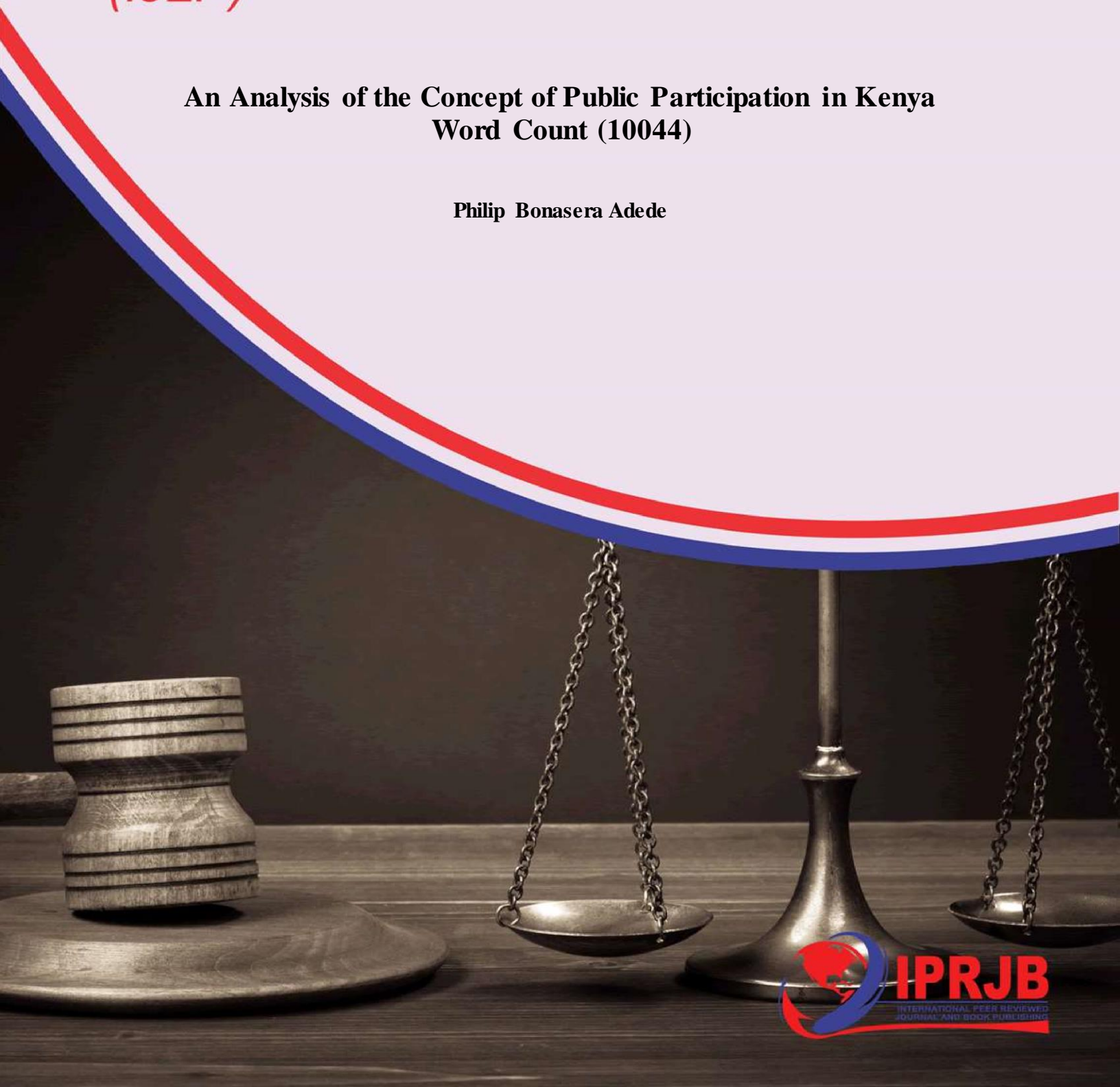


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**An Analysis of the Concept of Public Participation in Kenya
Word Count (10044)**

