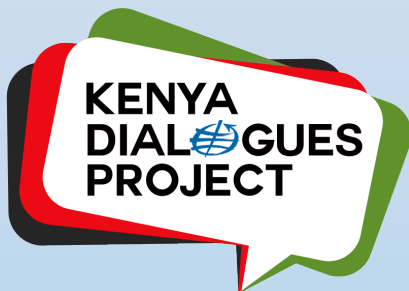




SID

Society for International Development

Improving the Quality of Citizen Engagement in Kenya: Promise, reality and prospects



DEVOLUTION | INTEGRITY | PUBLIC PARTICIPATION | EQUALITY

KDP Policy Brief 1, May 2015



Executive Summary

The Constitution of Kenya 2010 is one of the most progressive constitutions in Africa. Kenyans hailed it as a new, powerful and transformative covenant between citizens and their leaders. The international community called it a watershed for reform in the continent. A key artery in this constitution is the vision of an open, inclusive and responsive Government, a vibrant civil society and an engaged citizenry.

Four years since the promulgation of the Constitution, this covenant seems elusive, suffocated by tokenistic participation strategies, disrespect for the rule of law and open tensions between the national Government and the county Governments. Citizens on the other hand, appear unable to seize the opportunities availed to them through the constitution and influence public policy making processes. Notable civic voices argue that the space for

citizens' engagement is gradually shrinking.

The Society for International Development has examined these perceptions within six important relationships and processes over 2014. Based on these case-studies, we come to the following three major findings;

1. **The space for meaningful public participation is reducing,** evidenced by attempts to control and weaken mediating organisations through restrictive laws and amendments such as the Public Benefits Organizations (PBO) (Amendment) Act, the Security (Amendment) Bill and the Media Laws. **At the county level, the space for meaningful public participation is being reduced to tokenistic participation in county consultative processes;**

2. **Civil society's capacity to effectively confront and challenge attempts to reduce the democratic space is weakened by** internal divisions and external political and social factors that pose a challenge in advancing a collective agenda, sustaining action and broad-based coalition-building among different types of civil society organizations;
3. **Due to increased loss of public trust,** citizens are continually seeking private solutions to public problems through associations or affiliation-based privileges rather than public-extensive rights.

The brief recommends:

1. **Establishment of laws and clear mechanisms for public participation,** at all county and national levels, by both County Assemblies and Parliament;
2. **Increased coalition building among civil society, citizen groups, unions and citizens** to strengthen the capacity of citizens and civil society to take the new opportunities that these new spaces provide and demand transparency and accountability as envisaged by the Constitution;
3. **Citizens have a responsibility to exercise integrity** in electing leaders who are not only determined to create spaces for participation, but are also equally determined to ensure that spaces for participation work effectively. This requires new social and political relationships based on entitlement to public-extensive rights to replace patron-client kind of alliances.¹
4. A recognition by all actors; citizens, civil society and Government that **a key component of democracy is building trust among and between different parts of society.**

¹ Nyamu-Musembi (2010; 38)

This policy brief arrives at these findings by comparing the constitutional promise of participation to what exists in reality and by examining the state of public participation in Kenya through six recent case studies. These case studies range from communities, Non-Governmental Organizations (NGOs), Community Based Organizations (CBOs) and health associations to media organizations. These organisations and communities have made attempts at tackling disabling legislation and challenging inadequate consultation in policy processes such as devolution of health services, natural resource extraction and environment management and youth unemployment.

The significance of these cases lies in their attempts to expand democratic space, the national or global significance of the issues they address and the number of people affected by their interventions. It is also important to note, that while each of these case studies has been trying to advance its agenda for the past two years or so, none has fully realised its objective. A key challenge is inability to organise both internally and externally, as well as connect the different struggles.

These case studies cumulatively provide valuable insights and lessons on some of the pressing issues facing the realization of the constitutional promise of public participation. With the transitional phase of the Constitution coming to an end, the recommendations provide a realistic pathway to improved public participation and meaningful engagement of citizens by the two levels of Government in the future.

Three of the case studies focus on national public action (media laws, PBO action and health devolution). The remaining three (Dandora, Turkana and Kiambu) focus on public participation at the county level.

Acknowledgements

This policy briefing is one in the series of briefings produced by the Kenya Dialogues Project of the Society for International Development. This policy brief was written by Joan Njagi, Policy Research Officer. The author is grateful for and acknowledges the editorial contribution of Irungu Houghton, and the insights of Annette Omollo, Celestine Musembi, Christine Njeru, Cidi Otieno, Jason Lakin, John Kinuthia, Leonard Wanyama, Mathias Kinyoda, Orwa Michael, Morris Maina, Regina Mwatha, Sandra Ochola and Stefano Prato on earlier drafts of the policy brief.

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Acronyms and Abbreviations

CAJ	Commission for Administrative Justice	KICA	Kenya Information and Communication Act
CBEF	County Budget and Economic Forum	KNCCI	Kenyan National Chamber of Commerce and Industrialization
CBO	Community Based Organisation	Kshs	Kenya Shillings
CCI	Coalition for Constitution Implementation	KUJ	Kenya Union of Journalists
CDF	Constituency Development Fund	LSK	Law Society of Kenya
CSO	Civil Society Organisation	MCA	Media Council Act
CIC	Commission for the Implementation of the Constitution	MCA(s)	Member(s) of County Assembly(ies)
DRD	Declaration on the Right to Development	MP	Member of Parliament
GoK	Government of Kenya	MSCO	Mustard Seeds Community Organisation
IBP	International Budget Partnership	NGO	Non-governmental Organisation
ICJ	International Commission of Jurists	PBO	Public Benefits Organisation
IDP	Internally Displaced Persons	PFM	Public Finance Management
KCA	Kenya Correspondents Association	PTA	Parents – Teachers Association
KMPDU	Kenya Medical Practitioners and Dentists Union	WHO	World Health Organisation

The Case Studies

i. National case studies

CASE STUDY 1: Advocating for the commencement of the PBO Act (2013) without contentious amendments: The new constitution presented an opportunity for the state and CSOs to reform the 20-year-old NGO Act (1990). Through a lengthy consultative process involving government Civil Society Organizations (CSOs), and citizens, a PBO Bill was developed. Although the Bill was assented into law on January 7, 2013, more than two years later, the Act is yet to commence. Instead, five legislative attempts have been made in the National Assembly to pass amendments that would significantly change the spirit and letter of the Act. The case study highlights actions taken and challenges faced by CSOs in protecting the shrinking civic space.

Amendments to the PBO Act would affect more than 8,000 PBOs, with a combined budget of Kenya Shillings (Kshs) 80 billion per annum. The sector employs over 200,000 people, and plays a critical role in reaching poorly resourced and underserved areas. The sector is critical in addressing social, economic and political problems including poverty and inequality food insecurity, youth unemployment, gender based violence and other human rights violations.

CASE STUDY 2: Contesting restrictive medial laws: The media community engaged a wide range of stakeholders to revise the Media Council Act (MCA) (2007), to reflect the expansive media freedoms contained in Articles 33 and 34 of the Constitution. Despite the extensive consultative processes, the Media Council Bill tabled in parliament was not reflective of the consultations and the media community deemed it unconstitutional. Even with recommendations for change and protests by the media fraternity, on December 5th, 2013, Kenya's National Assembly passed the Kenya Information and Communication (Amendment) Bill and the Media Council Bill, receiving presidential assent shortly after. This case study documents how the media community organized and mobilized others to contest the laws, as well as missed opportunities for more collaborative action.

The media industry is made up of not less than 14 newspapers (four daily and ten non-daily), 8 TV stations, and 38 radio stations. Combined, these reach more than

3.4 million people daily². The contested media laws affect a media industry that was worth \$ 1.2 Billion (Kshs. 108 Billion) in 2012, and estimated to be worth \$ 3 Billion (Kshs. 270 Billion) in 2017 , providing employment to thousands of media professionals.³ Media plays an important intermediary role between the state and citizens, and informs and influences public opinion.

CASE STUDY 3: Organisation of health workers to challenge devolution of health: The move to devolve health in line with the Constitution has been met with a lot of resistance from health workers, arguing against its logic and practicality. This case highlights some of the concerns raised by health workers, as well as the organisation of the campaign, through the Kenya Medical Practitioners and Dentists Union (KMPDU) to contest devolution of health. While health workers sought increased engagement and consultation, the case-study highlights the contradiction that exists between rhetoric and reality with regard to engaging stakeholders in decision-making on public policy. The case also highlights the opportunities missed by the health sector to build critical mass support from the public and civil society, given that the issues raised by health workers would affect majority of the population.

The Ministry of Health's goal is to provide equitable, affordable and quality healthcare for all 40 Million Kenyans. However, this goal is hindered by a poorly equipped and resourced health sector, with an average of 16 doctors and 153 nurses per 100,000 people.⁴ This is a very low figure compared to the 36 doctors and 356 nurses for every 100,000 people, as recommended by the World Health Organisation (WHO).⁵ In addition, healthcare funding has consistently failed to meet the 15% of National budget requirement as recommended by the Abuja Declaration.⁶ These factors demonstrate the complexity and the need for a carefully planned approach to provision of healthcare in the context of devolution.

² Price WaterHouse Coopers (PWC) (2014)

³ Ibid.

⁴ The Kenya Institute for Public Policy Research and Analysis (KIPPRA) (2013)

⁵ Ibid.

⁶ Lakin and Kinuthia (2014) <http://internationalbudget.org/wp-content/uploads/Understanding-What-the-Kenyan-Government-Spends-Money-On.pdf>

ii. County case studies

CASE STUDY 4: Community Organizations as active citizenship: The case of Mustard Seed Community Organization (MSCO): Dandora estate in Nairobi is a community grappling with high levels of insecurity, youth unemployment and environmental degradation. These challenges have led youth in Dandora through the initiative of MSCO, to organise in an effort to collectively address these challenges. The case study highlights the challenges that the youth in Dandora are facing in advancing the agenda to address these challenges, in a potentially progressive political structure that is nonetheless characterized by static political cultures. The case is a clear indication that having the most progressive constitution, laws and democratic institutions is not enough to transform the political culture of corruption and systemic abuse of power. Citizens must also exercise integrity in electing leaders who represent their interests.

High levels of youth unemployment, rapid growth of urban informal settlements, and high levels of insecurity, are some of the challenges facing urban areas in Kenya. MSCO has developed an innovative strategy providing an inter-linked approach to these three key problems facing urban areas. Partnership with government is therefore critical in scaling such innovative approaches generated by young people to address the multiple challenges faced by youth in urban areas. Given the focus of the Constitution to ensure representation of youth, the case of youth in Dandora raises critical questions regarding the representation of youth.

CASE STUDY 5: Organisation of the Turkana Community to challenge Tullow Oil Company operations: Tullow Oil Company has been involved in oil exploration in Turkana County since 2010. While the company had made contractual arrangements with the Kenyan National Government prior to promulgation of the Constitution, the community has in the recent past begun to challenge the ways in which Tullow has been engaging with them, particularly on employment and contracting. This case study highlights the role that the Constitution, particularly devolution and participatory governance, played in empowering citizens to challenge Tullow's operations. It highlights the issues raised by the community, the role of catalysts in organising the community to articulate these issues, the impact of this engagement as well as the evolving nature of the community's engagement.

