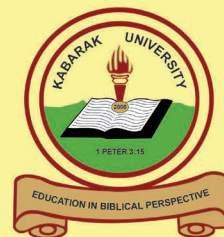


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# Public Participation in Budget Making Processes in County Governments in Kenya

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## Abstract

This paper discusses the legal and administrative framework for public participation in budget making process in County Governments in Kenya. It seeks to address three research questions: First, what is the conceptual, legal and administrative framework for public participation in budget making in Kenya county governments? Second, is the existing framework for public participation in budget making effective? Third, what lessons can Kenya learn from Brazil and South Africa?

**Key words:** Public Participation, Devolution, Participatory Budgeting, County Governments

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## 1. Conceptualising Public Participation

Public participation as a concept has received considerable attention as a result of its current mainstream position in the development sector in states.<sup>1</sup> Public participation is the process by which an organisation consults with interested or affected individuals, organisations, and government entities before making a decision.<sup>2</sup> It is the process that allows for individuals within communities to positively contribute to the general good.<sup>3</sup>

Public participation plays a key role in socio-legal and political processes in Kenya. It is an avenue through which citizens contribute and make their voices heard in socio-economic, legal and political processes in Kenya. The concept of public participation is embedded in classical and contemporary development theories and concepts that put emphasis on the significance of effective and participatory governance for sustainable change.

There are two aspects to public participation: direct participation and participation through association. Direct participation occurs when citizens in their individual capacities as citizens take part in decision making in governance. Indirect participation or participation through association occurs when an individual is elected by citizens to represent their needs and views in decision making.<sup>4</sup>

Brynard defines public participation as ‘a process wherein the common amateurs of a community exercise power over decisions related to the general affairs of a community’.<sup>5</sup> He lays emphasis on the “common amateurs of a community.” This focuses attention on the non-elite members of society. This is the group of people with no special knowledge, low education levels and persons not in formal employment. The World Bank Learning Group on participation have defined participation as a process through which stakeholders influence and share control over development initiatives and decisions and resources that affect them.<sup>6</sup>

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<sup>1</sup> Stephen Greenberg and Malachia Mathoho ‘Conceptual Framework on Public Participation and Development,’ (2010), available at <<http://www.planact.org.za/wp-content/uploads/2014/11/2.-Conceptual-framework-final-3.pdf>> accessed on 18th August 2020.

<sup>2</sup> Ibid.

<sup>3</sup> Onkgopotse Senatla Madumo ‘Fostering Effective Service Delivery through Public Participation: A South African Local Government Perspective’ (2014) University of Pretoria, p 3, available at <[https://repository.up.ac.za/bitstream/handle/2263/45204/Madumo\\_Fostering\\_2014.pdf?sequence=1](https://repository.up.ac.za/bitstream/handle/2263/45204/Madumo_Fostering_2014.pdf?sequence=1)> accessed on 24th July 2018.

<sup>4</sup> Ibid, 132.

<sup>5</sup> Brynard, P.A. ‘Realities of Citizen Participation’ in Bekker, J.C.O. (Ed), *Citizen Participation in Local Government* (Pretoria, JL van Schaik Publishers 1996).

<sup>6</sup> World Bank, World Bank Participation Sourcebook Environment Department Papers Participation Series (Washington, DC: World Bank, 1995).

The term “public” entails a variety of individuals and groups in the context of public participation. As Possi & Karia write,<sup>7</sup> “public” entails categories of indigenous people, local community, women, youth and Non- Governmental Organisations (NGOs). Indigenous people are inhabitants of a certain area before western invasion and they should be satisfy the elements of prior existence, non-dominance, cultural difference from those invading and identification amongst themselves as indigenous persons.<sup>8</sup> Local community on the other hand represents the persons in the grassroots where the local government is mostly in-charge.<sup>9</sup>

Kenyan Courts have also pronounced themselves on what public participation is. In *Robert N. Gakuru & Others v Governor Kiambu County & 3 Others*,<sup>10</sup> the High Court held, citing with approval the South African case of *Doctors for Life International v The Speaker of the National Assembly & Others*, that governments ought to do ‘*whatever is reasonable*’ to ensure as many of their constituents were involved in the decision making process.

Significantly, the leading English case law, *Rex v Secretary of State for Social Services, ex parte Association of Metropolitan Authorities*<sup>11</sup> is a 1986 case that defined the ingredients of consultation by public authorities in governance. It generally answers the question of what amounts to sufficient consultation. In this case, the Secretary of State for Social Services made regulations and amendments to some sections of the Social Security and Housing Benefits Act without consulting the relevant stakeholders who would be affected by the decision. When it purported to give them a chance to give their comments, it did not give them sufficient time to do so. The court held that the Secretary of State had failed to fulfill his obligation to carry out sufficient consultation before making the regulations and a declaration was be granted to that effect. In explaining the essence of consultation, the following pronouncement by the court is apt:

But in any context, the essence of consultation is the communication of a genuine invitation to give advice and a genuine consideration of that advice. In my view it must go without saying that to achieve consultation sufficient information must be supplied by the consulting to the consulted party to enable it to tender helpful

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<sup>7</sup> Ally Possi & Pooja. M. Karia “The Right to Public Participation: Constitutionally Guaranteed tool in achieving the Aspirations of the AU Agenda 2063,” (2018), a presentation at the African Bar Association Conference, 2018, Nairobi.

<sup>8</sup> George Pring and Susan Noe, ; ‘*The Emerging International Law of Public Participation Affecting Global Mining, Energy and Resource Development*’, (OUP, 2012) 59.

<sup>9</sup> Ibid.

<sup>10</sup> [2014] eKLR

<sup>11</sup> (1986) 1 All ER).

advice. Sufficient time must be given by the consulting to the consulted party to enable it to do that, and sufficient time must be available for such advice to be considered by the consulting party. Sufficient, in that context, does not mean ample, but at least enough to enable the relevant purpose to be fulfilled. By helpful advice, in this context, I mean sufficiently informed and considered information or advice about aspects of the form or substance of the proposals, or their implications for the consulted party, being aspects material to the implementation of the proposal as to which the Secretary of State might not be fully informed or advised and as to which the party consulted might have relevant information or advice to offer.<sup>12</sup>

In essence, for there to be “sufficient consultation”, the following four conditions should be fulfilled: First, there must be a *genuine invitation* to give advice and a *genuine consideration* of that advice. Second, *sufficient information* must be supplied by the consulting to the consulted party to enable it to tender helpful advice. Third, *sufficient time* must be given by the consulting party to the consulted party to enable it to do that. Fourth, *sufficient time* must be available for such *advice to be considered* by the consulting party. The aforementioned elements embolden the quality of citizen participation in governance. They should inform strategies employed by county governments in establishing frameworks for public participation in budget making for fruitful results. As shall be seen in the frameworks for public participation in budget making considered to be successful such as Brazil’s, the elements in *Rex v Secretary of State for Social Services* are all present and they define the success of the participatory budgeting framework in place.

Public participation under the Constitution of Kenya may take many forms, including involvement in elections, referenda, public hearings or inquiries, parliamentary representation of citizenry, public opinion surveys and citizen advisory committees.<sup>13</sup>

## 2. The Budget Process in Kenya

The Public Finance Management Act provides for the budget making process including the key dates. The main budgeting process in Kenya is controlled at the national government level. The four major stages of the budget process are: formulation; approval; implementation; and audit.<sup>14</sup>

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<sup>12</sup> *Rex v Secretary of State for Social Services, ex parte Association of Metropolitan Authorities*, 169 e to j, 175 b to f and 176 a to g.

<sup>13</sup> Ben Sihanya ‘Public Participation and Public Interest Litigation under the Kenyan Constitution,’ (2013) Vol. 9 (2013) No.1 *Law Society of Kenya Journal*, 1-33.

<sup>14</sup> Article 228 of the Constitution.

The key budget institutions in Kenya include the Ministry of Devolution and Planning, the Ministry of Finance, the Office of the Controller of Budget, the Office of the Auditor General, the Intergovernmental Budget and Economic Council, the Parliamentary Budget Committee and county treasuries, among others. These institutions work together in the budget making cycle.

