

Freedom of information and the right to child participation: Unmasking the Constitutional, Policy and Legislative framework in Kenya

Joseph Muthuri

*Senior researcher-African Centre for Communication, Policy and Research (ACCPR)
Ph.D(Ongoing) - Information and Communication Studies (University Of Nairobi-Kenya)*

Abstract

Freedom of information and the right to public participation are Siamese twins. Without freedom of information, optimal participation in policy and legislative processes in particular and governance in general is greatly compromised. This linkage is even more important when we consider children who, not only require information, but expect such information to be packaged and disseminated in a form they can easily process and understand. The international and regional policy sphere is replete with conventions, treaties, protocols and guidelines on mechanisms States ought to deploy to facilitate optimal freedom of information and child participation in all matters concerning children. At the national level, the Constitution of Kenya, policies and legislations promote these rights. However, over the years, Kenya has had neither robust policies neither implementation structures to facilitate child-focused freedom of information and participation. Using an analytical approach, this paper explores the existing constitutional, legislative and policy frameworks regarding freedom of information and participation for children in Kenya. It identifies gaps, proposes alternatives and finally, provides recommendations for a re-consideration of Kenya's policy and legal architecture as the panacea for addressing freedom of information and child participation challenges in the country.

Key Words: Children, freedom of information, child participation, policy, legislation

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I. BACKGROUND

Historically, Menefee (1999) avers that children have been associated with the private sphere and their presence in the public sphere "was viewed as an aberration" (p.107). As such, freedom of information and public participation are human rights concepts that have traditionally been examined through adult lenses. In the whole scheme of things, children have been neglected and their opinions ignored. Arguably, children have been left behind. In cases where attempts have been made to bring children near the epicenter of policy and legislative making and implementation processes, such efforts have at best been half-hearted and incomprehensive. Peters (1996) observes that "the very people who may have the most to gain from participation may be the same people who are least likely actually to participate in the policy process" (p. 21). This rings particularly true for children in Kenya.

The importance of a child-focused exploration of human rights, Smith (2004) argues is because children are human too. Such rights she argues "are the travelling companions that support every human being from the first sigh to the last sigh" (p.15). It is therefore important that children are accorded their rightful place in society. This includes, at the minimum, upholding their right to freedom of information and participation. Sadly, constitutional, legislative and policy frameworks across the world have served to marginalize and disenfranchise children.

This paper seeks to explore the dual concepts of freedom of information and the right of participation in Kenya from child lenses. It explores the existing constitutional, legislative and policy foundations that underlie freedom of information and child participation in the country. It starts by giving a comprehensive background of the two concepts from international, regional and national perspectives. It then explores the question of why children should claim such rights in the first place followed by an in-depth inquiry into specific constitutional, legislative and policy provisions. It concludes by a discussion of inherent gaps and suggestions of attendant recommendations.

Demystifying the right to freedom of information for children

UNESCO (2011) defines freedom of information, or the right to information, as the right to access information held by public bodies, which is an integral part of the fundamental right of freedom of expression. It therefore means freedom of information and freedom of expression enjoy a symbiotic relationship, interdependently co-joined at the hip. In linking the two concepts, the African Commission on Human and Peoples' Rights has held that "freedom of expression is a basic human right, vital to an individual's personal development, his political consciousness and participation in the conduct of public affairs in his country" (1998, p.6).

Instructively, the United Nations General Assembly, in its first session in 1946, elevated freedom of information as the fulcrum around which every other human right rotates. The Assembly was categorical that "freedom of information is a fundamental human rights and is the touchstone of all the freedoms to which the United Nations is consecrated". This is to say, without freedom of information, all other human rights and freedoms stand gravely threatened.

Freedom of information is integrated in several United Nations and African Union treaties, conventions and protocols. The International Covenant on Civil and Political Rights (ICCPR) notes:

Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice (1966, article 19)

Regionally, the African Charter on Human and Peoples' Rights is explicit that "every individual shall have the right to receive information" (1981, article 9). Further, the Declaration of Principles on Freedom of Expression in Africa hold that "public bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information, subject only to clearly defined rules established by law" (2002, article iv).

