

UNIVERSITY OF NAIROBI

SCHOOL OF LAW

**A CRITICAL APPRAISAL OF THE ROLE OF SENATE UNDER THE
CONSTITUTION OF KENYA, 2010**

WAMBULWA JOB WAFULA

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DECLARATION

Declaration by the Student:

This thesis is my original work and has not been presented for a degree at the University of Nairobi or in any University or examination body.

Name: **WAMBULWA JOB WAFULA**

Registration No: **G62/82535/2015**

Signature

Date.....

Declaration by the Supervisor:

This thesis has been submitted for examination with my approval as the University supervisor.

Name: **MR. JOSHUA KIPTOO**

Department:

Signature.....

Date.....

DEDICATION

This thesis is dedicated to my son Juan Wekesa, my wife Patriciah, my mother Grace, my father Vincent, my brothers Wyckliffe, Amos, Aron, Sammy, my sisters Sarah, Deborah, Naomi and my LLM classmates and friends: Moses Sikuta, Mwengi Mutuse, Nelson Mandela, Sudi Wandabusi, Nick Osoro, Nick Biketi, Hon. Kalonzo Musyoka, Onyango Oloo, Rista Nyabuto, Maurine Ntinyari among others. I cherish you for the love, encouragement and inspiration.

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TABLE OF CONTENTS

DECLARATION	i
DEDICATION	ii
ACKNOWLEDGEMENT	iii
TABLE OF CONTENTS	iv
ABBREVIATIONS	vii
LIST OF LEGAL INSTRUMENTS	viii
LIST OF CITED CASES	ix
ABSTRACT	xi
CHAPTER ONE	1
1.0 INTRODUCTION	1
1.1 Background to the Study.....	1
1.2 Problem Statement.....	7
1.3 Justification of the study.....	8
1.4 Research Objectives.....	9
1.4.1 Main Objective.....	9
1.4.2 Specific objectives	9
1.5 Research Questions	9
1.6 Research Hypotheses.....	10
1.7 Theoretical Framework.....	11
1.8 Literature Review	17
1.9 Research Methodology	24
1.10 Scope and Limitations of the Study	28
1.11 Chapter Breakdown	29
CHAPTER TWO	31
2.0 HISTORICAL DEVELOPMENT AND PHILOSOPHICAL FOUNDATIONS OF THE ROLE OF LEGISLATURE’S SECOND CHAMBER/SENATE	31
2.1 Introduction	31
2.2 Historical Origins of Legislature’s Senate/Second Chamber.....	31
2.3 Arguments For and Against Second Chamber	36
2.4 Conclusion.....	41

CHAPTER THREE	42
3.0 HISTORY, ESTABLISHMENT, COMPOSITION AND ROLE OF THE KENYAN SENATE UNDER THE 2010 CONSTITUTION OF KENYA: AN OVERVIEW	42
3.1 Introduction	42
3.2 History of Bicameralism in Kenya	42
3.3 Establishment of the Kenyan Senate under the 2010 Constitution of Kenya	48
3.4 Composition of the Senate under the 2010 Constitution of Kenya.....	53
3.5 Role and Powers of Senate under the 2010 Constitution of Kenya	59
3.6 Conclusion.....	65
CHAPTER FOUR	67
4.0 APPRAISING THE SCOPE, NATURE AND EXTENT OF SENATE’S LEGISLATIVE AND OVERSIGHT ROLE: ADDRESSING CURRENT SUPREMACY WARS	67
4.1 Introduction	67
4.2 Senate’s Legislative Function in ‘Matters Concerning Counties’	68
4.3 Senate’s Oversight Function Over National Revenue Allocated to the County Government	79
4.4 Conclusion.....	84
CHAPTER FIVE	85
5.0 SUMMARY OF FINDINGS, CONCLUSIONS AND RECOMMENDATION	85
5.1 Introduction	85
5.2 Summary of findings	85
5.2.1 The role of the senate under CoK, 2010	85
5.2.2 Senate’s legislative function in matters concerning counties.....	85
5.2.3 Senate’s oversight function over national revenue allocated to counties.....	86
5.2. 4 Disputes between the senate and national assembly over bills concerning counties	87
5.2.5 Resolution of disputes between the senate, national assembly and county governments	87
5.3 General Conclusions.....	87
5.4 Recommendations	89
5.4.1 Oversight role of the over national revenue allocated to counties	89
5.4.2 Oversight role of the senate vis-a- vis county assemblies.....	90
5.4.3 Legislative role of the senate over matters concerning counties.....	90
5.4.4 Disputes between the senate and national assembly on whether the bills concerns counties	91
5.4.5 Benchmarking with other Ccountries with successful bicameralism.....	91

5.4.6 Disputes among the Ssenate, Ccounty Ggovernments and the Nnational Aassembly.....	91
APPENDICES.....	92
APENDIX A: QUESTIONNAIRE.....	92
APENDIX B: INTERVIEW SCHEDULE.....	96
APPENDIX C: CONSENT FORM.....	98
APPENDIX D: LIST OF RESPONDENTS.....	99
BIBLIOGRAPHY	100
Books.....	100
Articles and Journals	103
Thesis	107
Institutional Reports and Publications.....	107
Internet/Online Sources	108

ABBREVIATIONS

CoK	Constitution of Kenya
CGA	County Government Act
CGD	Center for Governance and Development
CLS	Critical Legal Studies
IDEA	Institute for Democracy and Electoral Assistance
KADU	Kenya African Democratic Union
KANU	Kenya African National Union
MCA	Member of County Assembly
MP	Member of Parliament
NCOP	National Council of Provinces
PFMA	Public Finance Management Act, 2012

LIST OF LEGAL INSTRUMENTS

1. Government of Ethiopia, *Constitution of the Federal Democratic Republic of Ethiopia*, 1994.
2. Government of Kenya, *Division of Revenue Bill of 2015* (Government Printers, 2015).
3. Government of Kenya, *Constitution of Kenya (Amendment) (No 4) Act No. 19 of 1966* (Government Printers, 1966).
4. Government of Kenya, *Constitution of Kenya (Amendment) Act No 14 of 1965* (Government Printers, 1965).
5. Government of Kenya, *County Government Act and the Public Finance Management Act of 2012* (Government Printers, 2012)
6. Government of Kenya, *County Government Act No. 17 of 2012* (Government Printers, 2012)
7. Government of Kenya, *Draft Constitution of Kenya (Bomas Draft)* (Constitution Kenya Review Commission 2004).

LIST OF CITED CASES

1. Association of Gaming Operators-Kenya & 41 others vs Attorney General & 4 others [2014] eKLR, Petition 56 of 201
2. Commission for the Implementation of the Constitution vs Attorney General and others(2013)
3. Council of Governors & 6 Others vs The Senate Petition Number 413 of 2015, [2015] eKLR
4. Ex Parte President of South Africa: In Re Constitutionality of the Liquor Bill 2000, 2000(1) BCLR 1
5. In the Matter of National Land Commission, Reference Number 2 of 2014, [2014] eKLR.
6. International Legal Consultancy Group vs the Senate and Clerk of the Senate, Constitutional Petition No.8 of 2014
7. Judicial Service Commission vs Speaker of the National Assembly and Another (2014) eKLR
8. Law Society of Kenya & 2 Others vs Attorney General & 2 Others, Petition 311 of 2016
9. Law Society of Kenya vs Centre for Human Rights and Democracy & 13 Others, Civil Appeal No. 308 of [2012] eKLR 2012
10. Martin Nyaga Wambora & 3 Others vs Speaker of the Senate & 6 Others, Civil Appeal No.21 of 2014, [2014] eKLR.
11. Matter of the Principle of Gender Representation in the National Assembly and the Senate Advisory Opinion Number 2 of 2012, [2012] eKLR.

12. Mwangi Wa Iria & 2 Others vs Speaker Murang'a County Assembly & 3 Others, Petition 458 of 2015, [2015] eKLR.
13. Re the Matter of the Interim Independent Electoral Commission, Constitutional Application No.2 of 2010, eKLR 2010.
14. Republic of Kenya vs Registrar of Societies and 5 others ex parte Kenyatta and six Others (2008) eKLR.
15. Speaker of the Senate & Another vs Attorney General & 4 Others, Advisory Opinion Reference No. 2 of 2013, [2013] eKLR.
16. William Kamket & 2 others vs Attorney-General & 5 others [2013] eKLR, Petition NO. 40 of 2013.

ABSTRACT

The 1963 Independence constitution of Kenya had established a bicameral legislature comprising of the Senate and House of Representatives. The role of the Senate was to protect the regions. However, due to deficiency of political will from the then government which favored unitary system of government, the Senate was abolished and merged with House of Representatives to form National Assembly in 1967. However, in 2010, the Constitution of Kenya reintroduced the Senate. Article 96 of the Constitution establishes the Senate and provides for its roles. The main justification of establishing the Senate was to represent and protect the interest of counties at national level. In 2013 through general elections the Senate was established comprising of the elected county representatives, nominated members of the Senate to represent special interests and the speaker. Kenyans were excited that the Senate would discharge their mandate and steer the fruits of devolution. However, since its establishment, there have been varied views on its effectiveness in representing and protecting the counties' interests. The Senate has been in conflict with the National Assembly and the County of Government over its functions.

The supremacy battles between the Senate and the National Assembly is underpinned on the extent upon which the Senate exercises its legislative mandate on matters concerning counties. The Senate has accused the National Assembly of ignoring its legislative input in Bills concerning the county. At the same time the National Assembly accuses the Senate of usurping its powers in legislation. On the other hand, the Governors and members of County Assemblies (MCAs) have accused the Senate of usurping their powers in exercising its oversight role over national revenue allocated to the counties. These supremacy battles undermine the intended fruits of devolution.

The conflicts amongst these organs have been attributed to the weak legal framework providing roles of the senate. The senate's oversight role is limited to national revenue allocated to the counties while the county assemblies play oversight over county executives over all fiscal matters. On the other hand, the senate is mandated to legislate on 'matters concerning counties' while the national assembly plays a role in all legislative matters. This study appraises the legislative and oversight roles of the Senate and the extent of the effectiveness of those roles as provided for under the CoK.

CHAPTER ONE

1.0 INTRODUCTION

1.1 Background to the Study

The Constitution of Kenya, 2010 provides for two levels of government comprising of national and 47 county governments.¹ These two levels are distinct from each other but inter-dependent and conduct their affairs through consultation and cooperation.² The national government is composed of Parliament, the Executive and the Judiciary while the county governments (47 county governments) are composed of County Assemblies and County Executives. In Kenya, the Legislature is designed as a bicameral body comprising of the National Assembly and the Senate.³ The Senate being one of the institutions of a bicameral parliament is an integral part of devolution.⁴ One of the main constitutional roles of the Senate is to represent and protect the interests of devolved governments.⁵ This function is performed through oversight and legislative mandate. It is thus an important pillar to support and protect devolved system of government in the country.

The 1963 Independence Constitution introduced a bicameral parliamentary system comprising of the Senate and House of Representatives.⁶ It also created a federal system with three levels of government: the national and regional, with local government as a competency of the regional government.⁷ Seven regions were created with each having legislative and executive powers over

¹ Article 6, CoK, 2010.

² Ibid.

³ Article 93, CoK, 2010.

⁴ Mutakha Kangu, *Constitutional Law of Kenya on Devolution*. (Strathmore University Press, 2015) 345.

⁵ Articles 96 and 9, CoK 2010.

⁶ Arap Kirui and Kipchumba Murkomen 'Legislature: Bicameralism under the new constitution' (SID Constitution Working Paper No. 8, 2011).

⁷ Kangu, (n 5) 73.

certain matters.⁸ The Senate was meant to represent and safeguard the interests of the people of various regions otherwise referred to as *majimbo*⁹ through legislation and oversight.¹⁰ However, there were constitutional weaknesses that exposed the Senate to a myriad of challenges that made it ineffective in representing and protecting the regions. The challenges included preference of the executive to deal with House of Representatives rather than the Senate in major parliamentary functions and starving the Senate of the necessary resources to facilitate its work among others.¹¹ These challenges thus rendered incapable of holding the government accountable on matters affecting the regions.¹²

Because of the constitutional weaknesses, the period between 1964 and 1966 saw a number of constitutional changes intended to abolish the *Majimbo* constitution and replace it with a republican one which in turn rendered the Senate completely ineffective.¹³ The amendment in 1964 re-designed the regional presidents as Chairmen.¹⁴ Further amendments in 1965 did away with the name 'regions' and reverted to colonial name 'provinces' while 'regional assemblies' became 'provincial councils'.¹⁵ Finally in 1966, the Senate having been rendered useless was abolished and merged with the House of Representative.¹⁶ From the above evidence, the design of the Senate at independence was not effective in protecting the regions from manipulation and eventual abolishment.

⁸ Ibid.

⁹ This referred to the 7 regions that were created under the Independence Constitution under the then federal system of government.

¹⁰ Kangu (n 5)74.

¹¹ Kirui and Murkomen (n 7) 5.

¹² Jesse Harris Proctor, *The Role of the Senate in the Kenya Political System* (University of Nairobi Press 1965).

¹³ The executive powers of the regions were greatly watered down through the Constitution of Kenya (Amendment) Act No 28 of 1964. The threshold for the Senate to approve constitutional amendments was also reduced through the Constitution of Kenya (Amendment) Act No 14 of 1965.

¹⁴ See Act No. 38 of 1964.

¹⁵ See Act No. 14 of 1965.

¹⁶ This was through the seventh Constitution of Kenya (Amendment) (No 4) Act No. 19 of 1966.

After years of a centralized system of government and unicameral legislature, growing agitations led to commencement of the constitutional review process that culminated in the current Constitution. The re-introduction of the multi-party democracy through the amendment of section 2A of the then Constitution was the first remarkable milestone in the constitutional review process.¹⁷ The enactment of the Constitution of Kenya Review Act in 1997¹⁸ set the stage for the establishment of the Constitution of Kenya Review Commission (CKRC) that kick started a comprehensive constitutional review process.¹⁹

During this constitutional review process, many Kenyans expressed a wish for a devolved system of government with a bicameral legislature.²⁰ Various constitutional drafts emerged: The Draft Constitution of Kenya, 2004 which was famously referred to as *Bomas Draft*;²¹ the Proposed Constitution of Kenya, 2005 which was famously referred to as the *Wako Draft*;²² the Harmonized Draft Constitution, 2009 and the Revised Harmonized Draft Constitution, 2010. Other than the *Wako Draft*, which proposed a unicameral legislature, the rest of the drafts proposed a bicameral legislature.²³ However, all drafts had varied proposals in terms of composition, functions, powers and mode of election of the members of the legislative chambers.

The *Bomas draft* proposed an indirectly elected Senate with equal legislative mandate to that of the lower chamber.²⁴ The harmonized draft proposed a comparatively similar model although it shifted the governance structure to a hybrid system with the Senate having the mandate to enable

¹⁷Petronella Mukaindo, *Kenya's Devolution Implementation: Emerging Issues in the Relationship between Senate and County Governments* (Master's Degree Thesis, University of the Western Cape. 2014) 13.

¹⁸Chapter 3A of the Laws of Kenya.

¹⁹Mukaindo (n19) 13.

²⁰ Ibid.

²¹ The Draft Constitution, 2004 was famously referred to as *Bomas Draft* because the meetings and deliberations that led to that draft were held at the *Bomas* of Kenya.

²² The draft Constitution, 2005 was named *Wako Draft* after the then Attorney General Amos Wako who spearheaded the coming up of that draft constitution after the political disagreements over the earlier version.

²³ The *Wako draft* in Article 114 proposed a unicameral parliament.

²⁴See the *Bomas Draft*, Article 120- 123.

devolved governments to share and participate in national legislations and represent and protect county governments' interest.²⁵ It also provided for shared legislative role between the National Assembly and the Senate with no chamber being superior to the other.²⁶ The revised harmonized draft proposed a directly elected Senate with limited legislative and constitutional powers. The Senate's roles were reduced to coordination of the regions.²⁷ It was also proposed that National Assembly was to have more powers than the Senate.²⁸ The debate during the entire constitutional review period centered much on the size, mode of election for members of both houses and the sharing of roles between the chambers.²⁹ It also surrounded the link between the proposed second chamber and the devolved units.³⁰ Unfortunately, these issues were not adequately addressed hence the current turmoil bedeviling the functionality of the Senate.

In 2010, after years of struggle, a new Constitution was adopted.³¹ The 2010 Constitution of Kenya established 47 counties that are intended to devolve power, responsibilities and resources among other objects.³² The Senate is created to guard the interests of counties at the national level among other functions.³³ The provision on the protections of the interests of counties and their governments refers to representation and protection of two distinct entities: the people and the county governments.³⁴ The Senators represent the interests of the county governments and its people as members of the parliament through legislation on the bills relating to county

²⁵See the Harmonized Draft 2009, Article 123- 126.

²⁶Ibid.

²⁷Parliamentary Select Committee, *Report on the Review of the Constitution on the Reviewed Harmonized Draft Constitution* (January, 2010).

²⁸Ibid.

²⁹CKRC (2005): 191, CoE (2010): 65 in Mukaindo (n19) 15.

³⁰CKRC (2005): 387, CoE (2010): 92 in Mukaindo (n19) 15.

³¹A new Constitution was promulgated on 27th August 2010 after a successful referendum.

³²Article 174, CoK 2010.

³³Article 96, CoK 2010.

³⁴Kangu (n 5) 75.

governments and determination of revenue allocation to counties.³⁵ It also plays an oversight role over both the national and county governments.³⁶ Thus, a critical analysis of the efficacy of the Senate as the representative and protector of the interests of the counties and their governments through the parameters of oversight and legislation is required.

Oversight involves participation of the Senate in impeachment of the President or his deputy, questioning cabinet secretaries and impeachment of governors. The County Governments Act (CGA)³⁷ gives the Senate an important role in the impeachment of governors. Section 33 of the Act gives the Senate power to approve the impeachment of a governor. The Constitution imposes an obligation for formal communication between the Senate and county governments on matters that affect counties in order to effectively represent and protect.³⁸ Kangu argues that the Senate has an obligation to consult county governments on matters touching on the concerns of the counties and those of their governments.³⁹ As the representative and protector of interests of counties and their interests, it also has the mandate to veto power over the president when it comes to suspension of the counties as envisaged under Article 192 of the CoK. These roles create a web of relations between the Senate and county governments in an effort to guard the concerns of counties and their governments.

However, from recent happenings, the effectiveness of this role remains to be seen. Some Governors have refused to be accountable to the Senate and its role in devolution.⁴⁰ Council of Governors moved to court to have a constitutional interpretation as to the role of the Senate and

³⁵Articles 109 -113 and 218, CoK 2010.

³⁶Article 96 (3) and (4), CoK 2010.

³⁷County Governments Act, No. 17 of 2012: An Act of Parliament to give effect to Chapter Eleven of the Constitution; to provide for county governments' powers, functions and responsibilities to deliver services and for connected purposes.

³⁸ supra (note 36).

³⁹ Ibid.

⁴⁰Mukaindo (n 19)15.

whether the Senate had power to summon them.⁴¹ Although the court ruled that the Senate could summon governors, some have still ignored Senate summons.⁴² Some Governors have used courts to stop their impeachment process by the Senate.⁴³ More so, the predicaments that have faced various counties like Makueni and Embu raises doubts as to how effective the Senate has been as the representative and protector of counties and county governments.

The Senate is also supposed to play the legislative function through legislating on the Bills touching on county governments.⁴⁴ This is a shared function with the National Assembly. However, the National Assembly and the Senate's relationship has been acrimonious with the Senate accusing the National Assembly of undermining it and usurping its powers while the National Assembly on the other hand arguing that the Senate is not needed and even dubbed it as "house of the aged" or "house of the retirees".⁴⁵ This supremacy battle between the Senate and National Assembly over the shared legislative process has cast doubts over the Senate's effectiveness as the representative and protector of the interests of the Counties.⁴⁶ From the foregoing, although the role of the Senate in protecting and safeguarding the interests of the counties cannot be understated, the numerous issues surrounding its legislative and oversight function since it was operationalized under the CoK, 2010 may apparently affect its efficacy.

This study analyses the role of the Senate as established under the CoK. It conceptualizes the justifications for and against the establishment of the second chamber. It then analyses the

⁴¹ *Council of Governors & 6 Others v. The Senate Petition No. 413 of 2015*, [2015] eKLR.

⁴² See the ongoing case where Governor Oparanya refused to heed the Senate summons forcing the Senate to apply to the DPP to have him arrested.

⁴³ *Martin Nyaga Wambora & 3 others v Speaker of the Senate & 6 Others* [2014] eKLR.

