



Ministry Of Justice and Constitutional Affairs



**REPORT OF THE
CONFERENCE ON DEVELOPMENT OF A PUBLIC
PARTICIPATION FRAMEWORK**

24TH – 26TH SEPTEMBER 2012, GREAT RIFT VALLEY LODGE, NAIVASHA, KENYA.

TABLE OF CONTENTS

ABBREVIATIONS	iii
PART I.....	1
INTRODUCTION.....	1
1.1 INTRODUCTION AND RATIONALE OF THE WORKSHOP	1
1.2 OBJECTIVES OF THE CONFERENCE	2
1.3 SEMINAR ORGANISING COMMITTEE.....	3
1.4 CONFERENCE OVERVIEW	3
1.5 PURPOSE AND ORGANIZATION OF THE REPORT	4
PART II.....	5
OPENING REMARKS	5
PART III	8
SYNOPSIS OF CONFERENCE PAPERS AND PROCEEDINGS	8
3.1 INTRODUCTION	8
3.2 PUBLIC PARTICIPATION CONTEXT	8
3.3 PUBLIC PARTICIPATION AT THE DEVOLVED LEVELS.....	13
3.4 PUBLIC PARTICIPATION ACROSS THE ARMS OF GOVERNMENT	19
3.5 INCLUSIVENESS IN PUBLIC PARTICIPATION	28
3.6 PUBLIC PARTICIPATION ENABLERS.....	32
PART IV.....	35
CONCLUSION AND WAY FORWARD.....	37
ANNEXE: PROGRAM	38

ABBREVIATIONS

CAK:	Competition Authority of Kenya
CDF:	Constituency Development Fund
TISA:	The Institute for Social Accountability
CCGD:	Collaborative Centre for Gender and Development
CIC:	Commission for the Implementation of the Constitution
CIOC:	Constitutional Implementation Oversight Committee
CLARION:	Centre for Law and Research International
COFEK:	Consumers Federation of Kenya
CKRA:	Constitution of Kenya Review Act
CUTS:	Consumer Unity and Trust Society
IHRL:	International Human Rights Law
ICPAK:	Institute of Certified Public Accountants of Kenya
SA:	South Africa
SCA:	Supreme Court of Appeal
NCOP:	National Council of Provinces
DFRD:	District Focus for Rural Development
EMCA:	Environment Management and Coordination Act
KAM:	Kenya Association of Manufacturers
KHRC:	Kenya Human Rights Commission
LASDAP:	Local Authority Service Delivery Action Plan
LATF:	Local Authorities Transfer Fund
MOJNCCA:	Ministry Of Justice, National Cohesion and Constitutional Affairs
SUNY:	State University of New York Parliamentary Support
TA:	Transition Authority
TDGA:	Transition to Devolved Government Act

PART I

INTRODUCTION

1.1 INTRODUCTION AND RATIONALE OF THE WORKSHOP

Constitutional implementation is a national effort that demands active participations by members of the public. The Constitution recognizes public participation in article 10, as a national value and principle of governance and further mandates parliament in article 118, to facilitate public participation in the legislative and other business of parliament. The Constitution also lays down principles on which a modern order should be established by enshrining rules, which are essential to establishing a democratic society. One of major innovations of Kenya's new constitution, which reaffirms the "sovereignty of the people", is the establishment of a devolved system of governance to promote a democratic and accountable exercise of power.

While strengthening the national unity by recognizing diversity, Kenya's new political system gives power of self-governance to the local level in order to enhance the participation of the people in making decisions affecting them. It also recognizes the right of communities to manage their own affairs and to further their economic development, including the provision of basic services. Public participation has been defined in various ways by different people, and for a variety of reasons, for example participation has been used to build local capacity and self-reliance, but also to justify the extension of the power of the state.

The levels of public participation vary from simply sharing of information to active engagement of citizens in the implementation and management of projects and services. Tools to build different types of participation also range from stakeholder consultations and public hearing to community watchdog groups and public-private partnerships. Two common threads run through various tools for participation. First, is the commitment of Government to sharing information and engaging communities in open dialogue. Second, is the presence and follow-through on an appropriate framework for public participation.

Public participation aims at bridging of the gap between the government, civil society, private sector and the general public, building a common understanding of the local situation,

priorities and program. Public participation encourages openness, accountability and transparency, and is thus at the heart of inclusive decision-making. It is a democratic process of engaging people in identifying, deciding, planning and implementing and monitoring socio-economic development initiatives that affect their lives.

Kenya is yet to implement a comprehensive and functional approach to public participation. This has led to a situation where public participatory processes are poorly conceptualized, misdirected and are even increasingly perceived as confusing by many stake holders. The consequences is participation fatigue that is beginning to be seen in the public reception of some of the public participation avenues like the task forces and public commissions 'forums.

There is need to put in place a framework for effectively implementing this important constitutional principle. It is on the basis of this recognition and the need to ensure effective public participation in constitutional implementation, that various efforts are being undertaken to ensure enactment of the most suitable framework for public participation.

It is against this background that CIC held an international conference on public participation from 24th to 27th September 2012 at Great Rift Valley Lodge in Naivasha, Kenya.

1.2 OBJECTIVES OF THE CONFERENCE

The conference sought to provide an opportunity for stakeholders from the three arms of government, civil society and other non-state actors, international experts and the academia to share different perspectives and experiences in regard to the implementation of this principle.

The specific objectives of the conference were to:

- (i) Provide an environment for concerned individuals, experts and organizations to take stock of the state of public participation within the framework of the Constitution of Kenya 2010;
- (ii) Evaluate the extent of public participation in government and private sector programs;

- (iii) Provide an opportunity for the public to give input on how they should participate in the formulation and implementation of programs that affect them;
- (iv) Discuss and agree on the most suitable framework on public participation and agree on plan of action for developing the framework.

1.3 SEMINAR ORGANISING COMMITTEE

The inter-agency organizing committee comprised of five other key institutions mandated to ensure a systematic approach in the development of an effective framework on public participation.

The committee, which worked under the stewardship of CIC, comprised representatives from both Government and Non-State Actors. These were:

- (i) Ministry of Justice, National Cohesion and Constitutional Affairs
- (ii) Katiba Institute,
- (iii) Collaborative Centre for Gender and Development (CCGD),
- (iv) Kenya National Civic Education Programme (URAIA) and
- (v) Kenya Human Rights Commission (KHRC).

1.4 CONFERENCE OVERVIEW

The conference was well attended with representation across the state and non-state actors. Represented among the state actors were: (i) Ministries; (ii) Constitutional Commissions and Independent Offices; (iii) Parliament and; (iv) the Judiciary. Whilst non-state actors included: (i) Private Sector Organizations; (ii) Academia; (iii) Civil Society; (iv) Faith based organizations and (v) Community based organizations. The conference also had representation from South Africa and Brazil.

Following the opening remarks, the seminar was organized into six plenum sessions during which presentations were tabled and discussions held on public participation across all arms

of Government as well as ensuring inclusivity and address the enablers for participation. Plenum 1 Topic: “Overview of Public Participation”. See Annex1 for a copy of the programme.

1.5 PURPOSE AND ORGANIZATION OF THE REPORT

This report gives a summary of key issues that emerged during the workshop. Part I of the report presents an introduction to the conference by way of summary of the opening remarks. The subsequent Parts II and III give a synopsis of the conference proceedings; these two parts of the report are organized along the lines of themes of the workshop and provided a synopsis of issues i.e. papers presented and discussions held. Finally Part IV presents a conclusion and way forward.

PART II

OPENING REMARKS

- 2.1 Speaker: Dr Elizabeth Muli**
Vice Chairperson, Commission for the Implementation of the Constitution

The Vice chairperson of the Commission for the Implementation of the Constitution welcomed the participants to the Conference. She outlined the objectives and importance of the Workshop and re-affirmed the Commission's commitment to mainstreaming public participation across Government.

- 2.2 Speaker: Mr. Charles Nyachae**
Chairperson, Commission for the Implementation of the Constitution

The Chairperson of the CIC noted that the conference was the first consultative meeting on public participation. He further stated that the background of the development of a legal framework for implementation of public participation was from Civil Society Organizations (CSOs). The Chairperson indicated that public participation involved not only making sure that the views of the public are heard, but also put in practice. Mr. Nyachae stated that the frameworks discussed in the conference endeavours to encourage citizens to participate, citizen to understand how the government works and its decisions, advance synergies from the government and private sector; and ensure inclusion of different interest groups.

- 2.3 Speaker: Hon. Prof. Githu Muigai FCI Arb**
Attorney General

In his opening remarks the Attorney General, Prof. Githu Muigai posed several critical questions i.e.: (i) What is the 'public'? (ii) What are the intentions of parliament in creation of a representative body? (iii) What forums do the public speak from? (iv) Are the public speaking from one voice and (v) Are the views of the public progressive or retrogressive?

