

UNIVERSITY OF NAIROBI LAW SCHOOL

**IMPLEMENTING THE RIGHT TO PUBLIC PARTICIPATION
IN THE LEGISLATIVE PROCESS IN KENYA**

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**A Thesis Submitted to the University of Nairobi Law School in partial fulfillment of the
requirements for the award of the Degree of Master of Laws (LLM)**

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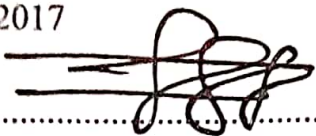
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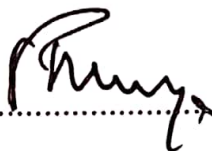


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This thesis is dedicated to my wonderful and deeply missed mother Esther Mokami. Forever you remain in my soul Mom.

List of Constitutions

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Constitution of Kenya, 1969
Constitution of South Africa, 1996
Constitution of Nigeria, 1995, as amended

List of Transnational Instruments

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International Covenant on the Civil and Political Rights, 1976

List of Statutes

County Governments Act, No. 17 of 2012
Public Finance Management Act, No. 18 of 2012
Statute and Instruments Act No. 23 of 2013

List of Case Laws

“Centre for Rights Education and Awareness (CREAW) & 8 Others v. Attorney General & Another [2012] eKLR

Coalition for Reform and Democracy (CORD) & 2 Others v. Republic of Kenya & 10 Others [2015] eKLR.

David Ndi & Others v. Attorney General & Others [2021] Eklr

Democratic Alliance v. The President of the Republic of South Africa & 3 Others CCT 122/11 [2012] ZACC 24

Federation of Women Lawyers, Kenya (FIDA-K) & 5 Others v. Attorney General & Another [2011] eKLR

International v. Speaker of the National Assembly & Others (CCT 12/05) [2006] ZACC 11, 2006 (12) BCLR 1399(CC), 2006 (6) SA 416 (CC)

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Kiai Mbaki & 2 Others v. Gichuhi Macharia & Another [2005] eKLR

Kiambu County Government & 3 Others v. Robert N. Gakuru & Others [2017] eKLR.

Land Access Movement of South Africa Association for Rural Development and Others v. Chairperson of the National Council of Provinces and Others, [2016] ZAACC 22

Land Access Movement of South Africa Association for Rural Development and Others v. Chairperson of the National Council of Provinces and Others, [2016] ZAACC 22

Matatiele Municipality & Others v. The President of South Africa & Others (2) (CCT 73/05 A [2006] ZACC 12; 2007 (1) BCLR 47 (CC).

Minister for Health v. New Chicks South Africa Pty Ltd, CCT 59/04

Okiya Omtatah Okoiti v. Nairobi Metropolitan Service & 3 Others; Mohamed Abdala Badi & 9 Others (Interested Parties) [2020] eKLR

Republic of Kenya Supreme Court of Kenya Advisory Opinions Application 2 of 2012, In the Matter of the Principle of Gender Representation in the National Assembly and the Senate [2012] eKLR

Robert N Gakuru & Another v. Governor Kiambu County & 3 Others [2013] eKLR

Robert N. Gakuru & Others v. Kiambu County Government & 3 Others [2014] eKLR

Speaker of the Senate & Another v. Attorney General & 4 Others, Reference No. 2 of 2013; [2013] eKLR”

Abbreviations and Acronyms

ACHPR	African Charter on Human and People’s Rights
A-G	Attorney-General
APP	African Peoples’ Party
BBI	Building Bridges Initiative
CA	County Assembly
CBEF	County Budget and Economic Forum
CDF	Constituency Development Fund
CJ	Chief Justice
CoE	Committee of Experts
COVID-19	Coronavirus Disease 2019
EC	Eastern Cape
ICCPR	International Covenant on Civil and Political Rights
IEBC	Independent Electoral and Boundaries Commission
IBEA	Imperial British East Africa
JSC	Judicial Service Commission
KAU	Kenya African Union
KADU	Kenya African Democratic Union
KANU	Kenya African National Union
KHRC	Kenya Human Rights Commission
KLRC	Kenya Law Reform Commission
KZN	KwaZulu-Natal
LegCo	Legislative Council
LSK	Law Society of Kenya
MP	Member of Parliament
NARA	National Accord and Reconciliation Act, 2008
NGO	Non-Governmental Organizations
PBO	Parliamentary Budget Office
PSC	Public Service Commission
SCORK	Supreme Court of the Republic of Kenya

ABSTRACT

This thesis assesses the frameworks on implementation of the right to public participation in the legislative process in Kenya. Primarily, the thesis addresses the “how” of implementing the right to public participation which distinguishes it from other literature that generally focus on the “why” and “what” on public participation.

The study evaluates and assessed the efficacy of the existing and proposed legal frameworks on public participation in legislative processes in Kenya. It also discusses the challenges of implementing public participation. “This arises from a background of the lack of active and effective citizen involvement in legislative processes. This then raises the question of legitimacy of the laws and regulations passed by Parliament and County Assemblies. Further, the study evaluated the nexus between public participation in legislative processes and good governance in a modern democracy like Kenya.

This study adopted various qualitative research methodologies including desktop research, and literature review of, books, journal articles, book chapters, journals. The gist of the study was the review of the legislation and bills related to public participation in Kenya. The research questions and research objectives were based on the review of these sources.

This study came up with various findings and recommendations on how to enhance public participation in legislative processes in Kenya. Among the key findings was that historically, public participation in the Kenya’s legislative process has been abstract due to the lack of comprehensive legislation to guide and give effect to the implementation of public participation in legislative processes. Therefore, this study recommends the enactment of a legal framework in the form of a Public Participation Act and a comprehensive review of the existing feedback mechanisms to promote the realization of public participation in legislative processes.

The study also notes that public participation is key in promoting good governance, constitutionalism, rule of law, human rights and inclusivity in legislative processes in Kenya and Africa. In conclusion, this study pushes for a practical and substantive realization of the right to public participation through effective implementation, as opposed to the theoretical approach taken in the various existing literature.

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CHAPTER 1

IMPLEMENTING THE RIGHT TO PUBLIC PARTICIPATION IN THE LEGISLATIVE PROCESS IN KENYA

1.1 Introduction

Public participation is a core human right in the constitutional democracy of Kenya, South Africa and the UK. This paper focuses on public participation as a fundamental process in a modern democracy, which involves the people in the affairs of the Government. However, there are fundamental variations and challenges in the implementation of the public participation in legislative processes in Kenya as compared to South Africa and the UK.

There are three (3) key sources of law on public participation in Kenya, South Africa and United Kingdom. First, public participation is conferred by the Constitution and statutes, and implemented by the Government, particularly the Parliament and the County Assemblies.¹ Second, the scope and nature of public participation has also been clarified through various case law. Third, public participation is entrenched in practice in the relevant institutional frameworks. This study compares the practice in Kenya, South Africa and the UK.

This paper argues that despite the inscription in the Constitution and other Statutes, there are various challenges that affect the implementation of public participation broadly, and specifically in the legislative process in Kenya.²

Historically, this has been the position of public participation right from the reign of Jomo Kenyatta, the first President of Kenya, to the practice post-promulgation and implementation of the Constitution of Kenya, 2010. Article 1 of the Constitution creates a two-tier system of Government where one; legislative decisions are made by their elected representatives and two, where the people exercise their sovereign power directly.³ In other words, public participation ensures that citizens take part in decision-making.⁴

¹ Constitution of Kenya, 2010; Article 118.

² See Ben Sihanya, 'Participation and Representation in Kenya and Africa,' in Ben Sihanya, *Constitutional Democracy, Regulatory and Administrative Law in Kenya and Africa (Vol. 1: op. cit., forthcoming 2021)*.

³ *Ibid*, Article 1(2), Constitution 2010.

⁴ Ben Sihanya 'Participation and Representation in Kenya and Africa,' *op. cit.*, (forthcoming 2021)."

National and international laws strive to ensure that citizens participate in various democratic processes such as legislation. The notion behind this is to ensure that everyone's opinion is regarded when legislating. Thus, the International Covenant on Civil and Political Rights (ICCPR) 1966 stipulates that:

“Every citizen shall have the right and opportunity... (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; (c) To have access, on general terms of equality, to public service in his [or her] country.”⁵

Public participation is vital in key decision making and building people's confidence in the institutions they have. The Constitution of Kenya, 2010 recognizes as of right that people's participation in the legislative process must be implemented.⁶

However, despite the people of Kenya vesting Parliament with powers to exercise their sovereignty as the citizens' representative as per Article 94(2) of the Constitution 2010, the institution is and remains to be an exclusive institution where citizens have limited opportunities to voice their views in terms of the laws passed.⁷

One of the problems that limits the full enjoyment of this democratic right is the lack of adequate information, which is due to the limited modes of communication available in Parliament. Article 118 of the Constitution guarantees every person a right to participate in the legislative process.

In line with the Article 118, there is need for Parliament to have a clear framework on how citizens should be involved in the legislative process. This is key in implementation of the right to public participation. Lack thereof is a major hindrance to the implementation of the right to public participation.

1.2 Background of the study

The overarching argument of the study is that there is need for the effective implementation of the right to public participation in the legislative processes in Parliament. This has been the problem in Kenya, since 1963. Key among the issues is a lack of a comprehensive and effective

⁵Article 25 International Convention on Civil and Political Rights (ICCPR), 1966.

⁶ Cleophas N. Kaseya & Ephantus Kihonge, 'Factors affecting the effectiveness of public participation in county governance in Kenya: A case of Nairobi County' (2016), 6(10), *International Journal of Scientific and Research Publications*, 476.

⁷ Article 94(2) of the Constitution of Kenya, 2010 (role of Parliament)."

legal framework to guide public participation in the Kenyan legislative processes. This study also argues that Parliament and County assemblies have not given effect to public participation despite the broad provisions for the same in the Constitution, statute, regulations and House Standing Orders.”

For instance, the 1963 Constitution provided for a multi-party, parliamentary democracy and a regional or quasi-federal structure of government, known as *Majimbo* and through the same Constitution, democratic system of government and the separation of powers, minimal provision was made for public participation in state affairs.⁸

However, for many years, the executive dominated the space for participation in law and policymaking. The Government was generally responsible for making and implementing key decisions and would do so without accommodating dissent or criticism.⁹ This led to abuse of public resources by members of parliament and other key stakeholders due to lack of accountability.

The space for public participation opened up with the re-introduction of multi-party politics in the early 1990s but remained constrained through bureaucratic control of the processes for policy making.¹⁰ The coming to power of a new Government in 2003 enhanced this space. The Government began inviting the public to contribute to the making of policies, including the budget-making process.¹¹ Even with this new development, public participation in key decision making and in the legislative process still remained elusive as there was no clear legal framework.

In order to ensure that members of the public are effectively engaged in key decision making, the Constitution 2010 has identified democracy and public participation as some of the key national values and principles of governance.¹²

⁸ Karuti Kanyinga ‘Kenya Democracy and Political Participation,’ (2014) A review by *AfriMAP Open Society Initiative for Eastern Africa* and *Institute for Development studies (IDS)*, <https://www.opensocietyfoundations.org/sites/default/files/kenya-democracy-political-participation-20140514.pdf> (accessed 6/12/2017).

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² *Ibid.*

Since Kenya attained its independence, the nation has had a history of dictatorship based on one-man rule which made people lose hope and trust in the government.¹³ There were no legal platforms and support for public participation. Instead, those who projected their opinions were met with violence and intimidation.¹⁴

However, the Constitution 2010 and legislation that were enacted as part of its implementation rekindled the lost hopes and confidence that Kenyans had in the Government and its institutions. Thus, the Constitution 2010 states that:

“Parliament shall conduct its business in an open manner and hold its sittings and those of its committees in public; facilitate public involvement in the legislative and other business of Parliament and its committees.”¹⁵

The Constitution further provides that:

“Parliament may not exclude the public, or any public or private media, from any sitting unless in exceptional circumstances the relevant Speaker has determined that there are justifiable reasons for the exclusion.”¹⁶

The Constitution also guarantees citizens the right of petitioning Parliament on any matter within Parliament’s authority.

The major theme across the structure of the Constitution 2010 is the involvement of the public. It extends past mere involvement in the electoral processes, to being a fundamental national value and principle of governance under the Constitution. Therefore, the proceedings in Parliament and county assemblies are supposed to be open to the public.¹⁷ This is seen through the provisions of Article 10 on national values and principles of governance.

The Constitution enshrines public participation as a core national value and principle of governance which binds all state organs and officers whenever they apply or interpret the Constitution.¹⁸ In other words, citizen participation is in the DNA of the Constitution, and

¹³ Susanne D. Mueller ‘The Political Economy of Kenya’s Crisis’ (2008) *Journal of Eastern African Studies*, <https://www.tandfonline.com/doi/pdf/10.1080/17531050802058302?casa_token=pS9VOHMnn9sAAAAA:Ae1JFc zW_t1mrLurnfQLu3p6ncAdLrw8W91xDuf7Em6PA45p9M7RLBCgi7LBe6Uj1Iia6PNHsNuDSkqhpI> accessed on 10 November 2020.

¹⁴ Yash Pal Ghai ‘A short history of Constitutions and what Politicians do to them’ (2020) *The Elephant*, <<https://www.theelephant.info/features/2020/03/30/a-short-history-of-constitutions-and-what-politicians-do-to-them/>> accessed on 10 November 2020.

¹⁵ Constitution of Kenya, 2010; Article 118.

¹⁶ Ibid; Article 118(2) Constitution of Kenya, 2010.

¹⁷ *Ibid.*”

¹⁸ *ibid* (n 8), Article 10.

Parliament together with County Assemblies as the legislative organ are bound by it. However, these provisions have not been addressed substantively, especially in the legislative processes in Kenya, due to ineffective implementation occasioned by the lack of a relevant legal framework.

This is the legal lacuna that this thesis addresses to promote effective implementation of citizen involvement in the legislative process. Through effective participation of the people in legislative processes and other key public policy making processes, the public have a chance to actively contribute to good governance and democracy. This will also lead to easier implementation of the laws passed by Parliament and County Assemblies.¹⁹

The exclusion of public participation has also been occasioned by citizen's lack of knowledge about key decision processes. According to Karuti Kanyinga,²⁰ the citizenry participate in legislative processes through various ways. First, during the electoral processes where the electorate determine Parliament's membership.

Second, citizens determine the agenda of the House. Parliament goes on recess three (3) times annually. During the recess, the citizenry have an opportunity to interact with their representatives. Through these interaction, MPs are made aware of the various proposed bills and other legislation to be debated and approved by Parliament.²¹

Further, the MPs also have a chance to receive feedback from the electorate on issues of local and national importance.

Karuti Kanyinga²² further states that the 2010 Constitution sought to enhance public participation by promoting accessibility and accountability of Parliament to the electorate.

Much as Kanyinga has emphasized on public participation in law making, this study argues that Kanyiga has looked at the pertinent issues broadly. This is because, inasmuch as members of the

¹⁹ Jill Cottrell Ghai 'Constitutionalizing Public Participation in Kenya' (2016) *Indian Yearbook of Comparative Law*, Oxford University Press, 189.

²⁰ Karuti Kanyinga 'Kenya Democracy and Political Participation' (2014) *op. cit.*

²¹ Victor Imbo & Felix Kiruthu 'Effects of public participation on legislation by the Kenya National Assembly' (2019) 1(2), *International Academic Journal of Law and Society*, 104.

²² *ibid* (n 8).

public meet their elected Members of Parliament (MPs) once in a while, this is not adequate in enhancing and implementing the right to public participation.²³

Therefore, it is on this background that the study recommends a review of the existing legal frameworks, and the formulation of a comprehensive legislation to give effect to public participation in legislative processes in the context of the Kenyan Constitution. Furthermore, the study seeks to interrogate the role of public participation in the legislative process in Parliament as provided for in the Constitution 2010.

1.3 Statement of the Problem

The Constitution of Kenya, 2010 guarantees the right to public participation in legislative processes in its architecture. An effective implementation of the constitutional provisions discussed under Chapter 3 of this study below, would therefore promote good governance, constitutionalism and democracy. These are key national values and principles under Article 10 of the Constitution 2010.

However, substantive public participation in legislative processes has remained elusive in Parliament even after a new constitutional framework. This is largely due to the lack of effective implementation as a result the absence of an effective framework in terms of either statute, regulations and or policy. This study recommends that to give effect to the right to public participation under the Constitution which is deemed in some respects as the *grund norm*, there is need to ensure proper implementation of the right to public participation.”

Relatedly, “Ben Sihanya while analyzing Hans Kelsen on the *grund norm*, states that Kelsen’s main argument is that what is important is the “*efficacy of the grund norm (or constitution); and the fact that it is habitually obeyed.*”²⁴ The normative constitutional framework was widely accepted by Kenyans due to the promise of a holistic Bill of rights and the entrenchment of national values and principles including public participation in legislative process.²⁵ However, there has been lack of and or ineffective implementation of these aspirations in legislative processes.

²³ Jane Muthoni Marine ‘Seizing on a mirage?: An analysis of public participation in Kenya in the constitutional transition period 2010-2016’ (2018).

²⁴ Ben Sihanya, ‘Participation and Representation in Kenya and Africa’ in Ben Sihanya, *Constitutional Democracy, Regulatory and Administrative Law in Kenya and Africa* (Vol. 1, Sihanya Mentoring & Prof Ben Sihanya Advocates, Nairobi & Siaya, 2021).

²⁵ Article 10 of the Constitution of Kenya, 2010.”

Therefore, the enactment of a comprehensive legislation should promote the participation of the citizenry under the Constitution 2010. The failure of effective implementation has created a lacuna in which Parliament circumvents the constitutional provisions on substantive public participation in legislative processes.

Such lack of citizenry participation is not only a derogation of the constitutional rights of Kenyans to exercise sovereign power, but also a window for the Government to push its own agenda which may breach the citizen's rights. The result is nullification and annulment of enacted laws by the courts due to lack of adequate public participation.

This also affects the legitimacy of the enacted laws in the eyes of the public. The study therefore argues that there is need to ensure actual, real and effective implementation of public participation in law making processes.

1.4 Research Objectives

This research project paper or thesis focuses on four (4) research objectives.

