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Augmenting Constitutionalism through Popular Participation for Responsive Governance in Africa: Putting Kenya into Perspective

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Abstract: This paper demonstrates the imperativeness of public participation if the people who are entrusted with leadership in a country misgovern amid the watch of constitutionalism. For social justice to occur—for the vast majority of Kenyans to access healthcare, adequate housing, adequate and nutritious food, safe water, social security, education, to ensure their well-being—governance is the sine qua non. It is not governance per se, but governance that is participatory: a type of governance that values the views of the governed. Kenya, with a population of approximately 50 million, has over 45 per cent of its people living below the poverty line or on less than two dollars a day while some citizens have by far more than they need. The East African country is regarded by the World Bank, UNDP and other authorities as one of the most unequal countries in sub-Saharan Africa. Because of this huge divide between the haves and the have-notes, the country is far from attaining social justice. For social justice to be achieved, social problems have to be mitigated. This is only achieved if people have access to the basic needs such as clean water, food, healthcare, and clothing. But then again, social justice cannot be achieved without public participation, accountability, transparency, effectiveness and efficiency, equity and inclusiveness, responsiveness, and the rule of law. Through literature review, it is clear that participatory governance boosts not only equality and equity, but also efficiency and effectiveness in service delivery, alleviation of corruption, ineptitude, laxity and inertia, and empowerment of the people in their quest to expand their choices.

Keywords: Responsive Governance, Popular participation, constitutionalism, governors.

INTRODUCTION

Poor governance is believed to be the cause of many problems – socio-economic, political and environmental – bedeviling the developing world. Ayittey [1] argues that the reason Africa remains underdeveloped is simple: bad governance. If the developing world can fix their governance issues, then it will be on high gear towards social transformation. A former UN Secretary General, Kofi Annan, refers to good governance as a prerequisite for economic and social change. It should be noted that good governance cannot directly benefit its people, but it can necessitate policies to enable the people to earn incomes that will ultimately result in better lives.

The 2010 Constitution of Kenya, in Article 174, states that one of the objectives of governance is “to give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them.” The County Government Act of 2012 (Section 87), on the other hand, spells out six principles upon which public participation shall be based:

- Timely access to information, data, documents, and other information relevant or related to policy formulation and implementation;
- Reasonable access to the process of formulating and implementing policies, laws, and regulations, including the approval of development proposals, projects and budgets, the granting of permits and the establishment of specific performance standards;
- Protection and promotion of the interest and rights of minorities, marginalized groups and communities and their access to relevant information;
- legal standing to interested or affected persons, organizations, and where pertinent, communities, to appeal from or, review decisions, or redress grievances, with particular emphasis on persons and traditionally marginalized communities, including women, the youth, and disadvantaged communities;
- Reasonable balance in the roles and obligations of county governments and non-state actors in decision-making processes to promote shared responsibility and partnership, and to provide complementary authority and oversight;

- Recognition and promotion of the reciprocal roles of non-state actors' participation and governmental facilitation and oversight.

Citizens should make every effort to contribute views on development issues; they should send letters; fill out questionnaires (when circulated); attend public meetings, and so on. That is how they can impose themselves in decision making. They can use their participation in decision making to check the excesses of governors to improve governance, thus increasing the chances of success of development projects. The 44th President of United States, Barack Obama, received thousands of letters when he was in power, "A woman can't find a job. A teacher with advanced certificate can't find a damn job. A lesbian couple just got married; thank you, Mr. President . . ." [2].

The letters were not seeking handouts, and some were quite critical of his style of governance, telling him point-blank that he was leading the country towards the wrong direction. Before he would retire to bed every night, the president made it a habit of reading ten sampled letters and responding to some of them. Even though the president did not provide solutions to most of the problems raised by letter-writers, being kept on his toes by the American citizens – through letter-writing – shaped his governance, and that is what public participation can do.