In seeking to further challenge the participants the Attorney General is it an adult population, social civic groups speaking for and in the name of public, the voting population of a country or all the people in the territory.

He highlighted some of the forums for the public can use as their voice such as churches, TV shows, Madrassas, Radio shows among others. Prof. Muigai, however, noted that the Public might have views that are bigoted, conceited, backward or retrogressive. He noted that modernizing elite is not always on the same wavelength as the general public. He however cautioned on the notion of viewing the modernising elite as a manipulative group.

He, further, added that there is need for respect of the autonomy and independence of the organs created by the Constitution for example the Judiciary which as he noted their decisions should, therefore, be open to public, parliament and civil society scrutiny although the Judiciary should not be opened to public lynching. Prof. Muigai stated that Public participation is critical and needs to be made real and practical.

He also noted the need for the public to be heard as well as the need to accommodate their views in so far as they are compliant with constitutional provisions. Prof. Muigai concluded by noting the need to create pillars of anchoring and delineating parameters on public participation.

2.4 Speaker: Hon. Prof J B Ojwang
Supreme Court Judge

In his speech read by Supreme Court Judge Prof .J.B Ojwang, the Chief justice Dr. Willy Mutunga noted that the public is a fundamental pillar in the journey to democracy. He pointed to two reference points of discussion being the Constitution of Kenya 2010 and citizens of Kenya of which the sovereign power belong to.

2.5 Speaker: Mr. Gichira Kibaara
Acting Permanent Secretary, Ministry of Justice National Cohesion and
Constitutional Affairs

Mr. Gichira Kibaara reiterated the Government's commitment in implementing the constitution. He further noted that public participation is a major ingredient in realizing the full implementation of the constitution.

PART III

SYNOPSIS OF CONFERENCE PAPERS AND PROCEEDINGS

3.1 INTRODUCTION

Following the opening remarks, the seminar was organized into six plenum sessions as follows: (i) Plenum 1 Topic: “Overview of Public Participation”; (ii) Plenum 2 Topic: “Enhancing effective Participation in Legislative processes”; (iii) Plenum 3: Topic: “Enhancing effective participation in Judicial processes”; (iv) Plenum 4: Topic: “Enhancing effective Participation in the Executive and in Public Private Partnerships”; (v) Plenum 5: Topic: “Enhancing Public Participation for Minority and Marginalized groups; Plenum 6: Topic: “Monitoring Public Participation”

Presented in this section, is a synopsis of the conference papers presented as well as related emerging issues from the ensuing proceedings. For ease of reference when effecting the way forward identified at the conference, this section is organized not as a chronology of events but as synopsis of key issues to be considered. See part IV for a synopsis of the emerging issues.

3.2 PUBLIC PARTICIPATION CONTEXT

3.2.1 Public Participation as Envisioned by the Constitution of Kenya

The Constitution recognizes that the people of Kenya fully participated in its making. It is the product of extensive public participation. Specific provisions include:

- (i) Article 1 of the Constitution - all sovereign power belongs to the people of Kenya and that it shall be exercised only in accordance with the Constitution. The provisions on public participation, national values and devolution are predicated on public participation, are entrenched and cannot be amended without the participation of the people.
- (ii) Article 10 - public participation as a cardinal national value and principle of Governance. The National Values and Principles of Governance articulated in Article 10 bind all state organs, state officers, and public officers.
- (iii) Article 94 empowers parliament to manifest the diversity of the nation, represent the will of the people and exercise the sovereignty of the People.

- (iv) Article 118 provides that parliament must ensure public participation and involvement in legislative processes and other business of Parliament and its committees.
- (v) Article 196 of the Constitution requires County assembly to: ‘conduct its business in an open manner, and hold its sittings and those of its committees, in public; and, facilitate public participation and involvement in the legislative and other business of the assembly and its committees’.
- (vi) Article 232 of the Constitution which provide for public participation as one of the values and principles of public service.
- (vii) For the Judiciary, Article 159 of the Constitution loosens up the procedural and technical rules to approach the court ensuring that the public has easier access to courts. It further states that any person can initiate the removal of a judge. Further it recognizes traditional dispute resolution methods and encourages their use in dispute resolution.
- (viii) Devolution has also been identified as a way of getting to people and creating avenues for them to participate in their government.

The transformative nature of the Constitution means that both the public and state actors mindset must change that civic education is required. Additionally, as consultations on technical and complex issues may be a challenge to public participation there is need to capacitate actors to ensure effective engagement.

3.2.2 Towards a Comprehensive Public Participation Model

Public sphere is a key plank in most public organizations’ politics. Thus, public participation is an embodiment of degree of responsiveness and performance of state to its citizens’ needs. Discourse within the public sphere is usually untethered from “coercion” and “dependency” which usually predispose citizens towards silence and acquiescence. Effective public participation framework incorporates this dimension in, for its value in governance and not for its “supposed threat”.

Public participation is multi faced in nature and is realized in a variety of ways depending on diverse contexts. Central to all participatory processes, however, is the engagement of the public, the *hoi polloi* in all fora and activities as a way of mainstreaming their perspective in policy making and execution. The goal is the ideal scenario where everyone is involved in “everything” and the process is on the mechanisms of inclusion.

Kenya's democratic practice "supposedly" thrives on strong institutions and mechanisms designed to create a semblance of an ideal representative democracy. Whichever elements it borrows from other forms, it remains a representative democracy largely in need of greater space for public inclusion, if it is to be sustained. All variants of democratic practice agree on one thing namely: a truly participatory process enhances citizens' democratic dispositions and capacities

There are many models of public participation in existence in the Country which includes public meetings which has been in existence for while and has been used widely by both the government and civil society organizations. In Kenya, focus groups are recent phenomena geared towards consensus building on issues at hand; opinion surveys are scientifically designed to collect individual views from citizens.

Models for enacting public participation are as diverse as the context that calls for it. However, there are two key approaches that can guide in the developing of model. One is the intrinsic and instrumental dimensions. The intrinsic rationale recognizes that public participation is the right thing to do while the instrumental function recognizes that successful public participation is anchored on well thought-out mechanisms and processes for achieving desirable goals. Additionally, 'no silver bullet' approach acknowledges that there is no '*one size fit all*' public participation mode. While developing a model for public participation the following considerations are vital; the quality and effective public participation; a good model which incorporates lessons from past and is in the context of civic and electoral awareness; and, take into account the intrinsic and instrumental dimensions.

Public participation mustn't ignore the urgency for civic and electoral awareness because only such awareness will make public participation an effective tool for countering inefficiencies in service delivery, corruption and other ills which are inimical to improving the effectiveness and quality of democratic governance.

3.2.3 Participation: Is There a Need for a Legal Framework

Public participation is a major theme of the Constitution of Kenya and appears as a national value in Article 10. Under Article 2(6) of the Constitution any international treaty or convention that Kenya is a part of is Kenyan law under the Constitution. Article 25 of the

International Covenant on Civil and Political Rights (ICCPR) provides that every citizen shall have the right and opportunity without any of the distinctions mentioned in article 2 and without unreasonable restriction to: “take part in the conduct of public affairs, directly or through freely chosen representatives”.

Internationally, there are very few countries that have attempted to have a legal framework for public participation. Tuscany in Italy has a broad-based legislative framework on public participation. Public participation in Kenya has been in the context of municipal, council and civic level. In countries where a framework is preferred, emphasis has been on the sectoral as opposed to a national framework. In Kenya, there are different laws that deal with different areas raising the question whether a national framework would override a sectoral one.

In countries where a legal framework on public participation exists, they are designed as a defense against attempts by affected interests to squash freedom of speech. The use of litigation for this purpose has been dubbed “SLAPPS” (Strategic Litigation against Public Participation). Laws designed to combat this are found in the USA, Australia and Canada; for example the Illinois Citizens Participation Act, the Australian (Capital Territory) Protection of Public Participation Act.

3.2.4 Reflections on Institutionalizing Platforms for Structured Stakeholders

The Government has engaged the public in the transformation of the public service with an aim of enhancing public participation in public service.

The constitutional provisions of public participation is found in National Values and principles of Governance – 10 (2)(b); Access to information -35; Minorities and marginalized groups participation-56(a); Values and principles of public service-232(d)- involvement of people in policy making; and, public participation and county assembly(196).

Legislative provisions for public participation is established in Transition to Devolved Government Act 2012- Guiding Principles- 14 (b) which requires accountability to the people of Kenya and participation in the transition process; TDGA 2012: 14 (g) which advocates application and promotion of national Values; TDGA 2012: 27 (1) - access to information; Intergovernmental Relation Act 2012: Section 29 which provides framework for public

participation to be provided by regulation; The Urban areas and cities Act 2011, 2nd Schedule -rights of, and participation by residents in affairs of their city or urban areas; Public Finance Management Act 2012: Section 207: Regulations on participatory governance to be developed. The regulation may include: structures, processes, procedures, rights and duties, receipt, processing and consideration of petitions, and complaints and special needs groups. County Government Act 2012, Section 87 promotes the principles of public participation by encouraging timely access to information, reasonable access to process of policy making, protection and promotion of interest and rights of minorities, legal standing, balance in role and obligation of county government and non-state actors, Public Private Partnership, reciprocal role of non-state actors and County Government. Section 91 establishes the modalities and platforms for citizen participation. CGA 2012 provides the modalities/structures of public participation through information communication technology based platforms; town hall meetings; budget preparation and validation fora; notice boards: announcing jobs, appointments, procurement, awards and other important announcements of public interest; and, development project sites.

