



**THE POTENTIAL ROLE OR LACK THEROF OF PUBLIC PARTICIPATION IN THE
FORMATION OF THE NAIROBI METROPOLITAN SERVICE**

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ABSTRACT

With the 2010 Constitution of Kenya having completed its first decade, some of the boldest features include public participation. With democracy and devolution at the fore front, this has enabled the government to provide a forum that would fully take into consideration the perspective of the citizens. With it was however, a big disappointment when the government in its attempt to create a solution to a political problem failed to apply this salient feature, when they transferred some gubernatorial functions back to a national government establishment the Nairobi Metropolitan Service. This has been seen as an institution that does not exist within the Constitutional provisions. This paper will attempt to look at the place of public participation within the context of a democracy and especially in relation with the transfer of functions. Thus look at the manner in which public participation should have been carried out. Through a comparative analysis, establish how Kenya can properly apply the lessons learnt to the issue of the formation and appointment of the NMS and its members and the lack of effective public participation that had been occasioned.

CHAPTER 1

1.1 BACKGROUND

With that in mind, we have seen for a while the rise in the distrust between the citizens and institution, more so national institutions worldwide. The reputation of political representatives as being ‘not trustworthy’, the rise of anti-system-oriented populist parties, as well as the trend of decreasing voter-turnout confirm a well-documented decline of trust levels within Western societies well able to shake the foundations of representative democracies.¹ Yet while the consequences of existing levels of distrust for the individual have been developed extensively, the implications of mounting distrust for a society and its political institutions are controversial as they have been theoretically conceptualized in different ways. Some scholars have placed a cautious and vigilant attitude of not trusting those in power at the center of any democratic institutions and as a fundamental democratic principle.² Others have objected this and have focused on social trust in the fellow citizen as crucial to any trust toward a representative and the delegation of power to him.³

While in the former case rising levels of distrust in other citizens, a political representative, or the political institutions would not impose a burden on the functioning of a liberal representative democracy, in the latter it could frustrate legitimate democratic decision-making. Yet the different implications and potential outcomes of different types of trust or distrust for a society have hardly been distinguished.⁴ In addition, existing levels of distrust have been suggested to have contrasting effects on political participation, depending on social and individual preconditions. Whereas some scholars have underlined the mobilizing character of distrust given certain resources such as political interest, political efficacy, or education, others have highlighted a distrust-induced withdrawal and disenchantment.⁵ As citizen participation has always been understood as a key

¹ Butzlaff F and Messinger Zimmer S, *Undermining or Defending Democracy: The Consequences of Distrust for Democratic Attitudes and Participation*, Critical Policies Studies, 14, 2019, 3, 249.

² Butzlaff F and Messinger Zimmer S, *Undermining or Defending Democracy: The Consequences of Distrust for Democratic Attitudes and Participation*, Critical Policies Studies, 14, 2019, 3, 249.

³ Butzlaff F and Messinger Zimmer S, *Undermining or Defending Democracy: The Consequences of Distrust for Democratic Attitudes and Participation*, Critical Policies Studies, 14, 2019, 3, 250.

⁴ Butzlaff F and Messinger Zimmer S, *Undermining or Defending Democracy: The Consequences of Distrust for Democratic Attitudes and Participation*, Critical Policies Studies, 14, 2019, 3, 250.

⁵ Butzlaff F and Messinger Zimmer S, *Undermining or Defending Democracy: The Consequences of Distrust for Democratic Attitudes and Participation*, Critical Policies Studies, 14, 2019, 3, 250.

feature of any vital democracy, analyzing the impact of distrust on the willingness to engage is an important cornerstone to understand its implications for democracy.⁶

At its most basic, democracy, refers to a government of the people, by the people and for the people. There are various manners in which we look at the democracy, the first being direct democracy.⁷ Here, political decisions and governments of the state are made by the people. For example, where, people gather in small town hall meetings to discuss and find a way forward to their problem. This can also be traced back to traditional African societies, where a similar approach to handle matters that required the people's consensus. Therefore the concept of democracy is not lost on the traditional African people.⁸

The second manifestation of democracy, is seen in representative democracy. Here, political decisions are not made by people themselves but rather by elected officials, on their behalf.⁹ The third type of democracy is that which is constitutional and liberal. At this point, the Constitution, outlines frameworks and the manner in which the government majority will rule. There will be however, certain restrictions put in place to ensure that the minority's rights are protected. This third aspect of democracy, is one that brings about a certain equality in which all the subjects of a particular state are commanded by the same law.¹⁰

The fourth and final democracy is that which is used in the more social or economic sphere. It seeks to minimize the difficulties that arise within the aforementioned spheres. This type of democracy advocates for a social system rather than a system under the will of the people.¹¹ An example of this in today's society is states that adhere to the communist regimes.

It is safe to make the assumption that ideally; Kenya falls under the third type of democracy. This is due to the fact that the Constitution is vital to the essence of democracy. There are certain principles in without which, democracy cannot be defined. This include; separation of powers,

⁶Butzlaff F and Messinger Zimmer S, *Undermining or Defending Democracy: The Consequences of Distrust for Democratic Attitudes and Participation*, Critical Policies Studies, 14, 2019, 3, 250.

⁷ Kaunda K, *Future of Democracy in Africa*, Indiana University Press, on Behalf of the Hutchins Center for African and African American Research at Harvard University, 15, 1964, 37.

⁸ Kaunda K, *Future of Democracy in Africa*, Indiana University Press, on Behalf of the Hutchins Center for African and African American Research at Harvard University, 15, 1964, 37.

⁹ Kaunda K, *Future of Democracy in Africa*, Indiana University Press, on Behalf of the Hutchins Center for African and African American Research at Harvard University, 15, 1964, 37.

¹⁰ Kaunda K, *Future of Democracy in Africa*, Indiana University Press, on Behalf of the Hutchins Center for African and African American Research at Harvard University, 15, 1964, 37.

¹¹ Kaunda K, *Future of Democracy in Africa*, Indiana University Press, on Behalf of the Hutchins Center for African and African American Research at Harvard University, 15, 1964, 37.

constitutionalism and fundamental civil liberties.¹² These pillars are thus guaranteed in the Constitution of Kenya of 2010.

At a centralized point of view, it is important to note that the main government is not to be charged with absolute power in making the laws. A short coming to democracy is that it is applicable within its area of influence. Thus where the government is concentrated, democratic decisions and their impacts are felt most within that territory. It is therefore safe to conclude that those far from the reach of mainstream government, would be would consequently miss out on their chance to pursue a matter that is of great interest to them.¹³ This thus resulted in the need to decentralize the government.

The concept of decentralization at its definition is to disperse from a whole or concentrated mass to smaller single entities. In relation to authority, we see for a better part of the last few years we have seen states attempt to transfer responsibility to local elected governments not only making decentralization fiscal and administrative but political as well.¹⁴ For some it was more a transition from one means or governance to another, with the motivations behind the respective shifts varying. The need to decentralize power would be to respond to ethnic clashes or to ensure better service delivery.¹⁵ However, the concept of participation began to translate in to the limitation of powers by the executive, and the restriction in the time frame it took the legislature took to make policies and implement them. The established decentralization not only insured that there was a separation of powers, in the governmental powers as well as the extent to which the powers could be limited, but also enhanced the role of individual participation.¹⁶

The Constitution of Kenya 2010, introduced the precept of Devolution.¹⁷ The devolution in Kenya saw the geographical breakdown and rebuild of what the Kenyan territory in to forty-seven counties each headed by a governor. In its objectives, devolution sought to promote democratic and accountable exercise of power,¹⁸ to enable people self-governance through encouraging

¹² Mbondenyei M and Ambani J, *The New Constitutional Law of Kenya: Principles, Government and Human Rights*, Law Africa, 2012, 9.

¹³ Madison J, *The Particular Structure of the Government and the Distribution of Power Among its Different Parts*, Federalist Paper No. 14, < https://avalon.law.yale.edu/18th_century/fed14.asp > 7th February 2021.

¹⁴ World Bank Policy Research Working Paper 3603, May 2005, page 1

¹⁵ World Bank Policy Research Working Paper 3603, May 2005, page 1

¹⁶ Strange J H, *The Impact of Citizen Participation On Public Administration*, Public Administration Review, 32, 1972, Special Issue: Citizens Action in Model Cities and CAP Programs: Case Studies and Evaluation, 457.