The Tullow oil case provides an opportunity to learn how the government, private sector and communities

can work together. Given the potential of the oil sector to dominate the economy, the lessons learned through Tullow's operations in Turkana are thus critical in informing similar initiatives that are likely to emerge, particularly in the natural resources sector. This case highlights the importance of engaging with communities as active participants with capacity to influence their surroundings.

CASE STUDY 6: Community participation and how it influences policy in Kiambu County: This study documents the process of developing county legislation, specifically the Kiambu Finance Act, and highlights gaps in involving the public in policy making, remaining an exclusive affair. The study discusses the actions taken by different organized groups, particularly Jamofastar Welfare Association and The Kenya National Chamber of Commerce and Industrialisation (KNCCI) – Kiambu Chapter, to contest regressive laws, and to seek more genuine and meaningful public engagement in developing laws that are acceptable to the citizens. While the case paints a grim picture of public participation in counties, it also demonstrates the power of organization, and the spirit of the Constitution to give power to the people by providing multiple options for the public to participate.

As counties develop laws and structures for governance, it is important that communities are engaged to ensure that these are fair to the people, and reflective of their needs and circumstances. The Kiambu case demonstrates the importance of meaningful negotiation between citizens and Government, and the consequences of failing to meaningfully engage with citizens. It provides lessons for all 47 counties on ensuring meaningful participation of citizens in public policy processes.

The Promise Versus the Reality of Public Participation in Kenya

i. The promise of the right to participate

Public participation is a civic right and responsibility, it is key in reconfiguring skewed power relations, restoring power to communities and promoting transparency, accountability and equity.

The Kenyan Constitution clearly recognizes this. Article 1 (1) gives all sovereign power to the people of Kenya. Article 1 (2) provides that this power may be exercised directly or indirectly through democratically elected representatives. The Constitution further recognizes public participation as a key national value and principle of governance in Article 10. Article 20 1 (a) highlights public participation as a key principle of public finance alongside openness and accountability.

For the very first time in Kenyan history, key legislative bodies at national and county levels are obligated to open all their deliberations to the public as follows;

Article 124 (4) c The proceedings of the committee and the House shall be open to the public.

196 (1) A County assembly shall –

(a) Conduct its business in an open manner and hold its sittings and those of its committees in public, and;

(b) Facilitate public participation in the legislative and any other business of the assembly and its committees.

196 (2) A County assembly may not exclude the public or any media from any sitting unless in exceptional circumstances the speaker has justified that there are justifiable reasons for doing so.

232 1 (d) involvement of the people in the process of policy making is outlined as one of the values and principles of the public service.

In addition, the Constitution provides the public with easy access to courts to receive and respond to complaints, the right to form associations (Article 36) and to assemble, demonstrate, picket and petition public authorities (Art 37). The Constitution also provides for the right to recall

legislators (Art 104) and grants citizens the right to protect the provisions of the Constitution through referendum as outlined in Articles 255 (2) and 257 (10).⁷

Flowing consistently with the Constitution, Sections 15 and 88 of the County Government Act (2012) empower citizens to petition the County Assembly to enact, amend or repeal any legislation. Section 91 of the Act further provides the establishment of modalities and platforms for citizen participation. The Public Finance Management (PFM) Act provides for County Budget and Economic Forums (CBEF) as a structure for budget engagement between the public and County Governments.

Both the Constitution and County Governments Act (2012) require County Governments to facilitate public participation by establishing mechanisms, providing the necessary information and building the capacity of the public to engage effectively.

ii. The reality of public participation in Kenya

Two years since the March 2013 general elections, 42 counties are yet to pass regulations to effect citizen participation in policy design, implementation and oversight. Only five out of 47 counties (Bomet, Nyeri, Kiambu, Laikipia and Kajiado) have County Public Participation Acts in place.⁸

Only 9% and 16% of counties have legislation on access to information and a strategy for inclusion and integration of minorities and marginalized groups respectively.⁹ Yet, despite the absence of county public participation and access to information laws, it is encouraging that more than half of the counties have established open governance processes and procedures over the last two years. The table below illustrates some of these processes and procedures.

⁷ Ghai (2014; 127)

⁸ Commission for the Implementation of the Constitution (CIC) (2014; 95)

⁹ Ibid; 97

Table 1: Structures established to facilitate public participation in counties¹⁰

Percentage of counties that have established open governance processes and procedures	
85%	Public notice boards announcing jobs, appointments, procurement, awards and other public interest issues
79%	Budget preparation and validation fora
72%	Information communication technology based platforms
70%	Development project sites
68%	Town hall meetings
55%	Establishment of citizen forums at County, Ward and other devolved units

Despite this progress, it is yet to translate into increased, active and meaningful public participation. Between June 2012 and June 2013, only 5.7% of Kenyans participated in citizen county consultation forums. Two thirds of the population remain unaware of the existence of consultative forums in their counties.¹¹ Moreover, despite increased options for direct and indirect self-representation and channels for citizens to engage with the Government, the political culture in Kenya has not transformed. It is still characterised by ethnic or sectarian mobilisation, patronage and abuse of power and state resources.¹²

The studies by the Commission for the Implementation of the Constitution (CIC) and Transparency International reveal important and worrying trends on the slow rate at which the Government, citizens and citizen groups are embracing the new constitutional opportunities and provisions. Understanding these trends can be deepened by analyzing the six case studies of public action between 2013 and 2014.

iii. Effective Participation: Active, free and meaningful

The standard of participation, described in the Declaration on the Right to Development (DRD) of 1986, as ‘active, free and meaningful’, is considered the most robust

¹⁰ Commission for the Implementation of the Constitution (CIC) (2014; 95)

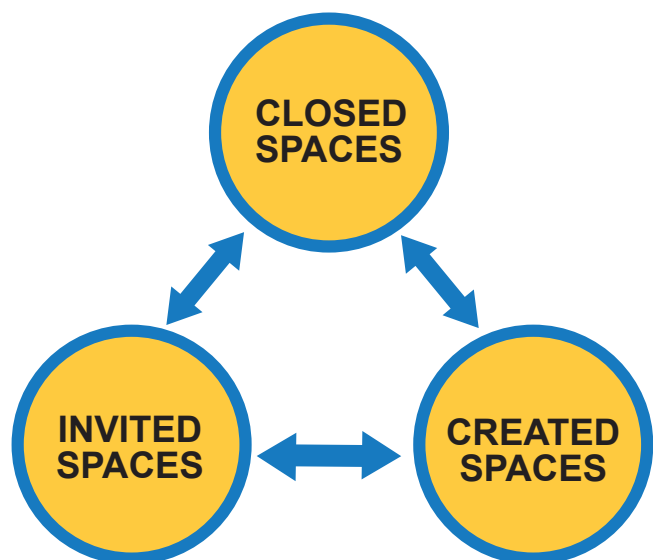
¹¹ The Transparency International Kenya (2014) study surveyed 1,993 respondents across 16 counties in different regions of the country including former provincial headquarters.

¹² Kanyinga 2014, Nyamu-Musembi 2010, Okello 2010.

articulation of participation in any international legal instrument.¹³ Active, free and meaningful participation moves beyond provision of information and consultation to authentic and empowered participatory governance. This requires creating opportunities for citizens to safely and freely influence decision-making at all stages.¹⁴

While these standards lay a foundation to examine the effectiveness of public participation, they only allow for examination of institutionalized participation. However, it is important to acknowledge that while increased formal spaces for citizen engagement are a current feature of many Governments worldwide, their proliferation does not in itself alter power, or change the status quo.¹⁵ Active, free and meaningful public participation therefore requires that strategies for mobilization and action connect across formal and informal spaces, using formal spaces to lobby and negotiate with Government, and informal spaces for protest/demonstration, articulation of demands and organization by citizens and civil society to participate in formal spaces.

Figure 1: Spaces for Public Participation



Closed spaces are formal spaces, occupied by public officials, experts or elected representatives who make decisions with minimal consultation or involvement. These include county and national assemblies, task forces and commissions. Similarly, invited spaces are

¹³ United Nations (UN) (2014; 6) report of the Special Rapporteur on the human right to safe drinking water and sanitation.

¹⁴ Ibid.

¹⁵ Gaventa (2007a)

created from above by various kinds of authorities. However, unlike closed spaces, invited spaces are open to the public. Invited spaces include county consultative forums and requests for submission of memoranda on public policy issues. Created spaces on the other hand, are created informally by citizens from below, and in some cases, contest decisions made in formal spaces.¹⁶ Connection across all three spaces creates an open and responsive Government, strong civil society and an active citizenry.¹⁷

The six case studies that form the basis for this brief go beyond using the standards set by the DRD to examine the capacity of associational mobilization to influence policy and to expand democratic space in Kenya. This is based on the recognition that democracy is not only built by engaging in formal structures but also by the capacity

of citizens and the associations that represent them to articulate their concerns and voice their demands. It also involves developing capacities for political mobilization and engagement, and effecting democratic change by demanding transparent and accountable governance.¹⁸ Expanding democratic space is therefore approached from both an institutional perspective and a bottom-up mobilization perspective.

¹⁶ Gaventa (2007 a)

¹⁷ Gaventa (2007 b)

¹⁸ Schattan et al. (2010)

Towards Active, Free and Meaningful Public Participation

i. Creating an open, inclusive and responsive Government

At national level, the Constitution presented an opportunity for different sectors including the NGO, the media and the health sector to align their laws and operations to realize the inclusive and democratic promise of the Constitution. At the county level, devolution and increased representation created opportunities for citizens to engage with the Government by establishing county Government structures including county consultative forums. All these are aimed at facilitating increased engagement between citizens and Government.

On one hand, citizens, through CSOs, citizen associations and workers unions have demonstrated willingness to collaborate with national and county Governments to ensure that devolution is beneficial and sustainable and that the promises of the Constitution are realized. This is through initiatives such as the CSO Reference Group, which developed a PBO Bill to transform and hold the sector to higher standards of accountability, transparency and integrity. Similarly, the media community collaborated with Government and other stakeholders to develop media laws to expand democratic space through increased media freedoms. Health workers on the other hand sought to be consulted in planning for devolution of health.

At the county level, the Kiambu business community presented a memorandum to the Kiambu County Government with tax proposals and suggestions on how to raise revenue in Kiambu County. The Mustard Seeds Community Organisation took initiative to organize the youth and transform the community by addressing the challenges of insecurity, youth unemployment and environmental degradation, while the Turkana community sought to understand and be engaged in Tullow's operations.

These initiatives demonstrate demand and willingness by citizens to engage more meaningfully with the state. However, persistent structural inadequacies and tokenistic participation strategies pose a challenge to realizing active, free and meaningful participation. This is

experienced at the county level where county consultative forums are better defined, and worse at the national level, where spaces for participation are more amorphous. Such inadequacies are demonstrated in consultative forums in Turkana in which the public has lost trust, believing that the spaces for public participation have been compromised to advance the interests of politicians and leaders; Dandora ward consultative forums, whose resolutions remain unrealized to date; and the Kiambu community, where the views of citizens were ignored in formulating the Kiambu Finance Act.