Within the context of the budget cycle at the county levels, there is a legal requirement that each county must have and present or circulate the following four documents:<sup>15</sup> First, a County Integrated Development (CIDP) Plan. This gives a roadmap for development in the county over a five-year period. It determines the priorities for the county. Second, each county must have sector plans. Every sector in the county must also have a ten-year plan, explaining how health, agriculture or water and sanitation will be managed. Third, each county must have ten-year spatial plans. The spatial plans explain how the county will manage land and development across the entire county. Fourth, counties should have city and municipal plans for the urban areas. There is also an annual plan that must be discussed and approved by the county assembly every year.<sup>16</sup>

Under the Public Finance Management Act, the budget process for county governments in any financial year consists of the following nine stages:<sup>17</sup> First, integrated development planning process which includes both long term and medium term planning. Second, planning and establishing financial and economic priorities for the county over the medium term. Third, making an overall estimation of the county government's revenues and expenditures. Fourth, adoption of County Fiscal Strategy Paper. Fifth, preparing budget estimates for the county government and submitting estimates to the county assembly. Sixth, approving of the estimates by the County Assembly. Seventh, enacting an appropriation law and any other laws required to implement the county government's budget. Eighth, implementing the county government's budget. Ninth, accounting for, and evaluating, the county government's budgeted revenues and expenditures.<sup>18</sup>

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<sup>15</sup> 'A Popular Guide to County Planning and Budgeting, Case of Nairobi City County' available at <[https://www.tisa.or.ke/images/uploads/A\\_Popular\\_Guide\\_to\\_County\\_Planning\\_and\\_Budgeting.pdf](https://www.tisa.or.ke/images/uploads/A_Popular_Guide_to_County_Planning_and_Budgeting.pdf)> accessed on 18th June 2018.

<sup>16</sup> (n 15) 3

<sup>17</sup> Section 125 of the Public Finance Management Act, 2012.

<sup>18</sup> Section 125 of the Public Finance Management Act.

### 3. Legal Foundation for Public Participation in Kenya

The Constitution is the legal foundation for public participation as a tenet of governance in Kenya. Broadly, the Constitution draws some of its provisions on public participation from international laws which apply to Kenya.

Public participation is also provided for under national and county legislation, policies and guidelines which draw their authority from the Constitution. These include the County Government Act, the Public Finance Management Act, the Urban Areas and Cities Act and the Access to Information Act, among others. There is a pending Public Participation Bill in the Kenyan Senate. There are also in place public participation Acts and Bills in various counties, most of which have never been gazetted.

Kenyan courts have also interpreted the law and pronounced themselves on public participation. These judicial authorities form part of the legal framework on public participation.

#### 3.1 *Public Participation under International Law*

Under international law, public participation is a civil and political right. The International Covenant on Civil and Political Rights (ICCPR) provides that every citizen has a right and opportunity to take part in the conduct of public affairs either directly or through representatives.<sup>19</sup> Although the ICCPR does not identify the public institutions to which the above right applies, the Human Rights Committee has clarified that it applies to all aspects of public administration, and the formulation and implementation of policy.<sup>20</sup>

The African Charter of Popular Participation in Development and Transformation recognises participation in governance and politics, as well as in economic development.<sup>21</sup> The Constitution does not provide for public participation as a right. Rather, it is among the national values and principles of governance which apply and are binding on all state officers.<sup>22</sup>

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<sup>19</sup> Article 25 of the International Covenant on Civil and Political Rights, 1966.

<sup>20</sup> Gregory Fox, 'The Right to Political Participation in International Law,' (2000) in Gregory Fox and Brian Roth (eds) *Democratic Governance and International Law*, , 55.

<sup>21</sup> Article 17, 18 and 19 of the *African Charter of Popular Participation in Development, 1990*.

<sup>22</sup> Article 10(2) (a) of the Constitution. The concept also finds expression in Article 1 of the constitution which provides that the people can exercise their sovereign power either directly or through democratically elected representatives.

### **3.2 Constitutional Foundation for Public Participation in Kenya**

The Constitution lays the foundation for the need for public participation in governance in at least ten articles. The Constitution aimed at giving powers of self-governance to the people, enhancing their participation in the exercise of the powers of the state and in making decisions affecting them in addition to recognising the rights of communities to manage their own affairs and to further their development.<sup>23</sup>

The requirement for public participation in governance can be gleaned from the Constitution through express provisions as well as provisions which imply the need. Under article 1(1) and 1(2), all sovereign power belongs to the people of Kenya and the people may exercise their sovereignty directly or through their elected representatives. Public participation is, therefore, necessary for citizens to be able to monitor and hold their leaders accountable. The rationale of public participation is based on the foundation that the people of Kenya have sovereign power which they have delegated to state actors at the national and county levels.

The Constitution also establishes national values and principles of governance which include: democracy and participation of the people; inclusiveness; good governance, integrity, transparency and accountability.<sup>24</sup> These values and principles bind all state organs, state officers, public officers and all persons whenever any of them applies or interprets the Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions.

The Constitution also provides that every person has the right to freedom of expression, which includes freedom to seek, receive or impart information or ideas.<sup>25</sup> Citizens, therefore, deserve information on critical government decisions such as those relating to budget making. The Constitution expressly guarantees the right to access information by citizens.<sup>26</sup> The state is also expected to encourage public participation in the management, protection, and conservation of the environment.<sup>27</sup>

Under article 118(1)(a) and (b), parliament is expected to conduct its business in an open manner, and its sittings and those of its committees are expected to be

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<sup>23</sup> Article 174 of the Constitution.

<sup>24</sup> Article 10 (2) a, b and of the Constitution.

<sup>25</sup> Article 33 (a).

<sup>26</sup> Article 35. There is also established the Access to Information Act which is aimed at giving effect to Article 35 of the Constitution.

<sup>27</sup> Article 69(1) (d).



open to the public. Parliament is also expected to facilitate public participation and involvement in the legislative process and other business of Parliament and its committees.

Every person has a right to petition parliament to consider any matter within its authority, including enacting, amending, or repealing any legislation.<sup>28</sup> In the same breadth, parliament may not exclude the public, or any media, from any sitting, unless in exceptional circumstances the speaker has determined that there are justifiable reasons for the exclusion.<sup>29</sup>

In establishing the devolved system of government, the Constitution lays down the objects of devolution which include giving powers of self-governance to the people and enhancing their participation in the exercise of such powers in decision-making.<sup>30</sup> Communities have the right to manage their own affairs and to further their development.<sup>31</sup> From the onset, it has been argued that devolution should not only bring government services and resources closer to the people at the county levels, but also give sovereign powers and responsibilities to citizens in decision making.

Under article 184(1) (c), the Constitution directs that national legislation shall provide for the governance and management of urban areas and cities and shall, in particular, provide for participation by residents in the governance of urban areas and cities. To this effect, parliament enacted the Urban Areas and Cities Act whose relevant provisions are discussed below.

Under article 196(1), a County Assembly is to conduct its business in an open manner, and hold its sittings and those of its committees, in public.<sup>32</sup> County Assemblies are to facilitate public participation and involvement in the legislative and other business of the assembly and its committees.<sup>33</sup>

Further, a County Assembly may not exclude the public, or any media, from any sitting. It is only in exceptional circumstances that a County Assembly is allowed to exclude the public or any media from sittings and these circumstances arise as and when the speaker may determine that there are justifiable reasons to do so.<sup>34</sup> Some have opined that by giving the speaker full discretion to determine

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<sup>28</sup> Article 119(1).

<sup>29</sup> Article 119 (2).

<sup>30</sup> Article 174(c) of the Constitution.

<sup>31</sup> Under Article 174(d).

<sup>32</sup> Article 196(1) (a) of the Constitution.

<sup>33</sup> Article 196(1) (b).

<sup>34</sup> Article 196(1) and (2).

whether to allow the public or not, this clause is prone to abuse as it provides an avenue for a speaker to deny the public a genuine opportunity to participate in sittings.

Under article 201(a), there shall be openness and accountability, including public participation in financial matters. This applies to financial matters at both national government and county government levels.

Under article 232(1)(d), the values and principles of public service include the involvement of the people in the process of policy making. They also include transparency and provision to the public of timely and accurate information.

