

PUBLIC PARTICIPATION IN JUDICIAL PROCESSES

The Case of Court Users Committees in Kenya

By:

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1. Public Participation in Perspective

- Public participation underlies the original idea of a court – Latin a contraction of co→together & hortus →garden or yard”
- Later, processes and rules evolved – necessitating expertise to adjudicate contests
- Judicial process became a preserve of a few –lawyers and judges – initiates of the mystiques of the complex system for dispensing justice to ordinary mortals
- Traditions evolved which, though sound in some respects, undermined the very essence of the judicial process, e.g., the idea that “***the court is not supposed to speak except through its judgments***”
- Colonialism entrenched the notion -judicial process serving mainly as a tool for domination
- Courts became the archetypical symbol of oppression – the very notion of going to court became confusing, frightening, and frustrating to the citizen
- It bred adversity between and among different users – each pre-occupied with defending its microcosm –a suspicious engagement

2. Changing Landscape in Public Participation

- A consequence of 2 separate but related processes:
 - (a) wind of democratic change in Africa in the 1990s & 2000s
 - (b) UNCED's/Rio's sustainable development paradigm
- As regards (a), courts have been responding to the call aptly put by B. Mc Lachlin, C.J of Canada

“...the courts, if they are to be relevant and responsible, must...operate in the real world...in a manner which furthers democratic principles and promotes perceptions and reality of the rule of law.”
- As regards (b), Principle 10 of the Rio Declaration has had a revolutionary effect:

“Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided”

3. Court Users Committees in Kenya

- An internally-driven process – product of democratic reforms in Kenya & enlightenment on HRBA to development
- Originated in the GJLOS programme, implemented with KMJA, GTZ (GIZ), etc
- A 2006 household survey under GJLOS reported only 4 % would submit legal disputes to courts;
- 96% preferred extra judicial means of settling disputes; mainly due to the lack of faith in the judiciary by the public based on the lengthy and complicated judicial processes, perceived compromised dignity of judicial officers and generally the mysterious administration of justice.
- KMJA initiated the CUCs as a platform for enhancing understanding and action
- This was later buttressed in the Constitution 2010

4. Law and Practice of CUCs in Kenya

- Constitution 2010 is very strong on public participation
 - **Preamble**, recognizes the aspirations of all Kenyans for a government that is founded and based on the fundamental values of human rights, equality, freedom, democracy, social justice and the rule of law.
 - **Article 159(1)** requires the judiciary, in the exercise of its judicial authority, to recognize that its is wholly derived from the people
 - Article 159(2)(c) requires Judiciary to be guided by principles of ADR
- Judicial Service Act 2011
 - Establishes NCAJ
 - S.35(2)(c) gives NCAJ mandate to oversee court user committees
- Aggressive efforts by the Judiciary
 - 2010 Report on Judicial Reform
 - Judiciary Transformation Framework, 2012
- **Composition** – senior-most judicial officer; police, prisons, children and probation officers; faith-based & HR organizations etc

5. CUCs in Uganda and Tanzania

- Consequence of similar concerns as in Kenya
- Not yet in general practice of administration of justice, but already institutionalised in specific cases
- **Tanzania**
 - CUC established in the Com Courts Division, R 6(1) of HC (Commercial Div) Procedure Rules 2012 through Govt. Notice No. 250 of 2012.
 - **Composition** – Rule 6(2): Judges of the Court; 2 advocates nominated by TLS; 2 State Attorneys nominated by the AG; and 5 other persons nominated by lawfully established organizations representing the business community.
 - **Tenure** – 3 yrs, renewable once; member may resign by tendering a resignation notice to the judge in charge of the Court, who shall seek for replacement of the resigning member from the responsible authority.
 - **Role** – to advise Court on matters of court practice; appointing persons to serve as assessors; educating the public; watchdog; and feeding the court with feelings of “the outside world” about the Division
- **Uganda**
 - CUC established in 2014 as one of the 4 major r/Bench Committees of the Supreme Court, alongside: Finance; Peers; and Bar/Bench

6. Conclusion

- There is a strong case for CUCs as a mechanism for strengthening the judicial process
- This practice is taking root in East Africa amidst operational and resource challenges
- CUCs can enhance confidence and efficiency in resolving disputes – especially in technical areas like land and environment
- In Kenya, over 60% of cases are environment and land matters matters
- Judicial officers can drive the process (as in Kenya), but it needs institutionalization, through law and Constitutions

Thank You