- 1) To examine and explore ways through which public participation in the legislative process can be implemented fully in Parliament under Article 118 of the Constitution of Kenya, 2010.
- 2) To critically analyze the historical background of public participation in the legislative processes of Parliament in Kenya.
- 3) To evaluate the legal frameworks on public participation and their implementation in the legislative process in Parliament.
- 4) To provide a comparative analysis of the right to public participation and its implementation in South Africa and the UK.
- 5) To make appropriate recommendations on the how to effectively implement public participation in Parliament in Kenya.

1.5 Research Questions

This research project paper or thesis addresses the following four (4) research questions:

- 1) Has Parliament effectively implemented the right to public participation in the legislative process under the Constitution of Kenya, 2010?²⁶
- 2) What is the historical background of public participation in the Kenyan Parliament?
- 3) What are the legal frameworks on the implementation of public participation in the legislative process in Kenya?
- 4) How does the implementation of the right to public participation in the legislative process in Kenya²⁷ compare to the practice in South Africa²⁸ and the United Kingdom?

1.6 Research Hypotheses

The main hypotheses of this thesis is that lack of a proper legislative framework to govern public participation in legislative process in Parliament and County Assemblies has led to poor and or lack of implementation of public participation under Article 118 of the Constitution 2010.

The other hypothesis is that effective public participation in the legislative process directly affects the quality of governance, transparency and accountability in public finance management and the rule of law in legislative organs.

1.7 Literature Review on the study

The subject of public participation is widely debated including through scholarly works. Through the promulgation of the Constitution, 2010, Kenyans gave themselves power through the Constitution to participate in legislative process and other key decision making.

In as much as a lot has been written on public participation, there is little explanation offered on how Parliament should enhance and ensure that public participation is not only documented in the Constitution but is indeed practiced.

Very little literature exists on the methodology of implementing public participation either through proper legislative or policy framework. A lot has to be done in order to actualize Article 118 of the Constitution that provides for the right to public participation.²⁹

²⁶ Jill Cottrell Ghai, 'Constitutionalizing Public Participation in Kenya' in *the Indian Yearbook of Comparative Law, op. cit.* (2016).

²⁷ *ibid.*

²⁸ Renee Scott, 'An analysis of public participation in the South African legislative sector' (Doctoral dissertation, Stellenbosch, University of Stellenbosch 2009)."

²⁹ Jill Cottrell Ghai, 'Constitutionalizing Public Participation in Kenya' in *the Indian Yearbook of Comparative Law, op. cit.* (2016).

This research intends to settle the legal lacuna on implementing public participation in the Kenyan Parliament despite there being a constitutional requirement.

Relatedly, citizens can participate directly or through their representatives. However, there is a duty of the elected representatives to ensure their electorate have adequate information on the affairs of the Government.³⁰ Democracy reveals that a democratic Government must blend representation and participation of citizens.

Furthermore, public participation in law making processes is one way through which the Government can accord its citizens the respect that they deserve as the governed and the electors of the governors.³¹ Arbitrariness and irrationality in the legislative system lurks in the absence of public participation. It is paramount that the legislative process conforms to the constitutional and statutory provisions on legislation.³² Hence, where Parliament fails to follow the constitutional provisions, the courts must invalidate such legislation.

Through devolution under the Constitution of Kenya 2010, citizens participate in governance even at the local levels. Devolution has also promoted the recognition of diversity including differences in ethnicity, religious beliefs, and cultural groups..³³

Devolution should enable citizens to play an active role in decision making and policy making processes, and in implementation. Migai Aketch emphasized that citizens at the local levels of governance have a major role to play in local governance and decision making. He argues that this is likely to result in citizen-centric solutions and a Government that is responsive to the local needs.³⁴

According to Professor Migai Aketch,³⁵ in his article on “Building a democratic legislature in Kenya” states that it is impossible to ensure the direct participation of citizens in governance on the scale of a nation-state.³⁶ However, he acknowledges the importance of public participation

³⁰ *International v. Speaker of the National Assembly & Others* (CCT 12/05) [2006] ZACC 11, 2006 (12) BCLR 1399(CC), 2006 (6) SA 416 (CC).

³¹ *ibid* (n 29).

³² County Governments Act 2012 s 115 (*provides for the principles of public participation in the County Governments*).

³³ Jimmy Carter, ‘Ethnicity, Human Rights and Constitutionalism in Africa’ (2008) *The Kenyan section of the International Commission of Jurists*, 43.

³⁴ *ibid*.

³⁵ Associate professor, School of Law, University of Nairobi.

³⁶ Migai Aketch, ‘Building a Democratic Legislature in Kenya’ (2015) *East African Law Journal*, 100.

including in Parliamentary business. The Constitution also empowers the people to petition Parliament, and to recall legislators before the end of the term of the relevant House.³⁷

Further, Migai Aketch states that Parliament has made an effort to implement constitutional provisions on public participation through legislation and Standing Orders.³⁸ According to Migai, the standing orders of both houses now grant citizens a unique and timely right to participate in Parliament's business by requiring the relevant House committees to engage citizens in their deliberations. This includes considering the comments of citizens to Parliament.

While acknowledging the significance of his arguments, the author has failed to clearly give a solution on how the said constitutional right can be implemented in the order to achieve an effective parliament with effective legislation. For instance, after acknowledging the challenges faced in the realization of the right to citizen participation the author failed to give a remedy to the problem.

Relatedly, according to Murimi Karani, in "Public participation after the elections," public participation is realized substantively through the exercise of political rights under Article 38 through voting.³⁹ The citizens determine which representatives exercise their delegated sovereign power in elective and appointive positions.⁴⁰ Much as the author acknowledges the right to public participation, he does not go beyond to explain the existence of the said right after an election and what role do citizens play in the law making process.

Azizan Marzuki in "Challenges in the public participation and decision making process," states that public needs and social welfare can be better distributed and realized through effective implementation of citizen participation.⁴¹ He states that by participation in decision-making

³⁷ *ibid.*

³⁸ The National Assembly Standing Orders; As adopted by the National Assembly on 9th January, 2013 during the Fourth Session of the Tenth Parliament."

³⁹ Murimi Karani, 'Public Participation after Elections' (2017) <http://eacj.org/general/243-public-participation-after-elections.html> accessed 13 December 2018.

⁴⁰ *ibid.*

⁴¹ Azizan Marzuki, 'Challenges in the public participation and the decision making process' (2015) <https://hrcak.srce.hr/136608> accessed 12 December 2018.

process, the Government can enhance the public trust, commitment and participation in governance.⁴²

Further Azizan argues that public participation is a means of discovering the interests of the individual members of the public regarding development and planning. This is because the opinions and planning activities conveyed through public participation have a direct impact on the public generally and certain groups specifically.⁴³

The author acknowledges the fact that public participation could lead to better policy and implementation of decisions. However, he fell short of recommending possible solutions on how to achieve public participation in the legislative process because he looked at public participation broadly as opposed to public participation as key in law making process.

Relatedly, Victor Imbo and Felix Kiruthu in their paper on “Effects of public participation on legislation by the Kenya National Assembly,” recommend measures to promote public participation in legislative processes. These include enhanced media coverage, citizen education, and increased time allocated for debate on National Assembly bills. However, this study argues that there is need for more practical and substantive implementation of the existing legal and institutional frameworks to give effect to public participation in Kenya.⁴⁴

Cleophas Ndiege Kaseya in his article titled “Factors affecting the effectiveness of public participation in County Government in Kenya: A case of Nairobi County”⁴⁵ states that before the promulgation of the Constitution, Kenya had tried various ways to encourage citizens to participate in decision making.” For instance, through the Constituency Development Fund (CDF) Act, Section 24, a number of mechanisms have been proposed through which citizen participation is conducted.⁴⁶

Thus, the CDF Act provides that members of the Constituency Development Fund Committee are supposed to be elected from the ward taking into account the geographical diversity within

⁴² *ibid* (n 41).

⁴³ *Ibid*”

⁴⁴ Victor Imbo & Francis Kiruthu, ‘Effects of public participation on legislation by the Kenya National Assembly’ (2019) 1 *International Academic Journal of Law and Society* 104.

⁴⁵ Cleophas Ndiege Kaseya & Ephantus Kihonge, ‘Factors affecting the effectiveness of public participation in County Government in Kenya: A case of Nairobi County’ (2016) <<http://www.ijsrp.org/research-paper-1016/ijsrp-p5871.pdf>> accessed 12 April 2017.

⁴⁶ *ibid*.

the constituency, communal, religious, social and cultural interests in the Constituency and the requirements of gender, youth and representations of persons with disabilities.⁴⁷ This promotes diversity in the decision-making.

The author further lays emphasis on public participation and argues that the spirit of public participation runs throughout the Constitution of Kenya, 2010.⁴⁸ He states that the Constitution seeks and facilitates the involvement of the potentially affected by or interested in a decision.

According to Kaseya,⁴⁹ meaningful citizen participation in governance is a key ingredient for public reforms that were instituted by the Constitution of Kenya.⁵⁰ Though the author appreciates the importance of public participation, he hasn't suggested any step aimed at implementing the right to public participation in Parliament and in particular their involvement in the legislative process.

1.8 Justification of the Study

Public participation is a democratic rights which foundational to the Constitution of Kenya. To this regard, the people are empowered to take part in major decisions making of the nation, both at national and county governments levels. Parliament and County Government Speakers are cognizance of this constitutional provision and the superiority of the Constitution in terms of legislation hierarchy.

Despite this awareness, Parliament and County Assemblies do not ensure public participation in the legislative process. This is caused by lack of proper legislation and policies on public participation process.

The courts play their part in the interpretation of the Constitution and ensuring that the legislative process involves the citizens as is provided in the Constitution. However, the decisions of the courts do not expressly prevent the future enactment or amendment of laws without public participation.

Enactment of effective public participation legislation and policies is the best way to ensure that there is public participation. It is on this rational that this study seeks to establish the legal and

⁴⁷ *ibid.*

⁴⁸ *ibid.*

⁴⁹ Victor Imbo & Francis Kiruthu (n 31).

⁵⁰ *ibid.*”

political position of public participation in the legislative process in Kenya. It seeks to do this through evaluating the strengths and weaknesses of the available public participation laws.

In addition, this study endeavors to make recommendations on how to implement public participation through a comparative analysis between Kenya, South Africa and the United Kingdom.

This study contributes to existing literature on public participation in Kenya, given that most of the available scholarly work focus on the general aspects of public participation. Relatedly, this study assesses the methodology of implementation of public participation in legislative processes. This is because in as much as a lot has been written on public participation, there is little explanation offered on how Parliament should enhance and ensure that public participation is not only documented in the Constitution but is indeed practiced.

1.9 Conceptual and Theoretical framework

Public participation in legislative processes concerns access to information and access to justice.⁵¹ Further, it involves the interaction between the government and private entities, civil societies, individuals and other entities in the evaluation, development and implementation of the laws and policies.⁵²

There are three (3) theories that support public involvement in the legislative process. These are the pure theory of law, public participatory theory and deliberative democracy theory.

1.9.1 Pure theory of law vis-à-vis Public participation in Kenya

The Hans Kelsenian pure theory of law is perceived as an extreme version of legal positivism.⁵³ The pure theory of law is a theory concerned with defining law. Kelsen focuses on ‘what is the law’ but not ‘what ought it to be’. It is therefore a science.⁵⁴

Hans Kelsen rejected natural law theory because he believed the theory confused the law with morality.⁵⁵ Kelsen believed that law consists of norms which draw legitimacy from other norms

⁵¹ UNECE ‘Guide to Public Participation under the Protocol on Water and Health’ 3 <http://www.unece.org/fileadmin/DAM/env/water/publications/PWH_public_participation/GuidePublicParticipationPW_H_WEB_EN.pdf> accessed on 11 November 2020.

⁵² ‘Public participation in basin projects’ <http://www.oas.org/dsd/Water/Public%20Participation%20in%20basin%20projectspagweb.pdf> accessed 11 November 2020.

⁵³ Wayne Morrison, *Jurisprudence: from the Greeks to post-modernism* (Cavendish publishing Limited, London 2000) 323.

⁵⁴ *ibid.*

as opposed to facts.⁵⁶ Norms according to Kelsen are regulations on human conduct, but positive law is a normative order that regulates human conduct in a specific manner.

Norms are an “ought” preposition that express not what is or must be, but what ought to be, given certain conditions. Its existence can only mean its validity.⁵⁷ Within Kelsen’s theory, the normativity of law is, if anything, an even more central and dominating factor for Kelsen’s argument was that there is a foundational argument implied ‘presupposed’ by legal statements just as there is foundational argument implied by religious statements.⁵⁸ Kelsen believed that there was an ultimate norm postulated on which all the others rest.⁵⁹ This is the Grund norm.

Further, the Kelsenian model of a legal system is one of a hierarchy of norms in which each norm is validated by a prior norm until the point of origin of legal authority is reached with the basic norm, the Grund norm.⁶⁰ Therefore, according to Kelsen’s words, the theory was ‘pure’ because it only describes the law and attempts to eliminate from the object of this description everything that is not strictly ‘law’.⁶¹

Kelsen has however, been criticized for not explaining candidly the origin of the Grund norm, its nature nor indeed where we find it.⁶² The theory is imperative to the study in the sense that the Constitution Article 118 of the Constitution of Kenya, upon which we draw all our laws from and that act as a guide, has clearly stipulated that there needs to public participation in the Legislative process but appears to be elusive as it is never implemented.”

The pure theory of law advances the theory that law is pure and doesn’t have any impurity and should at all times be respected. The study therefore seeks to find out whether the Kenyan Parliament has strictly implemented the law concerning public participation in legislative drafting as articulated in the Constitution as advanced by Hans Kelsen.

⁵⁵ Michael Freeman, *Introduction to Jurisprudence* (9th ed, Sweet & Maxwell 2014) 251.

⁵⁶ *ibid.*

⁵⁷ *ibid.*

⁵⁸ Brian Bix, *Jurisprudence: Theory and Context* (Sweet and Maxwell, London 2006).

⁵⁹ *Ibid.*

⁶⁰ Hilaire McCoubrey, *Textbook on Jurisprudence* (4th ed, Oxford University Press 1993) 46.

⁶¹ Hans Kelsen, *The Pure Theory of Law* (University of California Press, California 1967).

⁶² Michael Freeman, *Introduction to Jurisprudence op. cit.* (2014) 258.

1.9.2 Public participation theory

Public participation theory postulates that private citizens should be allowed to influence public decisions.⁶³ Public participation theory considers citizen participation as a cornerstone of a constitutional democracy whereby the citizens have an active role in the decisions made concerning the public. This analogy can be traced back to the Greek and Britain.

However, the institutionalization of public participation took place in the mid-20th Century. Critics of public participation theory subdue the theory on the grounds that it is very expensive to implement public participation. They also argue that public participation is time consuming and unnecessary since the people have elected their representatives, they ought to let them make decisions concerning them.⁶⁴

However, public participation theorists compliment the theory by stating that it has more advantages than disadvantages. Some of the advantages of the advantages include; the government gets support from the public on its plans, the government avoids future conflicts with the public which can cause avoidable delays, the government gets to win public trust which can ease future decision makings and it creates the spirit of cooperation between the government and the people.⁶⁵

The above advantages of public participation theories can be related to the Kenyan situation. Members of the public questioning their constitutionalism have taken several legislation to the courts due to lack of public participation.⁶⁶ This has led to delays in the legislative and implementation process of the legislation. Furthermore, lack of public participation has caused huge expenses in suing and defending the suits.

In the 21st Century, public participation theory has become easy to comply with since technology has made its administration easy. This has led to a division of public participation into two that is, supporters of technocratic approach public participation and democratic approach to public participation.

⁶³ Peter Biegelbauer and Janus Hansen, 'Democratic theory and citizen participation: Democracy models in the evaluation of public participation in science and technology' (2011) 38 *Science and Public Policy* 589."

⁶⁴ *ibid.*

⁶⁵ Gene Rowe and Lynn J. Frewer, 'Public participation methods: A framework for evaluation' (2000) 25 *Science, technology, & human values* 3, 29.

⁶⁶ A good example is the case of *Robert N. Gakuru & Others v. Kiambu County Government & 3 Others* [2014] eKLR

Technocratic approach merits the fact that only experts with knowledge in a particular field should participate in the decision making process.⁶⁷ Democratic approach on the other hand, postulates that everyone affected by a decision or a legislation should be allowed to take part in the decision-making.”

The normative constitutional framework provides for democracy and citizen participation.⁶⁸It does not limit public participation to a particular set of individuals but instead directs Parliament and County Assemblies to “facilitate public participation and involvement in the legislative and other business of Parliament and its committees.⁶⁹

1.9.3 Deliberative democracy theory

Deliberative democracy theory postulates that the citizens and their representatives should justify their actions to each other.⁷⁰ The theory demands that the two ought to justify the laws or regulations that they impose on one another. Deliberative democracy makes the Government realize that citizens are not its subjects who it can with no justifiable reason develop legislation and implement them at its pleasure. It must indulge the people and justify why such legislation is important and what it seeks to achieve by implementing such legislation.

In other words, deliberative democracy views the people as autonomous agents who are not only meant to be ruled by the government but also treated with dignity and respect.⁷¹ In their autonomy, they have been empowered to govern themselves or through their representatives.⁷²

Therefore, the autonomous agents have the right to respond to the justification by the government either by themselves or through their elected representatives. The importance of such justification by the government on the suggested legislation is to not only to produce a justifiable decision to do so but also to ensure that there is respect between the autonomous agents.⁷³

Furthermore, the theory hypothesizes that it is not sufficient that the people’s power should end during election. The citizens need to keep checking on the government to ensure that the legislation it intends to legislate are justifiable. This is because the laws are meant to provide

⁶⁷ Jack De Sario and Stuart Langton, ‘Citizen Participation in public decision making’ (1987).”

⁶⁸ Constitution of Kenya 2010; Article 10.

⁶⁹ *ibid*; Constitution of Kenya 2010, Article 118(1) (b).

⁷⁰ Amy Gutmann and Dennis Thompson, ‘What deliberative democracy means’ (2016) *Democracy: A Reader*

⁷¹ *ibid*.

⁷² Constitution of Kenya 2010; Article 1.

