

The Right to Public Participation: Constitutionally Guaranteed tool in achieving the Aspirations of the AU Agenda 2063

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Abstract

Citizen involvement, indigenous peoples' rights, and local community consultations are synonymous to "Public Participation Rights". They all entail:

Interaction between government and civil society... including the processes by which government and civil society open dialogue, establish partnerships, share information, and otherwise interact to design, implement, and evaluate development policies, projects and programs.¹

At the level of international law, public participation rights are yet to be categorically recognized as norms of international law, and are therefore scattered in various international human rights texts.² These rights are commonly clinched from either political rights of self-determination, on one hand; or property rights, cultural rights and the right to non-discrimination, on the other hand.³ In some instances, public participation rights are intertwined over other rights such as access to information, public participation in decision-making and access to justice.⁴ Evaluation of these forms integrates a connection to right of freedom of expression, non-discrimination and national treatment, the right to environment and sustainable development, right to own land and resources, and the right to

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¹ Organisation of American States Inter- American Council for Intergral Development (OAS CIDI), "Inter American Strategy for the Promotion of Public Participation in Decision Making for Sustainable Development", *CID/RES*, 98 (V-o/00), see introduction.

² Tara Ward, "The Right to Free, Prior, and Informed Consent: Indegenous Peoples' Participation Rights within International Law", *Northwestern Journal of International Human Rights* 10, 2 (2011): 54-84.

³ *Ibid*, page 55-56.

⁴ George Pring and Susan Noe, "The Emerging International Law of Public Participation Affecting Global Mining, Energy and Resource Development" in *Human Rights in Natural Resource Development*, ed.D.N.Zillman & Others (Oxford: Oxford University Press, 2002), 11-76.

outcome of the processes.⁵ Currently debated element of public participation is “the right to free, prior and informed consent”. It is the right of indigenous people to make free and informed choices about the development of their land and resources and is principled on non-coercion and non-intimidation.⁶

Populations concerned are Indigenous people, tribal and native populations, local communities, local government and even Non-Governmental Organizations.⁷ At the Global scale, Public participation is currently a vibrant explosive seen at the heart of major economic development projects of mining, energy and resource-development projects emphasizing the insertion of the human dimension.⁸ For this reason, public participation is now becoming a legal requirement internationally and nationally, and crucially, it should be a human rights agenda.

Public participation rights therefore stand out as a vital guarantee and tool in achieving the aspirations of the AU Agenda 2063, focus being on aspirations 1,3, and 6 while considering constitutional democracy and rule of law.

This symposium is a trigger to a discussion on the constitutionality of on the right to public participation in political, economic and social sectors. The spectrum of Public Participation rights in the African Human Rights System shall be analysed with a focus to scrutinising their emphasis in the Mining and Extractive Industry in order to achieve sustainable development for an integrated African continent.

Key words: Public participation, Human Rights, AU 2063 Agenda

⁵ *Ibid*, See also, Yinka Omorogbe, “The Legal Framework for Public participation in Decision- making on Mining and Energy Development in Nigeria: Giving Voices to the Voiceless” in *Human Rights in Natural Resource Development*, ed. D.N.Zillman & Others (Oxford: Oxford University Press, 2002), 549-587.

⁶ Ward, pg 54.

⁷ Omorogbe, Pg 568.

⁸ Pring, Pg 13-14.

1.0 The right to public participation as a new concept

Public participation has been into practice and implementation since the beginning of human civilization. The difference lies only in the ways and modalities of various cultures, religions and geographical continental locations. It is further a corner stone, central value and foundation of democracy.⁹ The later have their emphasis on ‘political participation’ while the fast trending concept in the current decade evolves even broader than political participation. The said explosion is towards not the rights of the majority but creation of chances to freely express, debate, challenge, involve equally and with human dignity in the political community and even more.¹⁰ In this new development, public participation is taking its position as a human right and further a catalyst in the realization of other human rights.¹¹ The right to public participation not only forms the framework for realization of all other rights but also connects the elements of good governance namely rule of law, democracy and good governance.¹² The trend is also pushed by developments in international environmental law through its principle of environmental impact assessment;¹³ which envisages public participation in the form of access to information, public participation in decision-making and access to justice.¹⁴ Explanation of such acceleration of public participation is the factors like adoption of international legal concepts of ‘sustainable development’, designating public participation as a political human right, increased recognition of local communities, indigenous and tribal people; and dissemination of information via the Internet.¹⁵

There has been a definition ambiguity for the term public participation, given the different synonyms it has added up the differences in interpretation by different geographical systems. So public participation, which is synonymous to Citizen

⁹ Pring and Noe, “The Emerging International Law of Public Participation Affecting Global Mining, Energy and Resource Development”, p.17.