⁴⁴ *Ibid.*

⁴⁵ The Standard, 'Turf wars between senate and MPs not good for the country' *The Standard* (Nairobi, 2015) <<http://www.standardmedia.co.ke/article/2000166214/turf-wars-between-senate-and-mps-not-good-for-country>> Accessed 28 April 2016.

⁴⁶ East African Centre of Law & Justice, 'Supremacy Battle between the Senate and National Assembly.' (2013) <<http://eacj.org/constitution/20-constitution-feature-articles/136-supremacy-battle-between-the-senate-and-national-assembly.html>> Accessed 17 November 2015.

historical development, establishment, composition and the role of the Senate under the 2010 CoK. It critically analyses the extent of the Senate's legislative and oversight roles in relation to the current supremacy battles. The aim of this study is to critically look into the role of the Senate and the place of bicameralism in the current constitutional dispensation in order to address supremacy battles amongst the Senate, National Assembly and county governments. At the end of study, the researcher gives recommendation on how to address the various disputes without creating animosity and hostility.

1.2 Problem Statement

The Senate has come under sharp criticism arising from claims of its failure to effectively represent and protect the interests of the county governments as provided for in Article 96 of the Constitution. The Senate is supposed to discharge this key mandate through its legislative and oversight functions. The Senate carries out its legislative role through constitutional amendment Bills⁴⁷ and other Bills concerning counties.⁴⁸ The oversight function of the Senate is to be exercised with respect to the use of revenue allocated to the counties as well as in considering and determining any resolution to remove the President, Deputy President or county governors from office.⁴⁹

In spite of these constitutional and legal provisions on the legislative and oversight roles of the Senate, there have been constant conflicts between the Senate and the County Governments on one hand and the Senate and the National Assembly on the other. The conflicts relate to the discharge of mandates by those organs. There are varied views also on the Senate from the recent push for constitutional amendment through a referendum with some calling for

⁴⁷Article 94 (3), CoK 2010.

⁴⁸Articles 109 and 113.CoK 2010.

⁴⁹Article 96 (3) and (4). CoK 2010.

disbandment⁵⁰ of the Senate while the other pushing for the strengthening of the Senate.⁵¹ These incessant conflicts and the acrimonious relationship witnessed amongst these organs points to an apparent lack of clarity on functional division of their mandate. It also points to the apparent lack of clarity and disconnect between the constitutional and legal framework concerning the key role of the Senate and the actual practice of carrying out its oversight and legislative functions. These pose the question as to whether the Senate has effectively discharged its oversight and legislative functions in order to protect devolution. An appraisal on the effectiveness of the Senate in discharge of its core functions as the protector of devolution is therefore critical at this point.

1.3 Justification of the study

It is now almost four years since the current Senate was elected paving the way for the discharge of its mandate as the representative and protector of counties and their governments. Unfortunately, there is hardly any academic work, which exhaustively deals with the functions of the Senate in Kenya and especially as the representative and protector of counties and their governments through oversight and legislative functions. This study seeks to bestow knowledge to the public on the roles of the Senate in Kenya and especially as the representative and protector of counties and their governments. The study will draw important lessons from appraising the roles of the Senate in Kenya and especially as the representative and protector of counties and their governments. This will contribute to the effectiveness of the Senate in discharge of its mandate and ensuring success of devolution as envisaged in the Constitution.

⁵⁰ Capital FM, 'Time to Offload Burden of Over-representation in Kenya' <<http://www.capitalfm.co.ke/eblog/2015/12/07/time-to-offload-burden-of-over-representation-in-kenya/>> Accessed 27 March 2016.

⁵¹'The Constitution of Kenya, 2010 (Amendment), 2015' <<http://www.slideshare.net/MuhammadNyamwanda1/the-okoa-kenya-constitutional-amendment-bill>> Accessed 27 March 2016.

1.4 Research Objectives

1.4.1 Main Objective

The main aim of this study is to appraise the Senate's key role in Kenya as a representative and protector of the concerns of counties and their governments through its legislative and oversight functions.

1.4.2 Specific objectives

The specific objectives are:

1. To analyze the justifications for and against the establishment of the Senate.
2. To discuss the historical development, establishment, composition and the role of the Senate under the CoK 2010.
3. To critically analyze the efficacy of the nature, scope and extent of the legislative and oversight the Senate's role in matters concerning the county.
4. To formulate recommendations that if adopted will strengthen the legislative and oversight roles the Senate in order to effectively represent and protect the interests of the counties and their governments.

1.5 Research Questions

This study seeks to answer the question as to how effective the senate has discharged its mandate under CoK 2010, as the representative and protector of the interests of the counties. In providing an answer to this broad question, the following specific research questions are asked:-

1. What is the effectiveness of the nature, scope and extent of the legislative and oversight role of the Senate under the CoK 2010, as a representative and protector of the interests of the counties and their governments?
2. What recommendations if adopted will strengthen the role of the Senate as a representative and protector of the interests of the counties and their governments through legislation and oversight?

1.6 Research Hypotheses

This research is based on the following hypotheses:

1. Limiting the Senate's legislative role to matters concerning counties alone makes it a weak Senate.
2. What constitutes 'matters concerning county government' in the CoK is ambiguous and lacks clarity.
3. The oversight role of the Senate is limited to national revenue allocated to the counties hence not effective.
4. The supremacy battles between the National Assembly and the Senate on one hand and the Senate and County Government on the other have no place in the current constitutional dispensation.
5. Inter-governmental cooperation and harmonious resolution of disputes is the best alternative in addressing disputes and the court should be the forum of last resort.
6. The current supremacy battles undermine the expected fruits of devolution.

1.7 Theoretical Framework

The CoK, 2010 has been theorized as a bold attempt to restructure the Kenyan State and as a radical revision of the terms of social contract whose vitality had long expired and which, for the most part was dysfunctional, unresponsive and unrepresentative of the peoples' future aspirations.⁵² It reviewed the State structure by introducing two levels of government thus national and county governments.⁵³ Devolution was placed central in Kenyan constitutional design and is regarded as part of the exercise of power of the people, the national values and principles of governance and the basic structure of the Constitution.⁵⁴ In line with the devolved system, CoK, 2010 also created a bicameral legislature with the senate charged with representing and protecting the interests of the counties.⁵⁵ The senate protects the interests of the counties through legislation and oversight functions. However, questions have been raised concerning the effectiveness of the senate in representing the interests of the counties amidst conflicts between the senate and national assembly on one hand, and the senate and the county governments on the other.

This study is underpinned on the broader critical legal studies (CLS) to critique the current legal systems' inability to produce just results. It is in particular used to challenge the existing legal structures that are not serving to protect the interests of the devolved governments and the people but the interests of those in power but rather entrenching status quo. The study also uses structural functionalism theory and representative democratic theory to fill in the gaps created by CLS. Structural functionalism is important in explaining the social structure and functions of various organs in society. The study uses representative democratic theory as a counter-argument

⁵² Chief Justice Willy Mutunga in *Advisory Opinion No. 2 of 2013*.

⁵³ *Supra* (n 1).

⁵⁴ Kangu (n 5) 98.

⁵⁵ *Supra* (n 6).

to the CLS notion law and politics are intertwined and that law is not neutral and works for the benefit of those in power. Representative democratic theory brings to the fore the argument for the representation of the interests of the people by the organs such as the senate.

a) Critical Legal Theory

This is a school of thought that challenges traditional legal theories especially on the neutrality of the law and mediates for other ways of understanding the law and law-making regimes.⁵⁶ CLS further rejects the notion that general legal principles are embodied in judicial opinions and that by legal analysis the correct principle can be reached and then dispassionately applied.⁵⁷ CLS maintains that law is an instrument of power and questions the fundamental legitimacy of traditional legal norms.⁵⁸ It is critical of the current political construction, which is working to the detriment of the people and maintains that law is an instrument of power that grows out of power relations in the society and questions the fundamental legitimacy of traditional legal norms.⁵⁹ Thus according to CLS, law exists to support the interests of the party or class that forms it.⁶⁰ The proponents of CLS were committed on shaping society based on a vision of Human Personality without hidden interests of Class domination of legal institutions.⁶¹ CLS further tries to explain why legal principles and doctrines do not yield determinate answers to specific disputes and how legal decisions reflect cultural and political values and shift over time.⁶² The proponents bring to the fore the indeterminacy of legal doctrine and show how any given set of legal principles can be used to yield competing or contradictory results because rules

⁵⁶ Unger Roberto Mangabeira, "The critical legal studies movement" (1983) 96Harvard Law Review 561.

⁵⁷ Ibid at 604.

⁵⁸ Ibid at 589

⁵⁹ Ibid.

⁶⁰ Ibid at 605.

⁶¹ Ibid.

⁶² Ibid at 607.

in force contain substantial gaps, conflicts and ambiguities.⁶³ CLS also focused on how law contributed to illegitimate social hierarchies by undertaking historical and socio-economic analysis to identify how particular groups or institutions benefit from legal decisions despite the indeterminacy of legal doctrine. On this, they argue that judges and legislature produce predictable results, using historical, socio-economic and psychosocial analyses hence CLS scholars try to unearth these predictable patterns and relate them to larger patterns of power and privilege.

To the CLS proponents, the neutral language and institutions operated through law masks the relationship between power and control.⁶⁴ They try to expose how legal analysis and legal culture mystify outsiders and work to make legal results seem legitimate.⁶⁵ To them, the wealthy and powerful use the law as an instrument of oppression in order to maintain their place in the hierarchy.⁶⁶ Thus the basic idea is that law is politics and is not neutral or value free. It questioned how law could be so tilted to favor the powerful, given the prevailing explanations of law as either democratically chosen or as a result of impartial judicial reasoning from neutral principles.⁶⁷ This is important in Kenya especially when the legal system is put into perspective. For example the CoK provides for the roles of the senate to protect the interests of the counties and their people. Despite the legal provisions, the efficacy of the roles played by the senate as the protector of the people has been in question. The power relations between the senate, national assembly and county governments have made it difficult for the current legal system to produce just outcomes for the benefit of the people. The argument that law and politics is intertwined is

⁶³ Ibid.

⁶⁴ James Boyle, "The politics of reason: Critical legal theory and local social thought" (1985) 133.4 University of Pennsylvania Law Review 685.

⁶⁵ Ibid at 747.

⁶⁶ Ibid at 748.

⁶⁷ Unger (n 58) 609.

important when considering the political set-up of the senate and other organs in the devolved system of governance. The legal structures in place now are for the benefit of political class rather than the interests they purport to represent.

b) Structural Functionalism Theory

This theory is founded on the larger sociological school of thought by emphasizing the importance of placing law in a social context. Structural functionalism theory looks at society as a complex system whose parts work together to give rise to stability and solidarity.⁶⁸ This theory explains why certain structures/ institutions exist in society by trying to ascertain their purpose and critical role.⁶⁹ Society is made up of groups and institutions that are cohesive, share common norms and have a definitive culture.⁷⁰ Thus how society is organized is the most natural and efficient way for it to be organized.

Hebert Spencer and Robert Merton are the major proponents to this theory with important concepts being social structure and functions.⁷¹ Spencer depicted constant struggle among various body organs with the organs with stronger structures surviving while those with weaker structures suffering.⁷² This can be likened to the various organs of the state including the Senate, National Assembly and county governments. They are all important for the functioning of the state although the institutions with weak functional structures are likely to suffer. Merton and other functionalists viewed society as an organism with various parts with each part having a

⁶⁸‘Structural-Functional Theory in Sociology: Definition & Examples - Video & Lesson Transcript’ (*Study.com*) <<http://study.com/academy/lesson/structural-functional-theory-in-sociology-definition-examples-quiz.html>> Accessed 1 December 2015.

⁶⁹Donald W. Harper, ‘Structural Functionalism: Grand Theory or Methodology?’ <https://www.academia.edu/1973019/Structural_Functionalism_Grand_Theory_or_Methodology> Accessed 15 June 2015.

⁷⁰Frank N Magill and Hector L Delgado, *Survey of Social Science* (Salem Press 1994).

⁷¹ Ibid.

⁷² Herbert Spencer, ‘Theory & Social Darwinism - Video & Lesson Transcript’ (*Study.com*) <<http://study.com/academy/lesson/herbert-spencer-theory-social-darwinism.html>> Accessed 1 December 2015.

duty to perform.⁷³ Merton recognized that some functions were intentional or manifest while others were latent or were unintended functions.⁷⁴ He also conceded that unintended/latent functions disrupted society.⁷⁵ These functions are known as the latent and manifest functions and dysfunctions.⁷⁶ For instance the intended function of Kenya's Senate is to represent and protect the interests of the counties.⁷⁷ The latent or unintended function is that there be legislative battles and conflicts over functions and powers between the National Assembly and the Senate.

The significance of this theory to this study is to explain the functional connection between the Senate and County Governments' and the citizens when looking at how effective the Senate has been in discharging its oversight mandate in order to protect devolution. It also helps explain the structural and functional connection between the National Assembly and the Senate in discharge of its legislative function. This framework conceives the government of Kenya as a social system and the bicameral parliament is a political institution viewed as a structural and functional part or unit of government.⁷⁸ As such, the National Assembly and Senate each performs explicitly specified requisite functions that ought to contribute to the stability, continuity and survival of the state or government. Whenever one of the organs failed in the performance of its duties, then there will be instability. This will thus help in understanding the effectiveness of the legislative and oversight roles of the Senate as the protector of devolved units of governance.

This study therefore places the Senate within a structural functionalism theory in an attempt to appraise the key legislative and oversight roles played by it especially as the representative and

⁷³ Robert King Merton, *Social Theory and Social Structure* (Free Press 1968) 75-76.

⁷⁴ Robert King Merton, 'Theories and Functionalism - Video & Lesson Transcript' (*Study.com*) <<http://study.com/academy/lesson/robert-k-merton-theories-and-functionalism.html>> Accessed 1 December 2015.

⁷⁵ Ibid.

⁷⁶ Ibid.

⁷⁷ Article 96, CoK, 2010.

⁷⁸ Maurizio Cotta, 'A Structural-Functional Framework for the Analysis of Unicameral and Bicameral Parliaments' (1974) 2, *European Journal of Political Research* 201.

protector of counties and their governments' interests'.⁷⁹ The Senate plays a critical role in the structure of the devolved system of governance. It is the representative and protector of the counties at the national level. Failure by either of these organs of the state in performance of its duties or the inefficiency of either level of government has a negative impact on the whole the success of devolution. Structural functionalism theory thus brings an understanding of the structural, institutional and legal relationship of various organs in the devolved system of governance.

c) Representative Democratic Theory

This study will also rely on representative democratic theory to offer a philosophical argument on the role of Senators as the representative of the people in various counties at the national level.⁸⁰ Representative democracy is where elected officials represent people in government or legislative assemblies as opposed to people exercising power directly. James Madison was one of the political theorists that presented arguments in favor of representative democratic theory.⁸¹ Madison argued that representative democracy effectively limited governmental power, safeguarded liberty, avoided tyrannical rule by a self-centered and overbearing majority and ensured justice.⁸² The theory thus advocated for donation of the authority to the representative of people.

The theory of representative democracy is anchored within the larger classical theory of democracy especially Jean Rousseau's, social contract theory which set the parameters of

⁷⁹ John H Chilcott, 'Structural Functionalism as a Heuristic Device' (1998) 29, *Anthropology & Education Quarterly* 105.

⁸⁰ Dovi, Suzanne, 'Political Representation', *The Stanford Encyclopedia of Philosophy* (Spring 2014 Edition).

⁸¹ Richard Bellamy, 'The Political Form of the Constitution: The Separation of Powers, Rights and Representative Democracy' (1996) 44 *Journal of Political Studies* 436.

⁸² *Ibid* at 447.

relationship between an individual and the state within a civil society.⁸³ This theory is brought forth under Article 1 (1) of the Constitution, which provides that all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with the Constitution. Article 1(2) provides that the people may exercise their sovereign power either directly or through their democratically elected representatives. Article 1(4) provides that the sovereign power of the people is exercised at the national and the county level.

This further reinforced under article 98, which provides that the Senate shall comprise of the members elected from 47 counties. Citizens elect Senators as their representatives in the Senate. The function the Senate performs is on behalf of the general public. During the constitutional review process, people expressed the interest in having a second chamber to represent and protect the interest of the devolved units at the national level.⁸⁴ This theory helps explain the source of legislative and oversight mandate of the Senate as emanating from the people who elected the Senators. Representative democratic theory thus brings in the understanding of the relationship between Senate and its role as the protector of devolved governments and the people. It is through direct elections that Kenyan Senate gets its legitimacy.

1.8 Literature Review

The CoK, 2010 provides for a bicameral legislature comprising of the Senate and National Assembly. One of the key roles of the senate is to represent and protect the interests of the counties through legislation and oversight functions. Many scholars have discussed bicameralism and the different roles of the two chambers. They have also discussed about the Constitution of Kenya generally and devolution. However, very little literature exists that has appraised the

⁸³Ibid at 448.

⁸⁴ Constitution of Kenya Review Commission, *The final report of the Constitution of Kenya Review Commission* (February 2005).

Senate's roles as the protector of the interests of the counties through legislation and oversight. There is also no discussion on how to address the challenges facing the senate in its discharge of functions as the protector of the counties.

Tsebelis and Money⁸⁵ define bicameral legislatures as those whose deliberations involve two distinct assemblies. They also discuss the historical evolution and geographical distribution of bicameralism and models of bicameral institutions, the diversity of bicameral institutions, both historical and geographic, models investigating different aspects of bicameralism and finally empirical evidence confirming different predictions of the models.⁸⁶ They give a brief history of bicameralism as was discussed by the founding fathers of the American Constitution. According to them, the founders of the American Constitution advocated for two important dimensions of bicameralism. The first was efficiency: improvement of legislative product, finding the common grounds between the two chambers. The second was political and redistributive: representation of societal preferences, seeking a compromise between the two chambers and reflecting the relative balance of power.⁸⁷ They thus give an overview of bicameralism in American perspective.

Tsebelis and Money⁸⁸ contend that the roles of the Senate are never unique in all states but they have few common roles in most jurisdictions. First they all represent a group of people, for instance in Ethiopia the House of Federation which is the second chamber represents their ethnic groupings.⁸⁹ Secondly, they take part in legislation, for example in the Netherlands, legislation is always initiated in the lower house, upon approval, is then submitted to the upper house (senate)

⁸⁵George Tsebelis and Jeannette Money, *Bicameralism* (Cambridge University Press, 1997) 15.

⁸⁶Ibid at 37-64, 74-86.

⁸⁷ Ibid at 6-7.

⁸⁸ Ibid.

⁸⁹ Article 61, Constitution of the Federal Democratic Republic of Ethiopia, 1994.

which then votes it down or up without the possibility of amendments. In Switzerland there are two chambers, the one that introduces a bill sends it to the other chamber and the bill shuttles back and forth until one chamber decides to turn the current bill into an up or down.⁹⁰ Although their writings provide a great insight into the role of various chambers in a bicameral setting, it is not specific to Kenya and does not look into the effectiveness of the legislative and oversight roles of the Senate as the protector of the devolved units. Their discussion is also devoid of recommendations to address the challenges that the senate is facing in discharging its mandate that this study intends to do.

Cutrone and McCarty⁹¹ discuss the necessity of bicameralism in today's world. They attempt to distinguish the effects of bicameralism from the effects of other institutional features that often accompany it, such as differing terms of office and super-majoritarian requirements. They contend that many upper chambers have legislative prerogatives that are usually limited in its legislative powers.⁹² They give an example of the British House of Lords that is unable to originate monetary legislation and at best, can only delay bills for a year rather than permanently veto those they disagree with.⁹³ The writings by Tsebelis and Money and Cutrone and McCarty are important as they provide an insight of bicameralism in various jurisdictions and the role the Senate plays in those jurisdictions. This lays the basis for understanding the functioning of bicameralism and the role different chambers play and their relationship with each other. Their studies are however not specific to Kenya and do not look into the effectiveness of the legislative and oversight functions of the Senate in protecting the interests of the counties that this study

⁹⁰Tsebelis and Money (n 90) 77.

⁹¹Michael Cutrone and Nolan McCarty, *Does Bicameralism Matter?* (Oxford University Press, 2006).

⁹²Ibid 32.

⁹³Ibid.

intends to do. There are also no recommendations to address the challenges that the senate is facing in discharging its mandate that this study intends to recommend.

