

**PUBLIC PARTICIPATION IN THE SELECTION OF PUBLIC OFFICERS:
A CRITICAL ANALYSIS OF THE MECHANISMS UNDER THE
LEADERSHIP & INTEGRITY ACT, 2012**

**A THESIS SUBMITTED IN FULFILMENT OF THE DEGREE OF
MASTER OF LAWS AT THE UNIVERSITY OF NAIROBI**

By

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STUDENT'S DECLARATION

I confirm that this research project/thesis is my original work and has not been presented in any other university/institution for certification. The thesis has been complemented by referenced works duly acknowledged. Where text, data, graphics, pictures or tables have been borrowed from other works including the internet, the sources are specifically accredited through referencing in accordance with anti-plagiarism regulations.

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DEDICATION

To my partner Mr. Tom Oduo, my mother Lydia Nyotah and Mr. Ramji Naran Patel for their selfless support throughout the period of the study, I dedicate this work to you.

ACKNOWLEDGEMENTS

I wish to thank God for giving me the resources to undertake this study. I thank my supervisor, Mr. Felix Odimmasi for his time, guidance, critique and useful insights.

LIST OF ACRONYMS

AG	-	Attorney General
CEAA	-	Canadian Environmental Assessment Agency
COFEK	-	Consumer Federation of Kenya
CREAW	-	Center for Rights Education and Awareness
CSOs	-	Civil Society Organisations
EACC	-	Ethics & Anti Corruption Commission
ICT	-	Information Communication Technology
IEBC	-	Independent Electoral and Boundaries Commission
KNHR&EC	-	Kenya National Human Rights and Equality Commission
NGOs	-	Non Governmental Organisations
OECD	-	Organisation for Economic Co-operation and Development
PSC	-	Public Service Commission
USAID	-	United States Agency for International Development

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3. Charles Omanga & 8 Others –vs- Attorney General & another [2014] eKLR.
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6. Famy Care Limited –vs- Public Procurement Administrative Review Tribunal Board and Another [2012] eKLR.
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8. International Center for Policy and Conflict & 5 Others –vs- Attorney General & 4 Others [2013] eKLR.
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10. Luka Angaiya Lubwayo & Another –vs- Gerald Otieno Kajwang & Another [2013] eKLR.
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13. Republic –vs- Tana River County Assembly & Another ex parte Ibrahim Bocha [2014] eKLR.
14. Trusted Society of Human Rights Alliance –vs- Nakuru Water & Sanitation Services Company & Another, [2013] eKLR.
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ABSTRACT

In Kenya public participation is one of the values and principles of governance provided for under Article 10 of the Constitution. These values and principles are binding on the State and every other person whenever they, among other things, interpret or enact any law. Article 73(2)(a) of the Constitution provides for criteria for selection of public officers which is that all public officers must be selected on the basis of their personal integrity, competence and suitability. This criterion requires participation of the public for purposes of gathering information to confirm that candidates to public offices comply with it.

For the participation to be meaningful, it requires a guiding legal framework. In Kenya, that guiding framework is the Leadership & Integrity Act, 2012 (L&IA). Although the L&IA exists, there are still challenges that affect public participation during the selection of public officers. This is as shown in the Background section of this study. It appears that the L&IA does not facilitate meaningful public participation. The objective of the study therefore is to analyse the provisions of the L&IA with a view to establishing whether it facilitates public participation in any way, identify any existing gaps and also make recommendations for improvement.

Chapter 2 of this study aims at creating an understanding as to what public participation entails. Chapter 3 contains an in-depth analysis of the provisions of the L&IA which brings out provisions which are facilitative of public participation and the gaps. Internationally, there are some best practices which have useful lessons and which have been used in making the recommendations. These are outlined in Chapter 4.

Overall, the study concludes that indeed, there are some few provisions which can facilitate public participation in the selection of public officers. However, there are also numerous gaps. The study makes recommendations as to how those gaps can be addressed. This is seen in Chapter 5.

CHAPTER 1: BACKGROUND TO THE STUDY

1.1 Introduction

In Kenya, all sovereign power belongs to the people of Kenya.¹ That sovereign power may be exercised either directly or indirectly through their democratically elected representatives.² Public participation is one of the national values and principles binding all State organs, state officers, public officers and all persons whenever any of them applies or interprets the Constitution, enacts, applies or interprets any law or makes or implements public policy decisions.³ This study takes the view that in the selection of public officers, direct participation of the people is mandatory and that elected representatives must consider the views of the people before attempting to exercise that sovereign power on behalf of the people.

Some of the criteria for selection of public officers, and which is the focus of this study, was set by Article 73(2)(a) of the Constitution. The criteria are that public officers must be ‘selected on the basis of their personal integrity, competence and suitability, or elected in free and fair elections.’⁴ This study will not address issues of freeness and fairness of elections because it takes the view that all public officers, whether elected or appointed must have personal integrity, be competent and suitable to hold public positions.

The Leadership & Integrity Act, 2012 (L&IA) was enacted for purposes of facilitating implementation of Article 73(2)(a) of the Constitution, among other provisions of Chapter Six.⁵ It is expected that the L&IA provides for meaningful public participation in the selection of public officers.

1.2. Background to the problem

There are numerous reasons why the citizens are entitled to participate in the selection of public officers. For instance, they need to exercise their sovereignty and participate in the decision-making as provided for in the Constitution.⁶ Kenya citizens are the consumers of the services and

¹Constitution, Article 1(1).

² Ibid, Article 1(2).

³ Ibid, Article 10.

⁴ Ibid, Article 73(2)(a).

⁵Ibid , Article 80.

⁶ Ibid, Articles 1, 10.

employers of public officers⁷ of public officers. Therefore, the public must have a say in all decisions affecting or likely to affect it.⁸

Personal integrity, competence and suitability of public officers has been a concern in public administration in Kenya.⁹ Before the promulgation of the Constitution public appointments were made in a manner that totally lacked transparency and the criteria and the basis for the appointments were mostly unclear.¹⁰

In Kenya, Civil Society Organisations (CSOs) have been actively participating in selection of public officers but they have faced challenges in accessing information because that they are not citizens within the meaning of Article 35 of the Constitution.¹¹ The timelines for submitting information are mostly inadequate; some selection processes are done in private; information available about candidates or the selection process itself is inadequate sometimes inaccessible and the modes of communication used do not reach as many people as possible; and some appointing authorities just ignore the requirement all together.¹²

⁷ Ibid, Article 260. In the definitions provided for under Article 260 of the Constitution, public officers are state officers and any other public officer who is not a state officer. Public office means an office in the national governance, a county government or the public service, if the remuneration and benefits are payable directly from the Consolidate Fund or directly out of money provided by Parliament. One of the major sources of the money is taxes imposed on and paid by the citizens. See Article 209 of the Constitution.

⁸ Tom Atlee 'Principles of Public Participation' (2008), available at The Co-Intelligence Institute official website <http://www.co-intelligence.org/CIPol_publicparticipation.html> (accessed on 10 December 2012).

⁹ *Trusted Society of Human Rights Alliance v Attorney General & 2 others* [2012] eKLR, paragraph 102.

¹⁰ *Centre for Rights Education & Awareness (Creaw) & 8 Others v Attorney General & Another* [2012] eKLR Justice Mumbi Ngugi observed that 'Public appointments were made in a manner that totally lacked transparency, and the criteria and the basis for the appointments were known only to the appointing authority. This is what Kenya has been moving away from, and the inclusion of the requirement for transparency imposes an obligation on the Public and Public officers to do all things in such a manner that will allow for transparency and for public participation in the process'; In *Community Advocacy and Awareness Trust & 8 Others v Attorney General, Interested Party National Gender and Equality Commission & 5 Others* [2012] eKLR, Justice Majanja also observed that 'The past was characterized by open corruption, tribalism, nepotism, favouritism, scrapping the barrel and political patronage, the new dispensation requires a break from the past. The Constitution signifies that the end of 'jobs for the boys' era. Article 10 sets out the values that must be infused in every decision making process including that of making appointments.'

¹¹ See *Nairobi Law Monthly Company Limited -vs- Kenya Electricity Generating Company & 2 Others* [2013] eKLR, the Court stated that 'As a legal "person", it may enjoy the rights conferred by Article 35 (2), which are conferred on all 'persons' but it is not a "citizen" that may have a right of access to information as contemplated under article 35(1). Thus the petitioner is a company with Kenyan nationality, but not Kenyan citizenship.'

¹² There are several examples of situations showing this reality. For instance, as regards the ongoing police vetting process, Independent Medical Legal Unit in a press statement titled 'Police Vetting Process: A Case for Public Participation' available in its website <<http://www.imlu.org/2011-08-04-18-06-26/news/item/76-police-vetting-process-a-case-for-public-participation.html>> (accessed 14 October 2014) observed that "It is our considered opinion that the timelines that the commission has been setting for the public to submit their information on police officers for the purposes of vetting is grossly inadequate. For instance, the seven days given by the commission for the public to submit information on 182 Senior Assistant Commissioners and Assistant Commissioners of Police can

It is not clear whether participation influences the decisions because there are instances where despite submission of adverse information that a candidate lacks personal integrity or is incompetent or unsuitable to hold a public office, the candidate is still selected to hold or to run for a public office.¹³

Regarding elective positions, it has been argued, mostly by politicians and some judicial officers that personal integrity, competence and suitability of those vying for elective positions is to be determined by voters at the ballot box.¹⁴

Most of the times, the time allowed for the entire selection process does not allow in-depth, detailed investigations or anything more than casual investigations that are seen as merely rubber-stamping ‘already-made appointments.’¹⁵

hardly be sufficient. Among the national values and principles of national governance articulated in Article 10 of the constitution is ‘participation of the people’. We wish to remind the commission that the legitimacy of the vetting process will solely be determined by the levels of public participation.” In the same press statement Constitution and Reform Education Consortium observed that ‘publishing names of police officers in two newspapers only once is hardly enough for optimal public participation in the ongoing police vetting exercise’ and that ‘public communication from the National Police Service Commission is inadequate in reaching out to individuals and communities across the 47 counties, considering that only about 20% of Kenyans access the daily newspapers and social media.’

With regard to vetting of judges and magistrates Debra Gichio in her article titled ‘Public Participation in the Judicial Reform Process: A Vital Ingredient in Restoring Public Confidence in the Judiciary’ available at <<http://new.tikenya.org/phocadownload/adili%20newsletter%20issue%20135.pdf>> (accessed 14 October 2014) observes that the public was outraged by some provisions in the Judges and Magistrates Vetting Act which allows a judge or magistrate to choose whether they want to be vetted in public or in private and which state that all the information obtained from the interviews would be confidential. The public wanted the interviews to be conducted in public and also to have access to all the information relating to the judges and magistrates. Private vetting negates public participation.

In *Republic –vs- Cabinet Secretary Ministry of Information and Communication & 8 others Ex-parte Adrian Kamotho Njenga & 2 others* [2014] eKLR, the Cabinet Secretary in charge of ICT ignored public participation in appointment of ICT Board members. In quashing the decision of the Cabinet Secretary and Gazette notice notifying the appointments, the court held that excluding the public from the exercise of statutory powers constitutes improper exercise of power since it amounts to failure to consider a relevant factor, in this case public participation.

¹³ For instance, there were complaints against some of the current Cabinet Secretaries regarding their suitability and compliance with requirements such as Higher Education Loans Board Clearance Certificates. These complaints were aptly recorded in the National Assembly’s First Report of the Committee on Appointments on the Vetting of the Cabinet Secretaries dated 14th May 2013. Nevertheless, appointment of the concerned individuals was approved. It did not matter to the National Assembly that the EACC clearly indicated it could not have given information regarding the appointees within the given deadline.

¹⁴ *Luka Angaiya Lubwayo & Another –vs- Gerald Otieno Kajwang & Another* (2013)eKLR paragraph 40.

¹⁵ Ndungu Wainaina, ‘Cabinet Vetting Process Lacked Thoroughness’ (2013) in the Star (Nairobi, Friday 31 May 2013) available at <<http://www.the-star.co.ke/news/article-122608/cabinet-vetting-process-lacked-thoroughness>> (accessed 14 January 2015).

Some selection panels have argued that there is no law that requires them to hold interviews in public.¹⁶ The current practice, comprised of largely discretionary attempts which are applied to only some section of public service, has fallen short of public expectations because some people who do not meet the requirements of Article 73(2)(a) of the Constitution are selected to hold public positions despite information showing that they do not qualify being given to those responsible for the selections.¹⁷

The foregoing shows that meaningful participation during selection of public officers is marred with challenges. Although the challenges may be emanating from many issues, one of the key issues is the legal framework guiding public participation in selection of public officers. This is particularly so because Article 73(2)(a) of the Constitution is a general guideline which requires a statute in order to give effect to it. Such a statute should have mechanisms aimed at facilitating meaningful public participation.

1.3. Statement of the problem

The background discussed above shows that that in Kenya there is no meaningful public participation in the selection of public officers. Although the reasons for this could be many and varied, one of the reasons appears to be that the L&IA does not facilitate meaningful public participation in the selection of public officers. It appears there are no proper rules, guidelines and structures under the L&IA. It appears, therefore, that the L&IA failed to meet its mandate under Article 80 of the Constitution to establish procedures and mechanisms for public participation in the selection of public officers.

1.4. Justification of the study

The sovereignty of the people and democracy cannot be achieved where there are no legal mechanisms to facilitate meaningful public participation in governance. With regard to selection of public officers, the people must be allowed to participate meaningfully in a manner that the participation influences the decisions of those who appoint, promote or nominate public officers.

¹⁶ *Consumer Federation of Kenya -vs- Public Service Commission of Kenya & Another* [2012]eKLR paragraph 11.

¹⁷See, Nzau Musau 'Parliamentary vetting of public officials in Kenya: Opinion Split on Effectivity' in Standard Digital (Nairobi, updated Sunday, 28 September 2014) available at <<http://www.standardmedia.co.ke/m/story.php?id= 2000136409&pageNo=2>> (accessed on 14 October 2014). Prof Ben Sihanya opines that vetting of public officers has failed to meet its objectives and observes that "Although it was well intentioned, it has failed to work. All of President Uhuru Kenyatta's nominees have been approved, including those with obvious and irremovable stains to their names" and further that "Besides Parliament, all other vetting forums — security and judiciary — are "simply playing games."

The L&IA is expected to have provisions to facilitate meaningful public participation in the selection of public officers in accordance with Article 73(2)(a) of the Constitution. This study aims at identifying such provisions, the extent to which they facilitate meaningful public participation, identifying any gaps that may exist and making suggestions for filling those gaps.

Therefore, the significance of this study is four fold. Firstly, it contributes towards furthering and deepening existing knowledge and understanding of the L&IA in respect of public participation in selection of public officers. Secondly, identifying existing gaps and making suggestions as to how they can be filled will be helpful in future legal, institutional and policy reforms and for further development of the law and jurisprudence relating to meaningful public participation in the selection of public officers. Thirdly, other countries that may be interested in having meaningful public participation during selection of public officers may benefit from the proposals made in this study as well as the reformed laws, institutions and policies which may have benefited from this study. Fourthly, it forms a basis for empirical studies for evaluation of the adequacy and effectiveness of the mechanisms for facilitating meaningful public participation in the selection of public officers. It may be helpful during the development of a public participation model that is suitable for selection of public officers.

This study may be particularly useful to the legal practitioners, judicial officers, parliamentarians, law reformers, civil societies, selection panels and the members of the public being the persons or institutions who are interested or involved in the selection of public officers in one way or another. Students of law may find this study useful in deepening their understanding of the concepts dealt with here.

1.5 Objectives of the study

The objectives of this study are:

1. To explore the extent to which the L& IA facilitates meaningful public participation in the selection of public officers in accordance with Article 73(2)(a) of the Constitution.
2. Identify gaps which need to be addressed for purposes of making the L&IA more facilitative of meaningful public participation.
3. Make recommendations on ways of facilitating meaningful public participation through the L&IA.

1.6 Hypothesis

This study is based on the hypothesis that lack of meaningful public participation in the selection of public officers has been partly due to lack of a conducive legal framework within the L&IA.

1.7 Research questions

This study seeks to answer the following questions:

1. What does public participation in the context of selection of public officers entail?
2. Are there mechanisms under the L&IA which facilitate meaningful public participation in the selection of public officers?
3. What are the gaps under the L&IA that hinder meaningful public participation in the selection of public officers?
4. What proposals can make the L&IA more facilitative of public participation during the selection of public officers?

1.8 Theoretical framework

Public participation is a key ingredient in the recipe for democracy as it increases transparency in the decision making process and ability to make government officials more accountable.¹⁸ The theory of democracy underpins public participation.

‘Democrats hold as an ideal that public power flows from public approval and that the law reflects public preferences. They all share a vision of government by free and equal citizens who participate in their own governance.’¹⁹ One of the earliest democratic theorists is Tocqueville who conceived democracy as the rule by the people.²⁰ According to other proponents of participatory democracy like Joseph Zimmerman, democracy is the control by citizens of their own affairs, which sometimes though not always involves instructing governmental bodies to carry out citizen’s wishes.²¹

¹⁸International Centre for Policy Studies, *Citizen Participation Handbook* (2002) “iMedia” Limited 15available at <<http://siteresources.worldbank.org/INTBELARUS/Resources/eng.pdf>> accessed 2 August 2014.

¹⁹ Ronald J. Terchek and Thomas C. Conte, *Theories of Democracy: A Reader* (Rowman & Little Fields Publishers, 2000),xii. Available at <[www.Amazon.com / Theories – Democracy – Ronald - J- Tercheck / dp /0847697258 #reader_0847697258](http://www.Amazon.com/Theories-Democracy-Ronald-J-Tercheck/dp/0847697258#reader_0847697258)> accessed 26 July 2014.

