

Constitutional responsibilities of public officers in (Un)making public policy, rules and regulations in Kenya

Prof Ben Sihanya

Kenya's constitutional and policy making framework

The Constitution of Kenya 2010 provides for certain constitutional responsibilities of public officers when enacting or rescinding public policies, rules and regulations that affect or are related to the enjoyment of human rights.

My overarching argument is that there are three main constitutional requirements that public officers must always consider when enacting or rescinding public policies, rules and regulations.

First, public officers are required to adhere to the set values and principles of governance. Article 10 of the Constitution binds and subjects all state officers to have due consideration to participation of the people, the rule of law, human dignity, equity, social justice and human rights whenever they make or implement any public policy decision. Articles 10, 43, 129(2) and 232 of the Constitution provide that the exercise of public authority, and public policy making, should be undertaken with popular participation and for the wellbeing of the people. This right is also provided for in Article 21 of the Universal Declaration of Human Rights (UHDR) as well as Article 13 of the African Charter on Human and People's Rights among other international legal instruments.

Second, the Constitution under Art 21(2) mandates the Government to take legislative, policy and other lawful measures to achieve the realization of the rights provided for under the Bill of Rights. This includes the setting of standards. Article 21(1) further obligates the state to address the needs of vulnerable groups in the society. These include women, children and the youth (of female gender). This position has been extensively litigated and held to be so by the Courts in several constitutional petitions. In *Mathew Okwanda v. Minister of Health and Medical Services & 3 Others*, Petition No. 94 of 2012, the court agreed with the Petitioners and affirmed that the success of our Constitution largely depends on the State delivering tangible benefits to the people particularly those who live at the margins of society. The incorporation of economic and social rights set out in Article 43 sums up the desire of Kenyans to deal with issues of poverty, unemployment, ignorance and diseases.

Third, Articles 22 and 159, among others, open up the judicial or adjudicatory process for the people, in terms of access to justice through broader capacity to sue (or *locus standi*). In fact, with regards to *locus standi* (or capacity to sue), the court in *Coalition for Reform and Democracy & Others v. Attorney General*, Petition No 628 of 2014, stated that a party does not have to wait until a right or fundamental freedom has been violated, or for a violation of the Constitution to occur, before approaching the Court. The court added that a party has a right to approach the Court for relief if there is a threat of violation or contravention of the Constitution.

It is important to note that the judiciary has been regarded as the “guard of guards.” This judicial or adjudicatory role has been called into action on several occasions as was in the case of *Aids Law Project v. Attorney General & 3 Others*, Petition No. 97 of 2010 as well as in *Kenya Legal and Ethical Network on HIV & AIDS (KELIN) & 3 Others v. Cabinet Secretary Ministry of Health & 4 Others*, Petition No. 250 of 2015. In both cases, the intervention of the judiciary was sought by both aggrieved and interested parties and the courts ruled in their favour. It is also worth noting that the provisions of Article 159 bestows upon the judiciary the core function of not only ensuring but also restoring constitutionality in instances where there is an attempt to erode its principles and values. This was also the position held by the court in Petition No 628 of 2014.

In terms of values and principles, the Constitution provides for at least three requirements. First, Article 10 articulates a set of comprehensive national values and principles of governance to bind all state organs, state officers, public officers and all persons in making or implementing public policy decisions. Second, under Article 21, the Government has a mandatory duty of taking policy measures to achieve the progressive realization of the comprehensive economic and social rights guaranteed under Article 43. The implementation of Article 43 has been litigated in various cases including Petition No. 94 of 2012 as well as Petition No. 15 of 2011. In both instances, the court pointed out that the inclusion of economic, social and cultural rights in the Constitution is aimed at advancing the socio-economic needs of the people of Kenya, including those who are poor, in order to uplift their human dignity.

Third, Article 232 provides that the values and principles of the public service include the involvement of the people in the process of policy making.

Art 47 provides that every person has the right to enjoy expeditious, procedurally fair, efficient, lawful, and reasonable administrative action. The article also bolsters Arts 33, 34, 35, and 46(1) on the freedom of expression, of the media and the right of access to information.