Regarding children, the African Charter on the Rights and Welfare of the Child (ACRWC) is empathic that "every child who is capable of communicating his or her own views shall be assured the rights to express his opinions freely in all matters and to disseminate his opinions" (article 7). However, there is international recognition that children are a special demographic group. For them, mere access to information may generally not be helpful. Considering this, the United Nations Committee on the Rights of the Child (UNCRC) noted that:

Children need access to information in formats appropriate to their age and capacities on all issues of concern to them. This applies to information, for example, relating to their rights, any proceedings affecting them, national legislation, regulations and policies, local services, and appeals and complaints procedures. (2009, clause 82).

An overview of the right to children participation

Williamson, Sithole & Todes (2006) defines public participation "as a democratic process of engaging people in thinking, deciding, planning and playing an active part in the development and operation of services that affect their lives" (p.5). It has also been described as "the process of engaging the public should serve to obtain the concerns of those who are most likely to be affected by the proposed law so that they can influence its content" (Phooko, 2014, p. 41).

The United Nations Human Rights Council comprehensively vouched for the overall right to public participation noting that:

International human rights instruments and mechanisms acknowledge the right of all people to be fully involved in and to effectively influence public decision-making processes that affect them... First of all, participatory mechanisms should be established by law and all stakeholders must have access to information in a timely and transparent manner, which implies that State authorities must make every effort to ensure easy, prompt, effective and practical access to information of interest to the public (2015, p. 4).

Further, the Council emphasized that the right to participation "depends on transparency and on access to full, updated and understandable information" and "should be premised on empowerment and capacity building" (p. 18).

Regarding children right to participation, the UNCRC notes that in promoting child participation, "States parties cannot begin with the assumption that a child is incapable of expressing her or his own views". Instead, there must be a presumption of the inherent capacity of children to form their own views "and recognize that she or he has the right to express them; it is not up to the child to first prove her or his capacity" (2009, par.20).

At the national level, articles 2 (5) and 2(6) of the Constitution of Kenya dictate that general rules of international law and any treaty or convention ratified by Kenya shall form part of the country's municipal laws. A number of treaties and Conventions that the country has ratified are explicit on their demand for public participation in general and child participation in particular. These include the UNCRC and the ACRWC.

A society that ensures its children are involved in legislative and policymaking and implementation processes does not only guarantee diversity of opinions but also insures its future through sustainable programming. How to ensure optimal freedom of information and the right to participation is responsive to the particular needs of children is, by all means, the fundamental question of our time.

Emphasizing on the importance of involving children in legislative and policy making and implementation processes, the United Nations Children's Fund and the Inter-Parliamentary Union (2011) note that "as citizens with lengthy time-horizons whose interests extend well into the future, children can offer the long-term outlook that is sometimes difficult for older people to discern or heed" (p. 9). Riekkinen (2009) extends a similar position arguing that "children's voices representing one of the subgroups diverse needs and opinions ought to be counted to avoid possible conflicts of interests in society (p. 108).

There is therefore no doubt as to whether children participation in governance is essential. In fact, the UNCRC notes that the right to child participation "in all matters of concern to her or him and for her or his views to be given due consideration, is a clear and immediate legal obligation of States" (UNCRC, 2009, para. 135).

However, for children to effectively participate, they require access to information. This information, unlike that which is accessible to adults, must be in a form that children can easily synthesize taking into particular consideration their ages and mental development.

Constitutional, legislative and policy framework on freedom of information and the Right to child participation in Kenya.

The Constitution of Kenya, 2010

Article 260 of the Constitution defines a child as "an individual who has not attained the age of eighteen years". Although the Constitution does not specifically provide for child participation, article 53 is categorical that "a child's best interests are of paramount importance in every matter concerning the child". Among the values and principles of governance articulated under article 10 (2) is "participation of the people". Additionally, under articles 118 and 196, the Constitution requires Parliament and County Assemblies respectively to facilitate public participation and involvement in the legislative and other businesses. Among the objects of devolution of power in Kenya 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" (article 174). In the governance and management of urban areas and cities, article 184 requires that Parliament enact a national legislation providing for, inter alia, participation by residents.