Moreover, attempts by the National Government to pass laws that restrict the operations of civil society and the media, such as the PBO (Amendment) Bill, Media Laws, and more recently, the Security (Amendment) Bill, demonstrate Government intent to shrink the space for meaningful participation and weaken organizations such as the media and NGOs that mediate between citizens and the state.

Therefore, whereas formal spaces for citizen engagement should be used for dialogue and negotiation between leaders and citizens, lack of mechanisms to ensure effective negotiations poses a challenge to active, free and meaningful public participation. Public participation remains an exclusive affair, lacking specific mechanisms to safeguard consultative forums from presenting and protecting the interests of dominant groups and politicians only, enforcing resolutions when citizens have not been involved or providing feedback and explanations when the views of the public have not been taken into consideration.¹⁹

Given that the state has not established mechanisms for engagement in consultative forums, thereby appropriating to itself the mandate to determine when, how and who is heard, spaces for public participation have not yielded returns in terms of acting on popular demands.²⁰ Consequently, dissatisfied citizens and organisations that represent them are increasingly challenging state dominance exercised through formal sites of participation by seeking alternative means of expression through protests, petitions and litigations. These include the media, health workers and the

¹⁹ International Budgeting Partnership (IBP) Kenya (2014)

²⁰ Tapscott (2010; 261)

Kiambu residents who contested what they deemed as unconstitutional legislation through street protests, strikes and court processes, the CSO Reference Group, which collected signatures from the public to petition against amendments to the PBO Act and the Turkana community that engaged in several protests, including violent ones, to demand for greater accountability in Tullow's operations.

While protests, petitions and litigations offer legally recognized alternative means of expression, these are more viable for groups with resources and greater ability to organize. In instances where resources and ability to organize are limited, citizens are left to utilize client-patronage relationships with leaders for their concerns to be addressed. The case of Dandora MSCO demonstrates the challenge of advancing communal interests in a context where client-patron relationships between citizens and leaders offer the most effective method of interaction.

There is an urgent need for a shift in formal spaces for public participation so that leaders and officials can listen to the public, understand their concerns and create room for citizens to play an active role in developing, implementation and monitoring policies. In the absence of such a shift, citizens and civil society will continue to engage in disruptive rather than constructive participation, diminishing prospects for meaningful participation. Both national and county levels of Government need to embrace the goodwill demonstrated by Kenyans and establish forums and mechanisms for genuine and meaningful dialogue between citizens and both national and county Governments.

ii. Creating a Strong civil society

While the Constitution sought to create an enabling environment for civil society and the media to operate, enacted media laws and amendments to the PBO Act reflect attacks to the Constitution's vision of expanded civic space. Moreover, the manner in which these laws and amendments were developed demonstrates an attack to the principle of public participation as provided for in the Constitution. For the health sector, the constitutional provision of devolution presented an opportunity for equitable access to quality health care services. However, the devolution of health did not adhere to the constitutional provision for gradual transition. Despite the concerns raised by health workers in addition to their requests to be consulted in the process, devolution of health was effected without their views being considered.

The absence of meaningful consultations between the state and the PBO sector, the health professionals and the media fraternity led to the creation of spaces by the NGO, the media and health sectors to contest actions seen as unconstitutional in their intent or in the processes that informed them. However, these groups face internal divisions due to perceptions of self-interest, or political and ethnic affiliations, leading to low levels of trust, and hindering the advancement of unified agenda that advance the interests of group members and the public. Moreover, while the three sectors face similar challenges, particularly unconstitutional passing and implementation of laws affecting their industries, mobilization remains highly sectarian with each sector fighting its battle independently. This may be attributed to the narrowing conceptualization of civil society as NGOs, often funded by international development agencies, as well as limited capacity and initiative by these associations to organize more broadly and collectively.

A key challenge to broad-based coalition building is media representation of the campaign agenda and the issues raised. This was evident in the PBO Amendments campaign by NGOs and the campaign by health workers on devolution of health. Narratives painting NGOs as drivers of foreign interests to destabilize the Government and corrupt agents that misappropriate development funding featured more prominently in the media. These kinds of narratives influenced public opinion thereby generating descriptions of civil society as "evil society". The health workers' campaign often presented the concerns that health workers regarded their emoluments more prominently. Objective presentation and analysis of the issues at the heart of the campaigns was often through opinion pieces by civil society and scholars while the media tended to report the confrontation between the groups and politicians.²¹ While this could indicate a challenge of media representation, it could also be a challenge of campaign framing, posing a challenge in balancing issues affecting the sector and those affecting the public.

As a result of the limited capacity and the challenges faced in broad-based mobilization and coalition building, the three organizations representing the NGO, media and health sectors missed an opportunity to organize collectively and mobilize more broadly to engage with both the state and the public. This consequently limited the capacity of civil society to create critical mass support,

²¹ Similar to analysis by Musembi and Scott –Villers (2014; 22) analysis of media reporting on food related protests between 2007 – 2012.

influence public policy and make significant contribution in the expansion of democratic space. However, this limitation in capacity to build critical mass support, needs to be examined in the context of diminishing levels of trust within these organisations, as well as the loss of trust by citizens.

It is important to forge alliances between conventional civil society NGOs, non-conventional civil society including associations, unions and other citizen groups, the media as well as political elements and elected representatives that seek to advance democratic agenda. This is based on the recognition that associations are more capable of intervening in a broader public arena when they are able to interact and link with other organizations and with political and social actors to struggle for collective demands and defend common interests.²² Coalition building will strengthen the capacity to demand for the minimum conditions for the rule of law and constitutionalism to flourish. Formal civil society also needs to play a catalytic role by building a critical mass of people to support democratic processes and values by stressing the connection between welfare, development and democracy. However, the role of trust in coalition building is essential. Unless people trust a cause to advance collective agenda and in the interest of the public, rather than the agenda of a few, internal cohesion, coalition building and gaining the support of citizens will continuously pose a challenge.

iii. Creating an engaged citizenry

The transformative power of the Constitution will largely be realized when citizens take up their sovereign power, which can be exercised directly or through elected representation, as provided in Article 1 of the Constitution. For citizens to exercise this political agency, they need to recognize themselves as citizens rather than beneficiaries or clients. This requires ownership of the Constitution and active efforts to exercise the power accorded by the Constitution in shaping the society, economy and polity in which they live.²³

For effective participation of the public in formal spaces, the integrity of leaders is crucial to ensure representation of the people. Given that participating in elections is still the main mode of direct exercise of sovereign power by citizens, citizens need to recognize the power they hold through their votes and therefore exercise integrity

in using this avenue of participation to ensure that the leaders they elect represent their interests.

Beyond voting, the level of individual and associational citizen contribution to overall democratic processes remains low. Organized groups, such as the Dandora MSCO, while effective in addressing the welfare needs of the community, remain limited in translating their welfare agenda to influence broader political democratization and policy processes. While CSOs have played a critical role in creating awareness on the Constitution and its provisions, they need to go further and catalyse the translation of welfare agenda into broader political democratization and policy processes. The role of a catalyst in organizing communities to advance collective agenda is demonstrated by the Turkana community which confronted and challenged the operations of Tullow as a result of the awareness creation efforts of CSOs and through the efforts of community leaders to organize the community to act.

The power of citizens organizing in their informal and semi-formal spaces such as *chamas*²⁴, resident associations, parent-teacher associations (PTAs) and Savings and Credit Co-operatives (SACCOs) and using such forums to translate welfare agenda into wider policy processes is evidenced by the Kiambu community through residents and business associations that successfully challenged the Kiambu Finance Act in court. Citizens also need to recognize their informal spaces as spaces for identifying, nurturing and supporting members to take up leadership positions to represent and defend their interests.

²² Schattan etal (2010)

²³ Mohanty (2010)

²⁴ Informal groups commonly used for saving and social support.

Conclusion

An important structural shift from a centralized and hierarchical system of governance to a decentralized system that aims to facilitate meaningful citizen-Government engagement has taken place. However, the shift in social-political cultures by citizens, civil society and the state remains slow. The relationship between citizens and the state is yet to transform into one based on a rights holder-duty bearer relationship and citizens entitlement to public-extensive rights.

Civil society, faced with internal divisions, has been slow to increase its strength through broad-based coalition building, mobilizing popular support and catalysing increased citizen organization. A key consequence of the failure to organise more effectively, is the fact that while each of these organisations have been working towards achieving these objectives for more than two years, none has been successful.

More positively, the demand for citizens' participation in the realization of the Constitution and in the advancement of the welfare of Kenyans is evident. Both county and national Governments should embrace this good-will and provide citizens and citizens associations with an enabling environment to participate in their constitutional right of nation building.

Through this six case-study analysis, this brief seeks to leave both formal institutions, citizens and the associations that represent them more clear about their roles in ensuring a cohesive and participatory policy agenda for the nation. In so doing, we hope that we can continue to light candles through the dark points of this delicate but worthy transition to full devolution and the eventual realization of the promises of the Constitution.

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Annex 1: Case Studies

CASE STUDY 1: Advocating for the commencement of the Public Benefits Organization's Act (2013) without harmful amendments

Context

Despite the regulatory framework provided by the NGO Act (1990) and NGO Sessional Paper No 1 (2006), PBO sector has grappled with weak coordination, poor leadership, poor vision and integrity issues over the last decade. The new constitution therefore presented an opportunity for the state and CSOs to reform the 20 year old NGO Act (1990). The CSO Reference Group was thus borne out of this realization with a view to creating a new legal framework for effective coordination and leadership within the sector.²⁵

Through a consultative process involving CSOs, the NGO Coordination Board and the Ministry of Home Affairs, a Public Benefits Organisation (PBO) Bill was written. This was significant because it was an Act written by PBOs to hold themselves accountable to the executive, parliament, judiciary and the public.

The PBO Act sought to create a more enabling environment for PBOs, raise their performance and accountability standards and bridge the gaps in the NGO Act that had been used to restrict the registration and operation of PBOs forcing some to register as companies limited by guarantee, trusts, societies and CBOs or through letters of agreement with the Ministries of Finance or Foreign Affairs.

The PBO Act was tabled in the Tenth National Assembly as a Private Member's Bill by Hon Sophia Abdi Noor, a former Woman Kind PBO Chief Executive Officer. After extensive debate, it was given presidential assent on 7th January 2013. Regrettably, the Act has not been implemented up to date. Instead, five attempts have been made in the National Assembly to amend it in a way that changes the spirit and letter of the Act. This case study highlights the attempts by PBOs to intervene, the challenges faced and lessons for state-PBO relations.

²⁵ The CSO reference group has grown in membership from 7 organisations in 2009 to over 150 organisations presently.