¹⁰ The Danish Institute for Human Rights, NHRIs and Public Participation, issue paper by Ulrik Spliid. Wilders Plads. Denmark’s National Human Rights Institution. 2013.

¹¹ *Ibid.*

¹² Morris. K. Mbondenyei, “The Right to Participate in the Government of One’s Country: An Analysis of Article 13 of the African Charter on Human and Peoples’ Rights in the Light of Kenya’s 2007 Political Crisis”. *African Human Rights Law Journal* 1 (2009): 183-202.

¹³ Pring and Noe, “The Emerging International Law of Public Participation Affecting Global Mining, Energy and Resource Development”, p. 26. Some of the international environmental law treaties and conventions that have clearly provided for public participation include: Stockholm Declaration of the UN Conference on Human Environment 1972, Convention for the Protection of the World Cultural and Natural Heritage 1972, Convention on Access to Information and Public Participation in Decision Making, and Access to Justice in Environmental Matters 1998 (Aarhus Convention).

¹⁴ Pring and Noe, “The Emerging International Law of Public Participation Affecting Global Mining, Energy and Resource Development”, p. 28.

¹⁵ *Ibid*, 13.

involvement, indigenous peoples' rights, and local community consultations was given a non-controversial definition that is at least appealing by the Organization of American States (OAS) Public Participation Strategy:

Interaction between government and civil society... including the processes by which government and civil society open dialogue, establish partnerships, share information, and otherwise interact to design, implement, and evaluate development policies, projects and programs.¹⁶

'Public' entails categories of: Indigenous people, local community, women, youth and Non- Governmental Organizations (NGOs). Indigenous people are inhabitants of a certain area before the western invasion and they should be satisfying the elements of prior existence, non-dominance, cultural difference from those invading and identification amongst themselves as indigenous persons.¹⁷ Local community on the other hand represents the persons in the grassroots where the local government is mostly in-charge. This category is considered highly when it comes to public participation due to the tendency of the central government taking unilateral decisions that concern them without their involvement. Women and youth are categories that are either often neglected when it comes to decision-making or are not given equal opportunities at par with other persons in the society,¹⁸ while NGOs are rapid and powerful participants in the on-going socio economic activities in which public participation is obviously vital.

As a human right, the right to public participation is yet to be categorically recognized as a norm of international law and it is therefore derived from other rights provided in the various international human rights instruments¹⁹. Some derive public participation rights from the right to self-determination from which a range of other rights are derived as will be seen in the discussion below.²⁰ Its traces can be recognized in the very 1948 Universal Declaration of Human Rights and to other international, regional and national legal instruments as analyzed in the further sections of this paper.

Another form of public participation rights is the right to free, prior, and informed consent:

"It is the right of the indigenous peoples to make free and informed choices about the development of their lands and resources."

¹⁶ Organisation of American States Inter- American Council for Integral Development (OAS CIDI), "Inter American Strategy for the Promotion of Public Participation in Decision Making for Sustainable Development", *CID/RES*, 98 (V-o/00), see introduction.

¹⁷ Pring and Noe, "The Emerging International Law of Public Participation Affecting Global Mining, Energy and Resource Development", 59.

¹⁸ *Ibid*, 66-67.

¹⁹ Ward, "The Right to Free, Prior, and Informed Consent: Indigenous Peoples' Participation Rights within International Law", 54-84.

²⁰ Ward, "The Right to Free, Prior, and Informed Consent: Indigenous Peoples' Participation Rights within International Law", 56.

It derives from property rights, cultural rights and the right to non-discrimination.²¹ This right is of major concern when it comes to properties and natural resources, extractives such as mining, oil and gas. It is also derived from the right to self-determination as stipulated in the United Nations Declaration on the Rights of Indigenous People.²²

With the major goal to articulate how the right to public participation can be used as a tool to achieve the aspirations of the AU Agenda 2063 focus being on aspirations 1,3, and 6; this paper is divided in 7 sections. The first explaining the public participation as a new concept, the second elaborating the right to public participation in the UN human rights system, the third section explains the right to public participation in the African human rights system, the fourth portrays the right to public participation in the national constitutions, the fifth explains the rights to public participation in the extractive industries, the sixth section explain how the rights to public participation are a tool in achieving the aspirations of the AU 2063 Agenda and the last section gives a conclusion.

2.0 The right to public participation in the United Nations human rights System

The United Nations being an international organization currently made up of 193 member states is committed at promoting and protecting human Rights.²³ From the Universal Declaration of Human Rights (UDHR)²⁴ to the nine core human rights treaties: the right to public participation and the rights from which it is derived from and rights to which it is intertwined with are provided for. Article 21 of the UDHR specifically provides:

1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
2. Everyone has the right to equal access to public service in his country.
3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections, which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

Art. 19 of the UDHR further provides for freedom of expression and the right to receive information, while art.20 guarantees freedom of association and assembly.