⁷³ *Ibid*.

welfare for the people and ensure that they are working towards their benefits. Deliberative theory focuses on the power of the people to entrench democracy and check the effectiveness of state institutions against the standards of democracy.⁷⁴

The Constitution of Kenya supports the deliberative democracy theory by turning away from a liberal individualistic conceptualization of democracy towards accountability and broad-based discussion.⁷⁵ It focuses on the opinion and the input of the people after voting process has ended. Therefore, the legislature will always have to invite the public and justify their intentions to legislate a particular legislation. This enables the people to moderate self-interests of the legislature and the executive.

Moreover, it empowers the marginalized, promotes integration and solidarity and mediate differences between the people and the government. This, it does by addressing socio-economic inequality and historical marginalization endured by the interested persons.

1.10 Research Methodology and Techniques

“This study will take the qualitative analysis approach. This shall be done through desk review of printed scholarly or academic texts and online academic materials. To give the best result, the review shall focus on both primary and secondary sources of information on public participation in the legislative process in Kenya, South Africa and the United Kingdom as the main research methodology.

The primary sources of information shall include the available legislation on public participation in the legislative process such the Constitution of Kenya, 2010, the Statutory Instruments Act No. 23 of 2013 and the County Governments Act, 2012 and published books on the subject.

Secondary sources shall include published academic and political. This research shall also rely on online journals and articles on approved websites for reference. Such websites shall include academic institutions such as universities, Government websites, civil societies’ websites, and the judiciary websites amongst other websites with approved and relevant information pertaining to this study. The Government websites shall include those of the legislature, the executive, the judiciary and the 47 County Governments.

⁷⁴ Simone Chambers ‘Deliberative democratic theory’ (2003) 6 *Annual review of political science* 307, 326 <<https://www.annualreviews.org/doi/pdf/10.1146/annurev.polisci.6.121901.085538>> accessed 13 November 2020.”

⁷⁵ *ibid.*

1.11 Challenges

The study foresees one challenge in the course of researching on public participation on the legislative process. Due to the coronavirus disease 2019 (Covid-19) pandemic and the containment measures, this study shall not get adequate information from printed texts that have not been converted into soft copy and uploaded on the internet.

Therefore, the study shall rely more on the citation by other scholars and authors which shall be limit it to the interpretation of the scholars or authors but not from the original work of the owner.

1.12 Chapter Outline

This study is organized into five (5) chapters as follows:

1.12.1 Chapter 1: Introduction to the study

The first chapter carries the background, the problem statement, objectives, research questions that the study seeks to answer, hypotheses, methodology, limitation and a brief literature review.

The chapter also provides a general introduction of the whole research.

1.12.2 Chapter 2: Historical Background to the Right to Public Participation in the Legislative Process in Kenya

The Chapter will look at the historical background of the right to public participation in decision making and make a great emphasis in the legislative process in Parliament. It will trace the origin of the said right from pre-colonial, during the colonial era and post-colonial era to the current state.

1.12.3 Chapter 3: Legal Framework on Public Participation in the Legislative Process in Kenya

The Chapter examines the existing legal framework on public participation in the legislative process. It analyses the current laws on the right to public participation and the inadequacy in the implementation of the right to public participation.

1.12.4 Chapter 4: A Comparative Study between the Right to Public Participation in the Legislative Process in Kenya, South Africa and the United Kingdom

The chapter will look at a comparative study from the Republic of South Africa, the United Kingdom and Kenya and make recommendations on best way possible in achieving and implementing the right to public participation.”

1.12.5 Chapter 5: Summary of Findings, Conclusion and Recommendations to Implementing the Right to Public Participation

This Chapter will deal with the conclusion of the study. It will also provide general and specific recommendations by proposing appropriate measures for the realization of the right to public participation in the legislative process in Kenya. These will also complement the available regulatory frameworks on public participation in Kenya.

The chapter also identifies future areas for research from the key discussions in this thesis, including the emerging debates across chapters 1 to 4 of the study.

CHAPTER 2

HISTORICAL BACKGROUND TO THE RIGHT TO PUBLIC PARTICIPATION IN THE LEGISLATIVE PROCESS IN KENYA

2.1 Introduction

This chapter seeks to establish the history of the right to public participation in the legislative process in Kenya. It endeavours to accomplish this through analyzing the practice of public participation in Kenya before, during and after the colonial era.

Furthermore, this chapter seeks to analyze the introduction and moulding of public participation in the legislative process in Kenya by the British. This, it seeks to achieve by appreciating the fact that public participation was initially indirect, that is, public participation in the legislative process was conducted through the people's representatives in the Legislative Council (LegCo) and later Parliament.

The right to public participation is a fundamental element of law making process in a constitutional democracy country like Kenya.⁷⁶ Thus, Professor Ben Sihanya argues that public participation is one of the national values and principles of governance granted by Article 10(2)(a) of the Constitution of Kenya, 2010.⁷⁷

The principle is to be binding on all State organs, State officers, public officer and all persons whenever they apply or interpret the Constitution; enact, apply or interpret any law; or make or implement public policy decisions.⁷⁸

The participation of the public in the Kenyan Legislature is one with a lengthy history.⁷⁹ There are four (4) phases through which public participation has evolved in Kenya. The first phase is the period preceding the invasion of Kenya by the British.⁸⁰ This is the period before the year 1890 when the British started navigation and subsequent settling in the East African territories.⁸¹

⁷⁶ Ben Sihanya, 'Electoral Justice in Kenya under the 2010 Constitution: Implementation, enforcement, reversals and reforms' (2017) 13 *Law Society of Kenya Journal* 1, 30.

⁷⁷ Ben Sihanya, 'Public Participation and Public Interest Litigation under the Kenya Constitution: Theory, Process and Reforms' (2013) 9 *Law Society of Kenya Journal* 1.

⁷⁸ *ibid.*

⁷⁹ Yash Ghai, 'Public Participation and Minorities' (Minority Rights Group International Report, London 2001).

⁸⁰ *ibid.*

⁸¹ Robert M. Maxon, *Struggle for Kenya: The Loss and Reassertion of Imperial Initiative, 1912-1923* (Fairleigh Dickinson University Press, 2001) 270, 279.

During this period the African societies were governed by the indigenous African governance systems and structures.

The systems of governance varied from one community to the other. Some communities had centralized systems of government headed by Kings or chiefs while others had decentralized governance structures that was headed by a council of elders.⁸²

Some of these structures have survived many centuries and continue to influence the socio-economic and political courses of their communities even under the current democratic dispensation.” A good example is Nabongo Mumia of the Wanga Kingdom among the Luhya Community and the *Njuri Ncheke* council of elders among the Meru. These structures are inclusive in nature and involving.⁸³

2.2 Public Participation during pre-independence

“The second phase that public participation underwent was over the period following invasion of the Kenyan territory by the British and the subsequent colonization of Kenya by the British.⁸⁴

The British invaded Kenya in the late 18th century and quickly embarked on a journey to civilize the Africans by introducing the white man’s language religion and the socio economic and political structures.⁸⁵ This met some resistance from many communities who sought to preserve their way of life by fighting the looming invasion, domination and subsequent colonization by the whites.

However, the British proved to be smart for the communities that rebelled finally conquering them and taking charge. Kenya was declared British East Africa Protectorate in 1895, and Colony and protectorate in 1920.⁸⁶

During this period, many African indigenous governance structures crumbled. However, some of the communities after witnessing the brutality of the British to their neighbours that resisted, opted to collaborate with the British and preserve both their territories and governments.

⁸² Gideon S. Were, *A history of the Abaluyia of Western Kenya* (East African Publishing House, Nairobi 1967).

⁸³Hellen Kagwiria Orina, ‘The contributions of councils of elders to the resilience of African traditional religion. A case of Njuri Ncheke in Meru County, Kenya’ (PhD diss., Egerton University 2018)”.

⁸⁴ Yash Ghai, ‘Public Participation and Minorities’ *op. cit.* (2001).

⁸⁵ Fall Makhete, *Early Political Discord in Kenya* (West Virginia University, Virginia 2016).

⁸⁶ *ibid.*

However, as fate was to have it, while they were spared the wrath of the British, they only secured ceremonial powers contrary to their intentions of collaborating.⁸⁷

The Imperial British East Africa Company (IBEACo) had earlier navigated the land and many Britons had started coming in and settling in Kenya as early as 1890.⁸⁸ The arrival of the British disrupted the African socio-economic and political structures to an extent of destabilizing most if not all of them.”

The period between 1890 and 1960 witnessed some of the worst experiences endured by Africans as far as participation was concerned, to say the least, even being involved or otherwise consulted in matters affecting them.⁸⁹ This period was characterized by a ruthless colonial “administration which hardly believed Africans had the right to be consulted or heard in matters of governance despite the fact that these matters affected the Africans directly.

They as well did not fathom any reason validating the African’s quest to be heard and involved.⁹⁰ This can partly be attributed the general belief shared not only by the British but also many other European powers that Africans were uncivilized and as such whatever the Crown did was civilizing the subjects and this was in the best interest of both the locals and the Crown.⁹¹

The Kenyan Colony and the 10 mile or 16 km Coastal Strip which had been declared a protectorate were ruled by decree Ordinances.⁹² The system of governance was dictatorial by nature. It is important to point out that such system by nature abhors public participation.

Before the dawn of the colonial era, land was communally owned and governed by customary laws of each community. Thus, there was no selling of land or buying since the title of such property was under the entire community.⁹³ Thus, they could only claim the right of usage of such property.” The colonial administration under the leadership of the Governor as the

⁸⁷ Evanson N. Wamagatta, *Controversial Chiefs in Colonial Kenya: The Untold Story of Senior Chief Waruhiu Wa Kung'u, 1890–1952*, (Rowman & Littlefield, Lanham 2016).

⁸⁸ Robert M. Maxon, *Britain and Kenya's Constitutions, 1950-1960* (Cambria Press, New York 2011).

⁸⁹ Peter O. Ndege, ‘Colonialism and its Legacies in Kenya’ *Lecture delivered during Fulbright–Hays Group project abroad program: July 5th to August 6th 2009*.”

⁹⁰ “Karuti Kanyinga, ‘Kenya: Democracy and political participation’ (2014).

⁹¹ Ibid.

⁹² George Githinji, ‘How colonial policies and practices led to land injustices in Kenya’ (2019) <https://www.epickenyan.com/colonial-policies-land-injustices-in-kenya/> accessed 8 February 2019.

⁹³ H.W.O. Okoth-Ogendo, *Tenants of the Crown: Evolution of Agrarian Law Institutions in Kenya* (Acts Press, Nairobi (1991) 6.

Monarch's representative employed both subjugation and subordination of the local people depriving them of their freedom and ancestral land which had now become Crown land.⁹⁴

Without public participation of the native Kenyans, the Colonial Governor introduced a number of laws with the primary intention of dispossessing the natives of their land and handing it over to the settlers. The land laws were introduced in the following order. First, there was Land Acquisition Act of 1894.” This was shortly followed by the Crown Land Ordinance of 1902, Crown Land Ordinance of 1915 and later the Kenya Native Areas Ordinance of 1926.⁹⁵

In summary, these laws facilitated the eviction of the natives to pave way for the British to construct the Kenya-Uganda Railway and dispossession of high potential highlands from the Indigenous communities.⁹⁶ These lands were leased to the white settlers for 999 years.

The natives were as well evicted from their ancestral lands and forced to settle in the reserves that were not as productive. These ordinances were passed with little or no participation on the part of the natives.⁹⁷ All these measures were arrived at with no civic engagement whatsoever by the colonial administration.

The first time there was a hint of public participation of Africans in governance was in 1923 following the Devonshire White Paper.⁹⁸ The paper acknowledged that Kenya was primarily a black man's land, and therefore whenever the interests of the white settlers and their black counterparts clashed, then the interests of the black Native ought to prevail.⁹⁹

This saw the appointment of Eliud Mathu to the Legislative Council (LegCo) in the year 1944 to represent the interest of the natives.¹⁰⁰ It also saw the formation of the first political party in Kenya the Kenya African Union (KAU) which provided the natives with a forum to articulate their issues and hence publicly participate in the governance of their country.

⁹⁴ *ibid.*

⁹⁵ Washington Osiro, 'Kenya's unresolved historical injustices - coming home to roost - again!' (2017) <https://www.huffingtonpost> accessed 8 February 2019.”

⁹⁶ *ibid.*

⁹⁷ Kariuki Gitahi, 'Lancaster Constitutional Negotiation Process and Its Impact on Foreign Relations of Post-Colonial Kenya, 1960-1970' (PhD Dissertation, University of Nairobi, 2015).

⁹⁸ Douglas Kiereini, 'The Devonshire White Paper: Kenya's Colonial Saving' *Business Daily* (2017) <https://www.businessdailyafrica.com> accessed 11 February 2019.

⁹⁹ Robert M. Maxon, *Struggle for Kenya: The Loss and Reassertion of Imperial Initiative, 1912-1923* (Fairleigh Dickinson Univ Press 1993) 270–279.

¹⁰⁰ Kariuki Gitahi, *Lancaster Constitutional Negotiation Process and Its Impact on Foreign Relations of Post-Colonial Kenya, 1960-1970, op. cit.* (2015).

Owing to the many oppressive policies introduced by the colonial administration the natives initiated an organized resistance in the 1940s.¹⁰¹ The introduction of the *Kipande* system,¹⁰² the hut tax¹⁰³ and the poll tax were the major triggers of this resistance.

The *kipande* system is the colonial British system where it was mandatory for Kenyan locals to wear a metal around their neck, containing their personal information including their name, age, place of birth, history of employment and the person's movements. It was used to suppress movement by native Africans, including the state of emergency in 1954. The Mau Mau uprising as well took shape and gained momentum during the 1950s.¹⁰⁴

However, due to the lack of inclusivity and participation in governance matters on the part of the Natives the agitation gained momentum eventually becoming a full-fledged struggle for independence and self-governance.

Owing to the pressure, the British gave a few concessions through various amendments albeit with the hidden agenda of consolidating the place of the immigrants in the colony.¹⁰⁵ This saw Africans reject the Lyttleton and Lennox Boyd Constitutions of 1954 and 1958, respectively.¹⁰⁶

The membership of Legislative Council (LegCo) later rose from 16 to 26 in 1952 after direct instructions from England. This reveals that Africans did take part in the legislation process before the 1944. Furthermore, one can conclude that some of the rights of African natives, including public participation in Parliamentary law-making process, were to be channeled through their appointed African men.

However, the six (6) Africans appointed to the Legislative Council in 1952 were not enough to uphold the right to public participation as the number was not adequate to express the opinions

¹⁰¹ E. R. Turton, 'Somali resistance to colonial rule and the development of Somali political activity in Kenya 1893–1960' (1972) 2 *The Journal of African History* 1.

¹⁰² Peter Karari, 'Modus Operandi of Oppressing the "Savages": The Kenyan British Colonial Experience' (2018) 25 *Peace and Conflict Studies* <<https://nsuworks.nova.edu/cgi/viewcontent.cgi?article=1436&context=pcs>> accessed 14 November 2020.

¹⁰³ The Colonial British introduced the 1901 Native Hut and Poll Tax which required the native citizens to pay tax through labour or in Kind. Later in the year 1910 it was amended to include attachment of native's property or three months imprisonment in default: Peter Karari, 'Modus Operandi of Oppressing the "Savages": The Kenyan British Colonial Experience' *op. cit.*

¹⁰⁴ "Robert M. Maxon, *Britain and Kenya's Constitutions, 1950-1960*, *op. cit.* (2011).

¹⁰⁵ George Githinji, 'How colonial policies and practices led to land injustices in Kenya' *op. cit.* (2019).

¹⁰⁶ Kariuki Gitahi, *Lancaster Constitutional Negotiation Process and Its Impact on Foreign Relations of Post-Colonial Kenya, 1960-1970*, *op. cit.* (2015).

and interests of all Africans.¹⁰⁷ By the 1960s, the British realized that Africans were on the brink of gaining their independence.

Therefore, the Queen's representatives started laying ground for independence by involving the natives in governance matters. Africans were isolated from the constitutional development during this period and as such the governance structures that were born out of this process were not frowned upon by Africans and perceived as colonial and therefore a source of colonial subjugation and oppression.¹⁰⁸

Therefore, Africans were not keen to participate or be involved owing to the general apprehension of appearing as collaborating with the colonial masters. They rather made the right to self-governance and freedom their main focus and this called for resistance, which was the main characteristic of the struggle for independence.

During the pre-independence period up to 1963, there was no legislation governing the right to public participation in Kenya. Laws were arbitrarily enacted in the UK and passed to Kenya as "royal instructions."¹⁰⁹

Kenya was administered by an Executive Council that comprised of the Governor and seven members: four *ex-officio* members and three officials. Africans were never part of the Governing council as such there was no element of public participation. Hence, there was no substantive implementation of public participation as a result of lack of political goodwill, comprehensive legal framework and inclusivity in political and legislative processes.

The first post-independence legislature in Kenya was formed in the year 1962. It was a succession of the Legislative Council (LegCo). It comprised a bi-cameral system, which was composed of the House of Representatives and Senate. a.¹¹⁰ During this time, Kenya had an

¹⁰⁷ Ben Sihanya, 'Constitutional founding of the Kenyan and African state' in Ben Sihanya, *Constitutional Democracy, Regulatory and Administrative Law in Kenya and Africa* (Vol 1, Sihanya Mentoring & Sihanya Advocates, Nairobi & Siaya 2021)."

¹⁰⁸ "Cullen Catriona, 'Kenya is No Doubt A Special Case: British Policy Towards Kenya' (PhD Thesis, Durham University 2015).

¹⁰⁹ Karuti Kanyinga, 'Kenya democracy and political participation' (2014) <<https://www.opensocietyfoundations.org/uploads/b24bc86e-9fa4-4771-980d-0888a7871e60/kenya-democracy-political-participation-20140514.pdf>> accessed 2 July 2020.

¹¹⁰ *ibid.*

increased number of representatives. They assisted in ventilating the affairs of the country. The first sitting of the National Assembly took place in 11 June 1963.¹¹¹

During this period, the Senate and the House of Representatives were greatly involved in legislation that required consideration and enactment of laws to enhance the “lives of Kenyans.”¹¹² It is safe to conclude that during this time also there was no clear legal framework governing the right to public participation. Members of the Legislature performed all functions including oversight roles on behalf of the public.