Public participation should be expanded so citizens can participate on issues such as whether the country should borrow, and if so, how much. Had it been expanded, Kenya would not have gone into a borrowing spree – as it has done in the recent past. When Uhuru Kenyatta took power in 2013, the public debt was just Sh1.89 trillion; in 2018 it stood at Sh5.04 trillion, and it is projected that by the time he leaves office in 2022, the debt would have hit Sh7.17 trillion. What do these figures mean? A trillion is a million million, so Kenya currently owes over five million million shillings to foreign creditors. And if the population of Kenya is, say, 50 million, then every Kenyan (even the poorest of the poor) owes the Chinese, Americans and Europeans Sh100 000. This is the debt many generations to come will have to pay. And if you ask Kenyans what the borrowed money has done, many of them would be unable to answer. As Prah [3] puts it, "Africa's debtors are always insisting on their pound of fresh", and so, expenditure for health, education and social welfare are reduced to near zero.

To boost food security in Kenya, the government injected over Sh7 billion into Galana-Kulalu irrigation project, but little results have come out of it [4]. Had stakeholders been involved, probably they would have convinced the government that the project was not viable, given that the area where it was located suffered from a perennial water shortage. Because the law does not mandate the national government to involve the public in all the development activities it initiates, that could be the reason many projects are mislocated and mismanaged. According to Karina and Mwaniki [5], the Kenyan government has a history of mislocating and mismanaging irrigation schemes. Besides Galana-Kulalu, Perkerra, Hola, and Mwea schemes have had more than their fair share of mismanagement.

Participation, however, should not target only economic activities, it should feature even in social and political activities. People have, for example, to take part in democratic process to improve governance so as to enhance service delivery; to reduce marginalisation; to bring about transparency, accountability and rule of law, just to mention a few. In this paper, governor means more than the head of county government; it means anybody with a mandate to manage resources to better people's lives.

Responsive Governance

What is governance? A 1992 World Bank document [6] defines governance as the way power is used in the management of economic, political and social resources for sustainable development – sustainable development being a kind of development that meets the wants of the present generation without hampering the ability of the coming generation to meet their own wants. Sisodia [7], on the other hand, defines it as simply an act of giving, serving, doing good to your people to solve their problems so as to make their lives better, enjoyable and satisfying.

Ochichi [5] observes that, one time, weather changes destroyed the coffee of Brazil, the world's leading grower, when the United States had already imposed a trade embargo on Uganda, another grower. Kenya's power elite sneaked Ugandan coffee into Kenya and then secretly exported it to Europe and America, making huge profits for themselves at the expense of the country. Those in power looked the other way as the country was denied the much-needed tax; they failed to prevent tax evasion, because the culprits were homeboys. The illicit trade therefore enriched individual traders with powerful political connections while the country suffered economically. When the illegal trade was at its peak, some traders who used to drink traditional liquor (because that was what they could afford), all of sudden started to enjoy imported whisky, for they were rolling in money that resulted from the 'coffee boom'. White [5], opines that the poor person's hopes are usually dashed by corruption, greed, nepotism, tribalism, cronyism and other social ills.

Good governance is a scarce commodity in many parts of Africa and people are yearning for it. A Kenyan opposition party's manifesto, for example, states in part, "A crisis has engulfed Africa. It is a crisis of governance. Everywhere established governments are being challenged from below to listen to the voices of the people. Everywhere they are being challenged to deliver the fruits of independence and to ensure development" [8].

Kenya, after over 50 years of independence, still remains underdeveloped—general elections are mismanaged each time they are held, causing violence which, in turn, affects the economy, driving the poor deep into poverty; the country is ever engulfed by the politics of ethnicity, corruption, ineptitude and lax. Because of poor governance, the Kenyan economy remains stagnant, with occasional and too low growth rates to lift the poor Kenyans languishing below the poverty line.

