

## Module 2 Session 3: Responsibilities of Citizens under the Constitution and Legislation

### TASK 2.4 ■ RECOMMENDATIONS FOR EFFECTIVE PUBLIC PARTICIPATION

2 HOURS

#### TASK OBJECTIVE

- ❖ UNDERSTAND EXISTING OPPORTUNITIES AND MECHANISMS TO IMPROVE PUBLIC PARTICIPATION IN BUDGETING

#### RESOURCES NEEDED

- ✓ Commission on Revenue Allocation: Guidelines on Formation of the County Budget and Economic Forum
- ✓ Toward Public Participation In The County Budget Process In Kenya: Principles And Lessons From The Former Local Authority Service Delivery Action Program (LASDAP)
- ✓ A Short Case Study on Participatory Budgeting in the Democratic Republic of Congo (DRC)
- ✓ CBEF – Principles and Options (Executive Summary)
- ✓ Opportunities in the Kenyan Legal Framework for Public Participation (County Level)

#### TASK EXPLANATORY NOTES

1. In groups of five/ six people review the readings provided in the task below:
2. Assign to each member of your group one/two of the readings and then allow each member to present the information from his/her reading to the rest of the group.
3. Take notes as you listen to these brief presentations, since they will need to have the information for an extended group task.
4. In a plenary session discuss key points that came out of the readings.
5. In your group develop specific recommendations on how to improve public participation in your county budget process that may be presented to your county governor or CEC Finance.
6. Give a short presentation of your recommendations, after which the other participants may ask questions and debate your proposals.

#### TASK 2.4

Read through the readings below then develop 5 to 10 recommendations on how to improve public participation in your county budget process to be present to your county governor or CEC Finance.

Give 3-5 recommendations related to the structure of participation (how government and the public should engage)

1)

2)

3)

4)

5)

Give 3-5 recommendations on what the public should be asked to give views on.

1)

2)

3)

4)

5)

## **READING ONE: COMMISSION ON REVENUE ALLOCATION: GUIDELINES ON FORMATION OF THE COUNTY BUDGET AND ECONOMIC FORUM**

### **A INTRODUCTION**

These guidelines have been produced to provide county governments, citizens and other stakeholder's basic information on public participation during the budget process according to the Public Finance Management Act 2013. The County Budget and Economic Forum (CBEF) is set-up to coordinate and collect views from

the public during the budgeting process and function as a think-tank for the County government in terms of financial and economic management. The CBEF assists the county to analyse and identify its priorities as they budget for programs, improve coordination between the citizens and government and improve harmonization of project implementation and funding. The guidelines are structured to clarify the establishment of the CBEF, and then provide administrative guidance for the CBEF and how its members are nominated. It then proceeds to break down the functions of CBEF and how to operationalize the forum. You are encouraged to read it together with the Public Finance Management Act 2012 section 137 which is the basis of developing these guidelines. In the event that there is a conflict, the PFM Act shall preside.

We hope that these guidelines will contribute to create awareness in the country and improve transparency, coordination and public participation in the management of public finance in Kenya.

This document was developed through a unique collaboration between the Commission on Revenue Allocation, the International Budget Partnership Kenya, The Institute for Social Accountability, and CBEF members in both Busia and TaitaTaveta Counties. The team combined legal knowledge with expertise on public participation and experience from the ground. The document lays out basic guidance for counties as they attempt to comply with the Public Finance Management Act 2012, Section 137

## **B. ESTABLISHMENT**

*Establishment of county budget and economic forum for county budget consultation process: (The Public Finance Management Act 2012)*

Section 137. (1) As soon as practicable after the commencement of this Act, a county government shall establish a forum to be known as the (Name of the County) County Budget and Economic Forum.

(2) The County Budget and Economic Forum shall consist of—

(a) The Governor of the county who shall be the chairperson;

(b) Other members of the county executive committee;

(c) 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.

(3) The purpose of the Forum is to provide a means for consultation by the county government on—

(a) Preparation of county plans, the County Fiscal Strategy Paper and the Budget Review and Outlook Paper for the county; and

(b) Matters relating to budgeting, the economy and financial management at the county level.

(4) In addition to the above, consultations shall be in accordance with the consultation process provided in the law relating to county governments.

## **C. COMPOSITION**

1. The County Budget and Economic Forum (CBEF, or “The Forum”) shall be chaired by the Governor of the county.

2. The other government members shall consist of all County Executive Committee (CEC) members, including the Deputy Governor, for a maximum of 11 members.

3. An equal number of non-state members shall be drawn from organizations including those representing professionals, business, labour issues, women, persons with disabilities, the elderly and faith based groups at the county level.

4. All members, state and non-state alike, are equal members of CBEF and shall have equal votes and equal access to information.

5. Members shall generally sit on CBEF until a new Forum is appointed by an incoming governor.
6. The Secretary to the CBEF shall be elected from among the non-state actors.