Modalities for public participation include avenues for the participation of peoples' representatives including but not limited to members of the National Assembly and Senate; or establishment of citizen fora at county and decentralized units. Section 92(b) of the constitution requires Governor to submit annual report on public participation. Section 92(c) Regulations is to be made to give full effect.

Public communication and access to information is an essential component of public participation. The Government will establish County communication framework; citizen upon request have right to information; County Government to designate office for purpose of ensuring access to information and legislate – guided by national legislation.

On inclusion of Minorities and Marginalized Group, Section 97 County Government Act advocates against discrimination of the same by county government, public and private individual and promotes protection, equal treatment, affirmative action, respect and promotion of identity. Section 97(g) advocates promotion of effective participation of marginalised and minority groups in public and political life.

3.3 PUBLIC PARTICIPATION AT THE DEVOLVED LEVELS

3.3.1 Practical Considerations for Public Participation

Public participation can be either direct or indirect. Indirect participation encapsulates traditional representative governance where citizens exercise their voice through political representatives and professional administrators working on their behalf. Direct public participation on the other hand, focuses on the role of the public in decision-making related to service delivery. This addresses the manner and form of citizen involvement in the service delivery process since if well effected should enable citizens to engage in, and positively influence service delivery and development outcomes.

While analyzing Kenya's public participation initiatives, it was noted that District Focus for Rural Development (DFRD) strategy introduced in 1983 sought to militate against the shortcomings of centralized planning by recognizing districts as development centers. DFRD established a five tier structure; at the national, provincial, district, locational and sub-locational /village level. DFRD sought increase communication between the local community and government officer's .It was also to facilitate local initiatives by creating opportunities for coordination with ministry efforts.

DFRD managed to decentralize government operations but was partially successful in fulfilling its development mandate and has quietly faded in to the background as other development structures have come into place usurping its original mandate. Studies have shown that DFRD failed to bring public onboard. Local voices were stifled by political elite capture.

Local Authority Service Delivery action Plan (LASDAP) was conceived in 2003 as a means of enhancing citizen role in decision making in local authorities which is managed by the Ministry of Local Government. A study clarion indicated that LASDAP had failed to effectively engage the public. Lack of well organized communities and elite capture are some of the reasons LASDAP did not realize effective public participation. Low level of awareness on both citizens and public officers' ahs also stifled the effectiveness of LASDAP.

The initiatives below were cited as practical examples of successful citizen participation which Kenya can borrow from in formulating a framework for public participation:

The Community Based Monitoring System (CBMS): Planning and Monitoring Tool-This is an organized process of collecting, processing and validating information at the local level, and the integration of the data in local development process. CBMS empowers local communities, to participate in the development process. This tool has been implemented in many parts of the world including Latin America, Philippines, Cambodia and Pakistan. In Africa it has been implemented in Benin, Burkina Faso, Ghana, Nigeria , Tanzania Zambia ,Kenya AIHD and CEDMAC are implementing it on a pilot basis.

CBMS has the following advantages; it empowers communities to participate in the development process by providing them with information with which to question government performance. Secondly it improves resource allocation, thirdly it helps monitor impacts of projects and programmes, fourthly increases the number of women and persons with disability in decision making structures and finally improves service delivery with a pro-poor focus. One limitation to this initiative is that it may be costly to administer.

Ubudehe in Rwanda: The name Ubudehe is derived from the Rwandan culture of mutual assistance and community through which people would come together to address problems facing them so as to work for their development.

The Ubudehe program was launched in 2001 as part of partnership between the ministry of finance and economic planning and the Ministry of local government. During field visits the Ubudehe facilitators organize the people in their cells based on their residential area and village. The Ubudehe credit scheme was established for individual members of a cell .Each beneficiary signs a contract with the community and is informed of his/her obligation and commitment to pay in order to enable another person to access credit. Community members' play a great role in monitoring the advanced loans and in recovering the loans since the Ubudehe credit fund is a community fund.

Participation in Partnership (PIP): Prior to 2005, the Malindi municipal council was facing many challenges striking staff due to salary arrears, LATF did not trickle down to the communities .Funds were instead being used to settle debts. The Institute of Participatory Development (IPD), the German Development Service (DED) and Malindi Municipal Council came together to analyze problems facing the council. Out of this process the Malindi Residents Forum (MRF) was formed.

Through the MRF residents and business community committed to assist the government in revenue collection and consequently the Revenue Enhancement Committee was formed. This committee monitored revenue collection and expenditures in the council. This led to an increase in revenue. MRF also organized workshops at the ward level to sensitize the communities on the LATF and LASDAP process.

Water Action Groups (WAGS): Water Action groups are local community based organizations constituted by citizens on a volunteer basis to address issues which affect consumers of water services. WAGs operate as an extended arm of the water Services regulatory Board (WASREB) under whose mandate consumer protection lies.

They facilitate improved understanding of the roles and obligations of consumers and sector institutions. They also receive and disseminate information to consumers from the WASREB and water services board.

Neighborhood Associations: These associations are formed by residents or property owners who advocate or organize activities within a neighborhood. They work together for changes and improvements such as neighborhood safety, beautification, peer education, social activities and neighborhood security. An example of a successful neighborhood association is the Karengata association, they have been able engage the city council, government ministries to address issue of roads, security, improved water and electricity supply among other needs.

Trade Associations: These are established based on common trade. They require a membership subscription and provide a platform for engagement with official institutions.

Participatory Budgeting: This is a process through which citizens participate directly in the different phases of the budget formulation, decisions making and monitoring of budget execution .It is instrumental in increasing public expenditure transparency and improving budget targeting.

Factors that undermine public participation in Kenya are: low citizen awareness and understanding of engagement frameworks; lack of access to information; negative officers' attitudes and failure to appreciate participatory methodologies; multiple engagement frameworks; absence of formal citizen engagement frameworks; and, absence of feedback and reporting mechanisms.

From the fore-going, there is need to have a structured framework on public participation. It is important for Kenya to examine the past experiences so that lessons learnt and best practices are highlighted and taken into consideration.

3.3.2 Public Participation through the LASDAP Process

The Local Authority service Delivery Action Plan (LASDAP) is one of the local government programmes that promote public participation in its implementation. Since its inception in 2002 to Local Authorities, the programme has received much acclaim as a practical and effective process that encourages participation of the citizenry. When the Government started devolving funds through Local Authorities Transfer Funds (LATF), it was misused as there was no involvement of the people in the management of the funds. It was with this view that LASDAP was reviewed in 2007 to make it more effective.

Lessons learnt from the LASDAP process include: In order to be effective and encourage public participation, LASDAP needs to be realistic and achievable, mirror both the principle of equity and equality and enhance effectiveness of technical teams, adherence to Procurement and Disposal Act of 2005. It, further ails from inadequate designs and bureaucracies, lack of guidance, capacity gaps in Local Authority (LAs), lack of rewards performing LAs and sanctions for underperforming ones. Besides, LAs should see LASDAP as an Aid not a hindrance, community must be involved throughout the process, effective Monitoring & Evaluation is critical in the success of LASDAP, community to be aware of the process and their roles and LASDAP must fit within the Planning process.

3.3.3 Defining the Public Engagement Framework within the Context of Transition to Devolved Government

The Transition Authority was established pursuant to Section 4(1) of the Transition to Devolved Government Act 2012. It is a Statutory body with a constitutional mandate of facilitating and coordinating the transition to the devolved system of government in Kenya pursuant to the provisions of the Transition to Devolved Government Act 2012 and Section 15 of the Sixth Schedule of the Constitution of Kenya 2010.

The constitutional provisions that guide the transition to devolved government include; National Values and principles of Governance – Article 10 (2)(b); access to information – Article 35; minorities and marginalized group participation-Article 56(a); values and principles of public service- Article 232(d); and, public participation and county assembly Article 196 of the Constitution.

Modalities and structure for public participation include; information communication technology based platforms; , town hall meetings; budget preparation and validation fora; notice boards: announcing jobs, appointments, procurement, awards and other important announcements of public interest; development project sites; avenues for the participation of peoples’ representatives including but not limited to members of the National Assembly and Senate; establishment of citizen fora at county and decentralized units; and, Section 92(b) which requires governors to submit annual report on public participation.