¹⁷ Chapter 11, Constitution of Kenya, 2010.

¹⁸ Article 174(a) Constitution of Kenya 2010.

participation in the government, and making decisions that will affect them,¹⁹ among many others. In addition to the functions of both national government and that of the county clearly outlined in the 4th Schedule of the Constitution.²⁰

As stated above the one of the perks decentralization was the ability of the citizenry to participate in decision making that would most likely affect their lives. This is to be done through the granting of access of information to the citizens, that would allow for the empowerment in policymaking.²¹ In addition, it would ensure that the principles of good governance in Article 10²² are upheld in line with the spirit of the law. This in turn reiterates the provisions of the Constitution of Kenya that the principles and values of public participation include the involvement of people in the process of policy making.²³ This is further seen in Article 196 which calls upon the County assembly to facilitate forums for public participation in relation to policy making, among other businesses. It goes on to state that in only limited circumstances would such participation be limited.²⁴

1.2. STATEMENT OF THE PROBLEM

As the Constitution of Kenya 2010 completes its first decade, one can highlight its forthcoming trials as well as its success. For the better part of the decade, some of the shortcomings have been made evident more so recently with the County government of Nairobi, where the governor Mike Sonko signed away his key functions back to national government.²⁵ Through an executive order made by the president, a transfer deed was signed thus leading to the creation of the Nairobi metropolitan Service (herein known as the NMS).²⁶ At the time of its creation, we fail to see that the Nairobi Metropolitan Service, being a choice of the people as there had been no active participation by the members of the public, in ensuring that their right guaranteed under Article 1 of the Constitution,²⁷ or even still indirectly through their representatives at the county assembly

¹⁹ Article 174 (c), Constitution of Kenya 2010.

²⁰ Articles 185(2), 186(1), 187(2) and 4th Schedule, Constitution of Kenya, 2010.

²¹ Mbithi. A, Ndambuki. D, Juma. F, *Determinants of Public Participation in Kenya County Governments*, 54, Journal of Asian and African Studies, 2019, page 53.

²² Article 10, Constitution of Kenya, 2010.

²³ Article 232(d), Constitution of Kenya, 2010

²⁴ Article 196, Constitution of Kenya, 2010.

²⁵ Baraka C, Kenya's Road to Dictatorship Runs Through Nairobi County, 26th June 2020, Foreign Policy, <<https://foreignpolicy.com/2020/06/26/kenya-road-dictatorship-nairobi-county-military-metropolitan-services-uhuru-kenyatta/>> 7th February 2021.

²⁶ Gazette Notice No. 1609, The Kenya Gazette, Volume CXXII-No. 38, 25th February 2020.

²⁷ Article 1, Constitution of Kenya, 2010.

level. This paper will therefore try to examine if public participation was invoked in to the creation of the NMS.

1.3 STATEMENT OF OBJECTIVES

The aim of this paper, is to study and investigate whether there was an adherence to public participation in the formation of the NMS, through the signing of the transfer deed from the County government. This is through:

1. Reflecting on the principle of Public Participation and its place in democracy
2. The situation in Kenya, how has public participation incorporated in to the law
3. The measures that should have been followed in terms of public participation, in the event there is a transfer of function from one level of government to the next.
4. Comparative analysis of what public participation in other states is carried out from one level of government to the next.

1.4. RESEARCH QUESTIONS

The dissertation will attempt to answer the following research questions:

1. What is the importance of public participation within the context of a democracy?
2. Whether the principle of public participation was adhered to in the formation of the NMS and the appointment of its members?
3. What is the interpretation of the courts on public participation?
4. What can Kenya learn from other states that have undergone similar change in powers between their various levels of government?

1.5. JUSTIFICATION

The situation presented above, is seen as political solution to a political problem. This means that it is not provided for in law, due to the unique circumstances surrounding the formation of the Nairobi metropolitan service. This paper, aims to look at the manner in which it was form and give recommendations that would clearly guide legislative policies as to the manner such institutions are to be formulated in order to uphold the spirit of devolution as well as public participation.

1.6. THEORETICAL FRAMEWORK

As stated above, democracy refers to the idea that a government should be one of the people, by the people for the people.²⁸ Some scholars are of the opinion that even though democracy is more

²⁸ Kaunda K, *Future of Democracy in Africa*, Indiana University Press, on Behalf of the Hutchins Center for African and African American Research at Harvard University, 15, 1964, 37.

accommodating of capitalism, there is a bit of a strains on the reliance of this principle. This is due to the fact that the it is difficult to use the rule of majority to solve disputes in divided societies. What hinders democracy from prospering in such situations is the lack of equality as well at the poor quality of participation.²⁹ The strength of democracy lies providing pools of legitimacy processes of succession, self-correcting mechanisms when corruption takes place and decentralization to allow for proper problem solving and redistribution of opportunities.³⁰

Democracy is interchangeable identified with the right to vote. In as much as this is an important segment, democracy is the vesting of power to the people within a state. Practically speaking, it requires for people to be involved in their own governance, for democracy to be realized. The core of this happening would be through public participation.³¹

Public participation at it the most basic comprehension, is the need for people to interact with policymakers and governance processes.³² Within a legal context, this would require purposeful consultation with members of the public or interested parties over a matter before the government can make its decision.³³ It is important to note that public participation must be meaningful, due to the fact that it impacts the lives of the citizens concerned.³⁴ There are different levels of participation. The most desirable form of participation especially from a normative point of view is one that is derived from the people.³⁵ This is referred to a citizen power. It includes citizens' control, delegated power and the partnership.³⁶ For effective public participation, the citizens, must have access to information. This is one of the most basic pre-conditions in which the government can engage it people.³⁷ This has also been supported by Article 35, which establishes the right to

²⁹ Adeney K and Taggart P, *The future of Democracy*, Government and Opposition in collaboration with Cambridge University Press, 50, 2015, 3, 326.

³⁰ Adeney K and Taggart P, *The future of Democracy*, Government and Opposition in collaboration with Cambridge University Press, 50, 2015, 3, 327.

³¹ Corrigan T, *Democratic Devolution; Structuring Citizen Participation in Sub-National Governance*, South African Institute of International Affairs, Occasional Paper 263, 2017, 5.

³² Corrigan T, *Democratic Devolution; Structuring Citizen Participation in Sub-National Governance*, South African Institute of International Affairs, Occasional Paper 263, 2017, 5.

³³ Legislative Sector South Africa, *Public Participation Framework for the South African Legislative Sector*, Legislative Sector South Africa, June 2013,7.

³⁴ Corrigan T, *Democratic Devolution; Structuring Citizen Participation in Sub-National Governance*, South African Institute of International Affairs, Occasional Paper 263, 2017, 6.

³⁵ Corrigan T, *Democratic Devolution; Structuring Citizen Participation in Sub-National Governance*, South African Institute of International Affairs, Occasional Paper 263, 2017, 7.

³⁶ Arnstein S, *A Ladder of Citizen Participation*, Journal of American Institute Planners, 35, 1969, 4, 217.

³⁷ Organization for Economic Co-operation and Development, *Citizens as Partners: Information, Consultation and Public Participation in Policy-Making*, 2001, 12.

access information held by the state.³⁸ This right also requires the governments to publicize any important information affecting the nation.³⁹ Next there should be consultation. At this point the government allows for the public to provide their comments, opinions and feedback on a particular matter. Consultation can be organized with a broader group of participants from the public. It is a reactive way of participation – the public becomes involved because the government requests this. However, this is not to say that the public cannot request to be consulted. Indeed, citizens can pro-actively engage and remind the governmental bodies about the need to be asked to comment on laws which will affect them.⁴⁰

Third, there should be active involvement. This includes collaboration as well jointly undertaken responsibilities undertaken by both the citizens and government to actively define the process and content of policy.⁴¹ Though the finality of the process rests with the government, this stage allows for equality of citizens to propose, ideas and discussions independently.⁴²

1.7. LITERATURE REVIEW

Developing countries are increasingly adopting various types of participatory governance mechanisms that aim to “facilitate the participation of ordinary citizens in the public policy process”. They involve citizens in planning, decision-making about the allocation of public funds and the design of public policies, as well as in monitoring and evaluation.⁴³ Within the Kenyan Context, transition in to democracy legally began in 1991 with the repeal of Section 2(a) of the Constitution, that had previously barred formation of multiple political parties outside of the main government run party Kenya African National Union (KANU).⁴⁴ Since that period of time numerous political parties have cropped up. With the dawn of the Constitution of Kenya 2010,a

³⁸ Article 35(1), Constitution of Kenya, 2010.