Government action

Despite the Government being elected on a commitment to create an enabling environment for the PBOs sector based on internationally recognized best practices, it has not operationalized the PBO Act up to date. On the contrary, it has done everything to water down the spirit and letter of the Act. For instance, on November 1st 2013, without consultation with PBOs, the Ministry of Devolution and Planning proposed 13 substantive amendments to the PBO Act. These amendments sought to:

- i. Empower the Public Benefits Organizations Authority to set the terms and conditions for registration and operations of PBOs;
- ii. Empower the President and Cabinet Secretary in charge to appoint the chairperson and the majority of the members of the Authority;
- iii. Cap external funding of PBOs to not more than 15 percent unless otherwise approved by the Cabinet Secretary for Devolution and Planning; and,
- iv. Have funds to PBOs channeled through a new Public Benefits Organizations Federation rather than directly to NGOs. (Government of Kenya (GoK State Law (Miscellaneous Amendments) Bill (2013)).

These amendments undermined the principles of self-regulation and ownership in the Act. They demonstrated the Government's intentions to violate constitutional provisions for the freedom of association and to overlook provisions in the Sessional Paper on NGOs (2006), the Jubilee Party Alliance Manifesto (2012) and the PBO Act (2013).²⁶

An extensive insider lobbying, public information and street action campaign was carried out over the month of November to beat the one month deadline for reading, discussion and adoption of the Bill in the National Assembly. On December 5, 2013, Members of Parliament (MPs) from both sides of the House voted against the entire Government-sponsored omnibus legislation²⁷.

²⁶ Houghton and Muchai (2014)

²⁷ Ibid.

Between June and July 2014, again without notice or consultation on the amendments, the Government sponsored a second Miscellaneous Amendments Bill with minor amendments. The CSO Reference Group welcomed the removal of the harmful November 2013 amendments. At the last moment, under pressure from the National Council of NGOs, the majority leader Hon. Adan Duale withdrew the amendments.

In October 2014, a new memorandum containing 54 new amendments came to light. The Ministry of Devolution and Planning, National Council of NGOs and the newly elected Gatundu South MP Hon. Moses Kuria publicly associated themselves with the memorandum with Hon. Kuria promising to have before the Parliament 'soon'. Below is part of this memorandum:

The National Council of NGOs, Ministry of Devolution and Planning and Hon Moses Kuria Memoranda, October 2014

32 of the 54 proposed amendments are harmful and change the letter and spirit of the PBO Act. They seek to:

- 1) Remove obligation to provide "an enabling environment for Public Benefit Organisations (PBOs)";
- 2) make compulsory the re-registration, regulation and control of an estimated 350,000 agencies acting in the public interest or doing public benefits work;
- 3) introduce a vague dual registration and "recognition" process;
- 4) re-introduce 15% cap on PBOs budgets and Foreign Public Benefits Organisations & deletes all clauses around corporate and individual giving;
- 5) remove public, judicial and parliamentary oversight in the appointment and management of the officials of the PBO Authority;

Only two new clauses strengthen information disclosure, transparency and accountability of PBOs to the public and state.²⁸

²⁸ There are two memoranda that are very similar to each other. The only difference between the two is the 15% cap and Foreign PBO clause. The NGO Council has declared their disagreement with this clause only. See At <http://mobile.nation.co.ke/news/NGO-Council-Kevinnah-Loyatum->

The amendments were informed by four perceptions including NGOs involvement in the International Criminal Court (ICC) case,²⁹ the lack of PBO accountability to the public and concerns that PBO funding could be fuelling extremist militia on one hand and the agenda of western Governments on the other.³⁰

Actions and challenges

The CSO Reference Group has achieved a fair amount of success in mobilizing to inform key stakeholders of the impact of the proposed November 2013, June and October 2014 amendments. This has included over 10 press conferences and appearances, 20 national stakeholder briefings, television public service announcements, two street protests, securing of petition and PBO Charter signatures and 29 county level workshops. Through these activities, the CSO Reference Group has probably directly reached 3,000 men and women.³¹

Despite the wide-ranging impact of the proposed amendments, the Government did not create spaces for the constituency represented by the CSO Reference Group to give their views. Instead, the Ministry of Devolution and Planning elected to work with the beleaguered National Council of NGOs especially from July 2014 onwards.³² In this regard, collaboration with the three arms of

[Law-Moses-Kuria-Amendment/-/1950946/2501684/-/format/xhtml/-/v02445z/-/index.html](http://www.standardmedia.co.ke/m/story.php?articleID=2000139575&story_title=Hurdle-in-Uhuru-plan-to-control-NGO-cash) various moments over September and October, Fazul Mohamed (later appointed NGO Coordination Bureau Director in December 2014) and Hon Moses Kuria spoke of new amendments to the PBO Act. See CSO Reference Group Analysis of the 54 amendments (2014) http://www.standardmedia.co.ke/m/story.php?articleID=2000139575&story_title=Hurdle-in-Uhuru-plan-to-control-NGO-cash

²⁹ Announcement of Taskforce <http://www.the-star.co.ke/news/task-force-review-public-benefits-organisation-act-unveiled>

³⁰ The President's Mashujaa day address referred to CSOs as gatekeepers in foreign capitals and associated the sector with criminal acts including terrorism and funding of terrorist groups. These comments were contained in the off the cuff comments after his address. <http://www.nation.co.ke/oped/Opinion/NGO-Funding-Bill-Civil-Society-Government/-/440808/2509212/-/c191ey/-/index.html>

³¹ See some of the calls for PBO Act commencement from the counties <http://m.news24.com/kenya/MyNews24/Civil-societies-urge-CS-Waiguru-to-gazette-PBO-Act-2013-20140411>

³² For the last five years, the National Council of NGOs has grappled with leadership wrangles and institutional

Government has been limited to short-term defensive mobilization around key moments of collective risk. This way of working has produced and reproduced some key tensions within the CSO Reference Group.

Some members of the CSO Reference Group see the battle for commencement of the Act without harmful amendments as a broader struggle for an enabling environment, justice and democratic governance. Others argue that a more direct political and public engagement strategy is needed. Yet others have argued that the combination of dialogue and public engagement will produce trust and mutual respect for the state and the PBOs to work together. These different opinions, which have sometimes brought tensions, have informed the debates within the group on when “street action” and “board room action” is appropriate.

Some representatives of citizens’ action groups and community-based movements view the diplomatic approach as “ineffective, mild and frustrating”. They hold the view that “the endless talking and meetings with Government officials” have not achieved much. Those representing the more formalized NGOs hold the view that street protests and demonstrations are actions of “last resort” and that much ground can be covered in policy dialogue before going to the streets.

Moreover, the level of trust among members has been diminishing due to perceptions of self-interest, ethnic and political affiliations. Civil society is further divided between humanitarian and human rights organisations, relegating the responsibility of work involving the PBO Act to human rights NGOs. These divisions have impacted on the ability of the CSO Reference Group to generate more broad-based and collective action, to include the public and other organisations and associations that do not fall in the conventional CSO category. The impact of these divisions is demonstrated by the fact that the public petition to the Cabinet Secretary for Devolution to commence the PBO Act only generated 17,000 signatures, less than 10% of the 290,000 individuals employed within the sector and the millions of Kenyans that have benefited from the work of CSOs.

Current status

The Cabinet Secretary in the Ministry for Planning and Devolution formed a taskforce and invited representation by the CSO Reference Group. The taskforce will be holding

weaknesses that have produced financial insecurity, vulnerable to corruption and an inability to unite and inspire the sector.

public hearings on Amendments to the PBO Act across the country. However, without a public participation framework, there are no mechanisms to guarantee inclusive and democratic deliberations.

Lessons

Although the increase of former CSO members in elected positions cannot be attributed to direct efforts by CSOs to ensure their representation, it demonstrates the need for organised groups to nurture and position their members to take up elected positions and ensure their representation.

The CSO Reference Group is however challenged in achieving internal cohesion, which poses a challenge for the group to move out and build mass support. How the CSO reference group manages existing tensions and the ability to build trust among different actors within the group will determine whether certain actors continue to feel poorly represented or excluded from the process.

It is essential that the group builds ownership of the process amongst different actors, as each one has a critical role in driving the process. While some actors within the group have the responsibility to negotiate and lobby key Government actors, grassroots NGOs and citizen movements have a responsibility to organize themselves to defend their own interests by building citizen support within their constituencies and lobbying their MPs to support the process.

The challenges faced by the CSO Reference Group in engaging the Government in the development of the PBO Act indicate the need for the group to consider lobbying for a public participation framework for national policy processes. This also presents an opportunity for the group to broaden the conceptualisation of civil society to include other sections of civil society including the media and workers unions which have been affected by lack of a national framework for public participation.

CASE STUDY 2: Contesting restrictive media laws

Context

The Constitution provided an opportunity for the media community, as it did to NGOs, to develop laws that would expand media freedoms as contained in Article 34 of the Constitution. The media fraternity opined that the Media Council Act (2007) did not conform to the provisions of Articles 33 and 34 of the Constitution and therefore

needed to be amended, to create a more enabling environment for the media. Moreover, in accordance with Schedule Five of the Constitution, new media laws were to be developed within the first three years upon enactment of a new Constitution.

To realise the expansive media freedoms provided by the Constitution, media stakeholders held discussions to revise the Media Act (2007) out of which Media Bill (2011) was developed. The Bill aimed at legislating the constitutional provisions of a free and independent media as captured in Articles 33 and 34 of the Constitution, providing for freedom of expression and freedom of the press, including the prohibition of state interference with press freedoms.

Government Action

In spite of the wide-ranging consultations that culminated in the drafting of the Media Bill, the final version that was tabled in parliament was different from the one drafted by the media stakeholders. This version had reduced the powers and undermined the role of the Media Council, a self-regulation media body anchored in law. This was seen as an affront to media freedoms and a strategy to rob media of representation. Consequently, the media termed this new bill unconstitutional for contravening Articles 33 and 34 of the Constitution.

Almost simultaneously, another law that would affect the media environment was tabled in parliament. The Kenya Information and Communication (Amendment) Bill, provided for a Government-appointed communications and multi-media tribunal with the authority to regulate all forms of media and journalism in the country including power to impose hefty fines of up to 500,000 Kshs and 20 million Kshs on journalists and media houses respectively, if they breached a Government-dictated code of conduct. This Government-controlled tribunal sought to reduce self-regulation by the media, and increase Government control.

This move was tantamount to threatening to interfere with freedom of the media from state control. The suggested changes were unconstitutional as they contravened the intent and purpose of KICA (1998), which was reviewed in 2004 giving CCK the mandate to perform oversight functions without interference of any person or body.³³ They also contravened the MCA (2007), which established the MCK as a self-regulating body for the media.³⁴

³³ Article 19 (2014)

³⁴ Ibid.

Actions and Challenges

These controversial changes to the two laws - MCA (2007) and the Kenya Information and Communication Act (KICA) (1998) - necessitated action by the media community. Led by three media associations: Kenya Union of Journalists (KUJ), Kenya Correspondents Association (KCA) and the Editors Guild, the media community began engaging with relevant stakeholders including the Energy and Communications Committee, the CIC, and NGOs such as ICJ (International Commission of Jurists) – Kenya and Law Society of Kenya (LSK) to register their concerns.