Kirui and Murkomen retrace the history of the Kenyan legislature before and after independence, tracking the various transformations spanning a century of its existence.⁹⁴ These transformations were largely characterized by two competing forces: one epitomized by a strong executive seizing power from other arms of government, and the other by pro-reform forces pushing for an expanded democracy, better governance and accountability, and the promotion of rule of law.⁹⁵ Of interest is the period immediately after independence when Kenya had a bicameral legislature until the period the Senate was abolished and merged with the lower house. They also cite three key functions of the bicameral parliament as to enhance the quality of representation; to create an appellate hierarchy in the enactment of laws and to improve the stability of the constitutional structure and political systems and provide a system based on checks and balance.⁹⁶ In these three functions, Senate has a specific function and role.⁹⁷ The authors conclude that the Constitution of Kenya, 2010 has created a strong bicameralism.⁹⁸ They also suggest for the establishment of a legislative mechanism through which Senators are made accountable to the counties in the performance of their duties.⁹⁹ This, according to them will help solve the conflicts between various players in the devolved system of government.¹⁰⁰ This is important to this study as it borrows greatly on the weaknesses that led to the abolishment of the Senate then. It is also important as they attempt to suggest how the Senators can be made accountable to the counties. The authors do not however, explain whether the Constitution of Kenya, 2010 creates an

⁹⁴Kirui and Murkomen (n 7) 8.

⁹⁵Ibid.

⁹⁶ Ibid at 15.

⁹⁷ Ibid.

⁹⁸ Ibid.

⁹⁹Ibid.

¹⁰⁰ Ibid

appellate hierarchy in the legislative roles between the Senate and the National Assembly. They also do not provide the parameters of measuring the strength of the Senate's powers and also failed to examine if Senate's structure, membership and powers are attuned to its primary role of protecting and representing county interests. Their study did not envisage the structural and functional challenges that the current Senate could face and hence it does not provide recommendations to address the challenges the senate is facing in discharging its mandate that this study intends to do. Their study does not appraise the legislative and oversight roles of the current Senate as it was written before the current Senate was constituted.

Hornsby Charles has sequentially delved into the social, economic and political history of post-independence Kenya.¹⁰¹ He provides important insights as to why the independent Senate failed and why it had to be abolished.¹⁰² His study provides an insight to the constitutional amendments that led to the abolition of *majimboism* and eventually the independence Senate. This is important to this study as far history of the Senate in Kenya is concerned. However, the political and legal regime in Kenya has changed drastically hence his writing will only be important when looking at the history. He does not discuss the post 2010 constitutional dispensation period and the current challenges the Senate is facing and thus no recommendations to address the challenges that the senate faces in discharging its mandate that this study seeks to do. He has also not appraised the effectiveness of the legislative and oversight roles of the senate that this study seeks to achieve.

Mutakha on the other hand looks into the insights of the intended roles of the Senate in the protection of the interests of the counties.¹⁰³ To him, the provision on the protections of the

¹⁰¹ Charles Hornsby, *Kenya: A History Since Independence*. (IBTauris 2013).

¹⁰² With the current contestations, will the current Senate face the same fate as the 1963 Senate?

¹⁰³ Kangu (n 5) 352.

interests of counties and their governments refers to representation and protection of two distinct entities: the people and the county governments.¹⁰⁴ He contends that in discharge of its legislative and oversight roles, the Senate has an obligation to consult county governments.¹⁰⁵ His writing on the Senate and Devolution generally is crucial in understanding the effectiveness of roles of the Senate under a devolved system of governance. He however does not appraise the effectiveness of the legislative and oversight roles of the current Senate as the representative and protector of the interests of the counties and their governments. He has also not proposed the ways to improve the working of the senate that this study intends to do.

Nyanjom has discussed the implications of devolution on certain aspects including service delivery.¹⁰⁶ This is important as it provides an insight on the roles of various stakeholders under devolved system of governance and also discusses the impact that devolution has had in the country.¹⁰⁷ However, he does not specifically discuss the effectiveness of the legislative and oversight roles of the Senate as the representative and protector of the interests of the counties and their governments under devolved system of governance.

Ghai and Cottrell on the other hand have discussed the constitutional provisions underlying the citizens' role in achieving the desired change under the new constitutional dispensation.¹⁰⁸ They provide an overview of the provisions of the current Constitution delve into the role of the current legislature comprising the National Assembly and the Senate.¹⁰⁹ They highlight the role of citizen participation in the legislative work by both chambers since the people donate the

¹⁰⁴ Ibid.

¹⁰⁵ Ibid at 356.

¹⁰⁶ Nyanjom Othieno, 'Devolution in Kenya's new Constitution' (Society for International Development, SID Constitution Working Paper No 8.2011).

¹⁰⁷ Ibid at 18-26.

¹⁰⁸ Yash Pal Ghai, *Kenya's Constitution: An Instrument for Change* (Katiba Institute 2011).

¹⁰⁹ Ibid at 106.

legislative power to these chambers.¹¹⁰ Their discussion is however general and does not specifically discuss the legislative and oversight roles of the Senate as the representative and protector of the interests of the counties and their governments nor have they appraised the effectiveness of the current Senate.

Sihanya has on the other hand explored the challenges and prospects of implementing the Constitution and the role of various agencies in the implementation process.¹¹¹ He does not however look at the possible challenges that were to face the Senate in the discharge of its legislative and oversight roles in representing and protecting the interests of the counties and their governments. He does not make recommendations for the effective functioning of the senate that this study intends to do.

Mukaindo, in her thesis discusses emerging issues in the relationship between the senate and county governments.¹¹² Her study was however limited to the conflicts between the Governors and Senators in Kenya and how these conflicts are affecting devolution. Her study provides a glimpse of the structural and functional challenges the Senate is facing in discharging its oversight roles and how this is affecting its effectiveness. This is important to this study as it provides a basis for appraising the oversight mandate of the Senate. It does not however appraise the effectiveness of the legislative function of the current Senate as the representative and protector of the interests of the counties. Although she makes recommendations to address the some of the conflicts between the senate and county governments, she does not address the legislative function of the senate that this study intends to fill in.

¹¹⁰ Ibid at 107.

¹¹¹ Ben Sihanya, 'Constitutional implementation in Kenya, 2010-2015: Challenges and prospects' (FES Kenya, Occasional Paper No 5, 2011).

¹¹² Mukaindo (n 19)16.

The literature discussed above reveals that, whereas there is a wealth of information on bicameralism, devolution and the Constitution generally, there are limited writings on the effectiveness of legislative and oversight roles of the Senate as the representative and protector of the interests of the counties under devolved system of governance. The literature does not provide recommendations to improve the effectiveness of the senate's roles. Even the scarce literature sources available, are those that were published prior to the new government and devolved system. Practical matters arising under the Constitution of Kenya, 2010 especially the effectiveness and the challenges of the legislative and oversight roles of the Senate have not been fully catered for. This study intends to bridge this gap by appraising the effectiveness of the key role of the Senate as the representative and protector of the interests of the counties by using the legislative and oversight functions as parameters. This will be done in light of the functional and structural challenges that the Senate is facing and changes that have taken place under the new constitutional dispensation. It will also provide recommendations to address the challenges that the Senate in Kenya has faced. This study thus seeks to address the knowledge gaps on the nature and extent of legislative and oversight functions of the Senate and how it has or has not been effective in representing and protecting the interests of counties and their governments under the Constitution of Kenya, 2010.

1.9 Research Methodology

This study is based on both primary and secondary data. Primary data refers to data collected from the field through questionnaires and interview schedules. The questionnaires consisted of two types of questions thus closed-ended questions and open-ended questions. The close-ended questions sought to provide alternative answers to the respondents while open-ended questions were used to solicit more information from the respondents. Questionnaires were used to elicit

information from respondents who were not available for face-to-face interviews. They were preferred because they were less costly, ensured little bias and also it was easy to analyze them. The study also used personal interviews where the respondents were available and willing to be interviewed. The researcher employed both the use of structured and unstructured interview questions to solicit information from respondents and give them room to explain further on their answers. By using interviews, the researcher was able to capture the emotions and behavior of the respondents. Personal interview with the respondents also ensured high level of reliability of the data obtained.

The primary sources were used to obtain relevant information from key informants on how effective the Senate has played its oversight and legislative roles as key elements of representing and protecting the interests of the counties and their governments. They also elicited recommendations from the respondents to help address the challenges facing the Senate in the discharge of its mandate. The questionnaires elicited key information from select members of the National Assembly, the Senate and Governors. These respondents were chosen because of their experience and their diversity in terms of political status and inclination, which has a bearing on the functioning of the Senate. They were also chosen due to their accessibility to the researcher. Some of these select informants were directly interviewed to elicit more information from them. Primary data collection modes ensured that the researcher obtained empirical views, insights, perspectives or perceptions of the target population on the effectiveness of the Senate in representing and protecting the interests of the counties and their governments. These informants were important to this study because they are at the centre of the current functioning of the roles of the Senate in the country

The use of primary data was necessary for the research to get firsthand accounts, events and occurrences that might not have been obtained by use of secondary data only. Since not much academic work has been written to appraise the effectiveness of the roles of the Senate under CoK, 2010, it was necessary for the researcher to carry out interviews and to obtain information from people at the centre of the current functioning of the Senate.

This study employed qualitative research design. This design was chosen because it allowed for an in-depth description and understanding of the actions and behaviors of the participants as it attempted to study the subject from the perspective of the participants themselves. It was also chosen because it involves a small number of respondents to be interviewed in attempt to study human actions from the perspective of the participants themselves.

The sampling technique adopted in this study was purposive and snow ball sampling. Purposive sampling is a form of non-probability sampling and was preferred because the researcher was targeting people with relevant information on the subject under study and their availability to fill the questionnaires or for personal interview. Thus purposive sampling was less costly and less time consuming. Snow ball sampling on the other hand was used where the researcher relied on the target respondents to refer him to other respondents. This was important to the researcher to get more information from the respondents with relevant information on the subject under study. Target population was 20 respondents. Only 60% of respondents returned the questionnaires and were available for face-to-face interviews. . Most of the respondents chosen by the researcher were politicians and a few professionals with knowledge of the topic under study.

After collecting data from respondents, the researcher compiled a summary of the results of each including the describing the participant in detail, and noting other practical details pertaining the interviews (date, place of the interview and themes that emerged from the interviews). Since some of the respondents wished to remain anonymous, the researcher referred to them as ‘respondents’ instead of their names. The researcher used qualitative data analysis particularly content analysis as a method of analyzing data collected from the respondents. Content analysis was used to analyze the data collected and to highlight the important themes, findings and draw conclusions from the study.

The collection of data by primary sources was limited by some factors. First, since many of the target respondents were politicians, the researcher could not access some of them. For instance, key respondents such as speaker of National Assembly, clerks of senate and national assembly, some senators and some governors could not be reached, as they did not avail themselves. Second, the time available for the research was limited thus the researcher could not access many of the respondents. Third, the sample size might not be representative of the entire population and there is danger of generalization. Fourth, some respondents misinterpreted the questions on the questionnaires hence gave irrelevant responses to questions. Lastly, due to financial constraints, the researcher did not collect data from counties far from Nairobi

The secondary sources for this study include the Constitution, various legislations, case laws, policy documents, books and articles online and physically in the institution’s library that contain relevant information especially on topics such as politics and devolution, constitutional amendment, Senate and bicameralism. Only relevant sources with information, which contributed to the research, was selected and reviewed according to the procedures provided under the methodology. Moreover, books, articles, journals, peer-reviewed papers, and any other

sources obtained from online libraries and the institution library formed secondary sources of data.

The research also utilized appropriate secondary data to draw conclusions and provide answers to the study questions or even solve the problem. By using both primary and secondary sources, sufficient data was obtained to solve the research problem and provide broader and more valid data.¹¹³

1.10 Scope and Limitations of the Study

The Constitution of Kenya 2010 provides for various roles of the Senate. These roles are broadly, legislative and oversight functions. This study does not discuss all the functions of the Senate. It is only be concerned with the role of the Senate as the representative and protector of counties and their governments through legislation and oversight. This study is also limited because firstly, the devolved system may take more than a decade for it to bear fruits but the study was only carried out in a very short period of time. Hence, it may be difficult to appraise the role of the Senate especially as the representative of the counties and county governments. Secondly, there is scarce literature written on the roles of the Senate under the Constitution of Kenya, 2010 and especially as the representative and protector of the counties and county governments hence may not benefit from different scholarly views on the subject. Thirdly, not many countries have adopted a devolved system of government with the Senate representing and protecting devolved units thus there may not be adequate literature published about devolution and the roles of the Senate. Fourthly, non-responsiveness of the respondents, majority of who are

¹¹³ Kuiper, Shirley, and, Dorinda Clippinger, *Contemporary Business Reports*. (Mason, OH: South-Western, Cengage Learning, 2013).

politicians hampered collection of primary data. Last but not least, collection of data was restrained by cost.

1.11 Chapter Breakdown

Chapter 1: Introduction

Chapter one introduces the topic under study. It provides the background and introduction to the study as well as offers an overview of the adopted style or approach in carrying out the study or investigations.

Chapter 2: Historical Development and Philosophical Foundations of the Role of Legislature's Second Chamber/Senate

This chapter conceptualizes the role of the legislature second chamber referred to as the Senate in Kenya. It discusses the historical origins of the concept of the second chamber. It critically analyses the arguments for and against the second chamber in order to provide a basis upon which countries consider on whether to adopt bicameralism or unicameralism. It provides a theoretical and philosophical understanding of the legislature second chamber, in order to understand the role of the Senate in the Kenyan scenario.

Chapter 3: History, Establishment, Composition and Role of the Kenyan Senate Under the 2010 Constitution of Kenya: An Overview

This chapter analyses bicameralism under the CoK, 2010. It analyses the historical development of bicameralism in Kenya in order to understand the intended purpose of establishing the Senate. It also analyses the establishment and composition of the Senate as provided for under the CoK. It finally analyses the role of the Senate as provided for under the CoK. The objective of this

chapter is to provide the role of the Senate in theory as envisaged under the Constitution. The establishment and composition of the Senate determines its power. This chapter determines whether the constitutional provisions on bicameralism are abstract and theory based.

Chapter 4: Appraising the Scope, Nature and Extent of Senate's Legislative and Oversight Role: Addressing Current Supremacy Wars

This chapter builds up on chapter three. It recognizes that despite the CoK providing for the role of the Senate and anticipating that the same would be discharged in order to protect the interests of the counties, this is not the case. It analyses the current conflicts and supremacy battles with regard to the nature, scope and the extent of the legislative and oversight role of senate

Chapter 5: Summary of Findings, Conclusions and Recommendations

This chapter enumerates the results of the research and the conclusions the researcher infers from the study. It also provides key recommendations and proposes the way forward.

CHAPTER TWO

2.0 HISTORICAL DEVELOPMENT AND PHILOSOPHICAL FOUNDATIONS OF THE ROLE OF LEGISLATURE'S SECOND CHAMBER/SENATE

2.1 Introduction

This chapter conceptualizes the role of the Senate or second chamber in a bicameral legislative system. It is divided into two. The first part discusses the origin of the concept of the Senate or second chamber. The second part critically analyses the arguments for and against the second chamber in order to provide a basis upon which countries consider on whether to adopt bicameralism or unicameralism. This chapter's aim is to issue a theoretical and philosophical understanding of the legislature's second chamber, in order to understand the role of the Senate in the Kenyan scenario.

2.2 Historical Origins of Legislature's Senate/Second Chamber

The establishment of the legislature's second chamber has its foundation in bicameralism. Bicameralism is a system of government where the legislature comprises of two houses: the first chamber and second chamber.¹¹⁴ However, unlike in a unicameral system where the powers of the single legislature to make decisions are well defined, in a bicameral system the powers of the chambers vary.¹¹⁵ In some countries, the chambers have equal powers but in other countries, the upper chamber has limited powers.¹¹⁶ In countries that have a federal or devolved system of government like Kenya and the US, the second chamber represents the interests of the territorial

¹¹⁴Tsebelis and Money (n 90) 86-88.

¹¹⁵ Dare Arowolo, 'Democracy and Bicameralism in Nigeria: Issues, Challenges and the Way Forward' (2015) 3, Review of Public Administration and Management 1.

¹¹⁶ In US it practices strong federal bicameralism and the two chambers have nearly equal powers. In Kenya, the Senate has limited powers affecting only the interests of the counties. In the UK, the House of Lords exercises limited powers too.

units while the first chamber represents the interests of the smaller units such as constituencies or districts.¹¹⁷

The second chambers may come into existence through direct elections,¹¹⁸ territorial representation,¹¹⁹ functional representation¹²⁰ and communal representation.¹²¹ However, the strength of a second chamber is usually determined by three factors: symmetry, congruence and democratic legitimacy.¹²² Symmetry refers to the equality of powers between the two chambers. In symmetrical bicameralism the two chambers have equal or nearly equal powers while in asymmetrical bicameralism, the upper house is constitutionally restricted in some areas.¹²³ For example in the Kenyan system, the power of the Senate over any legislation is limited to the matters concerning counties hence asymmetrical in nature. Congruence refers to the composition of the chambers in terms of their partisan composition.¹²⁴ Chambers are congruent when the majority of the chambers are made from similar political party.¹²⁵ A government with upper chamber majority lasts longer than that without as it is easy for such chamber to approve the legislations passed by the lower chamber.¹²⁶

¹¹⁷ Ibid.

¹¹⁸ This is usually through direct elections by the people. In Kenya, members of the upper house are elected directly during general elections held after every five years for a fixed period of time. Members of the second chamber who are elected through direct elections usually enjoy legitimacy and are able to exercise their powers.

¹¹⁹ This is where members of the second chambers are chosen from the sub-national governments.

¹²⁰ In this case the upper house is made up of members representing various interests of the society such as social, economical, professional and vocational. This is to ensure that society is represented as a whole. For example the National Council of Slovakia and the Irish Senate represents certain interests of the society.

¹²¹ It applies to linguistic, ethnic, cultural or religious representation.

¹²² International Institute of Democracy and Electoral Assistance (IDEA), *Bicameralism: Legislatures with Two Chambers* (IDEA 2014).

¹²³ Ibid.

¹²⁴ Boris Shor, 'Congruence, Responsiveness and Representation in American State Legislatures' (University of Houston, Department of Political Science; Georgetown University, Department of Government August 25, 2014) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1697352> accessed 9 August 2016.

¹²⁵ Ibid.

¹²⁶ James Druckman and Michael Thies, 'The Importance on Concurrence: The Impact of Bicameralism on Government Formation and Duration' (2001) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1158644> accessed 5 August 2016.

Jeremy Bentham first coined the term ‘bicameral’ in 1832.¹²⁷ However, bicameralism dates back before 1832.¹²⁸ It can be traced back in the ancient Sumer and later ancient Greece and Rome, where kings would consult with respected and trusted members of society.¹²⁹ In the Middle Age, sovereigns consulted their vassals on various issues such as war, taxation, security etc.¹³⁰ It developed in unitary systems as a method of representing the social needs and interests of different social classes.¹³¹ The circle of those who had to be consulted increased and resulted into the existence of different bodies representing various interests.¹³²

Greek philosophers propounded the idea of mixed governments over simple government as a means of representing the interests of the people.¹³³ The mixed government included the representations of the interests of one or more forms of government such as monarchy, aristocracy or republic.¹³⁴ The objective of the mixed government was to prevent tyranny of powers in one body. In Rome, the earliest kings appointed a number of council of elders – referred to as the Senate- to advise them.¹³⁵ The Roman Senate was an integral institution that controlled money, administration and foreign policy.¹³⁶ The senators were reserved a dominant place in government and contributed to the efficiency of the government. The main objective of

¹²⁷ Alexis De Toqueville, ‘Unicameralism and Bicameralism: History and Tradition’ (1965) 45, BU Law Review 250.

¹²⁸ Ibid.

¹²⁹ Nomaindiya Mfeketo, ‘Bicameralism in South Africa’ <http://www.revparl.ca/35/4/35n4_12e_Mfeketo.pdf> accessed 5 August 2016

¹³⁰ Betty Drexhage, *Bicameral Legislatures: An International Comparison* (Dutch Parliament 2015).

¹³¹ Tsebelis and Money (n 90) 39.

¹³² Ibid at 42.

¹³³ James Blythe, *Ideal Government and the Mixed Constitutions in the Middle Ages* (Princeton University Press 1992); Gregory R Johnson, *The First Founding Father: Aristotle on Freedom and Popular Government* (Hoover Press); Dora Kis-Jakab, ‘Thomas Aquinas on Mixed Governments and the Government of the Dominican Order’ (Masters Degree Thesis, Central European University 2014).

¹³⁴ Jed William Atkins, ‘Cicero on the Mixed Regime’ (APSA 2011 Annual Meeting Paper).

¹³⁵ Tsebelis and Money (n 90) 21.