There are three key components of effective public participation. First is public communication and access to information. Once county communication framework is established, county governments will designate offices for the purposes of ensuring access to information. Second is inclusion of minorities and marginalized groups. Section 97 of the County Government Act provides for inclusion and integration of minorities and marginalized groups, while Article 97 (g) provides for promotion of effective participation of marginalized and minority groups in public and political life. Third is civic education. The County Government Act 99(1) states that the purpose of civic education is to have informed citizenry that actively participates in governance affairs of the society on the basis of enhanced knowledge, understanding and ownership of the constitution. These three components seek to ensure effective participation.

Transition Authority has developed public engagement framework on transition and devolved governance. First is County Transition Teams which act as bridge for connecting national Government, Local Authorities, non-state actors and public. Second is County Citizen (Transition) Forum which is a platform comprising of representatives of National government departments in the counties, representatives of local authorities, elected leaders and Non-state actors. All transition to devolved Government issues are discussed in this platform. These forums will be in all decentralized units. Third is working with People’s Organizations. The rationale behind this initiative is that more people will be reached as each organization

has its own channels of reaching its members. They include: professional organization (APSEA, LSK, ICPAK, ICPSK) which will act as reference groups; trade unions such as COTU, KNUT; interest groups or organizations such as KEPSA, Chamber of Commerce, ASAL Alliance, resident associations, social accountability organizations, special interest groups-minorities, PWD, PLWA; Faith Based Organizations; individual experts; and, women, youth, men organizations. Fourth is Public Communication which include: use of media (print, electronic, vernacular radios, web platform- interactive pages, performance dashboard. Transitional Authority will develop public communication strategy. Fifth is civic education provided by public officers and public to address transition and devolution. Different strategies will be used to reach out to the public.

Public participation have received a number of challenges which include change coming slowly or difficulty in changing old mindset; expense in pubic participation which, slows down processes and is sometimes time wasting; apathy among the marginalized groups; inadequate capacity of social platforms/groups; public participation being not well institutionalized; and, democracy not having taken root in the Kenyan society.

3.4 PUBLIC PARTICIPATION ACROSS THE ARMS OF GOVERNMENT

3.4.1 Public Participation in the Legislative Process

Public participation is a basic principle of parliamentary democracy; it is also a human right and a basic principle of democratic governance, enshrined in the Constitutional values. Inclusive governance is more sustainable, bridges the public trust and governance deficit, ensures better decision-making and enhances transparency and accountability in governance. Budget hearings and parliamentary committee hearings are some of the avenues of public participation within the legislature.

Article 1 of the constitution states that all sovereign power belongs to the people while Article 10 on National Values and Principles of Governance vouch for “democracy and participation of the people”. Article 118 on Public access and participation requires that open and public conduct of all parliamentary business; facilitation by Parliament of public participation and involvement in *“legislative and other business of Parliament and its Committees”*; and, not to exclude the public without exceptional cause. Article 119 recognizes the right of every person to petition parliament.

Challenges in determining public participation in the legislative process are: defining minima in public participation; determining activities requiring public participation (under Article 118); defining the public (stakeholders, concerned persons, civil society, interested persons, diaspora); determining appropriate entry point for public participation; informing the public of the opportunity for participation; providing the information needed by citizenry to ensure participation; determining suitable media/ forums/methods for public participation; reasonable timeframes for public participation; resource implications of facilitating public participation; quantitative versus qualitative public participation; making public participation influence decision making (vetting of nominees, Bills); and, ethical questions in public participation. Owing to the above challenges, there is need for a systematic and well conceptualized approach to public participation where there is legislative framework that brings about certainty, consequences and the required standard.

3.4.2 Public Participation in the Legislative Process –South African Experience

A strong democracy needs strong legislatures; legislative reforms, oversight and accountability over executive, representative and constituency functions. Strong legislature should: empower, independent, open and accessible and resourced. A strong, diverse and independent civil society strengthens democracy and promotes plurality of voices.

Participation enhances the civic dignity of those who participate by enabling their voices to be heard and taken account of; promotes a spirit of democratic and pluralistic accommodation calculated to produce laws that are likely to be widely accepted and effective in practice; and, owing to its open and public character, it acts as a counterweight to secret lobbying and influence-peddling. Comparing South Africa (SA) Constitution (1996) to Constitution of Kenya, SA Constitution requires the National Assembly to represent the people, ensure government by the people and provide a national forum for public consideration of issues in Sections 42(3) and 42(4). Besides, public participation is facilitated in respect of the legislative and other processes of the National Assembly, NCOP, and Provincial Legislatures (Sections 59, 72 and 118).

In SA, public participation ranges from: making information about the processes of parliament available and building awareness through to providing actual platforms for participation in decision making. Supreme Court of Appeal (SCA) recognises that public participation as an ‘inexact concept and has scope for ‘infinite variation’. Thus, Parliament and legislatures have a duty to facilitate public involvement and wide discretionary powers to enable participation, balanced with parliamentary institutional autonomy. Discretion of which requires greater guidance. Public involvement has overwhelmingly focused on legislative mandate not oversight; strong drivers of public participation seem to be organised pressure groups, controversiality and overt politicisation of legislation and policy.

SA’s parliament is still grappling with its oversight function whereby committees are obligated to assess performance of national departments such as The Money Bills Amendment Procedure and Related Matters Act. National Assembly and NCOP are more accessible than Provincial Legislatures. The systems for participation in legislative reform well developed in SA, road shows to rural areas are provided on certain legislation and there is Parliament to the People and Sector parliaments which create important platforms for engagement with the public.

Public participation in South Africa comes with some challenges which include: little notice given; format of engagement tend to be short, once off events; follow-up on issues raised is extremely poor; and, poor participation processes which deepen frustration, helplessness and mistrust. However, meaningful participation, though, promotes empowerment and challenges power can be threatening. There is, therefore, need for expansion of the range of organisations/individuals that participate: citizens/different groups of citizens; private sector stakeholders; NGOs, larger national through to smaller service delivery organisations, community-based organisations, social movements; organised labour; and, research institutions and universities. Additionally, emphasis should be placed on marginalised and vulnerable groups: children, persons with disabilities, women, youth, elderly people, people living in rural communities and people living in poverty or under-resourced contexts.

On the lessons for civil society on participation, CSOs should build parliamentary engagement into strategic plans and organisational budgets; be organised - work in coalitions, alliances and networks - mobilise; ensure sustained presence and engagement; be proactive - don't wait for an invitation; seek information out; request, claim, demand opportunities; and, offer information. Being that the parliaments are political institutions, she advises that a purely technical approach is naïve. CSOs should know the priorities of political parties and the dynamics between and within parties - particularly on substantive issues. To lever power, CSOs should engage in strategies inside (formal - in the committee rooms, assemblies, written submissions, petitions and correspondence, presentations and request meetings) and outside (informal - be present and interact between meetings, mobilisation, demonstrations and media and public engagement strategies) parliament. Besides, CSOs should build relationships with MPs (especially committee chairpersons, active committee members and opposition parties) together with support staff (committee secretaries and researchers) which results in stronger legislatures as MPs, being in political office, come and go.

3.4.3 Public Engagement in the Judicial System.

Article 10 of the Constitution establishes public participation as one of the national principles of governance. Indeed, this principle is threaded through the entire Constitution. This fundamental principle connotes and reaffirms the notion that the people are sovereign and therefore must have a say in the running of the affairs of the various constitutional

institutions and offices, including the Judiciary. With regards to judicial reforms, the right to public participation is highlighted in the Constitution under Article 159. This Article provides that; the source of judicial power is 'derived from and vests in the people'-Art 159(1); recognition of alternative forms of justice, traditional dispute resolution mechanisms and other, less formal conflict management systems.- Article 159(2)(C); access to courts by relaxing procedural technicalities -Article 159(2)(d); and, inclusion of lay persons as members of the Judicial Service Commission.

Part 1 of Chapter 13 of the Constitution on "The Public Service" sets out the values and principles for public participation in the public service. Specifically, section 232(1) provides that the national values and principles of public service include, "... (d) Involvement of the people in the process of policy making...and (f) transparency and provision to the public of timely, accurate information" Article 35-related guarantees access to state information. The right to know is an important guarantee of accountability in institutional activities.

In judiciary the vetting of judges and magistrates is an avenue for public participation. Public participation has important roles before, during and after the vetting hearings. This is achieved through: educational outreach, consultation, and recruitment, or information gathering; direct participation during the actual hearing; and, access to written decisions after the end of the hearings.

The role of the Judiciary in public participation relates to issues of public information, education and communication. Issue relating to the interpretation of the Constitution raises issues of public interest. Potentially, almost every Article of the Constitution could give rise to litigation. Already a number of issues have come before the courts, including: date of the first elections; on the gender composition of the Supreme Court; chapter six-Leadership & Integrity among others.