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ABSTRACT

This paper defines public participation and gives the reader an ample understanding on how it operates within the country and the counties. The reader should be able to also understand the various ways the government; both county and national, achieve the principle of public participation. This paper also outlines and analyses the current statutes on public participation and how they are to be implemented by the Government of Kenya. The research will mainly rely on secondary data from written material. It will be based on an analysis of legislation and entail desktop research of literature concerning the matters in question from the available sources. The paper outlines the current best global practices on public participation and tackles how Kenya measures against the global best practices and the constitutional requirements. This paper looks at the findings from the study and makes various conclusions on the concept of public participation in realizing the implementation of the constitution of Kenya. Finally this paper makes a number of recommendations drawn from various legal regimes to make the concept of citizen participation better.

Key Words: *Public participation, word count, Kenya, global*

Introduction

This paper will analyze the concept of public participation with particular reference to Kenya. It will determine and explore the obligations, both the citizens and the government owe towards achieving this goal of public participation or what may at times, be referred as citizen participation. It will also show how this concept helps us realize the objectives of the constitution as set in the preamble of the constitution of Kenya. Public participation is defined as an open, accountable process by which an organization consults with interested and affected parties before coming up with a resolution¹. It ensures their contributions; opinions and input, are welcomed before an important decision by authorities is made. The principle of public participation is based on the fundamental human right to hold and express their opinion and to seek, receive and impart ideas as enshrined in Article 33 of the Kenyan Constitution which provides for the freedom of expression.

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The Citizen Handbook by URAIA defines public participation as an action or a series of actions, a citizen takes to participate in the affairs of his or her own government and community. When done correctly, public participation can bring the government closer to its citizens, produce more transparent public policies and decisions and enable citizens to hold government leaders more accountable. According to the International Law Association, the principle of public participation has three key elements². The first element being the human right of expression, which had previously been denied to the women in the society. The second element is the right to access appropriate, comprehensive and timely information held by the government. This should be made possible without any undue financial burden by any citizen seeking the said information from the government.

This is provided for under Article 35 of the Kenyan Constitution that talks about access to information. The final element is access to justice, and this is provided for under Article 48 of the constitution.

Therefore, to fully meet the elements set out by the International Law Association, the decision making process needs to be transparent. That is, the public need to have access to information. The process also needs to be consultative, in that the public need to participate in it and also have access to justice³.

Statement of the Problem

Kenya has progressively shifted from a centralized⁴ to a decentralized⁵ form of governance⁶. This paradigm shift was precipitated by the shortfalls that are often characteristic of highly centralized systems. The deficiencies include administrative bureaucracies and inefficiencies, misappropriation of public resources and the marginalization of local communities in development processes. The Constitution provides a firm legal foundation for the enhancement of participatory governance through devolved structures at the county level.

Public participation is an integral part of Kenya's legal positivism⁷, out of the accepted wisdom that the authorities in charge of various institutions in the government will do better if they are exposed consistently to public views⁸. Besides, the public is likely to feel better and be more positively won over to accept outcomes if they are invited to express their opinions and facts⁹. Among the key elements of public participation, as discussed, is access to information and this

¹ International Association for Public Participation (2002) Retrieved from <http://www.iap2.org> (Accessed on 11 January 2016)

² MC Segger A Khalfan "Sustainable Development Law: Principles, Practices and Prospects" (2011) 110.

³ K Bottriel MC Segger (n 3 above) 4

⁴ A centralized government is one in which power or legal authority is exerted or coordinated by a de facto political executive to which federal states, local authorities, and smaller units are considered subject <http://en.wikipedia.org> (Accessed on 10 March 2016)

⁵ A decentralized system of governance is where administrative functions are distributed or devolved from the national government to smaller administrative units <http://en.wikipedia.org> (Accessed on 10 March 2016)

should be provided in a comprehensive and timely manner as laid down in Article 35 of the Constitution.