The International Covenant on Civil and Political Rights (ICCPR), which a given number of African Countries have ratified, also guarantees the very same rights.²⁵ Further, both the ICCPR and the international Covenant on Economic, Social and Cultural Rights (ICESCR) provide for:

²¹ *Ibid.*

²² General Assembly Resolution 61/295, UN. Doc A/RES/61/195 (2007).

²³ See Preamble, art 1(3) & 55 of the charter of United Nations 1945. The Charter was signed on 26th June 1945 in San Francisco and entered into force on 24th October 1945.

²⁴ A declaration made by the United Nations General Assembly, General Assembly Resolution 217 A of 10th December 1948.

²⁵ Signed in 1966 and entered into force in 1976.

“All peoples have the right to self determination”²⁶

It is argued that self-determination should include economic self-determination to enable the public to control their traditional lands, territories and resources.

Under the Convention on the Elimination of All forms of Discrimination against Women (CEDAW), the elimination of discrimination on participation in elections, government policy formulation and implementation, and participation in NGOs is guaranteed.²⁷ Persons with disabilities are also guaranteed of these rights under the Convention of Rights of Persons with Disabilities (CRPD). Children with disabilities have the right to express their views on matters affecting them, art. 21 guarantees persons with disabilities with the right to freedom of expression and access to information, the right to political and public life is also specifically guaranteed under the convention.²⁸

The United Nations promotes and protects these rights through various committees formed under the respective treaties.²⁹ They monitor the implementation of treaties by the member states through state reports sent by the member state to the committee, individual communication or complaints made to the committee and through enquiry procedures.³⁰ Further, there are bodies formed under the Charter of the United Nations whose functions are to promote and protect Human Rights.³¹ The Human Rights Council which replaced the Human Rights Commission which was formed by the Economic and Social Council;³² introduced mechanisms of Universal Periodic Review (UPR), the Human Rights Advisory Committee, and the Complaints procedure.³³ This discussion brings forward the fact that where the right to public participation is violated, the ‘public’ of the member states has a range of avenues to enforce the protection of their rights. However, when it comes to individual communication, the given treaty body would not deal with the matter where local domestic remedies are not exhausted unless such remedies are unreasonably prolonged.³⁴

²⁶ Art.1 of both the ICCPR and ICESCR, the ICESCR was passed by General Assembly Resolution 2200A (XXI) of 1966, entry into force in 1976.

²⁷ Art.7 of CEDAW, adopted in 1979.

²⁸ See art.29 of the CRPD.

²⁹ Examples of such committees include: Committee on the Rights of Persons with Disabilities; and Human Rights Committee on Civil and Political Rights.

³⁰ See also ‘Monitoring implementation of the international human rights instruments: an overview of the current treaty body systems’: Background conference document prepared by the Office of the United Nations High Commissioner for Human Rights, fifth session of the Ad Hoc committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities, 24th January- 4th February 2005.

³¹ Ally Possi & Pooja. M. Karia, “Procedure for lodging Complaints Before Human Rights Institutions: Considerations to Litigants.” *LST Law Review* 1, No.2 (2016):76-92

³² See UN General Assembly Resolution A/RES/60/251.

³³ See the ‘Institution Building Package’, Human Rights Council Resolution 6/102 of 27th September 2007.

³⁴ Ally Possi & Pooja. M. Karia, “Procedure for lodging Complaints Before Human Rights Institutions: Considerations to Litigants”, 80.

3.0 The right to public participation in the African human rights system

The African human rights system began when the then Organization of African Unity (OAU), now African Union (AU),³⁵ through its Heads of states and Government who signed and adopted the African Charter on Human and Peoples' Rights (The African Charter).³⁶ The African Charter sets out various first, second and third generation rights. Other Human rights instruments of the AU include: Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Protocol on Women's Rights),³⁷ and the African Charter on the Rights and Welfare of Children (Charter on Children's Rights).³⁸ The African Charter establishes the African Commission of Human and Peoples' Rights for the purpose of promoting and protecting human and peoples' rights in Africa.³⁹ Other bodies with similar functions include the African Court on Human and Peoples' Rights (The African Court)⁴⁰ and the African Committee of Experts on the Rights and Welfare of the Child (The African children's Committee).⁴¹

The African charter provides for the right to public participation under art.13:

1. Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.^[1]^[SEP]
2. Every citizen shall have the right of equal access to the public service of his country.^[1]^[SEP]
3. Every individual shall have the right of access to public property and services in strict equality of all persons before the law.^[1]^[SEP]

A look at this article portrays the guarantees of right to political participation and equal access to public services for the citizens of that given member state and equality to access of public property and services to individuals of that given member state.⁴² While interpreting art.13, the African Commission has extended it to cover many other various rights. For instance, in *Amnesty International v. Zambia*,⁴³ the commission has held:

³⁵ See the Constitutive Act of the African Union signed on 11th July 2000 in Togo.