In part 2(14) of the fourth schedule, the functions and powers of the county are to coordinate and ensure the participation of communities in governance. Counties are tasked to assist communities to develop the administrative capacity to enhance their exercise of power and participation in governance at local levels.

The Constitution, therefore, seeks to ensure that citizens in the counties are involved in the management of the devolved finances. Special focus is given to marginalised and minority groups in the Constitution. All state organs and all public officers are mandated under article 21(3) to address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, members of minority or marginalised communities, and members of particular ethnic, religious or cultural communities. Public participation must, therefore, involve these groups.

The state is further mandated under the Constitution to put in place affirmative action programmes designed to ensure that minorities and marginalised groups participate and are represented in governance and other spheres of life.<sup>35</sup> The state is to ensure measures are put in place to ensure minorities and marginalised groups are provided special opportunities in educational and economic fields; are provided special opportunities for access to employment; develop their cultural values, languages and practices; and have reasonable access to water, health services and infrastructure.<sup>36</sup>

Elderly members of the society are also recognised as significant participants in the affairs of the society. Under article 57 of the Constitution, the state is to take measures to ensure the rights of older persons to fully participate in the affairs of

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<sup>35</sup> Article 56 (a) of the Constitution.

<sup>36</sup> Article 56 (b) – (d).

society. Elderly people are seen as a distinct group in the society with specific needs or concerns. Nobody is to be discriminated on the basis of his or her age.<sup>37</sup>

It is further expected of the state to establish measures to ensure youth have opportunities to associate, be represented and participate in political, social, economic and other spheres of life. Statistics show that youth who are 15-34 years in Kenya constitute 35.39% of the Kenyan population.<sup>38</sup> However, the youths have not received adequate recognition and appreciation from successive Kenyan governments since independence. Yet, there are many opportunities for to engage in nation building, ranging from education and training to governance and economic development.

It is, therefore, a constitutional requirement that youth, persons with disability minority groups, marginalised groups, women and the elderly participate in governance.<sup>39</sup> If these provisions are fully implemented, they will ensure that the residents of a particular county or the target groups of any form of financial devolution are involved in decision making.

### **3.3 The Public Finance Management Act**

The Public Finance Management Act was enacted to, *inter alia*, provide for the effective management of public finances by the national and county governments; the oversight responsibility of parliament and county assemblies; and for the different responsibilities of government entities and other bodies on public finance management. The Act mandates different constitutional and statutory bodies, offices or organs to ensure there is public participation in budget processes. First, it mandates the Parliamentary Budget Office to observe the principle of public participation in handling the budgetary processes.<sup>40</sup> Second, it gives the Cabinet Secretary for finance the mandate to ensure that there is public participation in all budget processes.<sup>41</sup> Third, it requires of the county executive committee member for finance to ensure that there is public participation in the county government budget process provided for under section 125 (1) of the Act.<sup>42</sup>

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<sup>37</sup> Article 27 (4) of the Constitution

<sup>38</sup> Chripine Oduor and Abraham Rugo, 'Opportunities for Youth to Engage in Devolved Governance and Economic Development in Kenya,' (2013) *The Future Bulletin*, 6, available at <<http://www.abrahamrugo.com/userfiles/Opportunities%20for%20youth%20to%20Engage%20in%20Devolved%20Governance%20-%20Oduor%20&%20Muriu%202013.pdf>> accessed on 3rd June 2019.

<sup>39</sup> Article 54 of the Constitution.

<sup>40</sup> Section 10(2).

<sup>41</sup> Section 35(2).

<sup>42</sup> Section 125(2).

Under section 126 of the Act, every county is obligated to prepare a development plan in accordance with article 220(2) of the Constitution for approval by the County Assembly. The county executive committee member responsible for planning is supposed to submit the development plan before the county assembly by 1<sup>st</sup> September of each year. The development plan informs the budget priorities for the coming year.<sup>43</sup>

The Act also requires the accounting officer of an urban area or city to ensure public participation in preparing the strategic plan and the annual budget estimates for urban areas or cities as outlined in the second schedule of the Urban Areas and Cities Act.<sup>44</sup>

County governments are also mandated to establish structures, mechanisms, and guidelines for citizen participation under the Act.<sup>45</sup> County governments are expected to establish a forum known as the County Budget and Economic Forum.<sup>46</sup> The County Budget Economic Forum consists of the governor of the county who is the chairperson, other members of the county executive committee, and a number of representatives, not being county public officers, equal to the number of executive committee members appointed by the governor from persons nominated by organisations representing professionals, business, labour issues, women, persons with disabilities, the elderly and faith based groups at the county level.<sup>47</sup>

The aim of the County Budget Economic Forum is to provide a means for consultation by the county government on preparation of county plans, the County Fiscal Strategy Paper and the Budget Review and Outlook Paper for the county.<sup>48</sup> It also provides means for consultation on matters relating to budgeting, the economy and financial management at the county level.<sup>49</sup> It is worth noting that County Budget and Economic Forums were not operational as at the time of this research.

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<sup>43</sup> The Institute for Social Accountability 'What You Need to Know About the County Integrated Development Plan (CIDP)' 9, available at <[https://www.tisa.or.ke/images/uploads/What-You-Need-to-Know-About-the-County-Integrated-Development-Plan\\_2013.pdf](https://www.tisa.or.ke/images/uploads/What-You-Need-to-Know-About-the-County-Integrated-Development-Plan_2013.pdf)> accessed on 30 May 2019.

<sup>44</sup> Section 175(9).

<sup>45</sup> Section 207.

<sup>46</sup> Section 137 (1) of the Public Finance Management Act.

<sup>47</sup> Section 137 (2).

<sup>48</sup> Section 137 (3).

<sup>49</sup> Section 137 (3).

The Act also establishes county treasuries which comprise the county executive committee member for finance (the head); the chief officer; and the department or departments of the county treasury responsible for financial and fiscal matters.<sup>50</sup> The responsibility of the county treasuries is to monitor, evaluate and oversee the management of public finances and economic affairs of the county government including developing and implementing financial and economic policies in the county; preparing the annual budget for the county, among others.<sup>51</sup>

### **3.4 The County Governments Act**

The County Governments Act is meant to give effect to chapter eleven of the Constitution which deals with devolution. It provides for county governments' powers, functions and responsibilities to deliver services. Under the Act, public participation in county planning processes is compulsory.<sup>52</sup> There are seven principles of public participation under the Act:<sup>53</sup> They include, timely access to information, data, documents, and other information relevant or related to policy formulation and implementation. This principle undergirds the need for consultation with citizens in the making of county budgets.

The Act also gives citizens the right to petition the county government on any matter under the responsibility of the county government.<sup>54</sup> In the same vein, county government authorities, agencies, and agents have a duty to respond expeditiously to petitions and challenges from citizens.<sup>55</sup>

Under the Act, county governments are expected to facilitate the establishment of structures for citizen participation including the following information communication technology based platforms; town hall meetings; budget preparation and validation fora; among others.

County governments are also expected to facilitate public communication and access to information by the citizens.<sup>56</sup> County governments are to use media to, inter alia, create awareness on devolution and governance and promote citizens

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<sup>50</sup> Section 103 of the Public Finance Management Act.

<sup>51</sup> Section 104.

<sup>52</sup> Section 113 of the County Government Act.

<sup>53</sup> Section 87.

<sup>54</sup> Section 88 of the County Government Act.

<sup>55</sup> Section 89.

<sup>56</sup> Part IX.

understanding for purposes of peace and national cohesion.<sup>57</sup> In addition, County Governments are to establish mechanisms to facilitate public communication and access to information in the form of media with the widest public outreach in the county. These may include television stations; information communication technology centres; websites; community radio stations; public meetings; and traditional media.<sup>58</sup> Every county is to designate an office for ensuring access to information.<sup>59</sup>

Under section 115 of the County Government Act, each county assembly is required to develop laws and regulations that should give effect to effective public participation.

The Governor is specifically mandated to facilitate public participation in the development of policies, plans and service delivery in the county.<sup>60</sup> At the County Assembly levels, the speaker and chairpersons of the various committees of the house are responsible.