#### **D. NOMINATION**

1. Upon taking office, and within 30 days after the appointment of the county executive members, the Governor shall release a call for nominations to the CBEF. The call shall clarify the type of information that must be submitted with each name, such as information about the degree to which the nominee represents a broad constituency in the county.
2. The call shall provide nominating organizations 21 days to submit their nominees in writing to the Governor.
3. Once the Governor has received the nominations, he shall have 30 days to make the final appointments.
4. Once the appointments have been made, the Governor shall have 7 days to publish and publicize the names of the appointments along with a basic description of the roles of the CBEF and its members, as well as the date of the Forum's first meeting. This information shall be published using print media, radio, public notices in religious institutions and markets and other available means.
5. Nominees and final appointees shall have at least a diploma and basic knowledge of budget and economic affairs.

#### **E. FUNCTIONS**

1. The Forum shall facilitate public engagement with the broader budget process from formulation through implementation. Including engagement on the following dates with the following documents:

##### *Requirements of Budget Formulation*

- a. September 1-Discuss county priorities to inform major plans. In discussing the Annual Development Plan, due on this date, reference shall be made to the County Integrated Development Plans, sector plans and other plans as required by the County Governments Act. Those plans that are longer-term in nature shall also be discussed by the Forum as needed beyond the annual discussion in September.
- b. February 28-Discuss overall estimates of revenue, spending, deficit, and the ceilings for each sector (e.g., health). These ceilings must be set when developing the County Fiscal Strategy Paper.
- c. April 30-Discuss within sector priorities to be tabled in the county's budget estimates (the executive's budget proposal submitted to the Assembly).
- d. June 15-Discuss debt, cash flow, and other documents tabled as part of the budget proposal that relate to how the county's finances are being managed.

##### *Requirements of Budget Implementation*

- a. 30 days after the end of each quarter- Review quarterly budget implementation reports and discuss emerging challenges in implementation.
- b. November -Discuss annual review of budget contained in the County Budget Review and Outlook Paper, as well as provisional ceilings for sectors to begin undertaking sector hearings.
- c. Discuss annual report on public participation by governor as required by CGA Section 92 (no date).
2. The Forum shall use sector-based consultations that lead into the budget. Sector dialogue should be in advance of the Fiscal Strategy Paper, sometime between September and January, with exact dates fixed by the County Treasury Circular that is released by August 30.
3. The Forum shall discuss and facilitate discussion on issues around the broader county economy and overall financial management, as per the requirements of the law (Section 137:3b). The Forum can engage additional professionals and technical expertise in the area of economic development to support their deliberations.

4. Committees of the Forum and sector committees shall consist of both state and non-state members with opportunities for both to chair/co-chair alternately.
5. CBEF shall ensure that the county's official plan and budget documents are produced in simplified and friendly versions for use by the Forum and the public. Where appropriate, these should also be produced in Swahili or local languages. The Forum should ensure that these documents are widely available to the public.
6. In organizing public consultations, the Forum shall cooperate with the County Assembly as far as possible to avoid unnecessary conflict.
7. The resolutions of the CBEF shall be documented and made available to the public within 7 days of any meeting or activity.
8. The Office of the Governor shall provide secretarial services to the CBEF, which shall, under the guidance of the CBEF Secretary, implement the decisions of the Forum and facilitate its functioning.

## **F. CONSULTATION PROCESS**

1. In organizing public consultations throughout the budget cycle, the Forum shall work through organized citizen groups in the county, including the constituent groups within the Forum: women, business, youth, professionals, labour, people with disabilities, elderly, religious groups, and so on.
2. The non-state members of the Forum have a responsibility to regularly engage with their constituents, both through sharing information from the Forum with constituencies, and representing the interests of constituencies within the Forum. This is a primary mechanism to facilitate ongoing engagement with county planning and budgeting.
3. Beyond regular communication between the members of the Forum and their constituents, there should also be other public fora held, at village, ward and sub-county level. These fora should follow the budget calendar and relate to the issues discussed above (under point 2 of "Functioning").
4. While coordinating with such fora, the CBEF shall follow basic principles of public participation contained in the County Governments Act (Section 87), as well as the 10 key principles described below:

### **1. Public consultations should be open to the widest spectrum of citizens and taxpayers, without discrimination.**

The "public" refers to citizens, residents and taxpayers who are not government officials.

**2. Safeguards should be established to prevent consultative forums from being dominated by any one political group, organized interest, or politician** These safeguards should include open and transparent proceedings and competitively selected technical staff empowered to manage procedures. Where appropriate, there may be a need for vetting of participants.

**3. Public consultations must have clear and specific purposes, and these purposes should generally be to seek feedback on government plans, budgets and budget implementation, to seek specific preferences over a defined set of priorities, such as prioritizing a list of capital investments, and to present and seek feedback on audit reports and queries raised by auditors.** The purpose of the consultation should be made known in advance to the public, along with relevant documentation, so that members of the public can prepare.

**4. The timeline and venues for public consultations should be made known at least two weeks in advance of the consultation to ensure that people can prepare themselves to participate.** The venue for consultations should be consistent, wherever possible, so people know where they need to be in advance. The venue selection should take into consideration citizen preferences for where they feel most comfortable expressing their views. A calendar of events must be released at the start of every financial year.

