

Local Governance in Kenya

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I. Introduction

Strong local governments are an important element in the development of democratic societies.¹ Compared to central governments, local governments tend to be more responsive to local needs and aspirations, and consequently more likely to “produce systems of governance that are effective and accountable to local people.”² In other words, local governance gives governors better information about local preferences and makes it easier for the local people to monitor the performance of government.³ And better information about local preferences contributes to better use of resources. Accordingly, democratic decentralization promises to make democratic rule more immediate, direct and productive.⁴ It therefore facilitates the attainment of subsidiarity, that is, ensuring that governmental decisions are taken as closely to the citizen as possible. However, these promises of democratic decentralization can only be realized where the governance system facilitates public participation in, and accountability of, local governments.

This chapter examines local governance in Kenya from the perspective of administrative law. It seeks to determine how local units of governance, namely the erstwhile local authorities and the county governments that have succeeded them, make and apply rules, and adjudicate disputes. In doing so, the chapter seeks to establish whether and the extent to which the governance practices of these local units of governance adhere to the principles of administrative law. Further, it seeks to establish whether and the extent to which the public participate in local government decision-making, and the role and impact of

¹ Allan Rosenbaum, “Decentralization, Local Government and Democratic Institution Building” 2 (year?).

² Craig Johnson, “Local Democracy, Democratic Decentralisation and Rural Development: Theories, Challenges and Options for Policy,” *Development Policy Review* 3 (2001).

³ Jose Edgardo Campos & Joel S. Hellman, “Governance Gone Local: Does Decentralization Improve Accountability?,” in *East Asia Decentralizes* 237 at 238 (World Bank, 2005).

⁴ Harry Blair, “Spreading Power to the Periphery: A USAID Assessment of Democratic Local Governance” 16 (1998).

judicial review on local government decision-making. Part II examines the role of administrative law in local governance from a historical perspective. The aim here is to explain how politics has shaped, and continues to shape, the structures of local governance. Part III examines the nature of local governance since the promulgation of the Constitution of 2010. In both parts, the chapter focuses on public participation in rule making, the administration of trade licensing and development control, and the resolution of disputes arising from these two aspects of local governance. Part IV concludes.

II. Local Governance in a Historical Perspective

A. Local Governance in the Independence Constitution

The Independence Constitution established an elaborate system of local government, which consisted of a Senate, eight regions, and a Regional Assembly for each region. The Senate was one of the two houses of a bicameral Parliament, the other one being the House of Representatives.⁵ It consisted of 41 senators elected by 40 districts and the Nairobi Area.⁶ But the Senate had limited powers. For example, unlike the House of Representatives, it could not originate money bills.⁷ In practice, it did not even generate any non-money bill.⁸ The Regional Assemblies consisted of elected and specially elected members and specially elected members, the former being elected by voters, and the latter by the elected members.⁹ The sittings of the Assemblies were presided by the Presidents of the Regional Assemblies, who were elected by the Assemblies from among the elected members.¹⁰ The Regions also had executive powers, which were vested in the Finance and Establishments Committees of the Regional Assemblies, but could be exercised on its behalf by other committees of these

⁵ Constitution of the Republic of Kenya 1963, Section 34.

⁶ *Ibid*, section 36.

⁷ *Ibid*, section 59. Money bills were bills which made provision for the imposition, repeal, or alteration of taxation, or for the imposition of any charge upon the Consolidated Fund or other fund of the Government of Kenya. *Ibid*, section 63.

⁸ J. H. Proctor, Jr., "The Role of the Senate in the Kenyan Political System," 18 *Parliamentary Affairs* 389 at 397 (1965).

⁹ Constitution of the Republic of Kenya 1963, sections 92 and 94.

¹⁰ *Ibid*, section 98.

Assemblies.¹¹ Further, the constitution empowered Regional Assemblies to divide the Regions into local government authority areas, which could either be municipalities or counties.¹² Within the municipalities and counties, the Regional Assemblies also had the power to establish municipal councils, county councils and township authorities as appropriate.¹³ These local government authorities consisted of elected and nominated members, and exercised the functions entrusted to them by the Finance and Establishments Committee of the Regional Assembly.¹⁴ Clearly, the Constitution made some effort to create participatory and accountable structures of local governance.

However, the foregoing local government system was neither effective nor democratic for three main reasons. First, the division of powers was “complex, elaborate and confusing.”¹⁵ The constitution divided powers into three categories: matters within the exclusive legislative competence of the Regional Assemblies, matters within the concurrent competence of Parliament and the Regional Assemblies, and matters within the legislative competence of Parliament but over which the Regions had executive authority.¹⁶ This division of power made it difficult to determine who between the Central Government and the Regional Assemblies were responsible for particular matters. Further, Parliament had power to introduce legislation with respect to any matter, even where the constitution vested exclusive authority over a particular matter in a Region.¹⁷

Second, the allocation of powers was tilted in favor of the Central Government, which could easily take over the powers of Regions in significant instances, thereby undermining their authority. For example, the constitution gave the Central Government the power to give directions to a Regional Assembly where it was of the opinion that the executive authority of a Region was being exercised in a manner that impeded or prejudiced the exercise of the executive authority of the Central Government, or violated the provision of an act

¹¹ Ibid, section 105.

¹² Ibid, section 224.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Ghai & McAuslan, *supra* note ___ at 197.

¹⁶ Ibid.

¹⁷ Constitution of the Republic of Kenya 1963, section 120(6).

of Parliament applicable to that Region.¹⁸ Where such directions were not followed, the Central Government had powers of direct administration.¹⁹ In addition, the Central Government had powers to “bypass the Regional Assembly, and address directions directly to regional officers or authorities if it was reasonably satisfied that such a course was necessary to avert a serious threat to the public welfare caused by an outbreak of disease or some other calamity.”²⁰ The Central Government also exercised control over the personnel of the Regions, since it has the power to hire and fire them.²¹ These officers were therefore loyal to the Central Government and not the regions.²² Further, the Central Government frustrated the Regions “by denying the regional authorities an effective and independent secretariat.”²³ It also denied them financial resources, without which they could not perform their functions.²⁴

Third, a number of critical provisions of the constitution dealing with devolution were not entrenched and therefore prone to amendment or abrogation. For example, the constitution entrenched the structure of the Regions, which could only be altered by a bill that secured three-fourths of the votes of all the members on the second and third readings in the House of Representatives and nine-tenths in the Senate on similar readings.²⁵ However, the powers of the Regions were not entrenched, “a situation which could lead to the attrition of these powers, leaving white elephants behind.”²⁶ Indeed, this attrition materialized when the constitution was amended in 1965 to remove the Regions’ exclusive executive authority and the exclusive legislative competence of the Regional Assemblies, which was now to be shared with Parliament.²⁷ In addition, the schedule of the constitution detailing the powers of the regions “was repealed *in toto*.”²⁸ Subsequently in 1966, the Senate was also abolished, the procedure for amending the entrenched provisions of the constitution having

¹⁸ Ibid, section 106(2).

¹⁹ Ghai & McAuslan, *supra* note __ at 200.

²⁰ Ibid.

²¹ Ibid at 210.

²² Ibid.

²³ Ibid.

²⁴ Mitullah, *supra* note __ at 192.

²⁵ Ghai & McAuslan, *supra* note __ at 208.

²⁶ Ibid.

²⁷ Ibid at 213.

²⁸ Ibid.

been altered, so that any amendment now only required a bill supported in each House on its second and third readings by 65 per cent of all its members.²⁹ The Kenyatta government had viewed the Senate “as a divisive factor, retarding the growth of nationhood,” and the division of legislative powers between the Regional Assemblies and Parliament “as impeding the implementation of coherent policies and slowing down the process of change and reform.”³⁰

The abolition of the devolution structures of the constitution was completed in 1969 when the Local Government Act was amended to transfer responsibility for the provision of education, health care and roads from local authorities to the Central Government.³¹ The Central Government also removed their powers to levy and collect key local taxes, thereby depriving them of significant revenue.³² And although local authorities retained certain functions, such as the provision of water and sewerage, the Ministry of Local Government now exercised extensive supervisory powers over their operations.³³ Among other things, these powers served to diminish local level democracy. For example, the Minister could now establish local authorities without consulting local residents, and even unilaterally appoint a commission to run the affairs of a local authority in place of an elected council.³⁴ The Minister also had the power to make rules regulating local authority elections, again without consulting local residents.³⁵ Further, the annual financial estimates of local authorities required the approval of the Minister, who could modify or disallow them altogether.³⁶ And the Minister had power to appoint inspectors “to conduct extraordinary inspections and examinations of the accounts and records of local authorities.”³⁷ The Minister therefore had sufficient powers to ensure that the local authorities did the bidding of the Central Government.

The local authorities consisted of councillors elected by the local residents, and councillors nominated by the Minister (although the Minister had the power

²⁹ Ibid.

³⁰ Ibid at 311.

³¹ Mitullah, *supra* note ___ at 193.

³² Ibid.

³³ Ibid.

³⁴ Ibid.

³⁵ Local Government Act, Chapter 265, Laws of Kenya, section 72 (Repealed).

³⁶ Ibid, section 213.

³⁷ Ibid, section 231.

to terminate the nomination of a councillor “at any time in his discretion”).³⁸ In turn, the councillors elected a mayor from among themselves. Administrative officers appointed by the Public Service Commission managed the local authorities.³⁹ The critical office here was that of the Clerk, who was the chief executive and administrative officer of the local authority, and who was responsible for coordinating the work of the local authority.⁴⁰ These officers, who wielded executive powers, were therefore not accountable to the councillors or the local residents. In theory, the departments of the administrative arms of the local authorities were supposed to report to committees of their councils. But councillors tended to be poorly educated, which created an information asymmetry that favored the technical officers. It has therefore been observed that “most councillors feel inferior to chief officers, and are ill equipped to oversee their work.”⁴¹ Conflicts between councillors and the administrative officers therefore became a common occurrence.⁴² Local authorities had power to make by-laws on matters such as the health, safety and well-being of the inhabitants of their areas, the good rule and government of their areas, and the prevention and suppression of nuisances.⁴³ But such by-laws could only take effect after the Minister approved them.⁴⁴ Although the Local Government Act envisaged that the local residents would participate in the making of such by-laws, very little public participation occurred in practice.

All in all, although the independence constitution had provided a useful framework for devolution, the Kenyatta government frustrated the emergence of democratic local governance, which it perceived as a threat to its machinations to centralize governmental power. It even reestablished the Provincial Administration, which the constitution had abolished, and now gave District Commissioners the power to supervise the operations of local authorities.⁴⁵ The Provincial Administration was an institution that the colonial government had

³⁸ *Ibid*, section 27(2).

³⁹ *Ibid*, section 107.

⁴⁰ *Ibid*, section 129.

⁴¹ Winnie V. Mitullah et al, “Local Democracy in Nairobi, Kenya,” in *Democracy at the Local Level in East and Southern Africa: Profiles in Governance* 79 at 80 (2004).

⁴² Constitution of Kenya Review Commission, *Final Report of the Constitution of Kenya Review Commission 231* (2005) (Hereinafter *Final Report of the CKRC*).

⁴³ Local Government Act, section 201.

⁴⁴ *Ibid*, section 204.

⁴⁵ Mitullah, *supra* note __ at 190, 194.

established for administering the country. It consisted of field officers, known as Provincial Commissioners (in charge of provinces), District Commissioners (in charge of districts), District Officers, and Chiefs.⁴⁶ The main role of the Provincial Administration was to ensure rule over the African majority by maintaining law and order.

To make it easy for District Commissioners to supervise the operations of local authorities, “the Minister for Local Government invariably nominated DCs to the councils of all local government authorities, a position from which the DCs greatly influenced council decisions.”⁴⁷ Compared to the local authorities, the Provincial Administration therefore came to be perceived by the local people as the preeminent institution of governance, and they even approached it to address matters that were within the jurisdiction of the local authorities.⁴⁸ In other words, the Provincial Administration became “the most powerful force in local government.”⁴⁹ The Provincial Administration also undermined local authorities. For example, in 2005 the Constitution of Kenya Review Commission observed that “the system has a stifling impact on local government; on many occasions, the provincial administration has refused to co-operate with the local authorities, ignoring their views, refusing them licences and central Government funds.”⁵⁰

As the 1970s approached, Kenya had therefore become a centralized state once more, and the Government’s efforts at decentralization largely took the form of deconcentration. The first such effort was the Special Rural Development Program (SRDP), whose objective was to prepare local plans to facilitate what was termed “integrated rural development” in some six districts.⁵¹ Although the SRDP was largely a failure, it led to the establishment of District Development Committees (DDCs), which assumed the responsibility of planning for rural

⁴⁶ *Ibid* at 183.

