

BEYOND ELECTIONS RITUALS: RETHINKING PUBLIC PARTICIPATION IN KENYA'S
PUBLIC FINANCE MANAGEMENT

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DECLARATION

I, WANJIKU FRANCIS NJOROGI do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed:

Date:

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed:.....

Mr. Harrison Mbori

ABSTRACT

Public participation is one of the edicts of the Constitution of Kenya, 2010 which aims to promote transparency and accountability of public resources to the people of Kenya. One of the principles of public finance in Kenya is to promote transparency and accountability in the process of public finance. This paper seeks to find out ways in which different levels of government have breathed new life into this principle of good governance.

Before the enactment of the Constitution of Kenya, 2010 Kenya did not have any kind of legislative statute that promoted transparency in the public finance system; it was done at the whim of the executive. Budget statements would be read at the request of the President; finance bills would be legislated in Parliament at any period during a financial year, parliament would rubber stamp budget statements without scrutiny and most importantly the people of Kenya were not involved in the process-apart from watching the Minister for Treasury annually posing with the popular briefcase engraved with the coat of arms and thereafter reading the budget statement live on state television.

This events allowed the researcher to explore what really is public participation. Public participation is the process by which government consults with interested or affected individuals, organizations, and other necessary stakeholders before making a decision. Other terms sometimes used are “public involvement,” “community involvement,” or “stakeholder involvement. The study has gone further to identify important principles that should be adhered to in order to build a successful model of public participation.

In conclusion, the study proposes a two way communication system which allows deliberation rather than mere participation. In order to strengthen the democratic principles upon which the country is founded upon, the executive and legislature must go beyond legislative intent and allow

the people's contribution to influence public debate and policies. It cannot be that public finance matters are left to the few technocrats at the Ministry of Treasury and Parliament.

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It is my privilege to have Harrison Otieno as my supervisor. He has directed me to numerous writings on public participation. At one time, I almost could not keep pace with the writings I was supposed to read and comprehend. Many thanks for the encouragement along the journey. Any errors in comprehending the material is entirely mine.

My family has been a pillar of support which has been unwavering.

DEDICATION

This Research paper is dedicated to the numerous unseen, unnoticed and unsung tax payers in Kenya who work tirelessly to contribute to nation building.

PRELIMINARIES

A. List of Legal Instruments

Constitution of Kenya, 2010

Kenya Revenue Act No. 2 of 1995.

Public Finance Management Act No. of 2012

International covenant for Civil and Political rights 999 UNTS 171 (1967).

Universal Declaration of Human Rights UN General Assembly, 10 December (1948)

The African Charter on Human and Peoples' Rights, (1982).

African Charter on Democracy, Elections and Governance, (2007)

B. List of Cases

Kenya

Communication Commission of Kenya -v- Royal Media Services & 5 Others - Petition No.14 of 2014; [2014] eKLR.

In the Matter of Peter Makau Musyoka and Award of Mining Concessionary Rights to the Mui Coal Basin Deposits - Constitutional Petition Nos 305 of 2012; [2015] eKLR,

Nairobi Metropolitan Psv Saccos Union Limited & 25 others – vs- County of Nairobi Government & 3 others [2013] eKLR

Okiya Omtatah Okoiti & 3 others v Attorney General & 5 others [2014] eKLR

Republic –Vs- County Government of Kiambu Ex parte Robert Gakuru & another [2016] eKLR

Speaker of the Senate & another v Attorney-General & 4 others [2013] eKLR

Speaker, Nakuru County Assembly & 46 others v Commission on Revenue Allocation & 3 others

Trusted Society of Human Rights and others v Attorney-General and others (2 012) 64 eKLR [2015] eKLR.

South Africa

Doctors for Life International vs. Speaker of the National Assembly and Others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC)

King and Others v The Attorneys Fidelity Fund Board of Control (137/2008) [2009] ZASCA

CHAPTER I: INTRODUCTION

“An important difference between this exercise and the negotiations at the World Trade Centre is that all the proceedings of the Constitutional Assembly are open to the public. Submissions have been invited - and two million received! Information on the Constitutional Assembly is available on the Internet. And you have solicited the views of ordinary citizens in hundreds of meetings around the country. Whilst proceedings may at times appear cumbersome, they have given real meaning to the phrase 'participatory democracy.’”¹

1.0. Background of the Study

This paper examines the legal framework of public participation in public governance in Kenya as enshrined in the Constitution of Kenya 2010, as a tool for promoting equitable sharing of revenue, the rule of law and transparency and accountability in the country. The author traces the links between meaningful public participation and sound public finance management. The study analyses the importance of the elements of meaningful public participation in promoting equitable sharing of accruing benefits and the sustainable development agenda as provided for in the Constitution of Kenya and the Public Finance Management Act.

Public Participation which is also referred to as citizen participation is seen as a necessity in public decision making.² However, it has been observed that many agencies or individuals choose to exclude or minimize public participation in planning efforts claiming citizen participation is too expensive and time consuming, while in reality, many citizen participation programs are initiated in response to public reaction to a proposed project or action.³

¹ Chief Emeka Anyaoku, Commonwealth Secretary-General, address to International Round Table on South Africa's Democratic Constitutional Development, 17 July 1995.

² Rowe G, Lynn J, "A typology of public engagement mechanisms." *Science, Technology, & Human Values* 30.2 (2005), 251.

³ Rowe G, Lynn J, "A typology of public engagement mechanisms, 251.

The Republic of Kenya is sovereign and a multiparty democratic state founded on the national values and principles of governance.⁴ The constitution further provides that the governments at the national and county levels are distinct and interdependent and shall conduct their mutual relations on the basis of consultation and cooperation.⁵ Simeon laments that a devolved government such as the one in Kenya is founded on principles of distinctiveness, interdependence and mutual consultations and cooperation.⁶ Devolved governance in the republic having being defined as a transfer of political, administrative and fiscal management from a central government to lower level implies that the inter-relationship between the governments is an important aspect of this paper.

Public participation is among the national values and principles provided under the Constitution of Kenya. The National Economic and Social Council, while advising the Committee of Experts who drafted the 2010 Constitution noted that these values are qualities in accordance with human dignity which fosters virtue and fulfills the sense of need and creativity of the human being, by making human behavior attractive, desirable and worthy of admiration.⁷ The council also opined that these values are common to our nation guiding people by fostering a virtuous growth.

1.1. Statement of the problem

Although public participation is a constitutional requirement, state organs have not put in the place the required framework to guide the process. Most public participation models in Kenya are done haphazardly and without any legal guidelines. The Constitution puts emphasis that state organs

⁴ Article 10, Constitution of Kenya (2010)

⁵ Barber B, *Strong democracy: Participatory politics for a new age*. University of California Press, (2003)

⁶ Simeon R, "Policy Divergence and Social Citizenship." *The State of the Nations* (2015), 3.

⁷ National Economic and Social Council, Working Draft, Committee of Experts, (2009).

should conduct their business openly and publicly and facilitate people involvement in their business and committees.⁸

1.2. Justification of the study

The law provides that the public must be involved in public governance including public finance management.⁹ Public finance includes areas of formulating fiscal and monetary policy, budget making, revenue collection and allocation. This can provide important basis for both the general public, civil society and county government, to tailor this information to suite the public or the public to demand synthesized information to allow them to make informed choices.