²⁰ Frank Cunningham, *Theories of Democracy: A Critical Introduction*, (Routledge Publishers,2002) 6.

²¹Ibid, 126.

Participation is an old notion that is rooted in the first democracy proclaimed in Greece.²² Brandy says that the outstanding characteristics of Athenian democracy also known as participatory democracy were public control of public decisions and maximum public participation in making the decisions and holding public office.²³ Even then it was understood that the democratic rule is impossible without hearing the people's voice.²⁴

The critics of the theory of participatory democracy have argued that the degree of direct democracy that was exercised by citizens on the relative small assemblies of ancient Athens is no longer possible in large and complex societies.²⁵ Realists do recognize public participation as a feature of democracy but reduce it to only one manifestation, namely voting.²⁶ According to those realities, there is therefore little need to go to the trouble of facilitating the participation of citizens since elected representatives have been authorized to act on their behalf.²⁷ The Kenyan practice in selection of public officers appears to be influenced by this theory by realists. Only state officers who are deemed to hold higher authority and responsibility in governance are subjected to rigorous public participation especially through the National Assembly where the members are expected to approve their appointments. It is assumed that the members have been authorized by the public to decide whether a candidate has personal integrity, is competent and suitable to hold those positions.

The difficulty relating to participatory democracy is that many democratic societies have a high degree of apathy amongst the voters.²⁸ In Kenya, it appears there is some considerably high apathy in participation during selection of public officers as well.²⁹

Over time, participation of the people is considered a standard practice and has been entrenched in democracies, formally or informally, globally.³⁰ Democracy without citizen deliberation and

²² Renee Scott, 'An Analysis of Public Participation in the South African Legislative Sector'(2009), A Thesis submitted in partial fulfillment of the requirements for the degree of Master of Public Administration, Stellenbosch University, 29.

²³ Ibid.

²⁴ Ibid.

²⁵ Ibid.

²⁶ Ibid.

²⁷ Ibid.

²⁸ Scott (n 22) 29.

²⁹ Commission for Implementation of the Constitution and Ministry of Justice and Legal Affairs, 'Report of the Conference on Development of a Public Participation Framework', conference held on 24th -26th September 2012 at Great Rift Valley Lodge, Naivasha Kenya 18.

³⁰ Ibid.

participation is ultimately an empty and meaningless concept.³¹The Constitution of Kenya asserts the need for participatory democracy which calls for active involvement and participation of all citizens in decision-making.³² Therefore, the people must participate in the selection of the public officers who run the government on their behalf and their say must be conveyed through direct participation as opposed to indirect participation through elected representatives.³³

The essential principle of a democracy is that the public be enabled to participate should they choose to do so, through effective channels of communication and civil society.³⁴ In the context of selection of public officers, one of the ways of enabling participation is by having a legal framework with mechanisms that facilitate meaningful public participation. The aim is to have the will of the people, which is that all public officers must meet the requirements of article 73(2)(a) of the Constitution, reflected in the appointments or nominations made. In the context of this study, that framework is the L&IA.

1.9 Literature Review

The literature chosen for this review addresses public participation and selection of public officers. The literature aids this research in terms of conceptualising and contextualising the research topic. It also aids in identifying the existing gaps in knowledge, thereby justifying this study. The issues of public participation contained in this literature assist in the analysis of the L&IA. However, this study has established that there has been no comprehensive study on L&IA with regard to facilitating meaningful public participation in selection of public officers.

1.9.1 Selection of public officers

According to USAID on selection of judicial officers the principles of a selection process include:

- a) Transparency at every point possible. Some of the ways of accomplishing this include: advertising vacancies widely; publicize candidate's names, their backgrounds, and selection process and criteria; invite public comment on candidates' qualifications; and dividing responsibility for the

³¹ Ibid.

³² Constitution, Article 10(2).

³³ Indeed it is a matter of law in Kenya that where the National Assembly's approval is required during the selection of public officers, the National Assembly must allow public participation and seek the opinion of the public before approving or rejecting a nominee; *see*, Public Appointments (Parliamentary Approval) Act, Chapter 136 Laws of Kenya s 6, 12.

³⁴ Scott (n 22) 32.

process between two separate bodies, one that nominates and one that selects and appoints. To be effective, the bodies must be truly independent from each other.

- b) Introducing additional actors into the process and thus diluting the influence of any one political entity.
- c) Use of more objective, merit based process can be important step forward when compared to traditional political or personal process.
- d) Diversity. Although diversity is rarely taken into account in judicial selection, many experts agree that it is important. A judiciary that reflects the diversity of its country is more likely to garner public confidence important for judiciary's credibility.³⁵

According to U.S Office of Democracy and Governance some of the guiding principles of selection process include: 'transparency at every point of selection possible; advertising vacancies widely; publicising candidate's names, their backgrounds and selection process and criteria; and inviting public comments on candidates' qualifications.'³⁶ These principles guide the selection of judges in the US. They are helpful in this research because they are instructive as to what legal mechanisms aimed at ensuring public participation the L&IA should contain.

1.9.2 Public Participation

Sihanya observes that public participation is one of the national values and principles of governance given by Article 10(2)(a) of the Constitution.³⁷He says that 'The principle is to be binding on all State organs, State officers, public officer and all persons whenever they apply or interpret the Constitution; enact, apply or interpret any law; or make or implement public policy decisions.'³⁸

1.9.2.1 Meaning of public participation

Ghai describes public participation as signifying the ability (of minorities) to bring relevant facts to decision makers, argue their position before decision-makers, propose reform, be co-decision-makers, veto legislative or administrative proposals and establish and manage their own

³⁵USAID, 'Guidance for promoting judicial independence and impartiality'(2000) 5.

³⁶ Office of Democracy and Governance, 'Guidance for promoting judicial independence and impartiality' (2002) (revised edition) 17. This is a publication of the US Agency for International Development. In Western Europe, recruitment of judges is through public competitions. In Italy, recruitment of career magistrates takes place once a year on the basis of national competitive examinations opened to law graduates of "good moral standing". This model of selection is based on the assumption that the magistrates will develop their professional competence within the judicial structure. In contrast Article 73(2)(a) of the Kenyan Constitution demands that competence be determined before a candidate is appointed.

³⁷Ben Sihanya, 'Public Participation and Public Interest Litigation under the Kenya Constitution: Theory, Process and Reforms' (2013) 9 Law Society of Kenya Journal 1.

³⁸Ibid 5.

institutions in specified areas.³⁹ The US Environmental Protection Agency defines public participation as the process that involves actively seeking and responding to input from citizens and enabling meaningful involvement in decision-making.⁴⁰ According to Canadian Environmental Assessment Agency (CEAA),

Public participation is a general term for any process that involves public input in decision making. It involves the process or activity of informing the public and inviting them to have an input into the decisions that affect them. The focus of public participation is usually to share information with, and gather input from, members of the public who may have an interest in a proposed project.⁴¹

According to Lam, public participation is a political principle, which has now been recognized as a right – the right to public participation.⁴² He argues that persons affected by a decision have a right to be involved in the process leading to the decision and that therefore, there is an implied assumption in this, that public participation can influence the decision that is eventually reached.⁴³ He further argues that public participation is seen as a form of empowerment and is a vital part of democratic governance.⁴⁴

1.9.2.2 Importance of public participation

Lam, Kairu and Maneno conclude that in essence, the principle is one of trying enable a balance between governing FOR the people, and governing BY the people.⁴⁵ They argue that the fundamental aspects of public participation are the promotion of credibility and integrity in public institution and it can also help build public confidence and infuse sense of impartiality into the vetting process.⁴⁶

³⁹Yash Ghai, 'Public participation of and Minorities' (2003), A Report published by Minority Groups International on July 2003 available at <www.minorityrights.org/download.php?id=112> (accessed 24 April 2013) 4.

⁴⁰US Environmental Protection Agency. 'Public Participation Guide: Introduction to public participation' available at <<http://www2.epa.gov/international-cooperation/public-participation-guide-introduction-public-participation>> accessed 24 April 2013.

⁴¹ Canadian Environmental Assessment Agency, 'Public Participation Guide', available at <www.ceaa.gc.ca/default.asp?Lang=En&n=46425CAF-1&offset=3&toc=show> accessed 28 July 2014.

⁴² Joshua Lam, 'Public Participation in the Vetting Process', (a presentation on behalf of Kenya Section of the International Commission of Jurists at Transparency International, Kenya Vetting Workshop in Eldoret, held on December 17, 2011) 1.

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ Ibid; Francis Kairu and Mary Maneno, 'Public Participation: Kenya's Best Weapon Against Graft and Poor Governance' (135 Adili Newsletter August 2012) 3 available at <<http://www.tikenya.org/phocadownload/adili%20newslett%20issue%20135.pdf>> accessed 7 January 2014.

⁴⁶Ibid.

Lenaola argues that allowing and promoting public participation is a demonstration that an institution represents the people in whom sovereign power vests and also enables the public to own their institutions.⁴⁷

Muli argues that the very public and in some cases transparent and open recruitment processes of commissioners and constitutional office holders, requiring them to go through serious public vetting gives the constitutional commissions and bodies legitimacy and credibility.⁴⁸

Wainaina argues that an open transparent and credible publicized vetting process provides an opportunity for the public participation in challenging nominees' character and integrity and creates a mechanism for the public to hold state and public officials to account.⁴⁹

Lam, Kairu and Maneno, Lenaola and Muli's focus is on the vetting of judges and magistrates. Wainana discusses the vetting process for Cabinet Secretaries in Kenya. Their papers assist in deepening understanding of the importance of public participation in the context of selection of public officers because the concept, its importance and application should apply uniformly across the board. Muli's Article provides a basis for interrogation of the mechanisms available under the L&IA regarding public participation in the selection of public officers. However, the writers have not discussed the L&IA.

1.9.2.3 What meaningful public participation entails

According to Smith, public participation encompasses a group of procedures designed to consult, involve, and inform the public to allow those affected by a decision to have an input into that decision.⁵⁰ This literature discusses public participation in environment impact assessment. Reference to a 'group of procedures' depicts that public participation can only be achieved if there are procedures or mechanisms designed to achieve it.

⁴⁷ Justice Lenaola, 'Public Participation in Judicial Processes: Mainstreaming Court Users Committees (CUCs)' (Paper presented during the Kenya Judiciary Annual Judge's Colloquium, 2011) 5. Available at, <<http://www.kenyalaw.org/klr/index.php?id=893>> accessed 11 December 2012.

⁴⁸ Koki Muli, 'Let anyone who wants public office be subjected to vetting' *East African Standard* (Nairobi, 18 August 2012) available at, <http://www.standardmedia.co.ke/?articleID=2000064290&story_title=Let-anyone-who-wants-public-office-be-subjected-to-vetting> accessed 20 November 2012.

⁴⁹ Ndung'u Wainaina, 'Cabinet Vetting Process Lacked Thoroughness', *The Star* (Nairobi, 31 May 2013) available at <<http://www.the-star.co.ke/news/article-122608/cabinet-vetting-process-lacked-thoroughness>> accessed 7 January 2014.

⁵⁰ L.G Smith, 'Impact Assessment and Sustainable Resource Management' (Harlow UK: Longman, 1983).

According to Sihanya, public participation in administrative processes includes the power to advice, or to be consulted before administrative conduct may be regarded as legitimate or valid.⁵¹ In administration, seeking advice, recommendation, approval, consultation and consent is crucial and may secure public participation.⁵² Sihanya's article discusses the juridical basis of the concept of public participation in Kenya. It is useful for this study because it is instructive as to what may secure public participation. However, it does not specifically address the mechanisms provided for under the L&IA, the subject of this study.

Tom Atlee argues that public participation:

[T]is based on the belief that those who are affected by a decision have a right to be involved in the decision-making process. It includes the promise that the public's contribution will influence the decision. It seeks out and facilitates the involvement of those potentially affected by or interested in a decision. It provides participants with the information they need to participate in a meaningful way. It communicates to participants how their input affected the decision.⁵³

Omollo and Bynoe argue that public participation points at direct participation as opposed to indirect participation through representatives such as Members of Parliament.⁵⁴ This is helpful to this study in justifying its view that direct participation in selection of public officers is compulsory and that the elected representatives of the people must also take public opinion into account when they are approving nominations for appointments.

Craig argues that before public consultations, the public bodies must avail sufficient information to the citizens being consulted to enable them tender advice.⁵⁵ Omollo, Coglianese, Kilmartin and Mendelson argue that for there to be meaningful public participation where citizens contribute meaningful comments, the citizens must have access to information held by the State

⁵¹Sihanya (n37), 14.

⁵²ibid, 15. Sihanya gives nomination of public officers as an example of a process that requires broader participation by the executive, administrative, political and judicial agencies.

⁵³Atlee (n8).

⁵⁴Annette Omollo, 'Policy Proposals on Citizen Participation in Devolved Governance in Kenya', (The Institute for Social Accountability) available at <www.tisa.or.ke> accessed 20 March 2013. Direct involvement suggests that citizens are the owners of the government and should be involved in the decisions of the State; Mark Lancerot Bynoe, 'Citizen Participation in the Environmental Impact Assessment Process in Guyana: Reality or Fallacy?' (2006) 2/1 Law, Environment and Development Journal 34, available at <<http://www.lead-journal.org/content/06034.pdf>> accessed 30 March 2013. Bynoe argues that citizen participation is viewed as getting people directly involved and becoming a part of the decision making process according to predetermined levels.

⁵⁵ Paul Craig *Administrative Law*, (Sweet and Maxwell, London 2010).

about a particular issue.⁵⁶ Omollo observes that without freedom of information, state authorities or agents can selectively release good news whilst withholding damaging information.⁵⁷ Webler and Tuler argue that good public participation processes reach out to all stakeholders, share information openly and readily and engage people in meaningful interaction.⁵⁸ Gina and Zakharchenko argue that in order to have effective participation, valuable information which should come from both the general public and the government has to be disseminated.⁵⁹

According to CEAA, some of the elements of meaningful participation include:

- Early notification - Where notification is to be given, it needs to be done early enough to allow the public to have the opportunity to influence the process before any irrevocable decisions are made.
- Accessible information - The responsible authority should ensure that all participants are provided with the information they need to participate effectively on a timely basis. Consideration should be given to the appropriate language for this information and the need to use culturally sensitive means of communication. Access to information should only be limited in accordance with the laws relating to access to information and privacy.
- Sensitivity to community values - Public participation processes need to be carried out in a manner that respects different community values and needs.
- Reasonable timing - A public participation process should provide the public with a fair and reasonable amount of time to evaluate the information presented and to respond to proposals and to proposed decisions.
- Appropriate levels of participation - A public participation process should provide for levels of participation that are commensurate with the level of public interest.
- Transparent results - Public participation is based on the premise that the public's contribution will be considered in the decision-making process. A public participation process should, at its conclusion, provide information and a rationale on whether or how the public input affected the decision.⁶⁰

⁵⁶Omollo, (n 42) 12. This is particularly in recognition of the fact that public bodies hold information not for themselves but for the public good; Cary Coglianese, Heather Kilmartin and Evan Mendelson, 'Transparency and Public Participation in the Rule Making Process' A non partisan Presidential Task Force Report, University of Pennsylvania Law School (2008) available at <<http://reginfo.gov/public/jsp/EO/fedRegReview/PennLawComments.pdf>> accessed 7 January 2014.

⁵⁷Omollo, (n 42) 14.

⁵⁸Webler Tuler and S. P. Tuler, "Four Perspectives on Public Participation Process in Environmental Assessment and Decision Making: Combined Results From 10 Case Studies" (2006) 34(4) Policy Studies Journal, 699, available at, <<http://www.seri-us.org/content/four-perspectives-ten-case-studies>> accessed 11 December 2012.

⁵⁹Holdar, et al. (eds). (2002), *Citizen Participation Handbook*, People's Voice Project, International Centre for Policy Studies Kiev: "iMedia" Ltd., 16 available at <http://siteresources.worldbank.org/INTBELARUS/Resources/eng.pdf> accessed 3 August 2014.

⁶⁰CEAA (n 41).

Saladin and Dykke argue that for there to be meaningful participation, the public must have access to the requisite information, know that a decision is being made and that they have a right to participate in the making of that decision and be able to enforce their right either to the information or participate in the decision-making.⁶¹Saladin and Dykke identify some principles of access to information and access to decision-making.⁶² As regards access to information, the principles include that the information must be accessible, no showing of interest is required, timely responses to requests and actual copies of documents requested must be provided.⁶³ Some of the principles of access to decision-making identified include notice that a decision will be made, sufficient notice for preparation to participate and provision of written decisions.⁶⁴

Although these articles discuss public participation by minority groups, devolution and environmental assessment respectively and not selection of public officers, they help this research in deepening knowledge of what meaningful public participation entails.

1.9.2.4 Some ways of enhancing public participation

Loukis and others argue that use of Information Communication Technology (ICT) enhances public participation because it opens up new channels of communication between the citizens and public participation.⁶⁵

According to the Organisation for Economic Co-operation and Development (OECD) ‘all OECD member countries recognise new ICTs to be powerful tools for enhancing citizen engagement in public policy-making’ since ‘the unprecedented degree of interactivity offered by new ICTs has the potential to expand the scope, breadth and depth of government consultation with citizens and other key stakeholders during policy-making.’⁶⁶ Further OECD argues that ‘Technology is an enabler not the solution. Integration with traditional, “offline” tools for access to information,

⁶¹Claudia Saladin, Brennan Van Dyke, ‘Implementing the Principles of the Public Participation Convention in International Organizations’, [1998] Center for International Environmental Law 4.