The enactment of the Kenya Independence Order in Council 1963 in the Lancaster House involved a lot of negotiations by members of the public in particular the Kenyan representatives. The process involved a series of negotiations between the representatives of the Kenya African National Union (KANU) and Kenya African Democratic Union (KADU).¹¹³

However, the rest of the people in Kenya were excluded from the process and their views were never factored. “This was partly contributed to by inadequate resources and lack of knowledge. Therefore, the concept of public participation applied remotely in the Lancaster House deliberations until the time in which the 1963 Constitution gained the force of law.”¹¹⁴ Public participation in this sense was applied indirectly as African people were represented by their representatives.¹¹⁵

However, the main stakeholders represented in these conferences were the British Administration, representatives from KANU and KADU and the settlers.¹¹⁶ However, the representatives of the two (2) political parties that participated in the negotiations did not represent the legitimate concerns of the African’s at the time.¹¹⁷ This was because the British administration had barred Mau Mau fighters and sympathisers from participating in the negotiations.

¹¹¹ National Assembly ‘History of the Parliament of Kenya’ (2017 Factsheet No 24), <http://parliament.go.ke/sites/default/files/2018-04/24_History_of_the_Parliament_of_Kenya.pdf> accessed 19 October 2020.”

¹¹² “Karuti Kanyiga, *op. cit.* (n 3).

¹¹³ Kariuki Gitahi, ‘Lancaster Constitutional negotiation process and its impact on Foreign relations of post-colonial Kenya, 1960-1970’ (Doctoral dissertation, University of Nairobi 2015).

¹¹⁴ *ibid.*

¹¹⁵ Tom Mulisa, ‘Public participation in constitution-making: A critical assessment of the Kenyan experience’ (Doctoral dissertation, University of Pretoria 2009).

¹¹⁶ Robert M Maxon, *Britain and Kenya's Constitutions, 1950-1960, op. cit.* (2011).

¹¹⁷ *ibid.*”

Over this second phase, the public participation on the part of the natives was minimal. Most of the decisions arrived at by the colonial administration were passed arbitrarily without Africans being consulted, and neither were they allowed to share their perspectives. The colonial Government did not put any public participation channels or mechanisms and neither did it engage the natives to air their views on any matter affecting their welfare.¹¹⁸

However, as the Africans became more aggressive and protested the British administration slowly started acknowledging the fact that eventually Kenya would attain independence sooner or later.¹¹⁹

This prompted them to start involving Africans in the legislative process and allowed them to form political associations. These associations later acted as vehicles through which Africans aired their concerns and later elected representatives participating in the governance process eventually.” It is clear that the Colonial Government did very little to promote public participation in their legislative process or even the fiscal policies introduced during this period until late towards independence.¹²⁰

2.3 Public Participation during the Presidency of Jomo Kenyatta, 1963 to 1978

After the attainment of independence in 1963, the executive was the main player in policy-making.¹²¹ The Government controlled policy formulation and implementation of decisions without consulting any members of the public. The 1963 Constitution did establish a sovereign Parliament which reserved the power to make, amend and repeal laws without proper involvement of the people of Kenya, save for representative democracy.¹²²

However, during this period, Kenya did not have a structured legal regime to enhance and facilitate the right to public participation in the law making process in Parliament. The main pre-

¹¹⁸ “Cullen Catriona ‘Kenya is no doubt a special case: British Policy towards Kenya’ *op. cit.* (2015).

¹¹⁹ Kariuki Gitahi, ‘Lancaster Constitutional Negotiation Process and Its Impact on Foreign Relations of Post-Colonial Kenya, 1960-1970’ *op. cit.*

¹²⁰ See HW. Okoth-Ogendo, ‘The politics of constitutional change in Kenya since independence, 1963-69’ (1972) 71 *African Affairs*, 9.

¹²¹ Karuti Kanyinga, ‘Democracy and Political Participation’ (2014) <<https://www.opensocietyfoundations.org/sites/default/files/kenya-democracy-political-participation-20140514.pdf>> accessed 8 February 2019.

¹²² Section 30 Constitution of Kenya, 1963 (repealed).

occupation of Jomo Kenyatta's ruling party, KANU was "power transfer."¹²³ KANU opposed the decentralization of power. Instead, KANU pushed for constitutional "reforms" under Parliament which rubber stamped the whims of the executive.¹²⁴

The citizens had no place or role in legislation making. The Legislature was weakened and had only one role of punishing the opponents through dubious amendments to the Constitution without citizen involvement. Parliament was also widely perceived as lacking independence hence its credibility was questioned since it was used as a political weapon by the including through adverse constitutional amendments.¹²⁵

The 1963 Constitution was mutilated severally under Jomo Kenyatta who wanted to establish an all-powerful presidency. This turned Kenya into a *de jure* one-party state.¹²⁶ Further, the executive controlled Parliament hence violating the the doctrine of separation of powers which is a key pillar of democratic governance.¹²⁷ Through this, public involvement in decision making was diminished.

It is also imperative to note that when Kenyans attained independence there was a renewed sense of hope. The country looked forward to a more inclusive democratic government. A government that took cognizance of the key role its citizenry had to play by publicly participating in the affairs of the nation that affect their lives directly or indirectly."

Mzee Jomo Kenyatta took the helm of leadership at independence following his release from prison and restriction. He became the first Prime Minister in 1963. Then later became the President being deputized by Jaramogi Oginga Odinga. His release was as result of public agitation by the African members of the Legislative assembly led by Jaramogi Oginga Odinga who later became his Vice President. The leaders demanded his release refusing to form the government following the 1961 election which saw KANU win majority seats being invited by

¹²³ John Mukuna, 'Popular participation in legislative law-making under the new democratic dispensation in Kenya' (2014) <https://www.researchgate.net/publication/271104569_Popular_Participation_in_Legislative_Law-Making_under_the_New_Democratic_Dispensation_in_Kenya> accessed 2 June 2020."

¹²⁴ *ibid.*

¹²⁵ *ibid.*

¹²⁶ John Mukuna, 'Popular participation in legislative law-making under the new democratic dispensation in Kenya' (2014) <<http://www.mcser.org/journal/index.php/mjss/article/viewFile/3751/3676>> accessed 7 January 2019.

¹²⁷ *ibid.*

“the Governor to form the government.¹²⁸ The elected members declined the Governors’ offer in protest demanding Kenyatta’s release from custody.

At the background of this debate, the Independence Constitution had adopted multiparty democracy with a parliamentary system of government. The Independence Constitution had laid down structures for representation and citizen participation through their elected leaders.¹²⁹ The Parliament was bicameral with two (2) chambers being the Senate and the House of Representatives. This can be argued as an institutional set up of the Kenyan Parliament to enhance the participation of the people through their representatives.

The Lower House comprised of 129 Members while the Upper House comprised 41 Members each representing one district.¹³⁰ The bicameral parliament consisted of the House of Representatives and the Senator. The 41 Senators represented the then 40 Administrative Districts and Nairobi, while the 129 Members of the House of Representatives consisted of 117 representatives of the then equivalent number of constituencies and 12 ex-officio members.¹³¹

There were regional governments and local governments governing at the regional and local levels which made the independence model of government closer to the people and more inclusive. The operationalization of regional government at independence points to a Government that was seemingly ready to engage its citizenry and involve them in governance. This Government had come to power following the May 1963 elections that had a record 72 percent voter turnout.¹³² There were also local governments that represented people at the local levels.

The European and Asian minorities were well represented in the independence Government. KANU had won the election with a 53.6% popular vote.¹³³ The Government engaged its citizenry, including the white settlers directly on sensitive issues such as land as evidenced by a”

¹²⁸ “Kariuki Gitahi, ‘Lancaster Constitutional negotiation process and its impact on Foreign relations of post-colonial Kenya, 1960-1970’ (Doctoral dissertation, University of Nairobi 2015).

¹²⁹ Gibson Kamau Kuria, ‘Confronting dictatorship in Kenya’ (1991) 2 *Journal of Democracy* 4.

¹³⁰ *ibid.*

¹³¹ National Assembly, ‘History of the Parliament of Kenya’ (2017 Fact Sheet No. 24) <http://www.parliament.go.ke/sites/default/files/2018-04/24_History_of_the_Parliament_of_Kenya.pdf> accessed 14 November 2020.

¹³² Kariuki Gitahi, ‘Lancaster Constitutional negotiation process and its impact on Foreign relations of post-colonial Kenya, 1960-1970’ *op. cit.*

¹³³ Cullen Catriona, ‘Kenya is no doubt a Special Case’: British Policy towards Kenya’ *op. cit.* (2015).”

“consultative meeting attended by Prime Minister Jomo Kenyatta in Nakuru where he met the European farmers and urged the more than 350 settlers “to stay and farm well.” Kenyatta also assured the whites of dealing with “youth wingers” and to address cattle rustling.”¹³⁴

The opposition was as well very vibrant at independence comprising mainly of KADU and African Peoples Party Members (APP) members. The Constitutional amendment negotiations were all inclusive with representation for both the natives through their elected leaders, European minorities and as well the opposition.

The ensuing constitutional amendment debate that followed independence embraced public participation and the views of Africans. Various ministries were required to present proposals in form of papers to help resolve difficult questions that related to different departments. The ministries on their part engaged their stakeholders and the public in coming up with the proposals.¹³⁵

The first constitutional amendment was done in 1964 with the intention of transforming Kenya from a constitutional monarchy with the Queen as the sovereign to a republic.¹³⁶ This amendment was fast tracked by the by the Government to quickly establish the Kenyan republic. In the quest to avoid any delays, the Government prevailed on the opposition to join the government’s side in voting for this bill making it sail through Parliament easily.¹³⁷

However, the move by the Kenya African Democratic Union (KADU), the then opposition to vote with the Government set Kenya on the wrong direction as far as democracy and public participation was concerned.¹³⁸ KADU was dissolved and merged with KANU. In the period that immediately followed this amendment, Kenya was presumably a one-party state and Parliament operated and functioned in manner that promoted tyranny.”

In the amendments that followed the Government slowly adopted a dictatorial attitude and embarked on a mission to mutilate the independence constitution to suit the interests of those in

¹³⁴ “Peter Veit, ‘History of land conflicts in Kenya’ (2019) 3, *Gates Open Res*, 982.

¹³⁵ Kariuki Gitahi, ‘Lancaster Constitutional negotiation process and its impact on Foreign relations of post-colonial Kenya, 1960-1970’ *op. cit.*

¹³⁶ *ibid.*

¹³⁷ Constitution of Kenya (Amendment) No. 28 Of 1964.

¹³⁸ Gibson Kamau Kuria, ‘Confronting dictatorship in Kenya’ *op. cit.* (1991).”

power.¹³⁹ This is what can be partly attributed to the more than 10 constitutional amendments that were hurriedly undertaken between 1964 and 1969. Most of these amendments were meant to concentrate power on the presidency and silence dissenting voices.

For instance, through an amendment the regions became provinces while regional assemblies became provincial councils under the central government.¹⁴⁰ This took the governance system further away from the people limiting the scope of public participation. Most of these amendments were responsible for the erosion of democratic space in Kenya and ushered the country to a period that the citizenry suffer in the hands of an authoritarian regime that paid no regard to public participation.

2.4 Public Participation during the Presidency of Daniel Torotich Arap Moi, 1978 to 2002

President Daniel Moi came to the presidency following Jomo Kenyatta's death on August 22, 1978. President Daniel Arap Moi succeeded Jomo Kenyatta and vowed to follow the old man's footsteps ushering in a brutal regime that was very intolerant to dissent. The philosophy came to be famously known as "Nyayo" a Swahili word connoting footsteps.¹⁴¹

Moi ushered in another period of governance that lasted for more than two decades where dissenting voices were silenced, with opposition leaders, activists and journalists who criticized his leadership being detained without trial and others assassinated.

According to Prof Yash Pal Ghai,¹⁴² Daniel arap Moi largely adopted Jomo Kenyatta's style of administration. Jomo and Moi did not uphold the rule of law under the Independence Constitution.. They used political power and state institutions as instruments of violence.¹⁴³

The Executive had influence over Parliament. As political agents, parliamentarians had the power and the resources at their disposals to make them achieve their self-seeking and rational. The laws were made to push the agenda of the government and not to advocate for the political rights of the citizens, including public participation in legislative processes. Furthermore, the

¹³⁹ "Robert H. Jackson and Carl G. Rosberg, 'Personal rule: Theory and practice in Africa' (1984) 16 *Comparative Politics*.

¹⁴⁰ Constitution of Kenya (Amendment) Act No. 14 of 1965.

¹⁴¹ Adar Korwa and Isaac Munyae, 'Human rights abuse in Kenya under Daniel Arap Moi, 1978' (2001) 1 *African Studies Quarterly* 5.

¹⁴² Yash Pal Ghai, 'A short history of Constitutions and what politicians do to them' (2020) *The Elephant*, <<https://www.theelephant.info/features/2020/03/30/a-short-history-of-constitutions-and-what-politicians-do-to-them/> (accessed 2/6/2020).> accessed 29 July 2021.

¹⁴³ *ibid.*"

freedom of speech and press was curtailed and controlled by the state.¹⁴⁴ Public opinions were limited to what the state deemed to be appropriate.

President Moi managed to make Kenya a one-man controlled state. This authoritarianism made it possible for parliament to amend the laws to favour the Executive's agenda. Furthermore, the Judiciary had lost its independence through amendment of Section 61(1) of the Repealed Constitution 1963.¹⁴⁵ As such, the Government generally faced very limited public criticisms.¹⁴⁶

Due to the lack of rule of law, one cannot possibly imagine of the existence of the right to public participation. The rule of law is the ultimate way that people can control the Government's exercise of public power.¹⁴⁷

Furthermore, it ensures political morality by striking a balance between human rights and the power accorded to the political regime.¹⁴⁸ Hence, in the absence of the rule of law, social and economic avenues are always crippled. In the same regard, the right to public participation was not expressly articulated in the repealed Kenyan Constitution. According to Karuti Kanyinga,¹⁴⁹ public participation was a façade in decision-making processes at any level.¹⁵⁰ Neither were there strong analytical discussions on what to do about the economy.¹⁵¹

Lack of public participation in decision-making resulted into poor economic growth. It is also safe to conclude that during Moi's tenure there was no structured legal framework on the right to public participation. Relatedly, this was despite the threshold of amending the constitution being

¹⁴⁴ "Susanne D. Mueller, 'The Political Economy of Kenya's Crisis' (2008) *Journal of Eastern African Studies* <https://www.tandfonline.com/doi/pdf/10.1080/17531050802058302?casa_token=pS9VOHMnn9sAAAAA:Ae1JFc_zW_t1mrLurnfQLu3p6ncAdLrw8W91xDuf7Em6PA45p9M7RLBCgi7LBe6Uj1Iia6PNHsNuDSkqhpI> accessed 19 October 2020.

¹⁴⁵ Munyae Adar, 'Human Rights abuse in Kenya under Daniel Arap Moi, 1978-2001' (2001) 5 *African Studies Quarterly*.

¹⁴⁶ *ibid.*

¹⁴⁷ Elizabeth Giussani, *Constitutional and Administrative Law* (1st edition, Thompson Sweet 7 Maxwell) 60.

¹⁴⁸ Alex Caroll, *Constitutional and Administrative Law*; published by Longman, 6th edition 2011, 46.

¹⁴⁹ Karuti Kanyinga (2020) "Messy Politics- The Legacy of Moi's Rule," *Daily Nation*, March 18, 2020, at <https://nation.africa/kenya/blogs-opinion/opinion/messy-politics-the-legacy-of-moi-s-rule-256406> (accessed September 16, 2021).

¹⁵⁰ Karuti Kanyinga, 'Why the economy performed dismally under Moi,' *Daily Nation* (Nairobi, 18/3/2020) <<https://www.nation.co.ke/news/Why-the-economy-performed-dismally-under-Moi/1056-5457258-fyv8v1z/index.html>> accessed 31 May 5 2020.

¹⁵¹ *ibid.*"

lowered to an easily manageable 65% in the now one-party parliament.¹⁵² This empowered Parliament to amend the constitution easily with neither civic engagement nor the participation by members of the public.

The Chief Justice (CJ) and judges could also be appointed by President Moi without any consultation of the Judicial Service Commission (JSC).¹⁵³ When the opposition sought to be recognized an amendment made defectors lose their seats requiring them to seek new mandate from the voters.¹⁵⁴

Some constitutional amendments that eroded the democratic space and shut constructive civic engagements included, the amendment of the bill of rights which led to arbitrary detentions in the guise of preserving public security.”¹⁵⁵ The amendment was effected without the involvement of citizens who were the consumers of the legislation.

An Act was then passed detailing the process of detention without trial.¹⁵⁶ The President had the power to detain anyone whom they ‘thought’ was a threat to public security. However, President Kenyatta I and President Moi used this law to detain and persecute political Dissidents.¹⁵⁷ These amendments gave birth to repressive laws that barred the citizens from participating in their Governments.” The period that followed these amendments was characterized by intolerance, disagreements, political assassinations and detentions without trial.¹⁵⁸

President Moi inherited an already divided republic that was undergoing chaos. The civil society organisations (CSOs), churches, activists, students and politicians were now agitating for the restoration of the democratic reforms and through political reforms.¹⁵⁹

This agitation infiltrated the armed forces resulting in an attempted *coup de tat* by the Kenya Airforce who attempted to overthrow Moi’s Government.¹⁶⁰ Following the failed coup Moi took drastic Measures to consolidate and personalize power and assert Himself as the president.

¹⁵² “Robert H. Jackson and Carl G. Rosberg, ‘Personal rule: Theory and practice in Africa’ (2018) Routledge *Africa*, 17-43.

¹⁵³ *ibid.*

¹⁵⁴ Constitution of Kenya (Amendment) (No. 2) Act No. 17 of 1966.

¹⁵⁵ Constitution of Kenya (Amendment) (No. 3) Act No. 18 of 1966.

¹⁵⁶ Preservation of Public Security Act, Cap 57.

¹⁵⁷ Korwa G. Adar and Isaac Munyae, ‘Human rights abuse in Kenya under Daniel Arap Moi, 1978’ *op. cit.*

¹⁵⁸ Kevin Conboy, ‘Detention without trial in Kenya’ (1978) 8 *Ga. J. Int'l & Comp. L.*, 441.

¹⁵⁹ Korwa G. Adar, ‘The internal and external contexts of human rights practice in Kenya: Daniel Arap Moi’s Operational Code’ (2000) 4 *African Sociological Review.*”

One of the worst moves by Moi was the the introduction of section 2A which was done through enactment of Constitution of Kenya Amendment Act Number 7 of 1982 that stated thus:

“There shall be in Kenya only one political party, the Kenya African National Union.”