6A. Omolo 'Policy Paper on Citizen Participation in Kenya' (2014) <http://www.tisa.or.ke> (Accessed on 16 February 2016)

7 Legal positivism is a philosophy of law that emphasizes the conventional nature of law that it is socially constructed. Law is therefore from positive norms from the legislator <http://www.iep.utm.edu> (Accessed on 10 March 2016)

8 DK Okoth 'Public Participation and Environmental Jurisprudence in Kenya' (2012) 3 <http://www.academia.edu> (Accessed on 9 January 2016) 9DK Okoth (n 8 above) 3

Kenya faces some challenges in the implementation of the constitutional transition. One of the major challenges is passive citizenry¹⁰. This can only be altered through public participation. Public participation should be done in full, in order to cover all aspects of the governance process.

Objectives

1. To explore the nature of public participation.
2. To examine the different ways of achieving public participation in Kenya.
3. To investigate the Kenyan laws that governs public participation.
4. To analyze the global best practices on public participation and see how Kenya measures against the global best practice and the constitutional requirements.
5. To investigate the future of public participation in Kenya.

Literature review

Public participation is a political concept or practice. It is also recognized as a right (right to public participation). The terms public participation may be used interchangeably with the concept or practice of stakeholder engagement and or popular participation. Public participation seeks and facilitates the involvement of those potentially affected by or interested in a decision¹¹. The principle holds that those who are affected by a decision have a right to be involved in the decision-making process. Public participation may be regarded as a way of empowerment and as a vital part of democratic governance.

The Nature of Public Participation

There are three main stages of public participation which can be further broken down into eight levels as discussed by Arnstein in her journal, The Ladder of Citizen Participation. The three categories are as follows¹².

Non-Participation

Here the public is not directly involved but may be manipulated to believe that they are part of the decision-making process¹³. Then comes the level known as therapy where the people in power promise to help the citizens and make them be part of some activities, where all their opinions will be respected and taken into account.

10 This is minimal participation by citizens therefore leading to less vigilance in preventing those opposed to the constitution from undermining its full implementation. Retrieved from Citizen Handbook Uraia 40

11 Public participation - Wikipedia, the free encyclopedia https://en.wikipedia.org/wiki/Public_participation
(Accessed on 16 February 2016)

12 SR Arnstein 'The ladder of citizen participation' (2006) 217 it is worth noting that one of the limitations of this typology is that it assumes that there are citizens who are powerless and the persons in authority who are powerful.

13 SR Arnstein (n 15 above) 218

Tokenism

Here the level of involvement of the citizen is to a certain extent. There is the informing level where citizens are in the know about what is going on¹⁴. The next level is consultation; here the citizen's opinion starts to affect the one in power, since the citizen's views are taken into account by the one in power¹⁵. The final level under this category is the placation¹⁶. Here the citizens may be hand-picked to sit at the decision-making body. Nonetheless, the ratio of citizens to power holders need to be equal lest the citizens will not be effective.

Citizen Power

Here the citizens directly influence the decision-making process. We have the sixth level here known as the partnership¹⁷. Here the citizens and the ones in power create a partnership, and this keeps both parties content. The seventh level is known as delegated power. At this level the citizens can start taking control, and the power holders need to start negotiating with the citizens. The majority of the board members at decision-making bodies would be the citizens¹⁸. This would mean that the power holders would need to negotiate decisions with the board members. The final level is known as citizen control. Here the citizens have the power to decide. This can be achieved through referendums. There are various ways the government achieves the concept of public participation according to the citizen handbook 2012 by URAIA Trust.

14 SR Arnstein (n 15 above) 219 15 SR Arnstein (n 15 above) 219 16 SR Arnstein (n 15 above) 220 17 SR Arnstein (n 15 above) 221 18 SR Arnstein (n 15 above) 222

Enhancing public participation in the counties.