⁶²Ibid, 6.

⁶³ Ibid, 7.

⁶⁴ Ibid.

⁶⁵ E. Loukis, M. Wimmer, Y. Charalabidis, A. Triantafillou and R. Gatautis, ‘Argumentation Systems and Ontologies for Enhancing Public Participation in the Legislation Process’ (2007) available at <http://www.lex-is.eu/upload/deliverables/LEX-IS_eGov_07.pdf> accessed 10 April 2013.

⁶⁶ OECD Policy Briefing (March 2003) 1 available at <<http://www.oecd.org/development/pcd/2501856.pdf>> accessed 10 April 2013. Kenya is not a member of OECD.

consultation and public participation in policy-making is needed to make the most of ICTs.⁶⁷ This literature discusses use of ICT in enhancing public participation in policy making not selection of public officers. It is helping this research in identifying some of the mechanisms that should be recognised in law for purposes of facilitating public participation.

1.9.2.5 Some proposed public participation legal framework models

According to the Deliberative Democracy Consortium of the US public participation frameworks should contain clauses such as:

- a) Definitions as to what public participation means.
- b) Adoption of a public participation policy and making it publicly available to guide the use of participation strategies and techniques to satisfy the principles of public participation.
- c) Principles which govern meaningful and effective public participation which include;
 - i) Planning ahead: public participation is an early and integral part of challenge and opportunity identification, planning and design, budgeting, and implementation of policies, programs and projects.
 - ii) Inclusive design: the design of a public participation process includes input from appropriate local officials as well as members of intended participant communities.
 - iii) Authenticate intent: a primary purpose of the public participation process is to generate public views and ideas to actually help shape government action or policy.
 - iv) Transparency: public participation processes are open, honest, and understandable, there is clarity and transparency about public participation process sponsorship, purpose, design , and how decision makers will use the process results.
 - v) Inclusiveness and equity: public participation processes identify, reach out to, and encourage participation of the community in its full diversity. Processes respect a range of values and interests and the knowledge of those involved.
 - vi) Informed participation: participants in the process have information and/or access to expertise consistent with the work that the sponsors and conveners ask them to do. Members of the public receive the information they need to participate effectively with sufficient time to study.
 - vii) Accessible participation: Public participation processes are broadly accessible in terms of location, time and language and support the engagement of community members with disabilities.
 - viii) Appropriate process: Each public participation process uses one or more engagement formats that are responsive to the needs of identified participant groups and encourage full, authentic, effective and equitable participation consistent with process purposes.

⁶⁷ Ibid,1.

Participation processes are well-designed to appropriately fit the legal authority, scope, character, and impact of a policy or project.

- ix) Use of information: the ideas, preferences and or recommendations contributed by community members are documented and given consideration by decision-makers. Local officials communicate decisions back to process participants and the broader public, with a description of how the public input was considered and used.
 - x) Building relationships and community capacity: public participation processes invest in and develop long term, collaborative working relationships and learning opportunities with community partners and stakeholders.
 - xi) Evaluation: sponsors and participants evaluate each public participation process with the collected feedback, analysis and learning shared broadly and applied to future public participation.
- d) Public participation specialist to assist in the implementation and to provide ongoing training in public participation.
 - e) Establishment of a public participation advisory board with specified duties, powers, and responsibilities.
 - f) Collaboration between state agencies, authorities and other public entities.
 - g) Public participation meetings for the sole purpose of public participation.⁶⁸

Cottrell Ghai has also made suggestions as to what participation framework should contain. He does this by suggesting provisions based on answers to some questions as follows;

- a) Who, on what, in what and how: *who* is to participate? On what sort of issues? In what decision and the body making that decision? *How*, that is, through which institutions, mechanisms, procedures?
- b) Of whom: which sectors are targeted?
- c) In what: on what issues are people able to participate?
- d) How: what methodology is applicable?⁶⁹

These proposals and suggestions are helpful to this research because they are indicative of what a legal framework for public participation should contain. They, however, do not concern selection of public officers in Kenya and the L&IA.

1.9.2.6 Some public participation methods, methodologies and models

⁶⁸ A Working Group on Legal Frameworks for Public Participation, 'Making Public Participation Legal' (2013),13.

⁶⁹ Cottrell Ghai, 'Participation: A Legal Framework?'(2013) available at <http://www.katibainstitute.org/index.php/editorial-and-opinion-pieces> accessed 22 July 2013.

According to Sihanya and Rowe and Flewer, some of the most formalized public participation methods include, elections, referenda, public hearings, public inquiries, parliamentary representation, public opinion surveys, citizen advisory committees, negotiated rule making, consensus conference, citizen's jury/panel and focus groups.⁷⁰

According to Rowe and Flewer, the criteria for evaluating effectiveness of the public participation methods include:

- a) Public participants should have access to the appropriate resources to enable them to successfully fulfill their brief. Necessary resources include: information resources (summaries of the pertinent facts), human resources (e.g. access to scientists, witnesses, decision analysts), material resources (e.g., overhead projectors/whiteboards), and time resources (participants should have sufficient time to make decisions).
- b) The participation process should be conducted in an independent, unbiased way such that managers and facilitators are not only independent in actuality but are seen to be independent.
- c) The public should be involved as early as possible in the process as soon as value judgments become salient.
- d) The output of the procedure should have a genuine impact on policy and be seen to do so. One of the main complaints about participation methods is that they often have been perceived as ineffectual, simply being used to legitimate decisions or to give an appearance of consultation without there being any intent of acting on recommendations. This results in public skepticism and distrust concerning the motives of sponsors.
- d) The process should be transparent so that the public can see what is going on and how decisions are being made (i.e it should not be held behind closed doors).
- d) The nature and scope of the participation task should be clearly defined. It is important to ensure that there is as little confusion and dispute as possible regarding the scope of a participation exercise, its expected output, and the mechanisms of the procedure.
- e) The participation exercise should use/provide appropriate mechanisms for structuring and displaying the decision-making process.
- f) The procedure should in some sense be cost-effective in terms of money and time.⁷¹

According to International Center for Policy Studies, some of the citizen participation methodologies include; public education, Citizens' Advisory Groups, coalition building, public hearings, Report cards and social monitoring.⁷²

⁷⁰Sihanya (n37); Rowe G and Flewer LJ, 'Public Participation Methods: A Framework for Evaluation' (2000) 25 (1) Science, Technology, & Human Values, Winter 2000 1.

⁷¹ Rowe & Flewer (n70), 12.

Two models of participation, as summarized below, have been developed focusing mainly on community planning process.⁷³

<p><i>Sherry Arnstein (1969) described citizen involvement in the planning process in the United States as a ladder of participation:</i></p> <p>1. Manipulation and 2. Therapy: Both are non-participative. The aim is to cure or educate the participants. The proposed plan is viewed as optimal and the job of participation is to achieve public support by public relations.</p> <p>3. Informing: A most important first step to legitimate participation. But too frequently the emphasis is on a one way flow of information. No channel for feedback exists.</p> <p>4. Consultation: Again, a legitimate step that includes attitude surveys, neighborhood meetings and public enquiries. Still, Arnstein feels that this is just a "window dressing" ritual.</p> <p>5. Placation: For example, co-option of hand-picked "worthies" onto committees. It allows citizens to advise or plan <i>ad infinitum</i>, but power holders retain the right to judge the legitimacy or feasibility of the advice.</p> <p>6. Partnership: Power is in fact redistributed through negotiation between citizens (stakeholders) and power holders. Planning and decision-making responsibilities are shared (e.g. through joint committees).</p> <p>7. Delegated Power:</p>	<p><i>David Wilcox (online) suggests thinking of five levels, which offer increasing degrees of control to others involved:</i></p> <p>1. Information: The least you can do is tell people what is planned.</p> <p>2. Consultation: You identify the problems, offer a number of options, and listen to the feedback you get.</p> <p>3. Deciding Together: You encourage others to provide some additional ideas and options and join in to decide the best way forward.</p> <p>4. Acting Together: Not only do different interests decide together what is best, but they form a partnership to carry it out.</p> <p>5. Supporting Independent Community Initiatives: You help others do what they want, perhaps within a framework of grants, advice and support provided by the resource holder.</p> <p><i>The "lower" levels of participation keep control with the initiator but they lead to less commitment from others. Partnership operates at the levels of "deciding together" and</i></p>
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⁷² Gina Gilbreath and Olha Zakharchenko (eds) (n55), 19.

⁷³Ibid. 82.

<p>This is a participative approach whereby citizens hold a clear majority of seats on committees and have delegated powers to make decisions. The public now has the power to assure accountability of the program.</p> <p>8. Citizen Control:</p> <p>The citizens control the jobs of planning, policy making and managing a program (e.g. neighborhood corporation with no intermediaries between it and the source of funds).</p> <p><i>Different levels of participation are appropriate in different circumstances. The key issue is what stance to take for initiating or managing a process of participation or partnership building.</i></p>	<p><i>"acting together". Information is essential for all participation, but is not participatory in itself.</i></p>
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These participation methods, methodologies and models are instructive and assist in understanding how public participation can be carried out. However, there are not specific to selection of public officers.

1.10. Research methodology

This study is intended to be a desktop research predominantly based on content analysis. The study will refer to primary sources like cases, statutes and draft bills and also from secondary sources like text books, scholarly articles and reports in libraries within Nairobi. It will employ qualitative data analysis.

To ensure the study meets its objectives, it employs some tools for analysis such as policy based reasoning and arguments, plain meaning rule of interpretation, textual and content analysis of the provisions, comparative analysis using draft bill, statutes and case law and the writer's views and understanding of the concepts of public participation and selection of public officers derived from literature review.

1.11 Limitations of the study

During the conduct of this research, there were some unavoidable limitations. The time for carrying out this study was limited. The finances available were also insufficient. Although field research would have enriched this study more in terms of measuring the adequacy of the provisions of the L&IA in facilitating meaningful public participation, it was not possible to carry out such a research due to time and financial constraints.

1.12. Chapter breakdown.

Chapter 1 is the background of the study which outlines what the study is all about. It contains and introduction, background to the problem, statement of the problem, justification of the study, objectives of the study, the hypothesis, and the research questions. It discusses the theoretical framework upon which the study is premised and literature review. It also states the research methodology and limitations of the study.

Chapter 2 discusses what meaningful public participation in the context of selection of public officers entails. It identifies domestic and international law that lays the legal basis of public participation generally and public participation in selection of public officers specifically. It also identifies issues, models and principles of public participation which are then used as a basis for analysis of the L&IA in the subsequent Chapters.

Chapter 3 contains an analysis of the L&IA with a view to identifying the extent to which it facilitates meaningful public participation in the selection of public officers. The methodology for analysis adopted includes; comparative analysis using Bills, other statutes and case law; textual and content analysis of the provisions; and writer's understanding, principles and model derived from the literature review and personal experiences.

Chapter 4 contains a discussion on lessons from some selected best practices. The selected best practices are Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters and South Africa's Municipal Systems Act, 2000. The two are legal frameworks, just like the L&IA is, and therefore their provisions are useful in

making recommendations on how the L&IA provisions should be and what they should provide for to make public participation in the selection of public officers more meaningful.

Finally, conclusion and recommendations arising out of the study will be discussed in Chapter 5.

CHAPTER 2: PUBLIC PARTICIPATION IN THE SELECTION OF PUBLIC OFFICERS: WHAT IT ENTAILS

2.1 Introduction

This Chapter discusses what facilitating meaningful public participation in the selection of public officers entails. It defines what public participation means, discusses the importance of public participation and principles of public participation. It also identifies the legal basis of public participation during the selection of public officers in Kenya. The principles, models and issues of public participation and the law both domestic and international discussed in this Chapter, all with necessary modifications to put them in the context of selection of public officers, will form the basis for analyzing the mechanisms of the L&IA in Chapters 3 and 4.

2.2 Meaning of public participation

As previously discussed, public participation means involving persons affected or likely to be affected by a decision in the process of decision-making and encompasses a group of procedures designed to consult, involve, and inform the public to allow those affected by a decision to have an input into that decision.⁷⁴ The input should influence the decision made.⁷⁵

2.3 Legal basis of public participation in the selection of public officers in Kenya

2.3.1 Domestic law

In addition to the Constitution, there are other statutes which recognize the principle of public participation in the selection of public officers.⁷⁶ Those statutes are for specific sectors of public service and are not the main concern of this study. The L&IA does not adopt their provisions as being applicable for its purposes. They will however be referred to where appropriate because they contain some helpful provisions.

2.3.1.1 The Constitution

In Kenya, all sovereign power belongs to the people of Kenya⁷⁷ and they are therefore entitled to participate on issues that concern the running of their affairs by the government.⁷⁸The

⁷⁴ Smith (n 50).

⁷⁵ CEAA (n60)

⁷⁶Except the L&IA, the other statutes were not enacted pursuant to Article 80 of the Constitution.

⁷⁷ Constitution Article 1.

⁷⁸ Ibid, Article 10(2)(a).

Constitution is to be interpreted in a manner that, among others, promotes its purposes, values and principles and contributes to good governance.⁷⁹ Therefore, there must be public participation in the selection of public officers.

For effective administration of Article 73(2)(a) of the Constitution, Parliament is required to establish procedures and mechanism and also make any other provision necessary for ensuring the promotion of the principles of leadership and integrity and the enforcement of Chapter Six.⁸⁰ Such procedures, mechanisms and provisions include providing for meaningful public participation in the selection of public officers. The L&IA, which was enacted pursuant to Article 80 of the Constitution, is expected to have met this mandate.

2.3.1.2 Leadership & Integrity Act

The L&IA was enacted to give effect to, and establish procedures and mechanisms for the effective administration of Chapter Six of the Constitution and for connected purposes.⁸¹ It recognises public participation as one of its guiding values, principles and requirements.⁸² The Public Officers Ethics Act, 2003 (POEA), which is part of the L&IA vide Section 6, provide that selection of public officers shall be on the basis of personal integrity, competence and suitability.⁸³

2.3.1.3 Public Appointments (Parliamentary Approval) Act

This Act applies to constitutional and statutory appointments.⁸⁴ This means that not all public appointments require Parliamentary approval.

The Act provides for notification of vetting requirements and the notification is by way of advertisement inviting applications for nomination for appointment to an officer to which the Act applies and the advertisement shall indicate that the candidates so nominated shall be required to appear before a committee of Parliament for vetting.⁸⁵

⁷⁹ Ibid, Article 259(1).

⁸⁰ Ibid, Article 80.

⁸¹ L&IA, Preamble.

⁸² Ibid, s 3(2).

⁸³ POEA, s 22.

⁸⁴ Public Appointments (Parliamentary Approval) Act, Preamble.

⁸⁵ Ibid, s 4.

The Approval Committee is required to notify the public of the time and place for holding an approval hearing at least seven days prior to the hearing.⁸⁶ All Approval Committee proceedings are to be open and transparent unless the Committee but on its own motion or application by the candidate or any other concerned person determine that the whole or part of its sittings shall be held in camera.⁸⁷ An approval hearing shall focus on a candidate's academic credentials, professional training and experience, personal integrity and background.⁸⁸ Any person may, prior to the approval hearing, and by written statement on oath, provide the Clerk with evidence contesting the suitability of a candidate to hold the office to which the candidate has been nominated.⁸⁹ The criteria to be used by a Committee during an approval hearing for the purposes of vetting a candidate are provided for under the Schedule to the Act.⁹⁰

Under Section 12, the approval committee has power to summon any person to appear before it for the purpose of giving evidence or providing information during approval hearing.⁹¹

2.3.1.4 Judicial Service Act

The First Schedule to the Act contains provisions relating to the appointment of judges.⁹² The Judicial Service Commission must, within thirty days of the reference check, investigate and verify, in consultation with the relevant professional bodies or any other person, the applicant's professional and personal background for information that could pose a significant problem for the proper functioning of the courts should the applicant be appointed.⁹³

Upon the expiry of the period set for applications, the Commission must: issue a press release announcing the names of the applicants; publicise and post on its website the place and approximate date of the Commission meeting for interviews; cause the names of the applicants to

⁸⁶ Ibid, s 6.

⁸⁷ Ibid, s 6 ss 5, 6

⁸⁸ Ibid, s 6 ss 7.

⁸⁹ Ibid, s 6 ss 9.

⁹⁰ Ibid, Schedule.

⁹¹It has the same powers as the High Court to: enforce the attendance of witnesses and examine them on oath, affirmation or otherwise; compel the production of documents; and issue a commission or request to examine witnesses abroad. Any person who: disobeys any order made by a committee for attendance or for production of papers, books, documents or records; or refuses to be examined before, or to answer any lawful and relevant question put by, a committee commits an offence and shall be liable, on conviction, to a fine not exceeding two hundred thousand shillings or to imprisonment for a term not exceeding one year, or to both.

⁹²This Schedule does not apply to the appointment of other officers of the judiciary such as magistrates, clerical officers etc. Indeed, the Act does not make provision for public participation during the selection of other officers of the judiciary other than judges. It is expected that the L&IA fills this gap.