³⁶ Adopted by the OAU Assembly in 1981 in Nairobi, Kenya.

³⁷ Signed on 11th July 2003 at Maputo, Mozambique by the AU in its second summit.

³⁸ Adopted on the 26th ordinary session of the Assembly of Heads of state and Government of the OAU on 11TH July 1990.

³⁹ See art.30 of the African Charter.

⁴⁰ Provided for under the Protocol to the African Charter on Human and Peoples' Rights (Court Protocol) Establishing the African Court on Human and Peoples' Rights (The Court Protocol) which was adopted on 9th June 1998 in Burkina Faso.

⁴¹ Provided for under the African Charter on the Rights and Welfare of the Child which was adopted by the Heads of States and the Government of OAU on 11th July 1990.

⁴² Morris. K. Mbondenyei, "The Right to Participate in the Government of One's Country: An Analysis of Article 13 of the African Charter on Human and Peoples' Rights in the Light of Kenya's 2007 Political Crisis", 185.

⁴³ (2000) AHRLR 325 (ACHPR).

Freedom of expression is a fundamental human right, essential to an individual's personal development, political consciousness and participation in public affair of the country.⁴⁴

Thus the above analysis clearly points out public participation not only to mean citizen participation in elections as voters or candidates but asks the government to be invoke sovereignty and will of people, and therefore guarantee all other rights that protects the interests of everyone in a society.⁴⁵

The African Charter also guarantees the right to expression and the right to receive to information, and further the right to association and assemble.⁴⁶

The jurisprudence of the African Commission also shows that art.21 of the African Charter also has traces of the right to public participation. In *Front for the Liberation of the State of Cabinda v. Republic of Angola*, the commission held:⁴⁷

... the rights in Article 21 of the Charter are still applicable in post-colonial Africa in favour of groups within states to the extent that it triggers an obligation on the part of the state parties to protect their citizens from exploitation by external powers and to ensure that groups and communities, directly or through their representatives, are involved in decisions relating to the disposal of their wealth...⁴⁸

Article 21 generally provides for the right to freely dispose wealth and natural resources.

Article 22 should also be considered here for it guarantees the right to economic, social and cultural development.⁴⁹

The protocol on women's rights elaborately and clearly points out women's right to public participation under art. 9. It guarantees the right to participate in elections equal representation at all levels of electoral processes and equal participation at all levels of development and implementation of state policies and development programs.

The Right to sustainable development is specifically provided for under the art. 19 of the Protocol on women's rights, while emphasizing on women participation it provides:

Women shall have the right to fully enjoy their right to sustainable development. In this connection, the States Parties shall take all appropriate measures to:

- a) introduce the gender perspective in the national development planning procedures; ^[11]_[SEP]

⁴⁴ *Ibid*, para 46.

⁴⁵ Morris. K. Mbondenyei, "The Right to Participate in the Government of One's Country: An Analysis of Article 13 of the African Charter on Human and Peoples' Rights in the Light of Kenya's 2007 Political Crisis", 191-192.

⁴⁶ See art. 9,10 and 11 of the African Charter.

⁴⁷ Communication 328/06 - *Front for the Liberation of the State of Cabinda v. Republic of Angola* (2013) ACHPR.

⁴⁸ *Ibid*, para 129. See also: Communication 276/03 – *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya* (2009) ACHPR, para 268.

⁴⁹ See also: Yinka Omorogbe, "The Legal Framework for Public participation in Decision- making on Mining and Energy Development in Nigeria: Giving Voices to the Voiceless", 565.

- b) ensure participation of women at all levels in the conceptualisation, decision-making, implementation and evaluation of development policies and programmes; ^[1]_{SEP}
- c) promote women's access to and control over productive resources such as land and guarantee their right to property; ^[1]_{SEP}
- d) promote women's access to credit, training, skills development and extension services at rural and urban levels in order to provide women with a higher quality of life and reduce the level of poverty among women; ^[1]_{SEP}
- e) take into account indicators of human development specifically relating to women in the elaboration of development policies and programmes; and ^[1]_{SEP}
- f) ensure that the negative effects of globalisation and any adverse effects of the implementation of trade and economic policies and programmes are reduced to the minimum for women. ^[1]_{SEP}

For reasons that the Protocol on women's rights specifically provides for right to sustainable development, it stands out as the most vibrant and innovative human rights instrument.