1.3. Statement of objectives

The main objective of the study is to assess the efficacy of public participation in the management of public finance. This study will also focus on the following specific objectives:

- a) To understand the history and current legal framework public participation in the management of public finance.
- b) To recommend ways to enhance effectiveness of the participation of the public in the management of public finance.

1.4. Research questions

The study intends to answer the following research questions:

- a) What is the history and current legal framework governing public participation in public finance management in Kenya?
- b) What is the legal test to be applied to an effective public participation model?
- c) What are the needs and challenges facing public participation in Kenya?

⁸ Article 118, Constitution of Kenya, 2010.

⁹ Article 201, Constitution of Kenya, 2010.

- d) With regards to the Public Participation Bill in Parliament, will it solve the challenges noted in this study?

1.5. Literature review

This study is based on public finance management in a devolved system of government on one hand and public participation on the other hand. Devolution has been defined as the process of transferring political, management, and fiscal powers between central and lower levels of government.¹⁰ The recipient of these powers exercise a huge degree of autonomy while having certain structures of checks and balances. This means that autonomy lower levels are directly accountable to the people and also to the legal structures set out. Ochieng Walter notes that such transfer is not a simple linear equation but in need of greater degree of cooperation between all levels of government.¹¹ In Kenya, the process of devolution was strengthened by Constitutional recognition which was promulgated after twenty years of struggle to amend the previous Constitution.

Hugh Dalton views public finance as a border line between economics and politics.¹² According to him, public finance is concerned with public expenditure, raising revenue of state organs and how one adjusts to another. State organs refers to public offices under both national and county government. Although state organs differ in functions and structure, there are functions within the context of public finance is guided through an act of parliament or laws legislated at the county level. What is the role of the law in public finance?

¹⁰ Ochieng W, 'Devolution of Government in Kenya as a means of engendering public participation in governance' Unpublished LLM Thesis, University of Pretoria, 2012, 13

¹¹ Ochieng W, 'Devolution of Government in Kenya as a means of engendering public participation in Governance' 13.

¹² Dalton H, *Principles of public finance*, Psychology Press, London, 2003.

According to the International Association for Public Participation, public participation refers to a process where the public participate in problem solving and decision making and uses public input to make decisions.¹³ In public affairs, public participation involves an open and accountable process through which people in a community share views and influence opinions. The state engages the public in thinking, planning, deciding and playing an active role in public finance in Kenya. It can be said that public participation allows for a participatory people centered government in which the people play a critical role in decision making process.

It is important people to understand the public participation process in public finance management in order to appreciate the role it plays in building consensus among the different parties. First, the people have to be informed of what policies might be changed or existing policies.¹⁴ Secondly public participation anticipates that public officers will make deliberate effort to collect the public's view on the issue under consideration.¹⁵ The role of the participation, it allows the decision maker to take into account the views of the public in the final decision. Therefore public participation does not usurp the role of the decision maker, it just enriches it. It also helps the decision maker to build a relationship of trust between the state and the people.¹⁶

According to the Report of the Constitutional Review Process, the issue of public finance was not widely discussed at the constituency level.¹⁷ However, people expressed the need to exempt

¹³ International Association for Public Participation, Foundations in Public Participation, Texas, 2nd February 2017.

¹⁴ Ochieng W, 'Devolution of Government in Kenya as a means of engendering public participation in Governance' 13

¹⁵ Ochieng W, 'Devolution of Government in Kenya as a means of engendering public participation in Governance' 13

¹⁶ Ochieng W, 'Devolution of Government in Kenya as a means of engendering public participation in Governance' 13

¹⁷ Constitution of Kenya Review Commission, '*The Final Report of the Constitution of Kenya Review Commission*', 2005, 291

agricultural produce from taxation and also need to introduce property taxes on private land.¹⁸ There was also need to reduce the tax burden on Kenyans at the time. Therefore it can be inferred that although many Kenyans do not understand the public finance system, majority are concerned about taxation laws and policies in the country.¹⁹

The Constitution of Kenya Review Commission noted that on the importance of financial control and accountability hardly needs emphasizing.²⁰

“In most countries, the government is the largest employer. Much money moves in Government activity. It has the power to tax; use and abuse of financial resources causes more complaints than perhaps any other aspect of Government. Normally, the complaints are about allocation on the basis of political loyalties, not need, the siphoning of resources (which ultimately means money) from places which generate them to those more politically favored, the plundering of the State by means of corruption or – more bluntly – theft. Money is easily linked to evil, especially when it becomes first priority. Without it, Government activities cannot run smoothly. But it needs extraordinary vigilance as Government resources are prone to great abuse. The financial resources available to the Government are generated from three main sources; namely, taxation and other levies, internal loans and external loans and grants.”

The promulgation of the Constitution of Kenya 2010, marked the birth of new constitutional order after years of struggle against bad governance and the travesties against the rule of law.²¹ Therefore

¹⁸ Constitution of Kenya Review Commission, ‘*The Final Report of the Constitution of Kenya Review Commission*’, 294.

¹⁹ Constitution of Kenya Review Commission, ‘*The Final Report of the Constitution of Kenya Review Commission*’, 2005, 241.

²⁰ Constitution of Kenya Review Commission, ‘*The Final Report of the Constitution of Kenya Review Commission*’, 2005, 285.

²¹ Kangu, John Mutakha. *Constitutional law of Kenya on devolution*. Strathmore University Press, (2015)

this has resulted to a stronger constitutional dispensation coupled with constitutionalism and rule of law. It is important to note that although the lower levels of governance are autonomous, they do not enjoy sovereignty like in the federal system.²² Professor Ghai in his speech on devolution, lamented that there is no standard formula for devolution however it has to reflect a country's circumstances, experience and aspirations.²³

One of the main tenets of devolution is the promotion of democratic and accountable exercise of power and to give powers of self-governance to the people.²⁴ According to the Constitution of Kenya Review Commission, the people who attended the hearings of amendment of the Independence Constitution complained that they have never seen their Members of Parliament since they voted for them. This means that the local population is left out of public policy discussions in the country including public finance policies.

1.6. Hypothesis

The major hypotheses in this study are:

- a) People participation in decision making in public finance matters is essential for sustainable democracy.
- b) The legal framework for public participation in the management of public finance management is inadequate.
- c) Participation of the public in the function and activities of government is not only a human right but it is a justiciable action.

²² Chome, Ngala. "The Grassroots are Very Complicated: Marginalization, Delegitimized Leadership and the Emergence of Alternative Authority in the Kenyan Coast 2013 Elections." *Afrique Contemporaine*, no. 247 (2014): 87–105

²³ Branch, Daniel, and Nicholas Cheeseman. "The Politics of Control in Kenya: Understanding the Bureaucratic–Executive State, 1952–78." *Review of African Political Economy* 33, no. 107 (2006)

²⁴ Cottrell, Jill, and Yash Ghai. "Constitution making and democratization in Kenya (2000–2005)." *Democratization* 14, no. 1 (2007): 1-25.

1.7. Assumption

In order for this study to be successful, there are some assumptions that have to be made;

- a) Every person wishes that public money will be utilized with prudence and transparent.
- b) Kenya and South Africa are signatories to International treaties that promote participation of the public in governance.

1.8. Study methodology

The study will rely on secondary sources which include Books, peer reviewed articles, relevant online sources and newspapers articles. The study will also rely on library research for the online resources. Due to time constraints, the author was unable to make use of primary sources.

1.9. Chapter breakdown

Chapter 1: Introduction

Chapter 2: Theoretical and Conceptual Framework

Chapter 3: Evidence and Findings

Chapter 4: Case Study

Chapter 5: Discussions

Chapter 6: Conclusion and Recommendations.