³⁹ Article 35(3), Constitution of Kenya, 2010.

⁴⁰ Organization for Economic Co-operation and Development, *Citizens as Partners: Information, Consultation and Public Participation in Policy-Making*, 2001, 12.

⁴¹ Organization for Economic Co-operation and Development, *Citizens as Partners: Information, Consultation and Public Participation in Policy-Making*, 2001, 12.

⁴² Organization for Economic Co-operation and Development, *Citizens as Partners: Information, Consultation and Public Participation in Policy-Making*, 2001, 12.

⁴³ Johnson O, Nyambane A, Cyoy E, and Oito L, *County Energy Planning in Kenya: Local Participation and Local Solutions in Migori County*, Stockholm Environment Institute, 2016, 6.

⁴⁴ Kivuva J, *Democratization in Kenya: Public Dissatisfied with the Benefit-less Transition*, Afro barometer Briefing Paper No. 152, 2015, 2.

devolved government⁴⁵ has cropped up to increase citizen participation as well as access to better service delivery.⁴⁶

The idea that ordinary citizens ought to participate in political decision making in general is a notion with a long historical tradition for which there is no space to elaborate the details of here. Suffice is to say that public participation in public affairs has been advocated during the course of centuries, primarily due to its educational merits.⁴⁷ Taking part in public affairs is said to teach people how to work together and how to adjust and reflect upon their own wishes and concerns while taking into account the wishes and concerns of other members of society. Participation is also believed to promote the development of responsible and politically aware citizens who recognize that cooperation with other members of society is in their own self-interest, both in the long, and short run.⁴⁸

There are two concepts of participation, namely political participation and social and project participation. Each of the concepts of participation carries with them differing methods for strengthening or enhancing participation.⁴⁹ Traditionally, in the field of political participation, such methods have included voter education, enhancing the awareness of rights and responsibilities of citizens, lobbying and advocacy, often aimed towards developing a more informed citizenry who could hold elected representatives more accountable.⁵⁰ In the social and community spheres, however, we have seen the development of a number of broader participatory methods for appraisal, planning, monitoring large institutions, training and awareness building. Greater emphasis here has been on the importance of participation not only to hold others accountable, but also as a self-development process, starting with the articulation of grassroots needs and priorities, and building popular forms of organization. Participation has included the realm of knowledge and direct action, not only the realm of representation and accountability.⁵¹

⁴⁵ Chapter 11, Constitution of Kenya 2010.

⁴⁶Linder Wolf, *On Merits of Decentralization in Young Democracies*, Oxford University Press, 40, (2010), 1, 1.

⁴⁷ Saati A, *Public Participation in Constitution Building: An effective Strategy for Enhancing Democracy?* Elanders Sverige AB, 2015, 8.

⁴⁸ Saati A, *Public Participation in Constitution Building: An effective Strategy for Enhancing Democracy?* Elanders Sverige AB, 2015, 8.

⁴⁹ Gaventa J and Valderama C, *Participation, Citizenship and local Governance*, Institute of Development Studies, 1999, 2.

⁵⁰Gaventa J and Valderama C, *Participation, Citizenship and local Governance*, Institute of Development Studies, 1999, 3.

⁵¹ Gaventa J and Valderama C, *Participation, Citizenship and local Governance*, Institute of Development Studies, 1999, 3.

1.8. RESEARCH METHODOLOGY

The study will use a doctrinal methodology. The doctrinal approach will involve the review of relevant primary and secondary sources. These include statutes, case law, books, journals, case law, newspapers and online internet resources.

1.9 HYPOTHESIS

The following hypothesis will be will be tested:

1. That the principle of public participation was not adhered to during the formation the NMS through the transfer deed.
2. That there needs to be a new proper procedural instruction to ensure that public participation is upheld and within a democracy.
3. The transfer of functions to the NMS, was in violation of the spirit of the constitution, and thus needs to be disbanded, and properly founded.

1.10. CHAPTERISATION

The chapter breakdown of this papers will be as follows; Chapter one will give background as to the aims and areas of focus of the paper. Chapter two, will try to analyze the role public participation plays in a democracy. Here the paper examines whether it is possible for one concept to exit without the other. Chapter three will look in to the principle of public participation was adhered to, based on the discussion in the previous chapter, but also through studying the court interpretation of what public participation is. In Chapter four, this paper will study the concept of public participation within a different jurisdiction. This will help highlight the short comings of the law in relation to the transfer of power within the Kenyan context. Chapter five will conclude and propose recommendations.

CHAPTER 2.

2.0 INTRODUCTION.

In the previous chapter, we see that through the establishment and appointment of the NMS and its members, this is the first instance in which the distrust aforementioned, threatens the core of democracy. This is due to the fact that there was a transfer of functions from the devolved government to the main stream government through the NMS. In this Chapter, there will be an attempt to determine whether there is a difference between democracy and public participation. This discussion will be through understanding the previously stated notion on the two principles highlighted in the former chapter. This will then help us comprehend the role that public participation has within the context of a democracy. Better still this paper will then try to understand what democracy means to Kenya within the context of the constitution and how public participation comes in to play.

Many academics are in accord that democracy is a universal value. This is not only in regards to the concept, but also the meaning of democracy being universalized.⁵² An example of Democracy as a universal principle is within the Universal Declaration of Human Rights (UDHR). It advocates for the right for all to take part in government of their country. This can be directly, or through representative democracy.⁵³ We also see this with the International Convention on Civil and Political Rights (ICCPR), where it advocates for citizen being able to have the right to self-determination. This derived from the fact that they are free to decide their political status that enables them to pursue development.⁵⁴ Similarly, the previous chapter echoed the same sentiments. This is that democracy, at its simplest form is the ability of the people to choose and partake in the formation of their own government. As it is a core in the promotion of national values in Kenya.⁵⁵ Public participation on the other hand, refers to the involvement of the people at the heart of decision making processes, in matters that concern their lives.⁵⁶ Participation enables citizen to hold their leaders to account on all decisions that require implementation.⁵⁷ A similar opinion is

⁵² Kurki. M, *Democracy and Conceptual Contestability: Reconsidering Conceptions of Democracy in Democracy Promotion*, International Studies Review, 12 (2010) 3, 365.

⁵³ Article 21, Universal Declaration of Human Rights, 1948.

⁵⁴ Article 1(1), International Covenant on Civil and Political Rights, 1966.

⁵⁵ Art 10(2)(a), Constitution of Kenya, 2010.

⁵⁶ Kanyinga. K, *Kenya: Democracy and Political Participation*, Open Society Initiative for Eastern Africa and Institute for Development, University of Nairobi, 2014, 5.

⁵⁷ Kanyinga. K, *Kenya: Democracy and Political Participation*, Open Society Initiative for Eastern Africa and Institute for Development, University of Nairobi, 2014, 5.

held by the African Charter on Human and Peoples' Rights where it brings to light the importance of participation of people in public affairs.⁵⁸

2.1. DEMOCRACY v PUBLIC PARTICIPATION.

a) Democracy

Habermas, in his theory of the public sphere theory, is of the opinion that previously, it was difficult to separate power from the person in charge. This is due to the fact that he/she represented the will of "God" as well as his power.⁵⁹ He further states that the public sphere creates a forum to which a public opinion can be formed. This inevitably means that citizens do have access to this public sphere. Moreover, private individuals are able to come forth to form a public body. Within this newly founded body, the citizens are able to enjoy certain freedoms that come with this public sphere.⁶⁰ The aforementioned sentiment has been criticized on the account that the public sphere is not necessarily a concrete space or set standard discussion practices, but rather a perspective. This perspective, creates an opportunity to discuss democracy.⁶¹

Democracy enables the not only the idea of the majority rule and the right to vote together with respect for elections, but also allows for the protection of freedoms and liberties. It allows for the access to the entitlements that accompany these freedoms as well as the guarantee that they will be upheld.⁶² Thus in relation to the formation of the NMS as well as the appointment of its members, the lack of participation, and or the failure to involve the citizens of the Nairobi county government⁶³ is an example of democracy in guaranteeing the right to public participation as provided for within the Constitution of Kenya.⁶⁴

Another role of democracy is the promotion of the intrinsic value of human welfare that comes as a result of social and political participation. In that democracy being viewed as a universal feature, and its undisrupted practice enriches the lives of citizens in whose state upholds democracy. Perversion of this democracy through censorship of some kind within the political and democratic

⁵⁸ Article 13, African Charter on Human and Peoples' Rights (Banjul Charter), 1981.