⁴⁷ *Ibid* at 194.

⁴⁸ *Ibid*.

⁴⁹ Balakrishna Menon et al, “Decentralization and Local Governments in Kenya,” Georgia State University, Andrew Young School of Policy Studies, International Studies Program Working Paper 08-32, 5 (2008).

⁵⁰ Final Report of the CKRC, *supra* note __ at 236.

⁵¹ Joel D. Barkan & Michael Chege, “Decentralising the State: District Focus and the Politics of Reallocation in Kenya,” 27 *Journal of Modern African Studies* 431 at 440 (1989).

development in the districts.⁵² District Development Officers, who coordinated projects funded by the Government, headed the DDCs.⁵³ It also contributed to the establishment of the Rural Development Fund (RDF), by which the Government undertook to provide block grants for district authorities to implement small-scale development projects, such as improving feeder roads and water supplies, and constructing community centers and health clinics.⁵⁴

Upon assuming the reins of government, President Daniel Arap Moi sought to use these SRDP-inspired structures to enhance local government by establishing the District Focus for Rural Development (DFRD) program. The Moi Government sought to make the district the center for planning, implementation and management of rural development.⁵⁵ In particular, the goal was to involve local residents directly in the identification, design, implementation and management of development projects and programs.⁵⁶ In this initiative, the DDC became the central decision-making body, and brought together the District Commissioner (who chaired it), district officers of central ministries, Members of Parliament, and the chairs of district and town councils.⁵⁷ At one level, the DFRD program led to the formulation of better development proposals.⁵⁸ However, it largely failed due to lack of independent funding, and domination of the DDC by the District Commissioner and the district sector heads.⁵⁹ The DDCs and local planning committees were dominated by officers of the Central Government, leaving little room for the representation of local interests.⁶⁰ Central Government ministries also undermined the work of the DDCs by issuing frequent ministerial guidelines.⁶¹ In addition, the Moi Government used the DDCs as instruments for dispensing patronage to favored districts, or preferred localities within the districts.⁶² Accordingly, although the DFRD program had good intentions, the Central Government sought to retain control of the resources required for it to

⁵² *Ibid* at 441.

⁵³ *Ibid*.

⁵⁴ *Ibid*.

⁵⁵ *Ibid* at 431.

⁵⁶ *Ibid*.

⁵⁷ *Ibid* at 444.

⁵⁸ *Ibid* at 449.

⁵⁹ Othieno Nyanjom, "Constitutional Devolution in Kenya: Setting an Agenda," Act, a Report of a Study Commissioned by the Kenya Civil Society Strengthening Program, 17 (2011).

⁶⁰ Mitullah, *supra* note __ at 200.

⁶¹ *Ibid* at 197.

⁶² *Ibid*.

succeed, which it distributed unevenly depending on whether it could earn political support or punish opposition elements.⁶³

B. Public Participation in Rule Making

In this environment, how did the local authorities make rules? Did the public participate in local governance? If so, what was the nature of this participation? These questions should be examined from the perspective of the functions of the local authorities. The Local Government Act (LGA) gave local authorities very wide functions, including establishing and maintaining schools and educational institutions, managing waste, lighting of streets, providing water and sanitation services, licensing business activities, regulating hawking and street trading, building and maintaining roads, and controlling the development and use of land and buildings. It is in the performance of these functions, therefore, that citizens interacted with the local authorities. And to enable the local authorities to perform these functions, the LGA gave them wide-ranging powers, including the power to impose fees and charges, and, importantly, the power to make the by-laws they deemed to be necessary for the maintenance of the health, safety and well-being of local residents, and for the good rule and government of their areas.⁶⁴

Further, the LGA sought to regulate the rule-making process by establishing various procedures. First, the LGA required a local authority seeking to make by-laws to give a fourteen-day notice to the local residents of its intention to make the by-laws and the general purport of such by-laws in one or more local newspapers.⁶⁵ However, a local authority could shorten this period if it obtained the consent of the Minister for Local Government.⁶⁶ Second, the LGA required the local authority to deposit a copy of the proposed by-laws at its offices and avail it for public inspection.⁶⁷ Third, the LGA required objections to the proposed by-laws to be lodged in writing with the local authority within twelve days after the

⁶³ Ibid at 198.

⁶⁴ Local Government Act, Chapter 265, Laws of Kenya, section 201 (repealed).

⁶⁵ Id, section 203(1).

⁶⁶ Id.

⁶⁷ Id, section 203(2).

date on which the notice of the intention to make the by-laws was given.⁶⁸ The local authority's council would then debate the proposed by-laws, which required the approval of a simple majority of the councilors in order to pass. However, the by-laws required the approval of the Minister before they could become law. Accordingly, any by-laws submitted to the Minister for approval had to be accompanied by a certified copy of the minutes of the local authority at which they were adopted, a certificate by the Clerk of the local authority that the foregoing procedures had been complied with, and copies of any objections to the adoption of the by-laws lodged with the local authority or a statement that no such objections had been lodged.⁶⁹ Once the Minister had granted his approval, the LGA required the Clerk to either publish the by-law, or a notice stating that the by-law had been approved, in the Kenya Gazette.⁷⁰ However, the Minister could exempt a local authority from this notification requirement.⁷¹

In practice, there was little public participation in local authority rule making. This partly explains why the Government sought to enhance the participation of local residents in local governance by initiating a reform program in the early 1990s, whose principal objectives were to improve local service delivery and financial management, and strengthen local level accountability mechanisms. This program, which was known as the Kenya Local Government Reform Program, introduced two related initiatives: the Local Authority Transfer Fund (LATF), which was buttressed by an act of Parliament,⁷² and the Local Authorities Service Delivery Action Plan (LASDAP) by which local authorities and their residents would, through a participatory planning process, set priorities for LATF funding and implementation. In other words, in order to access LATF, local authorities had to prepare a LASDAP through a process of public participation,⁷³ and adhere to established accountability mechanisms.

Despite these initiatives, citizens remained discontented and sought deeper democratization of local governance. They were not only dissatisfied with the inefficiencies of local authorities, but also the abuse of power by the Provincial

⁶⁸ Id, section 204(1).

⁶⁹ Id, section 204 (2).

⁷⁰ Id, section 205 (1).

⁷¹ Id.

⁷² Local Authority Transfer Fund Act, No. 8 of 1998.

⁷³ Devas & Grant, *supra* note ___ at 314.

Administration.⁷⁴ In their views to the Constitution of Kenya Review Commission, the citizens therefore agreed that state power and authority should be devolved, and the functions of the Provincial Administration given to local government agencies.⁷⁵ They wanted the Provincial Administration to be made more accountable to the people if it were to be retained, or “replaced with a strengthened elected local authority administration answerable to the people.”⁷⁶ Many citizens also felt that they had been marginalized, neglected and victimized for their political affiliations,⁷⁷ and that communities at the grassroots had been excluded from participating in local governance.⁷⁸

In general, local authority rule making was defective in two significant respects. First, there was a perception, particularly in urban areas, that many of the by-laws were oppressive and did not address the needs of local residents. These by-laws had been enacted in the era of British rule, and were geared towards containing the growth of indigenous enterprises and keeping Africans away from European areas.⁷⁹ In any case, the Africans did not participate in the making of these by-laws. For example, the by-laws of the City Council of Nairobi prohibited individuals from making loud noise or wailing in any street or in a shop, business premises or other place adjoining a street.⁸⁰ Further, the City Council of Nairobi’s General Nuisance by-laws allowed its officials to arrest any individual deemed to be creating a “general nuisance” in public spaces.⁸¹ In effect, such by-laws criminalized vending, which was viewed as a problem rather than a useful economic activity.⁸² Thus informal traders found violating these by laws were charged before city and municipal courts with offences such as hawking, touting and littering. In contrast, formal businesses were treated differently and were “rarely involved in criminal cases at the city and municipal courts.”⁸³

⁷⁴ See, e.g., Final Report of the CKRC, supra note ___ at 233-236.

⁷⁵ Ibid at 236.

⁷⁶ Ibid.

⁷⁷ Ibid at 234.

⁷⁸ Ibid at 235.

⁷⁹ Caleb Atemi, ed, Justice at City Hall 31 (ICJ-Kenya, 2013).

⁸⁰ City Council of Nairobi (General Nuisance) By-Laws 2007.

⁸¹ Id.

⁸² Atemi, supra note ___ at 31.

⁸³ Id at 22.

This state of affairs persisted long after independence. Studies have shown that the process of making by-laws remained opaque and did not consider the views of vulnerable groups such as street traders.⁸⁴ According to some studies, the regulation of street trade was arbitrary, and the local authorities were unable to formulate suitable policies and laws.⁸⁵ Instead, they adopted an ad hoc approach to dealing with street traders, who in any event were not involved in the making of by laws concerning them.⁸⁶ The result was that informal trading activities were not incorporated adequately in the urban authorities' "land use framework[s] and trading spaces for informal vendors, if provided, commonly lack[ed] adequate infrastructure facilities."⁸⁷ To make matters worse, the street traders had no access to the by-laws and were therefore unaware of their existence.⁸⁸

Further, street traders were poorly organized and did not have effective associations; they were therefore unable to lobby the local governments to take their interests into account in their law making processes.⁸⁹ It therefore comes as no surprise that they did not participate in urban planning, and so did not have any say on the issue of trading sites, among other issues.⁹⁰ The result was that vending became a precarious activity: street traders were typically confronted with high and arbitrary daily charges, unsuitable and insecure working environment, constant harassment by local authority officers, and confiscation and loss of goods leading to loss of livelihood.⁹¹ Again, there was no uniformity in the manner in which the local authorities handled street traders: some authorities charged a fixed daily fee, while the fees charged by others varied depending on the officer on duty.⁹² Further, their relationships with the local authority officers were "determined by favoritism, nepotism and corrupt

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* at 43.

⁸⁷ Susanne David et al, "Managing Informality: Local Government Practices and Approaches Towards the Informal Economy – Learning Examples from Five African Countries 27 (year?)

⁸⁸ Atemi, *supra* note ___ at 31.

⁸⁹ *Id.*

⁹⁰ Patrick O. Alila & Winnie V. Mitullah, "Enhancing Lobbying Capacity of Women Street Vendors: The Challenges in the Kenyan Policy Environment" 30 (Institute for Development Studies, University of Nairobi, 2000).

⁹¹ Atemi, *supra* note ___ at 31.

⁹² Alila & Mitullah, *supra* note ___ at 48.

practices.”⁹³ Thus it was not uncommon for the enforcement officers to demand for bribes from the street traders.⁹⁴ But even where street traders paid for the licenses, they did not receive essential services – such as the provision of water and storage facilities, and garbage collection – from the local authorities.⁹⁵

Secondly, the local authorities did not follow the procedures stipulated by the LGA in making by-laws in some cases. In a number of instances, local residents and businesses consequently contested the validity of the resulting by-laws by filing judicial review proceedings. In *Mbuini Mwa Environment Sand Harvesting Cooperative Society Ltd & 3 others v County Council of Masaku*,⁹⁶ for example, the applicants had sought orders to quash the sand by-laws made by the County Council of Masaku on the grounds that the Council had failed to publish a notice of the intention to make the by laws in local newspapers and failed to give them a hearing, and that in any case the Council did not have the power to make the said by-laws. The applicants were cooperative societies whose business was to conserve the environment, and control the harvesting of sand within the Council’s area of operation. The court agreed with the applicants, and took the view that the said by-laws were ultra vires the LGA and could only have been made under a different law, namely the Trust Land Act.⁹⁷ The court also found that the Council had not complied with the statutory requirements of issuing a fourteen-day notice of intention to make the by-laws and providing the residents with sufficient information about the proposed by-laws. This was because the Council had only given a notice of 12 days and failed to give the general purport of the intended by-laws in that notice.

Again in *Republic v City Council of Nairobi ex parte Kenya Taxi Cabs Association*,⁹⁸ the court nullified by-laws of the council on the ground that they could only become law after the public had been given an opportunity to participate in their making. Here, the Kenya Taxi Cabs Association had challenged the decision of the City Council of Nairobi on the Licensing of Taxi

⁹³ Atemi, supra note ___ at 31..

⁹⁴ Id at 39.

⁹⁵ Winnie V. Mitullah, “A Review of Street Trade in Africa,” Institute for Development Studies, University of Nairobi at 19 (2004).

⁹⁶ *Mbuini Mwa Environment Sand Harvesting Cooperative Society Ltd & 3 others v County Council of Masaku* [1999] eKLR.

⁹⁷ Trust Land Act, Chapter 288, Laws of Kenya (repealed?)

⁹⁸ *Republic v City Council of Nairobi ex parte Kenya Taxi Cabs Association* [2010] eKLR.