CHAPTER II: THEORETICAL FRAMEWORK

2.1. Social contract theory

The main theory that underpins this study is the social contract theory by Jean Jacques Rousseau.²⁵

Rousseau states that the social contract can succeed only by submitting our individual particular wills to the collective wills through agreement with other free and equal persons.²⁶ Rousseau's social contract seeks to address how people can live together without succumbing to the force and coercion of others. Rousseau also believed that all men are made by nature to be equals and therefore the only justified authority is the authority generated through consensus.

The author argues that Kenyans agreed to a social pact where individual interests are merged into common interest to form a republic.²⁷ Madison comments that the role of people in a republic as follows; ²⁸

“to be, or at least may bestow that name on, a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior. It is essential to such a government that it be derived from the great body of the society, not from an inconsiderable proportion, or a favored class of it; otherwise a handful of tyrannical nobles, exercising their oppressions by a delegation of their powers, might aspire to the rank of republicans, and claim for their government the honorable title of republic. It is sufficient for such a government that the persons administering it be appointed, either directly or indirectly, by the people; and that they hold their appointments

²⁵ Rousseau J, "Discourse on the Origin of Inequality among Men," World Heritage, London (2010), 24.

²⁶ Rousseau J, "Discourse on the Origin of Inequality among Men," 24.

²⁷ African Rights (Organization), "Kenya shadow justice, African Rights, (1996)

²⁸ Madison J, Federalist Paper 39, McGraw Hill Publications (1880)

by either of the tenures just specified; otherwise every government in the United States, as well as every other popular government that has been or can be well organized or well executed, would be degraded from the republican character.”

The Constitution of Kenya, 2010 is a social contract among Kenyans. Through this social contract, the people make rules to govern it including public participation. During the drafting of the draft Constitution of Kenya, Kenyans were facing numerous social and political problems. These include corruption scandals in the most state organs and public service, judiciary could not be trusted and also there was total disregard on the principles of rule of law and human rights.²⁹ Rousseau also formulated the social contract theory when the world was facing challenges such as high growth rate of population, increase of communicable disease, rapid rise of strife and therefore his basis was that the general public have to conciliate on these issues in order to come up with better solutions.³⁰ When facing such challenges public participation offers us the same opportunity, to conciliate on the way forward in the implementation of the constitution of Kenya, 2010.

Through this social contract, the people made rules to govern it including public participation. Just like the change which was marked by the promulgation of the constitution of Kenya, 2010, Rousseau formulated the social contract theory when the world was facing challenges such as high growth rate of population, increase of communicable disease, rapid rise of strife and therefore his basis was that people have to conciliate on these issues in order to come up with better solutions. Public participation offers us the same opportunity, to conciliate on the way forward in the implementation of the constitution of Kenya, 2010.

²⁹ Constitution of Kenya Review Commission, *The Final Report of the Constitution of Kenya Review Commission*, 2005, 32.

³⁰ Wraight D, *Rousseau's' The Social Contract': A reader's guide*, A&C Black, (2008), 121.

2.2. Personalist Approach

To complement Rousseau's theory on social contract, the author acknowledges the theory of personalism. Personhood carries with it an inviolable dignity that merits unconditional respect. Dignity refers to the inherent value of the person, as a "someone" and not merely "something," and this confers an absoluteness not found in other beings.³¹ Personalism has for the most part not been primarily a theoretical philosophy of the person.

At the center of this personalism stands an affirmation of the dignity of the person, the quality which constitutes the unique excellence of personhood and which gives rise to specific moral requirements.³² Attributing a unique dignity or worth to the human person also throws light on the cardinal virtue of justice. Rendering "to each his due" hinges on one's understanding of what each deserves, and this cannot be correctly ascertained without taking into account the dignity and worth that are at the same time general qualities of all persons, and inseparable from the singularity of each of them.³³

The author attempts to link the strong correlation between the human dignity and public participation in formulating and enacting public policies. It would be unjust to formulate laws and policies which greatly prejudice the life of people without giving them a chance to contribute or to be heard. Unjust laws violate the dignity of the person either through the enforcement of the law or its formulation.

Personalism affirms public participation; that each person has an opportunity to give their views on matters of public interest. The Independence Constitution did not make it mandatory for public

³¹ Wojtyła, Karol, *The Acting Person*, Dordrecht: D. Reidel Publishing Company, 1979.

³² Wojtyła, Karol, *The Acting Person*, Dordrecht: D. Reidel Publishing Company, 23.

³³ P. Bristow, *Christian Ethics and the Human Person*, Oxford 2009, 103.

officers to consult or involve the people of Kenya on matters of Public discourse.³⁴ Consequently Kenyans were not aware of majority of the decisions made by public officials, violating principle of good governance. Respect for dignity of a person involves considering the opinions of the person, group or community in the decision making of any public policy.³⁵

2.3. Justice and freedom Approach

John Rawls developed the theory of the “veil of ignorance,” which requires the public to make decisions without knowing how they will impact on them directly, as a tool for ensuring that our reasons are guided by the public good and not vested interests alone.³⁶ Amartya Sen concludes that we must make arguments that would be acceptable to an impartial observer, even one from a different society. This distinguishes the idea of rationality, which may be self-interested, from public reasoning and ethical behavior. As Sen argues, “taking serious note of critical scrutiny from the perspective of others must have a significant role in taking us beyond rationality into reasonable behavior in relation to other people.

2.4. Conclusion

In conclusion, public participation, when conducted effectively can lead to a decision which is reasonable and which mitigates adverse effects on the various interest groups. When majority of the constituents and the public are consulted, the decision will take into account various interests which are represented and the decision maker will have to balance public interest with the interest of the private individuals.

³⁴ Muigai G „The Structure and values of the Independence Constitution“ Report of the Constitution of Kenya Review Commission (2003) 308.

³⁵ De Visser J, Developmental Local Government: A Case Study of South Africa (2005).

³⁶ Jason L, Deliberating Budgets: How Public Deliberation Can Move Us Beyond the Public Participation Rhetoric, *International Budget Partnership*, (2016).

CHAPTER III: INSTITUTIONAL AND LEGAL FRAMEWORK IN KENYA

The aim of this chapter is to evaluate the current institutional and legal framework which governs public finance in Kenya. The author seeks to distinguish between the current systems of public finance to the previous systems pre-2010, herein emphasizing on critical theories expounded in chapter one of that supported participatory governance in Kenya.

3.1. Legislature

The legislature has three critical functions with regard to public finance namely revenue mobilization, allocation of resources, supervisory function. According to Njeru Kirira, the Independence Constitution provided that once Parliament passed the tax law, the only time it ever got involved again is when the audit report was tabled in Parliament.³⁷ Njeru comments that the Independence Constitution limited the policy making role of parliament: Parliament did not get involved at all in scrutinizing domestic borrowing since there was no Constitutional or legal requirement for the local debt to finance approved expenditures or any expenditures. There was also no limit on how much the minister can borrow locally. It was up to the minister to decide how much to borrow, at what terms and for what purpose.³⁸

Therefore these in-efficiencies were the main concern of people during the constitutional review process that begun in 1998. Due to financial scandals that crippled the President Daniel Moi and Mwai Kibaki regimes, there was need for Parliament to enhance scrutiny and oversight over public finance. Parliament needed to reserve the right to take corrective action, especially on mobilization and allocation of resources, to ensure that fiscal policies are not used discriminatively and that they are efficiently implemented.