⁵⁹ Gripsrud J, Moe H, Molander A, and Murdock G, *The Idea of the Public Sphere: A Reader-* Habermas J, *The Public Sphere*, Lexington Books 2010, 114.

⁶⁰ Gripsrud J, Moe H, Molander A, and Murdock G, *The Idea of the Public Sphere: A Reader-* Habermas J, *The Public Sphere*, Lexington Books 2010, 115.

⁶¹ Graham N, *Habermas and the Public Sphere*, *Global Communication and Media*, 3, 2007, 2, 203.

⁶² Sen, A, *Democracy as a Universal Value*, *Journal of Democracy*, 10, 1999,3, 10.

⁶³ Gazette Notice No. 1609, *The Kenya Gazette*, Volume CXXII-No. 38, 25th February 2020.

⁶⁴ Public participation is a principle within the national values under Article 10, Constitution of Kenya, 2010.

society is a big miss-step.⁶⁵ The practice of democracy gives citizens an opportunity to learn from one another, and helps society to form its values and priorities. Even the idea of "needs," including the understanding of "economic needs," requires public discussion and exchange of information, views, and analyses. In this sense, democracy has constructive importance, in addition to its intrinsic value for the lives of the citizens and its instrumental importance in political decisions. The claims of democracy as a universal value have to take note of this diversity of considerations.⁶⁶

b) Public Participation

On the opposite end of the ring, we have public participation. This refers to activities that that involves the contribution of stakeholders. This could be the public, media or other institutions. There are two types of participation. This could be citizen participation and political participation.⁶⁷ The latter involves voting in elections, freedom to participate in formation of political parties and campaigns.⁶⁸ The former refers to the redistribution of power within the political and economic processes to encourage citizens to be engaged in forums that would have otherwise excluded them.⁶⁹

The classical conception of the laws of a republic express the unrestricted will of the united citizens. Regardless of how the laws reflect the existing ethos of the shared political life, this ethos presents no limitation insofar as it achieves its validity only through the citizens' own process of will-formation.⁷⁰ The principle of the constitutional exercise of power, on the other hand, appears to set limits on the people's sovereign self-determination. The rule of law requires that democratic will-formation not violate human rights that have been positively enacted as basic rights

In conclusion, from the above discussion, with the presence of rule of law, captured in Article 2 of the Constitution of Kenya,⁷¹ as well as the principle of democracy, granted through Article 1⁷², we see that public participation is able to arise. So despite the difference in meanings and understandings, for public participation to exist, there should be and must be democracy.

⁶⁵ Sen, A, *Democracy as a Universal Value*, Journal of Democracy, 10, 1999,3, 10.

⁶⁶ Sen, A, *Democracy as a Universal Value*, Journal of Democracy, 10, 1999,3, 10.

⁶⁷ Verba S and Nie H, *Participation in America: Political Democracy and Social Equality*, Chicago Press. 1987,

⁶⁸ Article 38(a) (b) and (c), Constitution of Kenya, 2010.

⁶⁹ Arnstein S, *A Ladder of Citizen Participation*, Journal of American Institute Planners, 35, 1969, 4, 217.

⁷⁰ Habermas J and Rehg W, *Constitutional Democracy: A Paradoxical Union of Contradictory Principles*, The Political Theory, 29, 2001, 6, 1.

⁷¹ Article 1, Constitution of Kenya, 2010.

⁷² Constitution of Kenya, 2010.

2.2. THE PLACE OF DEMOCRACY AND PARTICIPATION IN KENYA

A Historical Outlook

As has been stated numerous throughout this paper, no political community can be held together and maintained without government. The most essential type being one created within the principles of democracy.⁷³ But to arrive at this point, we see that pre 2010, democracy was more a representative of a government made up of the major ethnic groups taking the chunk of leadership to better their community, rather than having the general interest of Kenyans as a whole. This greatly challenged the principle of democracy and rule of law.⁷⁴ This was due to the fact, that despite being recognised as a democratic state, Kenya in fact had one political party (Kenya African National Union- KANU), that predominantly formed the government, and was left unchecked.⁷⁵ This strain on democracy, resulted in the formation of a government that was intolerant of an opinion that was contrary to that of KANU. In addition, we see that even then there was recognition for the need of public participation however this was undermined by due to the restrained democratic governance structures especially during the single party state.⁷⁶ The symbolism of change, that would uphold the promise of democracy, was the repeal of Section 2(A) to allow for the change to a multi-party democracy.⁷⁷ This meant that members of government as well as citizens were free to form and take part in the formation of political parties that would either vie for or form part of the government. Despite this small step in the right direction, there was a paralysis by the main government thus making the practice of citizens right to democracy being practiced in its proper sense difficult.⁷⁸

Furthermore, in pre2010 Kenya there was also a recognised need to decentralize the government structure at that point. This is due to the fact that distribution of resources as well as planning was focused on some regions over others. There was also an acknowledgement that there was need to involve citizen in participation that would be best actualized in a decentralized system of

⁷³ Shuifa H, *The Concept of Democracy*, Frontier of Philosophy in China, 3, 2008, 4, 622.

⁷⁴ Kanyinga. K, *Kenya: Democracy and Political Participation*, Open Society Initiative for Eastern Africa and Institute for Development, University of Nairobi, 2014, 11.

⁷⁵ Kanyinga. K, *Kenya: Democracy and Political Participation*, Open Society Initiative for Eastern Africa and Institute for Development, University of Nairobi, 2014, 8.

⁷⁶ Intergovernmental Relations Technical Committee, Status of Public Participation in National and County Governments Report, 13.

⁷⁷ Kanyinga. K, *Kenya: Democracy and Political Participation*, Open Society Initiative for Eastern Africa and Institute for Development, University of Nairobi, 2014, 8.

⁷⁸ Kanyinga. K, *Kenya: Democracy and Political Participation*, Open Society Initiative for Eastern Africa and Institute for Development, University of Nairobi, 2014, 9.

government. Some efforts to achieve this is seen in the Local Authority Transfer Fund and the Constituency Development Fund which focused on the distribution of monies to ensure development outside the reach of national government. However, these organizations failed in its aims to achieve citizen participation resulted in the low levels of engagement thus limiting the capacity for citizen empowered development.⁷⁹

The Current Situation

With the 2010 Constitution of Kenya we see that as side from the provisions of democracy, public participation is a key feature to the democratic process. This is not only at a national level, but also at the decentralized one. To further reiterate the position of public participation at the devolved level of government, there is also legislation like the County Government Act.⁸⁰ It provides that for efficient citizen participation there should be first timely access to information, data, documents, and other information relevant or related to policy formulation and implementation. Second, there should be reasonable access to the process of formulating and implementing policies, laws, and regulations, including the approval of development proposals, projects and budgets, the granting of permits and the establishment of specific performance standards.⁸¹

Third presence of protection and promotion of the interest and rights of minorities, marginalized groups and communities and their access to relevant information. Next is the 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.⁸²

There should also be a reasonable balance in the roles and obligations of county governments and non-state actors in decision-making processes to promote shared responsibility and partnership, and to provide complementary authority and oversight. In addition, promotion of public-private partnerships, such as joint committees, technical teams, and citizen commissions, to encourage direct dialogue and concerted action on sustainable development. Lastly, the recognition and promotion of the reciprocal roles of non-state actors' participation and governmental facilitation and oversight.⁸³

⁷⁹Intergovernmental Relations Technical Committee, Status of Public Participation in National and County Governments Report, 14.

⁸⁰ Part VIII, County Government Act, Chapter 17, 2012.

⁸¹ Section 87, County Government Act, 2012.

⁸² Section 87, County Government Act, 2012.

