important for county governments to invoke section 70 of the County Government Acts and conduct referendum whenever it deems necessary.

¹⁸¹ Kauzya J. (2007).

3.4 Conclusion on Structures and Processes of Public Participation

With these significant legal provisions on public participation the question that needs to be addressed is to what extent citizens can participate in decision making and their voice be heard and considered in county governance. Review of structures and processes available in the counties considered reveals that there is inadequacy of opportunities and facilitation on public participation. Important lessons that need to be borrowed is on establishing institutional mechanisms like the office of public participation with the mandate to coordinate and ensure there is meaningful public participation in the county. Such an office should also be free from interference from the county executive and county assembly when they are conducting public participation and providing their recommendations. Counties should explore creating an enabling environment where the public will come in as partners in decision making.

There is also need to educate the public about the structures and processes available for public participation in county governance. Majority of citizens are not aware about these processes. Counties should consider employing technological methods of communication like social media. As proposed by the County Public Participation Guidelines citizens must be informed about their recourse as regards dissatisfaction with their leaders. Public participation should not be only to adhere to constitutional requirement but as a way of addressing citizens concerns in decision making.

Counties that have not legislated on public participation laws should urgently legislate on the same. In so doing they should borrow best practices on structures and processes from various counties and also adopt some from other jurisdictions. The structures ought to be easy to understand by the common man. The ultimate aim being to have effective county governance geared towards participatory arrangements capable of solving citizens' problems and enhance wellbeing of all.

CHAPTER FOUR

CONCLUSION AND RECOMMENDATIONS

4.0 Introduction

This chapter provides a conclusion and recommendations on the right to public participation in county governance in Kenya. The study aimed at examining the right to public participation in devolved governance in Kenya. A summary is developed and a conclusion is made in regard to the findings of the study. Thereafter the researcher employs the conclusion to develop appropriate recommendations to enhance meaningful public participation in the county governance.

4.1 Conclusion Drawn from the Study

This study was carried out with the objective of examining the right to public participation in devolved governance in Kenya. The researcher therefore examined the legal framework and gaps relating to the right to public participation in county governance in Kenya. The study also investigated on laws and policies on public participation and their effectiveness in county governance. The study further carried out a comparative study on how the public is involved in matters of local governance in other jurisdictions. This helped to develop recommendations on the legal and policy framework suggested in this chapter. The suggested recommendations are not exhaustive but are taken to be appropriate in enhancing effective public participation in devolved governance in Kenya.

This study revealed that right to public participation enhances good governance and is protected under national and international law. The Universal Declaration of Human Rights provides for the rights of “citizens to take part in the government of their country, directly or through freely chosen representatives.” Such provisions are also emphasized in the International Covenant on Civil and Political Rights and the Declaration on the Right to Development. Similar provisions on the right to public participation are also found in the African Charter on Human and Peoples Rights and the African Charter on Democracy, Elections and Governance. These instruments

coupled with others have placed obligations on states to develop laws and policies directed towards achieving participatory government.

The Constitution of Kenya in Article 174 among others provides for the “powers of self-governance by the people and enhances participation of citizens in the exercise of powers and decision making in the county governments.” Similarly the Constitution under Article 184 states that “residents must be involved in the governance and management of urban areas and cities.” To enhance public participation the national parliament has enacted three important laws to guide the county governments. These legislations are the County Government Act, the Public Finance Management Act and the Urban Areas and Cities Act. The Urban Areas and Cities Act provide that residents of urban areas and cities must be involved in planning, development and management of such areas. The County Government Act provides an avenue to improve service delivery and is aimed at enhancing use of resources for developmental actions. The Public Finance Management Act requires participatory governance on the administration and use of public finance.

Based on the findings of this study, it is evident that the Constitution intended well by providing for the right to public participation in county governance. Similar provisions are in international instruments and other national laws as discussed in chapter two. According to the literature reviewed, participatory governments enhance legitimacy by giving citizens an opportunity in making decisions affecting their lives. It is important to point out that this study established that public participation in decision making and policy implementation is an important principle in democratic governance. Many scholars like Nabatchi suggest that participatory governance helps those in governance to advance development and well being of citizens. Citizens help frame important decisions and policies that can be employed in solving problems and issues affecting the society. Leonard sees participatory democracy as a human right as it encompasses the right to self-determination. However this study found that counties have not adequately provided for meaningful public participation. This study reports that this principle of public participation can be well protected within a legal framework.