At the sub-county levels, the sub-county administrator is responsible for the coordination, management and supervision of the general administrative functions in the sub-county including the facilitation and coordination of citizen participation in the development of policies, plans and service delivery.<sup>61</sup>

At the ward levels, the ward administrator is responsible for the coordination, management and supervision of the general administrative functions in the ward including the facilitation and coordination of citizen participation in the development of policies, plans and service delivery.<sup>62</sup> At the village levels, the village administrator is responsible for the coordination, management and supervision of the general administrative functions in the sub-county including ensuring and coordinating the participation of the village unit in governance.<sup>63</sup> A major challenge at the Kenyan county governments is that the law has not defined what exactly a village is.

The Act further obligates a county to develop an integrated plan, designate planning units at all county administrative levels and promote public participation

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<sup>57</sup> Section 94.

<sup>58</sup> Section 95.

<sup>59</sup> Section 96 (1).

<sup>60</sup> Section 30(3) (g) of the County Government Act.

<sup>61</sup> Section 50(3) (g) of the County Government Act.

<sup>62</sup> Section 51(3) (g) of the County Government Act.

<sup>63</sup> Section 52(3)(a)(I) of the County Government Act.

and engagement by non-state actors in the planning process.<sup>64</sup> Under the Act, the county plans consist of the following: First, the County Integrated Development Plan (CIDP) which is a five year plan that is supposed to inform the county's annual budget. Second, a County Sectoral Plan which is a ten-year plan. Third, a County Spatial Plan which is also a ten-year plan that uses the Geographic Information System (GIS) based system. Fourth, County Governments are supposed to develop city and municipal plans.<sup>65</sup>

### **3.5 *The Urban Areas and Cities Act***

The Act gives effect to article 184 of the Constitution. Its principal purposes include to provide for the classification, governance and management of urban areas and cities; to provide for the criteria of establishing urban areas, to provide for the principle of governance and participation of residents.

The Act mandates the board of the city or municipality to ensure participation of their residents in decision making, activities and programmes.<sup>66</sup> Under section 22 (1) (a) of the Act, residents of a city, municipality or town may deliberate and make proposals to the relevant bodies or institutions on the provision of services; proposed issues for inclusion in county policies and county legislation; proposed national policies and national legislation; the proposed annual budget estimates of the county and of the national government; the proposed development plans of the county and of the national government; and any other matter of concern to the citizens.

### **3.6 *County Public Participation Guidelines***

The County Public Participation Guidelines were published by the Ministry of Devolution and Planning and Council of Governors in January 2016. The guidelines are meant to be used by all stakeholders, including county government officers, civil society and national government institutions that are engaged in activities which require public participation. The guidelines are meant to guide county governments in putting in place their specific legal and administrative public participation mechanisms. The guidelines establish nine general principles

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<sup>64</sup> Section 104.

<sup>65</sup> The Institute for Social Accountability 'What You Need to Know About the County Integrated Development Plan (CIDP)' 3, available at <[https://www.tisa.or.ke/images/uploads/What-You-Need-to-Know-About-the-County-Integrated-Development-Plan\\_2013.pdf](https://www.tisa.or.ke/images/uploads/What-You-Need-to-Know-About-the-County-Integrated-Development-Plan_2013.pdf)> accessed on 30th May 2019.

<sup>66</sup> Section 21 (g).

of public participation. These include the need for timely access to information, data, documents and other information relevant or related to policy formulation, implementation and oversight; and the need for reasonable access to the process of formulating and implementing policies, laws, and regulations including the approval of development proposals, projects and budgets, among others.

On management and coordination of public participation, the guidelines propose a coordinated administrative approach in managing public participation and civic education by both the county executive and the County Assembly.<sup>67</sup> The viable option provided in the guidelines is that the county government appoints a county public participation coordinator who acts as the administrative head for public participation. The coordinator works with the county executive committee, County Assembly and administrators in the county units.<sup>68</sup>

### **3.7 Draft Policy on Public Participation**

The draft Policy on Public Participation was published in September 2018 by the national government through the office of the Attorney General and the Department of Justice. The draft Policy is meant to apply to all public bodies in Kenya which shall be expected to comply with it as a constitutional requirement.

It is meant to be the country's overarching framework for public participation.<sup>69</sup> The Policy is meant to provide the framework for the management and coordination of public participation in Kenya for the fulfilment of the constitutional requirement on citizen engagement in development and governance processes in Kenya.<sup>70</sup>

The policy is organised into nine policy areas that highlight the key policy concerns and objectives, and sets the standards for public participation in Kenya. These standards are expected to guide all public bodies at the national and county levels, that is to say, the public bodies under both levels of government must apply the policies.

It is acknowledged by the government in this draft policy that the nature and extent of public participation contemplated by the Constitution and devolution laws has not been fully achieved by either levels of government.<sup>71</sup>

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<sup>67</sup> Paragraph 76 of the Guidelines.

<sup>68</sup> Paragraph 76 of the Guidelines.

<sup>69</sup> The Executive Summary of the Draft Policy.

<sup>70</sup> Part 1.4 of the Policy.

<sup>71</sup> Page 3 of the Draft Policy, paragraph 1.



The national and county governments are expected to effect or implement the nine objectives of the draft policy. These include: ensuring citizens continually access timely information on public issues in a language and format that is easy to understand; promoting effective public participation in planning, budgeting and implementation of approved plans and budgets; among others.

The draft policy identifies public participation in budget making as its fourth priority area. It sets six general policy standards for both levels of government in budget making. The national and devolved governments are to, *inter alia*, integrate public participation action plans in all development plans, budgets and implementation processes; provide adequate resources for public participation in planning, budgeting and implementation processes; and adopt and implement effective stakeholder mapping and engagement plans with sufficient stakeholder consultations in planning, budgeting and implementation processes.

The policy is expected to be implemented through an integrated, coordinated and consultative process by various actors both at the national and county levels of government. The draft Policy provides that the Intergovernmental Relations Technical Committee, the Council of Governors, county governments, national government, the Kenya School of Government, and the Kenya Institute for Curriculum Development would play key roles in the implementation of public participation.

Further, it is envisaged in the draft Policy that a multi-sectoral committee co-convened by the Office of the Attorney General and the Department of Justice and the Ministry of Devolution and ASAL will constitute the coordinating agency. The draft Policy is consistent with the constitutional requirements for public participation and if adopted, it can form a significant guideline for the enactment of public participation laws in the county governments.

### **3.8 Public Participation Bill, 2018**

The Bill is pending at the Senate. It is meant to give effect to the constitutional principles of democracy and participation of the people under articles 1(2), 10(2), 35, 69(1)(d), 118, 174(c) and (d), 184(1)(c), 196, 201(a) and 232(1)(d) of the Constitution. The Bill also aims at promoting transparency and accountability in decision making; enhancing public awareness and understanding of governance processes; promoting community ownership of public decisions; and promoting public participation and collaboration in governance processes.<sup>72</sup>

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<sup>72</sup> Clause 3 of the Public Participation Bill 2018.

It establishes nine principles that should guide the conduct of public participation. These include the principles that the public, communities and organisations to be affected by a decision shall have a right to be consulted and involved in the decision making process.<sup>73</sup>

Under the Bill, the authorities responsible for developing guidelines for public participation in County Assemblies shall be the county assembly committees responsible for public participation while the county secretaries shall be develop guidelines with respect to county executives.<sup>74</sup>

The Bill establishes the general public participation guidelines that apply to both national and county governments. It requires the responsible authorities to develop the specific guidelines within a stipulated timeline in accordance with the general guidelines. Key among the general guidelines is the requirement in guideline 11 that the responsible authority shall ensure that all responses are carefully and independently analysed and that the final decision is made widely available to the public, including the reasons for the decisions taken.

Before undertaking public participation, the responsible authority is expected to develop a public participation programme which should clearly identify specific purposes for consultation; the community, profession or groups to be consulted; the length of the consultations; whether submissions should be oral, written or both; and the issues or matter for consultation.<sup>75</sup>

The Public Participation Bill is a step in the right direction, as far as the realisation of effective public participation in budget making in Kenyan counties is concerned. It, however, remains to be seen whether county governments will implement the salient provisions once they become law, in light of the observation that most county governments have not implemented or applied the Public Participation Guidelines published by the Ministry of Devolution.