Cabs for the Year 2010, which sought to raise licensing fees, ban taxi cabs which were more than ten years old, require the inspection of all taxis, and require all taxis to be painted yellow. The City Council had based these requirements on its Taxi Cab By-laws of 2007. However, the applicants contended that the decision of the City Council on the Licensing of Taxi Cabs for the Year 2010 had sought to regulate matters that were not provided for in the by-laws of 2007, in violation of the rule making procedures stipulated in the LGA, and without consulting interested parties. In response, the City Council contended that it had notified the applicants of these changes to the by-laws of 2007 at a meeting where they were discussed. According to the applicants, however, at this meeting the City Council merely informed them of the changes and ignored their objections and concerns.

The court thought that the decision of the City Council would have fundamentally altered the by-laws of 2007, and should therefore have been preceded by public participation. According to the court, the City Council should have amended the by-laws of 2007 following the procedures⁹⁹ stipulated in the LGA for the making of by-laws, and not through “a memo or mere rule made by the Town Clerk or Town Engineer” as it had purported to do. The court therefore agreed with the applicants that “the Town Clerk and City Engineer have exceeded their mandate by actually making new Rules without following due process or allowing the applicants a chance to give an input or raise objections to rules that adversely affect them.”

The existing literature does not indicate whether and how local authorities reacted to such adverse judicial review decisions (whether, for example, they remade the impugned by-laws in accordance with the stipulated procedures), and whether the decisions had an impact on their subsequent rule making initiatives.

C. Rule Application and Adjudication of Disputes

⁹⁹ See sections 203 & 204 of the Local Government Act, supra note ___

With respect to rule application and the adjudication of disputes arising therefore, a good starting point is to examine the procedures established by the LGA and other relevant laws for the performance of the functions of the local authorities. Trade licensing and development control offer two useful examples.

i. Trade Licensing

The LGA gave local authorities the power to prohibit or control peddling, hawking and street trading, barbers and hair dressers, the trader or dealers in second-hand clothes, and to prohibit, control and regulate such other trades, occupations and premises as the Minister, from time to time, prescribed in the Gazette.¹⁰⁰ They also had power to control or prohibit all businesses, factories and workshops which could be or were a source of danger, discomfort or annoyance to the neighborhood due to smoke, fumes, chemicals, gases, dust, smell, noise, vibration, or other cause.¹⁰¹ As far as the licensing of trades, businesses and occupations was concerned, the LGA envisaged that a person seeking a business permit would apply to the relevant local authority, which would hold then hold a hearing to consider such an application.¹⁰² However, in the case of a business, trade, profession or occupation regulated by another law, the LGA required the applicant for a business permit to satisfy the requirements of that other law before submitting the application to the local authority.¹⁰³ It therefore gave local authorities the power to summon applicants and persons objecting to the grant of licences to appear before them for purposes of giving evidence and producing documents.¹⁰⁴ Further, local authorities had the power to refuse to grant or renew licenses where the trade, business or occupation in respect of which a license was sought was sufficiently provided for in its area of jurisdiction, or where the grant or renewal of a license would in its view be contrary to the public interest, or where the grant or renewal of a license would be calculated to cause nuisance or annoyance to persons residing in the

¹⁰⁰ Id, section 163.

¹⁰¹ Id, section 163(e).

¹⁰² Id, section 163A.

¹⁰³ Id.

¹⁰⁴ Id, section 164(1).

neighborhood.¹⁰⁵ In addition, local authorities could refuse to grant licenses where the applicant failed to produce satisfactory evidence of good character, or the premises in respect of which the license was sought were frequented by persons of bad character, or the premises were unsuitable for the intended purpose, or the methods adopted or proposed to be adopted by the applicant for preventing noxious or offensive vapors, gases or smells arising from the premises were not efficient.¹⁰⁶ The local authorities also had powers to cancel licenses on various grounds, for example, that it would be contrary to the public interest for a license to remain in force, or that the continuation of the license in force would be calculated to cause a nuisance or annoyance to persons residing in the neighborhood.¹⁰⁷ An applicant who had been denied a license, a renewal thereof, or whose license had been cancelled had a right to appeal such a decision to a subordinate court.¹⁰⁸

The local authorities also had the power to impose fees or charges for licenses or permits in respect the trades, businesses, occupations or professions they were empowered to control.¹⁰⁹ However, the LGA stipulated that such fees or charges had to be regulated by by-laws, although in the absence of such by-laws they could be imposed by resolutions of the local authorities with the consent of the Minister.¹¹⁰

In practice, the local authorities administered a dual licensing regime: one for the formal sector and another for the informal sector. While the formal traders were subjected to the LGA's trade licensing procedures, informal traders were required to pay a daily fee. In the case of the latter, this fee was fixed in some local authorities, while in others it varied, often depending on the officer on duty. And so while the formal licensing regime was certain and predictable, the informal regime was arbitrary.

With respect to the formal licensing regime, local authorities for a long time issued multiple licenses for a single business. Thus a hotel would be required to pay a separate license fee for lodging, restaurant, bar, disco, and the sundry shop,

¹⁰⁵ Id, section 165(1)(a).

¹⁰⁶ Id, section 165(1)(b).

¹⁰⁷ Id, section 165(2).

¹⁰⁸ Id, section 165(3).

¹⁰⁹ Id, section 148(1)(a).

¹¹⁰ Id, section 148(2).

while a retail store would be required to pay for multiple licenses based on the type of the goods it sold.¹¹¹ This licensing regime created problems of classification and assessment: “Depending in the interpretation by individual licensing officers, it was possible for two identical businesses to be charged completely different license fees.”¹¹² Further, the majority of the local authorities administered the business licensing system without a proper business register.¹¹³ Thus, they only collected fees from businesses that complied voluntarily by coming to the council offices or from businesses that were netted during random field audit procedures conducted in the business trading centers.¹¹⁴ A further problem was that businesses were often required to satisfy a range of regulatory requirements before a license could be granted, which often created scope for rent-seeking, thereby “greatly increasing the burdens to businesses of obtaining licenses, while at the same time usually failing to protect public health and safety.”¹¹⁵

To address these problems, the central government amended the LGA in 1998 to allow local authorities to shift to a Single Business Permit System. Further, it repealed the Trade Licensing Act (TLA)¹¹⁶ thereby eliminating the collection of fees by the central government, and restructured and simplified the local authority licensing structure.¹¹⁷ Through these initiatives, the Government delinked the regulatory aspects from the issuance of business permits, eliminated multiple licensing of the same businesses, and streamlined the administrative procedures for issuing licenses.¹¹⁸ Henceforth, businesses were therefore expected to ensure that their activities complied with planning, public health and safety requirements without needing to demonstrate such compliance as a precondition for the issuance or renewal of trade licenses.¹¹⁹ And with respect to the administrative procedures, “the tariff structure was

¹¹¹ Roy Kelly & Nick Devas, “Regulation or Revenue? Implementing Local Government Business License Reform in Kenya,” Harvard Institute for International Development, Development Discussion Paper No. 723 at 19 (1999).

¹¹² *Id.*

¹¹³ *Id.* at 20

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ Trade Licensing Act, Chapter 497, Laws of Kenya (Repealed).

¹¹⁷ Licensing Laws (Repeals and Amendment) Act 2006.

¹¹⁸ Kelly & Devas, *supra* note ___ at 21.

¹¹⁹ *Id.*

simplified, the number of business categories reduced, and the overall tariff schedule was reorganized making it easier for the local authority to administer the business permit system and for the businesses to comply.”¹²⁰ Secondly, a standardized business registration form was introduced for all local authorities, which among other things served as the basis for the construction and maintenance of business registers.¹²¹

The formal licensing regime formed the subject of various judicial review applications, which give some useful insights on how it was administered. The case of *Republic v Municipal Council of Thika ex parte Kenya Medical Association & 5 others*¹²² provides an example. Here, a number of medical practitioners practicing in the municipality of Thika had been hounded and harassed by officers of the Thika Municipal Council to pay what they thought were illegal fees and charges. They therefore brought judicial review proceedings to put a stop to this harassment. The question before the court was whether the local authority had the power to raise the charges, fees or levies upon members of the prescribed professions under the LGA and the TLA, and whether the Minister local government had power to approve the levying of such charges and fees.

The Municipal Council had based its action on by-laws that it had issued by resolution and had been approved by the Minister. But with respect to the licensing of businesses, trades and occupations, it is important to bear in mind that the LGA provided that this power could only be exercised subject to other applicable laws.¹²³ Where such a law existed, it was urged, a local authority had no power to regulate the business, trade or occupation in question. In this case, such a law existed in the form of the TLA, and it excluded the regulation of “professional and consultancy services” on the basis that the laws established to regulate the professions would regulate them. In these circumstances, the court stated that where the primary law excluded the prescribed professions from the application of a trade license, a local authority whether by by-law or by resolution approved by the Minister could not impose such a license. It therefore held that the Municipal Council’s by-laws in question were unlawful and

¹²⁰ Id at 22.

¹²¹ Id.

¹²² *Republic v Municipal Council of Thika ex parte Kenya Medical Association & 5 others*, Nairobi, High Court, Misc. Appln. No. 782 of 2000.

¹²³ Local Government Act, supra note ___, section 163A(1).

contrary to both the LGA and the TLA, meaning that the Municipal Council and the Minister had acted ultra vires in purporting to apply these by-laws to the applicants.

A second illustrative case is *Kijuki Kiambi Paul Kaiga & 5 others v Clerk Meru Municipal Council*.¹²⁴ The applicants, who were dealers in scrap metal, had approached the Meru Municipal Council to renew their annual licenses for the year 2012. However, the Council declined to renew the licenses on the grounds that it had outlawed the business of scrap metal dealing in the municipality because it suspected that the scrap metal dealers were involved in criminal activities, such as stealing manhole lids, chamber lids and other implements used by the Council to cover drainage and serve channels within the municipality. Further, the Council informed the applicants that their licenses would only be renewed if they wrote individually to the Council and undertook not to be involved in stealing of scrap metal. The applicants refused to do so, and instead filed a judicial review application seeking orders to restrain the Council from interfering with their businesses. However, the court declined to issue these orders reasoning that doing so would prejudice the rights and fundamental freedoms of the majority since the theft of drains, manholes, and materials of various local authorities had been on the rise in the country thereby prompting various local authorities to the ban trading in scrap metal.

A third useful case is *Republic v Town Clerk Mandera Council ex parte Ali Abdullahi Ahmed & another*.¹²⁵ The applicants were traders in miraa (khat), which they bought from sellers in Meru and Maua County Councils, and transported by road through Wajir County Council to Mandera town, where it was sold to customers. While the applicants paid cess for the miraa at source, they had in addition been required by the Wajir and Mandera county councils to pay further cess when passing through their territories. They objected to these additional charges, and filed the judicial review application seeking an order of prohibition to prohibit the Mandera Council from levying the additional cess, which they argued was both unfair and illegal since it contravened the LGA. In particular, it was argued that the LGA prohibited local authorities from making

¹²⁴ *Kijuki Kiambi Paul Kaiga & 5 others v Clerk Meru Municipal Council* [2012] eKLR.

¹²⁵ *Republic v Clerk Mandera Town Council ex parte Ali Abdullahi Ahmed & another* [2011] eKLR.

by-laws that contradicted the provisions of other laws.¹²⁶ In this case, it was contended that the Town Council of Mandera (Miraa Import Cess) By-laws 2009 were contrary to section 192A(1) of the Agriculture Act, under which the Council was required to obtain the consent of the Minister for Agriculture before it could impose cess on the miraa. The court agreed, and prohibited the Council from levying the additional cess.

These cases demonstrate that the courts were keen to ensure that the local authorities adhered to the principle of legality in their rule making processes. They were therefore quick to outlaw by-laws where it was shown that the procedures stipulated by the applicable laws had not been followed. However, the *Kaiga* case indicates that where the courts thought that insisting on the observation of procedural requirements, such as the right to a hearing, would prevent or delay local authorities from quickly resolving matters that were in the public interest, the courts did not hold these authorities to strict standards.

The latter approach can also be seen in *Republic v Municipal Council of Limuru ex parte Kenya National Chamber of Commerce & Industry Ltd (Limuru) Branch & 6 others*.¹²⁷ The Municipal Council of Limuru had increased its fees and charges for various licenses through a Gazette notice, which the applicants contended was unlawful. In particular, the applicants contested the increase on the ground that they had not been consulted before the fees and charges were increased. Although the court found that the applicants had not been consulted, it declined to prevent the Council from implementing the new fees and charges on the basis that the Council had demonstrated, by producing detailed minutes, that it had consulted other stakeholders and could therefore not be accused of failing to make consultations. Not only does this case raise a question as to the requisite threshold of consultation (where a key stakeholder alleges it was not consulted yet the Council did undertake some consultations), the court here also seems to be leaning towards overlooking violations of procedural requirements where it deems that the public interest requires it to do so. Interestingly, while dismissing the application, the court nevertheless exhorted the Council to, in future, endeavor to reach all relevant stakeholders before revising fees and charges, and

¹²⁶Local Government Act, supra note ___, section 202(3).