**5. Public consultations must set aside dedicated time for public feedback and questions.** A meeting at which officials simply present to the public without receiving any feedback or questions does not constitute public participation

**6. Public consultation in the planning and budget process should occur at all stages in this process, including formulation, enactment, implementation, and oversight/evaluation.** This means that there must be consultations on at least a quarterly basis for any ongoing financial management processes.

**7. The public must have access to all relevant plan and budget documents in a timely fashion, meaning at least two weeks before any decisions are taken about draft plans or budgets.** Relevant documents include all strategic plans, budget proposals, enacted budgets, quarterly or monthly implementation reports, audit reports, supplementary budgets, project plans and implementation reports, and contract and tender documents.

**8. All plan and budget documents should contain an executive summary and a narrative explanation of tables and figures.** All of these documents should be written in a user friendly, simple format, or should be accompanied by simplified versions that are readily accessible.

**9. Citizens should be able to provide input into public consultations through direct participation, through representatives, and through written comments.** It is not possible for every citizen to participate in every forum, and there must be other ways to provide input.

**10. Where the public is asked for input, there should be a feedback mechanism so that citizens know whether or not their inputs were received, and whether and why they were or were not incorporated into the relevant plans or budgets.**

This mechanism should take the form of a written document and, where possible a, public forum. The feedback must also be made available in a timely fashion so that citizens know before decisions are taken whether they have been heard or not.

5. In addition to regular consultations with constituencies and public fora, the CBEF shall consider additional mechanisms of engagement with the public, including but not limited to: encouraging written submissions, setting up delegate structures from the village to county level to represent citizens at county meetings, undertaking targeted site visits in the county to complement information in official documents, and so on.

6. Mobilization of citizens for meetings should be done as far as possible in cooperation with non-state actors and should in no case be done exclusively through any single mechanism, such as exclusive reliance on MCAs, or exclusive reliance on chiefs.

**DATED:** 3rd March, 2015

## **READING TWO: BUDGET BRIEF 20: TOWARD PUBLIC PARTICIPATION IN THE COUNTY BUDGET PROCESS IN KENYA: PRINCIPLES AND LESSONS FROM THE FORMER LOCAL AUTHORITY SERVICE DELIVERY ACTION PROGRAM (LASDAP) (by Jason Lakin)**

### **Introduction: Home Schooling**

Counties across Kenya are required by the 2010 Constitution and the Public Finance Management Act 2012 to create mechanisms for public participation in the county budget process. Every county must set up a

County Budget and Economic Forum (CBEF) to facilitate consultation on county plans and budgets. In a joint statement issued last year with other Kenyan civil society organizations, we described the legal requirements for setting up the CBEFs, advocated for a set of 10 principles to inform their creation, and made specific suggestions on how the CBEFs should function. We update these suggestions in a forthcoming options paper that looks at what international experience tells us about how Kenyan counties could set up their CBEFs to be as participatory and effective as possible.

In this short piece, we draw exclusively on Kenya's experience with participatory budgeting under the former local authority system. The former local authorities received a substantial share of their resources through the Local Authority Transfer Fund. In exchange for these transfers from central government, the local authorities were required to set aside a portion of their funds for a participatory process known as the Local Authority Service Delivery Action Plan (LASDAP). While LASDAP was an imperfect system, imperfectly implemented, it was based around a set of ideas that envisioned fairly substantial public participation in local budgeting.

One of the ironies of Kenya's otherwise progressive devolution reforms is that as local authorities have been replaced by counties, LASDAP has been eliminated. Thus a very detailed set of principles and procedures for local budget participation has been cast aside and replaced with rather vague participation requirements. It is in an effort to rescue the spirit of LASDAP and encourage counties to embrace its essence that we present this paper.

Our argument is simple: LASDAP guidelines were essentially good, but were not implemented. As counties think about how to implement participation requirements, they should look again at these guidelines, developed so close to home, and borrow from them. To this end, we describe the key principles below, and a couple of additional insights gained from the experience of implementing LASDAP.

## **Core Principles of LASDAP**

By looking at the LASDAP guidelines, we can see that they were built on a number of ideas about how public participation happens that are rooted in principles of democracy and experiences from around the world. We describe these ideas further below.

1. *Citizen participation and consultation must be given adequate time.* The consultative process with citizens took about two months, beginning in September and ending in November. Because consultations were required at ward level and then at local authority level, and because advance notification was required, substantial time was to be used each year to ensure an effective participatory process.
2. *Participatory budgeting always starts with planning.* LASDAP guidelines required the local authority to develop a background paper to guide the budgeting process. This stage was known as "Information Gathering." According to the guidelines, local officials (LASDAP Desk Officers and Community Development Officers) were responsible for gathering the following types of information, among others:
  - baseline socioeconomic data by community;
  - stakeholder analysis;
  - lessons learned from the previous year's LASDAP process;
  - status of the previous year's projects; and
  - Analysis of strategic plan and linkages to the upcoming LASDAP process.