Article 201 of the Constitution lays emphasis on transparency, accountability, and public participation. The various ways of achieving the goals set in Article 201 are as follows: Participation requires organization. The County Government should build the capacity of citizens on the need to form organized groups for representation and protection of their diverse interests. Effective community mobilization. This is a problem-solving technique and a change mechanism

whereby the general public is psyched up to undertake a certain task. Print and Electronic media which has been relied heavily on - may not be necessarily the most effective strategy. Instead churches, mosques, opinion leaders, social media can supplement this. The choice of the mobilization strategy should be informed by the preferences of the target group.

Limited Resource is a challenge to effective mobilization (fuel, meals, agenda dissemination) - to address this requires innovation. County Government needs to allocate time, resources and even personnel for community mobilization. It also requires the County Government to raise resources. This can be done through forums such as Town Committees. In Robert N. Gakuru and Another v County Government of Kiambu and three others. The

Petitioners and the Applicants are seeking in the main a declaration that the Kiambu Finance Act, 2013 gazetted via Kiambu County Gazette Supplement No. 8 (Act No. 3) (hereinafter referred to as the Act) violates various provisions of the Constitution and that the same is null and void. The grounds on which these matters were based were that no consultations took place and no invitations were made by the Respondents before the said Act was enacted. It was further contended that the provisions of the said Act contravene the provisions of the Constitution as it contains levies and taxes which the Respondents are not empowered to impose.

Judge G V Odunga held that: "Having considered the preceding, the inescapable conclusion I come to is that there was no public participation as contemplated under the Constitution and the County Government Act, 2012. In the instant case, it has not been alleged that any interests have been acquired under the said Act that would militate against the immediate nullification of the said Act. Accordingly, I hereby declare that the Kiambu Finance Act, 2013 gazetted via Kiambu County Gazette Supplement No. 8 (Act No. 3) violates the Constitution and that the same is null and void. This case has laid the emphasis on the need to involve the public in the decision-making process as the same is enshrined in the constitution, failure to which, would lead to a violation of the court leading to dire consequences. In this scenario the Act null and void.

Tools to promote public participation

Public participation varies from simple sharing of information to active engagement of citizens in the implementation of projects and services¹⁹. How a given community is structured will greatly influence the way public participation will be conducted in that given area. According to Moseti a number of ways can be used in realization of public participation in Kenya they include²⁰:

1. Study Circles- These are important in having discussions on any issue tabled and is usually done in stages. These study circles help in acquiring new ideas amongst members of a given community, and they can find alternative views that might not be possible when dealing with an individual or a particular group of individuals. Study circles offer something unique since it encompasses people of different ethnic, educational and religious background, therefore, giving different views on the issues raised. These help in enhancing access to justice.

2. Citizen Advisory Boards- The main aim of these is to tackle issues such as housing and economic development therefore very useful in public participation. Anyone willing to volunteer can be part of the citizen advisory board. The boards are independent of the control of the authorities, therefore, are highly effective in and very transparent in their undertakings.

3. Public Hearings- for public participation to be effective there has to be the element of public hearing. It depicts a picture of democracy where parties can sit and discuss matters in an open forum where citizens can freely air out their views which the regulator can, in turn, address. This will make it smoother for the administration to drive the development agendas home and the citizens will be satisfied.

19 Y Moseti 'Public participation for sustainable development in local cities, 46th ISOCARP Congress Kenya' (2010) 3

<http://www.isocarp.net> (Accessed on 9 February 2016) 20

Y Moseti(n 31 above) 4

4. Public Watchdog Groups- These are groups of people at the grass-root level that are tasked with keeping the authorities in check. They are civic activists and inform the general public of the inactivity of the government. The watch dogs play a major role in pushing for reform agendas and in the reduction in corruption since they demand accountability of the state. They also push for the enactment of anti-corruption legislations and better anti-corruption measures within the state. **Key actors in promoting public participation.**