Some of the strategies that have been implemented as a result of the judicial reforms include: open days; judicial marches; public and student visitation programmes; Chief Justice's annual state of the judiciary address; Open court proceedings to be the norm and chamber hearings the exception; robust Bar- bench programmes; elaborate media and communication strategy; establishment and expansion of the Office of the Ombudsperson to receive and deal with public complaints; internet-based and SMS Code complaints; Public Feedback Mechanism to harness public opinion and views on the Judiciary's performance; National Council for the

Administration of Justice (NCAJ) to provide a forum for the stakeholder collaboration in delivering justice; and, Court User Committees to be cascaded to all court stations and enabled to function effectively.

Improving physical access to courts and reducing distance to courts by: building new courts, based on model court design guide; provide mobile courts; ensuring all courts are accessible to court users and accommodate the needs of persons with disabilities; using ICT tools to provide access to court services without requiring a physical presence; establishing special courts for children and other marginalized and vulnerable groups; operationalising Small Claims courts; simplifying court procedures to reduce costs; develop a Litigants' Charter to provide information of court jurisdiction, fees and calendar; and, providing customer care desks at every court station

Alternative Dispute Resolution (ADR) is another avenue for public engagement. Mr. Mboya indicated that there is need to develop laws and rules for ADR. There is also need to sensitize court users and communities on ADR. ADR is an important avenue for enhancing public participation and also facilitating access to justice.

Another strategy in promoting access to justice is the development and execution of information, education and communications strategy directed at the general public. This entails IEC strategy and IEC tools and mechanisms; developing a media strategy that also covers social media; and, designing appropriate collaboration and partnership frameworks with private sector and civil society for public engagement.

In conclusion the objective behind public participation has been to facilitate the involvement of the citizenry or potentially affected persons or interested members of the public in the decisions and process of the Government.

3.4.4 Access to Justice: Promoting Court and Alternative Dispute Resolution Strategies

Access to justice is the process a justice seeker has to go through to achieve appropriate redress. It takes into account not just the goal, but the process too. People, notably poor and vulnerable, suffering from injustices, have the ability to have their grievances listened to, and to obtain proper treatment of their grievances by state or non-state institutions, leading to

redress of those injustices on the basis of rules or principles of state law, religious law or customary law in accordance with the rule of law.

ADR provides different pathways to resolving disputes, relieving the overcrowding that makes court processes unnecessarily slow. Access to justice is therefore, not just access to the judicial system, but to an adequate dispute resolution process. ADR refers to voluntary techniques for preventing and resolving conflict with the help of neutral third parties. It is broadly understood to include, but not be limited to, negotiation, arbitration, mediation, conciliation, mini-trials, or early neutral evaluations. In plain terms it is an alternative to the formal legal system, and is often underscored in the context of the shortcomings of the formal legal system.

Some of the advantages of ADR are: speeding up procedure; eliminating unnecessary costs; Simplicity; facilitating rather than stalls business growth; improving better compliance with settled disputes; and, preserving and sustaining relationships.

Although the Kenya has statutorily provided for arbitration (Arbitration Act 1995) as an alternative to civil dispute resolution, arbitration has become entrapped in the mould of formal legal dispute resolution. Dispute resolution by provincial administrators (Chiefs, District officers, land disputes tribunals etc) with the support of local elders has often been viewed as unjust and illegitimate due to their abuse of the dispute resolution mechanisms and processes. Constitution of Kenya, 2010 gives formal recognition to ADR as a viable avenue for the enhancement of access to justice. Some of the constitutional provisions on ADR include: The Constitution enjoins courts and other adjudicating authorities to promote and encourage reconciliation, mediation, arbitration and other alternative dispute resolution methods in settlement of disputes- Art 159 (2)(c)). The ten commissions created under the Constitution are empowered to apply conciliation, mediation and negotiation. (Art 252(b), and are required to entrench ADR mechanisms in their operations. Other laws with provisions on ADR include: Civil Procedure Rules, 2010 and The Statute law (Miscellaneous Amendment) Act 2012.

Some of the recommendations to the Executive to enhance public participation through ADR include developing policy requiring all government departments to take an active role in adopting and promoting ADR in resolving disputes. This calls for the development of public awareness programmes and sensitization on ADR. Second is is making ADR attempt a pre-

requisite for state funded legal aid. Third is incorporating provisions in legislation that promote the amicable settlement of disputes by encouraging the use of mediation, ensuring a balance between ADR processes and judicial procedures. Fourth is, applying ADR within its own processes.

For the Judiciary, it was proposals were made to endorse existing ADR initiatives and encourage recourse to ADR; in collaboration with stakeholders, develop and make available a menu of ADR mechanisms for different types of cases; and, through Mediation Accreditation Committee, maintain a list of ADR providers, develop guidelines on qualifications and training programs through JTI in collaboration with relevant institutions

For the role of the judiciary in ADR, it was proposed that through the Rules Committee, the Judiciary make rules requiring an ADR attempt before litigation in appropriate cases such as family disputes. Besides, the judiciary role is to conduct a mapping of community based dispute resolution mechanisms and creates appropriate referral systems for suitable cases.

For community ADR there is need for restorative justice approaches; community based ADR may be used in addressing *minor* infractions- including neighborhood disputes, anti-social behavior; and, judiciary through Court Users Committees in all counties could partner with community based dispute resolution structures as part of community safety strategies.

For ADR to be effective safeguards must be put into place to protect communities, as opposed to just gaining consensus e.g. in environmental issues and citizens should be able to make informed decisions about whether dispute resolution ultimately will resolve their conflicts effectively, so that they are not vulnerable when using ADR.

3.4.5 Public Sector Stakeholder Partnership

Citizen engagement includes all the measures and institutional arrangements that link citizens more directly to the decision-making of the State, whether in public policy or service delivery. Citizen engagement enriches the practice of representative democracy by elevating public discourse and expanding the sphere within which citizens can exercise influence. It can also broaden consensus, accelerate the formation of public will, and enhance the legitimacy of government actions in the eyes of citizens.

When the collective interest and the public good are at play, governments will never escape the responsibility of being the insurer of last resort against the most important failures, and no matter what governments do, no matter how proactive they become, crises will inevitably beset them and their societies.

In its potential future forms, citizen engagement could open up unprecedented avenues for *co-design*, *co-production* and *co-creation* of government services. It could bring citizens in as part of the innovation cycle of government services. It could provide the necessary grounds for a different relationship between government, citizens and Society.

3.4.6 Public Participation in Public Finance and Procurement; How Open is Public Procurement in Kenya

The Constitution under Article 227 (1) requires a Procurement System that is fair, equitable, transparent (Open and Accountable), competitive and cost-effective. Section 2 of the Public Procurement and Disposals Act, 2005 sets the objectives for effective Public Procurement. The Act endeavours to maximise economy and efficiency, promote competition and equal treatment, promotes integrity of the procurement procedures; increased transparency and accountability; increased public confidence in the procurement procedures; and facilitate promotion of local industry and economic development. These provisions make public participation in procurement a requirement.

The procurement process in Kenya as required by the Law requires that; establishment of Tender Committees in the procuring public institution; no conflict of interest in administration of public procurement – employee or relation involvement; and, PPOA given powers to the Director General to satisfy himself on the integrity of the procurement process prior to award. Public participation in public procurement is important because: constitutional requirement – Art 196; a statutory requirement under the Public Procurement and Disposals Act – Section 2; helps in building trust in public institutions; means of educating and informing the public; and, way of resolving conflicts among competing interests – an open system.

Areas of inefficiency in Public Procurement System (Procuring Entity Specific inefficiencies) are: lack of Procurement Planning which is in consistency with the National Budget; high

instances of manifest of conflict of interest; demand for facilitation fees by officials of procuring public entities; over-pricing of common user items whereby 30% of Budget lost in Procurement related scams; varied rules and procurement requirements; over-use of the Request for Quotation Method; manual Procurement System which yield increased costs; decentralized procurement of Common User Items; lack of self-monitoring mechanisms within the procurement systems; and, delayed payments to suppliers due to insufficient funds, corruption, poor work ethics.

Opportunities for improvement include: encourage more of open tendering as opposed to direct or restricted tendering; establish procurement plans that are aligned to National Budget; participation on a level playing ground for all participants (suppliers); leverage on ICT in procurement processes to reduce direct physical intervention by procuring officials; operationalize preferred treatment to local entrepreneurs in accordance with the Presidential directives for the youth (10%) and restricting procurement of government office furniture; proactive audits of the procurement processes under an operational Internal Control Framework; make sanctions deterrent enough; and enhance participation of Independent observers in the Procurement Process.

Policy directions to be taken include two levels at which efficiency in Public Procurement could be improved were proposed. First is low level involving removal of the inexperience of government officials and lack of professionalism of suppliers (private sector). Second is high level involving adoption of policies that ensure cost savings even where no apparent losses are evident. The focus should be placed on value for money.