3. *Proper consultation starts with advance public notice about funds available, status of past projects, and core decisions to be made.* The LASDAP guidelines required that the public be notified two weeks prior to the consultation. This notice must include information about the budget available for projects:

*The Public Notice provides information on the resource envelope, list of projects identified and implemented in the previous years, consultation timetable and venues. It also asks for the public's view on their needs for consideration. The Notice must be posted in public areas at least two weeks before the first consultation meeting. It is important to circulate this information as widely as possible to encourage participation. Public areas include the market place, bus stops, health centres, churches, mosques, temples, the district/ chief's offices and educational institutions.<sup>2</sup>*

4. *Consultation starts at a level closer to the community and moves upward.* LASDAP started with ward level “consultation meetings” and proceeded to local authority level “consensus meetings.” This allowed citizens to select projects at a level that is closer to their communities and for these priorities to then flow up to the larger area. Ward views were represented at the local authority level through two representatives (one male, one female) nominated by each ward.
5. *Participation must also be linked to technical analysis of project feasibility.* In LASDAP, as projects moved from the “consultation” stage to the “consensus” stage, they were to be reviewed by a technical team that would look at their feasibility. This is an important complement to citizen preferences.
6. *Participatory mechanisms must be coordinated with parallel approaches to funding to avoid duplication of projects.* When there are multiple approaches to identifying and funding projects in a single geographic area, it is imperative that there be a way to coordinate these efforts. The LASDAP guidelines were quite clear on this:

*Representatives from other funding sources (incl. CDF) should present their list of projects in implementation or planned. This information sharing will support the effort to harmonise the roles and project list of the development actors in the area, and ensure that maximum synergy and synchronization between LASDAP projects and projects from other funding sources will occur, and overlap avoided.<sup>3</sup>*

7. *Similarly, citizen preferences must form an integral part of the official budget process.* Decisions from the LASDAP meetings were fed into the overall budget process as carried out through local elected bodies and were voted on with the rest of the budget. If the council wished to make changes to the agreements reached through the LASDAP process, these had to be referred back to the citizen “Consensus” meeting to be agreed upon. Citizen preferences could not be ignored by elected officers.
8. *Citizen participation does not stop with proposing but continues into implementation of projects.* LASDAP required the formation of Monitoring Groups that were charged with monitoring the implementation of agreed projects in the LASDAP over the course of the year. This body was composed of seven people, including non-state actors and elected councilors. It was to meet quarterly and provide oversight of procurement and other processes of project implementation.

## **LASDAP Lessons from Implementation**

As already noted, LASDAP often did not work as intended, and citizen participation in many parts of Kenya was minimal. Nevertheless, there were some cases where the process was more successful. For example, Malindi has been cited as a case of effective implementation of LASDAP.



There were at least two key features of the more successful approach in Malindi:

1. *Formation of a resident's forum to lead sensitization.* The Malindi Residents Forum was created in order to reform the LASDAP process. It began to organize workshops in the two months prior to the first LASDAP consultation meetings in order to prepare citizens to participate. Over time, citizens took more ownership of the Forum as well, giving it greater legitimacy.
2. *Further devolution below the ward level.* To ensure adequate and effective participation of citizens, it was necessary to begin consultation at a lower level than the ward. Consultation was moved down to the sub-location level. Even here, it was found difficult to engage with all citizens, so consultation was moved down further to the school catchment level. This ensured participation by all citizens. The further down one moves, the more expensive and complex participation becomes. However, it is possible to incorporate lower levels through nominated representatives, as was done in LASDAP as one moved from the ward to the local authority level. Counties are also responsible for establishing offices down to the village level anyway, so these can help to mitigate the administrative complexity of reaching down to the grassroots.

The Malindi example suggests that effective implementation of a participatory process for budgeting demands further sensitization and a deeper reach to the local level than what is generally contained in the law. Counties are encouraged to think creatively about how to build further structures around the legal minimums.

## Conclusion

As counties move to establish County Budget and Economic Forums and to meet their public participation requirements in the county budget process, it is an opportune moment to reflect on what we already know about how to enhance public participation in Kenya. LASDAP may be no more, but we should not throw out the baby with the bathwater.

LASDAP is dead. Long live LASDAP!

## READING THREE ■ PARTICIPATORY BUDGETING IN THE DRC

The local governments in the province of South Kivu, DRC have been conducting participatory budgeting since 2010. In August of that year, the provincial government informed local governments that it would start transferring funds to the local level, as mandated by law, but which previously had not been happening. The condition for receiving the transfers was that the local governments would be required to implement participatory budgeting (PB). In 2011 the Ministry of the Budget institutionalized the PB process in South Kivu, so that for the year 2012, local governments were required to carry out PB, meaning that they had to submit a part of their investment budget to citizens to decide on how the funds should be spent.

The first phase of the PB process in South Kivu proceeds as follows:

- 1) The head of the municipality, in consultation with civil society and representatives of local communities, decides on the percentage of the budget that is going to be used for local investment. This is the part of the budget that will be determined through the PB process. The total amount is divided equally among all of the communities that fall under the municipality's jurisdiction.