⁹³ Judicial Service Act, First Schedule s 8.

be published in the *Kenya Gazette*; invite any member of the public to avail, in writing, any information of interest to the Commission in relation to any of the applicants; and interview any member of the public who has submitted any information on any of the applicants, and such information shall be confidential.⁹⁴

All interviews shall be conducted in public.⁹⁵

The criteria for evaluation of qualifications includes: professional competence with elements like intellectual capacity, diligence and the ability to work well with a variety of people; written and oral communication skills; integrity; and fairness.⁹⁶

2.3.1.5 County Government Act

One of the objectives of County Government Act is to provide for public participation in the conduct of the activities of the county assembly as required by Article 196 of the Constitution.⁹⁷ The activities of the county assemblies include vetting and approving nominees for appointment to county public offices.⁹⁸

Although, the Act does not have specific provisions providing for mechanisms for public participation during the selection of county public service officers, it makes quite elaborate provisions on citizen participation and public communication and access to information generally.⁹⁹ It makes provision for: principles of citizen participation, citizen's right to petition and challenge, duty to respond to citizen's petitions or challenges, matters subject to local referenda and establishment of modalities and platforms for citizen participation.¹⁰⁰ It also makes provisions for issues such as principles of public communication, objectives of county communication, county communication framework, access to information, and inclusion and integration of marginalized and minority communities.¹⁰¹

2.3.1.6 Case law

⁹⁴ Ibid, s 9.

⁹⁵ Ibid, s 10.

⁹⁶ Ibid, s 13.

⁹⁷ County Government Act, s 3.

⁹⁸ Ibid, s 8(1)(a).

⁹⁹ Ibid, Parts VIII (sections 87-101) and IX (sections 102-115).

¹⁰⁰ Ibid, s 87,88,89,90, 91.

¹⁰¹ Ibid, s 93,94,95,96,97.

Kenyan courts were handling matters concerning public participation in the selection of public officers even before enactment of the L&IA. The courts are of the view that there must be public participation in selection of public officers.¹⁰² The following decisions demonstrate what that public participation entails.

In *Consumer Federation of Kenya (COFEK) v Public Service Commission & another*¹⁰³, the court held that ‘there is no express requirement that “participation of the people” should be read to mean that “the people” must be present during interviews but taken in its widest context that their in-put is recognised.’¹⁰⁴ In the court’s view it is sufficient public participation where it is shown that the selection authority ‘called for, and received, information regarding the applicants and it used it during the interviews.’¹⁰⁵ The court accepted publication of information in the website, regular briefings in press conferences as to the procedure being used in conducting the interviews, video recording of proceedings as reasonable mechanisms of public participation.¹⁰⁶

¹⁰²For instance, in *Center for Rights Education & Awareness (CREAW) and 7 Others –vs- Attorney General (AG)* [2011]eKLR, the petitioners were challenging the nominations for purposes of eventual appointment to the offices of the Chief Justice, AG, Director of Public Prosecution and the Controller of Budget. The court held that values and principles stated under Article 10 ought to be borne in mind in making the nominations; In *David Kariuki Muigua – vs- AG* [2012]eKLR, the petitioner was challenging his own removal as the chairman of the Standards Tribunal and the subsequent appointment of another person in his place. He argued that the subsequent appointment made through a gazette notice did not conform to Article 10 of the Constitution. The court held that ‘it would be expected that the Minister, in making the appointments to the Tribunal, would be guided by the national values and principles set out in Article 10, in particular, participation of the people....’; In *Benson Riitho Mureithi –vs- J.W Wakhungu & 2 Others* [2014]eKLR, the petitioner was challenging the constitutionality of the appointment of the Interested Party as the Chairman of Athi Water Services Board on the basis that the Interested Party was appointed without regard being given to, among other things, his personal integrity, character, competence and suitability. At paragraph 80 of the judgment, the court held that ‘public officers must be appointed on the basis of the criteria set out in Chapter 6. They must also, in addition, be appointed in accordance with national values and principles set out in Article 10.’ At paragraphs 82 and 83 of the judgment, the court observed that ‘no-one knew or had any inkling that the Interested Party was going to be appointed as Chairman of the Water Services Board; and consequently, there was no opportunity for the petitioner or any other person to seek information about the appointment, or raise objections to the appointment...it seems to me therefore that the primary responsibility lay on the 1st respondent, and indeed any other state officer making a similar appointment, to put in place a mechanism for recruitment or appointment of members of the Boards of state corporations that would allow for public participation and consideration of the suitability and integrity of potential appointees as the Constitution now demands.’; in *Consumer Federation of Kenya (Cofek) v Public Service Commission* [2013]eKLR, the petitioner was challenging the appointment of principal secretaries on the basis that, among other things, there was no public participation in the process because the interviews were held in camera. The court held that there is no express requirement that participation of the people should be read to mean that the people must be present during interviews but taken in its widest context, that their in-put is recognized.

¹⁰³ [2013]eKLR.

¹⁰⁴ Ibid, Page 4.

¹⁰⁵ ibid.

¹⁰⁶ ibid.

In *David Kariuki Muigua –vs- AG and the Minister for Industrialisation*,¹⁰⁷ the court held that a competitive process would enable public participation and show transparency and accountability compared to appointment on the basis of a gazette notice and an appointment made at the whims of the Minister or President.¹⁰⁸ In *Center for Rights Education & Awareness (CREAW) & 6 Others –vs- AG*,¹⁰⁹ the court held that it is critical to have public participation and consultation. It observed that one may not have an opportunity to present whatever view one may have had on the suitability of those appointed where appointments are made on the basis of gazette notices.¹¹⁰

In *COFEK –vs- AG*,¹¹¹ the court concluded that there is no specific constitutional, legislative or policy standard of what constitutes public participation in matters of public appointments.¹¹² It held that advertising vacant positions with clear requirements and shortlisted and selected candidates were mechanisms for public participation.¹¹³ Further, the public is entitled to know who has been shortlisted and participate by being able to send any reports or objections of the persons who has been selected.¹¹⁴ Those who have not been shortlisted should be given an opportunity to make enquiries as to why they have not been shortlisted.¹¹⁵ It added that approval by National Assembly of nominees to certain office also achieves public participation.¹¹⁶

In *CREAW –vs- AG*¹¹⁷ the court held that public participation requires that an opportunity is given to all who may be interested in the position to apply and for anyone who may have a view on the suitability of a proposed appointee, particularly with regard to integrity and competence, to be heard should they wish to be heard.¹¹⁸

¹⁰⁷[2012]eKLR.

¹⁰⁸ Ibid, Page 2; See also *Benson Riitho Mureithi –vs J W Wakhungu & 2 Others* [2014]eKLR, where the court nullified an appointment on the basis that there was no public participation in an appointment made through a gazette notice. The court directed the Cabinet Secretary responsible for the appointments to use a competitive process and ensure that there is a mechanism to allow public participation in the process as required by Article 10 of the Constitution and also consider the personal integrity, character, competence and suitability of potential appointees; *Center for Rights Education & Awareness & 6 Others –vs- AG*[2012]eKLR, the court held that it is critical to have public participation and consultation. It observed that one may not have an opportunity to present whatever view one may have had on the suitability of those appointed where appointments are made on the basis of gazette notices.

¹⁰⁹ [2012]eKLR.

¹¹⁰ Ibid, Page 11.

¹¹¹[2012]eKLR.

¹¹²Ibid, Page 14.

¹¹³Ibid, Page 12.

¹¹⁴Ibid.

¹¹⁵ Ibid.

¹¹⁶ Ibid,Page 13.

¹¹⁷ [2012]eKLR.

¹¹⁸ Ibid, Page 11.

In *Albert Lukoru Oduna & 2 Others –vs- Judicial Service Commission & 2 Others*,¹¹⁹ the court held that the requirement for oral hearing in procedural fairness is not universal.¹²⁰ It held that there was public participation because the applicants and shortlisted candidates were duly advertised and interviews conducted in public.¹²¹ As to whether an oral hearing is necessary is dependent on the circumstances of the case and the nature of decision to be made.¹²²

2.3.2 International law

The Constitution provides that any international treaty or convention ratified by Kenya shall form part of the law of Kenya under the Constitution.¹²³ Therefore, the ratified treaties form part of the legal framework governing public participation. There are a number of treaties and conventions which emphasise the importance of public participation for their purposes. Although none of them deals with selection of public officers specifically, their principles are applicable even in the context of selection of public officers.

The aim of the treaties is to ensure everyone, without any distinction based on either age, gender, property, language, physical or mental disability, religion or race participates in governance. This study takes the same approach- that public participation in selection of public officers must be inclusive and everyone must participate.

Some of those treaties and conventions are outlined below.

2.3.2.1 International Covenant on Civil and Political Rights (ICCPR)

Every citizen shall have the right and the opportunity, without any of the distinctions and without unreasonable restrictions to take part in the conduct of public affairs, directly or through freely chosen representatives.¹²⁴ The distinctions are race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.¹²⁵

This provision encourages the participation of all citizens in governance. It justifies this study's view that all citizens must participate in the selection of public officers.

¹¹⁹ [2013]eKLR.

¹²⁰ Ibid,Page 7.

¹²¹ Ibid.

¹²² Ibid.

¹²³ Constitution, Article 2(6).

¹²⁴ ICPPR, Article 25(a).

¹²⁵ Ibid, Article 2.

2.3.2.2 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

Women have a right to participate in elections by voting and vying for elective positions, participating in the formulation and implementation of government policy, to hold public office and perform all public functions at all levels of government.¹²⁶ Even rural women have a right to participate in all community activities.¹²⁷

Although this provision is about participation of women in elections and community activities, its spirit is that all women must also to be allowed to participate in governance and therefore selection of public officers.

2.3.2.3 African Charter on the Rights and Welfare of the Child

Children have a right to participate freely in cultural life and arts.¹²⁸ Mentally or physically disabled children also have a right to special measures of protection under conditions which ensure his active participation in the community.¹²⁹

The Charter encourages the participation of all children. In addition to participate in cultural life and arts, children should also participate in selection of public officers because they are children of candidates for public officers or have interacted with them, are entitled to services from public officers such as in education sector, juvenile justice system and protection under the Children's Act.

2.3.2.4 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

Women have a right to participation in the political and decision-making processes and state parties are required to ensure increased and effective representation and participation of women at all levels of decision-making.¹³⁰ States Parties are required to undertake to ensure the protection of women with disabilities and take specific measures commensurate with their

¹²⁶ CEDAW, Article 7.

¹²⁷ Ibid, Article 14(f).

¹²⁸ African Charter on the Rights and Welfare of the Child, Article 12.

¹²⁹ Ibid, Article 13.

¹³⁰ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Article 9.

physical, economic and social needs to facilitate their access to employment, professional and vocational training as well as their participation in decision-making.¹³¹

These provisions emphasize the need to have women participate in decision-making including decisions pertaining to selection of public officers.

2.3.2.5 Universal Declaration of Human Rights (UDHR)

Everyone has a right to take part in the government of his country, directly or through freely chosen representatives and that the will of the people shall be the basis of authority of government.¹³²

This provision underscores the need to facilitate public participation in selection of public officers in furtherance of democracy and to have the appointments or nominations made reflect the will of the people. Under this provision, participation is a right. With regard to selection of public officers, the participation should also be seen as a right, not a mere aspiration.

2.3.2.6 African Charter on Human and Peoples Rights (Banjul Charter)

Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law and shall have the right of equal access to the public service of his country.¹³³

This provisions shows that public participation is a right that is available to every citizen. Citizens are therefore entitled to participate in the selection of public officers as of right.

2.3.2.7 African Charter on Democracy, Elections and Governance

One of those objectives of this Charter is to promote the establishment of the necessary conditions to foster citizen participation, transparency, access to information, freedom of the press and accountability to management of public affairs.¹³⁴

¹³¹ Ibid, Article 23.

¹³² UDHR, Article 21.

¹³³ Banjul Charter, Article 13.

¹³⁴ African Charter on Democracy, Elections and Governance, Article 2.

The Charter provides the principles which guide state parties in the implementation of the Charter and one of the principles is effective participation of the citizens in democratic and development processes and in governance of public affairs.¹³⁵

State parties are required to commit themselves to, among other things, fostering popular participation and partnership with civil society organizations in order to advance political, economic and social governance.¹³⁶ They are also required to create the necessary conditions for full and active participation of women in the decision-making processes and structures at all levels as a fundamental element in the promotion and exercise of a democratic culture.¹³⁷

Further State parties are required to promote participation of social groups with special needs, including the youth and people with disabilities, in the governance process and to ensure systematic and comprehensive civic education in order to encourage full participation of social groups with special needs in democracy and development processes.¹³⁸

These provisions are aimed at facilitating participation by all social groups in governance process. Selection of public officers is also a governance process and all citizens must be facilitated to participate taking into account their special needs.

2.4 Public participation legal framework

Public participation legal framework should contain provisions such as:

- a) Definitions.
- b) Adoption of a public participation policy and making it publicly available.
- c) Principles which govern meaningful and effective public participation which include; planning ahead, inclusive design, authentic intent that actually helps in shaping action or policy, transparency, inclusiveness and equity, informed participation, accessible participation, appropriate process, use of submitted information by decision-makers and monitoring and evaluation.
- d) Public participation specialist to assist in the implementation and to provide ongoing training in public participation.

¹³⁵ Ibid, Article 3.

¹³⁶ Ibid, Article 27.

¹³⁷ Ibid, Article 29.

¹³⁸ Ibid, Article 31

- e) Establishment of a public participation advisory board with specified duties, powers, and responsibilities.
- f) Collaboration between state agencies, authorities and other public entities.¹³⁹

It should also contain provisions based on answers to questions such as;

- a) who, on what, in what and how: *who* is to participate? On what sort of issues? In what decision and the body making that decision? *How*, that is, through which institutions, mechanisms, procedures?
- e) Of whom: which sectors are targeted?
- f) In what: on what issues are people able to participate?
- g) How: what methodology is applicable?¹⁴⁰

2.5 Public participation methods, methodologies and model

Some public participation methods that may be appropriate in the context of selection of public officers include: public hearings, public inquiries and parliamentary representation.¹⁴¹ Some appropriate methodologies include: public education, public hearings and social monitoring.¹⁴²

An appropriate model of participation should include: information, consultation, involvement, acting together and partnership but devoid of manipulation and therapy both of which aim at achieving support by public relations and increases an opportunity for public input to influence the decision.¹⁴³

2.6 A summary of key elements of meaningful public participation in selection of public officers

The above discussion shows that some of the key elements of public participation in the selection of public officers include:

- Definition of public participation, personal integrity, competence and suitability.
- Suitable procedures
- Availability, access and use of information in a manner that influences the decision made.
- Inclusiveness and equity

¹³⁹ Working Group on Legal Frameworks for Public Participation (n 68).

¹⁴⁰ Ghai (n 69).

¹⁴¹ Sihanya et. al. (n 70).

¹⁴² Holdar, et. al (eds) (n 55).

¹⁴³ Gina, et.al.(eds) (n 72).

- Reasonable and adequate timelines
- Transparent process and results providing information and a rationale on whether or how the public input affected the decision.
- A clearly defined nature and scope of participation.
- Suitable model, methods and methodologies of public participation.
- Accessibility of decision makers

CHAPTER 3: PUBLIC PARTICIPATION IN SELECTION OF PUBLIC OFFICERS UNDER THE L&IA

3.1 Introduction

As seen before, meaningful public participation is essential during the selection of public officers. It is a constitutional requirement that it be given effect. The L&IA is the primary Act of Parliament which is meant to give that effect. This Chapter focuses on the mechanisms under the L&IA and how facilitative they are to meaningful public participation in the selection of public officers. The aim is to assist in ensuring that only persons who have personal integrity, are competent and suitable to hold public offices are appointed, promoted or nominated for elections as provided for in Article 73(2)(a) of the Constitution. This study promotes the view that Article 73(2)(a) of the Constitution must be complied with for purposes of fresh appointments, promotions and nominations for elections.

3.2 Mechanisms of public participation under the L&IA

Chapter Six of the Constitution, Article 73(2)(a) included, applies to all public officers.¹⁴⁴ The L&IA also applies to all public officers as if they were state officers.¹⁴⁵ Therefore, there must be public participation in the selection of all public officers not just state officers.

3.2.1 Recognition of the principle of public participation in selection of public officers.

The L&IA recognizes the principle of public participation in the selection of public officers by recognizing Articles 10 and 73 of the Constitution as some of its guiding principles.¹⁴⁶ It provides that nothing in the L&IA should be construed as diminishing or derogating from those recognized principles.¹⁴⁷

POEA forms part of the L&IA.¹⁴⁸ The POEA recognizes the principle of having public officers selected on the basis of personal integrity, competence and suitability or election in fair elections and obligates all public officers to promote and practice that principle and couches it in mandatory terms.¹⁴⁹ However, the POEA makes no further provision to facilitate implementation of the principle of selecting public officers on the basis of personal integrity, competence and

¹⁴⁴ Constitution, Article 80©.

¹⁴⁵ L&IA, s 52(1).

¹⁴⁶ Ibid, s 3(2).

¹⁴⁷ Ibid, s 3(3)

¹⁴⁸ L&IA, Section 6.

¹⁴⁹ POEA, s 22.

suitability. There is no provision under the POEA intended to have any other person, private institution or public entity respect, uphold and practice selection of public officers on the basis of personal integrity, competence and suitability. Lack of further provisions makes public participation difficult. Public participation should not be a responsibility of public officers alone. It is a responsibility of the entire community and must be respected by all.

A state or public office is a position of public trust and the authority and responsibility vested in a state officer shall be exercised by the public officer in the best interest of the people of Kenya.¹⁵⁰ This underscores the importance of public participation in the selection of the public officers so that only persons who can promote the best interest of the people of Kenya may occupy those offices.

The recognition of the applicability of the principle of public participation in selection of public officers facilitates public participation by making it legal. However, recognition alone is not enough. In fact, there is no express and specific provision which is easy to pick out without going back to confirm where and whether public participation is provided for under Article 10 of the Constitution or whether selection of public officers on the basis of personal integrity, competence and suitability is one of the principles of leadership provided for under Article 73 of the Constitution.