⁸³ Section 87, County Government Act, 2012.

In addition, vices like ethnicity that had previously been a hindrance to the practice of democracy and or participation had been capped through the presence of anti-discrimination clauses⁸⁴ that would ensure that citizens freely took part in political activities and well as decision making activities without facing any discrimination. There have been attempts to enact a public participation act, however, there has been no visible efforts as it is still a bill and has yet to undergo the complete drafting process.

This in relation to the transfer of functions from the County Government back to the National Government through the NMS comes in to play as follows. It is true that the Constitution of Kenya 2010, gives out grounds for transfer of functions from one level of government to the next.⁸⁵ The manner in which this transfer was carried out was unlawful, based on the fact that it was carried out via an executive order given by the president and that this particular action lay outside his powers and functions.⁸⁶ In addition there is no indication of what arrangements were made to enable the transfer of functions between the Nairobi County Government and the National Government were made in a manner that ensured that the constitutional responsibility for the performance of the function remained within the government it has been assigned to, in the fourth schedule.⁸⁷ Furthermore, we see that there was failure on the part of the legislature to provide a regulatory criterion to which the transfer of function would take place between NMS and the Nairobi County Government.⁸⁸

Moreover, there was a failure to adhere to court guidance in relation to the natural succession of functions. This is due to the fact that there was a vacancy in the Deputy Governor's office. There was a failure to on the part of the Governor of Nairobi to nominate another when the first one resigned.⁸⁹ Thus there would have been no need to invoke the Article 187.⁹⁰

⁸⁴ Article 27, Constitution of Kenya, 2010.

⁸⁵ Article 187, Constitution of Kenya, 2010.

⁸⁶ Article 132, Constitution of Kenya, 2010.

⁸⁷ Article 187(2)(b), Constitution of Kenya 2010.

⁸⁸ Section 29, Intergovernmental Relations Act, 2012.

⁸⁹ Terer. L, *Procedure for Filling Vacancy in the Office of the Deputy Governor; In re Speaker, County Assembly of Embu*, The Bench Bulletin 40, 2018, 6, < <http://www.kenyalaw.org/kl/fileadmin/BenchBulletin/BBIssue40.pdf>> 30th May 2021.

⁹⁰ Article 187, Constitution of Kenya 2010.

2.3. ROLES OF PARTICIPATION IN RELATION TO TRANSFER OF FUNCTIONS.

Now that we have established that democracy then gives rise to the right to public participation from the discussion above. Then in turn we can establish what the role participation plays within the context of transfer of functions.

First is that the principle of sovereignty granted to the citizens is upheld. Within the Kenyan Constitution of 2010, the first Article grants citizens the power to make decisions within the context of the powers granted to them to make decisions within the law⁹¹. Therefore, it would be important for the national government to have involved the members of Nairobi county to have partaken in the decisions being made concerning, the formation of the NMS and its members. make the future of the country.

Second in relation to the devolution structure of government, we see that, with participation from the public, this would make it much easier for the citizen to be part of the actions that spear head development.⁹² It really doesn't matter what sphere we work in it is the duty of all citizens to do everything we can to live in better conditions. Citizen's participation is a process which provides private individuals an opportunity to influence public decisions and to be a component of the democratic decision-making process.⁹³ This requires the legislature to provide a framework on how the transfer of functions will be conducted and the manner in which public participation will be incorporated.⁹⁴

With the right to participate being granted to the citizens, there may be the challenge arising, this is concerned with mechanisms that stipulate how this should be done. What this does is enable citizens to be granted the right to access information. This makes citizen participation consultative, thus aiding in the formulation proper opinions that would assist in the decision that needs to be made. Thus the right to participation enables the promotion of the right to access information.⁹⁵

2.4. CONCLUSION

So to then recap the matters of discussion within this chapter, we find that democracy is important in the formation of a government that will one be able to be held to account over their actions. And

⁹¹ Article 1, Constitution of Kenya, 2010.

⁹² Mbithi. A, Ndambuki. D, Juma. F, *Determinants of Public Participation in Kenya County Governments*, 54, Journal of Asian and African Studies, 2019, page 53.

⁹³ Shakaia N, The importance of Citizen Participation, LADDER, 25th October, 2016, < <http://www.ladder-project.eu/?p=16008> > 28th February 2021.

⁹⁴ Section 29, Intergovernmental Relation Act, 2012.

⁹⁵ Shakaia N, The importance of Citizen Participation, LADDER, 25th October, 2016, < <http://www.ladder-project.eu/?p=16008> > 28TH February 2021.

it is therefore through democracy that citizens get to enjoy public participation. This means that citizens are allowed to enjoy access to information that would make decision making an easier process. To therefore try and bring the chapter to a more suitable close, we see that indeed democracy does come first in order to ensure the proper functioning of the subsequent rights not attached to it. Further we see that for participation of any nature to take place, there has to be an adherence to the values placed in Section 87 of the County Government Act of 2012. Moreover, even though there was a call to ensure public participation, there is not actual practice of it, or documented indication that there was a forum left open for Members of the Nairobi county to take part in the formation of the Nairobi Metropolitan Service. In the next chapter we will try and look at the opinion of the court in relation to public participation in Kenya.

CHAPTER 3

3.0.INTRODUCTION

From the previous chapter we learnt that, democracy is an integral to the existence of public participation. We also see that within the Kenya context there has been attempt to legitimize participation within the law. In addition, a key feature of democracy is participation. We see that there are for effective participation there has to be access to information, as well as some form of consultation to gain the opinions and interests of the citizens We further see that there are little to no procedures outlined for there to be effective public participation outside of the politically mandated means like, the right to vote⁹⁶ that is freely afforded to all citizens during general elections or by-elections. There is a clear failure to uphold public participation in the formation of the Nairobi Metropolitan Service in any capacity. In this chapter, we shall look at all legal frameworks that support the principle of public participation, in the Kenyan context. Next we shall look at the court's interpretation on public participation.

3.1.LEGAL FRAMEWORKS SUPPORTING PUBLIC PARTICIPATION.

When looking at the legal framework, the port of call is the Constitution of Kenya. This begins with the sovereignty of the people. This enable the protection of all other right and freedoms within the law.⁹⁷ Next we have national values. These ensure the promotion of good governance with the more relevant and important values being democracy and public participation.⁹⁸ Within the context of land there is a need to advocate for public participation. Especially in the situations that require for the conservation and sustainability of the environment.⁹⁹ As has been stated above numerously, there is a need for the public participation within the devolved entities, as this provides a much more personalized experience for members of a particular area.¹⁰⁰ This as read with the provisions of the County Government Act, gives suggestions as to the manner in which participation forums should be facilitated.¹⁰¹

3.2.CASE ANALYSIS AND JUDICIAL INTERPRETATION.

The current law does not seem to offer much in terms substantive law in regards to public participation. Thus there is a turn to the Judiciary for interpretation. In this section of the chapter,

⁹⁶ Article 38, Constitution of Kenya, 2010.

⁹⁷ Article 1, Constitution of Kenya, 2010.

⁹⁸ Article 10(2)(a), Constitution of Kenya 2010.

⁹⁹ Article 69(1)(d), Constitution of Kenya, 2010.

¹⁰⁰ Article 174(c), Constitution of Kenya 2010.

¹⁰¹ Section 91, County Government Act, 2012.

we shall look at what the court had to say concerning certain cases on how public participation affairs were handled.

First, we have the:

*Republic v Independent Electoral and Boundaries Commission(IEBC) Ex Parte National Super Alliance and 6 Others.*¹⁰²

In summary, we see the court challenge the IEBC's decision to grant a tender to Al Ghurair to print ballot papers.

The main issue that arose was whether there was any public participation?

The applicant avers that the IEBC failed to, make it known that Al Ghurair, in regards to the tender had been engage. Thus was in breach of upholding the national values of governance mandated by the Constitution of Kenya, especially public participation.

The applicant counters this claim stating that based on the fact that the nature of the tender and its procurement was confidential, to support this claim, he relied of Section 67 of the Public Procurement and Disposal Act which advocates for non-disclosure and the knowledge of this procurement being made public would be in breach of this section. He further claims that that Section 103 of the same act does not mandate public Participation as part of the procurement process.