¹³⁶ Frank Frost Abbot, *A History and Description of Roman Political Institutions* (Elibron Classics 1901).

having the council of elders was to apply the wisdom acquired by age to moderate and govern people.¹³⁷ The Roman Senate provided the basis of Cicero's discussion on ideal state.¹³⁸

The modern form of bicameralism as we know it today originated in the 14th Century in the English parliament but gained popularity in the 18th and 19th century.¹³⁹ In fourteenth century, England had established two chambers: the first chamber where debate took place with the feudal lord; and the second chamber where the citizens (commoners) were represented.¹⁴⁰ This system of legislature evolved from the King's Great Council who advised the King on various issues such as taxation.¹⁴¹ The Great Council composed of feudal lords, who were summoned periodically to discuss extraordinary issues such as taxation.¹⁴² The principles of mixed government as propounded by the Greek philosophers were applied in the English legislature where the 'lower house represented the democratic element of society, the upper house the aristocratic element and the kings power veto, the monarch element'.¹⁴³

Montesquieu was the first individual to discuss the significance of the separate chambers. He argued that separate chambers limited the power of the majority to dominate the minority.¹⁴⁴ It avoided the tyranny of a single chamber. The political freedoms and rights of the citizens were best safeguarded in England because the executive power was separated from legislative power

¹³⁷Tsebelis and Money (n 90) 41.

¹³⁸Richard Maas, 'Political Society and Cicero's Ideal State' (2012) 45, *Journal of Quantitative and Interdisciplinary History* 79.

¹³⁹ Meg Russell, 'Rethinking Bicameral Strength: A Three-Dimensional Approach' (2013) 19, *Journal of Legislative Studies* 370.

¹⁴⁰ John Uhr, 'Bicameralism' <<http://content-calpoly.edu.s3.amazonaws.com/politicalscience/1/documents/faculty/mike-latner/POLS-112/POLS-112-Uhr-Bicameralism.pdf>> accessed 8 August 2016.

¹⁴¹ Jeannette Money and George Tsebelis, 'Cicero's Puzzle: Upper House Power in Comparative Perspective' (1992) 13, *International Political Science Review* 25.

¹⁴² Ibid.

¹⁴³Tsebelis and Money (n 90)71-77.

¹⁴⁴Baron De Montesquieu, *The Spirit of Laws* (Translated by Thomas Nugent, Botoche Books Kitchener 2001).

envisaged in two chambers.¹⁴⁵ He further argued that the senate due to its distinct characteristics such as age, virtues and wisdom provided an avenue where the senators would provide sound judgment.¹⁴⁶ In essence what Montesquieu meant was that the second chamber was in a better position to review legislation of the first chamber as it had experienced members. He stated that:

In a state there are always some people who are distinguished by birth, wealth, or honors; but if they were mixed among the people and if they only had one voice like the others, the common liberty would be their enslavement and they would have no interest in defending it, because most of the representations would be against them. Therefore, the advantages they have in the state, which will happen if they form a body that has the right to check the enterprise of the people, as the people have the right to check theirs. Thus, legislative power will be entrusted both to the body of the nobles and to the body that will be chosen to represent the people, each of which will have assemblies and deliberations apart and have separate views and interests.¹⁴⁷

In North America most of the English colonies had a unicameral legislature.¹⁴⁸ However, at the founding of the US, most of the states had evolved into bicameral legislatures apart from Pennsylvania and Georgia.¹⁴⁹ The founders of American Constitution advocated for two objectives of bicameralism in the US: first, efficiency; and secondly representation of political power.¹⁵⁰ During the deliberation of the founding Constitution which led to what is known as the ‘great compromise of 1787’, an agreement was reached providing for two chambers of congress, that the House of Representatives would be elected on the basis of the population while the

¹⁴⁵ Ibid.

¹⁴⁶ Ibid.

¹⁴⁷ Ibid Chapter 6 at 90.

¹⁴⁸ Tsebelis and Money (n 90) 79.

¹⁴⁹ Steven Calabresi and Kyle Bady, ‘Separation of Powers in American Constitutionalism: Is the Separation of Powers Principle Exportable?’ (2010) 33, Harvard Journal of Law & Public Policy 1.

¹⁵⁰ Ibid.

Senate would be represented by each state.¹⁵¹ The United States was the first country to use federal bicameralism for political representation of different territorial units.¹⁵² The lower house represented the popular interests of the people while the upper house represented the interests of the states as territories. In 21st century more than a third of world democracies had adopted bicameral legislature.¹⁵³

2.3 Arguments For and Against Second Chamber

The rationale for having a second chamber has in the history of democracy become a critical question. The debate concerning bicameralism dates back to before and during the 14th century. For example, Jeremy Bentham was hostile towards the establishment of a second chamber. In his works, Bentham argued that there was no need for a second chamber if no difference existed between the second and the first chamber.¹⁵⁴ He argued that, ‘if the second chamber offers nothing different from the first, then it is redundant and every cost incurred in its establishment and maintenance is wasted’.¹⁵⁵ In fact, Bentham was of the view that in case there were some inadequacies in the first chamber, that could not guarantee the establishment of a second chamber; instead, the best solution would be to change the character of the first chamber and not institute the second one.¹⁵⁶

John Stuart Mill in his book, *Considerations on Representative Government*, on the chapter on ‘the Second Chamber’ argues in favor of the second chamber that, if a majority in a single house

¹⁵¹ ‘Documenting Democracy: Lesson Plans on the United States Constitution’ <http://www.history.com/images/media/pdf/Constitution-LessonPlans.pdf> accessed 8 August 2016.

¹⁵² Tsebelis and Money (n 90) 71-86.

¹⁵³ John Charles Bradbury and W Mark Crain, ‘Bicameralism’ in Charles K Rowley and Friedrich Schneider, *The Encyclopedia of Public Choice* (Springer 2004).

¹⁵⁴ Jeremy Waldron, ‘Bicameralism and Separation of Powers: Current Legal Problems’ (2012) 65, Oxford Journals 31.

¹⁵⁵ Lewis Rockow, ‘Bentham on the Theory of Second Chambers’ (1928) 22, American Political Science Review 576.

¹⁵⁶ Jeremy Waldron, ‘Bicameralism’ (New York University Law School Research Paper No 12-19, 2012).

is always assured of victory they can easily become overweening and despotic.¹⁵⁷ Mill also argued that the first chamber must not be like the second chamber hence embracing the principle of concurrence separation.¹⁵⁸ The membership of each chamber should not be subject to the leadership of the other chamber, neither should the two be subject to a single political leadership.¹⁵⁹ Mill put it that:

A majority in a single assembly, when it has assumed a permanent character, when composed of the same people habitually acting together and always assured of a victory in their own house, easily becomes despotic and overweening, if released from the necessity of considering whether its acts will be concurred in by another constitutional authority.¹⁶⁰

Justification for and against establishment of the legislature second chamber is mainly based on the role of the legislature in a democratic society.¹⁶¹ That is democratic representation, public deliberation, legislative output and scrutiny of the executive.¹⁶²

The first argument for and against the establishment of legislature upper house is usually premised on the role of the legislature as a representative body.¹⁶³ Supporters of bicameralism argue that, the second chamber represents diverse interests of the people. Whereas the first chamber represents the interests of the people, the second chamber allows for representation of other interests promoting diversity,¹⁶⁴ where a second chamber represents the interest of a larger territorial unit unlike the first chamber, which in most cases represents constituencies -it

¹⁵⁷ John Robinson (ed), *The Collected Works of John Stuart Mill, Volume XIX: Essays on Politics and Society Part Two (Considerations on Representative Government)* (University of Toronto Press, 1979).

¹⁵⁸ Ibid.

¹⁵⁹ Waldron (n 161) 3.

¹⁶⁰ John Stuart Mill, *Considerations on Representative Government* (Everyman edn, Chapter 13, 1972).

¹⁶¹ Nicholas Aroney, 'Upper Houses Democracy and Executive Accountability' (University of Queensland TC Bierne School of Law Research Paper No. 07-24, 2007).

¹⁶² Ibid.

¹⁶³ Ibid.

¹⁶⁴ IDEA (n 127) 2.

increases diversity. This has been exercised in countries practicing federal bicameralism such as US, Nigeria, Canada and Germany.¹⁶⁵ In such cases the second chamber represents the interests of the larger territories while the first chamber represents the interests of the constituencies or districts. In National Council of Slovenia, the second chamber represents the social, economic, occupational and local interest's groups.¹⁶⁶

To counter this argument, critics of bicameralism argue that a second chamber is not necessary as it repeats the functions of the first chamber as a representative body.¹⁶⁷ It only leads to a duplicate of duties arguing thus that one house can do what the two houses do.¹⁶⁸ This argument stems from the theory of representative democracy, which is equated to majoritarian rule. The lower house is directly elected as representatives of the people hence any approval by it is the voice of the majority. The upper chamber undermines democracy, as it does not locate 'full governmental power in the representatives of the popular majority'.¹⁶⁹

Aroney argues that critics of second chamber on representation base their arguments on three assumptions of democracy.¹⁷⁰ First, they assume that society is made up of the 'people' who can be represented in the lower house through electoral process without a problem. Bicameralism fosters the representation of the interests of particular people. In the US, for example, the adoption of the Senate was justified on the ground that it represented the interests of the States.¹⁷¹ The state, it was argued had different and specific interests, distinct from the interests

¹⁶⁵ Michael Cutrone and Nolan McCarty, 'Does Bicameralism Matter' available at <http://www.columbia.edu/~gjl10/cutrone_mccarty_bicameralism.pdf> Accessed 5 August 2016.

¹⁶⁶ Ibid.

¹⁶⁷ Aroney (n 166) 21.

¹⁶⁸ Arowolo (n 120) 9.

¹⁶⁹ Dare Arowolo and Obafemi Aluko, 'Democracy, Political Participation and Good Governance in Nigeria' (2012) 3, *International Journal of Development and Sustainability* 397.

¹⁷⁰ Aroney (n 166) 21.

¹⁷¹ Money and Tsebilis (n 90) 22.

of the population. In order for bicameralism to be effective; ‘representation must be amplified; opportunity for debate and deliberation broadened and examination for legislation increased’.¹⁷²

Secondly protagonists of the second chamber argue that it safeguards against the tyranny of the first chamber.¹⁷³ Critics on the other hand provide that the second chamber is conservative and undemocratic institution that prevents the government from pursuing policies for the benefit of the people.¹⁷⁴ This arise especially where the members of the second chambers are not directly elected hence lacking democratic legitimacy. This argument is usually attributed to Emmanuel-Joseph Sieyes, who argued that, second chambers are either undemocratic and illegitimate or democratic and redundant.¹⁷⁵ In such cases, power struggles between the first and the second chambers of who is more representative may arise derailing formulation of legislation. Through the first chamber, the voice of the people should only be spoken once and not twice by subjecting legislation approved by the first chamber to the second chamber.¹⁷⁶

Another argument is that the second chamber facilitates a deliberative approach to legislation.¹⁷⁷ The doctrine of separation of powers as articulated by Locke and Montesquieu requires that government be divided into three institutions; legislature, judiciary and executive.¹⁷⁸ The legislature enacts the law, executive implements the law and the judiciary makes an interpretation of the law.¹⁷⁹ The people’s legislative authority is vested in the legislature. The role of the second chamber in a bicameral legislature is to review the legislature enacted by the

¹⁷² Waldron (n 161) 4.

¹⁷³Tsebelis and Money (n 90) 29.

¹⁷⁴Rockow (n 160) 23.

¹⁷⁵ Emmanuel Sieyes, ‘What is the Third State?’ In Michael Sonenshcer (ed), *Emmanuel Joseph Sieyes: Political Writings* (Hackett Publishing 2003).

¹⁷⁶ Ibid.

¹⁷⁷Tsebelis and Money (n 90) 32.

¹⁷⁸Montesquieu (n 149) 90.

¹⁷⁹ Ibid.

first chamber¹⁸⁰ Proponents of the role of second chamber to review the legislature of the lower house argue that it improves the stability and the quality of the legislation.¹⁸¹ It facilitates a second look of legislation and acts as a check on the hasty and ill-conceived legislations by the majority first chamber.

In one of his lectures on bicameralism, Waldron compares the establishment of the second chamber to the practices of the ancient Goths of Germany when they had to decide on important issues.¹⁸² When the Goths of Germany had to decide an important issue, they would do it twice, when drunk and sober. The reason why they discussed important issues when drunk was to give the deliberations a bit of vigor and spirit while sober in order to add some prudent and discretions in their deliberations.¹⁸³ He compares the Goths practice with the current bicameralism arguing that the lower house can be compared to the ‘drunk deliberations’ and its only the upper house which can ‘soberly’ deliberate hence the need for the second chamber.¹⁸⁴ He argues that there is need for a second chamber to represent the various interests of the people. The second chamber compliments the first chamber.¹⁸⁵ Montesquieu echoed these sentiments in his earlier writings on bicameralism.¹⁸⁶

Lastly, supporters of the second chamber argue that it restrains the lower house from dictatorship and ensures scrutiny of the executive.¹⁸⁷ Executive dominance in parliament calls for establishment of second chamber, which can scrutinize and review the laws adopted by the lower

¹⁸⁰ Nicholas Aroney, ‘Four Reasons for an Upper House Representative Democracy, Public Deliberation, Legislative Outputs, and Executive Accountability’ (2008) 29, *Adelaide Law Review* 205.

¹⁸¹ *Ibid* at 210.

¹⁸² Waldron (n 161) 3.

¹⁸³ *Ibid*.

¹⁸⁴ *Ibid*.

¹⁸⁵ *Ibid*.

¹⁸⁶ Montesquieu (n 149) 90.

¹⁸⁷ Scott Prasser, John Nethercote and Nicholas Aroney, ‘Upper Houses and the Problem of Effective Dictatorship’ in Nicholas Aroney, Scott Prasser and John Nethercote (eds), *Restraining Effective Dictatorship: The Upper House Solution* (University of Western Australia Press, 2008).

chamber.¹⁸⁸ The second chamber operates with greater independence and is detached from party politics hence in a better position to perform oversight functions.¹⁸⁹

2.4 Conclusion

The role of the Senate has its foundations on bicameralism. The main justification of a second chamber is to enhance representation of specific interests and promote deliberative approach to legislation. It safeguards against the tyranny of the first chamber. Whichever legislature a country adopts shall be underpinned on the justifications of each legislature. In a federal or devolved system of government, the role of the Senate remains to safeguard the interests of the territorial units either through legislation or oversight.

¹⁸⁸ Ibid.

¹⁸⁹ Aisling Reidy and Meg Russell, 'Second Chambers as Constitutional Guardians and Protectors of Human Rights' <<https://www.ucl.ac.uk/spp/publications/unit-publications/44.pdf>> accessed 8 August 2016.

CHAPTER THREE

3.0 HISTORY, ESTABLISHMENT, COMPOSITION AND ROLE OF THE KENYAN

SENATE UNDER THE 2010 CONSTITUTION OF KENYA: AN OVERVIEW

*“The senate represents the counties, and serves to protect the interests of the counties and their governments”.*¹⁹⁰

3.1 Introduction

In 2013, after the general elections, the first Senate under the Constitution of Kenya (CoK), 2010 was established to play a pivotal role in devolution. This chapter analyses the historical development of the bicameralism in Kenya in order to understand the intended purpose of Senate. The second part analyses the establishment of the Senate under the CoK, 2010. The third part discusses the composition of the Senate. The fourth part analyses the constitutional provisions on the role and powers of the Senate. The aim of this chapter is to look into the function of the Senate in theory as envisaged under the Constitution. The establishment and composition of the Senate determines its power. This chapter shall determine whether the constitutional provisions on bicameralism are abstract and theory based.

3.2 History of Bicameralism in Kenya

Parliament defines the relationship between the citizens and the state.¹⁹¹ The legislative authority of the people is vested in parliament as their representative body.¹⁹² Therefore, parliament plays a vital role in the present day constitutional democracy. In most jurisdictions, the role of the parliament is to represent the will of the people, make laws and provide oversight mechanisms to

¹⁹⁰ Article 96 (1), CoK 2010. (Emphasis added)

¹⁹¹ Sebastian M Saiegh, ‘The Role of the Legislature in the Policymaking Process’ (University of Pittsburg 2005).

¹⁹² Article 94, CoK2010.

other organs of the state.¹⁹³ In order to carry out its function, Parliament must enjoy democratic legitimacy.¹⁹⁴

The promulgation of the CoK, 2010, brought with it various changes including the creation of two levels of government; national and devolved government. While the CoK, 2010, is celebrated for restructuring the governance system by introducing a system of government that is devolved, the establishment of the Senate is not novel. The Senate was established for the first time in the Independence Constitution, 1963, because of a compromise between Kenya African Democratic Union (KADU) and Kenya African National Union (KANU) during the three Lancaster House Conferences in London.¹⁹⁵ The Independence Constitution also created a federal system with three levels of government: the national and regional, with the local government as a competency of the regional government.¹⁹⁶ Seven regions were created with each having legislative and executive powers over certain matters.¹⁹⁷ These regions were known to as *Majimbos*.¹⁹⁸ The executive authority of the regions was however subject to the national government.¹⁹⁹

It must be remembered that Senate at independence in Kenya had been borne through aggressive lobbying by KADU, primarily to ensure protection of the rights of the minority groups in

¹⁹³ John K Johnson, 'Role of Parliament on Government' (World Bank 2005).

¹⁹⁴ Jamison E Colburn, *Democratic Experimentalism: A Separation of Powers for Our Time?* (Pennsylvania State University 2003).

¹⁹⁵ Patrick Loch Otieno Lumumba, Maurice Mbodyeni and Steve Odero (eds), *The Constitution of Kenya: Contemporary Readings* (Law Africa Publishing 2011).

¹⁹⁶ Kangu (n 5) 73.

¹⁹⁷ Ibid.

¹⁹⁸ This was a Swahili term used to refer to semi-autonomous regions that were established after independence which had created a federal system of government.

¹⁹⁹ Supra note 188.

Kenya.²⁰⁰ Initially bicameralism was not KADU's idea, but of the colonial powers who wanted to retain authority over their territories.²⁰¹ It was a scheme aimed at offering protection for the minority groups, which were represented by KADU, against the risk of domination by the gigantic and more advanced Kikuyu and Luo ethnic factions. These majority groups supported KANU.²⁰² KADU then supported a federal system within which substantial power would be distributed to regional administrations.

KADU wanted a federal state with autonomous regions.²⁰³ The main justification by KADU for establishment of a second chamber was to protect minority tribes in Kenya.²⁰⁴ Second justification was to protect the autonomy of the regions and interests of people in those regions.²⁰⁵ KANU on the other hand supported a centralized system of government. KANU saw bicameralism as an institution that would promote tribalism and cause divisiveness among Kenyans.²⁰⁶ It supported a unitary form of government with all decision making powers centralized.

An upper house was considered important to protect the independence of the regions and to assure sufficient representation of minority's interests at the core, for it was acknowledged that a

²⁰⁰ Fredrick Khaunya, Peter Wawire and Viola Chepng'eno, 'Devolved Governance in Kenya: Is it a False Start in Democratic Decentralization for Development?' (2015), *International Journal of Economics, Finance and Management* 4 (1).

²⁰¹ Ibid.

²⁰² Ibid.

²⁰³ Jackton Boma Ojwang, *The Constitutional Development in Kenya: Institutional Adaptation and Social Change* (Act Press, 1990).

²⁰⁴ Bethwel Allan Ogot, and William Robert Ochieng, *Decolonization and Independence in Kenya: 1943-1991* (James Curry 1995); Bruce Berman, *Control and Crisis in Colonial Kenya: Then Dialectic of Domination* (James Curry, 1990).

²⁰⁵ Kirui and Murkomen (n 7) 5.

²⁰⁶ Yash P. Ghai and John McAuslan, 'Public Law and Political Change in Kenya: A Study of the Legal Framework of Government from Colonial Times to the Present' (1972) 5, *The International Journal of African Historical Studies*

unicameral legislature elected based on "one man, one-vote" might very well be exclusively managed by KANU, which favored centralization of power.²⁰⁷ At independence, a bicameral parliament was established consisting of the House of Representatives and the Senate.²⁰⁸ The Senate consisted of forty-one Senators directly elected by registered voters in their districts.²⁰⁹ The 41 Senators were elected to serve for a maximum of six years, but one-third of the Senators retiring every two years.²¹⁰ This kind of representation ensured that minority tribes were represented in the Senate. Although the Senators were elected directly, the Senators were to serve for a fixed period meaning that their elections were held on a different calendar with members of House of Representatives.²¹¹ The main reason was to detach Senators from party politics of the day.

The legislative power of the Senate in the independence Constitution was not limited to regions alone. The two houses had almost equal powers when it came to legislative process. In the CoK, 2010, the power of the Senate to legislate is restricted to matters concerning counties only.²¹² Section 59 of the Independence Constitution allowed the Senate to consider debate, amend and enact any bill as long as it was not a money bill. Section 59 of the 1963 independence Constitution provided that:

The power of Parliament to make laws shall be exercisable by Bills passed by both Houses of the National Assembly (or, in the cases mentioned in section 61 of this Constitution, by the House of Representative) and assented to by Her Majesty or by the Governor-General on behalf of Her Majesty.