There are some stakeholders that promote public participation or that advocate the activities envisaged in the tools mentioned earlier²¹. These include:

1. The Government: The national and county governments should take all necessary steps to ensure that the public participation concept is realized within its organs. This concept is envisaged in the 2010 Kenyan Constitution. Therefore, the state should provide mechanisms for the public involvement in its affairs. The tools above will only be realized if the government, both national and county, are committed to ensuring transparency, accountability and public participation at all levels

2. Civil Society Organizations: These are usually deemed as the fore runners for the formation of the public watchdog groups and the citizen advisory groups. They enhance public participation at the grass root level all the way up to the national level.

3. The Private Sector: The private sector is usually the backbone of any economy. They usually offer continued support, monetary or otherwise to foster participation in the country. Their

aim is to ensure there is democracy and citizen empowerment. They also participate in the Citizen Advisory Boards.

21 Y Moseti (n 31 above) 5

Legal Provisions on Public Participation in Kenya

In Kenya, provisions on Public participation are provided in the Constitution and other legislations. An example of legislation dealing with public participation is the County Government Act. Further, different County Public Participation Bills are in enactment stages and are expected to facilitate public participation greatly.

Constitution

Public participation is underpinned as an important principle and a right under the 2010 Constitution. It is regarded a tool of good governance and democracy in Kenya²². Some of the provisions are:

National Values and Principles of Governance²³

One of the national values provided under Article 10(2) is public participation in governance. This has the effect that the people have a right to have their opinions heard by the authorities before enforcement or execution. Under the article, public participation is regarded as a matter of national importance, which has to be fulfilled by authorities before making their decisions.

Right to access Information²⁴

The right to access information is provided in Article 35 of the constitution. It is a very necessary and key in ensuring that the right to public participation is fulfilled. Without this right, citizens and stakeholders interested in participating or making decisions cannot effectively do so. It is fundamental as it will enable those citizens to know the decisions to be made and empower them to make the best possible contributions, while knowing their development rights and projects proposed to be undertaken.

22N Caleb (n 35 above) 6. The author discusses different articles in the constitution. Public participation is denoted as a right and a key requirement in governance.

23 Article 10

24 Article 35

Public participation in assemblies²⁵

Under Article 196(1) (b) the county assemblies are required to facilitate public participation in the legislative activities of the assembly. This includes peoples' participation in assembly committees and other business of the assemblies. The National Assembly is also required to public participation in the legislative and other business of parliament²⁶.

Further, under Article 69(1) of the constitution, participation of the people in the management, protection and conservation of the environment is required to ensure effective policies are passed. Article 174(c) also provides for public participation as an object of devolution. Under the 4th schedule part 2(14) also, the county governments are required to ensure, coordinate and promote participation of communities and locations in governance at the local level. Counties are also to assist communities to develop the administrative capacity for the effective exercise of the functions and powers and participation in governance at the local level.

County Government Act

As provided for under the objects and purpose of the Act²⁷, the County Government shall make provisions for public Participation in the conduct of the activities of the county assemblies as provided for under the Constitution²⁸. Which has several provisions of the manner in which the County Governments have to conduct their businesses, which include holding their sittings and even those of their committees in public, they have to facilitate public participation and involvement in the legislative and any other business that is involving the assemblies and the committees. The county government is also not mandated to exclude the media, the public from any sitting unless there is a justifiable reason to do so and this has to be determined by the speaker. The Section also goes further to cater for the community and cultural diversities, which is to be reflected in both the County Executive and the County Assembly as at the Constitution²⁹. In addition, the section³⁰ also insists on county governments' observance of national values and principles of good governance as provided under the constitution³¹ which entails participation of the people.