As Pieterse argue, desirable solutions to development issues involve dissolution of old regimes and adoption of democratic institutions and practices. This is the reason why the 2010 Constitution of Kenya introduced the devolved system of governance.

As the Constitution provides, the aim of devolution is to give powers of self governance to the people. In addition, Article 1 (2) of the Constitution provides that “people may exercise their sovereign power either directly or through their democratically elected representatives.” Whichever the case, good governance requires that the members of the public be involved in decision making. That is the reason why Article 10 of the Constitution specifically states that participation of the people is one of the national values and principles of governance. This is in agreement with Sihanya’s assertion that citizens retain the right to participate in and oversee the decision making and representation process. Scholars have suggested that participation offers solutions to some of the challenges facing the society.

The importance of legislating on public participation is to enable county governments achieve public participation at county level as required by the Constitution. This study revealed that it is only three counties that have legislated on public participation within the constitutional framework. These counties are Meru, Elgeyo Marakwet and Machakos counties. Although the three counties legislated on public participation without the guide of a national policy framework on public participation, this study found it important to amend such laws and incorporate important structures and processes recommended by the guidelines. Close review of the guidelines reveals that they create standards of public participation that counties should strive to achieve for meaningful and effective participation.

Analysis of the Machakos, Meru and Elgeyo Marakwet counties Public Participation Acts reveals that different definitions of public participation are provided. A challenge with the definition with the Machakos County Public Participation Act is that it confines the definition of “public participation” to sector representatives while that of Meru and Elgeyo Marakwet refer to public participation as applying to the general citizenry. This study found that meaningful public participation is a participation that engages the members of the public without restrictions or any form of discrimination.

Public participation is important as it encompasses democratic governance and enhances effectiveness in governance and legitimacy in service delivery. This study found that public participation at the county level is not as effective as contemplated by the Constitution. Counties have not done much in developing legal frameworks geared towards meaningful public participation. Majority of the counties did not enact public participation laws within the constitutional timeframe. Also the three that enacted such laws did not provide for strong structures and processes to enhance public participation. For example, the Machakos County Public Participation Act tries to shift the focus of participation of citizens by narrowing it to sector representative. In addition the Act provides for coordination of public participation activities within the county government structures and organs.

The other important aspect discussed in this study is in regard to the financial implication of public participation activities. Elgeyo Marakwet has clear financial provisions for public participation. However Meru and Machakos place the budgetary implications of public participation under normal budget operations. This is contrary to the county public participation guidelines that recommend that the public participation budget should be up to 1% of the total county budget. It is important for the other counties legislating on public participation laws to include such a proposal. For those counties that have already legislated on public participation laws, they should consider amending their laws to make citizens involvement more meaningful.

Another weakness noted in the Machakos County Public participation law is its institutional framework on public participation. The Act fails to provide an office to coordinate and manage public participation in county governance. Instead it leaves this process to be carried out within the departments and organs established in the county. An important aspect to the Meru and Elgeyo Marakwet counties public participation laws is that they create an office of public participation. The Elgeyo Marakwet public participation office has a model that places citizens at the centre of public participation activities. In Meru County the public participation office is located within the county assembly service. To support the functioning of the office of public participation in Meru the participation Act creates a county Public Participation Advisory Committee.

Public petitions are provided for in the Elgeyo Marakwet, Meru and Machakos County Public Participation Acts. This was found to be an important process by the citizenry when a wrong has been committed or threatened to be committed. Petitions enable citizens to show their dissatisfaction if aggrieved by decisions of those in authority at the county government. The study recognizes the importance placed on the process of petition by the three counties that have legislated on public participation.