²⁰⁷Ibid.

²⁰⁸Section 34 (2), 1963 Independence Constitution.

²⁰⁹Section 35, 1963 Independence Constitution.

²¹⁰Ibid.

²¹¹Section 42, 1963 Independence Constitution.

²¹²Article 109, CoK 2010.

The structure of bicameralism in the independent Constitution ensured that every house had an input in the legislative process. The independent Constitution structured the relationships of the Senate and House of Representative as complimentary. It promoted deliberation, consultations and negotiations between the two houses.²¹³ The Senate had the right to scrutinize any Bill from the House of Representatives and vice versa. No bill would be referred to the governor for signature before any of the houses scrutinized it. In case of money bill the role of the Senate was limited to debate alone.²¹⁴ This did not imply that the jurisdiction of the Senate was by-passed by the House of Representatives but it served to distinguish the role of the two houses. Some commentators argue that bicameralism in the independent Constitution was more practical in its functions than the Senate under the current Constitution.²¹⁵ For instance, Cheserek argues that the current constitution drifts back to unicameralism especially on matters not concerning counties.²¹⁶

Whereas the intended purpose of the Senate under the independence Constitution was to protect the rights of minority tribes and regional interests, its role was hampered by many challenges.²¹⁷ The central government and the House of Representatives frustrated the Senate.²¹⁸ The Senate was denied adequate financial resources to carry out its functions.²¹⁹ While the Senate had the power to hold the government accountable, the extent of this role was limited to regional interests. KANU used its members in the Senate to frustrate its functioning and depict it as

²¹³Ghai and McAuslan (n 211) 140.

²¹⁴Section 51, 1962 Constitution.

²¹⁵ Jephumba Cheserek, 'Bicameralism: A Critique of the Constitution of Kenya 2010' <https://www.academia.edu/21711249/BICAMERALISM_A_CRITIQUE_OF_THE_CONSTITUTION_OF_KENYA_2010>accessed 23 August 2016.

²¹⁶ Ibid.

²¹⁷Ajuma Odinga Odinga, *Not Yet Uhuru* (Heinemann Educational Books 1968).

²¹⁸ Gibson Kamau Kuria, *Majimboism, Ethnic Cleansing and Constitutionalism in Kenya* (Kenya Human Rights Commission 1994).

²¹⁹Odinga (n 222) 48.

duplicate of the House of Representative hence unnecessary. Lack of political will and unnecessary frustrations led to the dismantlement of the Senate in 1967.

The Senate lasted for a few years and abolished in 1966 and its membership and powers merged with that of the House of Representatives to establish a unicameral legislature, the National Assembly.²²⁰ Bicameralism was viewed as divisive and it was used as a justification to introduce unicameralism. Throughout the Moi regime²²¹ and part of Kibaki regime²²², and until the promulgation of the CoK, 2010, Kenyan parliament had only one house; the National Assembly.

In 1990's as the concerted efforts for constitutional change were made, bicameralism found its way into the Kenyan jurisprudence.²²³ Article 120 of the 2004 *Bomas* Draft Constitution²²⁴ explicitly provided for the establishment of parliament consisting of the Senate and National Assembly.²²⁵ The *Bomas* Draft Constitution gave the Senate the powers to originate any Bill apart from money bills and they represented the district that elected them.²²⁶ In fact the *Bomas* Draft Constitution provided for a strong bicameralism where all the bills apart from money bill were to be referred in either house for introduction, consideration and passage.²²⁷ The bill except money bill would be defeated if the referred House rejected it.²²⁸ The 2004 *Bomas* Draft Constitution, which called for the establishment of a bicameral legislature, was rejected due to

²²⁰ This was through the seventh Constitution of Kenya (Amendment) (No 4) Act No. 19 of 1966

²²¹ This was the period between 1978 and 2002 of the presidency of the second President of the Republic of Kenya, Daniel Toroitich Arap Moi.

²²² This was the period between 2002 to 20013 of the presidency of the third President of the Republic of Kenya, Mwai Kibaki.

²²³ Cheserek (n 220) 10.

²²⁴ This was a draft proposed Constitution of Kenya of 2004.

²²⁵ Government of Kenya, *Draft Constitution of Kenya (Bomas Draft)* (Constitution Kenya Review Commission 2004).

²²⁶ Ibid Article 132.

²²⁷ Ibid article 134.

²²⁸ Ibid Article 134 (3).

political interests.²²⁹ The efforts to get a new Constitution were crushed down until when the NARC government came into power.²³⁰

In 2005 the *Wako* Draft Constitution²³¹ was enacted and subjected to referendum. It proposed a unicameral legislature.²³² During the referendum the *Wako* Draft Constitution was rejected and the status quo remained. The quest for constitutional reforms in the country continued especially after the 2007-2008 election violence. Kenyans felt that they needed a new Constitution to set in motion an array of institutional reforms to promote constitutional democracy. On 27th August 2010, a new constitution was promulgated to steer social, political and economic changes. It reintroduced bicameralism by establishing a parliament consisting of the Senate and National Assembly.²³³

3.3 Establishment of the Kenyan Senate under the 2010 Constitution of Kenya

The quest for a new Constitution was characterized by the need to change the Kenyan political system. Kenyans were tired of the Moi regime and yearned to redeem themselves from the oppressive government and political oblivion.²³⁴ The CoK, 2010, is transformative in nature based on values such as democracy, human rights, good governance, and public participation among others.²³⁵ The court in the case of *Speaker of the Senate and Another v Attorney General*

²²⁹ Koki Muli, 'The Draft Constitution of Kenya 2004 (Bomas Draft): Reflections and Commentary on Issues of Content and Process'. Available at <https://wikileaks.org/w/images/Kenya-bomas.pdf> accessed 23 August 2016; Center for Governance and Development (CGD), 'Bomas Draft Constitution, Disputed Facts: Representation of the People' (CGD 2004).

²³⁰ Alicia L Bannon. 'Designing a Constitutional-Drafting Process: Lessons from Kenya' (The Yale Journal of Law, 2007) 1824-1872.

²³¹ This was a proposed Constitution of Kenya of 2005.

²³² Article 114, 2005 Wako Draft Constitution.

²³³ Article 93, CoK 2010.

²³⁴ *Kuria* (n 223)8.

²³⁵ Article 10, CoK 2010.

and 4 Others (Advisory Opinion Referenced No.2 of 2013),²³⁶ recognized the transformative nature of the CoK, 2010. It held that:

Kenya's Constitution of 2010 is a transformative charter. Unlike the conventional "liberal" Constitutions of the earlier decades which essentially sought the control and legitimization of public power, the avowed goal of today's Constitution is to institute *social change and reform*, through values such as *social justice, equality, devolution, human rights, rule of law, freedom and democracy*.²³⁷

The Constitution of Kenya, 2010 brought with it many significant changes amongst them the legislative system and design of parliament.²³⁸ It brought to life two levels of government; the national and the county government. The objects of devolved system of government includes: promotion of democratic and accountable exercise of power; fostering national unity by recognizing diversity; fostering economic development; and promotion of county interests among others.²³⁹ In order to realize devolution, a presidential bicameral parliament was established comprising of the National Assembly and the Senate.²⁴⁰ Senate, the second legislative chamber, is intended to act as a territorial chamber, that is, 'a chamber of the counties' by representing the counties and protecting the interests of the counties and their governments at the national level.²⁴¹ The Senate represents and protects the interests of the county governments through its legislation and oversight. The National Assembly on the other hand represents the people of two hundred and ninety electoral constituencies and special interests, enacts national legislation and exercises oversight over funds appropriated for expenditure by the National government and its agencies.²⁴² In this chapter, this study considers the Senate's establishment,

²³⁶*Speaker of the Senate and Another v Attorney General and 4 Others*, 2013 eKLR.

²³⁷ *Ibid.*

²³⁸ CoK 2010, Chapter Eight.

²³⁹ Article 174, CoK 2010.

²⁴⁰ *Kirui and Murkomen (n 7) 7.*

²⁴¹ Article 96, CoK 2010.

²⁴² Article 95, CoK 2010.

its legislative and oversight roles, scope of authority and powers within the devolved system.²⁴³

The current Senate officially came into existence during the 2013 general elections in Kenya.

The Institute for Democracy and Electoral Assistance (IDEA) in its publication argues that before establishing a second chamber, the country must establish the needs it is supposed to address.²⁴⁴ The intended purpose of the second chamber shall determine its composition, powers and legitimacy. In Canada, the Canadian Senate was established as early as 1867 to counterbalance representation in the House of Commons.²⁴⁵ Apart from representation the Senate was also intended to provide parliament with a second chance to reconsider bills.²⁴⁶ In federal or regionalized states like the US, Australia, India, Kenya and South Africa, the intended purpose of a second chamber is to represent the interests of the territorial units at national level.²⁴⁷

Kenyan's quest for devolution was a driving force behind the promulgation of the CoK, 2010, in order to devolve public governance and resources to the grass root levels.²⁴⁸ In a devolved system of government like Kenya with distinct territorial units, the main justification of the second chamber is the representation of the territorial interests at the national level through legislation and oversight. The Senate hence remains an important institution in the realization of devolution which has been embraced by most of the Kenyans. It can be concluded that the intended purpose for the establishment of the current Kenyan Senate was: first as an institutional framework to steer devolution; and second to protect the territorial interests of the counties through legislation and oversight. The Independence Constitution of Kenya, 1963, provided for the establishment of

²⁴³ For an analysis of Kenya's devolved presidential system, see Othieno Nyanjom, 'Devolution in Kenya's New Constitution' (Society for International Development (SID) Constitution Working Paper Series No.4, 2011).

²⁴⁴ IDEA (n 112) 2

²⁴⁵ Parliament of Canada, 'The Senate' <http://sen.parl.gc.ca/portal/about-senate-e.htm> accessed 20 August 2016.

²⁴⁶ Ibid.

²⁴⁷ Juan Pablo Micozzi, 'Does Electoral Accountability Make a Difference? Direct Elections, Career Ambition and Legislative Performance in the Argentina Senate'. (The Journal of Politics 75, 2013) 137-149).

²⁴⁸ Thomas Nzioki Kibua and Germano Mwabu (eds), *Decentralization and Devolution in Kenya : New Approaches* (University of Nairobi Press 2008).

two houses: the Senate and House of Representatives.²⁴⁹ The main justification of having the Senate under the 1963 Independence constitution was to protect the interests' minority groups and the regions under *Majimboism Rule*.²⁵⁰

The strength of the second chamber according to Russell will be determined by three major factors; symmetry, congruency and legitimacy.²⁵¹ Symmetric bicameralism refers to the extent upon which the two houses share power. In symmetrical bicameralism, the two houses have equal or almost equal powers, and the consent of every house is needed in the enactment of laws. The Senate under the 1963 Kenyan Independence Constitution was symmetrical in nature with the Senate and House of Representatives having almost equal powers in the legislative process whereas in asymmetrical bicameralism, the powers of one chamber are limited. In Kenya, for example, the powers of the Senate under the CoK, 2010, are limited to matters concerning the counties only. Although they have the powers to originate debate and consider bills concerning county governments, this power is restricted when it comes to money bills. Money bills and any matter not concerning counties remain an exclusive preserve of the National Assembly. Congruence refers to the similarity of political partisan in the chambers.²⁵² A congruent second chamber has its majority members from one political party or coalition. Incongruent second chamber on the other hand is based on different representative principles. Democratic legitimacy is usually conferred through popular elections. Second chambers that enjoy legitimacy usually make use of their full powers.²⁵³

²⁴⁹Section 34 (2), 1963 Independence CoK.

²⁵⁰ Peter Kagwanja and Willy Mutunga, 'Is Majimbo Federalism?: Constitutional Debate in a Tribal Shark-Tank' (2001) <<http://www.hartford-hwp.com/archives/36/136.html>> accessed 23 August 2016.

²⁵¹ Meg Russell, 'A Stronger Second Chamber? Assessing the Impact of the House of Lords Reform in 1999 and the Lessons of Bicameralism' (2010) 58, *Journal of Political Studies* 866.

²⁵² IDEA (n 112)7.

²⁵³ Ibid.

There are three ways in which members of the second chamber may come into office; appointment, direct elections and indirect elections.²⁵⁴ The stronger the legitimacy of the second chamber, the more it is likely going to make full use of its powers. Legitimacy can be drawn from the Constitution as the Supreme law of the land or through direct/indirect elections. IDEA states that:

Democratic legitimacy is typically conferred by popular election, but other forms of legitimacy such as traditional or religious legitimacy or legitimacy conferred by representing sub-national governments may apply in some contexts. Many second chambers around the world, especially those that are appointed rather than elected, are perceived as lacking legitimacy, and as a result have less practical authority than their formal legal powers would suggest.²⁵⁵

Commentators argue that a directly elected second chamber enjoys democratic legitimacy than an appointed one.²⁵⁶ The South African second chamber National Council of Provinces (NCOP)- draws its legitimacy from representation of sub-national interests; same to the Australian Senate,²⁵⁷ German *Bundesrat*²⁵⁸ and Indian.²⁵⁹ In Canada, the Governor on the advice of the prime minister appoints Senators.²⁶⁰

²⁵⁴ Lewis Baston, 'Direct Elections for a Reformed Second Chamber'. [year?] Available at <https://www.electoral-reform.org.uk/sites/default/files/Direct-Elections-for-the-House-of-Lords.pdf>. Accessed 19 August 2016.

²⁵⁵ IDEA (n 112)8.

²⁵⁶ Meg Russells, 'What are second chambers for?' Elected Chamber' (Parliamentary Affairs 2001) available at <https://www.ucl.ac.uk/spp/publications/unit-publications/39.pdf> accessed 23 August 2016.

²⁵⁷ Samuel C Patterson and Antony Mughan (eds), *Senates: Bicameralism in the Contemporary World* (Ohio State University Press 1999).

²⁵⁸ Thomas Konig, 'Bicameralism and Party Politics in Germany: An Empirical Social Choice Analysis' (2001) 49, *Journal for Political Studies* 411; Andrzej Jackiewicz, *Territorial Organization of European States: Federalism, Regionalism and Unitarism* (Temida 2011); 'Bundesrat' <http://www.bundesrat.de/EN/homepage/homepage-node.html> accessed 23 August 2016.

²⁵⁹ SS Nanda, *Bicameralism in India* (New Era Publications 1988); Mahendra Prasad Singh, *Indian Federalism: An Introduction* (3rd edn, Magadh University Press 2014).

²⁶⁰ David E Smith, *The Canadian Senate in Bicameral Perspective* (University of Toronto Press 2003); Serge Joyal, *Protecting the Canadian Democracy: The Senate You Never Knew* (McGill-Queens Press 2003).

The Kenyan Senate is established through direct elections. It draws its existence and authority from the concept of devolution under the Constitution of Kenya 2010. As one part of Parliament, the Senate, together with the National Assembly, shares in the people's sovereign authority to make the laws of the land.²⁶¹ Article 93 of the CoK provides for the establishment of a Senate. However, Article 98 stipulates how such a Senate shall come into existence. Registered voters directly elect members of a Senate at county level during general elections from specific counties. Other members are directly nominated by political parties to represent special interests such as women, youth and people with disabilities.

Another key feature of the Kenyan senate is that members of the Senate and the National Assembly are elected at the same time for a similar fixed period of time. In the previous general election in 2013, Kenyans elected the president, deputy president, governors, senators, women representatives, members of the national assembly and members of the county assemblies for a fixed period of time. According to IDEA, 'If the electoral system, timing of elections, and apportionment of seats are similar between the two chambers, then it is likely that the second chamber will be congruent, having a similar partisan composition to the first chamber, and thus having less effective veto power.'²⁶²

3.4 Composition of the Senate under the 2010 Constitution of Kenya

The Senate consists of a total of 67 members and a speaker; 47 of them are elected directly by the voters of the counties forming a single constituency at the general elections.²⁶³ Political Parties nominate 16 Women Senators to represent the women of Kenya²⁶⁴, another 2 (a man and

²⁶¹ Article 94, CoK 2010.

²⁶² IDEA (n 127)10.

²⁶³ Article 98 (1) (a), CoK 2010.

²⁶⁴ Article 98 (1) (b), CoK 2010.

a woman) representing the youth of Kenya²⁶⁵, and two other members (one man and one woman) representing all persons with disabilities.²⁶⁶ Kangu puts the composition of the Senate into three categories: the county senators, the special interest senators and the speaker.²⁶⁷

a) County Senators

Under the devolved system of government in the Constitution, each of the 47 Counties directly elect a one Senate Member.²⁶⁸ The 47 members are each elected by registered voters of the counties, each county constituting a single member constituency.²⁶⁹ These Senators represent and protect both the county and its people and the government of the county.²⁷⁰ The representation of each of the counties by one member is a reflection of the principle of equality of all counties irrespective of the differences in demography and population size. Kirui and Murkomen argues that Senators representing more populated counties may very well find themselves under pressure to somehow exert more clout and influence in the Senate so as not to appear to be outdone by those from smaller counties.²⁷¹ These Senators may however often pass the buck to the house or committees and as a result disguise their decision-making responsibility.²⁷² It is however interesting to note that no woman was elected as a county Senator during the 2013 general election.²⁷³

²⁶⁵ Article 98 (1) (c), CoK 2010.

²⁶⁶ Article 98 (1) (d), CoK 2010.

²⁶⁷ Kangu (n 5) 347.

²⁶⁸ Article 98 (1), CoK 2010.

²⁶⁹ Ibid.

²⁷⁰ Article 96, CoK 2010.

²⁷¹ Kirui and Murkomen (n 7) 5.

²⁷² Ibid.

²⁷³ Wanjiku Mukabi Kabira and Elishiba Njambi Kimani, 'The Historical Journey of Women's Leadership in Kenya' (2012) 3 Journal of Emerging Trends in Educational Research and Policy Studies, 842.

b) Special Interest Senators

As stated earlier, the Senate safeguards the interests of Counties. Further, the Senate protects the interests of women, youth and persons with disability. These minorities and marginalized groups are nominated through political party lists as provided for under Article 98 (1) of the Constitution. These special interest Senators should be understood to be groups that were previously marginalized and whom the Constitution offers an opportunity for representation, protection and participation.²⁷⁴ Thus, only those people belonging to the categories of women, youths and people with disabilities qualify to be nominated under this category.²⁷⁵ The Court of Appeal in *Commission for the Implementation of the Constitution v Attorney General and others*²⁷⁶ declared section 34 (9) of the Election Act, which provided for the inclusion of the Presidential and Deputy Presidential candidates among persons eligible for nomination to the Senate under the special interest groups, unconstitutional.

Members of these special interest groups are nominated to the Senate through party lists on the basis of the proportional representation.²⁷⁷ This is based on the total number of seats a party wins out of the 47 county Senators who are directly elected by the registered voters in the counties.²⁷⁸ However, the special interest nominees must first meet all the qualifications set out for members of Parliament.²⁷⁹ Thus, they must be 18 years and above required for one to register as a voter.

²⁷⁴Ibid at 348.

²⁷⁵Ibid.

²⁷⁶(2013) eKLR (Commission for the Implementation of the Constitution).

²⁷⁷Articles 98 (2) and 90, CoK 2010.

²⁷⁸Article 90 (3), CoK 2010.

²⁷⁹Article 99, CoK 2010.

c) Senators representing interests of women

Article 98 (1) (b) provides for sixteen women members who shall be nominated by political parties according to their proportion of members of the Senate elected by county as constituencies. Political parties participating in a general election are required to nominate and submit in advance before the general election, a list of sixteen women members who would stand nominated if the party were to be entitled to all the sixteen seats.²⁸⁰ After the general election, Independent Election and Boundaries Commission then allocate each party woman members in proportion to the total number of its elected county senators,²⁸¹ picked from the submitted list.²⁸²

The 16 nominated women Senators are expected to perform delicate balancing acts when legislating given that different counties attach different levels of importance to women issues as a matter of social-cultural fact. In matters affecting counties, the women nominated Senators do not have individual votes; rather, they must consult and share their concerns with county Senators who cast one vote each on the basis of equality among the counties.²⁸³ In matters that do not affect the counties, all Senators have individual votes.²⁸⁴ Kangu argues that it is difficult to determine matters that do not affect the counties other than constitutional amendments due to the broad definition of the matters affecting counties as per article 110.²⁸⁵

d) Senators representing the youth

The Constitution provides that two members (one from each gender) representing the youth must be nominated in accordance to article 90 on the basis of party lists presented to the IEBC before

²⁸⁰Kangu (n 5)346.