25 Article 190(1)

26 Article 196(2)

27 Article 118

28 Article 3 of the County Government Act, 2012

29 Article 196 of the Constitution

30 Article 197 of the Constitution

31 Article 3(l) of the County Government Act, 2012

The powers of the county government among others includes: ensuring efficiency, effectiveness, inclusivity and participation of the people³². The nomination of the membership of the county assembly also goes further in promoting the principle of public participation and provides that, additionally to members elected as under the Constitution³³ and even those nominated constitutionally³⁴, the political party that is nominating this persons should go further in ensuring that the Communities and cultural diversity of the county is reflected in the nominations³⁵.

The members of the county Assembly, amongst other roles, are charged with the role of ensuring that they maintain a very close contact with their electorates as well as consulting with them on any issues before or even those that are under discussion with the county assembly³⁶. The other roles that go steps further in ensuring the concept of public participation is upheld, are presenting proposals, views and even opinions of the electorates in the county assemblies ³⁷. They also have to attend sessions of the Assemblies³⁸ and provide a linkage between the electorates and the county assemblies. These roles aim at ensuring public participation.

In reviewing ward boundaries the Commission is to consult all the interested parties³⁹, this also promotes the concept of public participation. The County Assembly Service Board also incorporates one resident of the County to the Board, and the person ought to be well versed with public affairs, this enhances public participation. Any person has the right of petitioning the

32 Article 6(6) of the County Government Act, 2012

33 Article 177(1a) of the Constitution

34 Article 177(1b) of the Constitution

35 Article 7(2a) of the County Government Act, 2012

36 Article 9(1a) of the County Government Act, 2012

37 Article 9(1b) of the County Government Act, 2012

38 Article 9(1c) of the County Assemblies Act, 2012

39 Article 26(8a) of the County Government Act, 2012

County Assembly with regards to their roles of enacting and repealing any of their legislation⁴⁰. The electorates in any ward have the powers of recalling back their member of County Assembly before the end of their term⁴¹ as under the provisions provided under subsection two. Among other functions of the governor, the governor has a duty of promoting and facilitating citizen participation in development policies and plans as well as service delivery⁴². The Governor has a duty of promoting public participation. The County Executive Committee when establishing and

organizing the county, they have to encourage participatory decision making so long as it is practicable⁴³. The implementation plan of county is to accommodate citizen participation in the evaluation of county government performance⁴⁴. The Sub County Administrator is also responsible for facilitation and coordination of citizen participation in development policies and plans⁴⁵, additionally the ward administrator is also charged with the same responsibility⁴⁶ as well as the village administrator. Among the objectives of the County Public Service are promoting Article 10 and 232 of the Constitution which promote public Participation⁴⁷. The Concept of citizen participation has been broadly discussed under part VIII and IX of the Act.

40 Article 15(1) of County Government Act, 2012 41 Article 27(1) of County Government Act, 2012 42 Article 30 (3g) of County Government Act, 2012 43 Article 46(2g) of County Government Act, 2012 44 Article 47(2d) of County Government Act, 2012

45 Article 50 (3g) of County Government Act, 2012 46 Article 51(3f) of County Government Act, 2012 47 Article 55(a) of County Government Act, 2012

The Constitutional Provisions on the Global Best Practices on Public Participation

One the best practices envisaged is that the process of public participation should be open and transparent. The affected and interested parties regardless of their tribe, gender or income should have access to all relevant information. The Constitution of Kenya provides for access to information which is necessary to ensure that the process of public participation is open and transparent. Article 118(1) and 196(1) direct parliament and the county assemblies to hold public meetings, facilitate the public involvement in the committees and not to exclude the public from any sitting unless in some exceptional circumstances that will be justified by the speaker. Article 201 (1) provides for openness and accountability and public participation when it comes to public financial matters. The developing guidelines on best practices in public participation are realized here since the constitution by providing for transparency, accountability and public meetings ensures that there is a high level of involvement and participation in the decision making process. The transparent nature that the Constitution envisages ensures that there is access to justice and equality. This will ensure that no particular group is favoured or another side-lined and in return this will facilitate a very successful process as all ideas will be accommodated.