The re-introduction of multi-party politics in the early 1990s gave citizens a central role through enhanced participation in governance. The main challenge was Government bureaucracy.¹⁶¹ However, due to public agitation through protest Moi bowed to pressure in 1991 and repealed Section 2A allowing the formation of many political parties. However, the environment remained repressive and toxic to public participation.

The elections that followed after multiparty politics restored in Kenya were highly rigged and the courts were not independent of political influence.¹⁶² Therefore, where elections were contested in court, the courts ended up giving decisions that favoured the regime of the time. The regime did not realize any Constitutional reforms over the time it was in power. In Kenya and other African countries, the participation of citizens was mainly centered around community development projects.¹⁶³

To further recognize such participation, the Physical Planning Act was enacted in 1996.¹⁶⁴ This statute sought to encourage the participation of local communities formulation and implementation of physical and development plans.¹⁶⁵

However, the main challenge was the lack of adequate citizen sensitization of their place and roles in physical planning.¹⁶⁶ Also, some argued that physical planning was a preserve of major towns and hence exclusionary of the local communities who reside in the remote areas and were not involved in planning and development.¹⁶⁷

¹⁶⁰ *ibid.*

¹⁶¹ “Korwa G. Adar and Isaac Munyae, ‘Human rights abuse in Kenya under Daniel Arap Moi, 1978’ *op. cit.*

¹⁶² *ibid.*

¹⁶³ Annette Omolo, ‘Policy proposal on citizen participation in devolved governance in Kenya’ (2011) <file:///C:/Users/jgitiri/Desktop/MARWA/Thesis/Policy_Recommendations_on_Citizen_ParticipationTISA_201df> accessed 8 February 2019.

¹⁶⁴ *ibid.*

¹⁶⁵ Cleophas Ndiege Kaseya & Ephantus Kihonge, ‘Factors affecting the effectiveness of Public Participation in County Governance in Kenya: A case of Nairobi County’ (2016) 6 *International Journal of Scientific and Research Publications.*”

¹⁶⁶ *ibid.*

¹⁶⁷ *ibid.*

2.5 Public Participation during the Presidency of Mwai Kibaki, 2002 to 2013

Professor Yash Pal Ghai describes the 2003-2013 period as the end of Cold War.¹⁶⁸ During this period, Kenya experienced some changes in particular respect for human rights. During this period, public involvement in decision-making took center stage. This was a great improvement in as far as the administration of the public's right to public participation in the legislative process is concerned.

Kenya's constitutional reforms journey had to wait till 2002 when Moi's Era came to an end and Mwai Kibaki took power. Under Kibaki's regime, Kenya became a haven of democracy with the public making contributions to the budget-making process.

This was followed by the formation of a constitutional commission that collected views of the citizens and had a series of consultations arriving at what was called the Bomas Constitution Draft of 2004. The ensuing referendum had two (2) sides the proposing side having symbol of a Banana and the opposing side an Orange.¹⁶⁹

For the first time, the Government ignored its traditional disregard of the people and the supremacy of the Executive and Parliament. The political regime was composed of a mixture of different political parties, some of which were formed to advocate for constitutional review through amendment.¹⁷⁰

Thus, citizens were given power to exercise their civil rights and liberties by participating in the campaign process and eventually voting to usher in a new constitutional dispensation decide.” This was the first attempt at that a new Constitution ended through a referendum, which took place on November 21, 2005.¹⁷¹

The citizens overwhelmingly voted against the referendum and this saw the orange side triumph over the Banana side. The country went back to the drawing board and this meant that Kenyans had to wait longer for a new Constitution.¹⁷² The intense clamour, political campaigns and voter

¹⁶⁸ *ibid.*

¹⁶⁹ Mwangi Danny Irungu, 'Constitutionalism in Kenya, 2010,' in Morris Odhiambo (eds), *The Annual State of Constitutionalism in East Africa* (Fountain Publishers, Kampala 2012).

¹⁷⁰ No. 22.

¹⁷¹ “Yash Ghai, *Constitutions and Constitutionalism: The Fate of the 2010 Constitution*, (2014); Cf. Jill Ghai & Yash Ghai, 'The contribution of the South African Constitution to Kenya's Constitution' Cambridge University Press (2018).

¹⁷² *ibid.*

turnout that characterized the 2004 constitutional referendum pointed towards an active citizenry and the fact that Kenyans were embracing public participation.

The Constitution of Kenya Review Commission (CKRC) Act, 1998 encouraged public participation and citizen engagement in the constitution making process. It also had provisions for civic education and public consultation. Generally, it was also felt that the Committee of Eminent Persons conducted wide consultations across many regions in Kenya. They also conducted open public hearings.

However, the question as to whether the public's input were implemented is debatable. This is because President Kibaki's Government operated on the traditional constitution.¹⁷³ The supreme law of the land had no express provisions on public participation in the legislative process. Therefore, the implementation of the public opinion was based on the political will.

In the period before the promulgation of the 2010 Constitution, the Committee of Experts (CoE) conducted civic education within 30 days across various constituencies in Kenya. The next referendum was conducted in 2010 ushering a new constitutional dispensation which ushered in a more liberal approach towards public participation.

The Kibaki regime set Kenya on a new path as far as public participation was concerned by ushering in a new constitutional dispensation which saw the citizens enjoying involvement in matters of governance in a whole new level.

2.6 Public Participation under the Constitution of Kenya, 2010

The Constitution 2010 presents the most recent and the most progressive phase of public participation in Kenya. After embarking on a long journey of constitutional reforms, the people gave to themselves a new Constitution.¹⁷⁴ The Constitution, 2010 entrenches two (2) supremacies. The first supremacy is to the people of Kenya. Second, supremacy is to the Constitution as a *Grund norm*.¹⁷⁵

¹⁷³ Ben Sihanya, 'The Presidency and Public Authority in Kenya's new Constitutional Order' (2011) SID Constitution Working Paper No. 2 <<http://sidint.net/docs/WP2.pdf>> accessed 20 October 2020."

¹⁷⁴ Ben Sihanya, 'Electoral Justice in Kenya under the 2010 Constitution: Implementation, enforcement, reversals and reforms' *op. cit.*

¹⁷⁵ Constitution of Kenya, 2010; Article 1

Therefore, the Constitution's supremacy exists not by the power of the government but by the will of the people. Hence, any legislation by Parliament or the County Assemblies must adhere to the supremacy of the Constitution, which expressly forbids legislation without involvement of the people.

Furthermore, courts have confirmed the position of the Constitutions that Parliament's powers are vested on the people and Parliament must involve the people through public participation. Thus, in *Kenya Union of Domestic, Hotels, Educational Institutions Hospitals and Allied Workers (KUDHEHIA) v. Salaries and Remuneration Commission*¹⁷⁶ the court held that:

“public participation as a national value is recognized under Article 10 of the Constitution. The Constitution at Article 94 has vested legislative authority of the people of Kenya in Parliament and Article 118 has provided for public participation and involvement in the legislative business.”¹⁷⁷

This is one of the many decided cases that confirm on the constitutional mandate of the Parliament inclusive of Parliament and County Assemblies to promote the participation of citizens.

According to Professor Ben Sihanya, the Constitution of Kenya 2010 is transformative. However, there is need for its full implementation to realize its transformative nature including democratic governance and political and socio-economic equity.¹⁷⁸ This was the beginning of hope that had been lost for many decades. A hope that Kenyan people would finally govern themselves through public participation in the legislative process.

To borrow a leaf from South African courts' practice of public participation, the Constitutional Court of South Africa observed in its ruling in *Land Access Movement of South Africa Association for Rural Development and Others v. Chairperson of the National Council of Provinces and Others*¹⁷⁹ that:

“The standard to be applied in determining whether Parliament has met its obligation of facilitating public participation is one of reasonableness. The reasonableness of Parliament's conduct depends on the peculiar circumstances and facts at issue. When determining the question whether Parliament's conduct was reasonable, some deference should be paid to what Parliament considered appropriate in the circumstances, as the power to determine how participation in the

¹⁷⁶ Petition No. 294 of 2013.

¹⁷⁷ *ibid.*

¹⁷⁸ *ibid.*

¹⁷⁹ *Land Access Movement of South Africa Association for Rural Development and Others v. Chairperson of the National Council of Provinces and Others* [20016] ZAACC22.

legislative process will be facilitated rests upon Parliament. The Court must have regard to issues like time constraints and potential expense. It must also be alive to the importance of the legislation in question, and its impact on the public.”¹⁸⁰

Kenya has also set principles for public participation under some of its statutes including the County Governments Act, 2012 and the Statutory Instruments Act. However, as will be seen in the next chapters, the provisions are insufficient and does not address the issues of public participation effectively. Despite their inefficiencies, the Constitution as the *grund norm* mandates the legislature to conduct public participation.

Through the 2010 Constitution, Kenyans gave themselves power to determine how they are governed. Thus, they promulgated an instrument that gave all legislative powers to the people through public participation that is, either directly or indirectly. To entrench public participation further, they ensured that every institution and state officers act within the Constitution and under the guiding principles which include public participation.¹⁸¹

To protect the aspirations of Kenyans to participate in their Government both directly and indirectly, the 2010 Constitution adopted a devolved system of Government. Devolution was aimed at bringing the government closer to the people.

The objects of devolution under the Constitution include citizen-centered governance and their active participation in decision-making.¹⁸² Devolution gives power to the communities to manage their own affairs and further their development.¹⁸³

The Constitution in Part 2(14) of the Fourth Schedule reiterates the role of the county governments to foster development to the local communities stating that functions and powers of the county are to coordinate and ensure the participation of communities in governance. Counties are also mandated to assist communities to develop the administrative capacity to enhance their exercise of power and participation in governance at the local level.

Despite this, there is still more to be done in terms of enhancing the capacity of Own-Source Revenue (OSR) to reduce the dependency on the National Government, which has generally, delayed county government funding, especially in 2014, 2019, 2020 and 2021. These have had

¹⁸⁰ *ibid.*

¹⁸¹ Constitution of Kenya, 2010; Article 10.

¹⁸² Constitution of Kenya 2010, Article 174(4).

¹⁸³ *ibid.*, (d).

detrimental effects on service delivery, stagnation of development projects and the provision of basic necessities including education and healthcare.”¹⁸⁴

The Constitution in a bid to devolve governance, established forty-seven counties governed by county governments bringing the government close to the people which is key for effective civic engagement. The Constitution went further to safeguard the interest of Kenyans in the urban areas to participate in the governance, management and running of the urban centres and the cities.¹⁸⁵

The 2010 Constitution clearly points out the key aspects of governance that call for citizen participation and explains how exactly the general public should be involved. The three (3) key areas that call for citizen participation include the legislative process, formulation of fiscal policies and in budgeting processes.

Thus, Article 258 gives the public the right to approach any court in the event of actual or prospective contravention of the Constitution. The citizens can as well approach any court in respect to any matter touching on human rights or touching on a class of citizens. To actuate this right, the Constitution did away with the concept of *locus standi* in respect to this specific” instance so as to allow everybody to approach the court on the said matters on their behalf or behalf of others.

Courts have also made several decisions on the question of *locus standi*. In *Michael Osundwa Sakwa v. Chief Justice and President of the Supreme Court of Kenya & Another* (2016), it was argued that:

“Our legal system is intended to give effective remedies and reliefs whenever the Constitution of Kenya is threatened with violation. If an authority which is expected to move to protect the Constitution drags its feet, any person acting in good faith may approach the court to seek judicial intervention to ensure that the sanctity of the Constitution of Kenya is protected and not violated. As part of reasonable, fair and just procedure to uphold the Constitutional guarantees, the right to access to justice entails a liberal approach to the question of *locus standi*.”¹⁸⁶

¹⁸⁴ “Kamotho Waiganjo, ‘Delayed funds to counties, a crude way to kill devolution’ *Standard* (Nairobi, 2 July 2021) <https://www.standardmedia.co.ke/opinion/article/2001417243/delayed-funds-to-counties-a-crude-way-to-kill-devolution> accessed 13 September 2021.

¹⁸⁵ Article 181(1): National legislation shall provide for the governance and management of urban areas and cities and shall, in particular— (c) provide for participation by residents in the governance of urban areas and cities.”

¹⁸⁶ “*Michael Osundwa Sakwa v. Chief Justice and President of the Supreme Court of Kenya & Another* [2016] eKLR.

Citizens can as well exercise their power through protest under article 37 of the Constitution that safeguards their right peaceful assembly, demonstration, picketing and presentation of public petitions.¹⁸⁷ “This gives the citizens the power to directly express their sovereign power as enshrined in the constitution. Participatory democracy is now felt in most cases of decision making though not absolute.”¹⁸⁸

2.6.1 Public Participation under the 2010 Constitution

Under the Constitution 2010 the legislative role has been devolved. Parliament and the county assemblies of the 47 counties exercises legislative power. The Constitution grants citizens the public the responsibility to elect and even the power to recall the elected representatives for non-performance.¹⁸⁹

Thus, in *Kenya Human Rights Commission v. Attorney General & Another*¹⁹⁰ Justice Mwita observed that:

“...in the absence of any demonstration by the Respondent as to how it complied with the Constitutional requirement of Public Participation, this court ought to find that there was a violation of an important constitutional step in the form of public participation and that the Amendments fails this constitutional compliance step.”¹⁹¹

This is one of the instances that the courts have reiterated the constitutional importance of citizen involvement in legislative processes.

The 2010 Constitution increased representation in Parliament by reverting to the independence constitution system of a bicameral legislature. The legislature comprises the Senate and the National Assembly as well introduced County Assemblies thus bringing the government close to the people.¹⁹² Courts have also appreciated the fact that County Assemblies also enjoy the benefits of separation of powers as the counties’ legislative arms.¹⁹³

¹⁸⁷ Constitution of Kenya 2010; Article 37.

¹⁸⁸ Jacqueline N. Kivuva, ‘Challenges to Participatory Democracy: The Politics of the new devolved Democratic system in Kenya’ (Doctoral dissertation, United States International University-Africa 2014)).

¹⁸⁹ Article 104 Constitution of Kenya 2010.

¹⁹⁰ *Kenya Human Rights Commission v. Attorney General & Another* [2018] eKLR

¹⁹¹ *ibid.*”

¹⁹² “Jeffrey Steeves, ‘Devolution in Kenya: Derailed or on Track?’ (2015) 53 *Commonwealth & Comparative Politics*.

¹⁹³ *Simon Wachira Kagiri v. County Assembly of Nyeri & 2 Others* [2013] eKLR.

The current legislature as well draws representatives from the minority groups with forty seven elected women representatives and a number of nominated members to represent the youth and the people with disabilities.

The Constitution mandates Parliament¹⁹⁴ and the county assemblies¹⁹⁵ to conduct their business in an open manner and to facilitate public participation and involvement in the legislative and other business of the parliament and its committees.¹⁹⁶

Therefore, under the current constitutional dispensation, every Kenyan has the right to access the National and the County assemblies and be physically present during the legislative proceedings.

However, in order for this to be fully realized, civic education and the channels of communication must be beefed up so that each and every citizen from any part of Kenya is involved, either through direct or indirect contribution.

The Constitution as well safeguards the right to participate by petitioning Parliament on any matter under its power or mandate.¹⁹⁷ The right to petition is exercisable against county governments vide Section 88 of the County Governments Act, 2012, grants Kenyans the power to exercise the same right in respect to any responsibility vested with the county government.¹⁹⁸ The County Government, its authorities and agents are required under the Act to address any petitions by the public expeditiously.¹⁹⁹

The National Assembly and County Assembly should carry out its business and that of its committees under the watchful eyes of the Kenyan public and everything done has to be open to the public scrutiny. Parliament and the County Assemblies must involve the public and media in their proceedings unless where there are justifiable reasons for any exclusion.²⁰⁰

¹⁹⁴ Constitution of Kenya 2010, Article 118 (1).

¹⁹⁵ Constitution of Kenya 2010, Article 196(1)(a) & (b).

¹⁹⁶ Art. 118(1) Constitution of Kenya 2010: Parliament shall— (a) conduct its business in an open manner, and its sittings and those of its committees shall be open to the public; and (b) facilitate public participation and involvement in the legislative and other business of Parliament and its committees.

¹⁹⁷ Every person has a right to petition Parliament to consider any matter within its authority, including enacting, amending, or repealing any legislation.”

¹⁹⁸ “Section 88 County governments Act 2012: Citizens have a right to petition the county government on any matter under the responsibility of the county government.

¹⁹⁹ County Governments Act 2012 s 89.

²⁰⁰ Art 119(2) Constitution of Kenya 2010.

Thus, the Supreme Court in *Speaker of National Assembly v. Attorney General and 3 Others*²⁰¹ stated that:

“Parliament must operate under the Constitution which is the supreme law of the land. The English tradition of Parliamentary supremacy does not commend itself to nascent democracies such as ours. Where the Constitution decrees a specific procedure to be followed in the enactment of legislation, both Houses of Parliament are bound to follow that procedure. If Parliament violates the procedural requirements of the supreme law of the land, it is for the courts of law, not least the Supreme Court, to assert the authority and supremacy of the Constitution. It would be different if the procedure in question were not constitutionally mandated.”²⁰²

The ruling by the apex court emphasizes the essence of legislative arms involving the people in the legislative process.

The legislative power is not a privilege reserved for the members of the legislative assembly but is as well at the disposal of the people. Every Kenyan therefore can petition Parliament on any matter including the enactment, amendment, or repealing of any legislation.²⁰³ Legislative processes under the new constitutional dispensation thus embraces civic engagement and guards the citizen’s right to be involved.”

2.7 Summary of Key Findings and Conclusion

This chapter addressed three (3) objectives. First, it discussed the history of the right to public participation in the legislative process in Kenya. Second, it provided an analysis of the native Kenyan’s mode of public participation through the village elders and chiefs where appropriate. Third, it analyzed the British introduction of common law in Kenya and the lack of public participation, particularly from native Kenyans.

There are at least four (4) findings from the discussions above. First, this chapter has established the gradual changes in the legislation process right from the first time an African was elected to the Legislative Council to the time Kenya attained independence. Relatedly, the chapter traces these changes until the period during and after, the promulgation of the Constitution, 2010.