Section 3 of the L&IA is not express that the ‘selection’ referred to in Article 73(2)(a) of the Constitution is more than just having public officers respect that provision. The Constitution does not bestow the responsibility of implementing Article 73(2)(a) of the Constitution on public officers alone. It is a guiding principle of leadership and integrity that must guide everyone in making appointments, nominations or promotions. This gap extends to the main provisions of the L&IA and has far reaching implications on public participation in the selection of public officers.

3.2.2 Definition of a public officer

The L&IA does not define who a public officer is. It nevertheless applies the provisions of POEA where appropriate. The POEA gives a definition of public officers that leaves out sections of public service from its application.¹⁵¹

¹⁵⁰ L&IA, s 8.

¹⁵¹ POEA, Section 2.

A ‘public officer’ means any state officer or any person, other than a state officer who holds a public office. A state officer means a person holding a state office. A state office means any of the following offices: president; deputy president; cabinet secretary; member of parliament; judges and magistrates; member of a commission to which Chapter 15 applies; holder of an independent office to which Chapter 15 applies; member of a county assembly, governor or deputy governor of a county or other member of the executive committee of a county government; Attorney –General; Director of Public Prosecutions; Secretary to the Cabinet; Principal Secretary; Chief of Kenya Defence Forces; Commander of a service of the Kenya Defence Forces; Director-General of the National Intelligence Service; Inspector-General, and the Deputy Inspectors-General of the National Police Service; or an office established and designated as a state office by national legislation. A public office means an office in the national government, a county government or the public service, if the remuneration and benefits of the office are payable directly from the Consolidated Fund or directly out of the money provided by Parliament.¹⁵² This is the definition that the L&IA should adopt for purposes of selection of public officers because it is more inclusive than that given by POEA.

3.2.3 Definition of ‘public participation’, ‘personal integrity’, ‘competence’ and ‘suitability’

The above terms requires a definition for purposes of clarity and objectivity when dealing with issues concerning them. Public participation is not defined and it is therefore difficult to know its nature and scope. Personal integrity is also not defined. As regards competence, whether reference is being made to educational qualifications or job experience should be clearly defined. Suitability is also not defined.

Selection of public officers on the basis of personal integrity, competence and suitability is part of the Leadership & Integrity Code (Code).¹⁵³ Neither the Constitution nor the POEA defines the terms ‘personal integrity’, ‘competence’ and ‘suitability.’ The L&IA does not define the terms either.

The absence of definition hinders meaningful public participation because one would not know what to look out for in determining whether a candidate meets the requirements of Article 73(2)(a) of the Constitution. Lack of definitions leads to engagement in speculation, witch-

¹⁵² Constitution, Article 260.

¹⁵³ L&IA, s 3(2)(c), s 6 as read with POEA, s 22.

hunting and guesswork all which are hindrances to meaningful public participation. Lack of definition leads decision-makers to have different views, which are largely personalized. There cannot be meaningful public participation in the circumstances.

3.2.4 Who may participate

Any individual and institution should participate in selection of public officers if they so wish. This would facilitate achievement of inclusiveness and equity in the selection process. The unique circumstances of individuals and institutions should be taken into account when creating mechanisms for participation. Such circumstances include: age, sex, religion, marginalized communities, the poor, the illiterate, the youth, women and persons with disabilities. Due attention must be given to the fact that juristic persons such as CSOs and institutions may not be able to access information because they are not citizens within the meaning of Article 35 of the Constitution. This challenge will be explored in greater detail in Chapter 4.

3.2.4.1 Individuals

There is no provision which excludes individuals from participating in the selection process.

3.2.4.2 Public officers

The primary purpose of the L&IA is to ensure that public officers respect the values, principles and requirements of the Constitution.¹⁵⁴ That is a mechanism that can facilitate public participation where the public officers are involved as decision-makers during the selection of other public officers because they must put in place mechanisms to facilitate public participation within their institutions or provide relevant information about candidates.

However, without more, the provision provides a bare minimum non-obligatory requirement that public participation be respected. It may not translate to facilitating meaningful participation where there is no such will on the part of the concerned public officer. Failure to make further provision to guide the public officers creates room for abuse of the resultant discretion by the decision-makers where they determine the extent to and the terms at which they will allow participation, if they so wish.¹⁵⁵ For instance, they can decide to carry out the selection process in

¹⁵⁴ Ibid, s 3.

¹⁵⁵ For instance, in *Consumer Federation of Kenya –vs- Public Service Commission & Another* [2013] eKLR the court observed that the PSC had not violated any law in not allowing public participation in the selection of Principal Secretaries because “The Petitioner had no answer to the 1st Respondent's assertion that in executing its

private, which negates public participation and erodes public confidence in the selection panel. It is also left to them to decide whether the process will be transparent, accountable and what to do with the information collected from participants. Given the past conduct on the part of most selection panels and other public bodies involved like the National Assembly where the selection process is largely rubber-stamping ‘an already made’ appointment, they cannot be trusted.

Selection of public officers is an exercise which involves more parties than just public officers. The members of the public and civil society organisations are also involved as they are required to participate in one form or the other. It is not possible for L&IA to purport to ‘establish procedures and mechanism for the effective administration of Chapter Six of the Constitution and for connected purposes’¹⁵⁶ yet leave out all other parties involved in the selection process, except public officers, from the purview of Section 3.

3.2.4.3 Other institutions

The Code contains elaborate provisions on how public offices are to conduct themselves either in public or private. Many institutions, public and private, may be involved in handling issues pertaining to conduct of public officers as per the Code. Those institutions can therefore participate in the selection of such public officers for new appointments, promotions or nomination for elections. A few examples are outlined below.

Public officers are required not to engage in actions which would lead to their removal from the membership of a professional body in accordance with the law and not commit offences and in particular, any of the offences under Parts XV and XVI of the Penal Code (Cap. 63), the Sexual Offences Act (No. 3 of 2006), the Counter-Trafficking in Persons Act (No. 8 of 2010), and the Children Act (Cap. 141).¹⁵⁷ Therefore, professional bodies like Law Society of Kenya and Certified Public Secretaries Board, may participate by providing information as to whether or not a specific candidate has been removed from its membership. Institutions involved in prosecution of criminal offences, sexual offences and children affairs can participate in the selection process.

mandate above, there is no requirement in law that it should conduct all interviews in public or publicise (*in newspapers*) the names of all persons who have applied for the position of Public Secretary.”

¹⁵⁶L&IA, Preamble.

¹⁵⁷ Ibid, s 13(h),(i).

Wrongful and illegal acquisition of property is prohibited.¹⁵⁸ Therefore institutions, such as land offices, involved in the acquisition of property whether movable or immovable can participate.

A public officer must pay their taxes and shall not neglect their financial obligations.¹⁵⁹ This means that any institution whether public or private can participate by giving information regarding compliance with this provision. In practice selection panels require clearances from institutions such as Kenya Revenue Authority, Credit Reference Bureau and Higher Education Loans Board from all candidates whether they are public officers or not.¹⁶⁰

There are other institutions such as EACC, the media, Kenya National Human Rights & Equality Commission (KNHR&EC) which participate on their own motion or upon invitation by the selection panels.

3.2.4.4 Special groups

As seen earlier in Chapter 2, the Constitution of Kenya promotes participation of every person in the conduct of public affairs. International treaties and conventions like ICCPR, CEDAW, UDHR, Banjul Charter and African Charter on Democracy, Elections and Governance advocate for participation of these groups of people in the making of decisions affecting the public generally.

Majority of Kenyans fall within these groups. Such people include women, children, youth, persons with disabilities, minorities, the poor, senior citizens, marginalized groups and the illiterate. They must therefore be facilitated to participate in the selection of their public officers.

However, the L&IA does not address issues of participation affecting these groups.¹⁶¹ The groups have special needs that affect their participation. For instance, some may not have access to advertisements made in newspapers or in websites because they cannot read and or understand English or cannot afford to buy newspapers or internet. Some are victims of oppression by the

¹⁵⁸ Ibid, s 15.

¹⁵⁹ Ibid, s 33.

¹⁶⁰ Koki, (n 48).

¹⁶¹ Cf. County Governments Act s 87 (c) and (d) which has “protection and promotion of the interest and rights of minorities, marginalized groups and communities and their access to relevant information” and also “ legal standing to interested or affected persons, organizations, and where pertinent, communities, to appeal from or, review decisions, or redress grievances, with particular emphasis on persons and traditionally marginalized communities, including women, the youth, and disadvantaged communities” as some of the principles upon which citizen participation is based.

very candidates and fear victimization if they forward the information they have to selection panels and more so, if they are invited to verify the information e.g their wives and children. Some cannot access towns or urban centers or the capital city where the selection process, especially interviews, takes place. Some do not have access to television to watch interviews being aired for varied reasons. The challenges have their roots in the social, political, economic and cultural contexts wherein they have been historically and systematically disadvantaged by reasons of societal inequities and unjust distribution of resources.¹⁶² Minority groups may not have representation in National Assembly or County Assemblies because of their numerical disadvantage. There should be mechanisms aimed at enhancing their participation given their special circumstances.

3.2.4.5 Civil Society Organisations (CSOs)

CSOs have been very active participants in selection of public officers especially through public interest litigation. As seen in the Background section of this study and as will be seen later in this Chapter, CSOs face a great challenge in accessing information necessary for their participation especially that held by the State because they do not qualify as citizens within the meaning of Article 35(1) of the Constitution. Kenya courts have held they are not citizens and they cannot enforce right to information. Their participation is therefore limited to that extent.

There is a public debate as to who the CSOs represent in their quest for public participation. There is a question as to whether they are genuinely motivated by public interest and are genuinely interested in promoting good governance. Whoever their principal is and whatever their motivation is, they have done a commendable job especially in public interest litigation. Some of the suits have resulted in having appointment of persons who do not meet the criteria set in Article 73(2)(a) of the Constitution revoked or barred. They therefore need to be facilitated to participate effectively through Article 80(d) of the Constitution which empowers Parliament to make any other provision necessary for ensuring the promotion of the principles of leadership and integrity and enforcement of the Chapter.

The L&IA ought to have made good use of Article 80(d) of the Constitution to facilitate CSOs' participation but completely it failed to do so.

¹⁶²Alternative Law Groups (2004), From the Grassroots: The Justice Reform Agenda of the Poor and the marginalized 3.

3.2.5 Accessibility of decision-makers

Most of the decision-making bodies are based in Nairobi or major towns. The interviews are conducted in English. Some require submission of information through affidavits whose preparation involves procedures which may be costly in terms of time and money. They are therefore not easily accessible especially by members of the disadvantaged groups like the poor, and the illiterate. An appropriate model of participation would solve this problem by ensuring that all persons access decision-makers. The L&IA does not have any model.

In Kenya, the process of selecting public officers takes various forms depending on the position sought to be filled and the relevant sectoral law governing such appointments. Various and sometimes several bodies may be involved in the making of the decision. This can be demonstrated by way of examples.

For some positions e.g cabinet secretaries, the President nominates and with the approval of National Assembly, appoints cabinet secretaries.¹⁶³ Before the President makes the appointment, the recommended persons must be approved by another independent body e.g National Assembly. For others e.g judges, a selection panel is set up to shortlist suitable persons for nomination by the Judicial Service Commission which then makes recommendation to the President for appointment subject to the approval of the National Assembly.¹⁶⁴ For public officers under the PSC, the PSC appoints persons to hold public positions.¹⁶⁵

For nominations for elections, the process involves political parties, county governor or presidential candidate nominating deputy governor or deputy president candidate and presentation and acceptance of the nomination certificates or papers to the IEBC.¹⁶⁶ Independent candidates may be nominated by individuals in case of presidential election or by delivery of applications for nominations to the returning officer.¹⁶⁷ During the presentation of nomination papers, only the two persons entitled to attend proceedings are entitled to inspect and to object to the validity of any nomination paper delivered in his or her presence.¹⁶⁸ The only persons entitled

¹⁶³Constitution, Article 152(2).

¹⁶⁴ *ibid*, Article 166; Judicial Service Act s 30 and First Schedule.

¹⁶⁵Constitution, Article 234.

¹⁶⁶ Elections Act, s 13-21, 31,33

¹⁶⁷*Ibid*, Elections (General Regulations), 2012 Rules 17, 23, 27, 31 and 35.

¹⁶⁸ *Ibid*, Rule 48.

to attend proceedings are the candidate, his or her agent, a person nominated as deputy to the candidate (if applicable) and one other person attending at the request of the returning officer.¹⁶⁹

These kinds of complex, sometimes multi-tiered and almost unclear processes of selection of public officers pose many challenges to meaningful public participation. For instance, where more than one institution is involved in the selection process, at what point will public participation take place? Is it at the first level or the last level or at all levels? In the case of nominations, is public participation allowed at all in view of provisions such as Rule 48 of the Elections (General Regulations), 2012? The L&IA has no provision addressing this challenge.

3.2.6 Model of participation

The L&IA has not developed or adopted any model of participation. As a result, the practice currently is not based on any model and appears to be largely manipulative and therapeutic or remedial in nature in that it looks like the public participation is merely called for to comply with procedural hops and rubber-stamp already made decisions. It is not clear whether the public are to be informed or consulted or both and whether the public is a partner in the decision-making. Lack of a model hinders meaningful participation because it is not clear how the public is involved in the process. Any participation devoid of a model is likely to be a mere public relations exercise aimed at rubber-stamping appointments, nominations and promotions that are otherwise illegal.

3.2.7 Methodology of the participation

To achieve meaningful public participation, an appropriate methodology has to be adopted. Otherwise, provisions for participation would remain mere aspirations.

The L&IA has not provided for any methodology or guidelines of adoption of any methodology regarding public participation in the selection of public officers. It has not addressed the question whether public is only to be educated of the process, whether public hearings are to take place or whether the public can monitor whether their participation is taken into account during decision-making. This gap is a hinderance to meaningful public participation.

¹⁶⁹ Ibid, Rule 48.

3.2.8 Nature of public participation

There is no clearly defined nature of public participation under the L&IA. This situation does not favour meaningful public participation.

In Kenya, a practice has emerged where the selection panels decide the nature and scope of participation depending on their needs and circumstances. Some ask for sworn affidavits, others ask for memoranda while others do not specify the mode of submission of information. In some cases, the public have been allowed to participate as audience and in others the interviews have been conducted in camera thereby closing out members of the public from participation. This confusion leads to personalized views as to the nature of public participation, the procedure and the scope which are not favourable to public participation.¹⁷⁰ The confusion arising hinders meaningful public participation.

3.2.9 Notification of selections and results of participation

For there to be meaningful participation the public must be notified of upcoming selection process early enough so that there is sufficient time for them to prepare for participation.

In *Republic –vs- Tana River County Assembly & Another ex parte Ibrahim Bocha*¹⁷¹ one of the complaints was that the public did not get sufficient time to participate in the selection exercise. The court held that an advertisement giving six day's notice was too short.¹⁷² It held further that advertisement in a newspaper is only a minimum step and that other modes can be used for purposes of reaching the disadvantaged.¹⁷³

After the participation, the participants must be notified of the results of their participation and reasons for the decision reached.¹⁷⁴ The results should be transparent and the public must know

¹⁷⁰ For instance in *Consumer Federation of Kenya -Vs- Public Service Commission & Another* [2013]eKLR, the court was satisfied that calling for, and receiving, information regarding the applicants and using it during the interviews was sufficient public participation despite the petitioner's objection as to the manner of calling for, receiving and using the information. The court was also satisfied that considerations of cost outweigh the constitutional principle of public participation such that publishing information on websites and having video recorded interviews is sufficient public participation. The court also held that there was no legal basis for opening up the interviews to the public or publication of the names of applicants in the newspapers. These were the views of the respondent too.

¹⁷¹ [2014]eKLR.

¹⁷² Page 6.

¹⁷³ Ibid.

¹⁷⁴ CEAA (n60).

whether and how their input influenced the decision made, otherwise public participation would have no meaning.¹⁷⁵

In majority of the cases especially for positions that do not require some form of approval by another public body in which event a report is required and may be available to the members of the public, no results or reasons for decisions are given and even when they are given, there are not made public or accessible to the public.¹⁷⁶ In others, the reasons are said to have been given to the candidate in writing ‘to protect his or her integrity.’¹⁷⁷

There are no provisions under the L&IA to guide notification of selection process and the results. This hinders meaningful participation.

3.2.10 Timelines for public participation

A meaningful participation process should be pre-planned to give the public sufficient time to participate and to obtain and consider the information they need for participation.¹⁷⁸ The L&IA does not have any provision providing for timelines within which public participation is to be done during the selection of public officers.

In practice, the period within which information about candidates is to presented varies from one selection panel to another and largely depends on a particular public entity’s level of internal organization and politics. Most of the times, it is left to the discretion of the selection panel to determine what period is sufficient depending, largely, on its convenience and other

¹⁷⁵*Matatiele Municipality & Others –vs President of the Republic of South Africa & others* [2006] ZACC page 12. The South African Constitutional court explained that the obligation to facilitate public participation does not simply entail holding hearings. It must provide the opportunity to influence the decision of the law maker: ‘While it is true that the people of the province have no right to veto a constitutional amendment that alters provincial boundaries, they are entitled to participate in its consideration in a manner which may influence decisions of the Legislature. The purpose of permitting public participation in the law-making process is to afford the public the opportunity to influence the decision of the law-makers. This requires the law-makers to consider the representations made and thereafter make informed decision. Law-makers must provide opportunities for the public to be involved in meaningful ways to listen to their concerns, values, and preferences, and to consider these in shaping their decisions and policies. Were it to be otherwise, the duty to facilitate public participation would have no meaning.’

¹⁷⁶ For instance, the results of the vetting of Ethics and Anti Corruption Commission staff pursuant to an undated notice titled ‘Vetting of Staff’ available at the Commission’s website <<http://www.eacc.go.ke/docs/VETTING%20OF%20STAFF.pdf>> (accessed on 7 January 2014) are not known despite the process having been completed.