- 2) After the size of the resource envelope is determined, the next step is a public launch event – a large meeting at which the head of the municipality informs the public of the PB exercise and explains the process, in order to mobilize participation.
- 3) Each community then organizes town hall meetings to discuss their priority needs and what they want to do with the funds (e.g., road maintenance, repairing classrooms, building toilets, etc.). The outcome of these town hall meetings is a list of priorities for each community.
- 4) A municipality-wide meeting is then held during which all of the communities gather. During this meeting, each community votes on the list of their community’s priorities – the priority project that receives the most votes is the one that gets funded. (Each community gets funding for only one project). Those who cannot physically vote at the meeting vote via mobile phones, and they are given a one-week window during which they can vote, i.e., the week leading up to the municipal-level meeting. Only one vote is allowed per mobile phone, as agreed by the participants in the PB process. After the regular voting takes place at the meeting, the SMS votes are merged with the regular votes.
- 5) The projects that receive the most votes are then included in the municipal budget. (At this point, the budget has already been prepared, except for the investment plan.) The budget is then finalized and signed by the head of the municipality. (Since 2006, there have been no municipal councils in the DRC, so the budget is approved by the head of the municipality.)
- 6) The budgets of the municipalities are sent to the provincial government, where they are consolidated and then reviewed and approved by the provincial legislature.

The second phase of the process involves monitoring the implementation of the projects that were identified through the PB process. There is no formal body in the communities responsible for the monitoring. However, civil society groups in each community organize themselves to conduct monitoring for that community. Throughout the year, these civil society representatives monitor the implementation of the projects and report any issues or problems to the municipal government. They also update citizens regularly on the status of project implementation via text messages. At the end of the budget year (and before the next PB process starts), the civil society monitors prepare reports on each of the projects, describing what went well, what has and has not been done, and what problems arose. These community-level reports are consolidated into one report, which includes a significant amount of photo evidence of project implementation.

The municipal government also produces a report, and the two reports are then discussed and adjusted, after which a final report is agreed upon. Lastly, a large public accountability forum is held at which the findings of the report are presented. At this forum, the head of the municipality is required to respond to issues and questions raised by community members about the projects in their communities, and to make commitments to address specific problems. This forum is similar to the public forums used during social audits and serves as a critical accountability mechanism in the PB process.

## **READING FOUR ■ CBEF – PRINCIPLES AND OPTIONS: EXECUTIVE SUMMARY (by Jason Lakin)**

### **INTRODUCTION**

Kenya’s 2010 Constitution and subsequent legislation require public participation in county public finances. While there are many references to “public participation” in these laws, most are vague and

contain no further guidance. The exception to this is the specific requirement that every county set up a County Budget and Economic Forum (CBEF).

The CBEF is mandated by the Public Finance Management (PFM) Act 2012. The Act states that counties shall create these forums in order 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; and
- matters relating to budgeting, the economy and financial management at the county level.”

While the CBEF is the most concrete example in law of public participation in public finance, existing legislation is still not very clear about how CBEF should work. This brief provides guidance to citizens and officials on how to form and operate a CBEF in their county. It is organized around a set of options and draws on Kenyan and international examples to explain these options.

### **WHY PARTICIPATION? WHY CBEF?**

Public participation is in part about aligning the needs and demands of the public more closely with the choices of government officials. This suggests that public participation must occur at the formulation and approval stages of the budget, when priorities are being set. At the same time, concerns about corruption and failure to account for resources during the course of budget implementation suggest that public participation in Kenya is also important during budget execution and when budget performance is evaluated. The public has an oversight role to play that complements the County Assembly and other bodies.

CBEF is the appropriate forum for public engagement throughout the budget cycle. As we have argued elsewhere, along with other civil society organizations, the primary function of CBEF should be to facilitate consultation with the public at all stages of the budget process.<sup>1</sup> The key question we try to answer here is *how* CBEF should encourage consultation with the public.

### **WHO PARTICIPATES AND HOW?**

The first issue we look at is *who participates* from the public. How they are identified and how are they represented in consultations? We consider five options.

**Option 1:** *Public participation can happen through multiple open public forums that have been widely advertised around the county*

**Option 2:** *Public participation can happen through forums in which people nominate representatives from lower levels (villages/ sub-locations) to represent them at higher levels (wards/ counties)*

**Option 3:** *Public participation can happen through the formation of a randomly selected group of citizens, sometimes known as a “mini-public,” brought together in one place to deliberate*

**Option 4:** *Public participation can happen through the selection of a group of citizens based on particular characteristics, such as region, type of organization, etc., and brought together in one place*

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<sup>1</sup> “Public Participation Under Kenya’s New Public Financial Management Law and Beyond,” <http://internationalbudget.org/wp-content/uploads/PFM-Brief-.pdf>

***Option 5:** Public participation can happen through the use of representative surveys or focus groups across the county that ask the public for specific views*

## **WHAT ARE PEOPLE CONSULTED ABOUT?**

The next issue we consider is the *content* of the consultations. What are people asked to talk about in these consultations? We look at this issue during the formulation stage of the budget, as well as the implementation stage. We consider four options during formulation, and three during implementation.