²⁸¹Article 90 (2)(a), CoK 2010.

²⁸²Kangu (n 5)347.

²⁸³Article 123 (2) and (4), CoK 2010.

²⁸⁴Kangu (n 5)348.

²⁸⁵Ibid.

the Election Day.²⁸⁶ Since there are only two slots under this category, it means that the party with the majority county Senators and the one with the second majority are the only ones, which get an opportunity to nominate. That would mean that the first two parties each gets one member and if the first gets a male member, then the other gets a female member.²⁸⁷ Since the Constitution²⁸⁸ refers to this category of Senators as representing the youth, it will mean that those nominated under this category must be youth. A youth is defined collectively as all individuals in Kenya who have attained the age of 18 years but have not attained the age of 35 years.²⁸⁹ Kangu holds that the persons nominated to represent the youths must not only be within the bracket of youths during nomination but must remain so throughout the entire five-year term.²⁹⁰ Thus if a person ceases to be youth before expiry of five year term, he ceases to be a member of the Senate.²⁹¹ The role of these Senators is subject to decision-making limitations under Article 123.²⁹² However, they are supposed to bring on board youth perspective in matters in which the Senate has a role.²⁹³

e) Senators representing persons with disabilities

The Constitution provides for two members (one from each gender) to represent people with disabilities.²⁹⁴ The nomination of members under this category must be in accordance with Article 90 on the basis of political party lists presented to the IEBC before the election date.²⁹⁵ Just like with the youth representatives, the party with the highest number of elected county

²⁸⁶ Article 98 (1) (c), CoK 2010.

²⁸⁷ Article 90 (2) (b) and (c), CoK 2010.

²⁸⁸ Kangu (n 5) 356.

²⁸⁹ Article 260, CoK 2010.

²⁹⁰ Kangu (n 5) 351.

²⁹¹ Ibid.

²⁹² Ibid.

²⁹³ Ibid.

²⁹⁴ Article 98 (1) (d), CoK 2010.

²⁹⁵ Kirui and Murkomen (n 7)10.

Senators and the one with the second highest number get the opportunity to get one member each provided they are of different gender.²⁹⁶ It also follows that since these members represent people with disabilities, they themselves must be people living with disabilities. The Constitution defines disability to include ‘any physical, sensory, mental, psychological or any other impairment, condition or illness that has, or is perceived by significance sectors of the community to have a substantial or long term effect on an individual’s ability to carry out ordinary day to day activities’.²⁹⁷ Thus these members are supposed to bring to the Senate disability perspective in matters that the Senate considers.

f) The Speaker

The Speaker is an *ex-officio* member of the Senate.²⁹⁸ He is elected by the members of the Senate from among persons qualified for election as members of Parliament but who are not elected as such.²⁹⁹ The Senate Speaker has the responsibility of presiding over the sittings and proceedings of the Senate.³⁰⁰ The Speaker also determines whether a Bill concerns counties or not and whether it is an ordinary Bill or special Bill.³⁰¹

Article 122 provides that the Speaker would not have a vote in the Senate and is he is not counted as a member when determining the number of members for the purpose of voting. Kangu argues that this is to ensure that the Speaker discharges his mandate in an independent and impartial manner, and in good faith, especially given that his is a constitutional office.³⁰² In discharging his responsibilities, the Speaker of the Senate must remain alive to the primary

²⁹⁶Kangu(n 5) 355.

²⁹⁷Article 260, CoK 2010.

²⁹⁸Article 98 (1) (e), CoK 2010.

²⁹⁹Article 106 (1) (a), CoK 2010.

³⁰⁰Article 107 (1), CoK 2010.

³⁰¹Article 110 (3), CoK 2010.

³⁰²Kangu (n 5) 362.

mandate of the Senate of representing and protecting the interests of the counties and their governments.³⁰³

Other than overseeing the sittings and proceedings of the senate, the Speaker also plays other pivotal roles as emphasized by the High Court in *Judicial Service Commission v Speaker of the National Assembly and another*.³⁰⁴ The court stated that the office of the Speaker is an important one since he determines the business of the House, restrains disorderly conduct, controls debate, and determines whether the motions tabled by members are admissible. The Speaker also represents the Senate in other functions in relation to other organs and authorities.

It must be noted that the Senate can constitute committees of the senate complete with Standing Orders.³⁰⁵ Senate Committees play an important role of raising the efficiency and speed of the business of the House. They do so by enabling a small group of members to work closely together and to produce Bills and reports for consideration by the whole House in plenary.

3.5 Role and Powers of Senate under the 2010 Constitution of Kenya

The role of the Senate is to protect the interests of the counties and their governments through representation at the national level, legislating on laws affecting the counties and playing its oversight role over national revenue allocated to counties.³⁰⁶ Article 96 of the CoK stipulates the role of the Senate as follows:

- (1) The Senate **represents** the counties, and **serves to protect the interests** of the counties and their governments.

³⁰³Ibid.

³⁰⁴(2014) eKLR.

³⁰⁵Article 124 (1), CoK 2010.

³⁰⁶The Kenyan Section of the International Commission of Jurists, *Devolution Handbook* (2013).

- (2) The Senate participates in the **law-making** function of Parliament by considering, debating and approving Bills **concerning counties**, as provided in Articles 109 to 113.
- (3) The Senate determines the **allocation of national revenue among counties**, as provided in Article 217, and **exercises oversight** over national revenue allocated to the county governments.
- (4) The Senate participates in the **oversight of State officers** by considering and determining any resolution to remove the President or Deputy President from office in accordance with Article 145.³⁰⁷

The Senate exercises its role through legislative and oversight process. In the case of *Mwangi Wa Iria & 2 Others vs Speaker Murang'a County Assembly & 3 Others*,³⁰⁸ the court recognized the role of the Senators as representative and protector of the interests of the counties in the impeachment of county governors. It held that:

With regard to the issue of public interest, I must state that the reason the process of the removal of governors is also subjected to a senatorial process is because the *Senate is expected to protect the interest of the counties and their governments*. Counties constitute people.³⁰⁹

The CoK grants the Senate the mandate as a safeguard of the interests of the counties to participate in the enactment of Bills affecting the counties. The Senate exercises the legislative authority of the people on matters concerning the counties in order to protect county interests.³¹⁰ Its legislative authority is capped at the county level. However, the authority of the Senate to make law on any matter concerning county government is not exclusive and will always be subject to that of the National Assembly. Article 111 (2) of the Constitution gives National Assembly the authority to amend or veto a special Bill that has been passed by the Senate if a resolution is supported by at least two-thirds of the members of the Assembly. This means that although for

³⁰⁷ Emphasis added.

³⁰⁸ *Petition 458 of 2015*, [2015]eKLR.

³⁰⁹ *Ibid.*

³¹⁰ Article 94, CoK 2010.

example, it is the responsibility of the Senate to determine the allocation of the revenue to the Counties, the National Assembly can amend or even veto the said resolutions.³¹¹ This was the case when in 2015; the National Assembly vetoed the proposals by the Senate to increase the county allocations.³¹²

The Senate's authority to make laws extends to amendments of the Constitution, with the Senate expected to protect the interests of devolved units, and in this instance, the boundaries that define those units.³¹³ The provision for amending and altering county boundaries is important as it protects the people's right to determine their area of identity and domicile with respect to a County. The said interests may jeopardize the sovereignty and inherent rights of weak and marginalized Counties who may be in danger of domination by stronger political interests at the national level.

Although the Senate is vested with various powers, its authority is limited to counties. For example the Senate under article 109 (3) will not get to consider, debate or approve Bills that do not concern Counties, which remains the preserve of the National Assembly.³¹⁴ Further, the Senate's authority in the larger scheme of national issues is limited by article 109 (5) that money Bills cannot originate from the Senate. The question of whether a proposed bill concerns counties has remained one of the contentious issues since the establishment of the 11th parliament.

The Task Force on Devolved Government in its final Report argued that extent of the legislative role of the Senate in protecting the interest of the counties can only be appreciated if the meaning

³¹¹Article 217 (5), CoK 2010.

³¹² <<http://www.businessdailyafrica.com/House-rejects-Senate-bid-to-raise-counties-cash-/-/539546/2693196/-/tfa485z/-/index.html>> accessed 23 August 2016. [is this an article? Who is the author?]

³¹³Ibid.

³¹⁴Article 109 (3), CoK 2010.

of the phrase ‘concerning counties’ is examined.³¹⁵ The report provides that article 110 of the CoK which defines Bill concerning counties is broad and ‘it creates room for the Senate to participate in passing of Bills in the exclusive functional areas of the national government, for as long as it can be shown that such Bills have provisions affecting the functions of the county governments’.³¹⁶ A Bill concerning County Government includes: a Bill containing provisions affecting the functions and powers of the county governments set out in the Fourth Schedule; a Bill relating to the election of members of a County Assembly or a county executive; and a Bill referred to in Chapter Twelve affecting the finances of county governments.³¹⁷ The court in the *Advisory Opinion Referenced No.2 of 2013*,³¹⁸ had to determine whether the Division of Revenue Bill was a bill concerning county government. In this case, the National Assembly had transmitted the Division of Revenue Bill to the president for assent before referring the same to the Senate. The National Assembly argued that this Bill did not concern the counties and fell in its exclusive exclusion. The Senate on the contrary argued that, the counties had a major interest in the monies hence it required the Senators’ contribution. It was held that such a bill concerned counties and hence the Senate had a role in its legislation.

The Senate has been given certain powers over suspension of counties. The Senate, as the defender of the interests of the Counties³¹⁹, has correctly been granted by the Constitution the final say on whether the National Government should intervene in the running of a dysfunctional

³¹⁵ Task Force on Devolved Government, *A Report on the Implementation of Devolved Government in Kenya* (Final Report).

³¹⁶ Ibid.

³¹⁷ Article 110, CoK 2010

³¹⁸ *Speaker of the Senate and Another v Attorney General and 4 Others*, 2013 eKLR.

³¹⁹ Article 96, CoK 2010.

County Government.³²⁰ It also has the power to bring to an end intervention measures in place against a County, such as the suspension of that County's Government by the President.³²¹

The Senate also has the power to summon any of the Commissions, the Auditor-General or the Director of Budget to report on a matter.³²² Article 254 provides that the Senate may require a commission or holder of an independent office to submit a report on a particular issue.³²³ Some authors argue that the establishment of a bicameral legislature in the CoK is practically fallacious.³²⁴

Apart from its legislative role at the national level on issues affecting the counties, the Senate has an oversight role over national revenue allocated at the county level. The objective of this role is to protect the interests of the counties from misappropriation of public funds at the county level. The oversight role of the Senate on county finances has put the governors and the Senators at loggerheads leading to court battles. While the Senate determines the allocation of national revenue among counties and exercises oversight over the same, the county assembly also has an oversight role over the county's fiscal management.³²⁵ The two levels of government must work in consultation and cooperation with each other.³²⁶ The extent to which the Senate can oversee national revenue allocated to the counties is argued to conflict with Article 226(2) of the CoK, which stipulates that a county public entity is accountable to the County Assembly.

³²⁰Article 192 (2), CoK 2010.

³²¹Article 192 (4), CoK 2010.

³²²Article 254 (2), CoK 2010.

³²³Ibid.

³²⁴ Silas W Aluku, 'Bicameralism: A Critique of the Constitution of Kenya 2010'(year) available at, https://www.academia.edu/21711249/BICAMERALISM_A_CRITIQUE_OF_THE_CONSTITUTION_OF_KENYA_2010 accessed 16 August 2016.

³²⁵Article 226 (2), CoK 2010.

³²⁶Article 6(2), CoK 2010.

The Senate also derives its power under Article 125 of the CoK to summon any person to provide information and evidence. Article 125 of the CoK grants any House of Parliament the power to summon any person to appear before it to provide evidence or give information. The Senators have invoked this Article to summon governors and county executives to appear before it to answer questions related to county finance. On 8th February 2014, the Senate summoned eight governors and county executives to appear before it on diverse dates to answer questions on fiscal management of the County.³²⁷ In response, the International Legal Consultancy Group filed a petition in Court arguing that in accordance with Article 226 (2) of the CoK, a county public entity is accountable to the County Assembly for its fiscal management and not the Senate.³²⁸ The court held that the Senate has an oversight role over the fiscal management of the counties.

In order to protect the interests of the county and county government, the Senate has an important role to play in the impeachment of the county governors. The Senators role in the impeachment of governors has heightened tension between the two. One of the objectives of devolution under Article 174 of the CoK is to provide democratic and accountable exercise of power. The governor in exercising his mandate as stipulated under section 30 of the County Government Act of 2012 is subject to the oversight authority of both the Senate and County Assembly. Where the governor fails to exercise his mandate in accordance with the CoK or where the interests of the people are under attack, then such a governor is prone to impeachment. The impeachment of a governor is provided for under Article 181 of the CoK and Section 33 of the County Government Act. Where the governor does not perform his role and the interests of

³²⁷ Ibid.

³²⁸ *International Legal Consultancy Group vs Senate and the Clerk of the Senate*, Constitutional Petition No. 8 of 2014, 2014 eKLR.

the counties are at risk then the Senate in exercising its mandate as the protector of county interests shall exercise its mandate through impeachment process.

3.6 Conclusion

The establishment of the current Senate under the CoK, 2010, is not new. The 1963 Independence CoK had a well-elaborated Senate. This Senate was as a result of compromise between KADU and KANU during the three Lancaster Conferences in London. KADU wanted a federal system of government while KANU leaned towards a centralized system of government. At independence a bicameral parliament was established consisting of the Senate and House of Representatives. The intended purpose of the Senate was to protect minority rights and interests of the autonomous regions. The Senate had the power to originate, consider, debate and amend any bill apart from the money bill. Both houses had almost equal powers with the legislative input of each house required. However, few years after independence, the role of the Senate was subjected to debate. The government under the Kenyatta regime attacked its existence arguing that it fueled tribalism and was unnecessary as it duplicated the roles of the National Assembly. The work of the Senate was frustrated and in 1967 it was disbanded and merged with the National Assembly. In the 1990's the quest for new constitutional dispensation brought back the idea of bicameralism in Kenyan jurisprudence. The 2004 *Bomas* Draft Constitution proposed the establishment of a bicameral legislature, The 2005 *Wako* Draft Constitution, which proposed a unicameral legislature, was defeated in a referendum.

The CoK, 2010, reintroduced bicameralism to support and steer devolution. The Senate was established in 2013. The Senate represents and protects the interests of the counties and their counties. Each county elects one Senator to represent them at national level. Other Senators are nominated by political parties to represent special interests such as women, children, youth and

people with disabilities. The Senate draws its legitimacy from the Constitution, which is the supreme law, and through direct elections. The Kenyan Senate is asymmetrical in nature because its powers are only limited to matters concerning the counties. It is also congruent because the elections of the Senate and National Assembly are held at the same time. The Senate exercises its role through legislative process and oversight.

CHAPTER FOUR

4.0 APPRAISING THE SCOPE, NATURE AND EXTENT OF SENATE'S LEGISLATIVE AND OVERSIGHT ROLE: ADDRESSING CURRENT SUPREMACY WARS

4.1 Introduction

As discussed in the third chapter of this study, the 2010 Constitution of Kenya (CoK) reintroduced the Senate setting out its roles in Article 96. The CoK envisaged a scenario where this mandate would be discharged through consultation and co-operation between the two levels of government. Kenyans were also excited that the Senate would discharge its duties effectively in order to realize devolution's objectives as provided for in Article 174 of the CoK. However, since its establishment in 2013, the Senate has found itself in a turf of wars with the National Assembly, Governors and members of the County Assemblies (MCAs) in discharging its oversight and legislative mandate. This calls for a need to inquire into the relationship between the Senate, National Assembly and county government, in order to appraise its role and address the current supremacy battles.

This chapter analyses the scope, nature and extent of legislative and oversight role of the Senate as stipulated under the CoK. The supremacy battles between the Senate and National Assembly center on the extent of Senate's legislative authority while the conflict between Senate and county government centers on the Senate's oversight function. This chapter looks into the role of the Senate and the conflicts arising.

4.2 Senate's Legislative Function in 'Matters Concerning Counties'

As Kenyans voted in Senators in the 2013 elections it was expected that they would perform their functions as stipulated in the CoK. The bottom line was that a senator would ensure the protection and the representation of the counties and their governments. In discharging these functions, the Senate was expected to coordinate and cooperate with the National Assembly and county government. The Senate is an institution geared towards the realization of devolution. However, the Senate is perceived not to have delivered beyond the visionary roadmap. According to Aluku, 'whereas institutionally the 2010 Constitution conceptualizes the basic tenets of bicameralism, its functional arrangements drifts it back to unicameralism especially in matters not perceived to be touching on devolved units, counties: thereby creating impotent bicameralism'.³²⁹ Instead of being an insurance against majoritarian legislation, the CoK has resulted into supremacy battles over functional jurisdiction between the Senate and National Assembly.³³⁰ Respondent 5 argues that the Senate's legislative role has been curtailed by the interpretation of Article 110 of the Constitution that has been narrowed to reduce space for the Senate.³³¹ Mukaindo argues that the CoK, 2010, did not anticipate the current supremacy wars that Kenyans have witnessed since the establishment of the senate.³³² When the national and devolved governments were established, the intended purpose of the CoK was that the two levels would exercise their mutual relations based on consultations and cooperation.³³³ No arm of government or state organ would be supreme or purport to be supreme. The supremacy battles amongst the various state organs have no place in the current Constitution. They only derail and

³²⁹ Aluku, (n 329) 2.

³³⁰ Ibid.

³³¹ Senator Stephen Sang, Senator, Nandi County, Personal Communication (1st September, 2016, Senate Chambers, Parliament Building, Nairobi).

³³² Mukaindo (n 19) 15.

³³³ Article 6 (2), CoK 2010.

undermine devolution.³³⁴ The people of Kenya are supreme.³³⁵ All sovereign power belongs to the people of Kenya, exercised either directly or indirectly through their elected representatives.³³⁶ The sovereign power of the people is exercised at both the national and county level delegated to state organs.³³⁷ The sovereignty of the people remains the guiding factor by any state organ in discharging its constitutional mandate.³³⁸ The CoK remains the supreme law of the land.³³⁹ In the case of *Martin Nyaga Wambora & 3 Others Vs Speaker of the Senate & 6 Others (Wambora Case)*³⁴⁰ the court affirmed the supremacy of the CoK.³⁴¹

The current supremacy battles between the Senate and the National Assembly centres on the role of the National Assembly vis-a-vis the Senate in the origin, consideration and enactment of laws concerning county government.³⁴² The role of the Senate in the legislative process, a shared function with the National Assembly, is to represent and protect the interests of the counties at national level. It is not contentious that the legislative authority of the people is vested in parliament that consists of the Senate and the National assembly. The issue of whether parliament refer to both Senate and National Assembly in the CoK was discussed in the case of the *Speaker of the Senate & Another Vs Attorney General & 4 Others (Advisory Opinion*

³³⁴ Patrick O Onyango, Monitoring Transition to Devolved Government (Final Report 2014). <[http://www.tisa.or.ke/images/uploads/Monitoring Transition to Devolved Government Report.pdf](http://www.tisa.or.ke/images/uploads/Monitoring_Transition_to_Devolved_Government_Report.pdf)> accessed 27 August 2016.

³³⁵ *Law Society of Kenya & 2 Others Vs Attorney General & 2 Others*, Petition 311 of 2016

³³⁶ Article 1, CoK 2010; Randy F Barnett, 'The People or the State?: Chisom v Georgia and Popular Sovereignty' (2007) 93, Va. L. Review 1729.

³³⁷ Article 1 (3) of the CoK 2010, delegates the sovereign power of the people to the legislature, judiciary and executive at both the national and county level. Such power is only exercised in accordance with the constitution.

³³⁸ Robert Araujo, 'Sovereignty, Human Rights and Self-Determination: The meaning of International Law' (2000) 24, Fordham International Law Journal 1477.

³³⁹ *Law Society of Kenya vs Centre for Human Rights and Democracy & 13 Others*, Civil Appeal No. 308 of 2012 eKLR 2012.

³⁴⁰ *Civil Appeal No.21 of 2014, [2014] eKLR*.

³⁴¹ On sovereignty of the people see, *Association of Gaming Operators-Kenya & 41 others v Attorney General & 4 others [2014] eKLR, Petition 56 of 2014; William Kamket & 2 others v Attorney-General & 5 others [2013] eKLR, Petition no.40 of 2013.*

³⁴² See chapter three on the role of the senate.