Since, the African Commission and the African Court are tasked with the role of promoting and protecting human rights; where there is a violation of the above-analyzed rights to public participation, the 'public' can enforce their rights through the African Court⁵⁰ and African Commission.⁵¹ However for individuals and NGOs, the governments of their countries should have made a declaration allowing their direct access to the African Court.⁵² The African Commission also receives inter-state communications.

4.0 The right to public participation in national constitutions

Nationally, the bill of rights is entrenched in the respective constitutions of the countries. The constitutions set out the respective rights and even the institutions responsible for the promotion and protection of those rights. This section would provide an analysis of the rights to public participation in constitutions of three selected countries namely: Republic of South African, Kenya and United Republic of Tanzania:

4.1 Republic of South Africa

South Africa has been first to set the trend of enacting a constitution that stresses on public participation, thus a liberal classic constitution of its own kind.⁵³ It furthers this goal by constitutionally providing for decentralization of the government in decision-making processes to reach out public services to the 'far-away' areas and to meet the

⁵⁰ See art.5 of the Court Protocol.

⁵¹ See art 55-56 of the African Charter.

⁵² See art. 34(6) and art 5(3) of the Court Protocol.

⁵³ Constitution of the Republic of South Africa Act, No. 108 of 1996 (South African Constitution).

needs of public in these areas.⁵⁴ Traces of the rights to public participation can be seen from parts of the the Preamble of the Constitution:

“... lay the foundations for a democratic and open society in which government is based on the will of people and every citizen is equally protected by law;”

s. 19 of the constitution provides for the right to participate in the activities of the political parties, in elections and voting, s.16 provides for the right to freedom of expression including the right to information. S.32 further provides for right to access to information held by the state or any other person. And further the right to public participation can be traced from the duties imposed on the government to facilitate public participation and democratic governance.⁵⁵ Of major value is s.24 that provides for the right to environment protected to secure sustainable development.

The constitution establishes a co-operative government that constitutes of national, provincial and local spheres, which are distinctive, interdependent and inter-related.⁵⁶ The local government further consists of municipalities that are established all over the territory of South Africa.⁵⁷ The municipalities are required to provide democratic and accountable government for local communities and also encourage the involvement of communities and community organizations in matters of local government.⁵⁸ Further, for the core principles, core principles and mechanisms of the municipalities the Local Government: Municipal Systems Act (systems Act) was enacted.⁵⁹ The whole of chapter of the systems Act provides community participation including aspects of mechanisms, process and procedures of public participation, communication of information, public notices; and admission of public to the meetings. It is noted that the Act shows a remarkable commitment to ensuring public participation.⁶⁰ However there are a few challenges like dysfunctionality of certain committees formed under the municipalities, lack of quality public participation, and overlooking of public participation as element of satisfying the socio- economic rights of the public.⁶¹

The two decade experienced constitutional court of South Africa has established good jurisprudence on the rights to public participation. Two cases shall be explained to portray this:

⁵⁴ Oliver.N. Fuo, “Public Participation in Decentralized Governments in Africa: Making Ambitious Constitutional Guarantees More Responsive”. *African Human Rights Journal* 15(2015): 167-191.

⁵⁵ *Doctors for Life International v. Speaker of the National Assembly & Others*, 2006 12 BCLR (CC), para 106 as cited in Oliver.N. Fuo, “Public Participation in Decentralized Governments in Africa: Making Ambitious Constitutional Guarantees More Responsive”. 172.

⁵⁶ S.40 of the South African Constitution.

⁵⁷ S.151(1) of the south African Constitution.

⁵⁸ See s. 152(1)(a) and (e) of the South African Constitution.

⁵⁹ Act no. 32 of 2000, commenced on 1st March 2001.

⁶⁰ J De Visser, “Developmental Local Government: A Case Study of South Africa (2005) as cited in Oliver.N. Fuo, “Public Participation in Decentralized Governments in Africa: Making Ambitious Constitutional Guarantees More Responsive”. *African Human Rights Journal*, 172.

⁶¹ *Ibid*, 174.

In *Doctors for life International, Matatiele Municipality & others v. The President of the Republic of South African & others*,⁶² the court held that the right to public participation guarantees a positive right of the public to participate in public affairs and a duty on the government to facilitate public participation in the conduct of public affairs in order to realize the right. That the duty to facilitate public participation entails providing meaningful opportunities for public participation in policy formulation and law making processes and further to implement measures to ensure that the public has the ability to take advantage of the opportunities provided by providing notices, public education through workshops, road shows, radio programs and publications informing the public of various activities.⁶³

In *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v. City of Johannesburg & Others*,⁶⁴ the court held that meaningful engagement helps resolve disputes through understanding and sympathetic care. It further emphasized that people may be vulnerable and may refuse to take part in the engagement, the municipality should not walk away but it should make reasonable efforts to engage with them, and such people should be managed by careful and sensitive people to achieve a structured, consistent and careful engagement. Further that, Civil Society Organizations (CSOs) should champion such engagements.⁶⁵ Meaningful engagement here is in line with planned evictions of the public from certain areas for various reasons.