On December 5, 2013, the two laws, MCA (2013) and KICA (2013), were passed by parliament and just like in the initial consultative processes, the concerns, requests and recommendations for change raised by the media community were not taken on board. In response, the media community filed a court case and on January 31 2014, the Kenyan High Court suspended the implementation of the two laws until the matter was dispensed with.

Similar to the PBO Amendments Act, KICA and MCA (2013) have been viewed as an attempt by Government to ‘punish’ the media for exposing impunity and corruption in the executive and parliament. The Government has been critical of media’s coverage of certain issues, including the post-election violence, management of internally displaced persons (IDP) and media’s championing of the proposed 2010 Constitution which varied from the position of key Jubilee Government officials who campaigned against the Constitution and who have been accused of undermining its implementation.

In addition, although the media campaigned for peaceful elections in 2013, it was critical of the conduct of the general elections and the petition over the presidential election. The media has also been critical of the management of the Westgate Mall terrorist attack. The media also played a critical role in highlighting the clamour by parliamentarians for higher remuneration and provided coverage to the campaign by civil society referring to MPs as MPigs in addition to reporting parliamentary improprieties when travelling abroad.³⁵

Current Status

More than a year later, the two media laws are still suspended, pending the ruling of the High Court, pending ruling. There is no indication as to when the Court intends to resolve the matter. Media associations on the other hand have not been able to push for a ruling, as they do

³⁵ Article 19 (2014)

not have any direct funding, and therefore lack funds to pay for lawyers to pursue the case. In the meantime, the terms of some of the board members of the Media Council and the Media Complaints Commission have expired, and appointment of new board members cannot proceed with the two media laws in their current status. The Complaints Commission currently lacks quorum and can therefore not deliberate on complaints received. The media community at the moment lacks an avenue to channel and resolve complaints. Should the stalemate continue much longer, the Media Council is likely to face the same problem as the terms of some of the board members are due to expire.

Lessons

Media associations succeeded in generating unity of purpose in contesting the passing of the two media bills including looping in journalists across various media houses. Organization was also broad-based as the media community was able to mobilize beyond the media sector with a few NGOs and LSK joining the campaign against unconstitutional laws. There was also success in organizing the public to support the cause as members of the public were involved in demonstrations.

The campaign also employed various strategies such as occupying various spaces and using different actors. Besides negotiations with the Government, the media also moved to court thereby increasing the number of stakeholders involved in addressing their concerns.

However, although the campaign was successful in mobilizing broadly, occupying a variety of spaces and engaging different stakeholders, its mobilisation was deep but not wide. While the campaign succeeded in mobilizing journalists across all media houses, its mobilisation was not wide enough to involve media workers that are not journalists or to include media owners despite the fact that the laws would affect everyone in the media industry. Further, although the campaign succeeded in mobilizing outside the sector, it only involved very few NGOs specifically dealing with legal issues.

Moreover, efforts by the media community to lobby MPs not to pass the two bills were not successful. The media community attributes this to the fact that parliament was going on recess. However, it is important to consider that MPs may not be willing allies, having fallen victim to exposure by media, thereby supporting attempts to reduce media freedoms. On the other hand, sections of civil society perceive the media to be servile to the regime. This has led to a situation where the regime sees media as an enemy while civil society sees media as

being too compliant to the regime, thereby leaving media without allies in both Government and civil society.

Geographically, the campaign was largely concentrated in Nairobi, failing to mobilize and involve other regions of the country. The campaign for media freedom has also not been publicly sustained beyond the period when the media laws were passed. Though the media has the tools to engage the public on the importance of free media, these have not been adequately utilized to sustain action.

CASE STUDY 3: Organisation of Health Workers to Challenge Devolution of Health

Context

In all the constitution drafts preceding the 2010 Kenyan Constitution, health was not a devolved function. All the drafts made provision for a Health Services Commission, which was responsible for recruiting, deploying and distributing health workers equitably, as well as managing human resources within the health sector. However, the 2010 Kenyan Constitution not only required health to be devolved but also removed the provision for a National Health Services Commission.

Despite the contestation by health workers against devolution of health, it is now a function of county Governments. This study interrogates the concerns raised by health workers regarding devolution of health. It further highlights how health workers organized the campaign to contest devolution of health and the impact of devolution to the health sector. The study highlights the contradiction that exists between rhetoric and reality with regard to engaging stakeholders in decision-making.

Government action

On August 9th, 2013, a gazette notice was published transferring health services to counties and postponing the transfer of health workers to counties to January 2014.

Health workers interviewed for this research argue that as a result of the political approach to devolution of health, the health sector is suffering the consequences of haphazard implementation to fulfil what they considered to be a political promise.

The main bone of contention has been the manner in which human resources issues are handled and managed at county level. Without proper personnel structures, there have been concerns about health workers'

emoluments. These include lack of clarity on payment of salaries, benefits and professional training. In several counties, devolution of health affected health workers remuneration due to late payment of salaries. In some counties, health workers had to re-apply for their jobs, raising concerns about accrued benefits.

With only two universities in Kenya offering post-graduate training, it is feared that county officials could refuse to grant leave to health workers to pursue post-graduate studies. Since health workers undergoing post-graduate training work in health facilities located in the areas where they study, there have been lack of clarity on whether they should be paid by their original county or the county in which they work as they train. Therefore, whereas the health sector had a sense of uniformity with regard to HR management, this is no longer the case, as different counties handle health workers' issues differently. At least 100 doctors were reported to have resigned by March 2014 due to missed salaries, frozen promotions and pay cuts.^{36 37}

Related to human resources, there have been growing concerns among health workers about the loss of professionalism in the health sector. Given that health services are now managed by county officials, this poses the challenge of use of health resources for political goals.

Another major concern was the quality and access to health care. Before devolution, district health facilities received quarterly funding from national Government and revenues generated from health facilities through user fees were used as facilities improvement funds. The situation has since changed with devolution as all county revenues are channelled to the county treasury which then decides how the money will be spent in the counties, and may not necessarily go back to the facilities.

This raises concerns due to prevailing challenges with funding healthcare. Government expenditure on health has constantly been way below the 15 % recommendation by the Abuja Declaration on Health. Under the central system of Government, health care in Kenya was already under-resourced, with the Government expenditure on health as a total Government spending percent of GDP remaining consistently below eight percent between 2001 and 2009³⁸. Government expenditure on health

as a percentage of total Government expenditure was reported at 5.4 percent in 2009. In 2012/2013, the health sector was allocated nine percent of the budget.³⁹ As a result of poor resourcing, the health sector has been faced with lack of basic health supplies. The fact that county health budgetary allocations are upon the discretion of county officials poses a risk as counties that do not prioritize health could be faced by higher levels of under-resourcing. There is also a danger of over prioritization of health in some counties leading to lack of uniformity in discharge of health services across counties, with implications for equality in healthcare services.

Actions and Challenges

The action by government to devolve health triggered three health workers unions, the KMPDU, the Kenya National Union of Nurses and the Kenya Health Professionals Society to move to court to contest devolution of health services. Through their unions, health workers claimed that devolution of health was contrary to the provisions of the Constitution, the County Government Act (2012) and the Transition Authority Act.

Health workers under KMPDU held meetings to discuss the effect of devolving health and to determine what action to take. In their discussions, health workers were clear that they were not entirely opposed to devolution of health. They were in support of devolving health infrastructure as well as medical equipment and supplies whose shortage they had complained about for a long time. They were however opposed to rapid devolution of all health functions as opposed to a phased transfer by the Devolution Transition Authority and without adequate consultation with the health workers. Health workers were thus demanding to be consulted.

In their discussions, they also spelt out which services should be devolved. Under the Fourth Schedule, county health services include: county health facilities and pharmacies, ambulance services, promotion of primary health care, among other preventive and health promotion services. As such, health workers maintained that health services under County Governments should only include health facilities that were formerly from Level one to three which included health centres and dispensaries offering primary health care and basic curative services at municipal and city councils. Health

³⁶ <http://www.nation.co.ke/lifestyle/DN2/How-to-end-cronyism-in-counties/-/957860/2582298/-/5q5e14/-/index.html>

³⁷ The challenges are not unique to health workers only, but also being experienced by other devolved workers in the country.

³⁸ Human Resources for Health (2013) http://www.health.go.ke/websitedocs/HRH%20REPORTS/Position_Paper_3_-_HRH_Budget_Analysis_2011-2012_eds.pdf

http://www.health.go.ke/websitedocs/HRH%20REPORTS/Position_Paper_3_-_HRH_Budget_Analysis_2011-2012_eds.pdf

³⁹ Lakin and Kinuthia (2014) <http://internationalbudget.org/wp-content/uploads/Understanding-What-the-Kenyan-Government-Spends-Money-On.pdf>

workers argued that Level four and five hospitals which included district hospitals and provincial hospitals offering specialized services should have remained under National Government. This is because these also serve as referral hospitals and devolving them could compromise access to health care due to the strict borderlines drawn in counties, restricting referrals across counties. They argued that in some instances, a referral hospital in a different county may be closer compared to one in the same county as the patient. Therefore, the argument that county resources should only serve members of the county creates inequalities in terms of accessing health care. This is against the spirit of the Constitution to devolve services for increased access and equity.

With regard to human resource issues, health workers suggested the establishment of a National Health Service Commission to manage the devolution process, harmonise health workers terms of employment, remuneration, training and benefits. They further requested the enactment of a health bill by parliament.

In general, health workers were proposing a gradual transition process, in accordance with the Transitional Schedule (Sixth Schedule) which proposes transition to be done in phases over a three year period. Health workers were thus proposing more time to set up structures before devolving health as well as a less politicized process of devolving health. They also demanded to be consulted more in the process, given that they would be the main implementers.

The union petitioned the Ministry of Health (MoH) to halt devolution of health, and listen to the concerns of health workers. MoH on other hand advised the union to petition county Governments as the matter was beyond the ministry. This was followed by meetings between the union and the Council of Governors (CoG), Ministry of Devolution and Planning and the Public Service Commission (PSC). The aim of the meetings was to negotiate against immediate devolution of health but this failed. Given that a large portion of county resources are in the health sector, it was unlikely that county governors would support a move to gradual devolution of health.

Failure to achieve successful negotiations, and in a bid to raise public awareness on the issue, health workers ran a social media campaign using the hashtag #SickAt50. This was parallel to a Government campaign dubbed Kenya at 50 aimed at celebrating 50 years of independence. The campaign was also featured by mainstream media through interviews and debates with health workers representatives and various Government officials.

This was followed by a 12-day national health workers strike in December 2013. The strike was called off after the Ministry of Devolution and PSC agreed to work on a HR policy to address the HR concerns that had been raised. However, to date, this has not been achieved and negotiations are ongoing between health workers and different Government institutions to centralize the human resource function of the health sector. Moreover, there are still a number of issues regarding the impact of devolving health on quality and access which are yet to be addressed.

Current status

The health workers strike was called off after the Government promised to introduce a health bill to parliament. The Health Bill (2014) seeks to establish a unified health system to coordinate the inter-relationship between the national Government and county Government health systems and to provide for regulation of health care services, health care service providers, health products and health technologies for connected purposes. However, to date, the Bill has not been enacted and it is still with the CIC undergoing review and consultation. The health sector continues to grapple with numerous challenges related to human resources and quality of health care.