Second, it can be implied that the Constitution of Kenya, 2010 was voted in by more than 60% of Kenyans due to the promises and solutions it carried for the historical evils Kenya faced since

²⁰¹ *Speaker of National Assembly v. Attorney General and 3 Others* [2013] eKLR.

²⁰² *ibid.*

²⁰³ *ibid* (n 92).”

1963, and any future constitutional aspirations or commitments.²⁰⁴ Kenya has undertaken a long journey towards a democratic culture.

Third, the political culture of Kenya largely determines the nature of commitment to public participation. This chapter found that indeed, the journey towards an all-inclusive Government that embraces public participation in Kenya, has been undertaken through the four (4) regimes of Presidents Kenyatta I, Daniel Moi, Mwai Kibaki and Uhuru Kenyatta. There were visible contrasts in the practice from one regime to the other

Fourth, the study concludes that one of the ways to ensure effective realization of the right to public participation in the legislative process is through a critical analysis of the legal frameworks on public participation. Therefore, Chapter 3 will consider the legal frameworks governing public participation in the legislative process in Kenya.

²⁰⁴ Ben Sihanya, 'Electoral Justice in Kenya under the 2010 Constitution: Implementation, enforcement, reversals and reforms' *op. cit.*

CHAPTER 3

LEGAL FRAMEWORK ON PUBLIC PARTICIPATION IN THE LEGISLATIVE PROCESS IN KENYA

3.1 Introduction

Chapter 2 of this thesis assessed the historical context of public participation in Kenya. This Chapter 3 reviews the content and examine the existing legal framework on public participation in the legislative process. It analyses the current laws on public participation and their adequacy in the realizing effective public participation in Kenya.

As discussed in Chapter 1, Karuti Kanyinga²⁰⁵ acknowledges the provisions of the Constitution of Kenya, 2010 on the right to public participation. Kanyinga states that the Constitution 2010 opened the National Assembly and legislative business to the people.

Kanyinga adopts a broader perspective in analyzing the place of public participation in the legislative process. This covers the questions as to how many times should elected or nominated members representatives meet with the electorate to enhance their citizen participation in the Kenyan constitutional democracy?²⁰⁶

Relatedly, Professor Migai Aketch,²⁰⁷ in his article on “Building a democratic legislature in Kenya” acknowledges that institutional frameworks including Parliament have formulated and enacted Standing Orders and legislation as a guide to the sittings and deliberations of Parliament, which prioritize citizen participation to ensure legitimacy in legislative processes.

These are institutional domestication of public participation by institutional frameworks under the Constitution 2010. Therefore, it is on this background and the gains that the Constitution of Kenya, 2010 has made, that this thesis is premised. Citizen involvement in legislation making is indeed, a fundamental pillar of democracy in Kenya and other African states.²⁰⁸ Functioning

²⁰⁵ “Karuti Kanyinga, ‘Kenya Democracy and Political Participation’ (2014) A review by AfriMAP Open Society Initiative for Eastern Africa and Institute for Development studies (IDS), <https://www.opensocietyfoundations.org/sites/default/files/kenya-democracy-political-participation-20140514.pdf> accessed 17 September 2021.

²⁰⁶ Jane Muthoni Marine, ‘Seizing on a mirage? An analysis of public participation in Kenya in the constitutional transition period 2010-2016’ (2018).

²⁰⁷ Associate professor, School of Law, University of Nairobi.”

²⁰⁸ “Ben Sihanya, ‘Participation and representation in Kenya and Africa: Electoral system, parties, CSOs, Business Organisations’ in Ben Sihanya (forthcoming 2021) *Constitutional Democracy and Administrative Law in Kenya and Africa* (Chapter 5, Sihanya Mentoring & Innovative Lawyering, Nairobi & Siaya).

democracy with a working legislature must promote public participation in its business. This can only be achieved if there is a clear legal framework on how the right for the public involvement in decision-making is to be accomplished.²⁰⁹

Legislation governing the right to public participation in Parliament in Kenya have undergone numerous transformations. To this regard, this chapter exhaustively discusses the metamorphosis of the public participation laws in Kenya right from pre-independence to the 2010 Constitution regime. Furthermore, it analyses the effectiveness of the laws and the mechanisms put in place concerning public participation in the legislative process in Kenya.”

3.2 Public Participation in Legislation Process under the 2010 Constitution

Direct participation in the policy-making, law-making and implementation of development programmes is an essential part of modern democracy.²¹⁰ The Constitution 2010 recognizes its superiority and the authority to implement it, vested on citizen sovereignty.²¹¹ Furthermore, Kenyans can exercise sovereign power themselves or through elected representatives.²¹²

The *Grund norm* is clear on the people exercising their sovereignty directly, not as optional, but rather as a mandatory requirement. Thus, one of the mandatory requirements in the exercise of people’s sovereignty is public participation in the legislative process.²¹³

Courts have decided cases in favour of the people where Parliament and County Assemblies have enacted laws without public participation.²¹⁴ These are substantively discussed under section 3.9 below. As a result of the merging jurisprudence on public participation, Kenya has come up with various statutes to aid in the realization of this right.

There are numerous statutory instruments governing the right to public participation in the law making process. Public Finance Management Act is one of the Acts that requires participation in

²⁰⁹ *Ibid.*

²¹⁰ ‘Report on the status of Public Participation in National and County Government’ <[file:///C:/Users/jgitiri/Downloads/Final%20Public%20Participation%20Report%20%20\(3\).pdf](file:///C:/Users/jgitiri/Downloads/Final%20Public%20Participation%20Report%20%20(3).pdf)> accessed 31/5/2020.

²¹¹ Constitution of Kenya, 2010; Article 1 on the sovereignty of the people.

²¹² *ibid.*

²¹³ Mercy K. Kaburu & Korwa G. Adar, ‘Kenya Citizens’ Sovereignty, Popular Participation, and the EAC Integration and Democratization’ (2020) 5 *Popular Participation in the Integration of the East African Community: Eastafricanness and Eastafricanization.*

²¹⁴ *Kiambu County Government & 3 Others v. Robert N. Gakuru & Others* [2017] eKLR.”

the legislation of any financial bill or any other Bill that involves revenue collection, allocation or sharing whether in the national government or devolved units.²¹⁵

Other legislation that emphasize on the need for public participation in the legislative process include The County Finance Act and the County Governments Act, 2012. The need for emphasis that the public must be involved in the law-making process carries a significant implication and must not be overlooked. “Many judicial authorities have declared on many occasions certain Acts of Parliament null and void due to lack of public participation. The content of these legislation pertaining to public participation in the legislative process have been discussed exhaustively below.”

3.2.1 Public Participation in Legislative Process under the 2010 Constitution

Professor Ben Sihanya, in his paper on “The Presidency and Public Authority in Kenya’s new Constitutional Order,” notes that citizens were largely excluded from lawmaking and their participation was minimal.²¹⁶

Furthermore, bodies including the Kenya Law Reform Commission (KLRC), collected public memoranda while drafting bills. Also, various task forces also engaged the public on various proposed laws. This was recognized under section 4(2)(i) of the Kenya Law Reform Commission (KLRC) Bill, 2006 which provided that:

“...encourage and promote public participation in the process of lawmaking and educate and sensitize the public on law-making through seminars...”

The 2010 Constitution thus promotes participatory legislative processes with regards to all the Acts of Parliament, regulations and policies. Thus, all the necessary organs, bodies and individuals are all invited to have a say on the proposed laws to be made or amended. Such organs and bodies include the Legislative arm of the government, that is, the Senate and the National Assembly, County Assemblies, Kenya Law Reports Commission (KLRC), the Office of the Attorney General (A-G), ministerial office, Constitutional and Statutory Commissions.²¹⁷

²¹⁵ See the Public Finance Management Act No. 18 of 2012; Section 10.

²¹⁶ Ben Sihanya, ‘The presidency and public authority in Kenya’s new Constitutional Order’ (2011) *Society for International Development (SID)* <<http://sidint.net/docs/WP2.pdf>> accessed 31 May 2020; Chapter 3 in Ben Sihanya, *CODRALKA 2*, *op. cit.*

²¹⁷ *ibid.* Also Chapter 15 of the Constitution of Kenya, 2010.

However, not all these bodies can be invited to take part in all legislative processes. Instead, they are invited when the area of law to be enacted falls within their docket. For instance, the Senate is always indulged on any law that touches on devolution.²¹⁸ The County Assemblies participate in legislation that involve intergovernmental relationships.

The Constitution of Kenya emphasizes on the inclusion of citizens during the legislative process in particular on a legislation that has a significant implication on the public. The involvement of the public has been made a factor that cannot be overlooked.

Emphasis is capture at Article 1(1) and (2) of the Constitution which provide that:

“All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution. The people shall exercise their sovereign power either directly or through their democratically elected representatives.”

From this, the power to legislate also belongs to the people of Kenya. As such, there is a constitutional obligation to involve them in the process of either decision making or law making process. The implementation and practice is however, still limited.²¹⁹

The idea of public participation in law making processes is also anchored on Article 10 of the Constitution as a form of good governance.²²⁰ It also connotes that state organs including Parliament are bound by Article 10(2) as read with Article 2 of the Constitution.

Therefore, Parliament has no choice but to abide by the provisions of the highest law of the land. Furthermore, the National Assembly must also respect, uphold and defend the Constitution under Article 3. In *Kenya Human Rights Commission v. Attorney General & Another*,²²¹ the petitioner filed this petition against the *Attorney-General*, and enjoined the *Law Society of Kenya (LSK)* as an Interested Party. The case challenged the constitutionality of the *Contempt of Court Act*, No. 46 of 2016.

²¹⁸ Constitution of Kenya, 2010; Article 96.

²¹⁹ Mine Pabari, Yemeserach Tessema, Amina Abdalla, Judie Wakhungu, Ahmed A. Odhwa, & Ali Kaka, ‘Parliament and public participation in Kenya: The case of the Wildlife Conservation and Management Act 2013’ (2020) 10 *Using Evidence in Policy and Practice*, 169.

²²⁰ Constitution of Kenya 2010, Article 10.”

²²¹ “*Kenya Human Rights Commission v. Attorney General & Another* [2018] eKLR.

It was the petitioner's case that the impugned Act was enacted without public participation contrary to Articles 10 and 118 of the Constitution 2010.²²² The Petitioner also sought a declaration that the entire Contempt of Court Act, No. 46 of 2016 was invalid for lack of public participation prescribed by the Constitution and written law.

Counsel for the Respondent submitted that the court has to look at the entire process and Parliamentary Standing Orders. Further, counsel for the Respondent relied on the case of *Law Society of Kenya v. Attorney General*,²²³ and argued that the impugned Act was published on 22nd July 2016 and relied on the case of *Melakony Semakot firm & Another v. President of Republic of South Africa & Others*,²²⁴ on public participation. Learned counsel concluded that the whole Act is constitutional and urged the court to dismiss the petition.

The Court expressed the view that public participation is one of the national values and principles in the Kenyan constitution under Article 10(1) of the Constitution, which must be observed by all persons; state organs and public officers in the exercise of their responsibilities. The enactment of the impugned Act was a legislative process, and for that reason the National Assembly was bound by the national value and principle of public participation as well as the principles of governance including transparency and accountability.²²⁵

Once a petitioner attacks the legislative process on grounds that the law-making process did not meet the constitutional standard of public participation, the respondent is under a legal obligation to demonstrate that the legislative process did meet the constitutional standards of public participation. This is because it is upon the legislative organ to invite the public to participate in the legislative process, unless in the context where an individual petitions Parliament to enact, repeal or amend the law.”

The judge was persuaded that the entire Contempt of Court Act failed the constitutional test of validity for lack of public participation. The Court issued a declaration that the entire Contempt of Court Act No. 46 of 2016 was invalid for lack of public participation as required by Articles

²²² Macronald Byaruhanga, ‘Contempt of court in Kenya, a critical analysis of the contempt of court act no. 46 of 2016’ (Doctoral dissertation, University of Nairobi 2018).

²²³ *Law Society of Kenya v. Attorney General* [2016] eKLR, paragraph 51).

²²⁴ *Melakony Semakot firm & Another v. President of Republic of South Africa & Others* [2008] 2ACC 10 (para 50).

²²⁵ Constitution of Kenya 2010, Article 10(2).”

10 and 118(b) of the Constitution 2010.²²⁶ However, courts are usually very careful not to cross the line of separation of powers. Thus, it allows Parliament including County Assemblies to proceed with their constitutional mandates uninterrupted.²²⁷

In addition, the decision of the Court illustrates the importance of Parliament indulging the public in the legislative process unless the circumstances fall under exceptional circumstances. Parliament must therefore uphold public participation when enacting a legislation or public policy.²²⁸

Art. 27 provides that all citizens are equal before the law and must enjoy equal protection. It also provides that various grounds of non-discrimination including race, gender, ethnicity and religion, among others. Fourth, Art. 33 enshrines the freedom of expression. Art. 35 also provides that everyone has the right to access information.²²⁹

Further, public participation in legislative processes can be achieved through the enforcement of political rights under Article 38 of the Constitution 2010, more specifically through the right to vote.²³⁰ Elections give the people the opportunity to decide who will be their leaders for a span of time and also appoint their representatives in specific government institutions.²³¹ This paper argues that the involvement of the people should go beyond voting in of the elected representatives under Article 1(2) and Article 38, hence, citizens should be actively involved in policy, governance and law making processes.

Additionally, Art. 69(1)(d) provides for public participation in the management and protection of the environment. This entrenches the role of citizens in environmental conservation efforts in Kenya, especially at the local levels. Public participation in this context means inviting people from all diversities in Kenya to take part in decision-making.²³²

²²⁶ “*ibid.*”

²²⁷ Ben Sihanya, ‘Legislative Power, Structure and Process in Kenya and Africa’ *op. cit.*

²²⁸ Ronald Bwana, ‘Public Participation in Kenya’ (2021) *Dead Letter Law.*

²²⁹ See also the Access to Information Act, 2016.

²³⁰ Murimi Karani, ‘Public Participation after Elections’ (2017) <http://eacj.org/general/243-public-participation-after-elections.html> accessed 13 December 2018.

²³¹ *ibid.*”

²³² “‘Directorate of National Cohesion and National Values Training Manual’ (2017) 80 <<https://www.cohesionandvalues.go.ke/wp-content/uploads/2017/04/TRAINING-MANUAL-ON-NVPG-2017.pdf>> accessed 23 October 2020.

Article 118(1) of the Constitution, provides that Parliament shall:

“Facilitate public participation and involvement in the legislative and other business of Parliament and its committee; and Parliament may not exclude the public, or any media, from any sitting unless in exceptional circumstances the relevant Speaker has determined that there are justifiable reasons for the exclusion.”

Any parliamentary seating touching on the law making process must be open to the public and made accessible through the available channels. Parliament is required to allow the public access parliamentary procedures and processes at all times.²³³ Article 118(1) insists on Parliament should conducting its business openly, including in House sittings and in committees.

The Constitution 2010 demands that such sittings should be open to the public as a means to public participation in the legislative process. However, this right is limited. Where there are exceptional circumstances and the Speaker assesses that there are justifiable reasons to exclude the public or media, the right to public participation in the legislative process may be limited.²³⁴

Where anyone alleges that they conducted public participation, the court interrogates the entire legislative process. Material evidence must also be adduced to demonstrate public participation in fulfilment of Article 118. For instance, publishing the statute alone in this case was not adequate.

The court relied on *Matatiele Municipality & Others v. The President of South Africa & Others*,²³⁵ where the South African Constitutional Court stated;

“The representative and participative elements of our democracy should not be seen as being in tension with each other... What our constitutional scheme requires is ‘the achievement of a balanced relationship between representative and participatory elements in our democracy.’ The public involvement provisions of the Constitution address this symbolic relationship, and they lie at the heart of the legislative function. The Constitution contemplates that the people will have a voice in the legislative organs of the State not only through elected representatives but also through participation in the law-making process.”²³⁶

From the holding above, Parliament has a fundamental duty of upholding the participation of the electorate in legislative processes both as duty and obligation.

²³³ Victor Imbo Weke & Felix Kiruthu, ‘Effects of public participation on legislation by the Kenya National Assembly’ (2019) 1 *International Academic Journal of Law and Society*, 104-120.

²³⁴ Constitution of Kenya, 2010; Article 118.

²³⁵ *Matatiele Municipality & Others v. The President of South Africa & Others* (2) (CCT 73/05 A [2006] ZACC 12; 2007 (1) BCLR 47 (CC).”

²³⁶ *ibid.*

Article 119 of the Constitution empowers members of the public to petition Parliament to consider any matter within its authority, including enacting, amending or repealing any legislation. Parliament is further directed to make provision for the procedure for the realization of this right. This provision is important in the fulfilment of the people's right to public participation in the legislative process. It creates a legal procedure through which one may legislate a legislation.

Moreover, though the legislative powers rest with parliament, this provision enables the people to check the arm of government to ensure that individuals can approach Parliament and effectively initiate enactment, repeal or amendment of an Act.²³⁷

Every individual has the right to access information,²³⁸ which includes the laws that are being repealed, enacted or amended by the Parliament. It is on this basis that individuals are accorded the right to acquire, comment and respond to the proposals made by the Parliament in laws. Members of the public are entitled to access any important information held by the state including Parliament.²³⁹ Any legislation to be undertaken by Parliament must be disseminated to the members of public for discussion.

Any petition by the members of the public against an ongoing legislative process is handled carefully by the court not to trespass the roles of the legislative arm of the Government. Only upon conclusion of the legislative process, can the courts come in to interpret the constitutional process of legislation and determine whether there was public participation or not.²⁴⁰

A good example is the case of *Speaker of the Senate & Another v. Attorney General & 4 Others*,²⁴¹ where the Supreme Court opined that;

“This Court will not question each and every procedural infraction that may occur in either of the Houses of Parliament. The Court cannot supervise the workings of Parliament. The institutional comity between the three arms of government must not be endangered by the unwarranted intrusions into the workings of one arm by another.”²⁴²

²³⁷ Ben Sihanya, ‘Legislative Power, Structure and Process in Kenya and Africa’ *op. cit.*

²³⁸ *ibid*, Article 35.

²³⁹ Article 35 of the Constitution, 2010 states that “Every citizen has the right of access to information held by the state; the state shall publish and publicize any important information affecting the nation.”

²⁴⁰ “Ben Sihanya, ‘Fusion and Separation of Powers, and Checks and Balances in Kenya and Africa’ *op. cit.* (forthcoming 2021).