3.5 INCLUSIVENESS IN PUBLIC PARTICIPATION

3.5.1 Enhancing Public participation for Persons with Disabilities under the new Constitutional dispensation

The prevalence of persons with disabilities in Kenya stands at 3.6% which is equivalent to 1,333,312 people. The percentage of female persons with disabilities stands at 51.3%. Article 4(3) of the United Nations Convention on the Rights Persons with Disabilities (UNCRPD) provides that: “In the development and implementation of legislation and policies to implement the present Convention, and in other decision-making processes concerning issues relating to persons with disabilities, States Parties shall closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organizations.” Article 54(2) of the Constitution of Kenya provides that “The State shall ensure the progressive implementation of the principle that at least five percent of the members of the public in elective and appointive bodies are persons with disabilities.” Article 29 of the UNCRPD which provides for participation in political and public life of persons with disabilities. It states that State Parties shall guarantee to persons with disabilities political rights and the opportunity to enjoy them on an equal basis with others. Some of the challenges that face persons with disabilities include: attitudinal factors; exclusion in policy making processes; educational level 67% have primary level education; 19% have secondary level education; 2% have university level education; readability of the materials; and, degree of impairment

The key issues in enhancing devolved participation for persons with disabilities and they included: civic education; training paraprofessionals to work with PWDs; an example would include people who give supportive services e.g. interpreter services; reasonable accommodation; Kenya National Examination Council (KNEC) gives PWDs more time when doing their exams; strengthen disability organizations; disability mainstreaming in all sectors of devolved system; formation of disability forums; accessibility to information and mobility; and, creating a universal design e.g. Riara University has buildings which are accessible to people with wheelchairs.

3.5.2 Role of the Youth in Public Participation

The National Youth Council has not been operational since 2010; the Ministry of Youth Affairs has been a let down to the youth. Article 55 of the Constitution of Kenya provides for the rights of the youth and that Article 53 provides for the rights of children. Article 55 provides that:

The State shall take measures, including affirmative action programmes, to ensure that the youth: access relevant education and training; have opportunities to associate, be represented and participate in political, social, economic and other spheres of life; access employment; and, are protected from harmful cultural practices and exploitation. The youth can participate in this as their key strengths include youthfulness vigor and intellectual rigour and curiosity.

Therefore, some of the challenges that the youth face in public participation include: rising social problems in the face of inadequate leadership; rising inequalities; stagnating accountability in spite of expanding political space; leadership jam-this is whereby the older generation has refused to acquiesce leadership to the younger generation; and, finding a vision.

Some of the strategies that can be used to enhance participation among the youth Include: representation (the National Gender and Equality Commission (NGEC) should ensure that there is equality in terms of representation); clear engagement framework; invest in technology and creativity; provide platforms for children to speak; operationalize Article 55 as an avenue for participation; and, communicate principles of public participation.

3.5.3 Enhancing Public Participation for the Marginalized Communities under the New Constitutional Dispensation

Article 260 of the Constitution provides that of Kenya provides that marginalized community means: community that, because of its relatively small population or for any other reason, has been unable to fully participate in the integrated social and economic life of Kenya as a whole; traditional community that, out of a need or desire to preserve its unique culture and identity from assimilation, has remained outside the integrated social and economic life of Kenya as a whole; indigenous community that has retained and maintained a traditional lifestyle and

livelihood based on a hunter or gatherer economy; pastoral persons and communities, whether they are nomadic or a settled community that, because of its relative geographic isolation, has experienced only marginal participation in the integrated social and economic life of Kenya as a whole.

Article 260 provides for marginalized groups as “marginalized group” means a group of people who, because of laws or practices before, on, or after the effective date, were or are disadvantaged by discrimination on one or more of the grounds in Article 27 (4). The difference between the two is that the definition of marginalized groups is more narrow as they deal with ethnicity and smaller populations. It is not enough to have a national definition but to look at a county and see whether a community is marginalized in the county level.

Challenges that marginalized groups/communities have faced in public participation include: historical exclusion; unresolved human rights violations-massacres, forced removal from ancestral claimed land; and, weak voice in public affairs. Some sections of the Constitution that deal with Participation or Marginalized Communities include: Articles 10, 56, 91(1)(e), 97(c), 100, 177(1)(c), 22, 258, 2(5) and (6) of the Constitution.

Key challenges to public participation of minority groups are: scattered nature of participation vision of marginalized communities in the Constitution; no singular institutional arrangement to elevate participation of marginalized communities; limited political commitment to enact enabling legislation; and, weak access to information framework. The three arms of government can effect public participation through legislating on Article 100 and 177, 35 on Freedom of Information and enforcement of judicial decisions.

3.5.4 Factoring Gender Parameters and Children Participation in Governance

Public participation is a context driven; it is a social and political process and not legal. Looking at culture, it difficult to assume that public participation can be built into the fabrics of societies through prescription as a requirement to achieve particular goals. The goals of public participation are: incorporation of public values into decision-making; improvement of the substantive quality of decisions; resolution of conflicts among competing interests; building trust in governance institutions; and, educating and informing the public.

The foundation for a functional public participation system calls for a certain level of knowledge where an ordinary citizen who is not an expert but has knowledge on a policy

matter that can enable them make informed decisions or contribute meaningfully. There should be knowledge input before the participation. Even the generation of parameters must be hinged on socialization and values.

On gender and children she stated that gender is an extension of emancipatory approaches. A common mistake is to assume you are dealing with a monolithic entity yet with the body there are competing interests along axis of class, age, ethnicity, levels of ability. Different parameters must be looked at social groups. Tend to look in terms of traits but would be best looked at as institutionalized system of practices depending on peoples experiences. Gender is not just a trait of individuals but is an institutionalized system of social practices. So factoring gender means how we deal with social system of practices.

3.6 PUBLIC PARTICIPATION ENABLERS

3.6.1 Industrial Sector Public Participation in Law Making Process - KAM Experience

KAM is Kenya's leading representative body for Manufacturing Value Add industry. KAM offers policy advocacy and representation to Government on Issues that impact on Business, representation in regional and international trade negotiations, educational/learning events for members, provision of business information – opportunities, linkages etc, market expansion and export facilitation, training on Industrial Energy Conservation and networks with other business Associations.

KAM has been working closely with Consumer Bodies such as Consumer Unity and Trust Society (CUTS), Consumers Federation of Kenya (COFEK), Competition Authority of Kenya (CAK) *et cetera*. She noted that the areas of engagement include: law making process such as the Consumer Protection Bill; seminars and workshops: organised both by KAM and by the Consumer organisations; through advocacy and educating consumers on the reasons for having a certain legislation such as the Anti-Counterfeit Act; using the media to create awareness to consumers on an upcoming legislation. Feedback from such forums with consumers and consumer bodies inform KAM advocacy exercises as well as are useful in its appraisals.

However, some of the challenges faced by this institution include: lack of a consultative process; lack of a uniform/standard approach by ministries in engaging stakeholders; lack of access to contentious bills; conflicting interest at play; and, lack of framework for engagement with ministries (that is, participation in legislative processes is at ministries' discretion).

KAM initially participated at the executive level only, the constitution provides for inclusion and it hopes that participation will be at all levels. There is, therefore, need for a legislation for engagement with the Executive on legislative process, institutionalization of Public Private Dialogue on legislative process especially with executive, access to contentious Bills should be improved; all Government institutions should adhere to the requirements of the constitution on consultation; checklist be developed to evidence stakeholders' engagement; requirement to have stakeholders' consultative meetings before a bill is taken to the Cabinet.

There is need for parliament to enact legislation on Public Participation since there are no proper guidelines of enforcing the constitutional provisions. The available avenues presently

do not make it mandatory that the public participates. The business community needs to participate in legislations affecting them for there to be reasoned legislations. She further noted that involving private sector at the policy formulation stage would be advantageous as the industry is educated early enough on ensuing legislations; consensus reached early (few or no amendments would be proposed by the Industry at the final stages of the Bill); and, good relationships would be maintained as parties get to understand each other.

KAM is ready to work with the Government in ensuring participation in all the regions where its members are situated; the spirit of devolution is aimed at ensuring that “*Wanjiku*” is empowered than by informing her and involving her in the law making process; and, curing the vices evidenced when Bills are fast tracked without stakeholder consultation. The Judiciary should keep check to ensure that the Law is not breached.

3.6.2 Role of Information Management and ICT in Enhancing Effective Public Participation

ICT offers the opportunity to harnesses the scattered resources into a single and well organized single point. Kenya has 29.2 million mobile users and 10.5 million have access to internet services.

ICT releases government held information e.g. KCPE/KCSE result, Counties profiles, Census data, and information on health facilities among others as a way of enhancing effective public participation. Many Kenyans are using the internet and the social media, it is therefore important to get online and respond to the public and develop personalized relationships with them.

3.6.3 Role of Culture and Arts in the Enhancement of Public Participation

Culture is the totality of a people’s way of life. Culture has not been effectively harnessed to enhance and mainstream public participation. Public participation can be made part of the Kenya’s national culture through:

Attitude: insist that the principle of public participation is not up for negotiation and that the challenge is to enable it within a culturally appropriate framework;

Skills- take into account cultural consideration in facilitating the practice of public participation; and,

Values: determine what Kenya's values were.