Reference No. 2 of 2013).³⁴³ In this case, the respondents argued that even though the CoK repeatedly refers to parliament in the origination of bills, this did not refer to both chambers.³⁴⁴ It only referred to National Assembly. In response, the petitioners argued that the term ‘parliament’ wherever used in the constitution referred to both chambers in accordance with Article 93 of the CoK.³⁴⁵ The court in referring to the *Final Report by the Task Force on Devolved Government, Vol 1: A Report on the Implementation of Devolved Government in Kenya* held that the term parliament referred to both the Senate and National Assembly as stipulated in Article 93 of the CoK.

Unlike the 1963 Independence Constitution, which gave, the former Senate almost equal power with the House of Representative in legislation, CoK 2010 caps the legislative authority of the Senate to matters concerning county governments only. The main justification of this was to demarcate the roles of the two chambers and avoid conflict of roles.³⁴⁶ However, this has not being the case. In doing so, CoK grants the National Assembly wide scope in legislating on issues affecting both the counties and at national level. It limits the Senate legislative role in considering any bill that does not concern the county government or money bill. Theoretically, the CoK 2010 adopts bicameralism, but its design is fallacious.³⁴⁷ These are similar sentiments echoed by majority of the respondents.³⁴⁸ Respondent 2 for instance argues that the functional design of the Senate *vis a vis* the National Assembly is ambiguous as it limits the Senate’s

³⁴³[2013] eKLR.

³⁴⁴ Ibid para 86.

³⁴⁵ Ibid para 89.

³⁴⁶ Government of Kenya, *Interim Report of the Task Force on Devolved Government: A Report on the Implementation of Devolved Government in Kenya (2011)*.

³⁴⁷ Aluku (n 329) 7.

³⁴⁸ Respondents 2, 3,7 and 10 Members of the Senate and National Assembly, Personal Communication (between 1st August and 6th September, 2016, Parliament of Kenya, Nairobi).

legislative role to matters of counties.³⁴⁹ Respondent 6 argues that the effectiveness of the Senate has been curtailed by the contestations of its role by other organs and a lack of appreciation of the Senate's role by the citizens.³⁵⁰ Aluka argues that this does not cushion against majoritarian legislation and it puts the country back to unicameralism on matters not concerning county government.³⁵¹ In other jurisdictions such as South Africa, US, Germany having federal units, the upper house represents the interests of the territorial units. However, the second chamber's legislative authority is not only limited to matters concerning territorial units. The second chamber plays a deliberative role. It is through consultations and negotiations that the two chambers exercise legislative authority. However, in Kenya the legislative authority of the Senate is limited to matters concerning counties leading to the current squabbles.³⁵² This gives the Senate weak powers in legislative process.

In interpretation of the function of the Senate in the legislative process, the biggest hurdle has been to define what constitutes 'matters concerning county government' that would require the Senate's legislative input. What was the courts intention? The CoK's interpretation of the court should be done in a way that permits development of law and promotion of national values.³⁵³ The interpretation of the phrase 'matters concerning county government' in the CoK has been subject to court intervention as the two chambers engage in supremacy battles.³⁵⁴ The National Assembly has accused the Senate of encroaching its mandate in matters that do not concern

³⁴⁹ Respondent 2, Member of Parliament Personal Communication (3rd August, 2016, Parliament Buildings, Nairobi).

³⁵⁰ Honorable Ekwe Ethuro, Speaker of the Senate, Parliament of Kenya, Nairobi (6th September, 2016, Speakers' Chambers, Parliament Building, Nairobi).

³⁵¹ Respondent 2 (n 354).

³⁵² Aluka (n 329) 8.

³⁵³ Article 259, CoK 2010.

³⁵⁴ 'The Never Ending Supremacy Battles between the National Assembly and the Senate'

<http://watsupafrika.com/news/the-never-ending-supremacy-battles-between-national-assembly-and-the-senate/> accessed 26 August 2016.

counties.³⁵⁵ On the other hand, the Senate has accused the National Assembly of undermining the Senate in matters touching on counties. During the legislation of the Division of Revenue Bill 2013, MPs led by majority leader Aden Duale were quoted saying that the Senate had overstepped their mandate in revisiting a bill that did not concern county government.³⁵⁶ Most of the respondents agreed that the supremacy battles between the Senate and the National Assembly have affected the Senate's effectiveness in its legislative role.³⁵⁷ Respondent 5 for instance argues that the narrow interpretation of Article 110 on matters concerning counties has favored the National Assembly and reduced the Senate's function in legislative matters.³⁵⁸

In the case of *Re the Matter of the Interim Independent Electoral Commission (Re IIEC)*,³⁵⁹ it was held that:

We consider that the expression “*any matters touching on county government*” should be so interpreted as to incorporate any national-level process bearing a significant impact on the conduct of county government.

However, interpretation in this category is to be made cautiously, and on a case-by-case basis.

In the *Re IIEC* the question of what amounts to a bill concerning county government was not discussed in detail because the main contention was on whether the reference was subject to advisory opinion. However, the court stated that the interpretation on ‘matters concerning county government’ have to be made on a case-by-case basis leaving it under judicial discretion. This statement creates a wide scope of aspects to be considered when interpreting what matters

³⁵⁵ Ibid.

³⁵⁶ East African Centre for Law and Justice, ‘Supremacy Battle Between the Senate and the National Assembly’ <http://eacj.org/constitution/20-constitution-feature-articles/136-supremacy-battle-between-the-senate-and-national-assembly.html> accessed 27 August 2016.

³⁵⁷ Respondents 1, 3 and 4, Nairobi City County Government and Members of Senate (between 27th July and 2nd September, 2016, Nairobi).

³⁵⁸ Senator Sang (n 336).

³⁵⁹ Constitutional Application No.2 of 2010, eKLR.(Emphasis added)

concern the county government that the Senate may invoke legislative authority.³⁶⁰ The interpretation that it should incorporate any national-level process bearing a significant impact on the conduct of the county government is what the *Final Report by the Task Force on Devolution* warns. Such interpretation would give the senate a wide leeway to argue that every piece of legislation had a significant impact on the conduct of the county hence requiring its input. In the *Matter of the Principle of Gender Representation in the National Assembly and the Senate*³⁶¹ it was held that representation of the county governments and the election process significantly impacted on the conduct of the county government. Such issues concerned county government. But how significant should the matter be in order to concern county government?

While the court has tried to define what ‘matters concern county governments’ for the purposes of rendering advisory opinion, what constitutes a bill concerning county government was a subject of interpretation in *Advisory Opinion No. 2 of 2013*. A bill concerning counties is defined as a bill: containing provisions affecting the functions and powers of the county government; relating to the election of members of the county executive or assembly; and affecting the finances of the county government.³⁶² According to the Report by the Task Force on Devolution, such a definition is blurred and vague. At page 18 of the report it provides that:

The extent of the legislative role of the Senate can only be fully appreciated if the meaning of the **phrase ‘concerning counties’** is examined. Article 110 of the Constitution defines bills concerning counties...This is a **very broad definition which creates room for the Senate to participate in the passing of bills in the exclusive functional areas of the national government, for as long as it can be shown that such bills have provisions affecting the functional areas of the county governments**...With a good Speaker,

³⁶⁰*In the Matter of National Land Commission, Reference No.2 of 2014*, [2014] eKLR.

³⁶¹*Advisory Opinion No.2 of 2012*, [2012] eKLR.

³⁶²Article 110, CoK.

the Senate should be able to find something that affects the functions of the counties in almost every bill that comes to Parliament, making it a bill that must be considered and passed by both Houses.³⁶³

In the *Advisory Opinion No. 2 of 2013*,³⁶⁴ the National assembly published the Division of Revenue Bill. A letter to the Senate's speaker was written by the speaker of the National Assembly seeking concurrence that the said bill was a bill concerning the County Government. The speaker of the Senate concurred and the bill was debated in the National Assembly. The Bill was then referred to the Senate for debate. The Senate made some amendments on the bill then sent back the same to the National Assembly. The National Assembly did not consider the amendments, instead of forming a mediation committee as provided for under Article 113 of the CoK, the Bill was referred to the president for assent. The reason behind this unilateral act by the National Assembly was that the speaker and some MPs, argued that it was an error of judgment to involve the Senate in the legislative process of a bill not concerning county government. The National Assembly argued that the said bill did not address matters concerning the counties. The Senate sought an advisory opinion from Supreme Court arguing that the said bill concerned the counties as the division of revenue would affect the efficiency and functionality of the counties. The National Assembly did not only reject the Senate's amendments and exclude it from the legislative process, but it also sent the initial bill as approved by the National Assembly to the president for assent.³⁶⁵

Article 218 of the CoK provides for the introduction of Annual Division Revenue Bill and County Allocation of Revenue Bill in parliament at least two months before the end of the financial year. It states:

³⁶³ Government of Kenya, *Final Report by the Task Force on Devolved Government, Vol 1: A Report on the Implementation of Devolved Government in Kenya* (2015). (emphasis added)

³⁶⁴ *Advisory Opinion No. 2 of 2013*, [2013] eKLR.

³⁶⁵ *Ibid* para 122.

218. (1) At least two months before the end of each financial year, there shall be **introduced in Parliament**—

(a) **a Division of Revenue Bill**, which shall divide revenue raised by the national government among the national and county levels of government in accordance with this Constitution; and

(b) **a County Allocation of Revenue Bill**, which shall divide among the counties the revenue allocated to the county level of government on the basis determined in accordance with the resolution in force under Article 217.

Article 110 (3) of the CoK, the Standing Order No. 122 of the National Assembly³⁶⁶ and Standing Order No.116 of the Senate require that after publishing a bill and before the first reading the speaker of each house must communicate to the other speaker for concurrence. The essence of such communication is to ensure that both houses play a participatory role in the legislative process of any bill dealing with county governments. It promotes consultations, negotiations and harmony. Any bill that has been published must be communicated to the other house for determination of whether it is a bill concerning county government jointly by the two speakers.³⁶⁷ It is not the unilateral act of the National Assembly’s speaker to solely determine if a bill concerns the county government. This is the legislative path set out by the CoK under Articles 109-113. The court held that, ‘neither speaker may to the exclusion of the other, “determine the nature of the bill” for that would inevitably result in usurpations of jurisdictions, to the prejudice of the constitutional principle of harmonious interplay of state organs’.³⁶⁸

³⁶⁶ (1) Upon publication of a Bill, and before the First Reading, the Speaker shall determine whether-

(a) it is a Bill concerning county governments and, if it is, whether it is a special or an ordinary Bill, or
(b) it is not a Bill not concerning county governments.

The Speaker shall communicate the determination under paragraph (1) to the Speaker of the Senate for concurrence.

³⁶⁷ *Advisory Opinion* No. 2 of 2013 para 130.

³⁶⁸ *Ibid* para 143.

In *Advisory Opinion No.2 of 2013*, the enactment of the Division of Revenue Bill and the County Allocation of Revenue Bill was a shared mandate between the two chambers.³⁶⁹ In order for devolution to be realized there is need for cooperation and consultation between the two chambers.³⁷⁰ The court held that the Division of Revenue Bill 2013 was an instrument essential to the functioning of the county government hence was a bill concerning the county government.³⁷¹ It recommended that in future the two chambers should engage in mediation. The court was categorical that the extent of Senate role in legislative process begun immediately the two speakers jointly communicate to each other for concurrence to determine whether the bill was one concerning county government.

In determining which ‘matters concern county government’ that would warrant Senate’s legislative input; in the *Advisory Opinion No. 2 of 2013* the Court stated that:

It emerges that a matter qualifies to be regarded as one of county government **only** where: that is the case *in the terms of the Constitution*;³⁷² it is the case *in the terms of statute law*;³⁷³ it is the case in *the perception of the Court*, in view of the function involved or the relation created as between the national government and its processes, on the one hand, and the county governments and their operations, on the other. In the last instance, the Court will conscientiously consider the relationship between the two units as this emerges from *the governance operation in question*, or from any pertinent *scenarios of fact*.³⁷⁴

While the majority ruled that the Division of Revenue Bill was bill concerning county government, Lady Justice Njoki Ndung’u in her dissenting judgment held that:

³⁶⁹Para 87.

³⁷⁰ Calvin Ondigi, ‘Challenges Facing Devolution in Kenya: A Comparative Study’ https://www.academia.edu/9385903/Challenges_Facing_Devolution_in_Kenya_A_Comparative_Study accessed 27 August 2016.

³⁷¹Para 148.

³⁷² A bill concerning county government as defined under Article 110, 111 & 112 of the CoK.

³⁷³The County Government Act and the Public Finance Management Act of 2012.

³⁷⁴Para 34.

I am persuaded that for any Bill to be deemed as one concerning county government it must specifically affect the functions and powers of the county governments as set out in the Fourth Schedule of the Constitution. In addition, the provisions of the Bill must be limited to the ambit of Part 2 of that Schedule which provides for the functions and powers of county governments. In the event that such a Bill goes beyond the scope of Part 2 of that Schedule it cannot in any way be deemed to be a Bill concerning county government. Accordingly, a Bill that concerns the funding of functions outside of those specified to the Counties under the Fourth Schedule, such as the Division of Revenue Bill would, in my opinion fail the test of being considered as a Bill relating to county government. To my mind, allowing the Senate to participate in the enactment of a Bill that goes beyond the parameters of what counties may do within the Fourth Schedule would certainly then be unconstitutional.

Lady Justice. Njoki argued that, there are only two ways in which the Senate can canvass for the expansion of its constitutional role.³⁷⁵ First is through the establishment of joint consultative committee with clear mechanisms to deal with deadlocks as practiced in other countries with bicameral legislature. Second, the Senate can call for a referendum under Article 251 of the CoK to expand its mandate. The Senate can seek a referendum to seek participation in all legislation or propose a return of unicameralism in which the county representatives shall sit together with the National Assembly to remove delineation of the roles of the two chambers.³⁷⁶ In the *Advisory Opinion No.2 of 2013* the majority decision was of the view that any matter concerning county government must be provided in the Constitution or statute law and must have a significant impact on the functioning of the counties. The court also has a leeway to interpret what constitutes matters concerning county government.

Respondent 6 argues that although *Advisory Opinion No.2 of 2013* held that a matter concerns counties if provided for by the Constitution or Statute and one which must have significant

³⁷⁵Ibid para 281.

³⁷⁶Ibid para 285.

impact on the functioning of the counties, all legislative matters concern counties as they will in one way or another affect the functioning of the counties.³⁷⁷ He gives an example of security issues that although not directly stated to be a matter concerning counties; it affects the functioning of the counties hence the Senate need to be involved.³⁷⁸

In *The Matter of National Land Commission*, the Court was very cautious on the interpretation adopted in the *Re IIEC* that the phrase ‘concerning county government’ should incorporate any national-level process bearing a significant impact on the county government.³⁷⁹ The applicant argued that the reference contained matters “concerning county government” as it involved issues of public land and the constitutional and statutory demarcation of the functions of the Commission in relation to those of the national and county government’.³⁸⁰ They relied on article 62 (2) of the CoK, which vests some classes of public land to be held in trust for the people by the county government. The Court held that:

It is my considered view that for a matter to qualify as one concerning county government... its subject matter must be **significant**; that is to say that it must be one that has some effect, impact, consequence on, or one affecting the role, the structure, management or running of county government.³⁸¹

In the interests of the counties that the Senate represent they should cooperate with the National Assembly and county government on a platform of mutual relations and consultations as opposed to engaging in adversarial relations with regard to any matter touching on devolution.³⁸² Whereas the court in the *Advisory Opinion No.2 of 2013*, tried to interpret what the court intended by ‘matters concern county government’, there is lack of clarity. However, the

³⁷⁷ Speaker Ethuro (n 355).

³⁷⁸ Ibid.

³⁷⁹ Reference No.2 of 2014, [2014] eKLR.

³⁸⁰ Ibid para 22.

³⁸¹ Para 90.(Emphasis added)

³⁸² *Legal Consultancy Group Case* para 73.

courts have been categorical that the current supremacy battles between the Senate and National assembly are unwarranted. The two chambers should engage in alternative dispute resolution mechanisms and the court should be their last resort. They should settle their dispute harmoniously and cooperate. What the court was trying to say is that, the two chambers should use what a South African Court referred to as cooperative government.³⁸³ In the case of *Ex Parte President of South Africa: In Re Constitutionality of the Liquor Bill 2000 (Liquor Bill Case)*³⁸⁴ the South African Constitutional Court held thus;

...Chapter 3 of the Constitution ‘introduced a “new philosophy” to the Constitution, namely that of cooperative government and its attendant obligations. In terms of that philosophy, all spheres of Government are obliged in terms of sections 40(2) to observe and adhere to the principles of cooperative Government set out in Chapter 3 of the Constitution.’³⁸⁵

4.3 Senate’s Oversight Function Over National Revenue Allocated to the County Government

Wars between the Senate and County government (governors and county assembly) usually centres on to what extent the oversight role of the Senate over national revenue allocated to the counties entail. Apart from legislation, the Senate protects the interests of the counties through oversight over national revenue allocated to the counties. Accountability, transparency, good governance and integrity are some of national values and principles of governance stipulated under Article 10 of the CoK that every state organ, state officer and public officer must uphold. The Senate through oversight ensures that the county government is accountable to the people. Section 8 of the Public Finance Management Act of 2012, grants the Committee of the Senate

³⁸³Ibid para 142.

³⁸⁴2000(1) BCLR 1

³⁸⁵ Ibid.

established to deal with budgetary and financial matters the power to present to the Senate proposals on allocation of revenue among counties and considering any bill concerning counties. However, the office of the Auditor-General and Controller of Budget are independent offices established under the CoK to deal with financial management both at national and county level.³⁸⁶

Article 96 (3) grants the Senate the power of oversight over national revenue allocated to the county government. Article 217 precisely gives the Senate the power to determine and allocate revenues amongst the counties. In exercising its oversight role on revenue allocated to the counties, the Senate must be cognizant of the role of MCAs under Article 185 of the CoK to avoid functional jurisdictional wars. Article 185 (3) of the CoK provides that, ‘A County Assembly, while respecting the principle of the separation of powers, may exercise oversight over the county executive committee and any other county executive organs’. So to what extent shall the Senate exercise its oversight role on county government without undermining the oversight role of the county assembly? Should the senate summon and grill governors over county financial management? These are some of the critical questions affecting the oversight role of senators.

Mukaindo argues that the oversight role of the Senate in the CoK presents two major problems.³⁸⁷ First, there is no jurisdictional divide between the oversight role of the Senate and that of the County Assembly.³⁸⁸ This makes it hard for the county assemblies and the Senate to share oversight roles over county government. Article 229 of the CoK stipulates that the Auditor-General shall submit an audit report to parliament or relevant county assembly, which shall

³⁸⁶ Article 228, 229 and 248 (3), CoK 2010.

³⁸⁷ Mukaindo (n 19) 46.

³⁸⁸ Ibid.

within three months of receipt debate and consider the report. It grants both the County Assembly and Senate oversight over fiscal management. This creates an overlap of duties. Respondent 1 argued that this is one of the major causes of conflict between the Senate and county Governments.³⁸⁹ He argues that the Auditor general's report is usually tabled at the same time in both oversight bodies and all can proceed without informing the other that they are seized of the matter.³⁹⁰ To him this embarrasses the oversight function if the two bodies reach contradictory decisions on the same matter.³⁹¹ Respondent 6 however argues that has tried to overcome this challenge by organizing trainings and annual forums with County Assemblies in order to ensure effective oversight of the counties with limited contestations.³⁹²

Second, the Senate lacks effective oversight tools.³⁹³ Although the Senators have invoked article 125 of the CoK to summon governors and county executives to provide information or evidence on fiscal management, this only translates to passive role. The governors have refused to heed to the summons arguing that they are only accountable to the County Assembly who exercises original oversight role and Senators are using flimsy excuses to usurp their authority.³⁹⁴ They have argued that summoning the governors, the Senators are usurping powers. The Senators on the other hand argue that even though the governors are county chief executives in accordance with Article 179 (4) of the CoK, for the protection of county interests, the governors shall remain personally accountable to the Senate.³⁹⁵ In 2014, through the then chairperson of Council of

³⁸⁹ Respondent 1, Nairobi City County, Personal Communication, (12th July, 2016, City Hall, Nairobi City County, Nairobi).

³⁹⁰ Ibid.

³⁹¹ Ibid.

³⁹² Speaker Ethuro (n 355).

³⁹³ Mukaindo (n 19) 47.

³⁹⁴ Lameck Baraza 'Akaranga tells Senators to go and Engage Governors in Counties to Cut on Costs' http://www.the-star.co.ke/news/2016/06/27/akaranga-tells-senators-to-go-and-engage-governors-in-counties-to-cut_c1375738 accessed 29 August 2016.

³⁹⁵ Pius Mugambi Murugu, *The Challenges and Opportunities of Decentralized Political Systems: Lessons for Kenya from India and Nigeria* (Masters Degree Thesis, University of Nairobi 2014).