¹⁷⁷ For instance, during the vetting of Senior Deputy Commissioners of Police in Kenya where three out of seven officers were removed for being unsuitable to hold the positions, the chairman of the National Police Service Commission was quoted in electronic media during news bulletin saying that reasons for the removal of the three would not be made public but would be given to the specific officers in writing to ‘protect the integrity of the officers.’

¹⁷⁸ A Working Group on Legal Frameworks for Public Participation (n 68) 2.

circumstances.¹⁷⁹ It is common knowledge that most public service selections are done as close to the deadline as possible, perhaps deliberately.

Not having standard minimum periods prescribed in law hinders meaningful public participation in that interested persons do not have sufficient time to collect the information they need, present it and ensure it has been considered. Further, the selection panels would have to work extremely hard to sift out all the information given close to or on the deadline for making the decision, give it due consideration and have the information influence their decision. As a result, chances are high that the information presented to a selection panel that has little time to make a decision will be treated casually, if it is given any consideration at all.

Where there are no timelines for rendering court decisions pursuant to litigation aimed at enforcing public participation or right of access to information, chances of having an unsuitable person being appointed or promoted to hold or continuing holding a public office, sometimes serving the full term, are very high. Chances of having an unsuitable candidate nominated to vie for elections are also high. This gap does not facilitate meaningful public participation in any way.

Some statutes provide for a period within which the members of the public are to forward their views about candidates. For instance, Public Appointments (Parliamentary Approval) Act provides that members of the public shall be notified of the time and place for holding an approval hearing at least seven days prior to the hearing for them to know when they should present their views.¹⁸⁰

3.2.11 Procedures for participation

In the selection process, there must be procedures for public participation. The procedures should be simple, clear, understandable and facilitate meaningful public participation. Some of those procedures are discussed below.

¹⁷⁹ For instance, the Kenya's National Police Service Commission 'decided to extend the period out of public demand' by another seven days from an initial seven days' period. The Judges & Magistrates Vetting Board gave a period of fourteen days for submission of information. *See* The Standard, 'Vetting team extends time to submit views' and 'Invitation to submit information' Thursday January 16, 2014 at pages 19, 23.

¹⁸⁰ Public Appointments (Parliamentary Approval) act s 6.

3.2.11.1 Vacancy advertisements and notifications for interviews, shortlisted candidates and appointed or nominated candidates

To facilitate public participation, members of the public need to know: what positions are being filled and the qualifications, who applied and who was shortlisted and who was appointed or nominated or promoted.¹⁸¹ The advertisements should be made early enough before the process starts. This will assist in facilitating meaningful participation in the selection process and also in monitoring and evaluation after the completion of the process. The L&IA does not have provision for this.

Some statutes have provisions for advertisements. For instance, the Judicial Service Act provides that upon expiry of the period set for applications, the Commission shall:

- a) issue a press release announcing the names of the applicants; publicise and post on its website the place and approximate date of the Commission meeting for interviews;
- b) cause the names of the applicants to be published in the *Kenya Gazette*
- c) invite any member of the public to avail, in writing, any information of interest to the Commission in relation to any of the applicants; and
- d) interview any member of the public who has submitted any information on any of the applicants, and such information shall be confidential.¹⁸²

3.2.11.2 Submission of information

The members of the public must be given an opportunity to submit the information they have to the decision makers and the modes of submission of the information must be widely accessible, affordable and available to all the members of the public taking into account their unique circumstances e.g special groups and those in foreign countries.¹⁸³ The L&IA does not give guidelines on this.

Some statutes specify how the views of the public are to be submitted. For instance, Public Appointments (Parliamentary Approval) Act provides that such information is to be submitted through a written statement of oath.¹⁸⁴ At the very least, the L&IA should provide that members of the public are entitled to submit information through any suitable means.

¹⁸¹*COFEK –vs AG*, (n114).

¹⁸² Judicial Service Act, First Schedule s 9.

¹⁸³ Working Group on Legal Frameworks for Public Participation (n68) 2; Ghai (n69); Rowe et. al. (n 70)

¹⁸⁴ Public Appointments (Parliamentary Approval)Act s 6 (9).

3.2.11.3 Conduct of proceedings

The L&IA is silent on whether the selections are to be held in camera or are open to the public or both. Proceedings held in camera negate the whole essence of public participation as no one, except the selection panel and the candidate, will know what transpired. Whether there was any information collected through public participation and how it was treated may not be known to the public.

Some statutes make provisions for conduct of proceedings. For instance, County Governments Act provides that when considering appointments, proceedings of the committee and county assembly shall be open to the public.¹⁸⁵ The Judicial Service Act provides that all interviews shall be conducted in public.¹⁸⁶ The Public Appointments (Parliamentary Approval) Act provides that the approval hearings may be open to the public or held in camera.¹⁸⁷

Appropriate language is important in order to enhance accessibility to decision makers for purposes of submitting information.¹⁸⁸ The L&IA is silent on the language(s) which can be used in the conduct of proceedings. Mostly, the proceedings are conducted in English. Anyone who has difficulties with the language cannot participate meaningfully.

3.2.11.4 Procedures for taking evidence or information

With regard to procedures for taking evidence or information, it is expected that the procedures do facilitate public participation. They must be simple, understandable, not onerous and not intimidating. They should also ensure that individuals with useful information or evidence are compelled to give it if they are not willing to do so voluntarily. The L&IA does not give any guidelines regarding this issue.

Some statutes like the Public Appointments (Parliamentary Approval) Act have procedures for taking information. It provides that the approval committee has the power to summon any person to appear before it to give evidence or information and it has the same powers as the High Court to: enforce the attendance of witnesses and examine them on oath, affirmation or otherwise;

¹⁸⁵ County Governments Act s 14(3)(c).

¹⁸⁶ Judicial Service Act, First Schedule s 10(5).

¹⁸⁷ Public Appointments (Parliamentary Approval) Act, s 6.

¹⁸⁸ A Working Group on Legal Frameworks for Public Participation (n 68) 14.

compel the production of documents; and issue a commission or request to examine witnesses abroad.¹⁸⁹ It also provides that any person who: disobeys any order made by a committee for attendance or for production of papers, books, documents or records; or refuses to be examined before, or to answer any lawful and relevant question put by, a committee commits an offence and shall be liable, on conviction, to a fine not exceeding two hundred thousand shillings or to imprisonment for a term not exceeding one year, or to both.¹⁹⁰

3.2.12 Public education and training

A public participation culture cannot be built unless those who participate have a sufficient education and information. It has been argued that the apathy of Kenyans that is being witnessed in so far as public participation is concerned is because there has been no culture of participation.¹⁹¹

The L&IA requires Cabinet Secretaries responsible for leadership and integrity, constitutional affairs, education and the public service shall collaborate with the Commission and the relevant public entity for the purpose of developing and overseeing the provision of long term education and training on leadership and integrity to: all public officers; all levels of the education system; and the public.¹⁹² If comprehensive, effective and results-oriented education programs that include public participation are put in place, meaningful public participation in the selection of public officers may be facilitated and even sustained in future.

3.2.13 Availability of, access to and use of information

For information to be useful in public participation, access to it should be preceded by its availability and given meaning and effect by its use.

3.2.13.1 Right to access information

The L&IA recognizes access to information rights conferred by the Constitution as one of its guiding values, principles and requirements.¹⁹³ However, not all persons have a right to information because the right is only available to citizens.¹⁹⁴ As seen in earlier, juristic persons

¹⁸⁹ Public Appointments (Approval Act), s 12.

¹⁹⁰ Ibid, s 12(3).

¹⁹¹ Report of the Conference on Development of a Public Participation Framework (n 29)13.

¹⁹² L&IA s 53.

¹⁹³ L&IA, s 3(2).

¹⁹⁴ Constitution, Article 35; In *Nairobi Law Monthly Company Limited V Kenya Electricity Generating Company & 2 Others*[2013]eKLR paragraph 82. In this decision the Court also stated that ‘As a legal “person”, it may enjoy the

such as the media, CSOs, public institutions e.g EACC, (KNHR&EC) and private institutions also do participate in the selection of public officers. It follows, therefore, that such a juristic person may have to use a citizen in order to obtain the information it needs for purposes of participation. However, Parliament has the power to make any other provision necessary for ensuring the promotion of the principles of leadership and integrity referred to in Chapter Six and the enforcement of Chapter Six.¹⁹⁵ Therefore, it is possible to legislate issues of access to information by juristic persons.

The L&IA does not have a provision which gives a right of access to information necessary for the promotion of Article 73(2)(a) of the Constitution and for enforcement of it to every person, whether natural or juristic. Some statutes like the County Governments Act make provision for this right and specifically provide that timely access to information, data and documents is a guiding principle for citizen participation.¹⁹⁶ At section 96(2), it provides that an office shall be designated for purposes of ensuring access to information.¹⁹⁷

3.2.13.2 Availability of information

To ensure that information necessary for public participation is available, there should be mechanisms for collection and retention of that information.

The L&IA contains the standards of conduct expected of public officers. It is therefore easy to challenge the candidature of a former or serving public officer if they breached the Code before and the information is properly collected and retained. To this extent, the Code facilitates availability of information necessary for public participation. However, the Code does not exhaustively and clearly provide for standards of personal integrity, competence and suitability even for serving public officers as shown by the examples below.

rights conferred by Article 35 (2), which are conferred on all 'persons' but it is not a "citizen" that may have a right of access to information as contemplated under article 35(1). Thus the petitioner is a company with Kenyan nationality, but not Kenyan citizenship; In *Famy Care Limited v Public Procurement Administrative Review Tribunal Board and Another (n110)* where the court held that "It is common ground that the petitioner is a body corporate duly incorporated in India. It is therefore excluded from the enjoyment of the right to access to information protected by Article 35(1)."

¹⁹⁵ Constitution, Article 80(d).

¹⁹⁶ County Government Act, s 87.

¹⁹⁷ Ibid, s 96.

It provides for standards of professionalism.¹⁹⁸ However, one may be a professional but incompetent or unsuitable for the position they hold. There are no standards or definitions provided for under the L&IA to guide determination of issues relating to competence and suitability.

The moral and ethical requirements set out under section 13 relate to conduct of public officers in their official capacity and not in private capacity or affairs. For example, they are required to demonstrate honesty in the conduct of public affairs. Does it mean they can be dishonest while conducting private affairs? Section 32 which provides that a public officer must conduct private affairs in a manner that maintains public confidence in the integrity of the office is abstract. Its application is heavily dependent on the views of the person interpreting as to what conduct would erode confidence in the integrity of a public office.

Any person who wishes to be elected to a state office is required to submit submit to IEBC a self-declaration form.¹⁹⁹ The self-declaration form is aimed at showing whether such a person meets the moral and ethical requirements under Section 13 only. Other requirements of the Code are not included in the self-declaration forms. In effect, persons who have acted unprofessionally, have failed in financial integrity, have not honored their financial obligations, have bullied others and other breaches of the Code can run for elective public offices.

Section 13 is clear that the moral and ethical requirements are for purposes of Articles 99(1)(b) and 193(1)(b) of the Constitution. These Articles deal with election of Members of Parliament and of County Assemblies respectively. These are certainly not the only elective offices under the Constitution. Leaving out the other elective offices from the ambit of Section 13 means the information about them is not available. The Commission for Implementation of the Constitution's Draft Leadership & Integrity Bill (CIC Bill) provided that all persons who wish to be elected into public positions are to forward the Self Declaration Forms to EACC which issues a compliance certificate and also notifies IEBC of the compliance or otherwise of the nominee.²⁰⁰

¹⁹⁸ L&IA, s 11.

¹⁹⁹ Ibid, s 13(2).

²⁰⁰ CIC Bill, s 49. The Draft Bill was heavily amended by the Cabinet and Office of the Attorney General before presentation to the National Assembly. One of the provisions removed was in respect of presentation of Self-Declaration forms by all persons.

The L&IA does not have provisions as to whether and how the Self-Declaration Forms can be availed to the public. CIC Bill provided that IEBC may publish the contents or summary of contents of the Self Declaration Forms for nominees of some positions for instance President, Deputy President, Governor and Deputy Governor.²⁰¹

Every public entity is required to maintain an open register of conflicts of interests and that register is open to anyone who is interested.²⁰² The registrable interests include directorship of private or public companies, securities, contracts for supply of goods and services, public affairs advice and services to clients are set out in the Second Schedule to the Act.²⁰³ Conflict of interest is an issue that touches on the personal integrity of an officer and also their suitability for the office. So long as the register is complete, up to date and accurate, it can facilitate public participation by providing the information contained in it.

It is the responsibility of a public officer to ensure the register of conflicts of interest is updated.²⁰⁴ However, no offence in not updating the register or giving false or misleading information while doing so has been prescribed. Further, there is no mechanism for ensuring that all public officers declare the registrable interests honestly and in time. Consequently, the accuracy of the information contained in the register is doubtful. Lack of accurate information impedes meaningful public participation.

The register of conflicts of interest is to be kept for a period of five years after the last entry in each volume of the register.²⁰⁵ The information contained in the wealth declarations shall be kept for at least five years after the person ceased to be a public officer.²⁰⁶ Five years after the last entry is a short period of time especially if a public officer needs to cover his or her tracks for future prospects and given the fact that most public officers serve for over five years.²⁰⁷ In essence, they can choose the timing of making of entries so that destruction of the register

²⁰¹ Ibid.

²⁰² L&IA, s 13(16).

²⁰³ L&IA, Second Schedule.

²⁰⁴ Ibid, s 16(14).

²⁰⁵ Ibid, 16(13).

²⁰⁶ POEA, s 31

²⁰⁷ Cf. CIC Draft Bill s 57 and 78 which provide that EACC shall not destroy the information collected under this Part unless thirty years have lapsed from the date of the declaration. After the lapse of thirty years, the information is to be transmitted to the Kenya National Archives and Documentation Service, and dealt with by the Service in accordance with its laws; The retirement age for public officers in the civil service is 60 years. There are some who retire at 70 years of age like judges (Article 167(1) of the Constitution).

coincides with their interests. Consequently, the accuracy of the register is questionable. This hinders availability of complete and accurate information.

The self -declaration form referred to under Section 13 relates to elective positions only. It has been argued that some of the candidates for elective positions from other sectors other than public officers have wealth acquired through criminal activities such as money laundering and drug trafficking. The wealth declaration referred to in Part IV of the POEA is limited in scope because it applies to serving public officers and in matters of income, assets and liabilities. A candidate for an appointive position is not required to submit a declaration similar to that submitted under Section 13 by candidates for elective positions. This is a hindrance to availability of information necessary for public participation.

A candidate's personal integrity, competence and suitability cannot be assessed against wealth declaration, conflict of interest and the moral and ethical requirements prescribed in the Act only. A lot more information about serving public officers needs to be kept and availed when needed. Failure to keep as complete information as possible hinders meaningful public participation.

3.2.13.3 Access to information

Availability of information alone is not enough. It must be accessible to all as and when it is needed. The procedures for accessing information should be simple, understandable to all and effective for the purpose and the conditions, if any, imposed for access to information must not hinder the access in any way.²⁰⁸

3.2.13.3.1 Requests

It is now settled law that for anyone who seeks to enforce their right to information to first show that they made a request and the request was declined.²⁰⁹ The L&IA does not make provision for

²⁰⁸ CEAA (n 60); Saladin et.al (n63);Loukis et.al (n 65);OECD(n66).

²⁰⁹For instance, In *Kenya Society for the mentally Handicapped (KSMH) versus the Attorney General and others Petition 155A of 2011*(unreported) the court held that "... coercive orders of the court should only be used to enforce Article 35 where a request has been made to the state or its agency and such request denied. Where the request is denied, the court will interrogate the reasons and evaluate whether the reasons accord with the Constitution. Where a request has been neglected, then the state organ or agency must be given an opportunity to respond and a peremptory order made should the circumstances justify such an order."; in *Farah Abdinor Ahmed v National Land Commission & 2 others* [2014]eKLR, the applicant sought a mandatory injunction against the respondent to compel it to issue him with certified copies of the applications and testimonials submitted by the shortlisted candidates from Wajir County for the position of Secretary to the County Lands Board. The court held that the petitioner did not demonstrate that there was a request or application filed with the respondents and that the information or record refused upon such request or application. It further held that it could only intervene where the requested information

how requests should be made. For instance, whether in writing or orally. It does not provide for timelines within which the requests must be processed and feedback given to the applicant.

3.2.13.3.2 Fees

Payment of fees in order to access information held by the state has an impact on accessibility of that information and therefore public participation especially to people who cannot afford the fees like the poor. Some state organs may wish to charge and others may not charge any fees.

The L&IA does not make provision for fees payable in order to access information. Without regulation, there will certainly be times when information will not be accessible because an unreasonable and unaffordable fee has been fixed by a state organ either deliberately or otherwise. This gap does not favour meaningful participation.

3.2.13.3.3 Form

An applicant for information may require it in specific form e.g. actual documents, extracts of documents, hard-copies and soft-copies through emails. Accessing the information in the required format may face challenges.

3.2.13.3.4 Conditions for granting access to information

The conditions for accessing wealth declarations are: show to the satisfaction of the responsible commission that the applicant has a legitimate interest and good cause in furtherance of the objectives of the Act; the affected party is given an opportunity to make representations on the matter before granting access to the declaration; and the information accessed is not published without prior written authority of the responsible commission.²¹⁰ Publishing the information without authority, knowingly republishing or otherwise disseminating the information is an offence which carries five years' imprisonment or a fine of not more than five hundred thousand shillings or both upon conviction.²¹¹

is refused or declined without any justification or reason; In *Charles Omanga & 8 others v Attorney General & another* [2014] eKLR, the court held that there is no way of enforcing right to information unless one shows that that right has been threatened by way of demonstrating that they made a request and it was denied.