The court in its wisdom, held that the decision in which the tender was granted to Al Ghurair was in violation of the public participation, and thus rejected it. It further stated that Public participation was important and critical to this tendering process and not a suggestion that could be taken when it suited the needs of the government officials.

Next we see:

Robert N Gakuru and Others v Governor of Kiambu County

This case looked at the approach where the it took into account the manner in which public participation should be carried out. The Claimant relied on the County Government Act under Section 91,¹⁰³ to bring to light the fact that there was not public participation carried out at all. The courts stated that public participation is not a formality, and should not the equated to consultation.¹⁰⁴

¹⁰² Judicial Review, 378 of 2017, eKLR.

¹⁰³ Section 91, County Government Act, 2012.

¹⁰⁴ Judicial Review (Consolidated Petition), 532 of 2013, eKLR.

The case *in the Matter of Mui Coal Basin Local Community*, the following understanding was brought to light. The first being that when determining whether public participation has been reached, the program drawn by the Public agency would have to **consider the quality and quantity of the persons being governed to participate**. Next one should consider **there is no single model of public participation being forced on to the agency or the participants**. Third the agency must **grant access and disseminate the information to the public**. Lastly the **information must be inclusive and reflect diversity**.¹⁰⁵

It should be important to note that the participation results do not have to be accepted by the public agency, if they do not maintain the spirit of the constitution. Public Participation is meant to enrich the perspectives of those in office¹⁰⁶ as well as those who would be most affected by the decision in question.

In relation to the formation and appointment of the NMS and its members, we have the case of *Okiya Omtata Okoti v Nairobi Metropolitan Service and three Others; Mohamed Abdala Badi and 9 Others (Interested Parties)*¹⁰⁷

Summary of Facts

The NMS was formed pursuant to the orders given by the President. This enabled the effective transfer of some of the functions of the Governor of the Nairobi County back to the National Government through the NMS. The petitioner takes the Order given was consequently illegal as this lay outside the powers of the president.¹⁰⁸ He further holds that the appointment of its members, who in his opinion were hand-picked, is also invalid as it was unconstitutional. Therefore, the transfer of the employees from the Nairobi County Government to the NMS that was supported by the Public Service Commission was unlawful and unconstitutional thus any succeeding engagements with these employees would be null and void.¹⁰⁹

Whether the Formation of the NMS is indeed unlawful.

This Deed of Transfer was made on the 25th day of February 2020 and the County Government functions to be transferred to the National Government include; Health, Transport, County

¹⁰⁵ Constitutional Petition 305 of 2015, eKLR.

¹⁰⁶ Muhia L, and Nganyi S, *A Critique of Public Participation-A Case Study of Al Ghurair*, 10th February 2020 < <https://wamaeallen.com/a-critique-of-the-public-participation-bill-a-case-study-of-the-al-gurhair-case/> > 16th March 2021.

¹⁰⁷ Petition 52 of 2020, eKLR.

¹⁰⁸ Article 132(4) (a), Constitution of Kenya, 2010 as read with Section 27 and 30, Public Service Commission Act, 2007.

¹⁰⁹ Petition 52 of 2020, eKLR.

Planning and Development and Public Works, Utilities and Ancillary Services.¹¹⁰ This Deed of Transfer was signed in the presence of the Attorney General, the Cabinet Secretary for Devolution Eugene Wamalwa and Mike Mbuvi Sonko the Nairobi County Governor and their witnesses.¹¹¹ The Petitioner is aggrieved by the fact that these County Government functions were transferred without the involvement of the Nairobi County Assembly, the Cabinet, the County Executive Committee and the Senate. He contends that the transfer was done without any executive paper and without any resolution by Parliament. The Petitioner also contends that the 10th Interested Party having been suspended as Governor of Nairobi City County, he had no capacity to transact any official county business as was held by the Court of Appeal in *Ferdinand Ndung'u Waititu Babayao vs Republic*.¹¹²

The County Government in this case consists not only of a Governor but also the County Assembly. In relation to the Deed of Transfer of functions of Nairobi County Government was done between the County Governor without involvement of the County Assembly, the Constitution was breached and the transfer was done without involvement of the entire County Government as envisaged by the Constitution.

In addition, the deed of transfer was made without the relevant entities, thus the 1st Respondent was thereafter borne out of this Deed of Transfer. The Petitioner avers that there was no legal document creating the Nairobi Metropolitan Services. The 1st Respondent in their replying affidavit exhibited a gazette notice dated 25th February 2020 in which they claim was the instrument that bore the NMS. Gazette Notice dated 25th February 2020 as indicated above is the transfer of functions Deed.

There is no indication in this deed of transfer that the NMS had been created or proposed to be created. The 1st Respondent submitted that the Nairobi Metropolitan Services was created by the President pursuant to his power under the Constitution of Kenya 2010.¹¹³ There is no evidence that the NMS was established by the President if at all as no instrument of its establishment has been presented before this Court. Thus the court found that the legal status of the Nairobi Metropolitan

¹¹⁰ Gazette Notice No. 1609, The Kenya Gazette, Volume CXXII-No. 38, 25th February 2020.

¹¹¹ Petition 52 of 2020, eKLR.

¹¹² Civil Appeal 416 of 2019, eKLR.

¹¹³ Article 132(4) (a), Outlines the powers of the President in relation to the formation of Public Bodies, requiring that there should be consultation with the Public Service Commission.

Service, as at the time of filing this Petition was not yet established as per the law as there was no instrument of its establishment presented before it.¹¹⁴

Whether the Appointment of the members of the NMS, was unlawful.

The members of the NMS, were appointed through a letter from the Head of Public Service dated 23rd March 2020. This letter outlined the terms of the appointment to serve in the NMS, that had been established by the president. The Petitioner through his allegation proves before this court that the appointments made were in contravention of fair competition and merit on the basis of appointments and promotions.¹¹⁵ He also submits that Article 10¹¹⁶ and Article 36¹¹⁷ of the Constitution of Kenya 2010 was flouted.

The court recognised the 4th Respondent submissions that highlighted the appointment of the members of the NMS violated the law and the Constitution. But had however noted that the Members to the NMS were not appointed but were deployed or seconded. This means they were serving under the County Public Service Board or under the Public Service Commission. It was therefore either of the 2 bodies that should have deployed them stating the terms and conditions of their secondment or deployment status. This process was overlooked and was done in contravention of the law and the Constitution.¹¹⁸

The Court held that, as had been stated above in the first issue, that the NMS had been established contrary to the provisions of the law. The court further expounded on this by stating that despite the violation, it had to take in to account the spirit of the law while striking a balance in relation to protection of the law. Here they relied on South African Law to state that the court could Suspend a declaration of invalidity for a period of time or on special conditions to give authorities an opportunity to correct the defect.¹¹⁹ A similar courtesy has been extended by the Canadian Court in *Schachter v Canada*, where a declaration on invalidity was suspended to allow parliament to

¹¹⁴ Petition 52 of 2020, eKLR.

¹¹⁵ Article 232(1) (g), Constitution of Kenya, 2010.

¹¹⁶ Outlines the national values and principles of governance that binds not only state organs, but also state officers and public officers.

¹¹⁷ This article guarantees every citizen the freedom of associate which includes the right to form join and participate in the activities of an association of any kind.

¹¹⁸ Petition 52 of 2020, eKLR.

¹¹⁹ Section 172(1)(b)(ii) Constitution of South Africa, 1996.

make cure a defect within the law.¹²⁰ However, this must be exercised with caution to ensure that the supremacy of the Constitution is not overlooked within the process.¹²¹

With this in mind the Court took in to account that the reason behind the formation of the NMS was to provide efficiency in the functioning of the Nairobi County Government, which at the time was facing internal constraints in its operation. Thus the declaration of illegality in this court opinion was suspended due to the fact that the presence of the NMS, ensures that all county functions and services are adequately met. This Suspension will carry on for a ninety-day period in which to grant the establishment of the NMS should be founded within law.¹²²

CONCLUSION

This chapter aimed to highlight that the court's opinion on public participation. This has meant that the court has had to draw its interpretation for the facts surrounding the case before it. Where there have been shortcomings, there has been an attempt by the court to give a guideline as to how public participation should be carried out. On the other hand, it is clear that the court has not overstepped its boundaries by trying to come up with new law but, has tried to provide workable solutions until the legislature drafts a proper public participation act. The court has even granted the other faculties of government the opportunity to fill in the gaps present within the law, so as to give parties involved a chance to preserve the spirit of the law and that of the Kenyan society. This has been more so in the establishment of the NMS, which in law had been an anomaly. In the next chapter, we hope to see what other states have carried out public participation within the confines of the legislative frameworks. And what Kenya Can learn from it.