Governors, Mr. Isaac Ruto, governors vowed not to appear before the Senate to answer to audit claims.³⁹⁶ Respondent 5 identifies this as a challenge that has curtailed the oversight role of the Senate hence affecting its effectiveness in representing and protecting the interests of the counties.³⁹⁷ He further argues that although the legal infrastructure makes oversight function to be a shared function between the Senate and the County Assemblies, the MCAs according to him lack political power oversight the powerful governors.³⁹⁸

In the Case of *International Legal Consultancy Group vs the Senate and Clerk of the Senate*,³⁹⁹ the petitioners averred that the oversight role of the Senate is limited to allocation of national revenue to the counties. The petitioners also argued that the oversight role of the Senate is limited to certain circumstances such as when the Senate is called upon to determine the impeachment of governor or formulate legislation on financial management.⁴⁰⁰ The court holding in affirmative stated that the Senate in exercising its oversight role could summon the governor or any county financial executive for purposes of getting the relevant information. However, the court was categorical that Senate's financial oversight role was not similar to the County Assembly's role under Article 226 of the CoK and Section 148 of the Public Finance Management Act, 2012. The court stated that:

We must however mention that the Senate's oversight role cannot be likened to the role of the County Assembly under Article 226(2) of the Constitution. Under Article 96(3), the Senate's oversight role is restricted to the National revenue allocated to the counties. It is has no oversight over grants, loans and revenue generated locally by the counties. Under Article 226(2) of the Constitution the County Assembly

³⁹⁶ Maurice Odhiambo, 'Governors will not appear before the Senate, Isaac Ruto says' <http://www.nation.co.ke/news/politics/Governors-will-not-appear-before-Senate-Isaac-Ruto/1064-2417724-tjh41/index.html> accessed 29 August 2016.

³⁹⁷ Senator Sang (n 336).

³⁹⁸ Ibid.

³⁹⁹ Constitutional Petition No.8 of 2014.

⁴⁰⁰ Ibid para 7.

has a wide berth to oversee all the financial resources of the county including revenues allocated by the National Government and the revenue generated locally by the respective County. The Senate cannot therefore overreach its oversight mandate under Article 96(3) to any other aspect of County Government operations and resources as that is the sole preserve of the County Assemblies. To that extent, we find that the Senate and the County Assembly only have a collective role in the oversight of nationally allocated revenue to the Counties.⁴⁰¹

The court in the above case recognized that there was a collective oversight role on national revenue located to the county government by the Senate and County Assembly. Respondent 3 also argued that limiting the Senate's authority only to play oversight over the national revenue allocated to Counties, and no other sources of revenue for the Counties has curtailed the effectiveness of the Senate to represent and protect the interests of the Counties.⁴⁰² The Public Finance Management Act does not provide for mechanism of exercising this role without jurisdictional overlaps between the Senate and County Assembly.⁴⁰³ It was the court's recommendation that the said Public Finance Management Act be amended, 'avoid duplication of roles and consequent inefficiencies with regard to the powers accorded to Senate under Article 96(3) and the powers of oversight accorded to the County Assemblies under Article 226(2) of the Constitution'.⁴⁰⁴ Most of the respondents argued for streamlining of the oversight function of the Senate to minimize conflict with the counties.⁴⁰⁵ Respondent 1⁴⁰⁶ for instance argues there is need for a law to curb the pursuit of self-interest by the Senators in the name of oversight while

⁴⁰¹ Ibid para 60

⁴⁰² Respondent 3, Member of the Senate, personal communication, (12th July, 2016, Parliament of Kenya, Nairobi).

⁴⁰³ Ibid para 63; Senate, *The Report of the Special Committee On the Proposed Removal from Office of Prof. Paul Kiprono Chepkwony, The Governor of Kericho County* (3rd June 2014).

⁴⁰⁴ Ibid Para 63.

⁴⁰⁵ Respondents 2, 3, 5 and 9, Members of Parliament, personal communication, (between 1st July to 6th September, 2016, Parliament Buildings, Nairobi).

⁴⁰⁶ Respondent 1 (n 369).

respondent 5⁴⁰⁷ argues that Senate should only play appellate oversight after County Assemblies' oversight.

An intrusion of the Senate into financial matters of the county government should not be seen as subjugation of the county government. The people of Kenya under Article 96 (3) of the CoK grant the Senate oversight powers in order to protect their interests. In exercising its oversight powers and power to summon public persons, the Senate must do so in a manner that promotes the spirit of devolution. The court also recommended that in case of disputes between the Senate and governors, issue of summons must be last resort.⁴⁰⁸ The parties involved should make use of alternative dispute resolution such as mediation in order to avoid hostility and animosity.

4.4 Conclusion

The extent to which the Senate exercises its legislative and oversight role will determine success of devolution. The biggest challenge in legislative function has been on how to define 'matters concerning county government'. A clear definition is important. The court in defining what constitutes 'matters concerning county government' has limited it to matters, which have significant impact in the functioning of county government. Still there is no clear demarcation between the County Assembly and Senate oversight role. There is need for streamline the oversight function of the two bodies to avoid unnecessary conflict and ambiguity. However, the Senate, National Assembly and county government must also make use of alternative dispute resolution in addressing conflicts in order to steer devolution.

⁴⁰⁷ Senator Sang (n 336).

⁴⁰⁸ Ibid para 69.

CHAPTER FIVE

5.0 SUMMARY OF FINDINGS, CONCLUSIONS AND RECOMMENDATION

5.1 Introduction

This chapter provides a summary of findings, the general conclusions and recommendations on topic under study. It seeks to answer to the research questions, objectives and the hypothesis.

5.2 Summary of findings

The findings of this study are discussed based on the thematic areas and research questions as analyzed under chapters 2, 3 and 4.

5.2.1 The role of the senate under CoK, 2010

The study established that the senate represents the 47 counties. It also represents special interests of minorities such as women, youth and people with disabilities at national level. The study also found out that the senate remains a pivotal body in representing county interests at the national level. The study also established that the Kenyan Senate is congruent in nature because the elections of the members of the senate and national assembly are done on the same day. This has ensured that the ruling coalition has more members in the Senate. It is asymmetrical because the role of the Senate in legislation is only limited to matters concerning counties. The Senate does not consider any bill that does not concern counties or a money bill. This is the exclusive jurisdiction of the National Assembly.

5.2.2 Senate's legislative function in matters concerning counties

The study established that the supremacy battles between the National Assembly and the Senate centers on the scope, nature and extent of legislative power in the origin, consideration and enactment of bills concerning counties. The study found out that the definition of what constitutes ‘matters concerning county government’ is vague and unclear. Although the courts in various advisory opinions have tried to define what the phrase ‘matters concerning county government’ means, it remains not clear. The study established that the courts seem to favor the definition that a bill concerning county government must have a significant impact on the functioning of the counties. However, in some cases both the national and county governments have shared responsibility over certain functions. This leaves a thin line in determining what constitutes ‘matters concerning county government’.

It was established that the interpretation of which bills or matters concern counties has curtailed the effectiveness of the senate to protect the interests of the counties. It was established that while the national assembly can participate in passing of bills concerning counties, the senate has no similar role in other bills which do not concern counties. It was thus established that the senate is only limited to a shared role in bills concerning counties. It was argued that this has made the senate weak.

5.2.3 Senate’s oversight function over national revenue allocated to counties

The study established that the CoK provides that the Senate determines the allocation of national revenue and exercises oversight over the national revenue allocated to the counties. It also established that while the court in the *International Legal Consultancy Group* interpreted Article 96 (3) of the CoK to mean that the Senate’s oversight role is limited to national revenue allocated to counties, this is not the case. The study found out that the senate lacks effective oversight tools over the county governments. There is no clear demarcation of the Senate and County Assembly

oversight role over fiscal management. Most respondents acknowledged that there is overlap in oversight role of the senate and that of county assemblies. For instance, it was established that the auditor general's report over the use of county revenue is tabled both in the county assembly and the senate. As such it was established that most county executives are usually found in dilemma concerning which organ between they should respond to.

5.2. 4 Disputes between the senate and national assembly over bills concerning counties

The study established that the disputes between the senate and national assembly centres on whether a bill concerns counties or not. The study found out that the constitution under articles 111-113 provides a legislative path to be followed to establish whether a bill concerns county governments. The study also found out that this legislative path is not always followed as highlighted in the *Advisory Opinion No.2 of 2013*.

5.2.5 Resolution of disputes between the senate, national assembly and county governments

The study established that disputes between the senate and national assembly on one hand and the senate and county governments on the other hand, have always ended up in court for determination. It was established that these organs have not made use alternative dispute resolution mechanisms like negotiations and consultations. The court holding

5.3 General Conclusions

This study sought to provide a critical appraisal of the legislative and oversight roles of the senate in Kenya under 2010 Constitution as the representative and protector of the interests of the counties. The study objectives have been met. The specific objectives of this study were to: analyze the justifications for and against the establishment of the Senate; discuss the historical development, establishment, composition and the role of the Senate under the CoK 2010;

critically analyze the efficacy of the nature, scope and extent of the legislative and oversight the Senate's role in matters concerning the county and to formulate recommendations that if adopted will strengthen the legislative and oversight roles the Senate in order to effectively represent and protect the interests of the counties and their governments.

To realize the above study objectives, the two research questions were formulated. The first question was to find out the effectiveness of the nature, scope and extent of the legislative and oversight role of the Senate under the 2010, CoK as a representative and protector of the interests of the counties and their governments and secondly, to suggest recommendations for reform in order to strengthen the role of the Senate as a representative and protector of the interests of the counties and their governments through legislation and oversight.

The study appraised the legislative and oversight roles of the senate in Kenya by analyzing the historical foundation and philosophical foundation of the senate. This was by looking at the arguments for and against the establishment of the second chamber and the role the second chamber plays in various jurisdictions with a bicameral form of parliament. It also analyzed constitutional and legal framework providing for the roles of the senate putting into consideration the various conflicts that have been witnessed between the senate and the national assembly on one hand and the senate and the county governments on the other.

The study shows that the constitution provides for the roles of the senate key among them being representation and protection of the interests of the counties. However, the discharge of these roles by the senate has been a subject of constant conflicts and contestations in court. These conflicts have been attributed to a lack of clarity in the functional division of the roles of the senate, national assembly and the county governments. Limiting the legislative to role of the senate to 'matters' concerning counties' alone has made the senate weak and a lack of clarity as

to the division of oversight mandate between the senate and county assemblies has affected its effectiveness.

Thus although the Kenyan Senate has tried to perform its function of representing and protecting the interests of the counties through legislation and oversight, the weak and unclear constitutional provisions has led to contestations of its roles that has affected its effectiveness. To realize an effective senate as the representative and protector of the interests of the counties, there is need for: clear constitutional provisions concerning the roles of the senate, clear dispute resolution mechanisms amongst various organs of the government and an increase in the roles of the senate to participate in all matters of legislation save for the money bills.

This study concludes that constitutional amendment is essential in empowering the senate and ensuring its effectiveness in protecting the interests of the counties. Kenya should therefore initiate the necessary suggested reforms to empower the senate for it to be able to effectively represent and protect the interests of the counties.

5.4 Recommendations

Based on the above-mentioned research findings general conclusions above, the researcher makes the following recommendations on the role of the legislative and oversight roles of the senate as the representative and the protector of the interests of the counties;

5.4.1 Oversight role of the over national revenue allocated to counties

Having found out that the senate plays an oversight role over national revenue allocated to counties but lacking oversight tools, I therefore recommend empowering of the senate to carry out its oversight functions by giving the senate power to oversight over all revenue under counties and not limiting it to revenue allocated to counties from the national government. The

senate's oversight role should be interpreted in a manner that it protects the interests of the people. The senate as a representative and protector of the interests of the people, it can only exercise its oversight role if county government is accountable to it. The success of devolution shall be determined by the success of the institutions established to steer it. Empowering the Senate can be done through increasing its oversight tools.

5.4.2 Oversight role of the senate vis-a- vis county assemblies

The CoK has not clearly demarcated the oversight role of the senate and county assemblies, hence they have collaborative role. They should cooperate and consult each other to ensure accountability in county fiscal management in order to ensure that the people's interests are protected. There is also need to streamline when the Senate oversees the counties. This can be done through empowering the County Assemblies in their oversight role and the Senate only to build on the County Assemblies oversight role or play appellate oversight role. This study also recommends that the article 96 of the Constitution be amended allow the senate play oversight role over county revenues as an appellate body. The appellate oversight by the senate will address the current conflicts with county governments.

5.4.3 Legislative role of the senate over matters concerning counties

Capping the legislative power of the Senate to matters that concern county government only, has made the Senate appear weak both in its efficiency and in the eyes of the public. In order to increase the Senate's legislative power, this study recommends amendment of the constitution. This shall give the senate the need powers to have legislative input in all bills apart from money bills. This shall put an end to the current supremacy battles between the Senate and the National Assembly. Otherwise demarcating bills that concern county government where the national government and county government are interdependent will remain tricky.

5.4.4 Disputes between the senate and national assembly on whether the bills concerns counties

The National Assembly and the Senate should endeavor to follow the legislative path as provided for in the Constitution under Article 111-113. The CoK has provided that after publication and before the bill's first reading, the speaker originating the bill must refer the same to the other speaker for concurrence. If this first step is followed, then the two houses will be able to determine which bill concerns county government. In so doing they will avert the current disputes.

5.4.5 Benchmarking with other Ccountries with successful bicameralism

There is need for Kenya to benchmark with other countries such as the US, Australia, Canada and UK where bicameralism has been successful. Through dissemination of information and understanding second chamber's function, Kenyans will appreciate the role of the Senate.

5.4.6 Disputes among the Ssenate, Ccounty Ggovernments and the Nnational Aassembly

Finally, in case of disputes among the Senate, county government and National Assembly, they should first seek alternative dispute resolutions through negotiation and consultations. The CoK expects that state organs shall conduct their mutual relations on the basis of consultations and cooperation. The court should remain a last resort. If sought court should also be cautious in interpreting the role of the Senate so that it does not heighten the already existing tension. Its interpretation of the constitution should be in a way that it promotes cohesion and upholds the doctrine of separation of powers.

APPENDICES

APPENDIX A: QUESTIONNAIRE

Introduction

My name is **JOB WAFULA WAMBULWA**, a Masters of Laws (LLM) student at the University of Nairobi. As part of my LLM degree, I am carrying out a study on ‘**A CRITICAL APPRAISAL OF THE ROLES OF THE SENATE UNDER THE CONSTITUTION OF KENYA, 2010.**’ This study’s main objective is to appraise the legislative and oversight roles of the Senate in Kenya as the protector and representative of the interests of the counties. I would like to ask you questions that would enable me understand the extent to which the Senate has effectively discharged its mandate as the protector and representative of the interests of the counties through its legislative and oversight functions. The data collected will also help in comprehending the constitutional, legal, and institutional and policy challenges that has faced the Senate in the discharge of its key roles. I intend to use the information gathered to come up with key recommendations to the national and county governments, and other stakeholders involved. These recommendations shall be integrated in to the constitutional and legal framework in order to enhance effectiveness of the Senate and promote devolution

Part A: Background Information

Please note that all information you give is confidential and will be used for research purposes only. Read each question carefully and give your honest response. Your responses will guide us in appraising the legislative and oversight roles of the Senate in Kenya as the protector of the

representative and protector of the interests of the counties. TICK and EXPLAIN where appropriate.

PART B: Demographic Information

1. Name (Optional):

2. Organization:

3. Designation:

Part C: APPRAISING LEGISLATIVE AND OVERSIGHT ROLES OF THE SENATE IN KENYA

1. Do you think the constitutional and legislative framework governing the oversight and legislative roles of the Senate in Kenya are sufficient, effective and efficient? YES [] NO [] Give reasons for your answer

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2. Do you think the senate has been effective in the discharge of its legislative and oversight functions as the representative and protector of the interests of the counties?

YES [] NO [] Give reasons for your answer

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3. What are the issues and challenges facing the Senate in discharging its legislative and oversight functions?

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4. Are there any functional ambiguities in the functional design of the Senate *vis a vis* the National Assembly and the County Governments?

YES [] NO [] Give reasons for your answer

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5. What recommendations would you suggest to enhance effectiveness of the Senate in the discharge of its legislative and oversight functions as the representative and protector of

the interests of the counties in Kenya?

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6. Any other comment(s) you may deem relevant to the study

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Thank you for your cooperation

APENDIX B: INTERVIEW SCHEDULE

Introduction

My name is **JOB WAFULA WAMBULWA**, a Masters of Laws (LLM) student at the University of Nairobi. As part of my LLM degree, I am carrying out a study on ‘**A CRITICAL APPRAISAL OF THE ROLES OF THE SENATE UNDER THE CONSTITUTION OF KENYA, 2010.**’ The main objective of this study is to appraise the legislative and oversight roles of the Senate in Kenya as the protector and representative of the interests of the counties. I would like to ask you questions that would enable me understand the extent to which the Senate has effectively discharged its mandate as the protector and representative of the interests of the counties through its legislative and oversight functions. The data collected will also help in comprehending the constitutional, legal, and institutional and policy challenges that has faced the Senate in the discharge of its key roles. I intend to use the information gathered to come up with key recommendations to the national and county governments, and other stakeholders involved. These recommendations shall be integrated in to the constitutional and legal framework in order to enhance effectiveness of the Senate and promote devolution

Part A: Background Information

Please note that all information you give is confidential and will be used for research purposes only. Read each question carefully and give your honest response. Your responses will guide us in appraising the legislative and oversight roles of the Senate in Kenya as the protector of the representative and protector of the interests of the counties. **TICK** and **EXPLAIN** where appropriate.

PART B: Demographic Information

1. Name (Optional):

2. Organization:

3. Designation:

Part C: APPRAISING LEGISLATIVE AND OVERSIGHT ROLES OF THE SENATE IN KENYA

1. Do you think the constitutional and legislative framework governing the oversight and legislative roles of the Senate in Kenya are sufficient, effective and efficient? Give reasons for your answer
2. Do you think the Senate has been effective in the discharge of its legislative and oversight functions as the representative and protector of the interests of the counties? Give reasons for your answer
3. What do you think are the issues and challenges facing the Senate in discharging its legislative and oversight functions?
4. Are there any functional ambiguities in the functional design of the Senate *vis a vis* the National Assembly and the County Governments? Give reasons for your answer
5. What recommendations would you suggest to enhance effectiveness of the Senate in the discharge of its legislative and oversight functions as the representative and protector of the interests of the counties in Kenya?
6. Any other comment(s) you may deem relevant to the study

Your cooperation is highly appreciated.

APPENDIX C: CONSENT FORM

**UNIVERSITY OF NAIROBI
SCHOOL OF LAW
CONSENT FORM**

NAME: WAMBULWA JOB WAFULA

REGISTRATION NO.: G/62/82535/2015

RESIGNATION: Masters of Laws Student, Parklands School of Law

CONTACT ADDRESS: Nairobi

MOBILE NO.: 0711176631

**PROJECT TITLE: A CRITICAL APPRAISAL OF THE ROLES OF THE SENATE
UNDER THE CONSTITUTION OF KENYA, 2010.**

Please Tick

- | | | |
|----|--|--------------------------|
| 1. | I confirm that I have read and understand the information sheet for the above study and have had the opportunity to ask questions. | <input type="checkbox"/> |
| 2. | I understand that my participation is voluntary and that I am free to withdraw at any time, without giving reason. | <input type="checkbox"/> |
| 3. | I agree to take part in the above study. | <input type="checkbox"/> |
| 6. | I agree to the use of anonymised quotes in publications | <input type="checkbox"/> |

Name of Participant	Date	Signature
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Name of Researcher

Date

Signature

APPENDIX D: LIST OF RESPONDENTS

1. Respondent 1, Nairobi County Government, Personal Communication, 12 July 2016, Nairobi.
2. Respondent 2, Member of National Assembly, 3rd August 2016, Parliament Building, Nairobi.
3. Respondent 3, Member of Senate, 12th July 2016, Parliament Buildings, Nairobi.
4. Respondent 4, Commission on Administrative Justice (Ombudsman), 15th July 2016, West End Towers, Nairobi.
5. Senator Stephen Sang, Senator Nandi County, 1st September 2016, Parliament of Kenya, Nairobi.
6. Honorable Ekwe Ethuro, Speaker of the Senate, 6th September 2016, Parliament of Kenya, Nairobi.
7. Respondent 7, Machakos County Government, 28th July 2016, Machakos Town.
8. Respondent 8, Member of the Senate, 1st September 2016, Parliament Buildings, Nairobi.
9. Respondent 9, Member of National Assembly, 14th July 2016, Parliament Buildings, Nairobi.
10. Respondent 10, Member of National Assembly, 14th July 2015, Parliament Buildings, Nairobi.

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