Lessons

While the concerns of health workers reflected on the wider health sector, these were not clearly articulated to the public. On mainstream media, the campaign was largely presented as a labour dispute, giving little prominence to issues related to quality, access and the unconstitutional manner in which devolution of health was handled.

The campaign required strong partnership with other sectors of civil society to support the initiative as well as strong partnership with citizens to understand how devolution of health would affect them. This would have been critical in forging partnerships and gaining popular support to advance the agenda of health workers. However, the campaign was largely conducted as a health workers campaign with little public involvement. The only public engagement was on social media through the #SickAt50 campaign.

Interviewed health workers and union members thought it was necessary to involve other non-state actors and the public, otherwise health workers would not achieve this on their own. This is particularly so as health workers are

not in a position to go on strike for long periods due to the sensitive nature of the health sector. While KMPDU leadership attribute lack of public engagement to time limitation which was a hindrance to mobilizing widely and engaging more stakeholders, union members cited lack of unity among health workers unions as a hindrance to successful organization. Similar to the CSO Reference Group, health workers perceive certain union officials to be driven by self-interest, rather than advancing the agenda of workers. Health workers also hold the view that it is often a challenge for unions within the sector to collectively support a common agenda, and action is often fragmented along the different health professionals in the sector. These dynamics within the health sector not only constrain their ability to mobilize and effectively advance a collective agenda within the sector but also pose a challenge to an effective mobilization that can gain support outside the sector.

In order to gain popular support among the public, a strike should have been avoided as it is perceived as advancing the interests of health workers at the expense of the interests of the public. Instead, the health workers campaign could have opted for a tactic such as a public petition combined with public awareness, which may have been considered by the public to be in their best interest, compared to a national strike. Strong civil society collaboration would have been necessary as a way of creating awareness to the public on the issue and galvanizing public support. However, the willingness of the public to participate in the campaign needs to be understood in the context of strong political interests by county Governments to devolve health and a citizenry that might view devolution of health as a solution to the poor state of health care in the country under the management of the national Government.

CASE STUDY 4: Community Organization Based on the Case of Mustard Seed Community Organization

Context

Mustard Seed Community Organization was born out of frustration emerging from perceived neglect of the youth by the local leadership. Interviewed MSCO group leaders, perceive the local authority not to have the Dandora community on its agenda, except for issues concerning the Dandora dumping site, which has become a lucrative menace⁴⁰. This frustration led a group of

youth to think of initiating a project that would transform the community in Dandora. Once successful, the group planned to approach local Government to demonstrate its achievements and seek support.

This case study highlights how community youth in Dandora have organised themselves to identify and innovatively address the issues that the community is grappling with. Through an innovative urban slum upgrading programme, MSCO has organized the youth to address insecurity, youth unemployment and environmental degradation. The study highlights how cultures that determine the relationship between leaders and citizens remain static and retrogressive despite the existence of a progressive constitutional framework.

Action and Challenges

Youth in Dandora identified a number of problems that Dandora was facing. Key among them was rising insecurity which had been facilitated by high levels of youth unemployment. They further identified environmental degradation and deterioration of the neighbourhood due to poor waste management as another key challenge that the community was facing. They decided that since the community had a role in the current state of affairs, it was necessary to involve it in reversing the situation. Youth, particularly the unemployed, were identified as drivers of this transformation.

To deal with these challenges, MSCO introduced a system which brought together several residential units as a single unit, referred to as a court. Through the court system, the youth group deals with insecurity, youth unemployment and environmental degradation⁴¹. The programme also provides a model of transparency and accountability

dumping site in Kenya, occupying approximately 30 acres, and receiving 850- 2000 tons of industrial, agricultural and hospital waste daily from Nairobi.

⁴¹ Every household within the court, is required to contribute one hundred Kshs per month, which goes towards cleaning the court and providing security. Each court employs at least two youth to provide security and keep the court clean. This initiative has succeeded in reclaiming drainages that were blocked, cleaning the streets and creating recreational spaces within the community. Security has also been enhanced as the court system involves fencing the courts and providing security, in addition to creating parking spaces. The parking spaces also create employment for young people providing security and washing vehicles, by charging for the services. In addition to upgrading the neighbourhood by reclaiming drainages and cleaning the streets, the programme aims to create a total of 3,500 jobs in Dandora.

⁴⁰ Dandora's dumping site is the biggest unrestricted garbage

and an example of how the *Nyumba Kumi*⁴² initiative can work⁴³. This programme is intended as a model to be replicated in other urban slums in Nairobi and other parts of the country.

Government (in) Action

While the group envisaged that the Government would support the initiative once it demonstrated ability to address the challenges faced by the community, this has not been the case. MSCO expected the support of the local council which claims to have the same vision as the group: a safer, cleaner Dandora with opportunities for the youth to earn an honest living.

However, their (in) action speaks otherwise. For instance, when the area Member of Parliament (MP) called for a public participation meeting, each ward was informed that it had a Constituency Development Fund (CDF) balance of 8 Million Kshs. This presented an opportunity for each ward to decide how to utilize the balance. However, four months later, the proposals⁴⁴ that were agreed on had not been implemented and MSCO had not succeeded in meeting the MP after that. Moreover, according to the group leader, when the organization launched a campaign to scale up the programme, the local Government did not support the initiative⁴⁵. Requests to officiate the launch of the campaign or to provide the groups with tools have been met with little

⁴² Nyumba Kumi, which means 10 houses in Swahili, is a community policing initiative, whereby neighbours know each other, as a mechanism to curb insecurity. The initiative was proposed by President Uhuru Kenyatta.

⁴³ Each ward has a register with basic details and contacts of residents. The residents of each court remit their monthly contributions through an M-Changa service which updates members of contributions and balances in the account. The account has three signatories, comprising of groups officials and residents of the court. Withdrawals to the accounts are only possible with the authorization of all three signatories, upon agreed expenses, most of which are salaries for youth employed in the courts.

⁴⁴ The proposals included a playground in one ward, an open air market in another, and to scale up the court system within an entire ward, as a way of upgrading the slum and to create employment.

⁴⁵ The campaign involved getting wards to compete in improving their neighbourhoods by unearthing the drainages, levelling the ground, closing off exits and erecting a gate. The court that will have achieved this most successfully will be awarded 100,000 KSHS. More than 30 courts are participating in this competition. However, even then, the local Government is not supportive of this initiative.

or no support from elected representatives and county Government officials. Neither have promises to support the group with engineers materialized to date. According to the group:

‘These tools are often lying idle in their stores, and when they lend them to us, they ask us to return them within three hours. Once a group gets the tools, they may be given the tools again up to a month later, despite the fact that we are helping them to do their job. When they came to level the ground, they came with a shovel instead of a grader, which ended up not doing much. Had the leaders been supportive and lived up to their word, Dandora would be a very different place now.’

Elected representatives are hardly seen in the community. Although the area MCA has helped community youth from getting arrested and helped them protect land from being grabbed, he is considered inaccessible. The MP, on the other hand, was described as ‘completely inaccessible and without time to listen to youth.’ The group states that they have invited the MP for community events and on one occasion invited the MP to officiate the ceremony but he did not even send his apologies. The group leaders add ‘the CDF chairperson is very close to him and if you want to see him [MP], you must go through the chairman.’ The CDF chairman is however accused of grabbing public land and therefore as the gatekeeper to accessing the MP, he denies access to groups that deter him from advancing a corrupt agenda. Group members say that they are perceived to be a threat by corrupt leadership, as they aim to protect spaces that could be grabbed and sold off illegally⁴⁶.

Current status

To date, the agreement to scale up the work of Mustard Seed Organization in Dandora is yet to become a reality. Elected representatives remain inaccessible and efforts to reach them are often futile. Efforts by the youth of Dandora to achieve fruitful working relations with their leaders are met with lack of similar effort by their leaders who continuously breach agreements and fail to honour their promises to their constituents.

Lessons

The case of Mustard Seed Organization in Dandora demonstrates that community organization is essential for social transformation. When communities are able to organize, discuss issues affecting them and generate

⁴⁶ Interview with group members.

solutions affecting them, they are likely generate more ownership amongst members, build communal power and the resultant initiatives are more sustainable. This shows the need to empower communities to use and create their own spaces to advance their agenda.

However, this case is also a clear indication that having the most progressive constitution, laws and democratic institutions is not enough to transform the political culture of corruption and systemic abuse of power. While the constitution envisions an engaged citizenry and a responsive leadership, political cultures have not shifted with the new vision. Archaic political cultures such as political patronage and clientelism exist and thrive. According to Mustard Seed, it is difficult to engage on issues as leaders still prefer to give handouts to individuals rather than respond to community needs.

Mustard Seed members argue that the court system has the potential to break the culture of non-substantive engagement between leaders and citizens as this system restores dignity to young people through employment and improved environments. This system also brings people together to speak collectively thereby fostering unity. The group advocates for devolution to go as low as the courts.

To achieve this, the group must break the barriers of unchanging political cultures to advance the agenda of meaningful participation and social transformation. The group states that it has made efforts towards this end, by urging politicians not to approach them with handouts, but with an agenda to listen to their issues and dialogue with a view to generating lasting solutions to issues faced by the community. The group seems stuck in the idea that they lack resources to raise their own to represent them in positions of power. The question of why Dandora youth have not attempted to change the political culture by identifying and supporting their own to get into a position of leadership so that their interests can be represented is one that needs to be further exploration among the group.

CASE STUDY 5: Community Organization to Challenge Tullow Oil Company Operations in Turkana County

Context

Tullow Oil Company began oil exploration activities in Turkana County in 2010 during the old constitutional dispensation. Under the then Constitution, Tullow was not obliged to consult the community. Moreover, elected

representatives were few and channels for engaging the local community and its leadership were minimal. The company therefore made contractual arrangements with the Kenyan National Government through the Ministry of Energy. However, knowledge of the provisions of the current constitution has led the Turkana community to challenge the ways in which Tullow Oil Company has been conducting its affairs in Turkana County. They have demanded for more involvement in Tullow's operations.

As a result of devolved governance, access to elected representatives has increased, providing more avenues for the community to raise its concerns. This case study highlights the role of the Constitution, devolution and participatory governance in empowering citizens to challenge old order and demand for inclusion in decision-making.

Action and Challenges

The Turkana community began questioning Tullow's operations in 2012 when Tullow discovered oil deposits. The discovery led to an increase in Tullow's activities as well as an influx of investors seeking to take advantage of the land and business opportunities emanating from Tullow's increased operations. This raised an awakening in the community, which began by challenging the fact that Tullow was operating heavily in Turkana, but was leaving out the local community to employ and contract people from outside the county. The community demanded affirmative action and asked to be given first consideration in opportunities for employment and tenders. The community was also concerned about lack of information about Tullow as well as lack of channels for communication between Tullow and the community.

To voice its demands to Tullow, the community raised these concerns through their leaders often in forums such as barazas. Community leaders such as seers, medicine men, prophets and elected representatives in the county played an instrumental role in getting the community organized to engage in protests against Tullow. The protests included blocking of roads and stopping Tullow from continuing with its operations. This led to a crisis as Tullow's operations were paralyzed and other activities such as trade within the county and with neighbouring counties were negatively affected.