4.2 Kenya

The constitution of Kenya 2010 is also referred to as one of the transformative constitutions because it portrays the commitment of Kenyans to establish a decentralized system of government based on the principles of good governance, human rights and democracy.⁶⁶ It provides for rights of public participation by provision of the right to freedom of expression, which includes the right to receive information, and right to access of information from the state or from another person, the right to political participation.⁶⁷ It further provides for rights of persons with disabilities including reasonable access to information.⁶⁸ The state has a duty to ensure that the youths are associated and participate in political, social, economic and other spheres of life.⁶⁹ This duty of the state also extends to the minorities and marginalized groups and older members of the society.⁷⁰ The state and the state organs have the fundamental duty to protect, promote, observe and respect these fundamental rights and freedoms,⁷¹ while the

⁶² (2) 2007 1 BCLR 47 (CC).

⁶³ *ibid*, para 119-132.

⁶⁴ 2008 (5) BCLR 475 (CC).

⁶⁵ *ibid*, para 15-21.

⁶⁶ Oliver.N. Fuo, "Public Participation in Decentralized Governments in Africa: Making Ambitious Constitutional Guarantees More Responsive". *African Human Rights Journal*, 175. See also art. 10(2) of the Kenyan Constitution.

⁶⁷ See art. 33,35 and 38 of the Kenyan Constitution.

⁶⁸ See art. 54(1)(c) of the Kenyan Constitution.

⁶⁹ See art. 55(b) of the Kenyan Constitution.

⁷⁰ See art. 56 and 57 of the Kenyan Constitution.

⁷¹ Art. 21(1) of the Kenyan Constitution.

High Court has the duty to deal with the violations and infringements of these rights and freedoms.⁷² The government is of national and county levels that work interdependently and on the basis of consultation and cooperation.⁷³ The whole of chapter 11 provides for the devolved government, some of the objects of the devolution government that portray public participation are:

to give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them;

to recognise the right of communities to manage their own affairs and to further their development;⁷⁴

The County Government Act further allows decentralization to urban areas and cities, villages and ward units.⁷⁵

4.3 United Republic of Tanzania

The Constitution of the United Republic of Tanzania 1997, provides for rights to public participation by provision for the right to freedom of expression including the right to receive information.⁷⁶ It also specifically provides for the right to freedom to participate in public affairs under art. 21:

21.-(1) Subject to the provisions of Article 5, 39 and 67 of this Constitution and of the laws of the land in connection with the conditions for electing and being elected or for appointing and being appointed to take in matters related to governance of the country, every citizen of the United Republic is entitled to take part in matters pertaining to the governance of the country, either directly or through representatives freely elected by the people, in conformity with the procedures laid down by, or in accordance with, the law.

(2) Every citizen has the right and the freedom to participate fully in the process leading to the decision on matters affecting him, his well-being or the nation.

The constitution also provides for the local government authorities to the levels of regions, districts and villages, and it clearly provides that the purpose of having a local government is to transfer authority to the people and to involve them in the planning and implementation of development programs within their respective areas and generally through out the country.⁷⁷

⁷² Art.23 of the Kenyan Constitution.

⁷³ As per art. 6(2) of the Kenyan constitution.

⁷⁴ See art. 174 of the Kenyan Constitution.

⁷⁵ County Government Act, no. 17 of 2012.

⁷⁶ Art. 18 of the Constitution of Tanzania.

⁷⁷ Art.145 and 146 of the Constitution of Tanzania.

5.0 Public participation Rights in Extractives Industry

The control of extractives is of vital importance to any country, and that is why in almost every country of the world there exists a system where the sovereign state owns the resources.⁷⁸ For African countries these extractives are very important because they depend on the revenues accrued from them.⁷⁹

It is noted that public participation requirements are coming up as components of the trend involving increased legal regulation of the mining and energy industries.⁸⁰ And it is further a part of the trend ‘public rights to control private development’ in the very same sectors.⁸¹ Since there does not exist a specific international norm for public participation, when it comes to natural resources and extractives, the right to free, prior, and informed consent which is a form of public participation rights; is derived from the rights of ethnic, religious, and linguistic minorities. For instance, art. 27 of the ICCPR:

... persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

The Human Rights Committee (HRC) has extended this right to controlling and use of lands and resources and that the state has a duty to ensure effective participation of minorities in the decisions that affect them; and a further duty to consult them before granting concessions for any economic development within their traditional and territorial areas.⁸²

A similar decision was made by the Committee on Economic, Social and Cultural rights by interpreting art.15 of ICESCR that provides for the right to participate in cultural life; that where the indigenous were not consulted for prior and informed consent, they should be restituted to their lands and resources.⁸³ Even the Committee on the Elimination of Racial Discrimination, made it clear that state parties have the duty to ensure consultation and attain consent of the indigenous people when it comes to development and resource exploitation within their territories.⁸⁴

South Africa, which is a country of substantial energy deposits and is known as one of the worlds leading exporters, its constitution provides for the right to environment

⁷⁸ Yinka Omorogbe, “The Legal Framework for Public participation in Decision- making on Mining and Energy Development in Nigeria: Giving Voices to the Voiceless”, 550.