Poor governance, according to Bindra [9], is to be blame for the social, political and economic problems afflicting the poor. He enumerates the factors that can stimulate economic growth; they include free markets, political democracy, technological capacity, social facilities (in education and healthcare), transparency guarantees, and protective security. To a large extent, Bindra concurs with Ayittey [10] who observes that if governance can provide the enabling environment – security for persons and their property; basic infrastructure; economic, social and political stability; incentives; basic freedoms – the citizens will do the rest on their own to develop themselves.

The citizens will be stimulated and energized to work hard to change their lives if they do not fear for their lives as they go about their daily activities; if they have no worries about the safety of their properties; if incentives are provided e.g. subsidized agricultural inputs and reduced taxes; if the law of the land is followed by everybody so that when a person takes another's property unlawfully, regardless of the culprit's standing in society, the law reigns supreme.

French jurist Montesquieu, credited with the philosophy of separation of powers, says that every government is composed of legislative, which enacts and amends laws; the executive, which "makes peace or war, sends and receives embassies, establishes public security, and provides against invasion." The judiciary, the jurist adds, punishes criminals and mediates to solve disputes between individuals. The three arms of government are supposed to operate independently [11]. It should be noted, however, that it is rather difficult for the judiciary to be completely independent since it is part of the government; semi-autonomy, however, is possible.

The provision of roads, health facilities, electricity, schools and clean water can also stimulate people to work hard to improve their lives. With electricity, for example, a citizen may be encouraged to begin to sell pop corns to generate some income; or availability of water may stimulate a young person to engage in small scale farming. About freedoms as an aspect of a conducive environment, when the media operate in a threatening environment, they will most likely fear to unearth corrupt practices that hinder development. Fear will also restrict them from taking issue with the violation of human rights – issues that can scare away investors. In any case, Sen [12] equates development to expanded freedoms.

Finally, socio-economic and political stability also constitute an enabling environment. For example, a stable economy and a democracy that conducts regular peaceful elections can attract investors; stable commodity prices and sound management of financial institutions can also encourage people to engage in small and medium enterprises (SMEs) to earn a living. Kenya, however, has not had governance that advances seriously the agenda of social transformation; that is why Asian countries (now called the Asian Tigers) that were on par with the East African country at independence (with poor education, corruption, inadequate housing, unemployment, among other problems) have leaped forward – thanks to good governance – while Kenya has lagged far behind, with a sizeable number of its people regarded as the poor of the poor.

The foregoing demonstrates that the then governors of Kenya misgoverned the country. In Kenya there is a belief that government is the fixer of the poor person's problems, and that is why wherever and whenever disaster strikes – floods, fires, landslides, traffic accidents, diseases, and so on – the poor turn to government for assistance. Resources were not managed well and leaders did not value transparency, responsiveness, rule of law, equity and inclusiveness, efficiency and effectiveness, and accountability.

Governments get the mandate of their people to safeguard the welfare of the vast majority of the citizens. If they protect the interests of a few, then they fail their people. According to Aristotle, "a good government is one which best serves the welfare of the generality of the people, while a bad government is one that subordinates the general good to the good of the individuals or groups of individuals in power or having power" [13].

Can A People's Constitution Deliver Popular Governance?

Can good constitution influence good governance? If the constitution is made through a participatory process that involves negotiations and wide consultation, it can improve governance – but there is no assurance. If the process of making the constitution is top-down and non-consultative, it is not likely to impact governance. For a constitution to enhance governance, the goodwill of the governors is imperative. Governors can undermine and even circumvent the constitution, however good it may be. When that happens then the supreme law becomes inferior, meaningless and irrelevant – not a superior instrument that is instrumental in improving governance