³⁷ Njeru Kirira, *Functions of Legislature of Public Finance / Financial Mechanisms* (2010).

³⁸ Njeru Kirira, *Functions of Legislature of Public Finance / Financial Mechanisms* 7-9.

The Constitution of Kenya, 2010 provides that Parliament has an active role to play in enacting laws on division of revenue and imposition of taxes. Parliament has to take into account the public finance principles. These principles include openness and accountability, including public participation in financial matters; the public finance system shall promote an equitable society; the burdens and benefits of the use of resources; public borrowing shall be shared equitably between present and future generations public money shall be used in a prudent and responsible way; and financial management shall be responsible, and fiscal reporting shall be clear.³⁹

3.1.1. Public finance management act

The Public Finance Management Act is an act of Parliament whose objective is to provide for effective management of public finances by the national and county governments. In developing the Act, Parliament was keenly aware of the importance of having a good public finance management system in determining the success or failure of devolution. To ensure a good public finance management system, two objectives were taken into account: that parliament ensures the enactment of all financial legislation especially; the Budget, the Appropriation Act, the Finance Act and Division of Revenue Act. Secondly all the processes that to be undertaken pursuant to the Act were in conformity with the Constitution.

Parliament has a duty to protect the constitution and promote the democratic governance of the republic.⁴⁰ The legislative authority of National Assembly includes budget making process, determination of allocation of national revenue between levels of government and exercise of oversight of national organs.⁴¹ The legislative authority of the Senate includes determination of allocation of national funds to counties, discussing any financial matters on issues concerning

³⁹ Article 202 and 203, Constitution of Kenya, 2010

⁴⁰ Article 94(1), Constitution of Kenya, 2010

⁴¹ Article 95, Constitution of Kenya, 2010.

counties and oversight to county governments.⁴² The legislature is guided by the constitution and its internal law and practice as it discharges its mandate. In the case of *Senate advisory opinion*, the supreme court of Kenya stated that;

“It emerges that Kenya’s legislative bodies bear an obligation to discharge their mandate in accordance with the terms of the Constitution, and they cannot plead any internal rule or indeed, any statutory scheme, as a reprieve from that obligation.”⁴³

3.2. The executive

The change from the Post-Independence Constitution to the Constitution of Kenya, 2010 greatly shifted the balance of power from the executive and greater scrutiny even when it retained certain functions. Yash Pal Ghai notes that during the constitution review commission at the Bomas of Kenya in 1998 there was an overwhelming support for devolution and checks and balances from the public views during the constitution review commission.⁴⁴

In the realm of public finance, the executive is in charge of the formulation of policies- that are referred to Parliament for debate and enactment into law- and also implementing the laws. Formulation of policy includes preparing estimates and analysis of the economic situation in the country.⁴⁵ The executive is in charge of giving the country direction and policies on matters of national interest.⁴⁶

The President and the Cabinet Secretary for Finance are the key players in the public finance management legislations. The Cabinet Secretary for Treasury is consulted whenever parliament

⁴² Article 96 (1), Constitution of Kenya, 2010.

⁴³ *Speaker of the Senate & another v Attorney-General & 4 others* [2013] eKLR

⁴⁴ Cottrell, Jill, and Yash Ghai. "Constitution making and democratization in Kenya 2000–2005." (2007), 24.

⁴⁵ Section 12 (c), Public Finance Management Act.

⁴⁶ Section 13, Public Finance Management Act.

has to enact any law that is considered as a money bill.⁴⁷ Therefore the executive through the cabinet secretary is involved if parliament seeks to impose tax, distribute funds or any other money bills. The President exercises his role in legislation during assent, he/she may decline or accept to assent to a bill (including those that concern finance matters). If the President declines to assent, he may give reservations which Parliament will re-consider.⁴⁸

The public service has a duty to ensure that public finance is spent prudently. The public service ensures that government policies are implemented, this includes planning and spending of public resources to meet the obligation of government. The Kenya Revenue Authority is mandated by law to collect taxes on behalf of the state.⁴⁹ Other essential state organs in public finance management include the Auditor General who audits the expenditure of government organs and the Controller of Budget who authorizes withdrawal of funds from the consolidated fund.⁵⁰

3.3. Judiciary

Judicial authority is derived from the people and vests in, shall be exercised by, the courts and tribunals established by or under this Constitution.⁵¹ In exercising judicial authority, the courts have a duty to ensure that justice shall be done to all, irrespective of status. The High Court in *Trusted Society of Human Rights and others v Attorney-General and others* acknowledged the authority of the courts under the new Constitution, noting that the Courts have an interpretative role: the last word in determining the constitutionality of all governmental actions.⁵² Benjamin Barber while referring to the United States Constitution agrees that a Constitution cannot propel

⁴⁷ Article 110, Constitution of Kenya, 2010

⁴⁸ Article 115, Constitution of Kenya, 2010

⁴⁹ Section 3, Kenya Revenue Act No. 2 of 1995.

⁵⁰ Article 228 & 229, Constitution of Kenya, 2010

⁵¹ Article 159, Constitution of Kenya, 2010

⁵² *Trusted Society of Human Rights and others v Attorney-General and others* (2 012) 64 eKLR.

itself and as such, the judiciary is assigned a central and special role as; the primary and ultimate arbiter, when the operations of the several public bodies are in violation of the constitution.⁵³

The role of the judiciary in public finance management is a means to achieve *justice*. *When parliamentary oversight fails, only the judiciary can ensure justice.*”

The High Court of Kenya has also affirmed the role of independent commissions in public finance management, the role of Commission on Revenue Allocation and the Salaries and Remuneration Commission have an important role to play in the implementation of public finance roles in Kenya.⁵⁴ Therefore the judiciary continues to ensure that the rule of law and constitutionalism is respected.

3.4. County Governments

County governments’ role in the management of public finance is devolved and limited to the functions of the county pursuant to schedule 4 of the Constitution of Kenya. County Government have a constitutional duty to adhere to the principles of public finance and national values.⁵⁵ The County government should raise their own revenue and those raised by the National government should be remitted to the county governments without undue delay and without deductions.⁵⁶

The County Executive formulates financial and economic policy through the office of the County Treasury.⁵⁷ The County Treasury prepare fiscal papers to initiate the budget process.⁵⁸ The County Assembly approves appropriation of the money by the County government. The Public Finance Management Act provides legal framework for counties to adhere to in enactment of finance

⁵³ Benjamin Barber, *Strong Democracy: Participatory Politics for a new age*, University of California Press.[2003]

⁵⁴ *Okiya Omtatah Okoiti & 3 others v Attorney General & 5 others [2014] eKLR*

⁵⁵ Section 102, Public Finance Management Act

⁵⁶ Article 219, , Constitution of Kenya, 2010

⁵⁷ Section 103, Public Finance Management Act

⁵⁸ Section 104, Public Finance Management Act

related bills. The distinct functions of the national legislature and executive is almost similar to the devolved functions of the county Assembly and the County Executive. However the comparison is only limited to the provisions of the fourth schedule on division of functions between the two levels of government.