¹²⁰ Schachter v Canada SCR 679, 1992.

¹²¹ Petition 52 of 2020, eKLR.

¹²² Petition 52 of 2020, eKLR.

CHAPTER 4

4.0.INTRODUCTION

In the last we saw that the court had indeed highlighted how there is a certain gap within the law that does not expressly state how to go about public participation. This has meant that the court had to draw its interpretation for the facts surrounding the case before it. On the other hand, it is clear that the court has not overstepped its boundaries by trying to come up with new law but, has tried to provide workable solutions until the legislature drafts a proper public participation act. In this chapter, we hope to see what other states have carried out public participation within the confines of the legislative frameworks. And what Kenya Can learn from it.

4.1. THE CONCEPT OF PUBLIC PARTICIPATION IN SOUTH AFRICA.

A key precept in the rendering of services within the government of South Africa is to ensure that the people are at the center of it. This meaning that public services offered should be the legitimate expectation of every citizen from its government.¹²³ The Batho Pele White paper puts forth the idea that, service delivery should be carried out in a manner that even the legislation reflect his main idea “people first”. Thus involves creating frameworks that manifest ensuring that the citizens always come first and should be treated more on a customer level.¹²⁴

This would then force not only legislators but also governments providing services to ensure that the needs of the citizens (“customers”) are heard and decisions made will be in keeping with the interests of the people. This also allows for the provision of services that are of the highest quality and thus being able to address situations that may arise in which below standard services rendered would be corrected or given a new.¹²⁵ This would require a consultation done by the government so as to garner participation from the people.¹²⁶

Public participation within the South African context prior to 1994, saw the exclusion of Coloured and Indian Communities form any form of decision making within state structure. There were even legislations¹²⁷ that made it illegal for any kind of forum that offered public participation rights to

¹²³ Pele B, *People First: White Paper on Transforming Public Service*, Department of Public Service Administration, 1997, 2

¹²⁴ Pele B, *People First: White Paper on Transforming Public Service*, Department of Public Service Administration, 1997, 7.

¹²⁵ Pele B, *People First: White Paper on Transforming Public Service*, 1997, 7.

¹²⁶ Pele B, *People First: White Paper on Transforming Public Service*, 1997, 7.

¹²⁷ Group Areas Act of 1950 as well as the Population Registration Act of 1950.

these communities, by those in authority.¹²⁸ With the fall of apartheid, and the election of a new government, we see that this transition to democracy, would seek to address some of the mishaps that had been occasioned by colonial powers as well as the legislator exclusions that had been put in place. Therefore, in the context of rebuilding their society, it became essential that in order to bring communities back together, one would need to ensure that local governments would set in place to provide the closest access to decision making.¹²⁹

4.2.RATIONALE FOR THIS

First, public participation extends beyond legislative compliance. Meaning that public participation is not only an integral right to the community at large, but can also help foster empowerment within that community.¹³⁰ This would enable them have the ability to control their livelihood. This active approach toward ensuring that their needs are met is a sign of an active and vigilant society, which is essential for mature democracy.¹³¹

As has just been stated, public participation plays a vital role in the promotion and maintenance of democracy. Despite traditional definitions of democracy where we look at a people's right to elect a leader of their choice. Democracy give citizens the power to make choices about the aims and goals of the government's actions.¹³²

Some scholars hold that public participation is imperative to a government especially in relation to decision making. This would mean that in the decision making and implementation process, really does need public participation.¹³³ This then translates to the fact that the public does have an influence over matters that would affect their lives. From a government point of view, we see that public participation is a chance to ensure that all parties views are being heard and considered. Thus creating a sort of reassurance to the public that their voice does indeed matter.¹³⁴

¹²⁸ Mbusiya S, Public Participation as Participatory Conflict Resolution: Short Comings and Best Practices at The Local Level in South Africa.

¹²⁹ Mbusiya S, Public Participation as Participatory Conflict Resolution: Short Comings and Best Practices at The Local Level in South Africa.

¹³⁰ Maphazi N, Raga K, Taylor J D and Mayekiso T, *Public Participation: A South African Local Government Perspective*, Nelson Mandela Metropolitan University South Africa, Africa Journal of Public Affairs 6, 2013, 2, 60.

¹³¹ Maphazi N, Raga K, Taylor J D and Mayekiso T, *Public Participation: A South African Local Government Perspective*, 6, 2013, 2, 60.

¹³² Maphazi N, Raga K, Taylor J D and Mayekiso T, *Public Participation: A South African Local Government Perspective*, 6, 2013, 2, 60.

¹³³ Maphazi N, Raga K, Taylor J D and Mayekiso T, *Public Participation: A South African Local Government Perspective*, 6, 2013, 2, 60.

¹³⁴ Maphazi N, Raga K, Taylor J D and Mayekiso T, *Public Participation: A South African Local Government Perspective*, 6, 2013, 2, 60.

Lastly, within the system of the South African local government, decentralization through municipalities is to be deeply rooted within the residents of that area. This will thus encourage direct participation in the development plans at the formative stage. This would be the public coming in after particular plans have already been committed to.¹³⁵

4.3.LEGISLATIVE FRAMEWORKS ON PUBLIC PARTICIPATION IN SOUTH AFRICA.

The first instance of legislation that does provide for a stepping stone for public participation is the South African Constitution.¹³⁶ Section 195, of the South African Constitution provides for the basic governing values that should be upheld by the public administration. One salient feature relevant to this paper is the fifth sub-clause. It requires that the people's needs to be responded to and that the public ought to be encouraged to participate in policy-making.¹³⁷ Moreover, this places some pressure on the government to ensure that the citizens are involved at the formulation point of planning. Then we have the onus placed on the National Assembly to facilitate public involvement in the legislative and other processes, of the assembly and its committees.¹³⁸ Similar responsibility is placed on municipal and provincial governments.¹³⁹

There is also the formation of the *Local Government: Municipal Systems Act*.¹⁴⁰ This legislative piece provides for the municipalities to develop a culture of participation by the community and come up with mechanisms and processes.¹⁴¹ This is also enshrined in the Constitution of South Africa.¹⁴²

4.4.COMMON PRACTISES OF PUBLIC PARTICIPATION WITHIN THE SOUTH AFRICAN CONTEXT

Part of the enabling environment is found in the governance system of a state. It may draw its answers from either opinion based on the concepts placed within the law. As has been noted on numerous occasions above, the increasing the reach of public participation is made possible with

¹³⁵ Maphazi N, Raga K, Taylor J D and Mayekiso T, *Public Participation: A South African Local Government Perspective*, 6, 2013, 2, 60.

¹³⁶ The Department of Public Service and Administration, *Guide on Public Participation in The Public Service*, <<http://www.dpsa.gov.za/dpsa2g/documents/cdw/2014/citizenengagement.pdf>> 17th March 2021.

¹³⁷ Section 195(e), Constitution of South Africa, 1996.

¹³⁸ Section 56, Constitution of South Africa, 1996.

¹³⁹ Section 118, Constitution of South Africa, 1996.

¹⁴⁰ Part 1, *Local Government: Municipal Systems Act*, 2000.

¹⁴¹ Tshoose C, *the Role of Public Participation Viewed in the Context of Adjudicating Socio-Economic Rights*, Southern Africa Public Law, 2018, 16.

¹⁴² Section 152(1)(e), Constitution of South Africa, 1996.

the presence of decentralization. Some strategies discussed below will bring to light some of the practices that have been carried out in the name of public participation.