²¹⁰POEA, Section 30.

²¹¹ Ibid.

Although this provision allows for access to information contained in the wealth declaration to some extent, the conditions for granting access and use of the information are onerous and cannot facilitate meaningful public participation. Given the time, mostly seven days, within which members of the public must forward their comments to selection panels, the slow pace of processing information by public entities and the centralization of operations in Nairobi only, it is not possible to access the information in good time for public participation.

The punishment for improper use of information is too harsh given that there are defamation laws which address injuries to reputations following publication or dissemination of information. It also makes public participation difficult for fear of consequences of use and dissemination of the information. In essence, Section 30 POEA is incapable of facilitating access to information in a manner that would facilitate meaningful public participation.

3.2.13.4 Timelines for providing information

The L&IA does not make provision for timelines within which requests for information must be availed, when decision declining a request must be communicated and when court decisions must be rendered. This omission can hinder meaningful public participation immensely especially where timelines within which applications or decisions must be made have been set by the law e.g disputes regarding nominations.²¹² Further, if the information is not accessible in time, a candidate whose candidature is challenged may have been appointed, assumed office and started to draw benefits before their appointment is revoked, if at all. The process of removal of such a person from office is more complicated and costly to the tax payers than stopping their selection into that office in the first place.

3.2.13.5 Use of information

The L&IA does not have a provision for ensuring that decision-makers take the information collected during public participation into account when making their decision. This increases the risk of rendering public participation meaningless. It would be difficult to know whether and how public input influenced the decision.

²¹²Elections Act, section 74(2). It provides that disputes relating to or arising from nominations must be determined within seven days of the lodging of the dispute.

Publication or use of wealth declarations without prior authority of the responsible Commission, republishing, dissemination and disclosure to other persons is prohibited.²¹³ Any person who contravenes the provision is guilty of an offence and liable to imprisonment for five years or to a fine exceeding five hundred thousand shillings, or both.²¹⁴ It appears that this provision does not take the circumstances of public participation in the selection of public officers into account.

The language in which the information is made available may hinder its use by some participants. For instance, the Self-Declaration Forms are in English and are to be filled out in English. It is common knowledge that not all members of the public are conversant with the language. The L&IA has no provision to make the information available in more than one language.

3.2.13.6 Offence, penalties and remedies

Sometimes it is not easy to get accurate information that may be held by the state regarding its public officers and in good time. Some of the reasons include: culture of secrecy, concealment of information and need to protect one another for reasons such as nepotism, tribalism, political interferences, corruption etc. Therefore it is expected that there are offences and penalties to guard against hindrances to availability, access and use of information.

The L&IA provides for offences and penalties.²¹⁵ The penalty for ‘obstructing or hindering persons acting under this Act’ is fine not exceeding five million shillings or to imprisonment for a term not exceeding five years or to both.²¹⁶ However, there is no minimum penalty so that one can be fined anything between one shilling and five million or imprisoned for any period between one day and three or five years. This is a loophole that can be abused by a regime where people are sympathizers of impunity.

The general penalty for an offence for which no penalty is expressly provided is a fine not exceeding five hundred thousand or to imprisonment for a term not exceeding three years.²¹⁷ This is an unnecessary provision as there is no other offence created under the Act other than those provided under Sections 46, 48 and 49 of the Act and which have penalties.

²¹³ POEA, s 30.

²¹⁴ Ibid.

²¹⁵ L&IA, s 46, 47, 48, 49.

²¹⁶ Ibid, s 46.

²¹⁷ Ibid, s 47.

There are no specific provisions for offences, penalties and remedies relating to availability, access and use of information. It is not an offence not to take public input into account. There are no consequential remedies for failure to take public input into account, for instance, removal from office and return of salaries by illegally appointed or elected individuals.

3.2.13.7 Leadership education and training

The leadership education and training to all public officers, all levels of the education system and the public²¹⁸ is a good mechanism for imparting information and knowledge about leadership and integrity. With that information, people will understand where and when they can access information, how to access it and how to use it. Public participation would be facilitated in the long term.

However, no timelines have been provided for the starting time. There are no suggestions as to what the curriculum must contain. The effect is that the ‘developing and overseeing provision of long term education and training’ can be taken as a long term goal which can be shelved or taken up as and when it is convenient. Without guidelines, the curriculum developed may not contain important aspects such as public participation.

²¹⁸ Ibid, s 53.

CHAPTER 4: LESSONS FROM SOME SELECTED INTERNATIONAL BEST PRACTICES

4.1 Introduction

There are some international best practices which have useful lessons in the development of public participation rules, regulations and guidelines in selection of public officers. The practices demonstrate that it is possible to address issues of public participation through legislation. The principles are useful to this study because they form a basis for the recommendations made for purposes of making the L&IA more responsive to public participation issues in selection of public officers.

This study selects the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters as a best practice. This is because it is an international Convention between states who are members of Economic Commission for Europe. Currently, it has thirty nine member states.²¹⁹ The study also selects South Africa's Municipal Systems Act, 2000. This is because the Act was enacted in the year 2000 and had been in operation for over eleven years before the enactment of the L&IA in Kenya in 2012. To this extent, its provisions contain useful lessons. However, the scope of this study and the time available does not allow an examination of how the Convention and the South African Act have been applied at the national levels and whether the same have been effective for their purpose.

4.2 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention).

This Convention applies to environmental matters.²²⁰

4.2.1 Recognition of principle of public participation and its significance

The Convention recognizes the principle of public participation and its significance in environment matters²²¹ in its Preamble. The recognition embodies the spirit behind the adoption of the Convention. The Convention:

²¹⁹ United Nations Treaty Collection available at <https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=xxvii-13&chapter=27&lang=en> accessed on 25 November 2014.

²²⁰ Aarhus Convention, Preamble.

²²¹ Ibid.

- a) Recognizes that improved access to information and public participation in decision-making enhance the quality and the implementation of decisions, contribute to public awareness of environmental issues, give the public the opportunity to express its concerns and enable public authorities to take due account of such concerns.²²² Likewise in selection of public officers, recognition of the principle of public participation would enhance the quality of appointments or nominations made, give the public an opportunity to express their concerns over candidates and enable selection panels to take due consideration of the concerns.
- b) Recognizes that the public needs to be aware of the procedures for participation in environmental decision-making, have free access to them and know how to use them.²²³ The same is expected of selection of public officers. The procedures for participation should be known, accessible and easy to work with.
- c) Desires to promote environmental education to further the understanding of the environment and sustainable development and to encourage widespread public awareness of, and participation in, decisions affecting the environment and sustainable development.²²⁴ In selection of public officers, there is need to have public education and awareness of issues of personal integrity, competence and suitability of public officers so as to promote participation in selection processes.
- d) Notes the importance of making use of the media and of electronic or other, future forms of communication.²²⁵ The use of these forms of communication facilitates participation because the information reaches a large number of people.

4.2.2 Definitions

The Convention defines ‘The public’ to mean one or more natural or legal persons and their associations, organizations or groups.²²⁶ This definition is important because there is no distinction between natural and juristic persons in so far as public participation in environmental matters is concerned. As discussed before, juristic persons in Kenya have faced a challenge in

²²² Ibid.

²²³ Ibid.

²²⁴ Ibid.

²²⁵ Ibid.

²²⁶ Aarhus Convention (n 219) , Article 2.

their participation in so far as accessing information is concerned because they are not citizens within the meaning of Article 35 of the Constitution. An all inclusive definition, such as the one provided by the Convention, would facilitate their participation by removing the distinction at least for purposes of accessing information necessary for public participation.

4.2.3 Principles of public participation

On public participation, the Convention provides for the following principles:

- a) The public concerned shall be informed, either by public notice or individually as appropriate early in an environmental decision-making procedure, and in an adequate, timely and effective manner, inter alia, of the proposed activity, nature of possible decisions, envisaged procedure e.g time and venue of any envisaged public hearing, opportunity to participate and commencement procedure.²²⁷

In selection of public officers the public need to be notified in good time in an adequate and effective manner of upcoming selections. Notifications that are too close to the deadline made through one medium that is not accessible to all such as websites are bad for public participation. The public also need to know the nature of decision sought to be made e.g whether it is fresh appointment or promotion or nomination. It should also be notified of the venue of and time allowed of public participation otherwise it may never get an opportunity to participate. This is important especially because most selection interviews take place in towns and people may need to travel and also time to locate the venue.

- b) The public participation procedures shall include reasonable time-frames for the different phases, allowing sufficient time for informing the public and for the public to prepare and participate effectively during the environmental decision-making.²²⁸

Reasonable timelines are also required for selection of public officers. As discussed before, insufficient timelines hinder meaningful participation because there is no sufficient opportunity to collect and present information and also for selection panels to consider that information.

²²⁷ Ibid , Article 6(2).

²²⁸ Ibid, Article 6(3).

- c) Each Party shall provide for early public participation, when all options are open and effective public participation can take place.²²⁹

In the context of selection of public officers in Kenya, early participation is important especially because of the multi-tiered selection process for some public positions. It increases chances of having people who lack personal integrity, are incompetent and unsuitable to hold public positions being eliminated at the earliest opportunity and at the lowest level of the selection process.

- d) Procedures for public participation shall allow the public to submit, in writing or, as appropriate, at a public hearing or inquiry with the applicant, any comments, information, analyses or opinions that it considers relevant to the proposed activity.²³⁰

In selection of public officers, the public must be allowed to submit the information they have through any mode that may be appropriate taking into account the circumstances of the individual participant. For instance, the blind should use Braille, the illiterate should use the language they are conversant with etc.

- e) Each Party shall ensure that in the decision due account is taken of the outcome of the public participation.²³¹

The essence of participation is to have input of the public influence the decision made. It is meaningless to have public participation whose input does not lead to the rejection of candidates who have no personal integrity, are incompetent and unsuitable to hold public positions.

- f) Each Party shall ensure that, when the decision has been taken by the public authority, the public is promptly informed of the decision in, accordance with the appropriate procedures. Each Party shall make accessible to the public the text of the decision along with the reasons and considerations on which the decision is based.²³²

²²⁹ Ibid, Article 6(4).

²³⁰ Ibid, Article 6(7).

²³¹ Ibid, Article 6(8).

²³² Ibid, Article 6(9).

It is through the availability of decisions made that the public will know the outcome of their participation. Only then will the public monitor how their participation influenced the appointments or nomination or promotion made. As seen earlier, in Kenya most decisions on selections are not availed to the public.

g) With regard to information necessary for participation:

- i. Public authorities must provide information required for participation in the form requested and without declaring an interest.²³³

This applies to selection of public officers as well. It will not be helpful to give information in soft copy when the applicant has no access to or cannot use computers. It is also not necessary to declare an interest in the information other than that it is to be used during public participation in upcoming selection of public officers.

- ii. The information is to be availed as soon as possible and at the latest, within one month of the request unless the volume and the complexity of the information justify an extension of this period up to two months after the request.²³⁴ The applicant shall be informed of any extension and of the reasons justifying it.²³⁵ Where the public authority does not hold the information, it must inform the applicant promptly and where it believes the information is held by another authority, advises the applicant accordingly or if the request is transferable, transfer the request.²³⁶

If the information is not availed in good time, then it might be rendered useless by lapse of time especially where timelines for public participation have been set. It is necessary to provide a maximum period within which the information is to be given.

- iii. A refusal of a request shall be in writing if the request was in writing or the applicant so requests. A refusal shall state the reasons for the refusal and give

²³³Ibid, Article 4(1).

²³⁴ Ibid, Article 4(2).

²³⁵ Ibid.

²³⁶ Aarhus Convention (n 219) Article 4(5).

information on access to the review procedure provided for in accordance with article 9. The refusal shall be made as soon as possible and at the latest within one month, unless the complexity of the information justifies an extension of this period up to two months after the request.²³⁷

A written refusal of request is important where an applicant may opt for judicial action to enforce their right to information for instance, through judicial review. As seen before in Kenya, for one to enforce their right to information, they must demonstrate that they requested for the information and that request was denied. It is difficult to demonstrate that a request was denied where the decision refusing the request is not in writing.

- iv. Public authorities may make a charge for supplying information, but such charge shall not exceed a reasonable amount.²³⁸ Public authorities intending to make such a charge for supplying information shall make available to applicants a schedule of charges which may be levied, indicating the circumstances in which they may be levied or waived and when the supply of information is conditional on the advance payment of such a charge.²³⁹

It is reasonable to expect that a charge is applicable for purposes of processing the information and especially where actual copies of documents are required. However, that charge must be reasonable.

- v. The way the information is made available should be transparent, effectively accessible and sufficient.²⁴⁰ If applicants do not know how the information has been made available, they will definitely have challenges accessing it. If the information is accessible but insufficient for the purpose, then it is not useful for public participation.

²³⁷ Ibid, Article 4(7)

²³⁸ Ibid, Article 4(8).

²³⁹ Ibid.

²⁴⁰ Aarhus Convention (n219), Article 5(2).

4.3 South Africa's Municipal Systems Act, 2000

One of the objectives of this Act is to encourage active engagement of communities in the affairs of municipalities of which they are an integral part, and in particular in planning, service delivery and performance management.²⁴¹

4.3.1 Development of culture of community participation

A municipality is required to develop a culture of municipal governance that complements formal representative government with a system of participatory governance.²⁴² To achieve this, the municipality has to encourage and create conditions for local community to participate in the affairs of the municipality, contribute to building capacity of local communities to participation, councilors and staff to foster community participation and to allocate resources and funds for purposes of community participation.²⁴³

In Kenya, public participation in the selection of public officers is a new phenomenon that is still being implemented. There is need to develop a culture of participation. The strategies applied by South African in encouraging participation of local communities can also be applied in Kenya. Having them in a legal framework, like South Africa has done, increases the chances of the strategies being implemented.

4.3.2 Mechanisms and procedures for community participation

Municipalities must establish appropriate mechanisms, processes and procedures to enable the local community to participate including: the receipt, processing and consideration of petitions and complaints lodged by members of the local community; notification and public comment procedures, when appropriate; public meetings and hearings, when appropriate; report-back to the local community.²⁴⁴ This provision appears to give the municipalities discretion to decide the most appropriate mechanisms, process or procedure. These mechanisms can also be used in public participation during selection of public officers where and when appropriate. However, caution must be exercised in giving the discretion so as not to give room for abuse of discretion by for instance, the panel deciding that there is no appropriate mechanism, process or procedure for a certain selection process.

²⁴¹ Municipal Systems Act, 2000, Preamble.

²⁴² Ibid, s 16(1).

²⁴³ Ibid.

²⁴⁴ Municipal Systems Act, s 17(2).

When establishing mechanisms, processes and procedures the municipality must take into account the special needs of people who cannot read or write, people with disabilities, women and other disadvantaged groups.²⁴⁵ As discussed earlier, majority of Kenyans fall within these groups. In addition to the illiterate, those with disabilities and women, other disadvantaged groups include the youth, the marginalized, the aged and children. Their needs must be taken into account and only then will appropriate mechanisms, processes and procedures for their participation be determined and their participation become meaningful.

The municipal council may also establish one or more advisory committees consisting of persons who are not councilors to advise it on matters relating to community participation.²⁴⁶ Such a provision would enable establishment of an advisory board with experts on public participation to be advising selection panels on the most appropriate mechanisms, processes and procedures for public participation during selections.

4.3.3 Communication of information concerning community participation

A municipality must communicate to its community information concerning available mechanisms, processes and procedures, matters with regard to which participation is encouraged, rights and duties of the members and the municipal governance, management and development.²⁴⁷ In doing this, language preferences and usage in the municipality and the special needs of people who cannot read or write must be taken into account.²⁴⁸

It is important that participants in selection of public officers do understand the available mechanisms, processes and procedures, matters which they are required to participate in and their rights and duties. Such communication will enhance participation and it will be done from a point of knowledge. Although the national language in Kenya is Kiswahili and is fairly understood by majority of the Kenyans, it is rarely used, if at all, during the selection process. All advertisements are done in English and most interview proceedings are also conducted in English. The information contained in websites is also in English. There can be no communication where language is a barrier. To enhance participation of all, language preference and those who cannot read or write should be taken into.

²⁴⁵ Ibid, s 17(3).

²⁴⁶ Ibid, s 17(4).

²⁴⁷ Ibid, Section 18(1).

²⁴⁸ Ibid, Section 18(2).

When anything must be notified by the municipal councils through the media, it must be done in the local newspaper or newspapers of its area, in a newspaper or newspapers circulating in its area and determined by the council as a newspaper of record or by means of radio broadcasts covering the area of the municipality.²⁴⁹ Any such notification must be in the official languages determined by the council, having regard to language preferences and usage within its area.²⁵⁰ In Kenya, some county governments have developed their own local newsletters, websites and vernacular radio stations that are popular with the residents. These are the mediums which should be used for purposes of engaging the locals.

When the municipality invites the local community to submit written comments or representations on any matter before the council, it must be stated in the invitation that any person who cannot write may come during office hours to a place where a staff member of the municipality named in the invitation, will assist that person to transcribe that person's comments or representations.²⁵¹ This is important because it encourages even the illiterate to participate by knowing they can get assistance from those seeking their participation.

When a municipality requires a form to be completed by a member of the local community, a staff member of the municipality must give reasonable assistance to persons who cannot read or write, to enable such persons to understand and complete the form.²⁵² This is an important mechanism for ensuring participation of the illiterate, children and perhaps the aged. It can promote inclusiveness and equity in public participation in the selection process.