The 2010 Constitution of Kenya is regarded by many constitutional lawyers and development experts as one of the best in Africa because the process of making it was open, and people-centred and people-driven. But governors occasionally either circumvent it or subvert it altogether. Even though The Economist, October 28, 2000 [14] says that a well-crafted constitution makes it difficult for governors to ignore the governed, however good a constitution is, the politicians, who double up as governors, will always devise ways to make a mess of it – they can even suspend it. For example, does not the Constitution of Kenya state, in Chapter three, Article 14 and 15 that a person is a citizen of Kenya either by birth or by registration? Does not Article 16 further state that "A citizen by birth does not lose citizenship by acquiring the citizenship of another country"? Here is Miguna Miguna with a legally acquired duo citizenship (Kenyan and Canadian), yet he is arrested and deported to Canada [15]. Twice he attempted to return to his native country, but the Kenyan authorities could not allow him – not even after the courts ordered that the politician-cum-human rights activist be allowed to return to his country of birth.

Chapter six, Article 73, of the Constitution states that a public official should be a person of high moral integrity, but a number of public officials are discovered every other day to have either embezzled public funds or used fake academic certificates to acquire public jobs. And they are never sacked or asked to step down from their positions. The unlucky ones are dragged through the courts but their cases drag on for years. Some of them complete their tenure before their cases are heard and determined. As Ihonvbere [14] says, "Governance is often interpreted as an opportunity to get rich . . ." When governors misgovern with impunity, people's participation in street demonstrations, civil disobedience, boycotts, and so on to express their displeasure becomes the viable option – of course, the state machinery will deal with them.

Citizens have to engage in Popular Participation

At the core of popular governance is public participation for social justice, yet public participation is the key element of social justice. Kabau and Mamboleo [16] say the 1986 UN Declaration states that the beneficiaries of development have to be the central actors in development policies and processes, including designing, implementation, monitoring and evaluation. True development is predicated on active participation of the beneficiaries. According to the International Commission for the Study of Communication Problems, i.e. McBride Commission [1], ". . . nations cannot be built without the popular support and full participation of the people, nor can the economic crisis be resolved and the human and economic conditions improved without the full and effective contribution, creativity and popular enthusiasm of the vast majority of the people. After all, all it is to the people that the very benefits of development should and must accrue."

Participatory approach came into being when the top down approach, scholarly known as the dominant paradigm, and the dependency paradigm, proved ineffective. Prior to the advent of the Alternative Development Paradigms, which followed the two it had been argued that when an economy grows, it trickles down to the poor person and thus poverty is alleviated. But economies flourished, and made the rich even richer. It failed, however, to affect the poor as they remained poor. So social development, which is supposed to decrease the suffering of the poor, cannot be synonymous with economic growth.

In the early 1990s, the Alternative Development Paradigms, which saw people as the architects of their own development, were then conceptualised. It embraced wide public participation as one of its key characteristics of real development. United Nations Research Institute in Social Development (UNRISD), quoting Pearse and Stiefel [17], defines participation as ". . . the organised efforts to increase control over resources and regulate institutions in given social situations on the part of groups and movements hitherto excluded from such control" [18]. In public participation people present their needs, address their problems, and then initiate and develop beneficial relationships when working together.

The Alternative Development Paradigms widened the meaning of development to include healthcare, education, food, decent shelter, clean drinking water, clean environment and equity. Generally development meant the attainment of basic needs (and not merely economic growth). Participation became important because it situated development projects at the centre of the lives of the people, promoting transparency and accountability. It made possible the sharing of information, experiences, and knowledge. It also enabled the people to be responsible for their own destiny, hence became an implement in decision making. Nobody can deliver development for a people – it is only the people who can deliver development for themselves. Taylor and Mackenzie [5] confirms that neither the government nor foreign development agencies can improve the lives of the poor. What Taylor and Mackenzie are saying is that nobody can develop anybody; what a person can only do is to allow another develop herself or himself. "To allow" means to create favourable conditions for the person to capitalise on to prosper.