Article 35 of the Constitution provides for the right to access information. This provision ensures that information gathered from the official business of the legislature and public finances are made available for public scrutiny by the citizens. Public servants therefore need to share information with citizens. Public participation needs to be informative and proactive. This ensures that all relevant information should be released to the public beforehand. The constitution in Article 232 provides for the values and principles of public service. Among these value sub-article (1) (f) provides for transparency and provision to the public of timely and accurate information. Public participation needs to be context oriented. Article 174 (c) provides that the objective of devolution

is to enhance the participation of people in exercising of the powers of the state and in making decisions affecting them. Here the constitution envisages a model of public participation that is tailor made for a particular society or locality that is why the decisions are made that affect them at the individual level.

Conclusions and Recommendations

Conclusion

Public participation is intended to bridge that gap between the government; both county and national, with the civil society, private sector and the general public. Public participation, therefore, is the tool with which these parties can collectively use to address various issues or development agendas. Kenyans now have an opportunity to enhance development and service delivery while entrenching governance and accountability. The baby must not be thrown out with the bathwater. If this concept is to be taken into consideration and implemented accordingly, it will be the key in alleviating citizens from bad leadership, impunity, corruption and misuse of public funds.

Public participation leads to behavioral change since it makes people be aware, informed, and self-convinced that change is needed. It makes citizens obligated to support a particular exercise since it encourages civic and community responsibility. The oversight role that the citizens play also promotes accountability and transparency in the government therefore reducing the abuse of power from those in authority.

The Constitution and the various legislations that are to be enacted promote the concept of public participation to a great extent. This has ensured that Kenya measures up to the expectations of the global best practice; nonetheless there is still some room for improvement. Finally, it should be noted public participation is not for the privileged few or the elite in Kenya but a role and duty for every citizen as it impacts on the country at large.

Recommendations

Institute transparent processes with the aim to address to complaints by the citizens. Most often citizens do not participate in any exercise if they feel the government is not addressing their issues or complaints. There should be a mode of addressing these complaints by the government from the county all the way up to the national level, thus ensuring that there is a timely response to these issues by the citizens. The LATF requirements for local government are among the models that can be used. This includes project identification before carrying it out. As per the global best practices, the government should involve the citizens at this stage to ensure the public participation process is successful. There should also be penalties for failure to respond to citizens' complaints as soon as possible. These penalties would ensure that the government is keen in service delivery.

The government should therefore ensure that public participation meets a certain criterion. First, the aim of a certain public participation exercise should be clearly defined, be it service delivery or allocation of resources. Second, the details of the said public participation process should be clearly outlined. Third, the process should be accountable ensuring that the views of the citizens are implemented and where the views have not been taken into consideration there should be a clear justification for it. Finally, the process should be transparent.

Since public participation is a new concept, training would be needed to ensure that the participants are well equipped with much needed skills to undertake the exercise. These skills can be developed from the global best practices on public participation and ensuring this is applied at all levels within the county government. Similarly, civil society and citizens will require training, especially when they are involved in activities that require some technical knowledge. This knowledge would help in identifying any flaws in the process or where any stage has been omitted therefore raising an alarm to have it addressed.

The county government should provide forums or public meeting where the general public can come out to discuss how to engage improve service delivery. This interaction from the citizens will be essential in building the capacity of the county in terms of ideas that will be implemented. This interaction is a horizontal mode of learning where the citizens are at the same level as the government, therefore is free to air out there views comfortably.

List of Statutes

1. The Constitution of Kenya 2010
2. The International Covenant on Civil and Political Rights (ICCPR)
3. African Charter for Popular Participation in Development and Transformation
4. Principles of the Rio Declaration
5. Convention on Access to Information 1988
6. Declaration of the International Conference on Public Participation 2012
7. The County Government Act No. 17 of 2012
8. The County Government Act No. 17 of 2012
9. Intergovernmental Relation Act 2012
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