### ***At the formulation stage:***

***Option 1:** The public can determine how to spend development (capital) funds on investment projects in the county*

***Option 2:** The public can determine how to spend part of the recurrent or operational budget in the county*

***Option 3:** The public can participate through councils that are organized around specific sectors (e.g., health, education, etc.) where they discuss part of or the full sector budget*

***Option 4:** The public can discuss the entire budget, both recurrent and development, and all sectors, especially if a mini-public is formed to deliberate on this*

### ***At the implementation stage:***

***Option 1:** The public can participate in sector councils that provide oversight of budget implementation in a single sector (health, education, etc.)*

***Option 2:** The public can participate in reviewing regular implementation reports for the whole budget throughout the year and providing input into the performance indicators used to monitor budget execution*

***Option 3:** Citizens can participate directly in monitoring projects by working together with county officers to visit project sites and review project records*

## **HOW DOES CONSULTATION HAPPEN?**

The last issue we examine is about the *process of consulting* and what actually happens during public engagements. We look at three options for organizing consultations.

***Option 1:** Public participation is organized so that citizens take decisions that are binding on government (but still have to be approved by the County Assembly)*

***Option 2:** Public participation is organized so that even if decisions are not binding, government must provide comprehensive feedback to explain how and why citizen inputs were used or rejected*

***Option 3:** Decisions in participatory forums can be taken using different voting methods, including different levels of majority rule or consensus*

## **CONCLUSION**

This brief draws on global experience to propose a set of options that counties can consider as they set up their County Budget and Economic Forums. It is intended to provoke debate and innovation in meeting the public participation requirements of the Constitution and the PFM Act. It is not intended to be exhaustive, and we are hopeful that as counties begin to roll out their County Budget and Economic Forums, they will also introduce novel, exciting ideas that go far beyond what we have discussed here.

## READING FIVE: OPPORTUNITIES IN THE KENYAN LEGAL FRAMEWORK FOR PUBLIC PARTICIPATION (COUNTY LEVEL)

(by Mokeira Nyagaka)

This brief discusses the concept of public participation as provided for in the constitution and national legislation, as well as its interpretation by the courts in Kenya. We begin by discussing the provisions of the constitution and how the courts have elaborated the principle of public participation and then indicate how the legal framework further amplifies the mechanisms and opportunities of public participation.

### PUBLIC PARTICIPATION AND THE CONSTITUTION

Public participation of the people is a national value cemented in the Constitution of Kenya (Article 10). Chapter 12 of the constitution gives the principles that should guide public finance (revenue collection and expenditure). One of these principles is openness and accountability, including public participation in financial matters (Art. 210). This is in tandem with one of the objects of devolution as provided in the constitution: ‘to give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them’(Art. 174)

The executive and legislative arms of the county must facilitate public participation and involvement in all their businesses (Article 196). At no point shall the public or any media be excluded from any sitting of the county assemblies apart from in exceptional circumstances determined by the speaker giving justifiable reasons for the exclusion. When the assemblies seek to review the budget estimates and approve the annual appropriation bill, the budget committees should ensure that they make recommendations to the assemblies after seeking representations from the public. County governments also have a special responsibility under the Fourth Schedule to ensure that participation of communities and different locations is well coordinated as well as developing administrative capacity for the effective exercise of the functions and powers and participation in governance at the local level.

### PUBLIC PARTICIPATION AND THE COURTS IN KENYA

Courts have played a key role in expounding the concept of public participation and ensuring that the right to public participation is protected in matters relating to public finance. In the case of **Robert N. Gakuru & Others v Governor Kiambu County & 3 others (Kiambu case)**<sup>2</sup> the court reiterated the decision of the Supreme Court of South Africa affirming that the right to public participation is a fundamental human right and that by virtue of having representatives in Parliament this right to directly participate in public decisions is not eliminated.<sup>3</sup> The only room for discussion can be that of the quality or quantity of public participation. The degree of public participation may differ in different circumstances but it is illegal to have a “complete blackout” of the public. A balance must be struck such that public participation is not ‘illusory’ nor should it be treated as a mere formality for the purposes of fulfillment of the constitutional dictates. However, the place of public participation in matters of public finance should not be exaggerated to make

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<sup>2</sup> [2014] eKLR

<sup>3</sup> Doctor’s for life International v The Speaker National Assembly and Others (CCT12/05)[2006] ZACC 11)

decision-making impossible as was pronounced in the case of **Tyson Ng’etich & another v Governor, Bomet County Government & 5 others.**<sup>4</sup>

Some guidance is issued in these cases on the process and content of public participation. Consider the following nuggets on public participation from the Kiambu case on different aspects of public participation:

1) Preliminary stages (preparation and civic education)

- a. *Due notice:* In order to have meaningful participation there should be sufficient time given to the members of the public who are wishing to participate. Due notice should be given and the notice period depends on the matter at hand.
- b. *Capacity building:* There is need for “public education” where the public learns/ understands through various platforms such as “road shows, regional workshops, radio programs and publications.” Capacity building should be on the content of participation (for example, education and health) and mechanisms available to the public to influence decision making (for example, referenda and petitions).