Similarly the three Acts provide for citizen fora. However, how the forums are conducted varies. The challenge, for example is that forums are conceived as an annual activity in Machakos County and a quarterly activity in Meru and Elgeyo counties. Studies carried out revealed that public forums though costly and time consuming they are more meaningful with respect to the right to public participation. Regular forums provide a probability of engaging a larger number of people. Legal frameworks must clearly stipulate how such forums are convened, how deliberations are made, how consultations and the outcome of such forums are recorded. There must be elaborate mechanisms on how contributions made in such a forum influence decision making in county governance.

Reporting and evaluation of public participation is provided for in all the three Acts analysed. This is important as it gives the county government and the public an opportunity to assess the effectiveness of the public participation processes. It allows for documentation of the public participation process, learning and informing future decision-making. Efforts made by counties by legislating on public participation face major challenges on evaluating meaningful participation.

Dissemination of information in regard to public participation is also important in county governance. It is a constitutional right protected in Article 35 of the 2010 Constitution of Kenya as well as in the Right to Information Act. As the Act states, members of the public must be notified in regard to all matters and policies affecting them to be undertaken by the county governments. This is in agreement with Sebugwago's assertion that citizens should be allowed to attend public meetings and freely obtain information on what happens in public offices, and who makes what decisions and why. Further, notices in regard to public participation activities must be communicated in time and with sufficient content in regard to the public participation process.

Timely access to information is intended to lead to greater and more meaningful participation. The three Acts discussed in this study emphasize the importance of access to information in regard to public participation as required in the Constitution. However the provisions are not adequate with respect to the form and content of information to be given out in regard to public participation.

The County Government Act provides that counties should create ICT platforms for public participation. Similar recommendations are made in the county public participation guidelines. Although the County Government Act does not provide the structure and design of this platform, county governments should come up with designs that are suitable for their counties' needs and interests. The county public participation guidelines offer a wide range of means and methods of informing the citizens about public participation. The guidelines propose use of technological advancement facilities like social media.

Public participation legislations discussed in this study do not provide for the referendum process. Referendum is however provided for in the County Government Act. The provision grants citizens in the counties an opportunity to participate in decision making through a local referendum in situations where a petition is made and duly signed by at least 25 percent of the registered voters in a county.

The fact that only three counties have legislated on public participation within the constitutional framework shows that counties are not serious on the right to public participation. The slow implementation of constitutional obligations on public participation as mandated shows that county governments are not ready to provide an environment where members of the public actively participates in decision making and in governance processes in general.

The study further revealed that majority of the county governments has not established well-designed public participatory legal frameworks and policies. In addition some frameworks have not been operationalised and some are ineffective. Challenges in other counties failing to legislate within the constitutional timeframe may be attributed to lack of political goodwill and selfless leadership.

From the discussion on public participation in county governance although majority of participatory processes are initiated from the county government structures it is also evident that a process like petition emanates from the citizenry. Petition is available when citizens are left out in decision making and when formulating policies.

The study also noted that there is lack of participatory innovations in creating structures and processes that may enhance effective participation. For example Machakos County has not created a framework for understanding the institutional possibilities for public participation. The county does not create an office to coordinate public participation in the county. Instead it opts to leave the process to be carried out by the structures and departments in the county government. According to Nabatchi good governance requires effective and fair legal frameworks. This is the case in South Africa that mandates the municipal manager to coordinate and manage public participation activities. The manager is obligated to notify and involve the public in adoption of an integrated development plan, capacity building and regulatory framework in budgeting processes.

Frameworks adopted by counties should be designed in a way that all members of the public have an opportunity and are in a position to participate in decision making. This means that the legal framework on public participation should also put into consideration special interest groups including minority and marginalized people. In instances where it is not practicable to engage all members of the public, counties should use focus group discussions, and engage citizen advisory committees or even media and civil society organisations.

It is also important for county governments to develop frameworks on sensitizing the public in matters that relate to public participation. This study established that the right to public participation can only be realized in county governance only if the citizens are informed and awakened on this constitutional right. Training on the public and persons responsible for enhancing public participation has been employed in South Africa where Thusong Service Centres and Youth Advisory Centres have been developed as programmes of involving youth and informing the public about governance issues and programmes.