Government (and Private Sector) Action

These protests forced Tullow to listen to the demands of the community and as a result, an additional three offices were set up in Lochir, Lodwar and Lokori. Initially, Tullow had only one office in Lokichar which was inaccessible

to the community as it was largely concerned with oil exploration. The three new offices act as an interface between the community and Tullow, through which, Tullow receives and provides information to the community. The community can now access information about opportunities for employment and advertisements for tenders through noticeboards in the three offices, unlike previously when advertisements were placed in newspapers or posted on the internet, which most of the community members did not have access to.

Since the oil and gas industry offers limited opportunities for employment and the skills needed are highly technical, most Tullow employees from the community are employed in non-skilled or semi-skilled employment. There are currently more than 2,400 locals employed by Tullow⁴⁷. To build the capacity of the community to take up opportunities, Tullow is focusing its social investment in education and operates an education sponsorship fund up to post – graduate training. Additionally, due to concerns about the capacity of the Turkana community to take up opportunities for tendering, Tullow is now engaged in a local content enterprise development initiative that aims to improve the business skills of local entrepreneurs.

To ensure that the entire community benefits, Tullow set up a social investments department which is involved in community projects in the areas of education, health and water. In addition, Tullow has now made it common practice to engage the community using a variety of forums established by the County Government including county consultative forums, district advisory committees and public barazas. The community is involved in identifying issues that are a priority to the community, after which an MOU is developed between Tullow and the community, to ensure that Tullow implements these social investment projects. Tullow is however only involved in development projects as a CSR initiative and the primary responsibility to develop the community lies with the Government.

Current status

With Tullow intensifying its operations in Turkana, issues related to land and natural resources have begun emerging. The community is now concerned about loss of land through land grabbing and displacement. In addition, with the fragile ecological environment, the community has begun to raise concerns about environmental degradation and destruction of the few available grazing lands and pastures for their livestock.

As the community gets more aware of the toxicity of oil mining, there are growing concerns about disposal of oil waste and how this affects natural resources, particularly the lake and soil.

Other emerging concerns include health issues as the machinery used by Tullow to conduct seismic surveys is said to be having negative health impacts on the community and livestock. Security is also said to pose a concern as many community police reservists that offered security to the community are now employed by Tullow. This has left the community vulnerable and prone to attacks.

However, while the community raises these concerns, its ability to organize and make meaningful demands is hampered by leaders with vested interests. Although protests are still relatively common, interviewed community members and CSOs indicate that many of these are driven by leaders and other influential people in the community, who, upon realizing the successes of previous protests, have been inciting communities to protest to advance their personal agenda, rather than that of the community.

The forums that Tullow uses to engage the community to advance their agenda are also perceived to be compromised and infiltrated by vested interests. “Both formal and informal structures for engagement have been compromised and politicized”⁴⁸.

Lessons

As in other forms of community mobilisation, the agenda of a catalyst has proved critical in informing organization of the Turkana community. While previous action was able to generate action from Tullow to open up additional offices and involve the community more, the perceived shift in the agenda of catalysts to advance personal interests is becoming more prominent, and a hindrance to effective community organization. Therefore, while the essence of devolved governance is to enhance effective representation of communities, this is shifting. The community is thus in need of a catalyst that is able to advance a collective agenda.

While a number of CSO initiatives are coming up to play the role of catalysts in protecting communities and advancing their interests, these have not been as successful. The Kenya Civil Society Platform of Oil and Gas is advocating for petroleum and other related policies to ensure that communities are included and protected within the oil and gas industry. Turkana Natural Resources

⁴⁷ Interview with Tullow Oil Communications Office

⁴⁸ Interview with Turkana CSO

Governance Hub is a loose network of CSOs campaigning for the involvement of the community in all extractive value chain processes. However, the group is faced with technical and political challenges and has not been able to successfully advance the agenda to ensure inclusion of the Turkana community in Tullow's operations⁴⁹.

CASE STUDY 6: Community Participation in Influencing Policy in Kiambu County

Context

This case study highlights the actions taken by different organised groups within Kiambu County seeking more genuine consultation and meaningful public engagement in developing laws that are acceptable to the community.

Government Action

On October 1st 2013, the Kiambu County Government gazetted the introduction of the Kiambu County Finance Bill 2013, seeking to introduce a range of taxes for farming, burial, businesses and institutions in the county^{50 51}. Some of the newly introduced levies were either new or up to 10 times the previous fees. The newly introduced taxes aimed at raising part of the 12.6 Billion Kshs. revenue for the county to finance its annual budget by supplementing the 6 Billion Kshs. received from the National Government. According to the governor, the 6 Billion Kshs. received from the National Government would only be able to cater for salaries⁵². The Bill was

⁴⁹ Interview with Turkana CSO officials

⁵⁰ http://www.ipsos.co.ke/NEWBASE_EXPORTS/Kenya%20Revenue%20Authority/131023_The%20Standard%20-%20Wednesday_30_60689.xml

⁵¹ These included proposals to tax farmers up to 4,000 Kshs for the disposal of livestock carcasses; burial fees for county residents ranging between 2,500 and 4,500 for burial in privately owned land, and 8,000 Kshs to be buried in public cemeteries. Kiambu residents that had died outside the county would pay 10,000 to be buried in Kiambu County, while non-residents would pay 25,000 kshs. to be buried in the County. Families would also be required to pay 30,000 Kshs. for every maintenance done on cemeteries. Farmers on the other hand, were required to pay 2000 kshs. to cultivate an acre of land, 1000 for half an acre and 500 for quarter of an acre. The Bill also introduced taxes of up to 50,000 kshs. annually, on entertainment spots and other business premises such as butcheries, as well as institutions of higher learning, private health facilities and churches.

⁵² <http://mobile.nation.co.ke/News/Even-death-is-taxable-in-county-bizarre-Bill/-/1950946/2046366/-/format/xhtml/-/6trkv8/-/index.html>

rejected by MCAs stating that the Bill was hurriedly introduced to the house.

On November 7th 2013, the Kiambu County Government invited the public, through a newspaper advertisement to a consultative forum on the 10th of November. The short notice did not allow for adequate participation by all stakeholders. Despite the short notice, a few stakeholders attended the forum and gave their input on the Finance Bill. On December 9th 2013, the Kiambu County Assembly passed the same Finance Bill that they had initially rejected, although with amendments. The Bill was assented to by the Kiambu County Governor on December 10th. The amendments included scrapping of license fees for livestock and bodaboda operators, uniform parking fees across the county, and reviewed license fees for various types of businesses⁵³. However, the views of the public had not been taken into consideration and the Act was still not acceptable to a section of Kiambu County residents, particularly the business community.

In January 2014, Kiambu County Government issued a letter informing traders that the new tax rates and licenses would be effective beginning from January 20, 2014.

Actions and Challenges

The gazette notice of the Kiambu Finance Bill in October 2013 facilitated discussions by different sections of Kiambu residents. Buoyed by increased civic awareness, some Kiambu residents observed that some of the taxes proposed in the Kiambu County Finance Bill (2013) contravened Article 209 of the Constitution which indicates that only the National Government is authorized to impose income tax, value added tax, customs and other duties and excise tax while a county may impose property tax, entertainment tax and any other taxes authorized by an Act of Parliament. Kiambu residents argued that the county Government was raising revenue in a manner that was detrimental to their socio-economic well-being. They also argued that the Bill had been published without consulting county residents as required by the Constitution. The Bill was opposed by the business community in the county who threatened to relocate their businesses if the Bill was passed. Churches within the county also opposed the Bill⁵⁴. The residents also felt that the newly introduced fees were not commensurate with the services offered⁵⁵.

⁵³ <http://allafrica.com/stories/201411171729.html>

⁵⁴ <http://www.standardmedia.co.ke/ktn/video/watch/2000071362/kiambu-burial-tax-raw?articleID=420>

⁵⁵ Interview with Kenya National NCCI official – Kiambu County

These observations led members of a resident's association, Jamofastar Welfare Association, to file a petition in court in November 2013. The court ruling argued that the Bill was still in the debating stage and had not yet been enacted. The judge argued that changes might be made in the process of debating, but should the Bill still be unacceptable to the petitioners, they could file the case in court again. Judge Odunga's statement on 14th November 2013 read;

'It is therefore my view that as the Bill is yet to be enacted, this court ought not at this stage to interfere with the process of the enactment however ugly, undesirable, arbitrary, unjust, fanciful or oppressive that Bill may appear. If the issues raised by the petitioners are not addressed during the debating of the said Bill, the petitioners will still be at liberty to move this court for appropriate orders'⁵⁶.

On January 2014, a few months after the court ruling, a letter was issued by the County Government of Kiambu informing traders of the new fees and rates. This led to protests by traders from Moi, Jamhuri and Makadara markets in Kiambu County, demonstrating against implementation of the law⁵⁷. Despite these protests, the county Government went ahead and enforced the law.

In February 2014, KNCCI – Kiambu County issued a memorandum to the Kiambu County Government on behalf of the Kiambu business community. In the memorandum, they stated that the business community was not opposed to taxation, and indeed appreciated that taxes were necessary in funding development⁵⁸. However, they were requesting for dialogue between the county Government and the business community to determine tax amounts that would enable the county Government raise revenue in a manner that was fair to the business community. In the memorandum, the traders documented the negative effect the law would have on businesses in the county and made proposals on levies that would be acceptable to different businesses. The memorandum made recommendations on public health levies, levies to alcoholic drink traders, bodaboda operators, market traders, MPESA and agency banking and supermarkets.

In the memorandum, the business community also

estimated that the County Government failed to collect approximately 25% - 30% due to corruption between corrupt revenue officials and scrupulous entrepreneurs. KNCCI further proposed to work with the County Government to reduce tax evasion and increase revenue collection. The memorandum also proposed a three year incremental plan for permit and license fees for various businesses and traders. The Kiambu County Government however, did not take up the suggestions in the memorandum and instead continued to implement the Finance Act, 2013.