The Bill does not sufficiently address the main challenges on public participation especially in budget making. Its generic nature in terms of content and application (to the national and county governments) makes it ineffective in addressing the challenge of public participation in budget making in Kenyan counties.

The substantive provisions of the Bill are contained in only 4 pages (45-49) while in the schedule, which provides guidelines, are only three pages (50-53.) The thinness of the Bill in terms of content does not suggest weaknesses but it points

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<sup>73</sup> Clause 4(a) of the Public Participation Bill 2018.

<sup>74</sup> Clause 5 (2) (e) (f).

<sup>75</sup> Schedule, Guideline 6.

at the possibility that there are aspects which ought to have been provided for as per the draft Policy, that are not. The structures envisaged in the draft Policy, for instance the coordinating agency, are not provided for the Bill. The Bill is, therefore, not consistent with the draft Policy. Yet, under article 174 (c) and 174 (d) of the Constitution on the objects of devolution and the 14th function of county government, there is need to ensure and coordination of participation of people and development of administrative capacity for local level participation.

Several Kenyan counties have enacted public participation laws but some have never been gazetted for lack of a substantive policy framework at the national level.<sup>76</sup>

#### **4. Comparative Study on Public Participation**

This study draws lessons from Brazil and South African experiences and practices on participatory budgeting.

##### **4.1 Participatory Budgeting in Brazil**

Participatory budgeting is considered to be one of the most significant innovations in Latin America for increasing citizen participation and local government accountability.<sup>77</sup> It is considered to be part of a larger effort in Brazil to extend and deepen democracy.<sup>78</sup> The politics in Brazil had previously been characterised by traditional patronage practices, social exclusion, and corruption. Since the re-establishment of democracy in 1985, many local (municipal) governments, NGOs, social movements, and political parties have embraced the ideas, values and rules associated with participatory budgeting in an effort to improve policy outcomes and enrich Brazil's young democracy. The practice of participatory budgeting has since been adopted by more than 2,700 governments throughout the world.<sup>79</sup>

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<sup>76</sup> Findings of this Researcher during the PHD research on the challenges of public participation in the budget making process in Kenyan counties.

<sup>77</sup> Celina Souza, 'Participatory Budgeting in Brazilian Cities: Limits and Possibilities in Building Democratic Institutions, (2001), Vol 13 No 1, Environment and Urbanization, 6.

<sup>78</sup> Brian Wampler 'A Guide to Participatory Budgeting' (2000), available at <[https://www.partizipation.at/fileadmin/media\\_data/Downloads/themen/A\\_guide\\_to\\_PB.pdf](https://www.partizipation.at/fileadmin/media_data/Downloads/themen/A_guide_to_PB.pdf)> accessed on 17th May 2019.;

<sup>79</sup> Valeria Lvovna Gelman and Daniely Votto, 'What if Citizens Set City Budgets? An Experiment That Captivated the World—Participatory Budgeting—Might Be Abandoned in its Birthplace,' World Resource Institute, available at <<https://www.wri.org/blog/2018/06/what-if-citizens-set-city-budgets-experiment-captivated-world-participatory-budgeting#:~:text=Porto%20Alegre%20is%20hailed%20as,fallen%20away%20in%20its%20birthplace.>> accessed on 17th September 2020.

Porto Alegre, the capital of Brazil's southernmost state, Rio Grande do Sul, is hailed as the birthplace of the system known as participatory budgeting. The use of participatory budgeting began in 1989 in the municipality of Porto Alegre. A progressive political party known as the Workers' Party that was founded during the 1964-1988 military dictatorship in Brazil won elections for the position of mayor in 1988.<sup>80</sup> The Workers' Party had pledged in its campaigns to introduce democratic participation and to inverse public funds' spending priorities which had since been skewed to only focus on middle and upper class neighbourhoods. Participatory budgeting was, therefore, meant to facilitate the means to help poorer citizens and neighbourhoods receive greater levels of public spending.

Upon assuming office of the mayor in 1989 in Port Alegre, the Workers' Party encountered a bankrupt municipality and a disorganised bureaucracy. They were, therefore, prompted to try and experiment with different mechanisms to address the financial challenges, change the spending priorities and involve the citizens in budget making decisions in the first two years of office. This experimental process is what led to the birth of participatory budgeting.

Less than one thousand citizens participated in the first two years, that is, 1989 and 1990. But the number rose significantly to about eight thousand in 1992. The Workers' Party was re-elected back to office in 1992. Participation thereafter increased to over twenty thousand every year as citizens continued to realise that participatory budgeting was an important decision making venue.

The system of participatory budgeting later spread throughout Brazil although the levels of success varied according to how some administrations embraced and applied the program.<sup>81</sup> Initially, the system of participatory budgeting was adopted and implemented by progressive municipal governments which enjoyed strong bases of support from NGOs, unions and other social movements.<sup>82</sup>

In Brazil, there is no precise or exact model for participatory budgeting programs. While there are similar tenets and institutional mechanisms, these programs are structured in response to the particular political, social, and economic

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<sup>80</sup> Wampler, (n 78). See also Center for Urban Development Studies of the Harvard Design School, 'Assessment of Participatory Budgeting in Brazil,' *Inter-American Development Bank*, Sustainable Development Department, (Washington, D. C 2005).

<sup>81</sup> Vera Schattan Coelho, Barbara . Pozzoni and Mariana Cifuentes, 'Participation and Public Policies in Brazil,' 4, available at <[https://assets.publishing.service.gov.uk/media/57a08c8c40f0b649740012ae/participation\\_and\\_public\\_policy.pdf](https://assets.publishing.service.gov.uk/media/57a08c8c40f0b649740012ae/participation_and_public_policy.pdf)> accessed on 22nd May 2019.

<sup>82</sup> Wampler, (n 78), 3.

environment of each city or state.<sup>83</sup> Under the Brazilian constitutional and legislative framework, the mayor has virtually all budgetary and administrative authority. Legal authority is derived from the requirements for popular participation in decision-making embodied in the charter of local governments, commonly known as “Lei Organica.”<sup>84</sup> The law does not stipulate the method by which public participation in budget making is to be discharged by the government. It is left to the mayor and the residents under them to stipulate the rules and frameworks.

The city council, which is the legislative organ at the municipal level has no powers to influence policy-making or the distribution of powers.<sup>85</sup> As such, the mayor has powers to implement a participatory budgeting program without necessarily getting consent of the city council which is the legislative branch.

Procedures and systems of participatory budgeting in the various municipal and state governments in Brazil are ‘similar but not identical.’<sup>86</sup> Rules on the conduct of public participation in budgeting in Brazil are designed by elected governments subject to the input by respective citizens. There are five principal tenets that undergird the setting of the said rules: First, throughout the financial year, there is consistent mobilisation of participants and their elected representatives (citizen-delegates). Second, a municipality is divided into regions to facilitate meetings and the distribution of resources. Third, the government creates a Quality of Life Index. This is meant to ensure that areas with higher poverty, higher population, and less infrastructure receive a higher proportion of resources than regions that are better-off. Fourth, there is public deliberation and negotiation between the residents who participate and the government over resources and policies. The elected representatives visit all pre-approved project sites before the final vote. Fifth, the elected representatives vote on all final projects and the results become part of the public record.<sup>87</sup>

For all development projects, the districts elect two representatives to a municipal-wide council that is established to oversee the program.<sup>88</sup> The municipal-wide council meets regularly with the municipal government to monitor the

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<sup>83</sup> Bheki Langa, B and Ateikhena Jerome ‘Participatory Budgeting in South Africa,’ (2004) IDRC Working Paper Series, available at <<https://idl-bnc-idrc.dspacedirect.org/bitstream/handle/10625/27571/120441.pdf?sequence=1>> accessed on 23rd August 2020.

<sup>84</sup> Inter-American Development Bank, ‘Assessment of Participatory Budgeting in Brazil,’ (2001) Center for Urban Development Studies, Graduate School of Design, Harvard University, 15.

<sup>85</sup> Wampler, (n 78).

<sup>86</sup> Wampler, (n 78) 6. See also Souza, (n 77).

<sup>87</sup> Wampler, (n 78) 6.