Due to the novelty of public participation and devolution, County Assemblies have been unable to put the best strategies to effectively conduct public participation. Father Dolan, a catholic priest based in Mombasa County expressed his dissatisfaction with the County public participation program. He commented as follows;

*“The county government of Mombasa government on June 22 requested its citizens through an advert in a national newspaper to participate in discussing the Budget Estimates and the County Appropriation Bill, 2016 in a meeting scheduled for five days later. The Speaker, however, didn’t inform the public that neither document was available in soft or hard copy. This was an invite to rubberstamp.”*⁵⁹

The major areas of conflict in public finance management include, concurrent functions between the county and national governments and the abuse of administrative powers. In *Speaker, Nakuru County Assembly & 46 others v Commission on Revenue Allocation & 3 other*, the High Court dismissed a petition by county assemblies challenging a circular that barred the members from travelling abroad due to wastage of funds. In his obita dicta, the learned judge held that;

“...it is time that County Executives and County Assemblies learnt that funds allocated to Counties are meant to serve legitimate and lawfully progressive purposes. It is distressing, as was said by one party to this Petition, to learn that Kenyans elected to serve in Counties may have been banned

⁵⁹ Dolan G, <https://www.nation.co.ke> (2016) accessed on July 2017.

from travel for being a nuisance in certain foreign Countries. The funds used for such trips are said to be in their millions. Granted, no doubt devolution is working and indeed it must work but wastage will only drain an already drained populace.”⁶⁰

⁶⁰ *Speaker, Nakuru County Assembly & 46 others v Commission on Revenue Allocation & 3 others [2015] eKLR*

CHAPTER IV: COMPARATIVE STUDY ON PUBLIC PARTICIPATION IN SOUTH AFRICA

4.1. Introduction

The drafters of the Constitution of Kenya, 2010 borrowed a lot from the South Africa's Constitution, 1995. First like South Africa, the Constitution of Kenya was adopted after long struggle and 'fight' for independence.⁶¹ Secondly the process of the Constitution was more consultative and participatory. Donald L. Horowitz commented that; "*If democracy endures in South Africa, more fortunately situated countries will have ground for greater optimism.*"⁶² This view has been proven to be true by the fact that South Africa Constitution was a bench mark during the drafting of the Constitution of Kenya, 2010.

The structures of government adopted in both Constitutions are quite similar. The foundational sections deal with questions of sovereignty, supremacy of the constitution, national values, and citizenship. The national values underpinning each are essentially the same. However, the Kenyan Constitution stipulates up front that state organs shall ensure reasonable access to services in all parts of the republic.

Howard Varney, in a report published by the International Centre for Transnational Justice, notes that the same rights and freedoms are enumerated and upheld in the bills of rights, often in similar terms. In some instances the protection provided in the Kenyan Constitution, such as freedom of the media, is considerably stronger than that provided in the South African Constitution.⁶³ The

⁶¹ Waruguru K, Introductory Note on Kenya, *International Centre for Not-For-Profit Law*, (2012).

⁶² Horowitz D, *A Constitutional Democracy in a Divided Society*, EC Press House, (2004).

⁶³ Howard V, *Breathing Life into the New Constitution; A new approach to law and Police in Kenya*, International Centre for Transnational Justice (2011).

functional clauses of the two bill of rights that deal with application, enforcement, interpretation, and limitation of rights appear to work largely in the same way.

Vanney concludes that both constitutions have chapters dealing with the different functions of organs of state such as the executive, legislature, judiciary, security services, public service, and public finance.⁶⁴ The chapters are preceded by important principles that the different organs must comply with. Due to Kenya's particular history, the framers saw fit to include chapters that provide specific attention to the questions of land and environment, leadership and integrity, and representation of the people.

Although this study is limited to public participation within the public finance management system, the case study serves as a good test for effective public participation in all areas of public participation.

4.2. History of public participation in South Africa

During the drafting of the South Africa Constitution in 1994, the current President Cyril Ramaphosa, as the Chairperson of the Constitutional Assembly recognized the importance of public participation in the drafting of the Constitution as follows;

“It is therefore important that as we put our vision to the country, we should do so directly, knowing that people out there want to be part of the process and will be responding, because in the end the drafting of the constitution must not be the preserve of the 490 members of this Assembly. It must be a constitution which they feel they own, a constitution

⁶⁴ Howard V, Breathing Life into the New Constitution; A new approach to law and Police in Kenya, 23.

that they know and feel belongs to them. We must therefore draft a constitution that will be fully legitimate, a constitution that will represent the aspirations of our people.”⁶⁵

Cyril Ramaphosa recognized that the legitimacy of any law must come from the people. The people of South Africa were key stakeholders to the constitution making process. The leaders also recognized the Constitution required the support of majority of the citizen; hence the importance of the public participation forums such as radio, television, newspapers etc.

Ms B. Mbete-Kgositsile, Member of Parliament passionately observed that;

*“The people of South Africa must be involved. They must be consulted in an organized fashion, on specific issues in order for the new law to be sensitive to and shaped by their realities, and for it to address these realities.”*⁶⁶

The Member of Parliament was alive to the fact that for any public participation to be effective, it required to be organized and specific issues on the law. This was because the effect of the legislation might have adverse effects on the lives of the people. The people might be required to pay more taxes or be required to forfeit some subsidies. No matter the magnitude, the people will have to adjust their lives to the new laws. Therefore it is essential that the people are part of the process.

4.3. Structure of governance

The structure of Executive and Judiciary is similar in both Kenya and South Africa.

⁶⁵ <http://www.sahistory.org.za/archive/chapter-13-public-participation-process>, (accessed on 8th November 2017).

⁶⁶ <http://www.sahistory.org.za/archive/chapter-13-public-participation-process>, (accessed on 8th 2017)

The main difference lies with the legislature. Section 43 of the Constitution of South Africa provides that legislative authority of the national, provincial and local sphere of government is vested in Parliament which consists of the National Assembly and the National Council of Provinces (NCOP), and in the provincial legislatures and municipal councils respectively.

The NCOP has the role of representing provinces by ensuring that provincial interests are taken into account in the national sphere of government.⁶⁷ The NCOP represents the provinces to ensure that provincial interests are taken into account in the national legislative process. It does this mainly by participating in the national legislative process by providing a national forum for the public consideration of issues affecting the provinces. Local governments can, through organized formations, participate in proceedings of the NCOP although they may not vote. The national and provincial spheres of government have concurrent legislative competence in accordance with schedule 4 of the Constitution.

4.4. Legal framework

The International Centre for Transnational Justice acknowledges that the right to participate in government is a Constitutional imperative granted to the people. Vanney begins to describe the legal framework as follows;

“While the concept of a ‘democratic state’ refers to diverse forms of citizen participation and representation in the political sphere, the specific rights, duties and obligations of both citizens and the state are enshrined in South Africa’s constitutional democracy. Here the ambition to move beyond simple representative democracy (i.e. mere participation in elections) to a more complex participatory democracy framework occurs through constitutional provisions intended to enable

⁶⁷ Mattes, B, "South Africa: democracy without the people?" *Journal of Democracy* 13.1 (2002): 22-36.

*citizens to participate in a number of direct ways to ensure oversight and accountability. These constitutional obligations are there to ensure a 'living' democracy in terms of the ways in which citizens perceive they have the political agency to influence lawmaking. Promoting public participation in the legislatures, according to the Constitutional mandate, is not only important to promote a people-centered democracy,"*⁶⁸

4.5. The constitution of South Africa, 1996

Section 1 of the Constitution provides that the Republic of South Africa is one, sovereign, democratic state founded on the following values: Human dignity, the achievement of equality and the advancement of human rights and freedoms, Universal adult suffrage, a national common voters' roll, regular elections and a multi-party system of democratic government to ensure accountability, responsiveness and openness.⁶⁹

Values such as accountability, responsiveness and openness are underpin the principle of public participation. Upholding of human dignity is a precept in respect of human rights, to violate the right of a person to participate in governance then the dignity of the person has been violated. Section 59 of the Constitution provides that the National Assembly must facilitate the involvement of the public in the national assembly and this process ought to be done in an open manner. Section 118 of the Constitution provides that the provincial legislatures must facilitate public involvement in the legislative process and also conduct its business in an open manner and hold its sittings in public.