Recommendations for those charged with ensuring public participation was recognizing and involving cultural workers in all aspects of public participation. Some of the categories for the implementers included: intellectuals, facilitators, change agents (activists), creative (expressive). One key opportunity that cuts across the various issues is the existence of the Kenyan Constitution provides the basis and gives legitimacy to public participation. It is worth noting also that the major challenge is to have a structured engagement that is measurable. This will facilitate the monitoring of public participation and its effectiveness. The issue of feedback when engaging the public also came up in the discussions and any initiative should ensure that there is feedback. This will strengthen and motivate citizens to engage more especially with the government.

PART IV

SYNTHESIS OF EMERGING ISSUES

INSTITUTION	AVENUES FOR STRENGTHENING PUBLIC PARTICIPATION
The Judiciary	<ul style="list-style-type: none"> • Promoting and encouraging Alternative Disputes Resolution as a way of decongesting the courts. • Involvement of the people in the judiciary transformation process. • Establishing a comprehensive mechanism curb corruption. • Putting in place a credible complaint mechanism- the judicial officers should be vetted and the public encouraged channeling their complaints to various committees. • Strengthening the Court Users Committees (CUC) and publicizing their functions. • There should be a sectoral policy framework on public participation in the judiciary. • Demystify the courts – the courts should be user friendly to the public in terms of environment and the judicial officers. • Access to the courts and information – the courts should be brought closer to the people.
The Executive	<ul style="list-style-type: none"> • Engaging in public interest litigation. • Vetting of the appointments to the executive – the public should participate in the appointment either directly or through their representatives. • The public should have access to information – we should adopt strategies to ensure that cabinet communication gets to the people. • The use of ICT to promote access and dissemination of information. • The public should be involved in the actual budgeting by them identifying their needs. <ul style="list-style-type: none"> • The executive should have a charter with the people in terms of the standard of service delivery.
The Legislature	<ul style="list-style-type: none"> • There should be developed a leadership score card to enable the public to interrogate and assess the performance of their performance. • Public petitions should be encouraged – the public should be able to present their petitions to

INSTITUTION	AVENUES FOR STRENGTHENING PUBLIC PARTICIPATION
	parliament and get feedback on the same <ul style="list-style-type: none"> • Civic education should be intensified – the public should be able to make informed choices on the kind of leadership they want. • The parliament is supposed to represent the public effectively and strive
Cross Cutting Issues	Pre-elections Initiatives <ul style="list-style-type: none"> • Mainstream civic education in a structured formal process that should be regular and not only target the elections process. • There is need to inculcate organizational structural programs that are committed formal and ensure we have commitments, tracks, reporting mechanisms that ensure performance. • There is need for a framework to ensure access to information • Mapping of engagement mechanisms is key • Exploitation of devolved system of government as an effective avenue for participation. • The role of the media in public participation should be exploited. • Media should change its style to ore development oriented issues rather than trivial political issues. • There is need to have more forum talk shows on topical issues. Long term strategies <ul style="list-style-type: none"> • Policy framework on public participation is key before the development of legislation. • Comprehensive, consistent and continuous civic education • Curriculum development to inculcate public participation. • County government policies should be fast racked to avoid last minute legislation rush. • Continuous and sustained capacity building of county officials. • Enhanced community engagement in community policing. • Embrace the culture of volunteerism and corporate social responsibility be encouraged. • More focus at the county levels and less focus at the national level as counties will b good avenues public participation especially to groups that have been historically marginalized. • There is need to refocus on the long term objectives and no the short term objectives.

PART V

CONCLUSION AND WAY FORWARD

The conference concluded that a policy on public participation was required. Going forward, it was agreed that Ministry of Justice, National Cohesion and Constitutional Affairs draft a concept paper together with CIC defining the road map to policy development. The concept would then be shared with key stakeholders.

It was agreed that the policy should provided the following;

- i. It will provide a framework for action
- ii. It will guide county governments in development of legislation on public participation
- iii. It will provide clarity for engagement
- iv. It will provide standards for public participation engagement; It will define participation in different areas and also define what will constitutes sufficient public participation
- v. It will bring out the thematic issues that are involved and provide direction for sectoral legislation
- vi. It will identify gaps in various sectors, areas which have insufficient public participation
- vii. It will provide a means of monitoring the implementation of public participation; address the efficiency and quality of public participation
- viii. It will guide the issue of inclusivity, fairness, address issues of gate keepers, mitigate against elite capture of citizen spaces;
- ix. It will enable the tapping of local information and knowledge
- x. It should be flexible not prescriptive

PART VI

ANNEXE - PROGRAMME

CONCEPT NOTE:

1. Background and Justification

Constitutional implementation is a national effort that demands active participation by members of the public. The Constitution which is largely based on human rights principles, recognizes public participation in article 10, as a national value and principle of governance and further mandates parliament in article 118, to facilitate public participation in the legislative and other business of parliament. The Constitution also lays down principles on which a modern order should be established by enshrining rules, which are essential to establishing a democratic society. One of major innovations of Kenya's new Constitution, which reaffirms the "sovereignty of the people", is the establishment of a devolved system of governance to promote a democratic and accountable exercise of power.

While strengthening the national unity by recognising diversity, Kenya's new political system gives powers of self-governance to the local level in order to enhance the participation of the people in making decisions affecting them. It also recognises the right of communities to manage their own affairs and to further their economic development, including the provision of basic service Public participation has been defined in various ways by different people, and for a variety of reasons. For example participation has been used to build local capacity and self-reliance, but also to justify the extension of the power of the state. Clearly, the new constitutional dispensation attempts to fortify the linkage between public participation, transparency and accountability. In any democratic society, the presence of clearly, well-developed strategies for public participation build trust, promote accountability, strengthen commitment of all stakeholders towards improved governance, and directly limit the potential for corruption and poor leadership.

Kenya is yet to implement a comprehensive and functional approach to public engagement, partly because of the actual requirements. This has led to a situation where public participatory processes are poorly conceptualized, misdirected and are even increasingly perceived as confusing by many stakeholders. The consequence is participation fatigue that is beginning to be seen in the public reception of some of the taskforces and public commissions' forums.

The levels of public participation vary from simply sharing of information to active engagement of citizens in the implementation and management of projects and services. Tools to build different types of participation also range from stakeholder consultations and public hearings to community watchdog

groups and public-private partnerships. Two key common threads that run through the various tools for participation, is the commitment of government to share information and engage the community in an open dialogue. In this regard the views of the citizens must not only be heard but also reflected in development decisions, thus making governments responsive and accountable to the community. Secondly, the presence and follow through on an appropriate framework for public participation.

Public participation aims at bridging of the gap between the government, civil society, private sector and the general public, building a common understanding about the local situation, priorities and programs. Public participation encourages openness, accountability and transparency, and is thus at the heart of inclusive decision-making. The level and the nature of public participation in local governance issues are often used as indicators of a healthy civic culture.

The new constitutional dispensation attempts to fortify the linkage between public participation, transparency and accountability. Public Participation may be defined as an open, accountable process through which individuals and groups within the community can exchange ideas and influence decision making. It is a democratic process of engaging people, deciding, planning and playing an active part in development and operation of services that affect their lives. In any democratic society, the presence of clearly, well-developed strategies for public participation build trust and confidence in the systems, promote accountability, strengthen commitment of all stakeholders towards improved governance, and directly limit the potential for corruption and poor leadership.

There is need to put in place a framework to effect this important constitutional principle to ensure it is effectively implemented. It is on the basis of this recognition and the need to ensure effective public participation in constitutional implementation, that various efforts are being undertaken to ensure enactment of the most suitable framework for public participation. Various consultants have been commissioned including research and compilation of research papers that provide a comparative analysis and highlight key issues for consideration in the development of a framework on public participation. These are among the research papers that will form the basis for discussion at a technical conference scheduled to be held on 24th – 26th September 2012. The objective of the conference is to provide an opportunity for stakeholders from the three arms of government, the civil society and other non-state actors, international experts and the academia to share different perspectives and experiences in regard to the implementation of this principle.

The focus of current consultations is to develop and implement a functional public participation framework in Kenya. The consultative process will explore the array of options to enable the realization of this goal. The framework(s) is/are that will be developed will be expected to recognise the independence of each arm of Government as well as each unique mandate and as such would be applicable separately though technically networked.

2. Specific Objectives of the Consultations

- a) To create an environment that will enable a cross section of concerned individuals, experts and organizations to meet, and take stock of the state of public participation within the new constitutional dispensation
- b) To evaluate the extent of public participation in government and private sector programs.
- c) To provide an opportunity for the public to give input in the designing of how they should participate in the formulation and implementation of programs that affect them.
- d) To discuss and agree on the most suitable framework on public participation and agree on a plan of action for developing the framework.