¹²⁷ *Republic v Municipal Council of Limuru ex parte Kenya National Chamber of Commerce & Industry Ltd (Limuru Branch) & 6 others* [2013] eKLR.

to ensure it consults the applicant “since it represents the interests of the local traders.”

ii. Development Control

The LGA also gave local authorities the power to prohibit and control the development and use of land and buildings in the interest of proper and orderly development in their areas.¹²⁸ Further, the Physical Planning Act (PPA) gave local authorities the following powers: to control or prohibit the subdivision of land or existing plots into smaller areas, to consider and approve all development applications and grant all development permissions, to ensure the proper execution and implementation of approved physical development plans, and to formulate by-laws to regulate zoning in respect of use and density of development.¹²⁹ Accordingly, every proposed development required the permission of the relevant local authority.¹³⁰

The PPA established the procedures regulating the exercise of these powers of development control. A person seeking development permission was required to submit an application, accompanied by such plans and particulars as were necessary to indicate the purpose of the development, to the Clerk of the relevant local authority.¹³¹ Upon receiving the application, the Clerk was required to refer it, within thirty days after receiving the application, to the Director of Physical Planning, who was the chief government adviser on matters related to physical planning, for comments.¹³² When considering a development application, the Director of Physical Planning could, at his discretion, consult officers and authorities such as the Director of Survey, the Commissioner of Lands and the Director of Urban Development. However, the final decision lay with the local authority, whose powers in this regard were circumscribed.¹³³ When considering a development application, the local authority was: (a) bound by any relevant regional or local physical development plan approved by the

¹²⁸ Id, section 166.

¹²⁹ Physical Planning Act, Chapter 286, Laws of Kenya, section 29.

¹³⁰ Id, section 30(1).

¹³¹ Id, section 31.

¹³² Id, section 32(1).

¹³³ Id, section 32(2).

Minister responsible for physical planning; (b) had to take into account the health, amenities and conveniences of the community generally and the proper planning and density of development and land use in the area; (c) had to take into account the comments received from the Director of Physical Planning and other officers and authorities of the government; and (d) in case of a leasehold, take into account any special conditions stipulated in a lease.¹³⁴ In addition, where the proposed development required the subdivision or change or user of agricultural land, the PPA required the local authority to refer the application to the relevant Land Control Board, whose function was to recommend to the local authority to accept or reject the application, and to give reasons for its recommendations to the local authority within thirty days.¹³⁵

A Local authority had the power to grant the applicant development permission, with or without conditions, or refuse to grant it.¹³⁶ In the latter case, the local authority was required to state the grounds of refusal.¹³⁷ In either case, the PPA required the local authority to notify the applicant in writing of its decision within thirty days of the decision being made, and specify the conditions, if any, attached to the development permission granted, or in the case of refusal to grant the permission, the grounds of refusal.¹³⁸ A person aggrieved by the decision of the local authority refusing his or her application for development permission could appeal to the relevant liaison committee.¹³⁹

Further, the PPA gave persons likely to be affected by such decisions of local authorities, such as neighbors, a right to object thereto. In this respect, the PPA provided that “Where in the opinion of a local authority an application in respect of development, change of user, or subdivision has important impact on contiguous land or does not conform to any conditions registered against the title deed or property, the local authority shall, at the expense of the applicant, publish the notice of the application in the Gazette or in such other manner as it deems expedient, and shall serve copies of the application on every owner or occupier of the property adjacent to the land to which the application relates and

¹³⁴ Id, section 32(3).

¹³⁵ Id, section 32(4) & (5).

¹³⁶ Id, section 33 (1).

¹³⁷ Id, section 33(1)(b).

¹³⁸ Id, section 33(2).

¹³⁹ Id, section 33(3).

to such other persons as the local authority may deem fit.”¹⁴⁰ Essentially, this provision gave the local authorities the discretion to decide whether or not to give a hearing to such affected persons. Where the local authority received objections or representations in connection with a development application, the PPA required it to notify the applicant of such objections or representations, and give the applicant an opportunity to respond thereto before making a determination on the application.¹⁴¹ Any person aggrieved by such a determination could appeal to the relevant Liaison Committee.¹⁴²

The PPA established the following liaison committees: the National Physical Planning Liaison Committee, the Nairobi Physical Planning Liaison Committee, a District Physical Planning Liaison Committee for each district, and a Municipal Physical Planning Liaison Committee for each municipality.¹⁴³ These committees incorporated professionals from various government departments, including the Ministry of Lands, Medical Services, Survey, urban development, the national environmental secretariat, public works and housing, agriculture, industry, education, water development, highways and roads authorities, and clerks of local authorities.¹⁴⁴ Physical planners in private practice appointed by the Minister were also members of these committees.¹⁴⁵

The Nairobi Physical Planning Liaison Committee, the District Physical Planning Liaison Committees and the Municipal Physical Planning Liaison Committees had the following functions: (a) to inquire into and determine complaints made against the Director of Physical Planning or local authorities in the exercise of their functions under the Act; (b) to inquire into and determine conflicting claims made in respect of applications for development permission; (c) to determine development applications for change of user or subdivision of land; (d) to determine development applications relating to industrial location, dumping sites or sewerage treatment which may have injurious impact on the environment; and (e) to hear appeals lodged by persons aggrieved by decisions

¹⁴⁰ Id, section 41(3).

¹⁴¹ Id, section 41(4).

¹⁴² Id, section 41(6).

¹⁴³ Id, section 8.

¹⁴⁴ Id.

¹⁴⁵ Id.

made by the Director or local authorities.¹⁴⁶ In respect of these matters, the committees had the power to reverse, confirm or vary the decisions appealed against and make such orders as “it deems necessary or expedient to give effect to its decision.”¹⁴⁷ And where such a committee reversed a decision, the PPA required it to give the Director an opportunity to make representations as to any conditions or requirements which in his opinion ought to be included in the order, and to give the appellant an opportunity to reply to the representations of the Director.¹⁴⁸ The PPA also required the liaison committees to keep records of their proceedings, which interested members of the public could inspect upon payment of fees prescribed by the Minister.¹⁴⁹

Appeals against the decisions of these committees lay to the National Physical Planning Liaison Committee.¹⁵⁰ A person aggrieved by a decision of a liaison committee was required to appeal to the National Committee within sixty days of receiving the notice of such a decision.¹⁵¹ As in the case of the liaison committees, the National Committee had powers to reverse, confirm or vary the decisions appealed against.¹⁵² In addition, the National Committee had the power to determine physical planning matters referred to it by the other liaison committees.¹⁵³ Where it reversed a decision of a liaison committee, the PPA also required the National Committee to give the Director an opportunity to make representations as to any conditions or requirements which in his opinion ought to be included in the order, and to give the appellant an opportunity to reply to the representations of the Director.¹⁵⁴ A person aggrieved by a decision of the National Committee could appeal to the High Court.¹⁵⁵

How has this regime been administered in practice? The foregoing rules and procedures were geared towards ensuring that only planned developments were

¹⁴⁶ Id, section 10(2).

¹⁴⁷ Id, section 13(2).

¹⁴⁸ Id, section 13(3).

¹⁴⁹ Id, section 12.

¹⁵⁰ Id, section 10(1).

¹⁵¹ Id, section 15(1).

¹⁵² Id, section 15(2).

¹⁵³ Id, section 10(1)(b).

¹⁵⁴ Id, section 15(3).

¹⁵⁵ Id, section 15(4).

allowed, that they were carried out in the correct land use zones,¹⁵⁶ and that they did not adversely affect the environment.¹⁵⁷ Each local authority was therefore required to prepare and publish physical development plans, planning and building regulations, and zoning regulations to control urban development. And it was expected that all development applications would comply with the policy guidelines, planning regulations, standards, approved physical development plans and local authority by-laws.¹⁵⁸

However, these lofty goals of the planning regime have not been attained due to various factors. First, local authorities have not adequately enforced development plans and as a result “developments have encroached road and railway reserves, zonal regulations and by-laws have not been followed, and there is proliferation of informal vendor markets in urban centres, and construction of illegal extensions, among many other unauthorized developments.”¹⁵⁹ Second, developers tend to lack awareness of the development control procedures, which has been attributed to a lack of guidelines in policy procedures such as current development plans, zoning regulations and building standards.¹⁶⁰ Many urban developers have therefore found the development control process to be confusing¹⁶¹ and view it as a hindrance.¹⁶² Indeed, the complexity of the development control process has been thought to offer opportunities for corruption.¹⁶³

Third, the process of approving development applications has been faulty. Development applications have been approved at two levels, a technical level and a political level. Once an applicant submits an application it is in the first instance evaluated by technical experts. If the experts approve the application, it is placed for consideration by a meeting of the local authority council. The

¹⁵⁶ These land use zone categories were: residential, industrial, educational, recreational, public purpose, commercial, public utility, transportation, deferred and agricultural.

¹⁵⁷ Architectural Association of Kenya, “A Study on Development Control Frameworks in Kenya,” 2011 at 1 (hereinafter AAK).

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 3.

¹⁶⁰ *Id.*

¹⁶¹ See Elijah Agevi, “Kenya: Building Standards and Planning Regulations – The Kenyan Experience,” 3 *Journal of the Network of African Countries on Local Building Materials and Technologies* (1995).

¹⁶² AAK, *supra* note ___ at 3.

¹⁶³ Theo Schilderman & Lucky Lowe, “The Impact of Regulations on Urban Development and the Livelihoods of the Urban Poor,” ITDG, 2002 at 12.

problem, however, has been that the councils have sometimes deferred developments that passed the technical evaluation, and instead adopted those that failed.¹⁶⁴ In the latter scenario, the technical officers attending the council meetings have not challenged the councilors because of fear of jeopardizing their employment.¹⁶⁵ This perhaps explains why some commentators have observed that councils routinely consider change-of-user applications and usually grant them without regard to any planning considerations.¹⁶⁶ Further, the general public has not effectively resisted unsuitable change-of-user applications, with the exception of up-market residents associations, such as those under the umbrella of the Kenya Alliance of Residents Association.¹⁶⁷ As a result, public parks, sports grounds, and land belonging to public schools have been lost to private developers.¹⁶⁸ In rural areas, by contrast, the absence of zoning plans has meant that development plans are invariably approved.¹⁶⁹ One result of this development has been the loss of agricultural land to residential developments.¹⁷⁰

Fourth, it has been observed that political interference in the urban development control systems has also limited the ability of local authorities to regulate and control developments. Thus “Powerful government officials have been known in the past to enforce approvals which do not meet the stipulated requirements.”¹⁷¹ Fifth, local authorities have not had sufficient capacity to inspect and implement the development control regulations.¹⁷²

With respect to dispute resolution, studies have shown that the majority of developers have preferred to revise their development applications where they have not been approved rather than appeal the decisions of the local authorities

¹⁶⁴ AAK, *supra* note __ at 65.

¹⁶⁵ *Id.*

¹⁶⁶ Mercel C. Werner et al, *Kenya's Urban Development in the 21st Century: The Call for Innovative Initiatives from Local Authorities* 65 (Development Trust Innovation Africa & African Centre for Technology Studies, 2011).

¹⁶⁷ *Id.* at 65-66.

¹⁶⁸ *Id.* at 66.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ Grephas Opata et al, “Urbanization and Urban Environmental Development Control Policies and Practice in Kenya,” 2 *Research Journal in Organizational Psychology & Educational Studies* 132 at 136 (2013).

¹⁷² Mary Kimani & Titus Musungu, “Reforming and Restructuring the Planning and Building Laws and Regulations in Kenya for Sustainable Development,” 46th ISOCARP Congress 2010 at 5.

to the Liaison Committees.¹⁷³ They do so not only because they think it would take a long time to settle the disputes with the Liaison Committees, but also because they do not wish to be seen to antagonize the approving authorities.¹⁷⁴

Nevertheless, some developers, and affected members of the general public, have contested the decisions of the local authorities before the Liaison Committees and the courts. In *Republic v Municipal Council of Mombasa ex parte Kamau J.G. Njengu*,¹⁷⁵ the applicant had made a development application to the Municipal Council of Mombasa. The Council subsequently wrote to the applicant informing him that his application was in order and would be considered by the Town Planning Committee. But the Council proceeded to demolish the structure that was the subject of the application, without informing the applicant. It is at this point that the applicant moved to court to obtain orders to compel the Council to approve his application or give him reasons for the refusal to approve the application. The court held that the Council had violated the PPA and the applicant's constitutional right to fair administrative action by refusing or neglecting to process the applicant's development application for a period of over one year. So this was a case in which the procedures for processing development applications established by the PPA had clearly been breached. The court therefore ordered the Council to consider the application.