⁷⁹ *Ibid.*

⁸⁰ Pring and Noe, “The Emerging International Law of Public Participation Affecting Global Mining, Energy and Resource Development”, 14.

⁸¹ *Ibid.*

⁸² UN General Comment No.23: The Rights of Minorities (Art.27), 3.2 UN Doc. CCPR/C/21/Rev.1/Add.5 (1994).

⁸³ CESCR, Ggeneral Comment No.21, Right of everyone to take part in Cultural Life (art.15(1)(a) of ICESCR), UN.Doc. E/C.12/GC/21 (2009).

⁸⁴ UN Commission on the Elimination of Racial Discrimination, Concluding observations of the Committee on Elimination of Racial Discrimination: Annex xxiii, 4 (d), UN Doc. Supplement No 18 (A/52/18), (1997).

secured for sustainable development.⁸⁵ And further the process of public participation is fully provided for in the Environmental Conservation Act 1989 and the regulations made under it. This is great achievement for it is said where the environment suffer, people suffer and where people suffer, the environment suffers, and therefore for people to people to protect the environment they must be accorded the right to public participation.⁸⁶

On a further note, public participation stands vital in the extractives industry in order to avoid the ‘resource curse’ also known as the ‘paradox of the plenty’, since lack of public involvement in the decision making is one of its causes.⁸⁷

6.0 Achieving Aspirations 1,3 and 6 of the AU 2063 Agenda

The Africa we want:

A prosperous Africa based on inclusive growth and sustainable development, An Africa of good governance, democracy, respect for human rights, justice and the rule of law, and An Africa whose development is people driven, relying on the potential of African People, especially its women, youth and caring for children.⁸⁸

From the foregoing discussion, the right to public participation can be the most vital tool in achieving the above aspirations in the following manner:

When exploring the rationale of public participation through both processed base (increase in public awareness and education, rise of opportunities for the public to give their views, reduction of conflicts among different competing interests, and increase of public acceptance on the decisions reached) and substantive based perspectives (reflective public values, local needs, and environmentally protected);⁸⁹ one realizes that it contributes to sustainable development, sustainable development meaning:

“development that meets the needs of the present without compromising the ability of future generations to meet their own needs.”⁹⁰

⁸⁵ Yinka Omorogbe, “The Legal Framework for Public participation in Decision- making on Mining and Energy Development in Nigeria: Giving Voices to the Voiceless”, 554.

⁸⁶ Pring and Noe, “The Emerging International Law of Public Participation Affecting Global Mining, Energy and Resource Development” 51.

⁸⁷ Natural Resource Governance Institute, “The Resource Curse: the political and economic challenges of Natural Resource Wealth. NRGI: Oil, gas and mining for development.

⁸⁸ Aspirations 1,3, and 6 of “*Agenda 2063, the Africa we want*” (Popular version). African Union Commission, 2015.

⁸⁹ Pring and Noe, “The Emerging International Law of Public Participation Affecting Global Mining, Energy and Resource Development”, 22.

⁹⁰ Pring and Noe, “The Emerging International Law of Public Participation Affecting Global Mining, Energy and Resource Development”, 22-23.

Thus, public participation proves very vital in sustainable development, and its recognition as a human right is additionally vital including the rights from which it is derived from or intertwined with.

The realization of the right to public participation has remained complicated in Africa due to various factors ranging from legal ambiguities, extreme poverty, corruption, and reliance and continuation laws and policies that were enacted during the colonial era; all of which prevent and obscure disadvantaged 'public' to enjoy this right fully.⁹¹ Thus African countries should begin by combating corruption, enhancing democratic elections to avoid the power quest, impart necessary awareness, and also work on bringing in modern laws that suit the current trend of the society.

Additionally, the fact that the right is derivable and intertwined with other rights provided in the international treaties and instruments and the instruments under the instruments under the African Union, and additionally that most of the member states of the African Union are signatories, have ratified and domesticated such instruments, it is the duty now of all the member states to thoroughly protect, promote, monitor and respect and right to public participation in the sense of its 'new concept' especially in the sectors that are vital in sustainable development like the extractives. This can be done by raising awareness amongst the public, paying attention to the special groups, vigorously starting off radio programs and television programs, introducing it as topics and courses in primary and secondary education curriculum.