2. During public participation

- a. *Ample time:* The public must be allowed an “opportunity capable of influencing the decision to be taken”.
- b. *Intensity/ magnitude of public participation:* Public participation should attain both the ‘quantitative and qualitative’ threshold. State actors have a duty to do whatever is reasonable to ensure as many citizens are aware and are actually directly participating in the decision making process (quantitative). The quality of public participation is much higher in policy decision regarding public finance such as impositions of taxes and public budget compared to other public decisions.

“The nature and the degree of public participation” depends on several factors including “the nature and the importance” of the decision or the “intensity of its impact on the public.” The potentially affected section of the public should be given more time and opportunity to participate in the decision making process.

- c. *Venue/ Fora:* State actors have the duty to ensure that the process of decision making is spread out “making use of as many fora as possible such as “churches, mosques, temples, public barazas national and vernacular radio broadcasting stations and other avenues”. This cannot be substituted by meetings in high end restaurants or hotels that are out of reach of ordinary citizens.

3. Post public participation stage/Feedback

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<sup>4</sup> [2015] eKLR in this case though the passing of the Bomet County Appropriation Act of 2014 and the Bomet County Appropriation [Amendment] Act of 2014 were declared unconstitutional it was not on the basis of lack of public participation in the process of enacting the as alleged by the petitioner.

There should be appropriate formal lines of communication, at least to clarify, if not to justify, the negation or deviation from the proposals of the public. This information should also be publically available.

The courts are clear that it is the role of the government to ensure public participation. Ample mechanisms must be adopted to determine the collective will of the people as not every individual/organization can be heard during the process of making policy decisions. This begins from the invitation given to the public up to the dialogue itself. The public should be aware of the magnitude of impact policy decisions have in their lives beforehand. There is no one approach to how to structure public participation, but the public may adopt mechanisms such as submission of commentaries and indirect representation.<sup>5</sup>

Public participation must be scrutinized by looking at the entire process leading to enactment of laws that dictate revenue collection and expenditure. In the cases **Tyson Ng’etich & another versus Governor, Bomet County Government & 5 others** and **Institute of Social Accountability & another v National Assembly & 4 others** the High Court of Kenya insists that public participation relating to public finance expenditure, such as the enactment of appropriation acts should be done at the preliminary stages of enactment of the legislation.<sup>6</sup>

The right to public participation extends to specific administrative decisions and major policy decisions made by the county and the national governments. The court in **Erick Okeyo v County Government of Kisumu & 2 others** declared that the decision of the Kisumu county government to award a tender to collect garbage and manage all solid waste for 15 years within the county was illegal as it did not involve the voice of the common mwananchi.<sup>7</sup> The tender was nullified.

## PUBLIC PARTICIPATION AND NATIONAL LEGISLATION

The Public Finance Management Act and Regulations provide for some guidance on public participation in decision making in budgeting matters. The act places direct responsibility on county executive committee members for finance at the county level (Section 126) and accounting officers in urban areas to ensure that there is public participation in all stages of public budgeting. Below are some of the guidelines given under the regulations providing for structures, mechanisms, processes and procedures of public participation at the county level.

- a. *Access to information:* The public shall have full access to financial information made available by the county treasury in a timely manner. This will be by establishing focal points to facilitate access of information especially on county websites, by utilizing media and by presenting summarized and user friendly information that is in the national language. Unless otherwise specified in the PFM act, all documents concerning county budgets should be published and publicized within 7 days.
- b. *Notices:* Due notice shall be given to members of the public by availing an annual calendar. The CEC finance shall ensure that the public is given notice in two newspapers of countywide circulation on the venue or manner of submitting written submissions. In the case of sectoral forums, a seven day notice is sufficient.

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<sup>5</sup> Association of Gaming Operators-Kenya & 41 others v Attorney General & 4 others [2014] eKLR and King V Attorneys Fidelity Fund Board of Control & Another 2006 (4) BCLR 462 (SCA) at 23-24 (S. Afr.)

<sup>6</sup> [2014]eKLR&[2015] eKLR

<sup>7</sup> [2014] eKLR

- c. *User friendly budgets:* Counties are required to prepare citizens budgets which shall explain and summarize budget proposals
- d. *Submissions:* This could be written or oral made in open forums, online platforms and media.
- e. *Monitoring and evaluation:* The public should also have access to data and information regarding the county including non-financial performance of all programmes and projects run by the county.