There have also been cases¹⁷⁶ where local authorities and Liaison Committees have blatantly abused their powers, as illustrated by *Republic v City Council of Nairobi & another ex parte Mehboob Abdulkader Esmail*,¹⁷⁷ *Republic v Town Clerk City Council of Nairobi ex parte Gatkim Enterprises Limited*¹⁷⁸ and *Republic v Matungulu District Physical Planning Liaison Committee & another ex parte Julius Musembi Mativo & 5 others*.¹⁷⁹ In *ex parte Esmail*, the applicant had submitted a development application to the City Council of Nairobi. Having waited for some 46 days without receiving a response from the City Council, the applicant

¹⁷³ AAK, supra note ___ at 59.

¹⁷⁴ Id.

¹⁷⁵ *Republic v Municipal Council of Mombasa ex parte Kamau J.G. Njengu* [2013] eKLR

¹⁷⁶ See also *J.A.S Kumenda & another v Clerk Municipal Council of Kisii & 6 others* [2013] eKLR, where the Court found that the Council's decision to use the applicant's property as a garbage dumping site was unreasonable.

¹⁷⁷ *Republic v City Council of Nairobi & another ex parte Mehboob Abdulkader Esmail* [2007] eKLR.

¹⁷⁸ *Republic v Town Clerk City Council of Nairobi ex parte Gatkim Enterprises Limited* [2012] eKLR.

¹⁷⁹ *Republic v Matungulu District Physical Planning Liaison Committee & another ex parte Julius Musembi Mativo & 5 others* [2012] eKLR.

decided to proceed with the development, whereupon a neighbor complained to the City Council that the development was encroaching on his land. The City Council then served the applicant with an enforcement notice, requiring it to comply with the PPA by submitting proper plans for the development within 24 hours. Having failed to receive these plans, the City Council went to the applicant's premises and arrested one of its employees. The court held that although the PPA gave local authorities discretion to determine the period of the enforcement notice, 24 hours was too short, unreasonable and "tainted by bad faith and meant to deny the Applicant a chance to comply or exercise his right of appeal."

In *ex parte Gatkim Enterprises Limited*, the City Council of Nairobi had refused to approve the applicant's change of user application. The applicant had submitted an application to the City Council, and had been informed that it would be processed since no objections had been lodged against it. But when the applicant requested the City Council for a determination, its Director of Physical Planning had informed him verbally that it would not approve the application because the applicant's land in fact belonged to the City Council and had been set aside for use as parking space. The court held that the City Council's failure to make a decision and communicate it in writing was an abuse of power.

And in *ex parte Mativo*, the applicant had made a development application to the Town Council of Kangundo. In the course of considering this application, a dispute arose between the applicant and the Council's surveyor concerning the boundary of the land in question. However, the Matungulu District Physical Planning Liaison Committee took up the matter without the applicant's knowledge, although it invited him to a meeting to consider the matter. On the material day, however, he was not allowed into the meeting room to participate in the proceedings, and was only allowed in after the Liaison Committee had prepared a verdict. At this point, the Committee informed him of its decision to excise a portion of his land to create a public road. He requested the Liaison Committee to allow him to state his case, but was denied the opportunity and ordered to wait at the suit premises for the new boundary to be marked. The court held that the Committee had violated the applicant's right to a fair hearing and quashed its decision.

The cases also demonstrate that some aggrieved parties do not comprehend the procedures of the PPA. Quite often, parties aggrieved by the decisions of the local authorities have bypassed the Liaison Committees and gone straight to court.¹⁸⁰ An example is *Wainaina Kenyanjui & 2 others v Andrew Ng'ang'a*.¹⁸¹ The applicants in this case brought on behalf of the Hardy Residents Association sought an injunction to restrain the defendant from carrying on the business of a student hostel. They claimed that the defendant had not obtained an approval from the City Council of Nairobi to convert the user of the suit property from the zoned residential user to the business of a student hostel. Further, they averred that the development was a nuisance to the members of the Hardy Resident Association, who had been deprived of the right to quiet possession and enjoyment of their residential properties. The court found that the defendant had not obtained a change of user approval. And while it granted the applicants a temporary injunction to restrain the defendants from carrying on the business of a student hostel, it urged the applicants to seek redress through the procedures established by the PPA.

A second example is *Republic v City Council of Nairobi ex parte Inderpal Singh & 2 others*.¹⁸² The applicants here brought the action on behalf of the Convent Drive South Residents Association, claiming that the City Council had approved a development which contravened its zoning policy, which required that one house be constructed on a minimum of 0.1 ha, yet the development consisted of 5 two houses being constructed on a plot measuring 0.3 ha. The court felt that it did not have the expertise to determine whether the zoning policy had been violated, and felt that the matter should have been dealt with by the relevant Liaison Committee, which had the expertise to interrogate the City Council's contention that its interpretation of the zoning policy was reasonable. It therefore urged the applicants to challenge the decision of the City Council by filing an appeal to the relevant Liaison Committee.

¹⁸⁰ See also *Dyno Holdings Limited v Director of City Planning Department & another* [2009] eKLR; *Republic v Municipal Council of Mombasa ex parte Hubert Seifert & others* [2007] eKLR; *Ephantus Mwangi Ruguru & 12 others v Director of City Planning Department (City Council of Nairobi)* [2012] eKLR.

¹⁸¹ *Wainaina Kenyanjui & 2 others v Andrew Ng'ang'a* [2013] eKLR.

¹⁸² *Republic v City Council of Nairobi ex parte Inderpal Singh & 2 others* [2013] eKLR.

In such cases, the courts seem keen to ensure that aggrieved parties follow the established procedures for redress of their grievances where those procedures are clear, while maintaining that the existence of such alternative remedies do not preclude judicial review.¹⁸³ So that the courts will only entertain such applications where they are satisfied that there are exceptional circumstances which justify the applicants' preference for judicial review remedies.¹⁸⁴

It is also clear from the cases that only up-market resident associations, who are well organized, have contested the change-of-user decisions of local authorities.¹⁸⁵ The cases of *Hardy Residents Association* and *Convent Drive South Residents Association* discussed above are good examples.¹⁸⁶ Another example is *Republic v City Council of Nairobi & 2 others ex parte Richard Bell & another*.¹⁸⁷ The applicants claimed that the City Council had clandestinely approved a change of user from residential to commercial despite the objections of the residents of Kikenni Estate. Their complaint was that the change of user would adversely affect the lives of adjacent landowners since there would be increased insecurity, inadequate water supply, noise pollution, poor road maintenance due to increased vehicular traffic, and essential amenities would be compromised. Although the court agreed with the applicants that it would be ultra vires and unreasonable for the City Council to approve a change of user application without determining objections thereto, it declined to issue the orders sought by the applicants on the ground that the applicants had failed to prove that they had lodged valid objections with the City Council.

From the foregoing cases, it is evident that the decision-making processes of local authorities and Liaison Committees have not always been fair. And so applicants have been denied a fair hearing, the approvals of their applications have been delayed inordinately, they have been given unreasonably short periods to comply with enforcement notices, and given verbal determinations as opposed to the written determinations mandated by law. However, it is not clear from the literature whether and how the local authorities and Liaison

¹⁸³ See also *Diasta Investments Limited v Nilesh Devan Kara Shah & 4 others* [2013] eKLR.

¹⁸⁴ See *Republic v City Council of Nairobi ex parte Spring Valley Residents Company Limited* [2012] eKLR.

¹⁸⁵ See *id.*

¹⁸⁶ *Wainaina Kenyanjui & 2 others v Andrew Ng'ang'a* [2013] eKLR.

¹⁸⁷ *Republic v City Council of Nairobi & 2 others ex parte Richard Bell & another* [2014] eKLR.

Committees reacted to adverse judicial review decisions, and whether the decisions had an impact on their subsequent rule application and adjudication practices. Another worrying trend discernible from the cases is the inability of aggrieved parties to comprehend or follow the procedures of the PPA. This impacts greatly on access to administrative justice. Another concern is that the Liaison Committees are not democratic institutions, considering that their membership does not include local residents or their associations. The paramount consideration in the design of the Liaison Committees seems to be that only the experts who are their members know what is best for the local residents, and will always make decisions in the latter's best interests.

Let us now examine how local governments have handled the questions of public participation in rule making, rule application, adjudication of disputes and judicial review since the Constitution of 2010 came into operation.

III. Local Governance under the Constitution of 2010

A. The Provisions of the Constitution

The Constitution of 2010 establishes a system of devolved government whose objectives include promoting participation and accountability in the exercise of governmental power, fostering national unity by recognizing diversity, giving powers of self-governance to the people, ensuring equitable sharing of national and local resources, protecting the rights of minorities and marginalized communities, and promoting social and economic development and access to public services throughout Kenya.¹⁸⁸ It establishes three main institutions to facilitate the realization of these objectives: County Governments, a Senate, and a Commission on Revenue Allocation.

It establishes a County Government for each of the forty-seven counties, which consists of a County Assembly (or legislative branch) and a County Executive Committee (or executive branch).¹⁸⁹ In addition, it envisages that the

¹⁸⁸ Constitution of Kenya of 2010, article 174.

¹⁸⁹ *Ibid*, article 176 (1).

county governments will decentralize their functions and the provision of services to the extent that it is efficient and practicable to do so.¹⁹⁰ The County Assembly consists of elected members, such special seat members as will ensure that no more than two-thirds of its membership is of the same gender, members of marginalized groups (including persons with disabilities and the youth), and the Speaker.¹⁹¹ The County Assembly performs three functions. First, it exercises the legislative authority of the County and makes laws “for the effective performance of the functions and exercise of the powers of County Government.”¹⁹² These functions and powers are: agriculture; county health services; control of air and noise pollution, other public nuisances and outdoor advertising; cultural activities, public entertainment and public amenities; county transport, including county roads and public transport; animal control and welfare; trade development and regulation; county planning and development, including land survey and mapping; pre-primary education, village polytechnics, homecraft centers and childcare facilities; implementation of specific National Government policies on natural resources and environmental conservation; county public works and services; fire fighting services and disaster management; control of drugs and pornography; and ensuring and coordinating the participation of communities and locations in governance at the local level.¹⁹³ The Constitution confers certain functions and powers on more than one level of government, and envisages that they will be exercised concurrently.¹⁹⁴ However, it does not outline these functions and powers, or what concurrent jurisdiction entails. It also contemplates that a government at one level may, by agreement, transfer a function or power to a government at the other level where such a function or power would be more effectively performed by the receiving government, and such a transfer is not prohibited by law.¹⁹⁵

The executive authority of the County is vested in the County Executive Committee, which consists of the County Governor, the Deputy County Governor,

¹⁹⁰ Ibid, article 176 (2)

¹⁹¹ Ibid, article 177.

¹⁹² Ibid, article 185 (1) & (2).

¹⁹³ Ibid, Fourth Schedule.

¹⁹⁴ Ibid, article 186 (2)

¹⁹⁵ Ibid, article 187 (1).

and at most ten other members.¹⁹⁶ The County Governor is elected by the voters registered in the County, and nominates the Deputy County Governor.¹⁹⁷ The County Executive Committee implements National and County legislation, manages and coordinates the functions of the county administration, and performs other functions conferred on it by the constitution or national legislation.¹⁹⁸ It also originates bill for consideration by the County Assembly.¹⁹⁹ It is accountable to the County Assembly. For example, it is required to provide the County Assembly with regular reports on matters relating to the County.²⁰⁰ The Constitution also contemplates that urban areas and cities will fall under the jurisdiction of the counties, and requires Parliament to enact a law for their governance.²⁰¹ In this respect, it is noteworthy that the constitution retains the local authorities.²⁰² These provisions demonstrate a significant departure from the past, given that the county governments are elected by, and accountable to, the local electorate.

The Senate is one of the two houses of Parliament, the other one being the National Assembly.²⁰³ It consists of forty-seven elected members, sixteen women members nominated by political parties, two members representing the youth, two members representing persons with disabilities, and the Speaker.²⁰⁴ It initiates, debates and approves legislative proposals (or bills) concerning counties.²⁰⁵ Another critical function of the Senate is to determine the allocation of national revenue among the counties, and maintain oversight over such revenue.²⁰⁶ Further, it plays a role in governmental accountability: it participates in the consideration and determination of resolutions to remove the President or Deputy President from office.²⁰⁷ Its essential role is to represent and protect the interest of the counties and their governments.²⁰⁸

¹⁹⁶ Ibid, article 179 (1), (2) & (3).