On specific demographic groups, the State is obligated to take measures, including affirmative action programs, to ensure that the youth "have opportunities to associate, be represented and participate in political, social, economic and other spheres of life" (article 55). It is also expected that the State shall facilitate minorities and marginalized groups to "participate and be represented in governance and other spheres of life" (article 56). The same rights should also be extended to older members of society to ensure they "fully participate in the affairs of society" (article 57). Among the values and principles of public service under article 232 is "involvement of the people in the process of policy making" and promotion of "transparency and provision to the public of timely and accurate information". Finally, among the functions allocated to the County governments under the 4th schedule is:

Ensuring and coordinating the participation of communities and locations in governance at the local level and assisting communities and locations to develop the administrative capacity for the effective exercise of the functions and powers and participation in governance at the local level.

Under article 201 on the principles guiding all aspects of public finance, the Constitution is categorical that "there shall be openness and accountability, including public participation in financial matters".

Regarding freedom of information, the Constitution considers transparency as one of the values and principles of governance under article 10. Additionally, article 35 provides that "every citizen has the right of access to information held by the State". There is a further constitutional requirement that "the State shall publish and publicize any important information affecting the nation". In sum, article 33 postulates that "every person has the right to freedom of expression, which includes freedom to seek, receive or impart information or ideas".

Children Act, 2001

Section 4 (2) of the Act is emphatic that "in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration". This provision is an important pillar in anchoring child participation in Kenya. This is buttressed by section 4 (4) emphasizing that in any matters of procedure affecting a child, the child shall be accorded an opportunity to express his opinion, and that opinion shall be taken into account as may be appropriate taking into account the child's age and the degree of maturity. In judicial proceedings under section 76, the court in considering whether or not to make an order with regard to a child, shall have particular regard to, among other matters, the ascertainable feelings and wishes of

the child concerned with reference to the child's age and understanding. Additionally in determining whether or not custody order should be made under section 83, the ascertainable wishes of the child counts as one of the principles to be applied by a court of law.

County Governments Act, 2012

Among the objects and purposes of the Act under section 3 is providing for public participation in the conduct of the activities of the County Assemblies. Section 6 further provides that in exercising its powers or performing any of its functions, a county government "shall ensure efficiency, effectiveness, inclusivity and participation of the people". Members of the County Assembly are expected to, among other roles, "maintain close contact with the electorate and consult them on issues before or under discussion in the county assembly and provide a linkage between the county assembly and the electorate on public service delivery" (section 9). Under section 38, a County Governor, in the performance of his functions, is obligated "to promote and facilitate citizen participation in the development of policies and plans, and delivery of services in the county".

Among the principles of citizen participation in counties under section 87 are timely access to information; reasonable access to the process of formulating and implementing policies, laws, and regulations; interests of the minorities and the marginalized; and the reciprocal roles of non-state actors' participation. Additionally, citizens have a right to petition country governments who in turn have a corresponding duty to respond to such petitions and challenges. Among the modalities and platforms for citizen participation the Act enumerates include "information communication technology based platforms; town hall meetings; notice boards; development project sites and establishment of citizen fora at county and decentralized units" (section 91). Under section 96, "every Kenyan citizen shall on request have access to information held by any county government or any unit or department thereof or any other State organ" and it is a requirement that "every county government and its agencies shall designate an office for purposes of ensuring access to information".

Urban Areas and Cities Act, 2011

Section 2 of the Act defines a citizen fora to mean "a forum for citizens organized for purposes of participating in the affairs of an urban area or a city". The objects, principles and purposes of the Act is, inter alia, "to establish a legislative framework for, inter alia, participation by the residents in the governance of urban areas and cities" (section 3).