⁶⁸ Howard V, Breathing Life into the New Constitution; A new approach to law and Police in Kenya, 23

⁶⁹ Constitution of the Republic of South Africa, 1996.

4.5.1. Public Finance Management Act, 1999

The Public Finance Management Act details the financial management regulatory framework for national and provincial government institutions, which include national and provincial departments, and the entities under their ownership or control.⁷⁰ The PFMA adopts an output-based and responsibilities-based approach to financial management as opposed to the previous Exchequer Acts rule-driven approach. The Act is part of a broader strategy on improving financial management in the public sector. The PFMA addresses the National Revenue Fund, the budgetary process, the specification of uniform treasury norms and standards, the institutional arrangements for procurement, the procedures, controls and the application of procurement methods, the pre-requisites for the issuance of government guarantees, and the intervention of the national government when a public entity fails to perform. In respect of budgetary oversight, the PFMA requires parliament to vote the budget estimates by programme rather than departmental votes. PFMA regulates the borrowing operations of the national government and specifies a single officer authorized to borrow on behalf of any national or provincial government entity. The PFMA sets also clear reporting requirements for in-year budget execution.

4.5.2. Municipal Finance Management Act

The Municipal Finance Management Act is the local government finance management act. It forms an integral part of the broader reform package for local government, as outlined in the White Paper on Local Government published in 1998.⁷¹ MFMA aims to modernize budget, accounting and financial management practices of the local government to achieve efficient service delivery to communities. It specifies the approach to be adopted through setting and monitoring outputs,

⁷⁰ Public Finance Management Act, 1999

⁷¹ Municipal Finance Management Act (2003)

outcomes and measurable objectives. One of the underlying principles of the MFMA is the role to be played by councilors in exercising their oversight role through considering the annual report of the municipality.

4.5.3. Division of Revenue Act and Intergovernmental Fiscal Relations Act

This Division of Revenue Act of Parliament is voted annually to determine the vertical and horizontal allocation of resources. The Division of Revenue Act is the subject of policy research and analysis by the Finance and Fiscal Commission, a constitutional body that advises the Parliament and the National Treasury. DORA establishes the annual transfers to provinces and municipalities including the equitable share and the conditional grant share. Both are determined by a well-defined formula. The Intergovernmental Fiscal Relations Act establishes the process of intergovernmental consultation in enacting the Division of Revenue Bill.⁷²

4.6. Case laws

In *King and Others v The Attorneys Fidelity Fund Board of Control*, the Supreme Court of Appeal of South Africa upheld the principle of public participation. The Constitution requires that Parliament function in accordance with the principles of accountability, responsiveness and openness that constitute one of its founding values. That founding value, so far as it relates to the conduct of the National Assembly, finds expression in the Constitution's requirement that its rules and orders for the conduct of its business must be made with due regard not only to representative democracy but also to participative democracy. It also finds expression in the National Assembly's power to receive petitions, representations or submissions from any interested persons or institutions, its duty to facilitate public involvement in its legislative and other processes and of those of its committees, its duty generally to conduct its business in an open manner and hold its

⁷² Intergovernmental Fiscal Relations Act (1997)

sittings and those of its committees in public, and its duty generally not to exclude the public or the media from sittings of its committees Those are all facets of a National Assembly that belongs to the people, although its formal business is conducted through their representatives, and it is to an Assembly functioning in this way that the Constitution entrusts the power to legislate. Its antithesis is a body that separates itself from and excludes the public, is indifferent to their participation and interests, and conducts its business concealed from the public eye. Were that ever to occur it would negate one of the essential pillars of the Constitution, with fundamental implications not only for Parliament's legitimacy, but for its legislative capacity.⁷³

In *Doctors for Life International v The Speaker of the National Assembly*, the Constitutional Court of South Africa decided on these issues; what the nature of the duty to facilitate public participation is and whether the legislature had discharged its duty to facilitate public involvement in the legislative process of certain health related legislation. Justice Sachs who agreed with the majority judgement observed as follows;

*“All parties interested in legislation should feel that they have been given a real opportunity to have their say, that they are taken seriously as citizens and that their views matter and will receive due consideration at the moments when they could possibly influence decisions in a meaningful fashion. The objective is both symbolical and practical: the persons concerned must be manifestly shown the respect due to them as concerned citizens, and the legislators must have the benefit of all inputs that will enable them to produce the best possible laws”.*⁷⁴

⁷³ King and Others v The Attorneys Fidelity Fund Board of Control (137/2008) [2009] ZASCA.

⁷⁴ Doctors for Life International v Speaker of the National Assembly and Others (CCT12/05) [2006] ZACC.

CHAPTER V: FINDINGS AND CHALLENGES

Public participation has been generally defined as either consultative participation or as empowered participation.⁷⁵ During the consultative process, the state initially provides the public and their representatives with information about proposed amendments or new laws to be enacted. The public are then invited to prepare and submit their opinions of why they agree or disagree with the policy or law. The public must be given a chance to be heard, with no guarantee that participation will be heeded since the decision makers have the freedom of whether or not to agree with the views of the public, though there is normally an obligation to give the reasons for why they agree or disagree.⁷⁶ Public participation in public finance management allows the public or stakeholders to influence the decision maker through consultative programmes as well as hearings of public memoranda.⁷⁷

4.1. Natural Justice

Lawrence B. Solum describes justice as a natural virtue. In his lecture titled as *Natural Justice*, he attempts to define natural justice as;

“Well functioning humans are just, as well-ordered human societies. Roughly this means that in a well-ordered society, just human internalize the laws and social norms- they internalize lawfulness as a disposition that guides the way they relate to other humans. In societies that are mostly well-ordered, with isolated zones of substantial dysfunction, the

⁷⁵ Lane M, ‘Critical issues in regional natural resource management’, paper prepared for the 2006 Australian State of the Environment Committee, Department of the Environment and Heritage, Canberra, (2006)

⁷⁶ The World Bank, ‘Navigating the storm delivering the promise: *With a special focus on Kenya’s momentous devolution* (2011) 5 Kenya Economic Update vii.

⁷⁷ A. Schneider, *Decentralization: Conception and Measurement*, (2003) Available at https://sites.hks.harvard.edu/fs/pnorris/ Acrobat/.../Schneider_Decentralization [Accessed on 20/11/2017]

*social norms are limited to those norms that are clearly inconsistent with the function of law-to create condition for human flourishing. In a radically dysfunctional society, humans are thrown back on their own resources- doing the best they can in circumstances that may require great practical wisdom to avoid evil and achieve good. Justice is naturally good for humans-it is part and partial of human flourishing. All of these are natural ethical facts.”*⁷⁸

The Constitution of Kenya and the Public Finance Management Act emphasizes on public participation as a principle of public finance. The concept of natural justice comprises of certain legal principles that, taken together, constitute procedural fairness in administrative decision-making. The Constitution of Kenya provides that this concept of public participation has been extended to all decision making including exercise of legislative and executive authority.⁷⁹

4.2. [Right to access to information](#)

In the recent past, there has been some effort by the state to actualize access to information in governance. Pursuant to the provisions of the Constitution and out of the realization that the clamour for change is unstoppable, the government, in collaboration with various stakeholders, has embarked on a number of initiatives aimed at ensuring the availability and accessibility of information by all Kenyans. According to Article 19, a non -governmental organization, there is an acknowledgement by government that the information it holds is a national asset which must be shared in order to improve transparency, promote social and economic values and boost the development of the country.⁸⁰

⁷⁸ Solum L, Natural Justice, *Natural Justice Lectures*, (2006)

⁷⁹ Article 10, Constitution of Kenya, 2010

⁸⁰ Article 19, “Realizing the right to access to information” (2013): 24.