¹⁹⁷ Ibid, article 180 (1) & (5).

¹⁹⁸ Ibid, article 183 (1).

¹⁹⁹ Ibid, article 183 (2).

²⁰⁰ Ibid, section 183 (3).

²⁰¹ Ibid, article 184.

²⁰² Ibid, Sixth Schedule, section 18.

²⁰³ Ibid, article 93.

²⁰⁴ Ibid, article 98 (1).

²⁰⁵ Ibid, article 96 (2).

²⁰⁶ Ibid, article 96 (3).

²⁰⁷ Ibid, article 96 (4).

²⁰⁸ Ibid, article 96(1).

It should be noted that the constitution retains the Provincial Administration, and mandates the National Government to “restructure [it] to accord with and respect the system of devolved government.”²⁰⁹ It is plausible that the retention of the Provincial Administration is influenced by its role as a symbol of the authority or presence of the National Government throughout the republic.²¹⁰ The Provincial Administration might also have been retained out of fear that its powerful officers could have influenced segments of the public to vote against the adoption of the constitution at the August 2010 referendum.²¹¹ However, it is not clear how the Provincial Administration will be structured and what role it will play in devolved governance, given that some of its key functions – such as coordinating central government policies and development programs at the local level – have been vested in the County Executive Committees.²¹² At the same time, the maintenance of law and order (including policing) remains a function of the National Government, and it could therefore choose to exercise it at the county level through the Provincial Administration.²¹³

B. The New Legislative Framework

Following the promulgation of the constitution, the Government established a Task Force on Devolved Government to make proposals for effective implementation of devolution, including proposals on appropriate legislation to anchor and implement the devolved government.²¹⁴ The proposals of this Task Force have since been adopted in the form of a number of laws, which create an elaborate institutional framework for local governance (see Diagram 1 below). These laws are the County Governments Act 2012,²¹⁵ the Urban Areas and Cities Act,²¹⁶ the Intergovernmental Relations Act 2012,²¹⁷ the Transition to Devolved

²⁰⁹ Ibid, Sixth Schedule, section 17.

²¹⁰ See Salim P. Ndemo, *Epitome of State Power: The Provincial Administration in Kenya* (Nairobi: Regional Institute for Cooperatives, 2007).

²¹¹ Nyanjom, “Devolution in Kenya’s New Constitution,” supra note __ at 19.

²¹² Obuya Bagaka, “Restructuring the Provincial administration: An Insider’s View,” Society for International Development, Constitution Working Paper No. 3, 1-3 (2012).

²¹³ Constitution of Kenya of 2010, Fourth Schedule.

²¹⁴ Republic of Kenya, *Final Report of the Task Force on Devolved Government 1-2* (2011).

²¹⁵ County Governments Act, No. 17 of 2012.

²¹⁶ Urban Areas and Cities Act, No. 13 of 2011.

²¹⁷ Intergovernmental Relations Act, No. 2 of 2012.

Government Act,²¹⁸ the National Government Coordination Act,²¹⁹ the Public Finance Management Act,²²⁰ the County Governments Public Finance Management Transition Act,²²¹ and the Constituencies Development Fund Act.²²²

[Insert Diagram 1 – Institutional Framework for Local Governance]

The County Governments Act seeks to give effect to the provisions of the constitution on devolution, and “to provide for county governments’ powers, functions and responsibilities to deliver services.” It also establishes additional decentralization units and provide for public participation in county governance.²²³ It establishes the following institutions: urban areas and cities,²²⁴ sub-counties (equivalent to constituencies),²²⁵ wards,²²⁶ village units,²²⁷ village councils,²²⁸ County Intergovernmental Forum,²²⁹ County Public Service Board,²³⁰ and Interim County Management Board.²³¹ However, it empowers county governments to establish additional decentralization units should they deem it necessary.²³²

The Urban Areas and Cities Act provides for the classification and governance of urban areas and cities, including participation of residents. It classifies urban areas into cities, municipalities and towns.²³³ On the one hand, it establishes Boards to manage cities and municipalities on behalf of the county governments.²³⁴ The Board consists of up to eleven members (in the case of a city) or nine members (in the case of a municipality) appointed through a competitive process by the County Executive Committee with the approval of the County Assembly.²³⁵ Members of these boards serve for a single term of five

²¹⁸ Transition to Devolved Government Act, No. 1 of 2012.

²¹⁹ National Government Coordination Act, No. 1 of 2013.

²²⁰ Public Finance Management Act, No. 18 of 2012.

²²¹ County Governments Public Finance Management Transition Act, No. 8 of 2013.

²²² Constituencies Development Fund Act, No. 30 of 2013.

²²³ County Governments Act, section 3.

²²⁴ Ibid, section 48 (1) (a).

²²⁵ Ibid, section 48 (1) (b).

²²⁶ Ibid, section 48 (1) (c).

²²⁷ Ibid, section 48 (1) (d).

²²⁸ Ibid, section 53 (1).

²²⁹ Ibid, section 54 (2).

²³⁰ Ibid, section 57.

²³¹ Ibid, section 126 (1).

²³² Ibid, section 48 (1) (e).

²³³ Urban Areas and Cities Act, sections 5, 8, 9 and 10.

²³⁴ Ibid, section 12 (1).

²³⁵ Ibid, sections 13 (1) and 14.

years, on a part-time basis.²³⁶ The Act then establishes the Office of City or Municipal Manager, who is responsible for implementing the decisions of the Board and is answerable to it.²³⁷ The Manager is competitively recruited and appointed by the County Public Service Board.²³⁸ On the other hand, the Act provides that towns, which (unlike cities and municipalities) are not corporate bodies, shall be managed by administrators answerable to committee appointed by the Governor with the approval of the County Assembly.²³⁹

C. Public Participation in Rule Making

The laws on devolved government seek to facilitate public participation in various ways. For example, the Urban Areas and Cities Act requires the boards of cities and municipalities to ensure the participation of residents in decision-making, and to invite petitions and representations from citizen forums with respect to the governance of the particular urban area.²⁴⁰ In similar vein, the Public Finance Management Act requires the County Executive Committee to ensure public participation in the budget process, and contemplates the enactment of regulations on matters such as the processes and procedures for participation.²⁴¹

Although these provisions on public participation are commendable, they all fail to prescribe the required procedures or the participation thresholds. Indeed, they perpetuate the existing practice of rule making by giving the responsible Cabinet Secretary (or the government agency concerned)²⁴² the power to make regulations, without stipulating the procedures governing such rule making or explicitly requiring public participation in the rule making process.²⁴³ Although in some cases the envisaged regulations require the approval of the National

²³⁶ Ibid, section 15.

²³⁷ Ibid, section 28.

²³⁸ Ibid, section 29.

²³⁹ Ibid, section 20 (2).

²⁴⁰ Urban Areas and Cities Act, sections 21 (g) and 22 (d).

²⁴¹ Public Finance Management Act, sections 125 (2) and 207.

²⁴² See, for example, Transition to Devolved Government Act, section 36.

²⁴³ See, for example, County Governments Act, section 135; Public Finance Management Act, section 205; Intergovernmental Relations Act, section 38 (1).

Assembly or the Senate before they can take effect,²⁴⁴ there is no provision that they must be subjected to public participation. It is also important to note that public participation in law making in the new regime will now be required at two levels, namely the making of law by the County Assembly, and the making of subsidiary legislation by the County Executive Committees and the Boards of cities and municipalities. But while the new laws provide for public participation in the law making processes of counties, there is yet no legal framework to regulate the making of subsidiary legislation by the counties, as was the case under the LGA.

At a minimum, it is arguable that effective public participation requires the following procedures: communication or publication of a notice and place of proposed government action (such as policy making or law making); inviting the public to participate in the decision-making process by giving oral submissions or written comments; due consideration of the views of the public before issuing policies or laws; giving a concise statement of the basis of the proposed policies or laws; and publishing the final policies or laws for a period, say thirty days, before they take effect. For the most part, these decision-making processes could take the form of public inquiries. Further, although oral hearings tend to be more expensive than paper hearings, the former are more suitable where the factual issues are localized and the politics smaller. This procedure would work as follows. The policy or law making agency would appoint a “hearing officer” who would initiate the public participation process by issuing a general notice to the affected public stating the agency’s intention to make a policy or law and disclosing its reasons as well explanations for the proposed action. Further, the procedure would prevent the “hearing officer” from proceeding with the hearing unless at least a third of the voters of the affected public are either present or represented. Such a provision would serve the useful purpose of compelling the policy or law-making agency to organize and whip the affected public to participate in devolved governance. In this respect, it is noteworthy that the County Governments Act requires decentralized units such as Sub-Counties, Wards and Villages to facilitate and coordinate citizen participation in

²⁴⁴ See, for example, County Governments Act, section 135 (2); Public Finance Management Act, section 205.

governance. Another possible procedure would be to make the decisions of the hearing officer appealable to the County Government, and even to the courts. And to facilitate such review, the hearing officer would be required to produce an evidentiary record, consisting of a record of the views received and how they were considered in the final policy or law. Although such an elaborate process could slow down policy and law making processes, they may be necessary to curb the existing practice of paying lip service to the idea of public participation. In practice, key stakeholders are often excluded, and there are no procedures for ensuring meaningful public participation. Ultimately, public participation procedures should balance administrative efficiency with fairness to the affected residents. While permitting meaningful public participation, any procedures adopted should therefore be manageable from the viewpoint of the agencies of county governance.

Effective participation also requires access to information and the legal empowerment of the poor and the marginalized. As far as access to information is concerned, the laws on devolved government take two different approaches. On the one hand, the County Governments Act, which represents the first approach, gives every citizen the right of access to information held by any County Government “in accordance with Article 35 of the Constitution” and subject only to the imposition of reasonable fees.²⁴⁵ On the other hand, the Urban Areas and Cities Act²⁴⁶ and the Transition to Devolved Government Act,²⁴⁷ which represent the second approach, qualifies the right of access to information by giving the relevant agency the power to decline to give the required information where it deems the request unreasonable, or considers the required information to be at a deliberative stage, or the applicant fails to satisfy any confidentiality requirements established by the agency. The trouble with the second approach is that the agency makes these determinations at its discretion, and there is no recourse should the agency determinations be considered unreasonable by those seeking access to information. Accordingly, this approach may undermine effective participation in local governance, and a need arises to establish mechanisms for reviewing the reasonableness of agency determinations.

²⁴⁵ County Governments Act, section 96.

²⁴⁶ Urban Areas and Cities Act, section 24 (3).

²⁴⁷ Transition to Devolved Government Act, section 27 (3).

On the question of legal empowerment, however, it is encouraging that the laws on devolved government appreciate the need to facilitate citizen participation, particularly of marginalized and minority groups. For example, the County Governments Act imposes a duty on County Governments to promote the effective participation of marginalized and minority groups in public and political life,²⁴⁸ and to implement an appropriate civic education program and establish a civic education unit.²⁴⁹ Such provisions are likely to ensure the inclusion of public participation programs in the budgets of county governments, and enhance the capacities of marginalized and minority groups to participate in local governance.

Sections 5, 6 Fair Administrative Action Act 2015 – minimum requirements for public participation, access to information.

To what extent are the foregoing prerequisites for effective participation being met in practice? Two significant judicial decisions shed some light on this inquiry. These cases have concerned public participation in the initiatives of the City Council of Nairobi, and its successor the County of Nairobi Government, to make a new by-law and law respectively, seeking to increase motor vehicle parking fees in Nairobi. In *Republic v City Council of Nairobi & 2 others ex parte Kaka Travellers Cooperative Savings and Credit Society Limited*,²⁵⁰ the applicants had moved to court to challenge a decision of the City Council of Nairobi to increase motor vehicle parking fees from Kshs.70 to Kshs.300 per day. At the same time, another aggrieved individual filed a similar suit seeking the same orders. The latter case, which was not a representative suit, was settled out of court, and the parties filed an agreement with the court to the effect that the parking fees for private cars would be revised downwards from the gazette Kshs.300 to Kshs.250. The applicants were aggrieved by this consent order, which they contended should not bind them since they had not participated in its making. The court agreed that the consent had denied the applicants an opportunity to challenge the proposed parking fees. It therefore nullified the consent order.

²⁴⁸ County Governments Act, section 97.

²⁴⁹ Ibid, section 100.

²⁵⁰ *Republic v City Council of Nairobi & 2 others ex parte Kaka Travellers Cooperative Savings and Credit Society Limited* [2011] eKLR.