- ***Public Hearings.***

This is one of the most common ways in which the public can participate. It involves the extension of an invitation to the citizens to express their opinions or interests in relation to a particular matter. This is most frequently done when there is a bill or legislative policy being reviewed. This could be through debates between those parties interested in the matter that would be affected by the proposition given by the government and a government representative. This could also extend to interested parties.¹⁴³

- ***Petitioning***

Though the nature of this is a bit more personal, this involves the request by an individual to the legislative body to take notice of a particular matter within a particular policy that requires amendment. Measures taken here may include campaigns to rally support. It can also be a group of citizens collecting signatures and delivering them to the site of a political power. One positive thing about petitioning is that it creates a demand is channeled where it can be addressed, regardless on whether the change is implemented right away or not. The South African system provides for the petition committees that accept submissions from the public.¹⁴⁴

- ***Traditional authorities***

Another important way in which communities, particularly traditional communities, can participate in local government is through traditional authorities. Traditional leaders play a role in community participation and are an important component of most rural constituencies. The functions of traditional councils include the facilitation and involvement of traditional communities in the development of a municipality's Integrated Development Plan.¹⁴⁵ This system of leadership is still faced with challenges that deter community participation. It remains a daunting task to forge the coexistence of two diverse and conflicting systems of governance. The party politicization of tribal structures invariably compromises the credibility and autonomy of the

¹⁴³ Corrigan T, *Democratic Devolution; Structuring Citizen Participation in Sub-National Governance*, South African Institute of International Affairs, Occasional Paper 263, 2017, 13.

¹⁴⁴ Corrigan T, *Democratic Devolution; Structuring Citizen Participation in Sub-National Governance*, South African Institute of International Affairs, Occasional Paper 263, 2017, 14-15.

¹⁴⁵ Maphazi N, Raga K, Taylor J D and Mayekiso T, *Public Participation: A South African Local Government Perspective*, 6, 2013, 2, 64

institution and its leadership. ¹⁴⁶Traditional leaders who are partisans bar efforts to spearhead community participation. However, the traditional leadership is flawed by a lack of a clear-cut roles and functions. The Traditional Leadership and Governance Framework Act, 2003, was enacted to redeem these problems, and has been criticized by the Amakhosi for being westernized in its provision and consultation. This has exacerbated the mistrust that exists between traditional and democratic authorities. There is also an ongoing dispute over traditional authority boundaries and the merger of tribes.¹⁴⁷

4.5.CONCLUSION

Within this Chapter it clear that the South African system has somewhat figured out how they will carry out their participation. It does not call for one's state to have experienced segregation the way the people of South Africa did in order to achieve this. Therefore, it is possible for the Kenyan system to start on a small scale, by first acknowledging that there is a need for participation, and that even within their small areas of residence will grant them the opportunity to be included in matters that that will impact them greatly. In the last and final chapter, there will be a reflection on how public participation has been overlooked especially in relation to the Formation and establishment of the Nairobi Metropolitan Service, as well as recommendations.

¹⁴⁶ Maphazi N, Raga K, Taylor J D and Mayekiso T, *Public Participation: A South African Local Government Perspective*, 64.

¹⁴⁷ Maphazi N, Raga K, Taylor J D and Mayekiso T, *Public Participation: A South African Local Government Perspective*, 64.

CHAPTER 5

Introduction

This Chapter provides the Conclusion of the whole dissertation. It has four objectives. First, it starts by restating the initial problem that this dissertation intended to solve. Second, it provides the four main hypotheses that it has developed in the aim of solving the problem under study. Third, the chapter brings to the reader's attention the findings that this dissertation has arrived at on these hypotheses. Fourth, recommendations on the way forward in directing future research.

Initial Problem.

This paper commenced by discussing the concept of democracy and the place of public participation it. In relation to the establishment of the Nairobi Metropolitan Service, it began demonstrating that there was no public participation carried out by the National Government as well as the State department for devolution. This showed a clear breach in the sovereignty granted to the people by the Constitution as well as a denial for an opportunity to participate in the formation of the NMS, or the appointment of its members. The author demonstrated this by highlighting that despite certain provisions within the law, there is no clear cut manner in which public participation should and is carried out within the law. In addition, there seems to be a gap within the law, due to the lack of a public participation legislative measures, that would provide a clearer vision of how public participation should be carried out. Lastly the transfer of functions though legal failed to be done in a manner that warranted public participation, rendering any services offered by the NMS to be declared invalid.

Hypotheses

The following three hypotheses were guiding the dissertation in addressing the above problem. First, that the principle of public participation was not adhered to during the formation the NMS through the transfer deed. Second is that there needs to be a new proper procedural instruction to ensure that public participation is upheld and within a democracy. Lastly, the transfer of functions to the NMS, was in violation of the spirit of the constitution, and thus needs to be disbanded, and properly founded.

Findings

- a) that the principle of public participation was not adhered to during the formation the NMS through the transfer deed.**

The Intergovernmental Relations Act under Section 29 requires for the development of regulations between the County and national governments to provide public participation frameworks for the transfer of functions between the levels of government. Following the formation and transfer functions from the Governor of the NMS, it is evident that there was a lack of public participation, due to the fact that first there was and still is no clear cut manner in which public participation should occur. We find that despite advocating for a forum to facilitate transfer of functions between levels of government, there is there is no manner in which the Constitution outlines the way forward.

Therefore, the author suggests that first there should be a clear cut guideline as to how public participation should be carried out. This would entail having either town hall meetings in various wards and constituencies within the County. This will help create an awareness over the matter, and especially in relation to the understanding for the need to constitute such a transfer.

In addition to adhering to the ability to allow for transfer of functions, there should be an outline reason that would allow for the transfer of functions and that public participation and adequate access to the information surrounding such actions is granted to the peoples. This would allow for the participation of the people in relation to the transfer of functions from one level of government to the next.

- b) there needs to be a new proper procedural instruction to ensure that public participation is upheld and within a democracy**

While within the Kenyan context democracy is seen to be quite well maintained, some of its supporting pillars like public participation are seen to be sidelined, and even taken as a mere suggestion, rather than a mandatory tool to ensure better governance. It will be good for all parties involved, the public and the government to have the legislature pass a public participation bill that will assist in ensuring that indeed participation is upheld within a democracy.

In addition, there should be an automatic rejection granted to those decisions made by public agencies that fail to take into account the need and interests of the people that would be affected by this decision. In relation to the issue at hand a forty-day, or rather a slotted amount of time would be sufficient to ensure that there is proper dissemination of quality information and that the members of the public informed are able to bring forth their perspectives that would be more impactful in the decision making process.

Furthermore, this would mean that the people would not only understand the impact of the transfer of functions, but also give the legislative bodies time to better establish the NMS to take over the functions of the county government within the proper context of the law, in addition to upholding the spirit of the law.

c) the transfer of functions to the NMS, was in violation of the spirit of the constitution, and thus needs to be disbanded, and properly founded.

Based on the information presented in this dissertation, it seems clear that the will of the people, is an important factor especially during the election of leaders. Despite Mike Sonko being the choice of the people, his replacement with a more efficient work force in the NMS, is a violation of the sovereignty of the people of Nairobi County. The fact that Public participation, which is core to democracy, was overlooked, it is thus safe to agree that indeed the spirit of the constitution of Kenya was violated and thus is in accord with the disbanding of this institution. This violation should have been a point of last resort. Meaning that the first order of business should have been done was the appointment of a Deputy Governor with approval of the County Assembly. This would have allowed for a smooth transition in the event the Government was impeached. This would be in following with the guidelines of *Wambora supreme court advisory opinion*. Have the sitting governor appoint his/her deputy with the approval of the County Assembly. Then in the event the Governor is incapable of continuing with his functions, there is within the law solution that is not an erosion of the spirit of the law.

If this was not possible there should be a by-election. This would help preserve the democracy of the people of Nairobi County Government. Better still this would help ensure that there was public participation, instead of having the transfer of functions to the unconstitutional entities like the NMS.

There should be the need to have the NMS established legitimately. This would entail having the citizens of the Nairobi County Government to understand what functions would be transferred from one level of government to the next. Also this would allow the citizens to participate and ensure that all the services are met within a legitimate form of governance rather than through the creation of a loophole that does not necessarily permit the formation of illegal institutions.

This may be made possible through petitions put in place to ensure that the people of Nairobi County were made aware of the options made available to them in the event there is need to have a transfer of functions. This would in turn ensure that the needs and interests of the people are taken in to consideration, rather than sidelined, as is seen in the agreement that led to the formation of the Nairobi Metropolitan Service. With this in mind, there would be an adherence to the principles of public participation outlined in the County Government Act under the provision of Section 87.

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