With the current advent of information communication technology and “digital government”, there has been some attempt to use ICTs to facilitate the public’s access to information and participation. On 8 July 2011, the President of Kenya launched the Kenya Open Data Initiative, a web portal that made key government data freely available to the public through a single online portal. Information uploaded onto the portal included census results, national and regional expenditure reports and information on key public services

The greatest challenge is that not all government bodies are enthusiastic about sharing information on public finance matters. According to Lakin, the Head of Research at International Budget Partnerships, County Assemblies do not publish their budget on their websites while some do not even share hardcopy budget statements with the public and therefore during the public hearing the public is asked to give suggestions on what development projects they would like to be considered in the budget.⁸¹

Lakin concludes that public deliberations which are conducted without a proposal being laid by the executive do not meet the standards of a reasonable public participation because “Wish listing” without a budget constraint or a set of objectives does not facilitate reasoned budget decision-making. Secondly while people have participated, the public input will not be deliberated because it is likely that members of the public were not asked to give or debate the reasons for their own proposals, so these were not necessarily vetted for reasonableness either.⁸²

⁸¹ <http://www.theeastafrican.co.ke/oped/comment/Public-participation-in-budgeting-Kenya-style-434750-3183870-format-xhtml-cu658b/index.html> accessed on 11/3/2018.

⁸² <http://www.theeastafrican.co.ke/oped/comment/Public-participation-in-budgeting-Kenya-style-434750-3183870-format-xhtml-cu658b/index.html> accessed on 11/3/2018.

4.3. Legitimate Expectation

Unlike administrative decisions where a person has to show how they are affected by a decision by a public body, the Constitution of Kenya affords the general public opportunity to be involved in the management of public finance.⁸³ Therefore the public can contribute to the issues such as fiscal policies, monetary and budget matters. Natural justice encompasses legitimate expectation which means that an assurance will be adhered to when making similar decisions in future. In the current scenario the constitution has provided a legitimate expectation that the public will be consulted whenever the state organs exercise legitimate power.

The High Court of Kenya in *Republic –Vs- County Government of Kiambu Ex parte Robert Gakuru & another [2016] eKLR* held that:

“In my view, whereas it is not to be expected that the legislature would be beholden to the public in a manner which enslaves it to the public, to contend that public views ought not to count at all in making a decision whether or not a draft bill ought to be enacted would be to negate the spirit of public participation as enshrined in the Constitution. In my view public views ought to be considered in the decision making process and as far as possible the product of the legislative process ought to be true reflection of the public participation so that the end product bears the seal of approval by the public. In other words the end product ought to be owned by the public.”⁸⁴

The rationale for public participation is that where there is public participation and consultations, the product of the consultation is less likely to be arbitrary and irrational. The Constitutional Court

⁸³ Communication Commission of Kenya -v- Royal Media Services & 5 Others - Petition No.14 of 2014; [2014] eKLR

⁸⁴ Republic –Vs- County Government of Kiambu Ex parte Robert Gakuru & another [2016] eKLR

of South Africa in *Doctors for Life International vs. Speaker of the National Assembly and Others* (CCT12/05) [2006] held as follows;

*“If legislation is infused with a degree of openness and participation, this will minimize dangers of arbitrariness and irrationality in the formulation of legislation. The objective in involving the public in the law-making process is to ensure that the legislators are aware of the concerns of the public. And if legislators are aware of those concerns, this will promote the legitimacy, and thus the acceptance, of the legislation. This not only improves the quality of the law-making process, but it also serves as an important principle that government should be open, accessible, accountable and responsive. And this enhances our democracy.”*⁸⁵

It is also essential that a public body takes into account the views of the public and stakeholders before making a final decision. This is essential so that the public participation can be real and not just a mere formality. In *Robert Gakuru – Vs- Kiambu County Assembly* (*supra*), the High Court held as follows;

“In my view public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfilment of the Constitutional dictates. It is my view that it behoves the County Assemblies in enacting legislation to ensure that the spirit of public participation is attained both quantitatively and qualitatively. It is not just enough in my view to simply “tweet” messages as it were and leave it to those who care to scavenge for it. The County Assemblies ought to do whatever is reasonable to ensure that as many of their constituents in particular and the Kenyans in general are aware of the

⁸⁵ *Doctors for Life International vs. Speaker of the National Assembly and Others* (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC)

intention to pass legislation and where the legislation in question involves such important aspect as payment of taxes and levies, the duty is even more onerous. I hold that it is the duty of the County Assembly in such circumstances to exhort its constituents to participate in the process of the enactment of such legislation by making use of as many fora as possible such as churches, mosques, temples, public barazas national and vernacular radio broadcasting stations and other avenues where the public are known to converge to disseminate information with respect to the intended action. Article 196(1) (b) just like the South African position requires just that.”

4.4. Reasonable opportunity

The law ought to provide for an appropriate degree of participation in the law making process of public finance related laws and policies. The public and relevant stakeholders should be offered reasonable opportunity to know the proposed laws and be accorded time to provide responses. What amounts to ‘reasonable’ participation will depend on a case to case basis. The High Court in the case of Robert Gakuru (supra) held that;

“It must be appreciated that the yardstick for public participation is that a reasonable opportunity has been given to the members of the public and all interested parties to know about the issue and to have an adequate say. It cannot be expected of the public authority that a personal hearing will be given to every individual who claims to be affected by the laws or regulations that are being made. What is necessary is that the nature of concerns of different sectors of the parties should be communicated to the law maker and taken into account when formulating the final regulations.”⁸⁶

⁸⁶ Republic –Vs- County Government of Kiambu Ex parte Robert Gakuru & another [2016] eKLR

While recognizing the similarity between Kenya and South Africa's democracy struggles, the Supreme Court of Kenya in the case of *Speaker of the Senate & another v Attorney-General [2013]* quoted extensively an article by Karle Klare that stated;⁸⁷

“At the most superficial level, South Africans have chosen to compromise the supremacy of Parliament, and correspondingly to increase the power of judges, each to an as-yet unknowable extent.”

“By transformative constitutionalism I mean a long-term project of constitutional enactment, interpretation, and enforcement committed...to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through non-violent political processes grounded in law.”⁸⁸

4.5. Product of the process of Public Participation

The end result of a policy or law ought to be the product of the process of public participation. However this does not mean that the views of the public must prevail upon. The decision maker only has to take into account those views during the process of decision making.