In terms of legal framework, there is some progress in some counties on involvement of citizens in county governance. However this implementation is slow based on the fact that it is only three counties that have legislated on public participation laws within the constitutional timeframe. Sadly these three counties have not established meaningful structures and processes for enhancing effective public participation as discussed earlier.

Public forums have been found by this study to be an important process of engaging citizens. Counties should devise ways of designing public participation forums. More importantly there should be sufficient communication in regard to these forums. This is to say that the office or department responsible for managing and coordinating public forums should give members of the public notice in good time of the venue, issues, time and date when the forum is to be held. Also important is the information to do with kinds of participants; when and how to participate and modes of addressing issues.

Although public forums are the main form of involving citizens in public participation, there are numerous other forms as discussed in chapter three. These structures include participation in budget processes, participation in planning, focus group discussions, citizen advisory committees and recognition of special interest groups. As discussed some of these structures and processes are found in the three public participation legislations of Meru, Machakos and Elgeyo Marakwet counties.

In order to have meaningful engagement with citizens, persons responsible in handling public participation activities should be clear about the intention of convening citizens' forums. Meru County has created citizen forums advisory committees to ease the process. Sihanya suggests that a small group may be selected to give views of various groups or communities in matters of governance. Ward development committees in Tanzania have helped in prioritizing the needs of the members of the public thereby helping in alleviating poverty.

The design of involving the public should have a clear structure that envisions a clear path from the intention and purpose of involving public, to the actual engagement and the outcome of the engagement. This is in agreement with Andrews assertion that public participation processes

should be designed in a way that outcomes are meaningful to participants. This in turn motivates the public to continuously engage those in leadership and also legitimizes the decisions taken.

This study also found that for there to be real public participation, citizens must come out to support institutions and processes put in place to enhance public participation. Counties can create groups or sector representatives for linking with the larger public whenever need arises. The Meru County Public Participation Act strengthens this by creating citizen forum advisory committee. Such process and institutions have been provided for in jurisdictions like South Africa and Tanzania. Citizens in Tanzania are given an opportunity to influence provision of services by being part of the decision makers through groups like health committees and school boards.

Also in public forums there should be deliberative, consultative and actual debates as opposed to speech sessions followed with questions. To enhance these, jurisdictions like the UK applies focus group research and online discussion forums. It is mandatory in the US to subject mandatory rules by the executive and administrative rules to public comment within a reasonable timeframe. The county public participation guidelines recommend that conveners of public hearings must give participants adequate and reasonable opportunity to participate in deliberations.

Literature reviewed reveals that public participation is an important principle in achieving good governance and legitimizes decisions taken by governments. A challenge noted as to why majority of the citizens do not participate is lack of clarity on the processes and insufficient information on policies and decisions being made by county governments. This study found out that greater citizen participation can be applied to reverse this and help in achieving valuable in governance.

The major weakness with county legal frameworks on public participation is that the framers purposes is to comply with the constitutional requirement but are not interested with the spirit and interests behind such participation. Counties must therefore devise participatory innovations aimed at effective governance. This will go a long way towards legitimizing government actions and improving service delivery and well being of citizens.

4.2 Recommendations

Recommendations in this study are given in regard to laws, policies and administrative decisions that need to be taken to enhance the right to public participation in county governance. It is important to note that the recommendations are not conclusive but are a stepping stone in enhancing the right to public participation. They are recommendations on meaningful county public participation legislation, amendments, implementation and practical enhancement.

The starting point is enactment of county legislations on public participation by counties that have not yet legislated. In doing so counties should not shy away from creating effective structures, design and processes that will enhance meaningful public participation in matters of governance and decision making in the county. County governments should borrow best practices from jurisdictions like South Africa and the US and improve on their systems and processes. Further county government should consider the full menu of design and choices provided for under the county public participation guidelines for engaging citizens.

In addition counties that have not legislated should adopt important structures and processes like the office of public participation as provided in the Elgeyo Marakwet and Meru counties laws. Establishment of such an office through the legal framework will enable counties coordinate and manage public participation activities. Counties that have legislated on public participation laws without such a body like Machakos should consider amending their legislations to pave way for such an office. In addition for effective functioning of the office of public participation it ought to have some independence in its operations.