If the form relates to the payment of money to the municipality or to the provision of any service, the assistance must include an explanation of its terms and conditions.²⁵³ This is important in making the participant understand that the payment is not meant to hinder their participation but it is for purposes of sustaining the provision of the service. With this understanding, apathy in public participation may reduce.

4.3.4 Public notice of meetings

²⁴⁹ Ibid, Section 21.

²⁵⁰ Ibid.

²⁵¹ Ibid.

²⁵² Ibid.

²⁵³ Ibid.

The municipal council must give notice of the time, date and venue of meetings.²⁵⁴ As discussed before, unless the time, date and venue of interviews for selections are known, the public will not be able to participate meaningfully in the process. It should therefore be a requirement that the public be notified of such important aspects.

4.3.5 Admission of public to meetings

The meetings of the municipal councils are open to the public including the media and space for public must be provided for.²⁵⁵ It is important to open the interview rooms to the public and the media and provide adequate space for them in the rooms. This will facilitate their participation. It should not be left to the selection panels to decide whether or not to open the interview rooms to the public. In other words, interview processes must never be conducted in camera. Otherwise, public participation will not be seen to be done.

4.3.6 Regulations and guidelines

The Act gives the Minister powers to make regulations and issue guidelines concerning among other things, minimum standards relating to funding for purposes of implementing this Chapter 4, any matter that may facilitate participation.²⁵⁶

Delegating the power to make regulations and guidelines to the executive arm of the government is important. This is because the executive arm is expected to implement or execute the law. In so doing, it may find it necessary to make further regulations or guidelines or to remove existing ones for purposes of better implementation of the Act. The L&IA gives this power to the EACC because it is the one with the specific mandate of ensuring compliance and enforcement of Article 73(2)(a) of the Constitution among other provisions of Chapter Six.²⁵⁷

²⁵⁴ Municipal Systems Act, 2000, s 19.

²⁵⁵ Ibid, s 20.

²⁵⁶ Ibid, s 22.

²⁵⁷ Constitution, Article 79.

CHAPTER FIVE: CONCLUSIONS AND RECOMMENDATIONS

5.1 Introduction

The problem under investigation in this study is lack of meaningful public participation in the selection of public officers in accordance with the criteria set by Article 73(2)(a) of the Constitution. The Background section gives the background to the problem. The focus has been on the L&IA being the statute that ought to give effect to Article 73(2)(a) of the Constitution taking into account the requirement of public participation. The hypothesis of the study has been that lack of meaningful public participation during the selection of public officers has been partly due to lack of a facilitative legal framework within the L&IA.

The objectives of the study have been three. Firstly, to explore the extent to which the L&IA facilitates meaningful public participation in the selection of public officers in accordance with Article 73(2)(a) of the Constitution. Secondly, to identify gaps which need to be addressed for purposes of making the L&IA more facilitative of meaningful public participation. Thirdly, make recommendations on ways of facilitating meaningful public participation.

The study sought to answer the following questions: what does public participation in the context of selection of public officers entail?; are there mechanisms under the L&IA which facilitate meaningful public participation in the selection of public officers?; what are the gaps under the L&IA that hinder meaningful public participation in the selection of public officers?; and can anything be done to make the L&IA more facilitative of public participation during the selection of public officers?

Chapter 1 provided the background to the study. Among other things, it states the problem, identifies the research objectives and questions, justification of the study, theoretical framework and literature reviewed.

Chapter 2 provided an overview of what meaningful public participation in selection of public officers entails. It identified principles, rules, model and methodologies of public participation. The principles identified include: planning ahead, inclusive design, authentic intent that actually helps in shaping action or policy, transparency, inclusiveness and equity, informed participation, accessible participation, appropriate process, use of submitted information by decision-makers and monitoring and evaluation. The rules include: definitions; advertising vacant positions; shortlisted and appointed candidates; selection process that is transparent and open to the public;

availability and access to information; inclusiveness and equity in the selection process; remedies, offences and penalties; monitoring and evaluation. The model should contain information, consultation, partnership and involvement and must be devoid of manipulation and therapy. The methodologies include public hearings, public education and monitoring.

Chapters 3 contain the analysis of the L&IA. The aim is to identify mechanisms which may facilitate meaningful public participation in the selection of public officers; identify the existing gaps; and lay a basis for recommendations to address the gaps. The methodology adopted for the analysis includes; policy based reasoning and arguments, plain meaning rule of interpretation, textual and content analysis of the provisions, comparative analysis using draft bill, statutes and case law and the writer's views and understanding of the concepts of public participation and selection of public officers derived from literature review.

Chapter 4 contains a discussion of some selected best practices. The practices contain important provisions that give meaning to public participation in their context. The principles in those provisions are applicable even in the context of public officers. The practices demonstrate that it is possible to legislate issues of public participation.

5.2 Conclusions

From the analysis, this study arrives at the following conclusions:

1. That there are some mechanisms that would facilitate public participation in the selection of public officers. Key among them:
 - a) It recognizes public participation as one of its guiding values and principles.
 - b) It recognizes that public officers are to be selected on the basis of personal integrity, competence and suitability.
 - c) The Code contains quiet elaborate provisions on how serving public officers should conduct themselves while in office. Non-conformity with the Code may point to a public officer's lack of personal integrity, competence and suitability e.g where one fails to meet their financial obligations, is charged with sexual offences or fails to act professionally. Information on breaches of the Code if accurately recorded and properly documented is useful when a serving or former public officer is a candidate.
 - d) Persons vying for the offices of Member of Parliament and Member of County Assembly submit a self-declaration form to IEBC to show that they meet moral and ethical requirements outlined in section 13.

- e) There is a requirement that a register for conflict of interest containing the prescribed information be maintained for a period of five years after the last entry. The POEA contains provisions relating to submission, retention and access to wealth declarations.
 - f) It provides for long term education and training on leadership and integrity to all public officers, at all levels of education system and the public.
2. The Act contains gaps and omissions which hinder meaningful public participation. The available mechanisms are also incapable of facilitating meaningful public participation. Key gaps and omissions include:
- a) It fails to define what public participation, personal integrity, competence and suitability mean.
 - b) It fails to outline principles of public participation that would guide the process. For instance, it fails to provide that all candidates for public offices whether elected or appointed must be persons of integrity, competent and suitable to hold a public office.
 - c) There are no provisions addressing essential elements of meaningful participation such as: model; methodology; nature; scope; transparency and openness; inclusiveness; notification of vacant positions, interviews and shortlisted and appointed candidates; availing decisions showing results and how public input influenced the decision; timelines for public participation; modes of submission of information; whether proceedings are to be taken in camera or are open or both; and procedures for taking evidence.
 - d) There is no provision to the effect that decision-makers must take into account the input from members of the public in making their decision.
 - e) The L&IA applies to serving public officers only. This means that selection of persons who are not serving or former public officers would be difficult to deal with because there are no regulations governing what their personal integrity, competence and suitability entails. It should apply to private sector as well because sometimes individuals from the private sector apply to be public officers.

- f) Except for conflicts of interest, there is no requirement that a register be maintained for purposes of all other provisions of the Code.
- g) Except for those wishing to vie for Member of Parliament and County Assembly, there is no requirement that those vying for other elective positions or are candidates for appointive positions do submit a self-declaration form to IEBC. In essence, information on compliance with Section 13 is not available in so far as those other candidates are concerned.
- h) There lacks clear guidelines as to how candidates who are not serving or former public officers are to be dealt with. The L&IA implies that it applies to public officers only so that its provisions do not apply to candidates from the private sector. Further, the Code clearly provides for conduct of public officers while they are in office. There is no similar or equivalent provision as to the conduct expected of candidates from the private sector.
- i) There are no guidelines regarding information such as those relating to: requests; timelines; form; fees; access by juristic persons such as CSOs; and access to information held by individuals and organisations other than the State.
- j) The information relating to conflict of interest, wealth declarations and the provisions of the Code is incomplete in so far as compliance with Article 73(2)(a) of the Constitution is concerned. The information is not enough to assess personal integrity, competence and suitability.
- k) There are no offences and penalties relating to issues of public participation e.g failure to allow public participation or to take into account information given pursuant to public participation.
- l) There are no remedies for a flawed public participation process. This increases the risk of disregard for public input.

- m) It fails to suggest what the curriculum for leadership & integrity education and training should contain.
3. Lack of meaningful public participation in the selection of public officers is partly due to lack of a facilitative legal framework within L&IA.
 4. That there are some best practices, such as those contained in the Aarhus Convention and South Africa's Municipals Systems Act, 2000 with some useful lessons which can be used to make the L&IA more responsive to issues of public participation and selection of public officers.

5.3 Recommendations of the study

This study makes the following recommendations.

5.3.1 Definitions

The L&IA needs to define what the terms 'public participation', 'personal integrity', 'competence' and 'suitability mean'. For purposes of participation in environmental decision making, 'Public' means one or more natural or legal persons and their associations, organizations or groups.²⁵⁸ This is definition can be adopted by the L&IA.

A further study as to the most comprehensive definition in the context of public officers is recommended because there is no unanimous agreement of what some terms such as 'personal integrity' mean.

5.3.2 Principles of public participation

There is need to outline the guiding principles of public participation. Such principles would include:

- a) All candidates for fresh appointments, promotions or elections must be persons of personal integrity, are competent and suitable to hold public positions.
- b) Recruitment for all public positions must be open and competitive as opposed to unilateral appointments.²⁵⁹

²⁵⁸ Aarhus Convention, (n 226).

²⁵⁹ *David Kariuki Muigua –vs Minister for Industrialization*(n107); *Benson Ritho –vs- J. W Wakhungu & Others* (n 108).

- c) The public must be informed, either individually or as appropriate, early in the selection procedure and in an adequate, timely and effective manner of the possible decision, procedure, opportunity to participate and commencement procedure.²⁶⁰
- d) All vacant public positions must be advertised in mediums that can reach all members of the public, newspapers being a minimal medium.²⁶¹
- e) Fair, sufficient and reasonable amount of time must be given to allow information reach the public and to allow for collection and presentation of information.²⁶² A minimum period should be provided for.
- f) Public participation should be done early when all options are open and effective public participation can take place²⁶³ in order to maximize chances of the participation influencing the decision.
- g) Clear and understandable procedures which must allow the public to submit, in writing or, as appropriate, any comments, information or opinions that they may have concerning a candidate.²⁶⁴
- h) All interviews must be open to the public including the media and sufficient space provided for.²⁶⁵
- i) An appropriate process that allows participation by all and with engagement methods which are responsive to their needs especially for special groups.²⁶⁶ To this end, where written comments are invited, it must be stated in the invitation that anyone who cannot write may visit the inviting body's or panel office during working hours where a staff member of the body or panel will transcribe that person's comments or representations.²⁶⁷ Also where a form requires to be completed, the body or panel requiring participation must give reasonable assistance to persons who cannot read or write²⁶⁸ e.g children, senior citizens and the illiterate to facilitate their participation.

²⁶⁰ Aarhus Convention, (n 227), (n228).

²⁶¹ *Republic –vs- Tana River County Assembly & Another* (n171).

²⁶² Aarhus Convention, (n 228).

²⁶³ *Ibid*, (n 229).

²⁶⁴ Aarhus Convention (n 230).

²⁶⁵ Municipal Systems Act, 2000 (n 254); Judicial Service Act (n95).

²⁶⁶ Municipal Systems Act,2000 (n245);

²⁶⁷ Municipal Systems Act,2000 (n251).

²⁶⁸ *Ibid* (n252).

- j) The decision-making body should be accessible in terms of location, language and time.²⁶⁹ To this end, notice of time, date and venue should be given.²⁷⁰
- k) All information presented pursuant to public participation must be considered in the decisions and transparent results with information as to whether and how the information influenced final decision given at the end of the process.²⁷¹
- l) The public must be promptly informed when a decision has been taken using appropriate procedures.²⁷² The actual text of the decisions must be made available and accessible to the public²⁷³ at no costs and to allow challenges to the selection process before the appointment, promotion or nomination is accepted and effected.
- m) To cultivate a culture of participation, the Government should encourage and create conditions for people to participate, contribute to capacity building and allocate sufficient resources and funds.²⁷⁴

5.3.3 Model with appropriate level of participation

A model of participation with appropriate level of participation that promotes meaningful participation is needed. In South Africa, although not stated in some specific provisions the Municipal Councils use a model that entails informing the local communities, consulting them and partnering with them in making the decisions. A further study of the most suitable model is recommended.

5.3.4 Availability, access to and use of information

For there to be meaningful participation, the necessary information must be available, accessible and put to use. Some recommendations include:

- a) Information concerning available mechanisms, processes and procedures of participation, rights and duties of the public must be communicated and language preferences and usage and special needs of the illiterate taken into account.²⁷⁵
- b) Where the media is to be used in the communication, local newspapers²⁷⁶ or newsletters, and vernacular radio stations should be used.

²⁶⁹ A Working Group on Legal Frameworks for Public Participation (n 68).

²⁷⁰ Municipal Systems Act, 2000 (n 254).

²⁷¹ Aarhus Convention (n 231); CEEA (n 41).

²⁷² Aarhus Convention (n 232).

²⁷³ Ibid.

²⁷⁴ Municipal Systems Act, 2000 (n 243).

²⁷⁵ Ibid (n 247); (n248).

²⁷⁶ Ibid (n249).

- c) Public authorities or even individuals holding any information that is required for public participation should provide it in the form requested and without declaring interest²⁷⁷ other than that the information is required for public participation. A maximum time within which the information is to be given should be prescribed.
- d) The way the information is made available should be transparent, effectively accessible and sufficient.²⁷⁸
- e) An applicant is entitled to an explanation as to why the information they need cannot be given at all or at the particular time.²⁷⁹
- f) A refusal of information should be made as soon as possible within a given time and in writing and reasons for the refusal given as well as information as to access to a review procedure.²⁸⁰
- g) A reasonable fee may be charged for supplying the information and to this end, a schedule of charges must be provided.²⁸¹ An explanation, if needed, as to why the payment is needed should be available²⁸² as strategy to reduce apathy and promote sustainability of the process.

5.3.5 Remedies

Specific remedies touching on public participation should be provided for. Some proposals include;

- a) Remedies for failure to allow public participation and refusal to record, consider or take into consideration any information received during public participation. This will end the culture of impunity perpetuated by some selection panels and Approval Committee of the National Assembly and the need to protect some individuals who otherwise lack personal integrity, are incompetent and unsuitable for the jobs.
- b) Remedies for removal of the person from office in the event of appointment, promotion or nomination of a person who fails to meet the criteria in Article 73(2)(a) of the Constitution. This may include a return of any salary and benefits they may have drawn and permanent prohibition from holding a public office if the issue is lack of personal integrity.

²⁷⁷ Aarhus Convention (n233).

²⁷⁸ Ibid (n240).

²⁷⁹ Constitution, Article 47; Aarhus Convention, (n235) .

²⁸⁰ Aarhus Convention (n237).

²⁸¹ Ibid (n 238;n239)

²⁸² Municipal Systems Act, 2000 (n 253).

- c) A provision to the effect that failure to raise a complaint either at the body charged with disciplining a public officer or a professional body or even a selection panel is not a ground for summary rejection of the complaint filed subsequently. Each complaint should be dealt with on its own merits at whichever forum and appropriate action taken. Whether the appointment or election has taken place should not be an issue for consideration.
- d) a general rule to the effect that the selection process shall be stayed whenever the selection process is challenged on the basis of lack of meaningful participation. If an appointment has already been made, the appointee is not to hold the office until determination of the suit. The principles for granting such interims reliefs need not be the same principles for granting injunctions. The principles should be carefully formulated taking all necessary issues into consideration. For instance, the applicant need not demonstrate irreparable damage or loss because in matters of public interest, it would not be easy to demonstrate irreparable loss compared to commercial transactions where it is easy to point out the loss.
- e) To enhance chances of public participation having an impact on decisions, a merit review should be adopted. A merit review would allow for a review the evidence placed before the decision maker.

5.3.6 Use of media and ICT

Making use of the media, ICT and or electronic or other future forms of communication is important in public participation.²⁸³ There should be appropriate regulations to guide proper and effective use of technology to promote meaningful participation. Use of websites, emails etc should be encouraged. The websites should contain full and accurate information. ICT infrastructure should be availed to all parts of the country. Education curriculums at all possible levels of education should contain ICT studies.

5.3.7 Public education

Education to further understanding of selection of public officers and to encourage widespread public awareness and participation in the selection process should be encouraged, facilitated and sustained.²⁸⁴ To this end, implementation of Section 53 of the L&IA which deals with leadership

²⁸³Aarhus Convention (n 225).

²⁸⁴ Ibid (n 224).

and training generally should be fast-tracked. An appropriate curriculum that ensures issues of public participation in selection of public officers are adequately covered should be developed.

5.3.8 Public participation advisory board

Given the history of public participation in Kenya, and the current practice it is necessary to establish a public participation advisory board with specified duties, appropriate powers, capacity and responsibilities²⁸⁵ which board will be instrumental in facilitating meaningful public participation in the selection of public officers. Its officers must include public participation specialists. South Africa Municipal Councils have advisory committee consisting of persons who are not councilors to advise it on matters of community participation.²⁸⁶

5.3.9 Further research

This study recommends that a further research be undertaken on the adequacy of the existing mechanisms under the L&IA, a best-fit model and incorporation of public participation in selection of public officers in the curriculum for leadership & integrity education. Such a study may come up with more ways of facilitating meaningful public participation.

²⁸⁵ A Working Group on Legal Frameworks for Public Participation (n 68).

²⁸⁶ Municipal Systems Act, 2000 (n 246).

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