The matter resurfaced when the County of Nairobi Government succeeded the City Council of Nairobi, and sought to augment its revenue base by increasing parking fees by passing the Nairobi City County Finance Act of 2013. This law raised the parking fees from Kshs.140 to Kshs.300. Once again, a number of aggrieved actors engaged in the business of public transport in Nairobi went to court seeking to overturn the increased fees on the basis that the law in question had been enacted in violation of the principle of public participation in the law making process, contrary to Articles 184 and 196 of the Constitution. The applicants in *Nairobi Metropolitan PSV Saccos Union Limited & 25 others v County of Nairobi Government & 3 others*²⁵¹ therefore wanted the court to declare the Nairobi City County Finance Act of 2013 unconstitutional, to the extent that there was no public participation in its making.

The County of Nairobi Government opposed the application, contending that it had actively involved the public in enacting this law. First, it carried five advertisements in local daily newspapers and on its website inviting public to participate in stakeholder forums to discuss and input on its proposed budget estimates of revenue and expenditure for the financial year 2013/2014. Second, it held two stakeholder forums, which were attended by some 371 stakeholders from diverse segments of the Nairobi community, who expressed their views, which were taken into account in the enactment of the Nairobi City County Finance Act 2013. Third, at the two forums, the County of Nairobi Government informed the public that it intended to increase parking fees in order to introduce an effective bus system, construct multi-parking spaces and eliminate roundabouts which were contributing to traffic jams in the city. Finally, the County of Nairobi Government held a workshop with the Ministry of Finance and the Members of the Nairobi City County Assembly to discuss its Finance bill. In the circumstances, it felt that having been invited to the stakeholder forums the applicants could not now blame it for their failure to participate in those forums.

The court agreed with the County Government, reasoning that the foregoing process was “highly public” and that the public was “accorded some reasonable

²⁵¹ Nairobi Metropolitan PSV Saccos Union Limited & 25 others v County of Nairobi Government & 3 others [2013] eKLR.

level of participation.”²⁵² In the court’s view, therefore, a county government fulfills the constitutional requirement of public participation where it gives the public a “reasonable opportunity” to know about the issue under consideration and have an adequate say.²⁵³ In this formulation, what amounts to a reasonable opportunity for public participation would depend on the circumstances of each case.²⁵⁴ The court therefore dismissed the application.

And so the court appears to take the view that a county government satisfies the notification requirement if it carries out advertisements in the daily newspapers, and satisfies the public participation requirement if it holds a minimum of two stakeholder forums. In other words, the court thinks that these procedures make the decision making process “highly public” and guarantee “some reasonable level of participation.” From the court’s reasoning, it is therefore not necessary to interrogate whether the advertisements actually reached the targeted public, or whether the stakeholder forums were administered in a manner that facilitated deliberation and ensured that the views of the affected public were considered in the final decision. For example, how can the test formulated by the court ensure that at least a third of the voters in the county are either present or represented? And in the absence of an evidentiary record, how can one arrive at the conclusion that the views of the stakeholders were considered in the final decision?

We carried out a public opinion survey in six counties that also sheds light on this inquiry.²⁵⁵ From this survey, it emerges that public hearings are either not a regular phenomenon in the six counties, or the communities are not aware when the hearings are held. The administrative agencies (including the county governments) usually make an effort to announce public meetings, using electronic and print media, word of mouth and announcements at public places such as markets and churches. These announcements are usually made in English and Kiswahili, although vernacular languages are also used in some cases. However, these announcements rarely contain information that would

²⁵² *Id* at para. 47.

²⁵³ *Id*.

²⁵⁴ *Id*.

²⁵⁵ We carried out the opinion survey in the counties of Isiolo, Kisumu, Nyeri, Nairobi, Mombasa, and Uasin Gishu.

enable the public to participate effectively in the decision-making processes in question. According to our 39.1% of our respondents, the information provided does not usually provide detailed information on the agenda of the hearings, with the result that they may not deem it necessary to attend the meetings, cannot prepare adequately, and consequently cannot participate effectively in the decision-making process.

In addition, even where the public has been given notice of a public hearing, in many cases they are unable to attend the hearings due to constraints such as lack of time (being busy at their places of work), lack of transport to the venue of the hearing, insecurity, and lack of interest. In turn, the lack of interest could be explained by three factors. First, it appears that only selected actors are usually allowed to speak in a significant number of these hearings (27.2% of the respondents). Second, there is no dialogue in a significant number of these hearings (7.8% of the respondents), in the sense that the conveners of the hearings come to inform the stakeholders of what actions they propose to take, as opposed to facilitating deliberations on the proposed action. This may explain why 67.7% of the respondents thought that the hearings are usually long and boring. Third, it could be that the public does not consider the hearings to be important since their views are not taken into consideration in the ultimate decisions. 38.3% of our respondents thought that their views given in the public hearings are not taken into consideration.

A related study on public participation Nairobi County also sheds light on this inquiry.²⁵⁶ The study evaluated public participation in the county's budget making process for the financial year 2014/2015. In particular, the study examined the publicization of a forum intended for the public to participate in this exercise, and actual participation at the forum. The study found that the notice convening the hearing was carried in newspaper advertisements only a day prior to the hearing.²⁵⁷ The public did not, therefore, have adequate notice of the hearing. As a result, there was low turn out for the hearing.²⁵⁸ The hearing was scheduled for a Monday morning, which was not convenient for most

²⁵⁶ Sally Anyanga Maling'a, "Public Participation in County Governance in Kenya: A Withering Eucalyptus in a Desert Middle," LL.B. Dissertation, School of Law, University of Nairobi, 2014.

²⁵⁷ *Ibid* at 43.

²⁵⁸ *Ibid* at 44.

residents of Nairobi. To make matters worse, the hearing commenced two hours later than the announced time, as a result of which some persons who had arrived early left before it commenced.²⁵⁹ Further, the notice targeted the following specific groups: elected leaders, resident associations, leaders of professional bodies, individuals, civil society, entrepreneurs, corporate bodies and government departments. The implicit message of the notice was that it was meant for the elite members of the Nairobi community, not ordinary citizens.²⁶⁰ Indeed, a majority of those who attended the hearing were the elite, while ordinary citizens were only “represented in negligible numbers and in fact did not voice any concerns.”²⁶¹ Persons the convener thought were making useful contributions dominated the hearing.²⁶² Those considered not to be making useful contributions were interrupted.²⁶³ This study also found that although there had been consultations on the proposed budget at the ward level, the Nairobi County Government did not mention how these consultations had impacted the budget estimates it was now presenting to the county forum.²⁶⁴ The public was not able to access the budget estimates prior to the hearing, and the estimates were only made available at the hearing.²⁶⁵ Further, those who submitted comments via email did not receive any responses from the county government, an outcome that undermined the integrity of the public participation exercise.²⁶⁶

In addition, efforts by the Mombasa County Government to ensure that the public participates in its budget making process have not been effective. According to one of the members of the County Executive Committee, only organized business and civil society groups have attended the public hearings, while informal traders have tended to keep away.²⁶⁷ In his view, the County Government needs to give the public more time to prepare for the hearings, and

²⁵⁹ Ibid at 52-53.

²⁶⁰ Ibid at 47 (contending that “The notice would perhaps have appeared more receptive of the ordinary citizens had it mentioned the invitation was to ‘all interested persons and the public in general.’”)

²⁶¹ Ibid at 48.

²⁶² Ibid at 49-50.

²⁶³ Ibid at 50.

²⁶⁴ Ibid at 51.

²⁶⁵ Ibid.

²⁶⁶ Ibid at 47.

²⁶⁷ Interview with Minister for Trade & Investment, Energy and Industry, Mombasa County Government, Mombasa, 23rd June 2014.

in particular “be deliberate in order to get the low cadre business” to attend the hearings. Officers of the Nairobi County Government and Uasin Gishu County Government expressed similar views: the process of public participation in county law making is not effective because the public is given short notices, as a result of which they are cannot prepare adequately, and hearings are held at times that are not convenient for many people.²⁶⁸

From these accounts, it is evident that at present there is no, or little meaningful, public participation in local governance. Not only is the publicization of county decision-making initiatives largely inadequate, but also the decision-making processes are not being administered in ways that facilitate effective public participation or ensure consideration of the views of the public in the final decisions.

D. Rule Application and Adjudication of Disputes

The new regime is still evolving, and it is not clear at this point how the County Governments apply rules, adjudicate disputes, and whether and how judicial review is impacting on their exercise of power. However, key informant interviews and the public opinion survey referred to above provide some useful insights into the workings the new regime with respect to trade licensing and development control.

i. Trade Licensing

In order to facilitate the execution of their constitutional mandate of trade development and regulation, each county government has enacted a Finance Act that is amended annually.²⁶⁹ These laws regulate the licensing of formal and informal businesses. In the case of Kisumu, for example, the Finance Act 2015

²⁶⁸ Interview with trade licensing officer, Nairobi County Government, 7th October 2014; Interview with trade licensing officer, Uasin Gishu County, Eldoret, 10th June 2014.

²⁶⁹ See, e.g., Kisumu County Finance Act 2015, Mombasa County Finance Act 2014, Nyeri County Finance Act 2014, Nairobi County Finance Act 2013.

requires all formal businesses to apply for a license every year.²⁷⁰ These businesses are issued with a single business permit, upon paying the applicable fee, which depends on the location and size of the business as specified in a schedule to the Act. Conversely, the Act requires informal businesses to pay a daily cess or market fee, which is calculated based on the goods they are selling and the location of the business.²⁷¹ Interestingly, the schedule gives county revenue collectors discretion on the fees they can levy. For example, sellers of “sweets and groundnuts” should pay a daily fee of Ksh. 50, while sellers of “snacks and sodas” should pay a daily fee of Ksh. 150. There is nothing to prevent a county revenue collector from determining that a person selling sweets and groundnuts is selling snacks, and should therefore pay Ksh. 150 and not Ksh. 50. A need therefore arises to establish a mechanism by which informal traders can contest the levies imposed by the county revenue collectors.

A person who wishes to obtain a trade license is required to complete an application form, describing the nature of his or her business. In this application, the applicant is required to provide information including the location of the business, the size of its premises, and the number of its employees. Second, a licensing officer inspects the business to verify the type of business in respect of which the license is sought and recommends the issuance if a Single Business Permit. That is, the licensing officer determines the appropriate fee guided by the Single Business Permit fees and charges schedule. Due to resources constraints, the licensing officers only carry out inspections where they are not sure of the truthfulness of the information contained in the application forms.²⁷² In Nairobi County, the application should be made at the County Government’s office in the ward in which the business is located.²⁷³ The applicant is not informed of the date and time of the inspection, the aim being to prevent the applicant from altering the situation on the ground to correspond with the claims made in the application. The applicant then goes to the county government offices for an invoice, and pays for the license at a bank or the county government’s cash office. But in Nairobi County, businesses seeking licenses sometimes apply directly to

²⁷⁰ Kisumu County Finance Act 2015, section 5.

²⁷¹ *Ibid*, section 7.

²⁷² Interview with licensing officer, Mombasa County, Mombasa, 24th June 2014.

²⁷³ Interview with licensing officer, Nairobi County Government, Nairobi, 7th October 2014.

the main office at City Hall, thereby bypassing the ward licensing officer, with the result that they obtain licenses without having their businesses inspected.²⁷⁴

Applications for the renewal of licenses go through the same process, except that inspections are not necessary in their case, unless they have increased or reduced their businesses. Where the licensing officer does not approve the contents of the application, he is required to attach a report to the application, giving his or her reasons for disapproval.²⁷⁵ An applicant dissatisfied with the decision of the licensing officer can appeal to the City Manager or County secretary in some cases. In Kisumu County, this procedure is also available to informal traders, who usually address their complaints through their associations.²⁷⁶ But in Nairobi County, hawkers do not have such rights. They are not allowed to operate in the central business district, and those found doing so are still arrested, their goods confiscated, and prosecuted.²⁷⁷ It should be noted that the sum of the daily fees that informal traders pay in a year could equal or even surpass the one-off licensing fees paid by some formal businesses.²⁷⁸ There is therefore no justification for denying them administrative justice rights that are available to formal businesses. According to the Nairobi County licensing officer we interviewed, the problem of hawkers can be resolved by allowing them to trade on designated closed streets, say three times a week, and giving them monthly permits.²⁷⁹

As can be expected, county licensing officers who carry out the inspections of businesses seeking licenses have considerable discretion, which may create an incentive for corruption. For example, the licensing officers might collude with the businesses being inspected to pay bribes for favorable inspection reports. The Mombasa County Government has started a digital mapping initiative that might minimize the need to inspect businesses seeking licenses, and consequently minimize the discretion of licensing officers and the opportunities

²⁷⁴ Ibid.

²⁷⁵ Ibid.