3. Expected outputs

- 1. Conclusive way forward on the public participation framework
- 2. A report of the deliberations of the forum.

4. Venue

The four day residential forum will be held in Naivasha. The forum will be held on 24th – 26th September 2012.

PROGRAM

23thSEPTEMBER 2012

Time	Topic	Responsibility
4.00PM	Departure for Venue	CIC
7:00PM	Round Table – CIC, Moderators, Panelists and Rapporteurs	CIC
7:30PM	Welcome dinner and Receipt of Conference Package	CIC

DAY ONE: 24thSEPTEMBER 2012

Time	Topic	Responsibility
8.00-8.30	Registration	CIC

8.30-10.30	<p>Opening remarks</p> <p>Mr. Charles Nyachae Chairperson, Commission for the Implementation of the Constitution</p> <p>Hon. Prof. Githu Muigai FCI Arb. Attorney General</p> <p>Hon. Eugene Wamalwa M.P. Minister, Ministry of Justice, National Cohesion and Constitutional Affairs</p> <p>Hon. Prof. J.B. Ojwang Supreme Court Justice</p> <p>Hon. Kenneth Marende, EGH, M.P. Speaker of the National Assembly of the Republic of Kenya - Chief Guest</p>	<p>Session Chairs:</p> <p>Mr. Gichira Kibaara Ag. Permanent Secretary MOJNCCA</p> <p>and</p> <p>Dr. Elizabeth Muli Vice-Chairperson CIC</p>
10.30 – 11.00	Health Break	
11.00 – 12.30	<p>Plenum 1 Topic: “Overview of Public Participation”</p> <p><i>Setting the Context: Video clip on case studies on public participation</i></p> <ol style="list-style-type: none"> 1) <i>The principle of Public Participation as envisioned by the Constitution of Kenya 2010 - Mr. Kathurima M’noti, Chairperson Kenya Law Reform Commission</i> 2) <i>Designing a successful Model for Public Participation in governance: Key factors to consider - International expert</i> 3) <i>“Towards a comprehensive public participation model” - Milton Obote, Consultant, USIU</i> 4) <i>“Participation: Is there a need for a legal framework” – Waikwa Wanyoike, Katiba Institute</i> 5) <i>Defining the public engagement framework within the context of transition to devolved Government – Angeline Hongo, Vice-Chairperson, Transitional Authority</i> 6) <i>Practical Considerations for Public Participation under County Governments – Wanjiru Gikonyo, TISA</i> 	<p>Plenum Moderator:</p> <p>Mr. Otiende Amollo</p> <p>Chairperson Commission on Administrative Justice</p>
12.30-13.30	Plenary	
13.30-14.30	Lunch	

14.30-16.00	<p>Plenum 2 Topic: “Enhancing effective Participation in Legislative processes”</p> <p>Panelists:</p> <ol style="list-style-type: none"> 1) <i>Public participation in the Legislative processes: Experiences, challenges and opportunities in line with the Constitution of Kenya</i> - Jeremiah Nyegenye, Parliamentary Counsel, National Assembly 2) <i>Challenges and Opportunities for Public Participation in the Law Making Process: Experiences in the Industrial Sector</i> - Ms. Fridah Mbugua, Kenya Association of Manufacturers 3) <i>Public participation in legislative processes: The South African experience</i> - Samantha Waterhouse, Parliamentary Liaison, University of Western Cape, South Africa 	<p>Plenum Moderator:</p> <p>Morris Odhiambo</p> <p>Executive Director</p> <p>Centre for Law and Research International (CLARION)</p>
16.00 – 16.30	Health Break	
16.30 - 18.00	Plenary	
	Close of first day	

DAY TWO: 25thSEPTEMBER 2012

Time	Topic	Responsibility
8.30-10.00	<p>Video slideshow on case studies on public participation</p> <p>Plenum 3: Topic: “Enhancing effective participation in Judicial processes”</p> <p>Panelists:</p> <ol style="list-style-type: none"> 1) <i>Public engagement in the judicial systems: Realizing and sustaining access to justice under the devolved system and in public interest litigation</i> - Mr. Apollo Mboya, Secretary, Law Society of Kenya 2) <i>Access to Justice: Promoting Court and Alternative Dispute Resolution Strategies</i> - Ann Amadi , Advocate, Practicing Arbitrator 3) <i>Factoring Gender parameters and Children participation in governance</i> – Prof. Jacqueline Oduol 	<p>Plenum Moderator:</p> <p>Hon. Ababu Namwamba</p> <p>Member of Parliament</p>

10.00-11.00	Plenary	
11.00-11.30	Health Break	
11.30 - 12.30	<p>Plenum 4: Topic: “Enhancing effective Participation in the Executive and in Public Private Partnerships”</p> <p>Panelists:</p> <p>Session 1:Public Participation in Planning and Development:</p> <ol style="list-style-type: none"> 1) <i>Public participation in National Planning: Lessons from the past and imperatives for public participation in planning under devolved Government - Dr. Edward Sambili, Permanent Secretary, Kenya Local Government Reform Program</i> 2) <i>Public participation: Reflections on Institutionalising Platforms for Structured Stakeholder –Mr. Emmanuel Lubembe, Head Public Service Transformation Department</i> 	<p>Plenum Moderator:</p> <p>Atsango Chesoni Executive Director - Kenya Human Rights Commission (KHRC)</p>
12.30 – 13.30	Plenary	
13.30-14.30	Lunch	
14.30-15.30	<p>Plenum 4: Continued</p> <p>Session 2:Public participation in Public Finance and Procurement:</p> <ol style="list-style-type: none"> 1) <i>Public Participation in Public Finance Management under the new constitutional dispensation - Mr. Albert Mwendwa, Ministry of Finance</i> 2) <i>Public Participation in Procurement processes; Lessons from Brazil and Opportunities from Kenya – Prof. Saul Tourinho Leal, Brazil</i> 3) <i>Experiences of Private Sector Actors in Procurement Processes: How Open is Public Procurement in Kenya? – Riaga Omolo, ICPAK</i> 	<p>Plenum Moderator:</p> <p>Commissioner Catherine Mumma CIC</p>
15.30-16.30	Plenary	
16.30-17.00	Health Break	
	Close of second day	

DAY THREE: 26thSEPTEMBER 2012

TIME	TOPIC	Responsibility
8.30 – 9.00	<p>Plenum 4: Continued</p> <p>Session 3: Access to Information as a component to public participation</p> <p>1) <i>The role of Information Management and ICT in enhancing realization of effective Public Participation – Eunice Kariuki, ICT Board</i></p>	<p>Plenum Moderators:</p> <p>Commissioner Prof. Peter Wanyande</p> <p>CIC</p>
9.00 – 10.30	<p>Plenum 5: Topic: “Enhancing Public Participation for Minority and Marginalized groups</p> <p>Panelists:</p> <p>1) <i>Enhancing public participation for Persons with Disabilities under the new constitutional dispensation - Dr. Michael Ndurumo</i></p> <p>2) <i>The role of the Youth in public participation – Susan Kariuki, Youth Agenda</i></p> <p>3) <i>Enhancing public participation for the Marginalized Communities under the new constitutional dispensation – Dr. Korir Singoei,</i></p> <p>4) <i>The role of culture and arts in the enhancement of public participation - Dr. Mshai Mwangola</i></p>	<p>Plenum</p> <p>Moderator:</p> <p>Winnie Lichuma</p> <p>Chairperson</p> <p>National Commission on Gender and Equality</p>
10.30 – 11.00	Health Break	
11.00 – 12.00	Plenary: Session 3	
12.00 – 13.00	<p>Plenum 6: Topic: “Monitoring Public Participation”</p> <p>Panelists:</p> <p>1) <i>The role of Constitutional Commissions in Monitoring and Implementation of Public Participation: Experiences and Opportunities – Commissioner Kamotho Waiganjo, CIC</i></p> <p>2) <i>The role of citizens in monitoring public participation:</i></p> <p style="padding-left: 20px;">i) <i>Practical Experiences with the Community Based Monitoring System: Case Study – Alice Sereti, Africa Institute for Development and Health</i></p> <p style="padding-left: 20px;">ii) <i>The role of Faith based organizations in monitoring and implementation of public participation –Oliver Kisaka NCKK</i></p>	<p>Plenum</p> <p>Moderator:</p> <p>Commissioner Dr. Ibrahim Ali</p>

		CIC
13.00 – 14.00	Plenary	
13.30 – 14.30	Lunch	
14.30 – 16.00	Plenary: <i>Emerging Themes on the Framework for Public Participation</i>	Commissioner Catherine Mumma CIC
16.00- 16.30	Way Forward Vote of Thanks and Close of Forum	MOJNCCA& CIC

27thSEPTEMBER 2012

Time	Topic	Responsibility
10.00 AM	Departure for Nairobi	CIC