²⁴¹ *Speaker of the Senate & Another v. Attorney General & 4 Others* [2013] eKLR

²⁴² *ibid*.

Further, Standing Orders²⁴³ are legal instruments with rules that regulates the business of the National Assembly. Public participation is addressed by Standing Order 127.

The Standing Order provides that

“A Bill having been read a First Time shall stand committed to the relevant Departmental Committee without question put. (2) Notwithstanding paragraph (1), the Assembly may resolve to commit a Bill to a select committee established for that purpose. (3) The Departmental Committee to which a Bill is committed shall facilitate public participation and shall take into account the views and recommendations of the public when the committee makes its report to the House.”

However, in as much as the standing order acknowledges the significance of public participation, it fails to elaborate the manner and mechanisms through which the said views will be collected. Furthermore, it is also not clear on what constitutes proper public participation in terms of time, place, standards and the targets for such public participation. Hence, the Standing Orders are open for unmeasurable interpretations.²⁴⁴

Justice Odunga in *Robert N. Gakuru & Another v. Governor Kiambu County & 3 Others*²⁴⁵ refrained from granting the petitioners a stay of the Bills made by the Respondent. The court wisely raised the concern that the Bill was still in discussions and the same had not been enacted. Thus, the court stated that:

“It is therefore my view that as the Bill is yet to be enacted, this Court ought not at this stage to interfere with the process of the enactment however ugly, undesirable, arbitrary, unjust, fanciful or oppressive that Bill may appear. If the issues raised by the petitioners are not addressed during the debating of the said Bill the petitioners will still be at liberty to move this Court for appropriate orders.”²⁴⁶

The court also observed that it needed to exercise caution when dealing with the functions of the County Assemblies since they are the legislative organs of the county governments.²⁴⁷ Thus, the court relied on the South African *Democratic Alliance v. The President of the Republic of South Africa & 3 Others*²⁴⁸ where the court stated that;

²⁴³ The National Assembly Standing Orders; As adopted by the National Assembly on 9th January, 2013 during the Fourth Session of the Tenth Parliament.

²⁴⁴ Mohamed Ngome, ‘The impact of PAC and PIC on accountability and transparency in Kenya under the new photography changes on the standing orders’ (1998).

²⁴⁵ *Robert N. Gakuru & Another v. Governor Kiambu County & 3 Others* [2013] eKLR.”

²⁴⁶ *ibid.*

²⁴⁷ See also the discussions under Chapter 2 and 4 of this thesis.

²⁴⁸ *Democratic Alliance v. The President of the Republic of South Africa & 3 Others*, CCT 122/11 [2012] ZACC 24

“The rational basis test involves restraint on the part of the Court. It respects the respective roles of the Courts and the Legislature. In the exercise of its legislative powers, the Legislature has the widest possible latitude within the limits of the Constitution. In the exercise of their power to review legislation, courts should strive to preserve to the Legislature its rightful role in a democratic society. This equally applies to executive decisions.”²⁴⁹

It is therefore important that the relevant institutional frameworks play their part in promoting public participation in Kenya. Such cooperation and collaboration must be mutual with requisite checks and balances to avoid conflict of the arms of Government.”

3.2.2 Public Participation under the County Governments Act, 2012

“This Act of Parliament recognizes and provides a wide range of public participation at the County level. There are numerous provisions of the Act that extensively provide for the right to public participation. For instance, section 87 provides for the principles upon which the right to public participation is anchored.”²⁵⁰

The Act provides for seven (7) principles of public participation, which are formulated to ensure simplicity in the process of public participation. Hence, the Act considers timeliness of the process, protection of the people’s rights and contribution by the people as key components of the principles. These principles of public participation have been discussed extensively below.”

First, timely access to information, data, documents, and other information relevant or related to policy formulation and implementation.²⁵¹ This principle corresponds to the principle of timely notice to the people to enable them prepare for the intended public participation. Furthermore, it “enables them to discuss as the people to be affected by the proposed legislation. Timeliness of access to information saves Parliament and any other legislative organ from avoidable suits that can be brought about by the people.”²⁵²

The second principle is that the county governments should endeavor to ensure that there is reasonable access to the process of formulating and implementing policies, laws, and regulations. This ensures that the people are informed of every step of the legislative process. The benefit of informing the public on the development of proposals, projects and the budget is to not only to abide by the public participation law but also to include the people in the governance of the

²⁴⁹ *ibid.*

²⁵⁰ Section 87 of the County Government Act, 2012.

²⁵¹ *ibid*; Section 87(a) County Governments Act, 2012.

²⁵² “See the Access to Information Act, 2016.

county and the country. It also sets the government's performance standards and strives to meet them.²⁵³

Third principle invokes the protection and promotion of the interest and rights of minorities, marginalized groups, communities, and their access to relevant information. This ensures that that the national values and principles of governance are met. It ensures that every person from all occupations and various political, social and political backgrounds are included in the legislative process. This way, everyone can air their opinions and the laws can favour everyone including persons with disabilities.²⁵⁴

Fourth, the people or organizations invited for the participation must have a legal standing and they must be affected by the proposed legislation. Furthermore, there have to be means upon which such persons can appeal from or review decisions or redress grievances, particularly persons and traditionally marginalized communities, including women, youth and disadvantaged communities.²⁵⁵

Fifth, there is an absolute need to ensure reasonable balance in the roles and obligations of county governments and non-state actors in decision-making process.” Furthermore, through indulgence of the non-state actors, the county government promotes sharing responsibilities and” partnership to provide complementary authority and oversight in the objectives of the government.

Sixth, there is need to create a good and effective relationship between the Government and private sectors. Thus, promotion of public-private partnerships, such as joint committees, technical teams and citizen commissions, to encourage direct dialogue between the relevant bodies is key in the legislative process. “Through this, the Government not only implements the public participation process but also creates an opportunity for a concerted action on sustainable development.²⁵⁶

²⁵³ Anthony Mbithi, Damiana Ndambuki & Fredrick J. Owino, ‘Determinants of public participation in Kenya county governments’ (2019) 54 *Journal of Asian and African Studies*, 52-69.

²⁵⁴ Michael M. Ndurumo, ‘Enhancing Public Participation by Persons with Disabilities and Obligations of the Government Agencies in Kenya.’

²⁵⁵ Azizan Marzuki, ‘Challenges in the Public Participation and the Decision Making Process’ (2015) 53 *Sociologija i prostor/Sociology & Space*.”

²⁵⁶ “Maurice S. Nyaranga, Chen Hao & Duncan Omenda, ‘Strategies of integrating public participation in governance for sustainable development in Kenya’ (2019) 9 *Public Policy Admin Res*.

Seventh principle also creates an avenue for recognition and promotion of the reciprocal roles of non-state actors' in public participation in the facilitation of governmental facilitation and oversight of the government activities. The non-state actors include media, civil society organizations and religious institutions. These were especially critical in the clamour for multiparty democracy in the 1990s.²⁵⁷

Section 89 of the County Government Act, 2012 mandates County Governments to respond to any petition from the members of the public. Therefore, where an individual petitions the county government to amend, repeal or enact a county law, the County Assembly need to respond to such petition and act on it within the parameters of Section 89 of the Act.²⁵⁸

The practice with this regard is that County Assemblies use their available platforms, such as websites, market notice boards and other social gatherings, to invite the people for public participation. However, not everyone invited to attend the legislative process, apart from those with close interest in the proposed legislation.²⁵⁹

In the case of *Robert N. Gakuru & Others v. Kiambu County Government & 3 Others*,²⁶⁰ it was observed that public participation ought not to be illusory but must be real. Furthermore, public participation should be adhered to not as a formality but in fulfilment of the constitutional dictates.²⁶¹ Hence, Justice Odunga observed in the case that;

“It is not just enough, in my view, to simply ‘tweet’ messages as it were and leave it to those who care to scavenge for it. The County Assemblies ought to do whatever is reasonable to ensure that as many of their constituents in particular and the Kenyans in general are aware of the intention to pass legislation and where the legislation in question involves such important aspect as payment of taxes and levies, the duty is even more onerous.”

The court in its wisdom recommended that public participation in the counties should be conducted in as many places as possible. Such places include public places such as barazas, temples, churches, mosques, national and vernacular radio stations amongst other public venues.

²⁵⁷ Duncan Okello, ‘The dynamics of political change and transition: civil society, governance and the culture of politics in Kenya’ in VSP Coelho & B von Lieres (eds) *Mobilising for Democracy: Citizen Action and the Politics of Public Participation*, London, Zed, 10 (2010).

²⁵⁸ Section 89 of the County Government Act, 2012.

²⁵⁹ Kasina Musunza & Wilson Muna, ‘An Assessment of the Effect of Mass Media Platforms and County Assembly Initiatives on Public Participation in Kitui County’ (2021) 5 *International Journal of Current Aspects*, 50-55”

²⁶⁰ “*Robert N. Gakuru & Others v. Kiambu County Government & 3 Others* [2014] eKLR.

²⁶¹ Ronald Bwana, ‘Public Participation in Kenya, Dead Letter Law?’ (2021) *Dead Letter Law*.

In other words, the places must be where people converge and disseminate information with respect to the intended area of the proposed legislation.²⁶²

Pursuant to the holding above, it is clear that the citizens are given an opportunity to participate in the process leading to the enactment of county laws that in turn bind them. The integral role played by the public in the law making process is given a center stage. It also enhances the legitimacy of the laws made by County Assemblies.

For instance, each County Government ensures public participation in the discussion of County Finance Bills pursuant to Article 201 of the Constitution of Kenya. Failure to ensure public participation illegitimizes any enacted laws in the County Assembly.²⁶³

Justice Odunga's decision was appealed to the Court of Appeal where the court affirmed the decision in *Kiambu County Government & 3 Others v. Robert N. Gakuru & Others*,²⁶⁴ stating that:"

“...The issue of public participation is of immense significance considering the primacy it has been given in the supreme law of this country and in relevant statutes relating to institutions that touch on the lives of the people. The Constitution in Article 10 which binds all state organs, state officers, public officers and all persons in the discharge of public functions, highlights public participation as one of the ideals and aspirations of our democratic nation...”²⁶⁵

The court expressed the view that public participation must include and be seen to include the dissemination of information, invitation to participate in the process and consultation. Further, these are material facts that must be proved by any party at fault.

3.2.2.1 Standards or Indicators of effective Public Participation

“In deciding the case of *Kenya Human Rights Commission v. Attorney General & Another*,²⁶⁶ the court referred to the matter of *Land Access Movement of South Africa Association for Rural Development and Others v. Chairperson of the National Council of Provinces and Others*²⁶⁷ where the standard for determining whether Parliament performed its obligation in ensuring there is public participation or not, was stipulated.

²⁶² *ibid.*

²⁶³ See also discussions under section 3.9 below.

²⁶⁴ *Kiambu County Government & 3 Others v. Robert N. Gakuru & Others*, [2017] eKLR.”

²⁶⁵ *Ibid.*

²⁶⁶ *Kenya Human Rights Commission v. Attorney General & Another* [2018] eKLR.

²⁶⁷ *Land Access Movement of South Africa Association for Rural Development and Others v. Chairperson of the National Council of Provinces and Others*, [2016] ZAACC22.

The standard is one of a reasonableness test. Therefore, one considers the circumstances and the facts in issue. Thus, the court observed that:

“The standard to be applied in determining whether Parliament has met its obligation of facilitating public participation is one of reasonableness. The reasonableness of Parliament’s conduct depends on the peculiar circumstances and facts at issue. When determining the question whether Parliament’s conduct was reasonable, some deference should be paid to what Parliament considered appropriate in the circumstances, as the power to determine how participation in the legislative process will be facilitated rests upon Parliament. The Court must have regard to issues like time constraints and potential expense. It must also be alive to the importance of the legislation in question, and its impact on the public.”²⁶⁸

In its holding, the Court acknowledged the place and importance of public participation in law making.²⁶⁹ The court also noted that citizens were not involved in legislation of the impugned Contempt of Court Act. This illustrates that no Act of Parliament can be enacted in secrecy. The people must be asked to contribute in order for the Act to be enacted and legitimately. Failure of which, the entire process will be a waste of Parliament’s precious time.²⁷⁰

Further, in *Minister for Health v. New Chicks South Africa Pty Ltd*,²⁷¹ the Constitutional Court of South Africa observed that:

“the forms of facilitating an appropriate degree of participation in the law making process are indeed capable of infinite variation and that what matters is that at the end of the day a reasonable opportunity is offered to the members of the public and all interested parties to know about the issue and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case.”²⁷²

The overarching argument is that county assemblies must ensure substantive realization of the right to public participation. The County Government Act, 2012 also outlines the modalities of ensuring effective public participation.²⁷³ The manner and procedure of collecting views from members of the public is also outlined therein.”

3.2.3 Public Participation under the Public Finance Management Act, 2012

“This is a critical Act of Parliament that aims at ensuring effective decision making through citizen involvement. The Act ensures that there is effective management of public resources by

²⁶⁸ *Land Access Movement of South Africa Association for Rural Development and Others v. Chairperson of the National Council of Provinces and Others*, [2016] ZAACC22.

²⁶⁹ See also James Macharia, ‘Right to Public Participation in Devolved Governance in Kenya; a Myth or a Reality’ (Doctoral dissertation, University of Nairobi 2017).

²⁷⁰ See the *Kiambu County Government & 3 Others v. Robert N. Gakuru & Others*, [2017] eKLR.

²⁷¹ *Minister for Health v. New Chicks South Africa Pty Ltd*, CCT 59/04.

²⁷² *Ibid.*

²⁷³ County Government Act 2012, Section 91.

the government. Furthermore, it ensures that legislative organs such as Parliament and the County Assemblies discharge their oversight responsibilities keenly and effectively.

The Act provides for mechanisms on how citizens can be engaged by the two levels of government, that is, national and county Governments, on matters relating to finance. Thus, Section 10 (2) of the Act provides that the Parliamentary Budget Office (PBO) in carrying out its work as provided for under Section 10(1) of the Act should observe the principle of public participation in budgetary matters in order to legitimize any enacted financial laws.”

At the County level, Section 137 of the Public Finance Management Act, 2012 provides for the establishment of the County Budget and Economic Forum (CBEF) for County budget consultation process.²⁷⁴ The purpose of the forum is to provide a means for consultation by the county governments on preparation of county plans, the County Fiscal Strategy Paper and the Budget Review and Outlook Paper for the county and matters relating to budgeting, the economy and financial management at the county level. “The Act also provides for the budget making process that allows for public participation.²⁷⁵

It is clear that this particular Act of Parliament does not deal and or envisage the law making process requiring citizen participation, but recognizes the important role played by members of the public in the budget making process. Budget making is a critical aspect of the Government, which affects entirely every member of the public and every sector.²⁷⁶

3.3 International and Regional Obligations on Public Participation

The Constitution of Kenya, 2010, acknowledges the importance of international law in the Kenyan legal system. The Constitution acknowledges the principles of international laws as part of the laws of Kenya. Furthermore, it provides that any instruments or treaties that have been ratified by Kenya forms part of Kenya law under the Constitution.²⁷⁷

²⁷⁴ Public Finance Management Act 2012, Section 137.

²⁷⁵ "Public Finance Management Act 2012, Section 175(9).

²⁷⁶ Francis Kahutu, ‘The Effect of Public Finance Management Act, 2012 Adoption in Budgeting Process by County Governments in Kenya’ (Doctoral dissertation, University of Nairobi 2019).

²⁷⁷ Article 2(5) of the Constitution, 2010; The general rules of international law shall form part of the law of Kenya.

International laws therefore, accrue legal force in Kenya as such binds Parliament just like any other law in terms of the law making process. They also impose a legal obligation on Parliament to consider and factor public participation in the law making process.²⁷⁸

Therefore, this study acknowledges the International Covenant on Civil and Political Rights (ICCPR) and the African Charter on Human and People's Rights (ACHPR) as very pertinent to this research. Therefore, one cannot touch on the principal of public participation in Kenya without acknowledging their provisions and role in implementing this political right.

3.3.1 International Covenant on Civil and Political Rights (ICCPR)

According to the ICCPR, the right to freedom of expression and political right consist of at least two (2) elements: a general right to take part in the conduct of public affairs and more specific right to vote and or elected.²⁷⁹ In other words, those who are elected and those who are not elected work hand in hand to attain certain goals. The convention clearly imposes an obligation on state parties to promote citizens' participation in political affairs.²⁸⁰

Therefore, citizens ought to be involved law making processes as it is a political process. This is the only way to legitimize the outcome of the law promulgated in Parliament, particularly in a democratic country like Kenya. This also ensures smooth compliance with the law as citizens consider themselves to be part and parcel of the exercise.

3.3.2 African Charter on Human and People's Rights (ACHPR)

This is a regional instrument in Africa that seeks to enhance and ensure human rights are adhered and complied with by state parties. The Act acknowledges the fact that the right to public participation is a political right that can be exercised in person or as a group of individuals.²⁸¹

²⁷⁸ Tom Kabau & Chege Njoroge, 'The application of international law in Kenya under the 2010 Constitution: Critical issues in the harmonisation of the legal system' (2011) 44 *Comparative and International Law Journal of Southern Africa*, 293-310.

²⁷⁹ Article 19 of International Covenant on Civil and Political Rights; Everyone shall have the right to hold opinions without interference; and Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

²⁸⁰ Karen Czapansiky and Rashida Manjoo, 'The Right of public participation in the law-making process and the Role of the Legislature in the promotion of this right' (2008) *Duke Journal of Comparative & International Law*, <https://scholarship.law.duke.edu/djCIL/vol19/iss1/1/> accessed 2 July 2020.

²⁸¹ Christof Heyns, 'The African regional human rights system: The African Charter' (2003) 108 *Penn St. L. Rev.*, 679.

Hence, the Convention provides for the right of member states' citizens to be indulged in the governance process, which involves public participation. Thus, through Section 13(12) (1) The Charter clearly provides that every citizen has the right to participate freely in the Government of their country, either directly or through freely chosen representatives in accordance with the provisions of the law.

Furthermore, every citizen has the right of equal access to the public service of his country. Therefore, this right should be administered without discrimination by the government or the relevant authorities.