Failure by the Kiambu County Government to consider the issues raised in the memorandum led to members of the KNCCI, to file a petition in court to contest the passing of the Act. Petitioners under the KNCCI umbrella included, the Likamba Matatu Savings & Credit Cooperative Society, Quarry Owners Association of Kenya and Town Link Cabs. They cited unconstitutionality of the Act due to lack of public consultation. They further argued that the Act had provisions that amounted to double taxation, which subjected residents of the county to the possible loss of livelihoods as some would be forced to shut down their businesses. This, they argued, was contrary to the Constitution which provides the right to affordable social amenities and to earn a living.⁵⁹

In April 2014, the High Court in Nairobi declared the Kiambu Finance Act 2013 illegal as it lacked public participation. Although the Kiambu County Government argued that it had involved the public by publishing an advertisement on newspapers inviting the public to a consultative forum, the high court judge ruled such participation as null and void, stating that one newspaper advertisement and a meeting in a five-star hotel.⁶⁰ The judge argued that this did not suffice as public participation as required in the Constitution. He dismissed the argument that the public had participated in the following words:

'In my view, to huddle a few people in a five-star hotel on one day cannot by any stretch of imagination be termed as public participation for the purposes of meeting constitutional and legislative threshold. Whereas the magnitude of the publicity required may depend from one action to another, a one-day newspaper advertisement in a country such as ours where a majority of the populace survive on less than a dollar per day and to whom newspapers are a luxury, leave alone the level of illiteracy in some parts of this country,

⁵⁶ <http://kenyalaw.org/caselaw/cases/view/92660/>

⁵⁷ <http://www.the-star.co.ke/news/article-151674/fresh-case-filed-against-kiambu-law>

⁵⁸ The Kenya National Chamber of Commerce and Industrialisation (KNCCI) (2014)

⁵⁹ <http://kenyalaw.org/caselaw/cases/view/97000/#.VJPOZWIA2Ec.twitter>

⁶⁰ The consultative forum was held in Windsor Golf Hotel and Country Club

may not suffice for the purposes of seeking public views and public participation’.

This decision was based on petitions⁶¹. by the public, including Petition 12 of 2014 filed by Likamba Matatu Savings & Credit Cooperative Society, which stated that even though the views of the public were sought and given consideration during the consultative forum at Windsor Hotel, the Bill that was tabled to the county assembly was rejected and their views were not reflected in the gazetted Act, particularly with regard to levying of taxes. The Quarry Owners Association in their petition no 36 of 2014 stated that they had been left out of the consultative forum despite being members of Kabete Sub-County Business Owners and Services Association who are major stakeholders in the County. In petition 532 of 2013 filed by Jamofostar Welfare Association, the petitioners indicated that although Kiambu County Government had made a public announcement of the meeting through a newspaper advertisement, the Finance Bill was not included as one of the issues that would be discussed in the forum.

Based on these petitions, the counsel argued that the Kiambu Finance Act, 2013 had contravened Articles 35 of the Constitution as many residents of the county were not aware of the forum, as well as Articles 10 (2) which identifies public participation as a national value of governance and Article 17 (4) which identifies the need for self-governance by the people.⁶² They also argued that the Bill was prepared without proper participation and consultation contrary to Sections 87 and 115 of the County Governments Act, 2012. Furthermore, whereas Section 87 of the County Governments Act requires counties to set up forums for citizens’ participation, these were not set up in Kiambu County, and as such, the people of the county were not consulted.

Having considered the arguments of the petitioners and the counsel, Judge Odunga declared⁶³ the Kiambu Finance Act null and void, as it lacked public participation as contemplated in the Constitution and County Governments Act, 2012.

Current status

As of January 2015, the Kiambu County Government had enacted a Kiambu Finance Act, 2014. The Act still contains

contentious issues and 20 livestock traders had sued the Kiambu County Government for introducing new levies. Similar to previous legal contestations, they argued that the Act was passed without public participation and that the new levies were affecting their businesses⁶⁴. This is the third time that the case has been taken to court.

Lessons

The Kiambu case paints a picture of both pessimism and optimism in public participation at the county level. On one hand, it demonstrates the inadequacy of public participation in counties due to its tokenistic nature and lack of genuine effort to ensure meaningful public participation. Like many other counties, the Kiambu case demonstrates how public participation remains an exclusive rather than inclusive affair, lacking specific mechanisms to safeguard consultative forums from presenting and protecting the interests of dominant groups⁶⁵. This exclusivity is demonstrated in the choice of media used to publicize consultative forums.

Similar to other counties, the Kiambu case also depicts how public participation is constrained by inaccessibility by majority of the public, lack of adequate notices, failure to avail relevant documentation to the public in simplified language and in advance, and lack of mechanisms to ensure that resolutions in county consultative forums are binding.⁶⁶ Moreover, when the views of the public are not taken into consideration, there are no mechanisms to provide feedback and explanations.⁶⁷

While this paints a grim picture of the situation, the Kiambu case strongly demonstrates the spirit of the Constitution to give power to the people by providing multiple options for the public to participate. The ability to utilise these options was made possible by increased awareness of the Constitution by Kiambu County residents. Knowledge of the Constitution is therefore essential if citizens are to take up the power accorded to them by the Constitution.

The actions and successes achieved by Kiambu County residents demonstrate the need for citizens to organize within various associations and actively participate to use available public participation avenues to ensure that county plans reflect the needs and realities of the people. The ability of the Kiambu business community to speak

⁶¹ <http://kenyalaw.org/caselaw/cases/view/97000/#.VJPOZWIA2Ec.twitter>

⁶² Ibid.

⁶³ <http://kenyalaw.org/caselaw/cases/view/97000/#.VJPOZWIA2Ec.twitter>

⁶⁴ Daily Nation (2015) 20 traders in court over removal of meat officers January 13th 2015,

⁶⁵ International Budgeting Partnership (IBP) Kenya (2014)

⁶⁶ Similar sentiments were shared by CSOs in Nyeri and Elgeyo Marakwet interviewed for this study.

⁶⁷ International Budgeting Partnership (IBP) Kenya (2014)

in one voice can be attributed to the strong associational life of the community. The KNCCI – Kiambu County encourages each business to join an association and each association to be a member of a Business Member Organisation (BMO) such as the KNCCI of the Kenya Association of Manufacturers (KAM)⁶⁸.

There is need for the business community to also engage with other sectors and associations to create an even stronger civil society. Strong civil society is a key ingredient in driving the realization of the tenets of the Constitution by creating a political culture that values citizen participation and inclusive governance.

The case also demonstrates that increased options for representation have not necessarily translated into adequate representation of the needs of the people based on their realities. Similar to the Dandora youth, residents of Kiambu need to explore the option of supporting some of the members of their associations to represent their interests.

Like all the cases in this case study, the case demonstrates demand by the public to be consulted and to meaningfully engage with government. This demand is however met with resistance by a County Government that is determined to impose, rather than listen and serve the people.

⁶⁸ The KNCCI has a membership of over 1000 individual businesses and business associations, with a mandate to protect business communities from poor legislation. KNCCI and other associations have played a key role in conducting civic education on the Constitution and devolution to business people and traders. These associations also empower the business community to take action and challenge laws that could impact negatively on the community. Through these associations, the business community has been in discussion with the county government to ensure that the county government is aware of the challenges faced by businesses in the county through quarterly dialogue forums.

Annex 2: Research Methodology

These cases provided a basis to examine recent developments that have necessitated public action by different groups. The study aimed to understand how these groups mobilized to take up opportunities presented by the constitution or to contest against threats to the Constitution. The study examined the dynamics surrounding their mobilization, highlighting structural and contextual factors that pose as barriers to effective mobilization and organization within civil society in Kenya. To achieve this, the research aims to answer the following questions:

- i. How did specific actors mobilize around contested issues?
- ii. What opportunities for meaningful participation were seized or missed?
- iii. How did structural and contextual factors impact on mobilization?

The study relied on semi-structured interviews with 31⁶⁹ purposively sampled respondents involved in the six case studies. These included county officials, union leaders and members of associations under study, CSO officers, community leaders, and private sector officers. Through already identified individuals, snowball sampling⁷⁰ was also used to identify other respondents who could give more information on certain aspects of the study. Each case involved interviews with at least three people, to build on the cases, as well as for purposes of corroboration and accuracy.

To validate information from interviews, secondary sources of data related to the six cases were reviewed. These included minutes of meetings, reports and publications by Government and CSOs, media reviews, correspondences and resolutions. Literature relating to public participation and active citizenship including academic literature and Government legal and policy documents were also reviewed. The researcher also

attended meetings related to the study⁷¹, and observation was thus used to generate information and in some cases to validate findings.

The six cases were selected to reflect public participation at both national and county levels. Three of the cases were at national level and other three at county level. The cases also illustrate the opportunities presented by the Constitution, particularly in relation to public participation, and the extent to which that has translated to active, free and meaningful participation. The cases were also used to reflect the diversity of mechanisms for public participation and at the same time highlight similarities in terms of experiences and challenges to public participation.

⁶⁹ List of respondents can be found in Annex 3.

⁷⁰ Snowball sampling is a research technique, where the researcher asks respondents for referrals to other possible respondents. This was used in cases where respondents may have been difficult to locate, or in instances where certain respondents were needed to respond to gaps in the research.

⁷¹ These include CSO Reference Group meetings.

Annex 3: Research Respondents

Case 1: CSO Reference Group	
Anne Tek	CSORG secretariat
Suba Churchill	CSORG
Regina Opondo	CSORG
Alfred Ngugi	Intern – PBO Amendments petition
Grace Kinuthia	Intern – PBO Amendments petition
Case 2: Media	
Eric Oduor	Kenya Union of Journalists
William Janak	Kenya Correspondents Association
Victor Bwire	Media Council
Case 3: Health	
Dr. Sultani Matendechere	KMPDU
Dr. Boniface Chitayi	KMPDU
Rosalind Murimi	Ministry of Health
A.M ⁷²	Ministry of Health (former)
Case 4: Mustard Seeds	
Charles Gachanga	MSCO
Samuel Ikambi	MSCO
Abubakar Mope	MSCO
Case 5: Tullow Oil	
Wanjiku Manyara	PIEA
Lynette Lokuruka	Tullow – Lodwar
James Ekal	Tullow – Lodwar
Chris Erukudi	Community elder – Lodwar
Charles Wafula	APAD
John Ebenyo Ewesit	Oxfam – Lodwar
Charles Ewoi	Cabinet Secretary – Ministry of Public Service

Case Study 6 and Interviews on Kiambu Finance Act and County Consultative Processes	
Francis Kirira	Nyeri County Government
Joyce Matogo	KANCO – Nyeri
Maryanne Mwangi	NTA – Nyeri
Hon. Albert Koichei	Speaker, Elgeyo Marakwet County Assembly
Stephen Cheboi	Elgeyo Marakwet CSO
John Kinuthia	IBP
Richard Ndung'u	KNCCI Kiambu

Research Advisors

Dr. Celestine Nyamu-Musembi	University of Nairobi
Dr. Jason Lakin	IBP – Kenya

Research Discussants

Annette Omollo	World Bank
Christine Njeru	CIC
Cidi Otieno	Coalition for Constitution Implementation (CCI)
Dr. Regina Mwatha	Commission for Administrative Justice (CAJ)
John Kinuthia	IBP - Kenya
Leonard Wanyama	SID - Kenya
Sandra Ochola	Katiba Institute

⁷² Respondent wished to remain anonymous



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The Society for International Development (SID) is an international network of individuals and organizations founded in 1957 to foster democratic participation in the development process. For more than fifty years we have done this through locally-driven programmes that strengthen facilitated dialogue, knowledge-sharing and promote policy change.

The Kenya Dialogues Project (KDP) was established by SID in 2013 to create a public covenant and leadership around four central promises of the Constitution of Kenya. The four promises are: Public Participation, Integrity, Equality and Devolution. These promises enshrine the constitutional vision of a democratic, just, equitable and economically prosperous Kenya. We support knowledge-building, dialogue and action towards active citizenship and responsive governance.

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