Through a citizen Fora, section 22 provides that residents of a city, municipality or town may deliberate and make proposals to the relevant bodies or institutions on, among other issues, the provision of services; proposed issues for inclusion in county policies and county legislation; the proposed annual budget estimates and the proposed development plans of the county and of the national government.

Under the 2nd schedule, a city or urban area is obligated to "develop a system of governance that encourages participation by residents in its affairs". It is further contended that "when establishing such mechanisms, processes and procedures, the city or urban area shall take into account the special needs of people who cannot read or write; people with disabilities; youth; gender equity; and minority and marginalized groups".

Public Finance Management Act, 2012

Section 207 provides that "regulations may be put in place providing for participatory governance in the implementation of this Act". Such regulations may provide for, among other issues, structures for participation; mechanisms, processes and procedures for participation; and special needs of people who cannot read or write, people with disabilities, women and other disadvantaged groups. Under section 137, every county is obligated to establish a County Budget and Economic Forum (CBEF) for county budget consultation processes. Besides State actors, the Governor appoints into the membership of the CBEF persons nominated by organizations representing professionals, business, labor issues, women, persons with disabilities, the elderly and faith based groups at the county level. The forum provide a means for consultation by the county government on preparation of county plans, the County Fiscal Strategy Paper and the Budget Review and Outlook Paper for the county.

Basic Education Act, 2013

Under section 4 of the Act, the guiding principles of basic education in Kenya include "promoting the respect for the right of the child's opinion in matters that affect the child" and "promoting the protection of the right of the child to protection, participation, development and survival". Every public institution of basic education is required to constitute a board of management whose membership shall include "a representative of the students' council who shall be an ex officio member" (section 56). One of the functions of the board of management is to "encourage a culture of dialogue and participatory democratic governance at the institution" (section 59). Under the 6th schedule, the membership of the National Council for Nomadic

Education in Kenya (NACONEK) comprises of, among others, a representative of persons with disabilities; a women representative and a youth representative.

Access to information Act, 2016

The object and purpose of the Act is to,inter alia,“provide a framework for public entities and private bodies to proactively disclose information that they hold and to provide information on request in line with the constitutional principles”.Under section 4, “access to information held by a public entity or a private body shall be provided expeditiously at a reasonable cost”. More comprehensively, section 5 provides that public entities shall:

Publish all relevant facts while formulating important policies or announcing the decisions which affect the public, and before initiating any project, or formulating any policy, scheme, programme or law, publish or communicate to the public in general or to the persons likely to be affected thereby in particular, the facts available to it or to which it has reasonable access which in its opinion should be known to them in the best interests of natural justice and promotion of democratic principles.

Section 5 further provides that dissemination of information shall take into consideration “the need to reach persons with disabilities, the cost, local language, the most effective method of communication in that local area” Additionally, “the information shall be easily accessible and available free or at cost taking into account the medium used”.

The National Children Policy, 2010

The policy, which precedes the Constitution, is premised on, among other principles, ensuring “accessibility of services and participation by children”(p.7). It also acknowledges that “access to accurate and appropriate information supplements the process of socialization and prepares children for various life experiences and challenges”(p.10). Acknowledging that, usually, “children are ignored in key decisions”,the policy calls for “appropriate forums to promote association and expression of opinion for all categories of children, at all levels, with proper representation by region, age and gender”.

Guidelines for child participation in Kenya2010

Among the stated objectives of the guidelines is to “give suggestions on how children should participate in the family, schools, community, inresearch,advocacy, policy and law and in the media” (p. vii). While recognizing that “participation is not an event but a process” (p.1), the guidelines require that “adults supporting children’s participation must ensure that childrenhave all the relevant information about the topic” (p7).