In line with the constitution (Article 184) the Urban Areas and Cities Act provides for regulation pertaining governance and management of urban areas and cities and how participation should be done by residents in the governance of urban areas and cities. The County Governments Act also provides for legal mechanisms for public participation Below is a summary of what the two acts provide on public participation:

Title	The Urban Areas and Cities Act	The County Governments Act
<b>The right of public participation</b>	<p>The object and purpose of the act is to establish a legislative framework for participation by the residents in the governance of urban areas and cities. <i>(Section 3(c))</i></p> <p>The principles of governance and management of these areas include the promotion of accountability to the county government and to the residents of the urban cities and cities as well as institutionalised active participation by its residents in the management of the urban areas and cities’ affairs. <i>(Section 11(c &amp; d))</i></p>	<p>The object and purpose of the act is to provide for public participation in the conduct of the activities of the county assembly as required under Article 196 of the constitution. <i>(Section 3)</i></p> <p>The act establishes decentralised units that are given the mandate to facilitate and coordinate citizens’ participation in the development of policies and plans for service delivery up to the village level. <i>(Section 50(3g), 51(3g,) and 53(2a) respectively )</i></p> <p>Public participation shall be mandatory in the county planning including CIDP, sectoral plan, spatial plans and urban areas plan. <i>(Section 115)</i></p> <p>Principles of public participations include availability of data, reasonable access to the process of formulating and implementing policies including budgets <i>(Part IV)</i></p>
<b>Tools for public participation</b>	<p>County governments have an obligation to publish and publicise all important information within their mandate affecting the city and urban area. Such information should be available at a reasonable fee. <i>(Section 24)</i></p>	<p>County governments are required to adopt mechanisms of communication including <b>traditional media.</b> <i>(Section 95)</i></p> <p>County governments should conduct civic education <i>(Part X)</i></p> <p>The governor should submit <b>an annual report</b> to the county assembly on citizens’ participation in</p>



the affairs of the county government. This can be used to gauge the level of participation.<sup>8</sup>

**Platforms for public participation**

1. The board of cities and municipalities (*Section 20(1i)*)
2. Citizens fora: residents of an area deliberate and make proposals to the relevant bodies on the proposed annual budget estimates of the county and national government as well as the proposed development plans of both governments. (*Section 22*)

1. Websites, social media, text messages, notice boards, etc.
2. Town hall meetings
3. Budget preparation and validation processes
4. Citizen involvement in managing & implementing development projects (at project sites)
5. Establishment of citizen forums at local level to discuss service planning and delivery
6. Referenda where citizens vote for or against specific issues
7. Ways for citizens' national-level representatives to contribute meaningfully at the county level (*Section 90*)

**Redress (should these platforms fail)**

1. Petitions  
Boards shall (this indicates that it is mandatory) invite **petitions** and representations from the citizens with regard to the administration and management of the affairs within the urban area or city.

1. Right to petition  
Citizens have a right to petition the county government on any matter under the responsibility of the county government. These shall be in writing. (*Section 88*)
2. Local referenda:  
This may be conducted by county government on local issues including county laws, planning and investment decisions affecting the county for which a petition has been raised and duly signed by at least 25% of registered voters. (*Section 90*)

In conclusion, the law and the courts have helped to interpret the meaning of constitutional provisions on public participation. What is lacking is often the actual enforcement and implementation of the provisions of the law.

**EXTRA READINGS**

<sup>8</sup>The indicators in the report are Inclusion (extent to which the diversity of the county is reflected among participants in planning processes); Allocative efficiency (extent to which plans, policies, and resource allocation reflect county citizens' priorities); Equity (extent to which planning outcomes reflect interventions that address the needs of different groups of citizens); and Accountability (extent to which public officials are accountable for their actions as a result of citizen participation)

- i. Lee Ann Banaszak, “Why Movements Succeed or Fail, Chapter 9. In *Why Movements Succeed or Fail: Opportunity, Culture, and the Struggle for Woman Suffrage*” (pp. 215–224). Princeton University Press 1996. Retrieved from <http://www.jstor.org/stable/j.ctt7pg6d.14>
- ii. Brian Wampler, (2008). “When Does Participatory Democracy Deepen the Quality of Democracy? Lessons from Brazil.” *Comparative Politics*, 41(1), 61–81. <http://doi.org/10.2307/20434105>
- iii. Jason Lakin, “Citizens of Kenya organize, or you’ll lose all control over the county budgeting process,” *The East African*, 14/03/2016 (available in the annex of background documents)
- iv. Jason Lakin & Mokeira Nyagaka, “Deliberating Budgets: How Public Deliberation Can Move Us Beyond the Public Participation Rhetoric”<http://www.internationalbudget.org/wp-content/uploads/ibp-paper-public-deliberation-in-kenya-2016.pdf>

### **KEY TAKEAWAYS**

- ✓ **KENYA’S LEGAL FRAMEWORK SECURES THE RIGHT TO PUBLIC PARTICIPATION IN BUDGETING**
- ✓ **THE LEGAL FRAMEWORK ALSO PROVIDES TOOLS AND PLATFORMS FOR PUBLIC PARTICIPATION SUCH AS THE CBEF**
- ✓ **THE COUNTY GOVERNMENT HAS THE CONSTITUTIONAL MANDATE TO ENSURE AND COORDINATE PUBLIC PARTICIPATION**
- ✓ **THE PUBLIC AND OTHER STAKEHOLDERS SHOULD ORGANIZE THEMSELVES FOR EFFECTIVE AND EFFICIENT PUBLIC PARTICIPATION**