<sup>88</sup> Wampler, (n 78) 6.

program. When participatory budgeting participants finally approve the annual budget, the executive sends it to the city council to be approved. A year-end report that provides the details of projects and programs to be implemented is prepared.<sup>89</sup> Programs and projects under implementation or execution are monitored by neighbourhoods committees.

#### 4.1.1 How Participatory Budgeting Meetings are Conducted

Participatory budgeting meetings are conducted in two phases. The first phase that runs from March to June involves the distribution of information, the initial discussions on policies, and the establishment of the number of elected representatives. Neighbourhood meetings' mobilisation is often high because the citizen turnout determines the number of elected representatives from each neighbourhood to the regional meetings. A greater number of elected representatives from a particular neighbourhood increase the likelihood of having a project selected as final votes are held at the regional level. This is a key motivator for participation of citizens in Brazil – that their input counts in the ultimate decisions to be taken in the budget process.

The meetings take approximately two hours at both the regional and neighbourhood levels.<sup>90</sup> The meetings are structured such that the first part of the meetings is information-oriented. This is where the participants discuss and share information amongst themselves. In the second part, information is formerly presented and the third part is a question and answer session.

In speaking or asking a question, there is a general limit of three minutes. This, according to Wampler, helps to keep 'the pace of the meeting moving right along.'<sup>91</sup> Citizen-delegates are not paid for their participation, although some municipalities provide bus fare to reduce the transportation costs.

The second phase defines the policies and projects that will be implemented by the government for the coming fiscal year. It is expected during this stage that participants shall have acquired sufficient information to promote the priorities of their communities and to make decisions at the regional meetings. It is at the regional meetings that final decisions on specific public works or the definition of general social priorities are made.

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<sup>89</sup> Inter-American Development Bank, (n 84) 17.

<sup>90</sup> Wampler, (n 78) 10.

<sup>91</sup> Wampler, (n 78) 10.

Public resources are distributed on the basis of two criteria. First, as noted earlier, resources are distributed based on the Quality of Life Index prepared by the government. The Quality of Life Index ensures every region receives a specific percentage of the budget depending on its overall need. Regions that are found to be wealthier and endowed with more advanced infrastructure receive a lower percentage than poorer regions which have little formal infrastructure.<sup>92</sup> The second criterion is the mobilisation and deliberation processes within the region. Organised groups compete, mobilise, negotiate and deliberate within their own regions over available resources. Groups form alliances to promote particular projects since not all projects can be supported at one instance.

When ready, the municipal budget council sends their selected proposed projects to the mayor's office. The mayor's staff adds the proposal to pre-existing budget items, for instance, debt payments, personnel, etc. and sends it to the legislature for approval. Brazil's legislature is weak, it generally approves the budget as presented. The final budget is then implemented over a one-year period.

#### 4.1.2 Assessment of Brazil's Participatory Budgeting

Participatory Budgeting in Brazil has succeeded in fostering the efficient and democratic allocation of resources and citizen involvement in the planning and management of their localities.<sup>93</sup> The participatory budgeting system is seen to be successful for at least four reasons: First, Brazil's participatory budget programmes tend to focus more on immediate needs. Second, Brazil's system of participatory budget is less structured. Individuals affected rather than representatives are likely to attend and participate. Third, participatory budgeting in Brazil is more deliberate i.e. citizens assemble, debate and set priorities on annual basis. Budget issues are discussed and negotiated continuously throughout the year. Fourth, in Brazil, the municipal effectively and efficiently disseminates information using various methods including: printing and distribution of rule books and pamphlets; advertisement of meeting time and places (in Port Alegre they use buses to advertise calendars for participatory budget assemblies); newspapers advertisements, government television programmes, among others.

Participatory budgeting in Brazil contributed to a more equitable distribution of city services. By 1997, sewer and water connections went up from 75 percent

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<sup>92</sup> Ibid.

<sup>93</sup> Inter-American Development Bank, (n 84).

to 98 percent; health and education budgets increased from 13 percent to about 40 percent; the number of schools quadrupled; and road building in poor neighbourhoods increased five-fold. Importantly, participation in budgeting meetings grew from fewer than 1,000 people per year in 1990 to about 40,000 in 1999.<sup>94</sup>

In municipal governments where participatory budgeting has been adopted, there has been increased spending on education and sanitation and reduced infant mortality. It is estimated that cities without participatory budgeting have infant mortality levels similar to Brazil's mean. However, infant mortality drops by almost 20 percent for municipalities that have used participatory budgeting for more than eight years. This is after taking into account other political and economic factors that might also influence infant mortality.<sup>95</sup>

Investment in participatory budgeting programmes has therefore yielded significant benefits to the public in Brazil and it continues to inspire many countries and governments. The evidence of improved education and sanitation strongly suggests that the investment in these programs is paying important dividends.<sup>96</sup>

Notwithstanding the above milestones and gains, participatory budgeting system in Brazil has in the recent years suffered set-backs. These set-backs have seen the level of participation in budget making decline from around 2002 to date. The main set back arose from the fact that in the 2000s, the government at the federal level started receiving new sources of funding at a scale that had not existed in the 1990s. This funding came without requirements for citizen participation, discouraging the participatory approach to budget making.<sup>97</sup>

After four terms of Workers' Party government, an opposition group took over and prioritised other policy areas. Participatory budgeting continued, but with reduced funds allocated through open assemblies with citizens. Consequently, thousands of projects approved in the 1990s and early 2000s are still pending implementation since the successive political leadership prioritised other areas. It

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<sup>94</sup> Gelman and Daniely, (n 79) 3.

<sup>95</sup> Gelman and Daniely, (n 79).3.

<sup>96</sup> Brian Wampler and Mike Touchton, 'Brazil Let Its Citizens Make Decisions About City Budgets: Here's What Happened,' (22/1/2014) Washington Post, , 1, available at <[https://www.washingtonpost.com/news/monkey-cage/wp/2014/01/22/brazil-let-its-citizens-make-decisions-about-city-budgets-heres-what-happened/?noredirect=on&utm\\_term=.52f12d6884b5](https://www.washingtonpost.com/news/monkey-cage/wp/2014/01/22/brazil-let-its-citizens-make-decisions-about-city-budgets-heres-what-happened/?noredirect=on&utm_term=.52f12d6884b5)> accessed on 17th May 2019.

<sup>97</sup> Gelman and V. Daniely, (n 79) 4. See also Carla de Paiva Bezerra, 'Why Has Participatory Budgeting Adoption Declined in Brazil,' available at <[https://www.academia.edu/37379437/Why\\_has\\_Participatory\\_Budgeting\\_adoption\\_declined\\_in\\_Brazil](https://www.academia.edu/37379437/Why_has_Participatory_Budgeting_adoption_declined_in_Brazil)> accessed on 22nd May 2019.



is, therefore, feared that the once vibrant participatory budget system in Brazil has declined and could fall further in the coming years.<sup>98</sup>

#### 4.2 Participatory Budgeting in South Africa

Since independence in 1994, successive governments of the republic of South Africa have been making attempts to address social inequalities brought about by apartheid. Apartheid was the ideology introduced in South Africa that called for the separate development of the different racial groups in South Africa. It forced the different racial groups to live separately and develop separately, and grossly unequally too.<sup>99</sup>

South Africa owes its participatory trajectory to several waves of democratisation where communities essentially established mechanisms to accomplish political transformation, ultimately culminating into the establishment of a participatory ideology as a pillar of democracy, albeit conceptualised through various lenses of the democratic imperative.<sup>100</sup>

South Africa's first democratic election in April 1994 ushered in a new chapter in the country's history, allowing the previously excluded 80% of the population to vote for the first time.<sup>101</sup> One of the serious challenges that faced the government then was the need to reprioritise existing budget resources and service delivery from tertiary services for middle-class white people in cities towards primary services for low-income black people in the rural areas in the provinces.<sup>102</sup>

In order to address the challenge above, South Africa had to reform its entire budgetary system, hence the designing and implementation of a new public financial management system.<sup>103</sup>

Legislative and regulatory frameworks in South Africa emphasise the importance of good governance and the necessity for public participation.<sup>104</sup> The South African Constitution divides functions between the three spheres of

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<sup>98</sup> Gelman and V. Daniely, (n 79) 4.