Kodia [19] says the poor are powerless, voiceless and at the mercy of the powerful politicians. He adds that government, even though it has the duty of bailing the poor out – as it promises during elections – it cannot salvage the poor's situation. Because government uses poverty as a bargaining chip during elections, it will want the citizens to remain in abject poverty so it can afford to buy their votes cheaply when the time comes so as to remain in power. It is incumbent upon the poor to put the governors to task to deliver what they promised during elections, and that is why popular participation in, for example, electoral process, is instrumental. Without citizens exerting pressure and seizing any opportunity during participation to remind the governors of their unfulfilled promises, the pledges remain pipe dreams.

In the 1980s and 1990s, governors at both the national and grassroots levels in Kenya criss-crossed the country giving a variety of promises: to eradicate hunger by the year 2000, to provide clean drinking water and electricity to every home by the year 2000, to ensure that every person is able to read and write by the year 2000 [20]. The year 2000 came and passed. In 2008 the governors were at it again; this time, they came up with the vision 2030 – to transform the country into a middle income economy by 2030. The 'goodies' in the vision include: one, to grow the economy so that it trickles down to benefit those at the periphery; two, to set up a fertiliser factory; three, to expand fish farming (today Chinese import fish); four, to establish small and medium enterprise (SME) parks across the country; five, to provide all primary schools with laptops; the list continues [21]. Just a decade since the plan was launched, it is already five years behind schedule. Recently, the President came up with yet another catchy slogan: The Big Four. In The Big Four, he pledges to: one, deliver affordable housing; two, provide universal healthcare; three, transform Kenya into a manufacturing country; four, make the country secure in as far as food and nutrition are concerned [22]. Only a year has passed since the launch of the so-called Big Four, but the enthusiasm has fizzled out. It will be foolhardy for Kenyans to still believe the slogans that are cleverly formulated to hoodwink them.

A Brazilian educator and philosopher, Paulo Freire, came up with the notion of *conscientisation* (awakening conscious) that is understood to mean that people have a right and capability to critique the situation they find themselves in and are able to act upon it by themselves. There should be faith in the capacity and capability of the people, including the illiterate, to dialogue critically to achieve the awaking of consciousness so as to chart their own destiny. Freire [23] believes people have the capacity to reflect, to conceptualise, and to think critically to contribute to decision making and ultimately social transformation, emphasising that the elite should not treat the poor as empty vessels.

Freire's idea of *conscientisation* agrees with Martin Buber's 'I-you' in Littlejohn and Foss [5]. In 'I-you', the two parties in a relationship respect and value each other; each listens attentively when the other speaks and they both see each other as unique individual. They express themselves freely and genuinely that the relationship graduates from *I-you* to *we*. It is like in a genuine marriage where the bride joins the groom to become one. In this arrangement, no party has a bigger say than the other – the case is the same in genuine public participation. But 'I-you' relationship is different from 'I-it' arrangement where one party enjoys overwhelming influence over the other. The inferior party is regarded as the thing 'it', that is none living and therefore cannot hold an opinion. Equality and trust are non-existence and so 'it' cannot tell 'I' anything, because it is incapable of saying anything useful.

Social Justice Means Fairness to all

Every person should be treated fairly and reasonably so that justice not only can be done but also can be seen to have been done to all. According to Works [24], The Romans took justice to mean giving everybody their fair share. But in an unequal society, whereas some people benefit, others are denied what rightfully belongs to them. Inequality occurs when members of society are far apart economically, socially and politically because of skewed distribution of resources. In such a case, social justice is required to remedy the situation by liquidating the conditions of exploitation and oppression that caused (contributed to the) imbalance [25].

In social development government cannot distribute money to members of society to use to improve their lives, but it can provide an enabling environment to enable individuals to exploit the environment to better their lives. If, however, governors make the environment conducive for one group of people and not another, then those governors have occasioned social injustice. So every governor has a critical role to play to promote social justice. One half of the city of Nogales is in the United States of America while the other half is in Mexico. Everything of the two halves is the same, but because of better governance that has occasioned a conducive (enabling) environment, the half that is in America is richer and has a higher life expectancy [26].