II. AN OVERVIEW OF CONSTITUTIONAL, LEGISLATIVE AND POLICY GAPS IN FREEDOM OF INFORMATION AND PARTICIPATION FRAMEWORKFOR CHILDREN IN KENYA

The overriding principle of best interests of the child underlines the whole corpus of child rights in the Constitution of Kenya. It is the fulcrum around which all other child rights revolve. This inevitably include the right to freedom of information and child participation. It is worth noting that ensuring best interest of the child injudicial and administrative decisions as well as policies and legislation concerning childrenmustinclude a description of “how the best interests have been examined and assessed, and what weight has been ascribed to them in the decision” (UNCRC, 2013, p. 5). Despite the constitutional guarantee, there exists no legislative criteria, guideline or mechanism for determining what the best interest of the child entails for the Kenyan child. There is no yardstick to measuring the best interests of the child in Kenya. As such, it is difficult for anyone to truly measure whether any consideration has been given to child rights in reality.

Children in Kenya have historically been at the periphery of the right to freedom of information and, inevitably, participation in public life. Their participation in governance at the national and devolved levels has not particularly interested policy makers, going by the existingconstitutional, policy and legislative framework. Whereas the Constitution, for example, explicitly provides for the right to participation for the youth and older members of society, it is eerily silent on child participation. The legislative and policyframeworks have not cured this apparent anomaly. The comprehensive legislative and policy review in this paper is a clear pointer that whereas freedom of information and the right to participation are highly regarded, little thought has been given to parameters of child inclusion. Whereas, for example, the Children Act provides for the right to child participation, it does not provide for mechanisms of implementation. Additionally, government agencies set up under various legislations as analyzed in this paper embrace inclusion of such demographic groups as the youth, women and persons with disabilities. However, children conspicuously unrepresentedin suchcritical agencies asNACONEK and CBEF. Where an attempt has been made to include children voices under the Basic Education Act, they are regarded as *ex-officio*. In other words, children are easily dispensable.

In 2012, the National Kenya Children's Assembly (NKCA) was established, launched with a lot of fanfare, and devolved across the 47 counties complete with a charter and standing orders. Unfortunately, these structures of children involvement have since collapsed due to, inter alia, lack of coherent policies that would have ensured children access the right information to inform effective participation in legislative and policy making and implementation processes. The reliance on funding from non-governmental organizations as opposed to government to sustain the assemblies dealt them a final fatal blow. UNICEF & IPU (2011) have posited that for children parliaments to be useful in facilitating child participation, the focus should be "on institutionalizing them so that they convene regularly. Too often children's parliaments are one-off, symbolic events with no follow-up and hence little impact on policy or lawmaking" (p. 49). The lack of a coherent policy, legislative and funding frameworks continues to hinder freedom of information for children in Kenya and subsequently, their participation.

Both the National Children Policy and the guidelines for child participation fall far short of providing any implementation framework for ensuring optimal freedom of information and participation for children in Kenya. On participation of children in policy and law, for example, the guidelines casually observe that "there is need for child participation practitioners to create structures that promote participation of children in policy making within organizations and in government" (p14). The identity of such practitioners and the nature of structures to be created is left to conjecture. Whereas the guidelines acknowledge that "all children have a right to get feedback on the outcome of the participation process", the channels for such feedback are left unaddressed. Notably, no comprehensive review has been done on both the guidelines and the policy, a decade since they came into force. They do not address contemporary issues of an emerging technological and globalized world that, undoubtedly, require newer thinking on freedom of information and participation for children.

Both national and county governments have inter-linked functions regarding promotion of the best interests of the child. As such, the two levels of government are constitutionally expected to work, "on the basis of consultation and collaboration" (article 6), towards ensuring that freedom of information and the right to participation for children are protected and promoted. The United Nations Committee on the Rights of the Child (2007) urges States to ensure establishment of "clear guidelines on how the views presented by children are taken into account by the formal political process, and how children are provided with adequate responses to their proposals" (para. 1013). No such guidelines exist in Kenya. An overwhelming majority of legislations in the country make no reference to children when discussing freedom of information and public participation. The Access to Information Act, while providing for such considerations as persons living with disabilities, local languages and cost of disseminating information, is surprisingly silent on how information will be processed and simplified to facilitate accessibility and use by children. In fact, the Act makes no direct reference to children.