<sup>99</sup> See South African History Online, available at <<https://www.sahistory.org.za/article/history-apartheid-south-africa>> accessed on 17th May 2019.

<sup>100</sup> Marchel Reutener and David Fourie, "The Role of Civic Participation in the South African Budgeting Process," (2015) 4(3), *Public and Municipal Finance Journal*, 7-15.

<sup>101</sup> Langa Jerome, (n 83).

<sup>102</sup> Ibid.

<sup>103</sup> Ibid.

<sup>104</sup> Reutener and Fourie, (n 100) 10.

government. These are national, provincial and local governments.<sup>105</sup> These spheres are distinctive, interdependent and interrelated.<sup>106</sup> Some government functions are shared (concurrent) and others are exclusive.

The provincial sphere performs functions like school education, health and social grants, which do not lend themselves to substantial cost recovery, but account for a substantial proportion of public spending.<sup>107</sup> Provinces only raise about 4% of their own revenue.<sup>108</sup> Municipalities, by contrast, have significant revenue-raising powers and collect between 60 to 95 % of their own revenue, as two-thirds of their activities such as water, electricity and refuse-removal, are self-funded.<sup>109</sup>

The concurrent functions shared between national and provincial governments include school education, health services, social security and welfare services, housing and agriculture.<sup>110</sup> For these functions, national government is largely responsible for providing leadership, formulating policy, determining the regulatory framework including setting minimum norms and standards.<sup>111</sup>

The Constitution of the republic of South Africa, 1996 embeds public participation as a key element of governance. Under the Constitution, the objects of local government are to 'encourage the involvement of communities and community organisations in the matters of local government.'<sup>112</sup> The Constitution also restricts the enforcing of promulgated by-laws, unless they have been published in the official provincial government gazette and made accessible to the public by the municipality concerned.<sup>113</sup> It expounds the basic values and principles that must govern public administration.<sup>114</sup> Section 195(1) (e) stipulates that 'people's needs must be responded to, and the public must be encouraged to participate in policy-making', whilst section 195(1)(g) stipulates that 'transparency must be fostered by providing the public with timely, accessible and accurate information.'

South Africa has also enacted statutes to provide for public participation in governance. The Municipal Structure Act 1998 allows for a ward participatory

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<sup>105</sup> See chapter 5, 6 and 7 of the Constitution of the Republic of South Africa, 1996.

<sup>106</sup> *Ibid*, article 40.

<sup>107</sup> *Ibid*, 6.

<sup>108</sup> *Ibid*.

<sup>109</sup> Langa and Jerome, (n 83).

<sup>110</sup> *Ibid*. See Schedule 4 of the Constitution of the Republic of South Africa, 1996 on functional areas of concurrent national and provincial legislative competence.

<sup>111</sup> *Ibid*.

<sup>112</sup> Chapter 7, Section 152(1)(a) of the Constitution of the Republic of South Africa, 1996.

<sup>113</sup> Section 162 the Constitution of the Republic of South Africa, 1996.

<sup>114</sup> *Ibid*, chapter 10.

system and sets up clear guidelines for ward committees.<sup>115</sup> The object of a ward committee is to enhance participatory democracy in local government.<sup>116</sup>

The ward committee system in South Africa is, therefore, a significant feature of local government. A ward committee consists of not more than ten persons and is chaired by a councillor representing the ward. Ward committees are seen as the vehicle for deepening local democracy and the instrument through which a vibrant and involved citizenry can be established.<sup>117</sup>

Significantly, sections 23(1) and 27(1) of the Municipal Finance Management Act, 2003 require that planning related to the budgeting process must be aligned to a strategic developmental initiative. Municipal Integrated Development Plans are subsequently developed and have to comply with this statutory requirement to promote and enhance developmental local government.<sup>118</sup>

There is also the Local Government Municipal Systems Act<sup>119</sup> which defines the legal nature of a municipality as including ‘the local communities within the municipal area, working in partnerships with the municipality’s political and administrative structures to provide for community participation.’ The clearest and most specific requirements for public participation in local governance are outlined in chapter 4 of said Act. Section 16 requires that the municipality must develop a culture of municipal governance that compliments formal representative government with a system of participatory governance. Section 16(1) mandates each municipality to put in place mechanisms to ‘encourage, and create conditions for, the local community to participate in the affairs of the municipality, including in: the preparation, implementation and review of its integrated development plan.’

The above provision points to an emphasis on participation of people in budget making and the related aspects of the preparation and implementation of development plans as well as the establishment, implementation and review of the performance management systems and its monitoring.

Administratively, the executive arm of government in South Africa established a planning commission made up of government and nongovernment repre-

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<sup>115</sup> Ibid, chapter 4.

<sup>116</sup> Ibid, section 72. see ‘Draft Public Participation Policy,’ (2016), available at <<https://www.overstrand.gov.za/en/documents/policies/3290-draft-public-participation-policy-may-2016/file>> accessed on 11th April 2019.

<sup>117</sup> Ibid, 5.

<sup>118</sup> Ibid.

<sup>119</sup> Local Government Municipal Systems Act.

sentatives to set long-term government priorities for the country (up to 2030).<sup>120</sup> The priorities in the long term plan feed into the shorter-term plans, budgets, and ministry performance agreements to strengthen accountability.<sup>121</sup> At the level of the budget process, the South African treasury has also been engaging with Civil Society Organisation working on fiscal issues to see whether there might be a way to collaborate to increase value for money outcomes.<sup>122</sup>

South Africa's parliamentary committees are required to invite civil society and experts to comment every time the budget is tabled.<sup>123</sup> The public can make submissions in writing and present at hearings. Reports for the committees are generated from the consultations. A new parliamentary budget office has been established comprising of technical staff to collect the information, including civil society input, and advise Parliament.<sup>124</sup>

South Africa also has a feedback mechanism on service delivery. There is a department for Performance Monitoring and Evaluation which houses a telephone hotline where citizens can report any incidences of bad service delivery.<sup>125</sup> The system is structured such that a unit fields these calls, records them, makes enquiries at the site of the lack of service delivery and checks with the citizens afterwards to see if their concerns have been addressed.<sup>126</sup> If the citizen's problems persist an investigation of the complaint will be undertaken. These investigations involve site visits to assess the reasons why the service delivery objectives are not being met, specific and concrete recommendations for improvement, and follow up audits to see whether the improvements have been made.<sup>127</sup> After these, the department reports back to the public its findings and activities. The hotline was embraced and utilised by citizens extensively following an extensive public awareness on the establishment of the hotline.<sup>128</sup>

Such an organised feedback, monitoring and evaluation system works well in governments that have established strong and independent institutions, and

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<sup>120</sup> Lindsey Marchessault 'Public Participation and the Budget Cycle: Lessons from Country Examples,' available at <<http://www.fiscaltransparency.net/resources/files/files/20151116137.pdf>> accessed on 12th April 2019.

<sup>121</sup> *Ibid.*

<sup>122</sup> *Ibid.*

<sup>123</sup> *Ibid.*

<sup>124</sup> Langa and Jerome, (n 83).

<sup>125</sup> Marchessault, (n 120) 7. See also Department for Performance Monitoring and Evaluation 'Citizen-based Monitoring,' available at <<https://www.dpme.gov.za/keyfocusareas/cbmSite/Pages/default.aspx>> accessed on 20 May 2019.

<sup>126</sup> *Ibid.*

<sup>127</sup> *Ibid.*

<sup>128</sup> *Ibid.*

where there is good will and commitment by political leaders to make systems run properly. It is seen to have worked in South Africa.<sup>129</sup>

In South Africa, public participation takes place mainly through political structures.<sup>130</sup> Under the law, every municipality is required to establish appropriate mechanisms, processes and procedures to enable the local community to participate in the affairs of the municipality.<sup>131</sup> At the lowest levels, public participation in budget making occurs through informal gatherings of people and their councillors where questions on municipal matters are raised and answered. In municipalities such as Tlokwe, these gatherings are referred to as *izimbizo*.<sup>132</sup> There are also other public meetings, consultative sessions and report back sessions with the local community organised in accordance with the Systems Act from a case to case basis.<sup>133</sup>

Public participation meetings in South Africa take place through a ward committee system and sub-council committee for large cities.<sup>134</sup> As observed earlier, the ward committee consists of a ward councillor and 10 members elected by the communities. Participation at the ward level meeting is voluntary and no remuneration is paid to any participant.<sup>135</sup> The ward committee makes recommendations of what affects the ward. The sub-council committee which is established in large cities consists of the councillors representing the wards included in its area as well as those determined by the council, and committees from every ward and government representatives.<sup>136</sup>

Public Participation in South Africa also includes government officials and members of the civil society, private sector and academic institutions. There are budget tips campaigns encouraging the public to provide feedback and suggestions on priorities for budget by means of: email note deposited in boxes in offices libraries as well as letters to governors.<sup>137</sup>

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<sup>129</sup> Ibid.