NGOs and CSOs in the respective member states should assist the governments in the promotion, protection and monitoring of these rights. They should in fact facilitate the engagement between the public and the governments. Where the government fails, violates or infringes these rights; these NGOs and CSOs should raise awareness of the same amongst the public and assist them enforce their public participation rights in the meaning of the 'new concept' beginning from the available national remedies, regional and international remedies. This will not only develop jurisprudences of the right to public participation in its 'new concept' meaning but also encourage their colleagues to do the same and the government to stop the infringement and violation.

Member states of the African Union that have not signed, ratified or domesticated the respective instruments analyzed above and other related instruments to the right to public participation should immediately take measures in doing so and enact laws for the respective instruments or amend laws of their respective countries where required. The African Union should devise measures to achieve and encourage this. The NGOs and CSOs should also assist on this.

The African Union member states should take initiatives and be the first in the world to specifically sign a treaty instrument for the right to public participation with focus to the major extractives industries.

⁹¹ Morris. K. Mbondenyei, "The Right to Participate in the Government of One's Country: An Analysis of Article 13 of the African Charter on Human and Peoples' Rights in the Light of Kenya's 2007 Political Crisis", 192.

Other countries should take examples from the liberal constitutions of South Africa and Kenya that have guaranteed the right to public participation in the bill of rights of their constitutions and have decentralized the decision making to the root levels. Moreover, other member states should take initiatives in providing for these local level governments in their constitutions together with the provisions of strict duties of enhancing public participation by the local governments. Further, initiatives can be taken by enacting laws and regulations in furtherance of the same. This is because a constitutional guarantee in the bill of rights provides a greater level of guarantee to the public in that the public can enforce the same in the respective constitutional courts.

When it comes to consultation and engagement with the public in matters of eviction, which may be an outcome of investment and exploitation of resources; careful and sensitive persons should be involved to make sure structured, consistent and careful engagement is done. This works out best where the public is vulnerable and helps tackle situations where they may refuse engagement.

The institutions responsible for the promotion and protection of human rights under the African Union and further in the respective member states should take initiatives and measures to come up with liberal decisions like that of the united nations treaty bodies and the South African Constitutional court. The more liberal the institutions, the less violation and infringement by the defending states.

It is also noted that where the public from the local areas concerned are engaged and participated in the decision making, the very African potential especially that of women would be utilized. Traditional ways of decision-making and the elderly wisdom would definitely encourage sustainable development.

And last but not the least; the respective National Human Rights Institutions (NHRI) in the respective member states should take measures and initiatives to adhere to the universally accepted Paris Principles on the framework for NHRIs.⁹² This would encourage proper follow up legislative provisions and administrative measures, devise methods on monitoring of the right to public participation, devise mechanism on international treaty reporting, it would strength international cooperation between NHRIs of various countries, NHRIs are encouraged in raising awareness and education, and better ways of complaints handling can be learnt.⁹³

The member states of the African Union can spearhead the joining into the ‘Global Peoples’ Assembly, a legislative assembly that would be elected by the people of the world in a system of global voting.⁹⁴ It is an initiative to respond and address the lack of meaningful public participation. This may ultimately lead to creation of ‘culture of

⁹² Adopted in 1991 and approved by the UN General Assembly in 1993.

⁹³ The Danish Institute for Human Rights, NHRIs and Public Participation, issue paper by Ulrik Spliid. Wilders Plads. Denmark’s National Human Rights Institution. 2013.

⁹⁴ Richard Falk and Andrew Strauss, “On the Creation of Global Peoples’ Assembly: Legitimacy and Power of Popular Sovereignty”. *Stan. Journal of international law*. 2000, 191.

participation' as more collaborations increase between CSOs and the government and the public.

7.0 Conclusion

The right to public participation does specifically guarantee political participation but it does not end there, it facilitates other rights that must be guaranteed to ensure satisfactory and fair public participation.⁹⁵ The African Union member states still seem that have limited experience in institutionalizing the right to public participation in their law and policy. Given the benefits of public participation: the fact the NGOs have more scientific expertise, local communities being important sources of information that the central government may not have, and the fact that the range of data that decision makers have would increase,⁹⁶ it is envisaged that the member states of the African Union would soon incorporate the right to public participation in their constitutions. The right to public participation not only guarantees other human rights but also stands as a vital component for sustainable development.

⁹⁵ Morris. K. Mbondenyei, "The Right to Participate in the Government of One's Country: An Analysis of Article 13 of the African Charter on Human and Peoples' Rights in the Light of Kenya's 2007 Political Crisis", 192.

⁹⁶ Pring and Noe, "The Emerging International Law of Public Participation Affecting Global Mining, Energy and Resource Development", 24.