Public officers and public policy

Article 260 of the Constitution of Kenya defines a public officer as any State officer or any person, other than a State Officer, who holds a public office. Public office is further described to mean an office in the National Government, a county government or the public service, if the remuneration and benefits of the office are payable directly from the Consolidated Fund or directly out of money provided by Parliament. The National Government includes Parliament, the Executive and the Judiciary as well as Constitutional Commissions and Independent Offices.

Policy making process in Kenya

Policy making has been integrated into the Constitution in at least three main ways: First, Article 10 articulates a set of comprehensive national values and principles of governance to bind all state organs, state officers, public officers and all persons in making or implementing public

policy decisions. In *Kenya Legal and Ethical Network on HIV & AIDS (KELIN) & 3 Others v. Cabinet Secretary Ministry of Health & 4 Others*, Petition No. 250 of 2015. The Petitioners moved to court to question the validity of an executive order that was found to have violated the Bill of Rights. Interestingly, the High Court did not hesitate to declare the order unconstitutional.

Second, Article 21 tasks the Government with a mandatory duty of taking policy measures to achieve the progressive realization of the comprehensive economic and social rights guaranteed under Article 43. Third, Article 232 provides that the values and principles of the public service include the involvement of the people in the process of policy making. This is especially in matters of life, security, safety and health as litigated in the cases mentioned in the foregoing paragraphs.

The impact of these constitutional provisions can be demonstrated through a full appreciation of the policy process. The policy making cycle conventionally entails policy initiation, formulation, debate, implementation and review. These activities are conducted by a number of organs and persons at different governance levels, including the Parliament, the Judiciary, President, Deputy President, Cabinet, cabinet secretaries, principal secretaries, other constitutional office holders, constitutional commissions, devolved governments, individual state officers in the national and county governments, parastatals, and state agencies. Previously, the Kenyan Parliament was involved in policy making by debating development plans or sessional papers, among others. The 2010 Constitution, emphasizes separation of powers and checks and balances renders this role unconstitutional or constitutionally suspect, as policy making is deemed an executive function.

Notably, the constitutional framework for policy making affects the process and outcome of policy making at all these levels. In terms of the process, it must be participatory, inclusive and transparent, and it must embody integrity and accountability.

In terms of outcome, Article 10 and other provisions require that the process of policy making should secure patriotism, national unity, sharing and devolution of power, the rule of law, democracy, equity and equality, social justice, inclusiveness, non-discrimination, and sustainable development. The process of policy making has gradually been opened up to public scrutiny and criticism. For example, prior to the litigation of the Petition No. 250 of 2015 above, the President had issued a directive through an executive order that all County Commissioners collect data of all students and pupils living with HIV/AIDs. The order was quashed as it did not only violate the Bill of Rights, it also violated certain provisions of the Constitution. Significantly, the Judiciary has the power to make, and has made policies that relate to its own functions and to Government generally. These include *Strengthening Judicial Transformation* (2016) as well as the general policies to enforce human rights.

Significance of constitutionalising policy making process

Anchoring the policy making framework in the Constitution is significant in at least three ways. First, it opens up the process of policy making for different kinds of participation by state organs and officers, and non-state actors such as academia, the civil society, the general public, etc. This is noteworthy in terms of value addition in the governance process in Kenya. Grassroot participation in policy making is therefore commercial as it enhances ownership and technical efficiency. Second, the constitutional provisions supply a framework for measuring the constitutionality or otherwise of the policy documents. They require that the policies secure such outcomes as equity, equality and social justice (Article 10). In this way, policy as a macro and micro management instrument brings to life the values and principles embodied in the Constitution.

Third, the constitutional framework ensures the policy making process and outcome justiciable. For instance, any process or outcome which is non-compliant with the Constitution, statutes, rules and regulations must be rendered null and void. This position has been upheld recently by the Supreme Court in the Presidential Petition No.1 of 2017. This heralds a new space in the governance process in Kenya, in terms of civil society's impact on the exercise of presidential and public authority in Kenya, from managerial, representative and juridical perspectives.

Prof Ben Sihanya, JSD (Stanford) is a *Public Interest Advocate and Scholar*, ©, *Intellectual Property and Constitutional Democracy at the University of Nairobi Law School*, *Sihanya Mentoring & Innovative Lawyering*; sihanyamentoring@gmail.com