III. CONCLUSION

Children are an integral part of society and the demographic group likely to live longest with consequences of non-participation and exclusion. They are regarded as the future of any one country. That's why, the international community has put in place extensive conventions and treaties to protect children's best interests. These instruments have additionally emphasized the need for them to be accorded freedom of information and the right to participation. In Kenya, the constitutional, legislative and policy framework flirts around these two fundamental child rights. While there is an overall appreciation that children must be accorded freedom of information and the attendant right to participation, there are no specific provisions on how this is to be achieved. Past attempts to establish structures and mechanisms on child participation have adversely been affected by legislative and policy lacunae leading to their ultimate collapse. Kenya must revisit its constitutional, legislative and policy architecture and ensure it pays homage to the dual child right concepts of freedom of information and participation.

REFERENCES

- [1]. Access to information Act, 2016
- [2]. African Charter on Human and Peoples' Rights
- [3]. African Charter on the Rights and Welfare of the Child
- [4]. African Commission on Human and Peoples' Rights (2002). Declaration of Principles on Freedom of Expression in Africa.
- [5]. Basic Education Act, 2013
- [6]. Children Act, 2001
- [7]. Constitution of Kenya, 2010
- [8]. County Governments Act, 2012
- [9]. Human Rights Council (2015). Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General

- [10]. International Covenant on Civil and Political Rights
- [11]. Media Rights Agenda and Others V. Nigeria, African Commission on Human and Peoples' Rights, Comm. Nos. 105/93, 128/94, 130/94 and 152/96 (1998).
- [12]. Menefee, J. (1999). From the mouths of politicians: Representing children in the public sphere. *Cultural Critique: Special Impeachment Issue*, 104-115.
- [13]. NCCS (2010). National Child Policy 2010. Nairobi:NCCS
- [14]. NCCS (2010). Guidelines for Child Participation in Kenya. Nairobi: Government Printer
- [15]. Peters, B.G. (1996). *The Future of Governing: Four Emerging Models*. Lawrence, KS: University Press of Kansas.
- [16]. Phooko, M. (2014). What should be the form of public participation in the lawmaking process? An analysis of South African cases. *Obiter*, Volume 35, Issue 1, Jan 2014, p. 39 – 59
- [17]. Public Finance Management Act, 2012
- [18]. Riekkinen, M. (2009). Public participation of children: foundations and a review of Russian legal practices under the convention on the rights of the child. *Baltic Journal of Law & Politics*2:2 (2009): 103-138
- [19]. Williamson, A., Sithole, P. &Todes, A. (2006). Decentralizing voice: women's participation in integrated development planning processes in KwaZulu-Natal, South Africa. (Paper presented to the Conference on the Place of Participation in a democratizing South Africa, IFAS, HSRC and CUBES, Wits, 20-32 November).
- [20]. Smith, C. (2004). Humanrightsas the foundation of society; in Lodrup,P. &Modrar, E. (eds).*Family Life and human rights*. Oslo. Gyldendal.
- [21]. UN Committee on the Rights of the Child (CRC), General comment No. 12 (2009): The right of the child to be heard, 20 July 2009, CRC/C/GC/12.
- [22]. UNESCO (2011). *Freedom of information: The right to know*.Paris:UNESCO
- [23]. United Nations Convention on the rights of the Child
- [24]. United Nations General Assembly Resolution 59 (1) 1946
- [25]. United Nations Committee on the Rights of the Child, Days of Discussion, The Right of the Child to be Heard (2006). Recommendations. UN Doc. CRC/C/43/3 (2007).
- [26]. UNICEF & IPU (2011). *A Handbook on Child Participation in Parliament*
- [27]. United Nations Committee on the Rights of the Child (CRC) General comment No. 19 (2016) on public budgeting for the realization of children's rights.
- [28]. United Nations Committee on the Rights of the Children General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration.
- [29]. Urban Areas and Cities Act, 2011

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