In *Nairobi Metropolitan Psv Saccos Union Limited– Vs- County of Nairobi Government*, where the Petitioners were stakeholders in the affairs of the City of Nairobi and specifically as relates to the transport business. It is was in dispute that the Nairobi County Assembly and Nairobi County

⁸⁷ *Speaker of the Senate & another v Attorney-General & 4 others [2013] eKLR*

⁸⁸ Karle Klare, *Legal Culture and Transformative Constitutionalism*, “*South African Journal of Human Rights*, Vol. 14 (1998)

Government carried out substantial public consultations and came up with a draft Bill that reflected public sentiments. The court held that;

“A Bill was presented to the City County of Nairobi Budget and Appropriation Committee and that Committee considered the public views in preparing the final budget estimates which were later on passed included in the Act that was passed by the County Assembly. Surely, after this lengthy enactment process, the Petitioners cannot now be heard to blame the 1st Respondent while all along they were made aware of the process , right from the time of the preparation of the 1st Respondent's budget estimates of revenue and expenditure up to the time the impugned Act was enacted. The Petitioners have in any event failed to demonstrate to this Court how the 1st and 2nd Respondents failed to achieve public participation taking into account all that the 1st Respondent did in the process of enacting the impugned Act. I should say in passing that public participation is not the same as saying that particular public views must prevail”⁸⁹

4.6. Conclusion

The right for the public to participate in the decision making process of public bodies is a fundamental right and principles under the Constitution of Kenya, 2010. It is not just inspirational and progressive but it is also a mandatory dictate in the Constitution. *In the Matter of Peter Makau Musyoka and Award of Mining Concessionary Rights to the Mui Coal Basin Deposits*, the High Court noted that;

“We will begin, happily, by stating what is not contested by the parties: They all agree that the precepts of Article 10 of our Constitution are established rights which are justiciable

⁸⁹ Nairobi Metropolitan Psv Saccos Union Limited & 25 others – vs- County Of Nairobi Government & 3 others [2013] eKLR

in Kenya. Hence, if any of the allegations made by the Petitioners is factually proven, it would lead to an appropriate relief by the Court.

As our case law has now established, public participation is a national value that is an expression of the sovereignty of the people as articulated under Article 1 of the Constitution. Article 10 makes public participation a national value as a form of expression of that sovereignty. Hence, public participation is an established right in Kenya; a justiciable one – indeed one of the corner stones of our new democracy.”⁹⁰

The court of Appeal of Kenya in the controversial case of the *Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya [2017]* held that;

In our view, analysis of the jurisprudence from the Supreme Court leads us to the clear conclusion that Article 10 (2) of the Constitution is justiciable and enforceable immediately. For avoidance of doubt, we find and hold that the values espoused in Article 10 (2) are neither aspirational nor progressive; they are immediate, enforceable and justiciable. The values are not directive principles. Kenyans did not promulgate the 2010 Constitution in order to have devolution, good governance, democracy, rule of law and participation of the people to be realized in a progressive manner in some time in the future; it could never have been the intention of Kenyans to have good governance, transparency and accountability to be realized and enforceable gradually. Likewise, the values of human dignity, equity, social justice, inclusiveness and non-discrimination cannot be aspirational and incremental, but are justiciable and immediately enforceable.

⁹⁰ *In the Matter of Peter Makau Musyoka and Award of Mining Concessionary Rights to the Mui Coal Basin Deposits - Constitutional Petition Nos 305 of 2012; [2015] eKLR,*

Our view on this matter is reinforced by Article 259(1) (a) which enjoins all persons to interpret the Constitution in a manner that promotes its values and principles.⁹¹

⁹¹ *Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance(NASA) Kenya & 6 others [2017]*

CHAPTER VI: RECOMMENDATIONS

The author of this paper began this study with the objective to assess the efficacy of the current model of public participation within the public finance management system in Kenya. Other objectives included to understand the constitutional history of the principle of public participation in Kenya and also to recommend means and method that will achieve the optimum level of public participation.

Although the efficacy of public participation models have to be assessed on a case by case basis, majority of these models assessed by researchers quoted by the author have numerous shortcomings- no adherence to the rule of law. Most of the current participation is obsolete and does not meet any innovativeness to achieve maximum participation of the public. Coupled with short notices are issued, the public is therefore subjected to having a decision made with regards but no right to be heard with well preparation in advance. In some cases, the author was unable to access most of the budget statements and finance related Bills in the respective county assemblies. In such a case, the general public cannot access neither the hard copy nor the soft copy.

The design of the model of these public participation models is not effective. In most scenarios, the professional bodies and affected groups are never invited to such forums to give their professional opinions. The role of civil society in governance is often not appreciated. Public officers often view public participation programmes as an opportunity given to the opposition to challenge the government position, hence they attempt to limit the audience so as to ensure minimum opposition to the agenda.

Public participation is a principle that enhances good governance and provides legitimacy to the actions of state and public officers. Good governance is constitutional imperative that expects that state and public officers will act in the best interest of the public while also adhering to the principles and values provided in the Constitution. It defeats purpose if the public participation is conducted haphazardly because it will not achieve the noble objectives that the people ought to be part of the governance and ought to participate in decision making that affects them.

Kenya has made significant progress to facilitate public participation in its decision making organs including parliament and executive organs including ministries and parastatals. However the progress has not managed to address short comings such as lack of inclusivity because it has been noted that the method in which these forums are held, it often excludes people who are from rural areas, women and minority communities. These forums are often held at city hotels and urban social halls thus it does not consider people outside these areas and hence their interest are never considered. It is important for public participation to be diverse and also to engage the public even at the most remote places.

The communication mode which state organs and county governments chose to employ to inform the public is also a concern because for the people to participate they must have received information about the forum and also what will be discussed. Most state organs utilize newspapers of national coverage to invite the public and stakeholders to submit memoranda. It is common ground that majority of Kenyans earn less than a dollar a day, which is equivalent to eighty Kenya shillings. Most newspapers in cost about fifty to sixty shillings. This illustrates the issue that most Kenyans cannot afford a newspaper and therefore do not often see or know about these forums.

What alternatives are there? It is also common ground from that most Kenyans have access to the radio and also internet access has also improved to cover over 50% of the population. State organs should be prepared to deploy means of communication that will reach most people who are targeted and hence it will be in the interest of each particular state office and county government to study what means of communication will achieve the optimum results in that particular area. This is because there are differences in culture, level of education, geographical and also level of technology in all counties in Kenya.

Juxtaposing Kenya to South Africa, I completely agree with Peter Shane who made the following remarks on deliberative state organs;

“Both elections and public deliberations are mechanisms, not ends in themselves. The overarching issue is what these mechanisms are intended to achieve. If we start from the premise that legitimacy is that quality of government that gives those in power the moral authority to impose their will on members of the polity, then, as I have argued elsewhere, democracy’s claim to legitimacy rests on two premises. One is that, as opposed to other systems, it is more likely to facilitate government decision making that at least takes seriously the interests of all persons subject to the decision at issue. Equal respect for all persons is thus one of the moral building blocks of democratic legitimacy. The second is that, as opposed to other systems, democracy empowers individuals with meaningful agency. That is, a democratic regime, properly constituted, allows citizens to experience themselves as autonomous actors free to participate in the determination of their political

fate. These are the qualities of government that both elections and public deliberation aim to achieve, the ends to which they function as our most powerful means."⁹²

Kenyans should also develop models of public deliberations; forums to receive proposals from government and also giving feedback. In public deliberations, the public must be given reasoned proposals and not just asked to give their opinions on blanket proposals. In this case the public officials would be able to make decisions based on informed choices and tradeoffs.

⁹² Peter M, Deliberative America, *Public Deliberations* 10, 10 (2005)

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