In society therefore some groups of people are treated unjustly by being denied the environment they can exploit to improve their living standards. So they find themselves living in appalling conditions. Because they are kept 'submerged', they cannot emerge out of dependency, humiliation, despondency and hopelessness that poverty is.

According to White [5], when Kenya gained independence, development experts believed the people were going to modernise fast enough to begin to live like Europeans. So when the Africans were handed the reins of power, they began to live like the colonisers, enjoying the fruits of independence alone, at the expense of the common people. During the fight for independence, the leaders had a clarion call of eradicating three enemies: poverty, disease and ignorance [27]. But the idea was discarded, immediately after independence as the Africans endeavoured to lead the live of the coloniser. They promoted tribalism and disunity by dishing out employment opportunities only to members of their ethnic groups, built good roads and health centres only in their home areas, among other things. They simply did all they could to promote their villages – instead of promoting nationhood. The rich-and-the-poor divide emerged and expanded rapidly. Whereas the rich took their children to private schools, the poor had theirs in non-functional public schools. When the rich went to private hospitals, the poor had nowhere to go because public hospitals were moribund.

Kenya, a country said to have unequal distribution of wealth, has today the bottom 10% households controlling less than 1% of the total income [28]. The country compares well with another country where a few people control the wealth of the whole world. The Forbes Magazine said in its headline, as the World Economic Forum began in Davos (Switzerland) in 2014 was taking place, “The 85 richest people in the world have as much wealth as the 3.5 billion poorest,” [29]. Oxfam also published results showing that just eight people – Bill Gates, Amanzio Ortega Gaona, Warren E. Buffet, Carlos Slim Helu, Jeff Bezos, Mark Zuckerberg, Lawrence J. Ellison, and Michael R. Bloomberg – controlled as much riches as the combined riches of half of the world population. According to Mbondenyi and Lumumba [30], some of the richest people in Africa are Kenyans; furthermore, some of the poorest of the poor on the continent are also found in Kenya.

CONCLUSION

Over a half a century since it attained independence, Kenya remains underdeveloped, with about a half of its population leading unpleasant lives. Attempts by governors to lift the poor out of poverty have failed, so they continue to die young, experience unemployment, lack drinking water, suffer from diseases, and whatnot. Scholars believe the cause of Kenya’s problems is governance – that is wanting. Quoting Chinua Achebe’s Novel, *The Trouble with Nigeria*, Ayittey [1] attributes the African country’s development problems to governance:

The trouble with Nigeria is simply and squarely a failure of leadership. There is nothing basically wrong with the Nigerian character. There is nothing wrong with the Nigerian land or climate or water or air or anything else. The Nigerian problem is the unwillingness or inability of the leaders to rise to the responsibility, to the challenge of personal example which is the hallmarks of true leadership . . . . We have lost the twentieth century; are we bent on seeing that our children also lose the twenty-first? God forbid?

Is there any way out? There is light at the end of the tunnel if the citizens decide to actively participate in decisions that affect them. Citizens have to take control of their destiny. If they do so, chances of development projects stalling, for example, will be reduced; service delivery, transparency, accountability, efficiency and effectiveness will all be improved. Participation empowers the participants, enlarging their choices and capabilities, and making them competent and confident; it builds on local strengths, creativity and resources, decreasing dependency; it fosters democracy because development is by the people and for the people; it sensitizes and enlightens people, making them responsive to their plight.

Chambers [18] provides examples of participation and lack of it. In reference to the Zambian Second National Development Plan of 1972-1976, he says, “The Plan is a people’s plan. It was designed and formulated by the people for their own development.” Further, quoting a locational agricultural assistant addressing a public meeting in Migori Division–Kenya, Chambers says, “There is a plan being drawn up now for this area. As soon as it is out, we will let you know what you are expected to do.” If development has to be of benefit to the people, then it has to incorporate the people’s views. The people have to actively participate in that development.

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