²⁷⁶ Interview with market superintendent, Kisumu County, 9th June 2014.

²⁷⁷ Interview with licensing officer, Nairobi County Government, Nairobi, 7th October 2014.

²⁷⁸ In Nairobi County, for example, sellers of fruits and vegetables pay a daily license fee of Ksh. 30, which comes to about Ksh. 9000 per month. On the other hand, shoe shiners pay an annual license fee of Ksh. 2500. Ibid.

²⁷⁹ Ibid.

for corruption.²⁸⁰ The idea behind the digital mapping initiative is to map all the businesses in the county, establish their locations, and issue them with digital identities.²⁸¹ Once the businesses have digital identities, they would be issued with licenses that have electronic tags, and should eventually be able to print the licenses from their premises.²⁸² This approach should also enhance the legibility²⁸³ of businesses in the county, thereby making it difficult for licensing officers to issue false inspection reports. This approach could also resolve a problem we encountered in Kisumu, whereby county revenue officers delay transmitting licenses to businesses that have already paid for licenses, and take advantage of their lack of possession of the licenses to demand bribes. All in all, the aim of the Mombasa County is to enhance transparency in the licensing process, so that the payable rates would be determined in advance, thereby reducing the discretion of licensing officers.²⁸⁴ The Nairobi County Government has adopted a similar approach. It has introduced an electronic payment platform, which enables applicants for business licenses to assess themselves, make payments and print licenses at their premises.²⁸⁵ Through this platform, this county government expects to reduce the amount of time taken to acquire business licenses and reduce corruption, by plugging loopholes for rent seeking.²⁸⁶ In addition, only designated officers, who report directly to director of the trade licensing department, will inspect businesses seeking licenses.²⁸⁷

[How is the evolving practice different from the old order?]

ii. Development Control

²⁸⁰ Interview with Minister for Trade & Investment, Energy and Industry, Mombasa County Government, Mombasa, 23rd June 2014.

²⁸¹ Ibid.

²⁸² Ibid.

²⁸³ See James C. Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* (Yale University Press, 1998).

²⁸⁴ Interview with Minister for Trade & Investment, Energy and Industry, Mombasa County Government, Mombasa, 23rd June 2014.

²⁸⁵ Interview with licensing officer, Nairobi County Government, Nairobi, 7th October 2014.

²⁸⁶ Ibid.

²⁸⁷ Ibid.

As we have seen, “county planning and development” is a function of the county governments.²⁸⁸ At the same time, the National Government is responsible for “General principles of land planning and the coordination of planning by the counties.”²⁸⁹ Clearly, development control is a shared function of the two levels of government, and therefore within their “concurrent jurisdiction.”²⁹⁰ This explains the on-going efforts to align the Physical Planning Act (PPA) with the Constitution. In the meantime, development control is operating in a legal vacuum.

A person who seeks development permission is now required to apply to the County Secretary (an officer of the County Government), who forwards the application to the Chief Officer in Charge of Physical Planning (an officer of the National Government).²⁹¹ In other words, the two levels of government work together in administering development control, although the lines of responsibility remain blurred.²⁹² The Chief Officer then circulates the application to the relevant departments of the National Government, namely Physical Planning, Survey and Lands. The officer can also seek the views of other ministries such as Roads and Water, if the proposed development might of concern to these ministries. The role of these departments and ministries is to evaluate the application, with a view to determining whether it complies with planning standards and regulations. If the departments and ministries have no objections, the Chief Officer would grant the applicant development permission, and may attach conditions to the license. If these agencies oppose the grant of development permission, the Chief Officer is required to inform the applicant, and advise the applicant to amend the application in case the objections can be cured by amendments.

Nairobi County has adopted a different approach. Here, an ad hoc “Planning Technical Committee” now makes development permission decisions.²⁹³ Where

²⁸⁸ Constitution of Kenya 2010, Article 186, Fourth Schedule.

²⁸⁹ Ibid, Fourth Schedule.

²⁹⁰ Ibid, Article 186(2).

²⁹¹ Interview with Physical Planning Officer, Kisumu County, Kisumu, 9th June 2014.

²⁹² Interview with Physical Planning Officer, Mombasa County, Mombasa, 24th June 2014.

²⁹³ Interview with planning officer, Nairobi County Government, Nairobi, 7th October 2014. This committee consists of representatives of relevant National Government departments (such as engineering, environment, water and public health), representative of finance institutions,

there is public interest in a particular application, the committee holds a public hearing, so that it can consider the views of affected persons before making its decision.²⁹⁴ Indeed, it has been suggested that all applications for development permission should in general be approved at public meetings.²⁹⁵

A developer who is either denied development permission or objects to the conditions attached to the license should appeal to the relevant Physical Planning Liaison Committee (hereinafter Liaison Committee). The dilemma is that some of the positions of the members of the Liaison Committees have since been abolished. The abolished positions include the District Commissioner (who chaired the district Liaison Committee) and the Provincial Commissioner (who chaired the provincial Liaison Committee). If the Liaison Committees were now to sit as they were constituted under the PPA 1996, their decisions would not be lawful. In practice, the Liaison Committees no longer sit to determine the grievances of developers. In Kisumu County, the physical planning officers now advise such developers to take their grievances to the Land and Environment Court.²⁹⁶ In Mombasa County, the Directorate of Planning has established a “Development Verification and Control Committee” to handle such grievances.²⁹⁷ This committee makes decisions by resolutions, which interested parties may access upon request.²⁹⁸ And in the case of Nairobi County, the Planning Technical Committee handles grievances by facilitating negotiations between the parties concerned.²⁹⁹ However, it has been pointed out that such negotiations can be abused unless they are grounded in a legal framework.³⁰⁰

Another notable change in practice is that the Chief Officers (or the planning technical committee in the case of Nairobi County) now handle development applications, without seeking the approval of the county assemblies.³⁰¹ The

representative of Kenya Power and Lighting Company, representative of the Architectural Association of Kenya, and representative of the Kenya Institute of Planners.

²⁹⁴ Ibid.

²⁹⁵ Vincent Ngethe, “Experts Want Plans Approved in Public,” *Nation*, 28th February 2015.

²⁹⁶ Interview with Principal Physical Planning Officer, Kisumu County, Kisumu, 9th June 2014.

²⁹⁷ Interview with Physical Planning Officer, Mombasa County, Mombasa, 24th June 2014. This Committee consists of six members including the sectional head for architecture (as Chair), assistant director control (as secretary), chief building inspector, and a representative of the governor.

²⁹⁸ Interview with planning officer, Nairobi County Government, Nairobi, 7th October 2014.

²⁹⁹ Ibid.

³⁰⁰ Interview with Director of Physical Planning, Ardhi House, Nairobi, 8th October 2014.

³⁰¹ Interview with Principal Physical Planning Officer, Kisumu County, Kisumu, 9th June 2014.

result is that the Chief Officers and Nairobi's technical committee now wield considerable power over development approvals, even if their role is merely to make recommendations to the County Executive Member in charge of planning. The danger is that politicians sometimes prevail upon these officers to approve developments that do not comply with planning standards and regulations.³⁰²

In these circumstances, it is evident that a legislative framework for physical planning that fits into the new constitutional dispensation is needed. The Directorate of Physical Planning has now developed a draft Physical Planning Bill 2014. The bill proposes the following development control procedures. A person seeking development permission should apply to the relevant planning authority (meaning the Director General of Physical Planning, a county director of physical planning, a city director of physical planning, a municipal director of physical planning, or a city or municipal board of management depending on the location of the proposed development).³⁰³ Where the proposed development requires compliance with the provisions of another written law (such as obtaining an EIA license under the Environmental Management and Coordination Act), the applicant must comply with the provisions of that law before making the application for development permission to the planning authority.³⁰⁴

Once the planning authority receives the application, it has seven days to share the application with relevant agencies (such as land survey, roads and transport, agriculture, health, public works and utilities, and environment and natural resources) to review and comment on it.³⁰⁵ These agencies have fourteen days to submit their comments on the application to the planning authority.³⁰⁶ The planning authority then makes a decision on the application: it can grant the development permission and attach conditions to the grant, or refuse to grant development permission, or defer the decision to grant or refuse the development permission for a period, in which case it must specify its reasons for deferring its decision.³⁰⁷ In making these decisions, the planning authority must consider the relevant physical development plan, the provision for social

³⁰² Ibid.

³⁰³ Physical Planning Bill 2014, section 62.

³⁰⁴ Ibid, section 62(5).

³⁰⁵ Ibid, section 64(1).

³⁰⁶ Ibid, section 64(2).

³⁰⁷ Ibid, section 65(4).

amenities such as health facilities, the comments of relevant agencies, and any special conditions stipulated in a lease where the proposed development concerns a leasehold property.³⁰⁸

A person aggrieved by the decision of a planning authority, whether he or she is an applicant or an interested party, may appeal to the relevant Physical Planning Liaison Committee within thirty days of the decision.³⁰⁹ The bill proposes the establishment of two categories of committees: National Physical Planning Liaison Committee, and a Liaison Committee for each County.³¹⁰ The National Physical Planning Liaison Committee consists of the chairperson of the National Land Commission (as chair), the Director General of Physical Planning (as secretary), representatives of various agencies of the National Government, and representatives of private sector associations, association of architects, association of physical planners and the Law Society of Kenya.³¹¹ Conversely, the County Physical Planning Liaison Committee consists of the County Chief Officer in charge of physical planning (as chair), the County Director of Physical Planning (as secretary), and other professionals appointed by the Governor.³¹² The relevant committee must hear and determine the appeal within fourteen days of the appeal being filed.³¹³ [Section 85 of the bill provides that the committee “shall hear and determine an appeal within thirty days of the appeal being filed and shall inform the appellant of the decision within fourteen days of making the determination]. These committees make decisions by a majority vote of the members present and voting; the chairperson casts the deciding vote in case of a tied vote.³¹⁴ Appeals from these committees lie to the Environment and Land Court, whose decision “shall be final.”³¹⁵ Further, the Act empowers the Environment and Land Court to hear and determine all disputes relating to physical planning before the establishment of the physical planning liaison committees.³¹⁶

³⁰⁸ Ibid, section 65(1).

³⁰⁹ Ibid, section 65(5).

³¹⁰ Ibid, section 79.

³¹¹ Ibid, section 80(1).

³¹² Ibid, section 82(1).

³¹³ Ibid, section 65(5).

³¹⁴ Ibid, section 84(3).

³¹⁵ Ibid, section 65(6).

³¹⁶ Ibid, section 99.

The bill can be faulted for perpetuating the status quo, in the sense that residents associations are still not represented in the liaison committees, which continue to be dominated by government actors and development control experts. Nevertheless, unlike in the past, the bill proposes that planning authorities will handle development control applications exclusively, meaning that county assemblies will play no role in the process. The bill therefore seeks to shield the process from political interference. Further it seeks to ensure that the planning authorities are accountable for the exercise of their powers by giving those aggrieved by their decisions a right of appeal. And it establishes time-frames within which planning authorities should make their decisions, which promises to enhance the efficiency of decision making in development control.

IV. Conclusion

Although there has been greater public participation in local government decision-making since the Constitution of 2010 came into force, participation remains ineffective due to two main reasons. First, there are no minimum procedures for public participation or participation thresholds, with the result that county governments merely seem to be paying lip service to public participation. As we have seen, courts now take the view that a county government fulfills the constitutional requirement of public participation where it gives the public a reasonable opportunity to know about the issues and have an adequate say. In practice, however, it is not clear what constitutes a “reasonable opportunity” or an “adequate say.” According to the courts, a county government satisfies the notification requirement if it carries out advertisements in the daily newspapers, and satisfies the public participation requirement if it holds a minimum of two stakeholder forums. A need therefore arises to interrogate whether such advertisements reach the targeted public, and whether the stakeholder forums are administered in a manner that facilitates deliberation, and ensures that the views of the affected public are considered in the final decision.

As far as rule application is concerned, the required laws have not been enacted, with the result that county governments are operating in an ad hoc

manner. In the case of trade licensing, and as was the case in the old order, informal traders largely continue to be denied administrative justice rights that are available to formal businesses. In the case of the latter, a number of counties are now automating their decision-making processes, with a view to minimizing the discretion of licensing officers and opportunities for corruption. The administration of the development control regime is perhaps more worrisome, given the absence of a legislative framework. The counties have adopted different approaches to administering development control, which lack mechanisms that would facilitate accountability in the exercise of power. Nevertheless, the physical planning bill promises to remedy this gap, even if it perpetuates the old regime in some respects, particularly with respect to denying residents association representation in the critical liaison committees.

Finally, it is not clear whether or how, in the past, the liaison committees reacted to adverse judicial review decisions, and whether those decisions had any impact on their subsequent administrative practices.