<sup>130</sup> Section 17 of the Local Government Municipal Systems Act, No 32 of 2000.

<sup>131</sup> Ibid, section 17(2).

<sup>132</sup> John Motale 'Public Participation Strategy for Budgeting in Local Government: The Case of Tlokwe Local Municipality,' (2012), available at <[https://repository.nwu.ac.za/bitstream/handle/10394/9150/Motale\\_IJ.pdf?sequence=1](https://repository.nwu.ac.za/bitstream/handle/10394/9150/Motale_IJ.pdf?sequence=1)> accessed on 20th May 2019, 18.

<sup>133</sup> Section 34 of the Systems Act.

<sup>134</sup> Madumo, (n 3).

<sup>135</sup> Ibid, 97.

<sup>136</sup> Ibid, 32.

<sup>137</sup> United Nations, 'Participatory Budgeting in Africa: A Training Companion With Cases From Eastern and Southern Africa Volume I: Concepts and Principles,' (2008) *United Nations Human Settlements Programme and Municipal Development Partnership for Eastern and Southern Africa*, 27.

There are regular road shows by the mayor at which the mayor and his team travel to all the sub-counties inviting citizens to attend meetings and answer citizen questions on the last budget and the next or current proposed budget.<sup>138</sup> Information from the municipality to the citizens is done through the media, mainly through the local newspaper or newspapers of its area; a newspaper or newspapers circulating in its area and determined by the council as a newspaper of record; or by means of radio broadcasts covering the area of the municipality.<sup>139</sup> There are special legal requirements that every municipality establishes its websites and publishes all information that is supposed to be made public under the law.<sup>140</sup>

Civil society organisations have also played a key role in the establishment of structures and initiatives to promote participatory budgeting in South Africa.<sup>141</sup> There is the Budget Information Service (BIS) of the Institute for Democracy in South Africa (IDASA) which was founded in 1986 as an effort to create a safe space for dialogue between those in power and the liberation movements.<sup>142</sup> IDASA established the Budget Information Service (BIS) in 1995 in order to produce timely, critical, objective and accessible information on the impact of the budget on poor people and ensure the smooth flow of public policy related information between citizens to government.<sup>143</sup> The main aim of the BIS system was to enhance the participation of legislatures and civil society in the budget process.<sup>144</sup>

Despite all the legal interventions, it is acknowledged that there remain challenges in the actual implementation. Effective public engagement is still inhibited by factors such as access to meeting venues, interest group identification, communication and even the recognition of developmental suggestions.<sup>145</sup>

## 5. Lessons for Kenyan Counties

Kenyan counties can draw numerous lessons from established mechanisms to ensure effective public participation in budget making at the county levels.

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<sup>138</sup> United Nations, (n 137), 58.

<sup>139</sup> Section 21 of the Systems Act.

<sup>140</sup> *Ibid*, section 21B.

<sup>141</sup> Langa, and Jerome, (n 83).

<sup>142</sup> *Ibid*.

<sup>143</sup> *Ibid*, 13.

<sup>144</sup> *Ibid*, 14.

<sup>145</sup> *Ibid*.

First, the formula, policies and strategies employed in budget making should emphasise models for distributing public resources to the poorest regions first. This will act as incentives for the people to participate in policy making and project implementation. Brazil established what they refer to as the Quality of Life Index, a model that is meant to ensure that areas with higher poverty, higher population, and less infrastructure receive a higher proportion of resources than regions that are better-off.

Second, for effective public participation in budget making, political commitment at the county executive level is advisable. From the outset, legal arrangements need to ensure that proposals received from citizens through the participatory process are implemented. Full implementation is only possible if the political leadership is fully committed. The Brazilian experience during the reign of the Worker's Party in the 1990s is a good illustration.

Third, it is advisable that county government ensure public participation in budget making is designed such that citizens at lowest local levels mainly give input on the projects within their neighbourhoods meant to benefit them. Citizens should be given room to discuss budgets for particular projects they consider most urgent. This is as opposed to the existing frameworks in Kenyan Counties where citizens are asked to give input on complex, general county budgets.

Fourth, county governments need to focus more on quality of participation as opposed to participation as a mere formality. Citizens who participate need to have a basic understanding of the budget items, the importance of their participation and their right to decide for themselves how they should be governed. The system in Brazil allows the participants who are the elected representatives to vote on the final projects and their decision/vote result is implemented. This gives meaning to the participatory process in budget making in Brazil.

Fifth, it is advisable that there be an increase in the number of participants from the lowest levels upwards. The more citizens participate, the wider the scope of ideas and views on policy steps and the greater the legitimacy of government action and its success. As the ladder of participation rises, there is need to ensure individuals who participate are not handpicked by the County Government arbitrarily. Citizens themselves should be given the opportunity to elect their own representatives as happens in Brazil.

Sixth, it is important that county governments enhance the implementation frameworks so as to accommodate the citizens in the entire budget making and implementation process. Citizen involvement in monitoring and implementation

stages makes participation in budget making useful and as it provides the checks and balances critical for any governance system. In Brazil, neighbourhood committees monitor implementation of projects, thus giving citizens a sense of control and ownership on projects.

Seventh, the consistent and year-long mobilisation of citizens in Brazil if adopted by county governments helps to foster a deeper understanding by the citizens of the budget policy, budget documents and the significance of their participation.

In summary, public participation in budget making should be well-structured and include capacity building to ensure active and informed participation by diverse segments of the population. The model should ensure inclusion of the poor in decision-making about projects of any scale – small and large.<sup>146</sup> When public engagement is limited or curtailed, the implementation of government policies frequently face resistance and fail to achieve desired objectives.<sup>147</sup> Direct citizenship, through participatory budgeting in particular, inculcates improved decision making and facilitates social interaction and uptake of democratic values and principles.

## 6. Summary of Findings

Some of the challenges of public participation have been singled out in the draft public participation policy. They include absence of standards, inadequate coordination among providers, ineffective inclusion of special interest groups, incoherent participation logistics, poor communication, and citizen apathy arising from inadequate implementation of the citizens' priorities and feedback to them on the decisions taken on their proposals.

The legal environment on public participation on budget making and other policy development processes was found not to be facilitative. At the national levels, there is a policy on aggregate public participation in government processes and a guideline to public participation for counties. Both the documents are guiding but not binding on public participation seeking and provision behaviour. The Senate was found to be at a stage in formulating and debating the Public Participation Bill 2018, it has since stalled and there is no clear way forward.

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<sup>146</sup> Gelman and Votto, (n 79) 7.

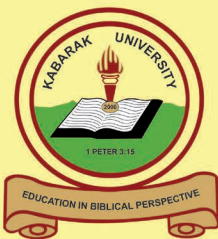
<sup>147</sup> Reutener and Fourie, (note 100).



## **7. Recommendations**

This study makes the following five key recommendations:

First, the Senate should be pushed to fast track the public participation law that seems to have stalled. Second, it is advisable to have a national and county government policy on public participation in budget making process. There is also need to have specific public participation policies in every county. Third, County Governments should enact Public Participation Acts that are consistent with constitutional requirements for public participation especially in the budget making process. Fourth, the County Executive and County Assemblies should work together in ensuring there is a participatory budgeting process. Collaboration between these two key institutions will guarantee the success in implementation of public participation in the budget making process. Fifth, the envisaged laws on public participation should provide sanction for concerned county government officials who fail to ensure public participation in the budget making process. This will help in checking county government officials in charge of public participation and pushing them to discharge their duties well in facilitating public participation.



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