This study recommends that county governments should employ benefits of engaging citizens as one way of dealing with governance issues and challenges that face their governments. County governments should formulate structures and processes on public participation that enhance meaningful participation of the public. These structures must clearly state who participates, how they participate and the effect of their participation. This study recommends deliberative and consultative citizen forums in policy areas like education, health care, fiscal and budget process among other areas.

There should be mechanisms for monitoring and evaluating public participation processes in the county government. The annual monitoring and measurement mechanism in South Africa plays an important role in evaluating public participation in local governance. As provided earlier establishment of the office of public participation will coordinate such monitoring and manage the process including preparation of an annual report. It is through such mechanisms that the public will be able to know whether their contributions influenced decision making and if not why their concerns were not taken into consideration.

Counties ought to be innovative in developing public participation processes and structures. However the study revealed that the forms of participatory innovation that may be employed by counties are not suitable for all. They differ from the diverse needs in various counties. Thus counties should develop the most suitable tools and processes depending on the intended purposes. For example in budgeting processes jurisdictions like South Africa use a top-down process of engagement in local governance. However Tanzania employs bottom-up budgeting approach where ward representatives play an important role in mobilizing the public.

As recommended earlier, immediate drafting and adoption of public participation laws in counties that have not legislated should be on their priority agenda. As this is being carried out counties should consider adopting recommendations made in the county public participation guidelines. This will minimize chances of variation in the meaningfulness of public participation in devolved governance in the country.

Instances when referendum may be conducted in the county should be clearly provided in a legal framework. Referendums should be held whenever important decisions or policies are being taken that affect all the citizens in that county or majority of the populace. It is noteworthy however that due to the cost implication and demands that go with such a process referendum should be used as the last option and in rare occasions.

Counties must provide for a framework detailing how and who participates in public participation processes. As discussed earlier the provision of participants must be framed in a way that every person who is to be affected or likely to be affected by a decision or policy has an opportunity and is free to give his/her contribution. Further there should be equality and non-

discrimination in such activities. There should be recognition of special interest groups like women, youth and persons with disabilities.

There should be creation of a platform in which matters that require public participation is communicated effectively and in time. Counties can make clear provisions on the person who is responsible for such communication like in South Africa where the municipal manager is obligated to oversee such a process. The system of communication chosen should be in line with the intended public. For example for the case of the general public communication bodies responsible for informing the public can use public address fitted on vehicles going round the county informing the public. This can be reinforced by announcing through print media and local radio stations and television. In this era of technological advancement, counties ought to create management information system and also establish online systems of communication. The most suitable method of communication especially for young people would be through the social media.

In budgeting process, members of the public should be notified in time and information containing budgetary details be freely accessible to the citizens. Due to the complexity of budgetary issues, notification should be simplified for easier consumption by the common man. Counties can borrow best systems like in Tanzania where ward development committees play the role of advising the public in budgetary issues. Further counties should partner or work closely with civil society organisations (CSOs) that are in a position to give the public an independent account of the issues of concern.

Meaningful public participation goes with financial implications. For this reason counties should consider facilitating public participation activities adequately. This study offers the recommendation by the county public participation guidelines that counties should use at least 1 per cent of their total budget for this purpose.

For the counties that have not legislated on complaints procedure and petition process, they should borrow best practices from counties like Meru County and other jurisdictions. This study recommends that all counties provide an annexure of template petition forms and a well laid down complaints procedure.

Speed and efficiency is important in complying with constitutional requirement in regard to public participation. The ultimate benefits will go to all stakeholders in county governance. Lastly, the right to public participation should be understood as requiring county governments to legitimize their actions and at the same time help in addressing challenges that may go with governance. Therefore this study recommends county governments develop solutions to enhance meaningful public participation that will help them properly articulate citizens' interests within the legal framework.

4.3 Recommendations for Further Research

The study further recommends more research on specific structures and processes of public participation. A study should also be carried out in identifying how the right to public participation is conceived in counties that have not legislated on public participation and the legal challenges that such counties may be facing.

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