Additionally, the Convention imposes an obligation to state parties to ensure that they promote and respect the rights and freedoms contained in the Charter. The states are expected to comply with these provisions through teaching, education and publication of the rights such as public participation in the legislative process.²⁸² Through this, Parliament should ensure that citizens are informed of any legislation that is to be enacted and its impact. Citizens who possess this knowledge will contribute to the promulgation of the said Act of Parliament.

Therefore, through the Charter, people should be well informed of their political rights and duties. The state Party must facilitate access to information on any law that is to be enacted so that they can contribute.

3.4 Statutory Instruments Act, 2013

According to the Statutory Instruments Act, 2013, public participation is defined as the involvement by the regulation-making authority of persons or stakeholders that the statutory instrument may directly or indirectly apply to;

Section 5 of the Act demands, that there is need to consult particularly where the proposed statutory instrument is likely to have a direct, or a substantial indirect effect on business. Also, that the regulation-making authority shall make appropriate consultations with persons who are likely to be affected by the proposed instrument.

Subsection 2 of section 5 provides that, in determining whether any consultation that was undertaken is appropriate, the regulation making authority shall have regard to any relevant matter, including the extent to which the consultation—

²⁸² African Charter on Human and People's Rights 1981, Article 25.

- a) drew on the knowledge of persons having expertise in fields relevant to the proposed statutory instrument; and
- b) ensured that persons likely to be affected by the proposed statutory instrument had an adequate opportunity to comment on its proposed content.

Subsection 3 of section 5 further provides that;

- a) involve notification, either directly or by advertisement, of bodies that, or of organizations representative of persons who, are likely to be affected by the proposed instrument; or
- b) invite submissions to be made by a specified date or might invite participation in public hearings to be held concerning the proposed instrument.

3.5. Public Participation Bill, 2020

The Public Participation Bill, 2020 sought to provide an effective legal framework for the participation of the public in decision making in legislation at the national and devolved levels of governance. This proposed legislation would give effect to the constitutional provisions under the Constitution as one of the ways of implementing the aspirations of the transformative Constitutional charter.

Section 5 of the Bill provides for elements of substantive public participation to include timely access to information, upholding of the national values and principles under Article of the Constitution 2010, principles of public finance management under Article 201 and 202 of the Constitution 2010 and upholding the rule of law through equal and inclusive decision making. This includes engaging both state and non-state actors in legislation.

Section 6 provides the obligations of state officers and the relevant institutions to promote the realization of the right to public participation in decision making. This would be critical in legislative processes since bureaucracy by state actors are one of the challenges facing the realization of the right to public participation in legislative processes. Section 8 makes the most important provision by recognizing the right of the public to participate in public forums including being allowed to present memoranda.

Relatedly, the Bill introduced an office of the Registrar of the Public Participation Registry to be domiciled under the Office of the Attorney General. This would be the institutional framework to monitor effective implementation of the right to public participation in decision making including in legislative processes in Kenya.

3.6. Summary of Findings and Conclusion of the study

From the above analysis, there are at least three (3) findings and recommendations. First, it is clear that public participation has had little effect on outcome of legislation by the National Assembly, and this is largely attributed by lack of clear legislations on the right to public participation.

Second, there is no Act of Parliament giving effect to Article 118 of the Constitution, detailing the manner and the procedure on how to achieve effective public participation in the legislative process as contemplated in Article 118 of the Constitution.

Third, there is need to address the lack of broad institutional cooperation and collaboration among state and non-state actors. This paper argues that a holistic and inclusive approach is critical towards enriching the quality and legitimacy of legislation in Kenya.²⁸³

²⁸³ “See also discussions in Chapter 2 and 3 of this thesis.

CHAPTER 4

A COMPARATIVE STUDY OF THE RIGHT TO PUBLIC PARTICIPATION IN THE LEGISLATIVE PROCESS IN KENYA, SOUTH AFRICA AND THE UK

4.1 Introduction

In the previous Chapter 3, I discussed the legal framework of public participation in Kenya. In this Chapter 4, I conduct a comparative analysis among Kenya, the Republic of South Africa and the United Kingdom regarding the right to public participation in the legislative process. This chapter demonstrates how the South Africa and the UK are able to effectively carry out public participation in the legislative process vis-à-vis the Kenyan experience, including their strengths and weakness.

Through this comparative analysis, lessons will be drawn on how best Kenya can improve the involvement of citizens in the legislative process. In modern democratic states like the USA, UK, South Africa and India, citizens are considered important stakeholders in the political system. It is a key element of a healthy democracy and without high level public participation, the political system loses legitimacy.²⁸⁴

This perception empowers them to take part directly or indirectly through their elected representatives in the formation, adoption and implementation of the laws and policies that affect them.²⁸⁵ Public participation is therefore a fundamental part of the public–Government relationship in democracies such as Kenya, South Africa and the United Kingdom.²⁸⁶

4.1.1 Justification for selecting South Africa and UK

This study has selected South Africa and the UK because of three (3) reasons. First, just like Kenya, the legitimacy of laws is enhanced through public involvement in decision-making. Second, public participation is used as a critical tool to ensure accountability and transparency of Government in South Africa and the UK. Third, South Africa and the UK have enriched the

²⁸⁴ Phil Parvin, ‘Democracy without participation: A new Politics for a disengaged era’ (2018) 24 *Res Publica*, 31–52.

²⁸⁵ Quick Kathryn & Bryson John, ‘Theories of public participation in governance’ (2019) <https://www.researchgate.net/publication/282733927_Theories_of_public_participation_in_governance accessed 6 July 2020.

²⁸⁶ UK Parliament UK, ‘Trends in Political Participation’ (2015) *The Parliamentary Office of Science and Technology*, 498.”

practice of public participation in legislation making and other key decision-making components that have a bearing on the Government and the citizenry.²⁸⁷

4.2 History of Public Participation in South Africa and the UK

This section contextualizes public participation in South Africa and the UK from a historical context.

4.2.1. History of Public Participation in South Africa

Historically, colonialism and apartheid in South Africa created an unequal system.²⁸⁸ “It was therefore essential that the first democratic Government, taking over in 1994, be held in high esteem by ensuring that the rights of both the majority and the minority of South African citizens are upheld.²⁸⁹

The South Africans therefore realized that the best way to ensure that every citizen is included in the governance is through public participation as held in *Doctors for Life International v. Speaker of the National Assembly* (2006). At paragraph 106, the court stated thus:”

“In our country, the right to political participation is given effect not only through the political rights guaranteed in section 19 of the Bill of Rights, as supported by the right to freedom of expression but also by imposing a constitutional obligation on legislatures to facilitate public participation in the law-making process.”²⁹⁰

This ideal framework and mandate given to Parliament would therefore, involve everyone including the minority in major and minor decision-making.²⁹¹ In comparison, Kenya’s Independence Constitution, 1963 did not offer an opportunity for citizens to be included in the legislative process.²⁹² The centralized system governance in Kenya, at that time, was patrimonial and dictatorial in nature.²⁹³

The new South African Government based its legitimacy on the concept of constitutionalism, where all the people, representatives of the people, and institutions would be subject to the South

²⁸⁷ “Vivien Schmidt, ‘Democracy and legitimacy in the European Union revisited: Input, output and ‘throughput’ (2013) 61 *Political Studies*, 2-22.

²⁸⁸ *ibid.*

²⁸⁹ *ibid.*

²⁹⁰ *Doctors for Life International v. Speaker of the National Assembly* [2006] ZACC 11; 2006 (6) SA 416 (CC); 2006 (12) BCLR 1399 (CC), at 106.

²⁹¹ Yash P. Ghai, ‘Public participation and minorities’ (2001) 1 *Minority Rights Group*, London.”

²⁹² “Karuti Kanyinga, ‘Kenya: Democracy and political participation’ (2014) <<https://www.opensocietyfoundations.org/uploads/b24bc86e-9fa4-4771-980d-0888a7871e60/kenya-democracy-political-participation-20140514.pdf>> accessed 14 February 2021.

²⁹³ *ibid.*

African Constitution.²⁹⁴ The Constitution of the Republic of South Africa Act 108 of 1996 was thus promulgated in 1996. It was the basis upon which the democratic South Africa would function and be governed.²⁹⁵ This was the new dawn for public participation in South Africa.

This new Government was the beginning of citizen participation in economic, social and political spheres. It is also imperative to note that under the previous regimes, the majority of South Africans had their political rights limited to an extent that they were excluded from public life in particular, they were denied the right to vote.²⁹⁶

During the Constitutional Assembly of South Africa on January 24,1995,²⁹⁷ Mr. M. C. Ramaphosa, who later became the President of South Africa after the resignation of President Jacob Zuma, stated that:”

“The people of South Africa must be involved. They must be consulted in an organized fashion, on specific issues in order for the new law to be sensitive to and shaped by their realities, and for it to address these realities.”²⁹⁸

“The above statement by Cyril Ramaphosa, later President of South Africa, reflected the then need for the people of South Africa to have a Constitution that worked for the people of South Africa. The best Constitution would be one that would enable every individual to take part in the affairs of the South African Government including legislative processes. Hence, the supreme law of the land was shaped to fit the problems and the issues affecting the country.

Furthermore, the people of the country had for a long time suffered in the hands of the apartheid regime. Therefore, they needed a change of how the system was run. At this point in time, Kenya was already 32 years into independence. Yet, as discussed in chapter 3, there were no constitutional or statutory provisions that allowed Kenyans to actively take part in the legislative process. Parliament was, safe to say, an institution of the elite.

²⁹⁴ *ibid.*

²⁹⁵ *ibid.*

²⁹⁶ Linda Nyati, ‘Public participation: What has the Constitutional Court given the public’ (2008) <http://www.saflii.org/za/journals/LDD/2008/15.pdf> accessed 6 July 2020.

²⁹⁷ South Africa History Online, ‘Public Participation Process’ <<https://www.sahistory.org.za/archive/chapter-13-public-participation-process>> accessed 6 July 2020.

²⁹⁸ ‘Justice’ (1996) Speech by Matamela Cyril Ramaphosa at the Constitutional Assembly of South Africa (24 January 1995) <https://www.justice.gov.za/legislation/constitution/history/MEDIA/CYRIL.PDF> accessed 24 September 2021. He was the Chair of the South African Constitutional Assembly.”

Another key player was Ms B. Mbete-Kgositsile, an MP of the African National Congress. During the Constitutional Assembly on 15 August 1994,²⁹⁹ she stated that;

“Our priority is to ensure that the process is not confined to these walls. We need to ensure that the communities along the Limpopo Valley also have their views heard in this Chamber and in our committee rooms. The final draft must reflect the views of our people in the villages, informal settlements, hostels, factories, towns and cities.”³⁰⁰

The above submissions by key role-players and influential observers shaped the spirit of the public participation process during the constitutional making process in South Africa. They managed to molten the concept of public participation and made sure it fitted well South Africa’s Constitution 1996.³⁰¹

Thus, since then, the notion of the people expressing their views in the legislative process has been anchored in the laws of South Africa. Similarly, Kenya should appreciate the history and experiences that led to the enactment of an inclusive Constitution and statutes in South Africa. In reiteration, Hon Justin Muturi remarked in 2015 that:

“Devolution is supposed to be about the people, but it is doubtful that the people are part of the process of governance in their counties... I would like to hear proposals on how Parliament can intensify its engagement with the people.”³⁰²

Therefore, public participation is not only a concept that is documented in the 1996 Constitution of South Africa, but also a legal principle entrenched in the South African political system. Moreover, South Africa has both representative and participatory democracy.³⁰³

The representative aspect of the South African Constitution 1996 upholds multi-partyism through regular elections.. The participatory aspect goes further than regular elections every five (5) years by promoting citizen participation beyond elections.³⁰⁴ Citizen participation in the South African parliamentary business is central to its democracy.

²⁹⁹ “South Africa History Online, ‘Public Participation Process’ <<https://www.sahistory.org.za/archive/chapter-13-public-participation-process>> accessed 6 July 2020.

³⁰⁰ Ms B. Mbete-Kgositsile, a Member of Parliament of the African National Congress speech during the Constitutional Assembly on, 15 August 1994.

³⁰¹ *South African Veterinary Association v. Speaker of the National Assembly and Others* (CCT27/18) [2018] ZACC 49; 2019 (2) BCLR 273 (CC); 2019.

³⁰² Justin Muturi, ‘Kenya must be involved in all processes’ *Sunday Nation* (Nairobi 28 June 2015) <http://www.parliament.go.ke/index.php/speaker-muturi-rallies-speakers-forum-embrace-citizenry-engagement-bid-enhance-opennesstransparency> accessed 24 September 2021.”

³⁰³ Nyati, ‘Public participation: What has the Constitutional Court given the public’ (2008) *op. cit.*

³⁰⁴ *ibid.*

4.2.1 Legal Framework governing public participation in South Africa

The Constitution of South Africa, 1996 entrenches a modern democracy provides for a, characterized by the principle of the separation of powers, which includes the Executive, Parliament and Judicial arm.³⁰⁵

Parliament of South Africa and the nine (9) provincial legislatures (“the legislatures”) are the legislative organs of the National Government and provincial Governments, respectively,³⁰⁶ and exercises legislative authority.

A key constitutional duty of the legislative arm of Government is to promote citizen participation in the legislative processes. This duty is anchored in section 59(1)(a)³⁰⁷ of the Constitution of South Africa where the National Assembly has the responsibility to ensure that the public can the House and its committees and can make contributions to the legislative process.

Additionally, Section 72(1)(a) of the Constitution provides for access to the National Council of Provinces (NCoP). Further, Section 118(1)(a)³⁰⁸ empowers provincial legislatures to ensure that their processes are open to the These provisions succinctly enable South Africans to participate in the running of the country, which ensures accountability and transparency in the government.

Parliament’s sittings must also be held in public and in an open and transparent manner.³⁰⁹ The Constitution, through section 59(2), emphasizes no inclusion of the public and the media in House and Committee sittings. The Constitution allows an exception to this restriction where it is justifiable and reasonable to exclude the media and the public from its sittings. This is to enhance and advance involvement of citizens in the legislation making.

This was captured in *Democratic Alliance v. Masondo N.O.* (2002) where it was held that:

“The open and deliberative nature of the process goes further than providing a dignified and meaningful role for all participants. It is calculated to produce better outcomes through subjecting

³⁰⁵ ‘Legislative Sector of South Africa’ <<http://www.sals.gov.za/docs/pubs/ppf.pdf>> accessed 6 July 2020.

³⁰⁶ *ibid.*

³⁰⁷ Section 59(1)(a) of the Constitution of South Africa, 1996 states that the National Assembly must facilitate public involvement in the legislative and other process of the National Assembly and its Committees

³⁰⁸ Section 118(1)(a) states that “a Provincial legislature must- facilitate public involvement in the legislative and other processes of the legislature and its committee.”

³⁰⁹ Calistus Mboya, ‘The concept of Public Participation in law making process in Kenya with reference to the jurisprudence in South Africa’ (LLB Dissertation, Moi University Law School 2016).

laws and governmental action to the test of critical debate, rather than basing them on unilateral decision-making.”³¹⁰

This is why it is a requirement under the South African Constitution for the National Council of Provinces (NCoP) to involve the public in its proceedings.³¹¹ Thus, under section 70 of the 1996 Constitution, the National Council of Provinces is mandated to make rules and regulations applicable in the legislative process of discharging its mandate, but must have due regard to representative and participatory” democracy.³¹²

The practice of public participation in South Africa has also been contested. The most famous South African judicial authority that brought to life the right to public participation is *Doctors for Life International v. The Speaker of the National Assembly*.³¹³

In this case, Parliament had passed four (4) health statutes. First, the Choice on Termination of Pregnancy Amendment Act 38 of 2004 (“the CTOP Amendment Act”). Second, the Sterilisation Amendment Act 3 of 2005. Third, the Traditional Health Practitioners Act 35 of 2004 (“the THP Act”), and fourth, the Dental Technicians Amendment Act 24 of 2004.³¹⁴

The Applicant challenged the enactment of the said statutes. The applicant’s complaint was that during the legislative process leading to the enactment of these statutes, the NCOP and the provincial legislatures did not comply with their constitutional obligations to facilitate public involvement in their legislative processes as required by the provisions of sections 72(1)(a) and 118(1)(a) of the Constitution of South Africa 1996, respectively.³¹⁵

Three (3) issues arose for determination. First, what is the nature of the duty to facilitate public participation? Second, whether the legislature had discharged its duty to facilitate public involvement in the legislative process of certain health related legislation. Third, what was the impact on the validity of such legislation if the facilitation of public involvement was flawed?

The test set in the case was whether the legislature acted reasonably in discharging the duty to facilitate public involvement. Where it is established that there was a deliberate omission to

³¹⁰ *Democratic Alliance v. Masondo N.O.* [2002] ZACC 28; 2003 (2) SA 413 (CC); 2003 (2) BCLR 128 (CC).

³¹¹ South African Constitution 1996, s 69.

³¹² *ibid.*

³¹³ *Doctors for Life International v The Speaker of the National Assembly* 2006 (12) BCLR 1399 (CC).

³¹⁴ *Doctors for Life International v. Speaker of the National Assembly and Others* (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) (17 August 2006) <<http://www.saflii.org/za/cases/ZACC/2006/11.html>> (accessed September 30, 2021).

³¹⁵ *ibid.*

involve the public in the legislative process, the enacted Act or policy is declared unconstitutional. The importance of involving the public in key decision making is therefore critical.

To establish whether there was reasonableness, three (3) grounds were considered. First, is the nature of the legislation concerned. Second, is the importance of the legislation to the community. The third factor considered is the impact of legislation on the society based on the unique circumstances of each legislation.³¹⁶ These three (3) factors are v key whenever the court has to determine the reasonableness of the legislature regarding to effectuating public participation.”

This is compared to the Kenyan *Robert Gakuru* case wherein Justice Odunga restated that:

“...public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfilment of the Constitutional dictates. It is my view that it behoves the County Assemblies in enacting legislation to ensure that the spirit of public participation is attained both quantitatively and qualitatively....”³¹⁷

Generally, two (2) elements underpin public involvement; first, to provide meaningful opportunities for public participation in legislation law-making and second, to ensure citizens participate in such opportunities. Thus, Sachs, J, emphasized the “special meaning” of public participation within a constitutional democracy, by arguing that the effect of public participation should be that:

“All parties interested in legislation should feel that they have been given a real opportunity to have their say, that they are taken seriously as citizens and that their views matter and will receive due consideration at the moments when they could possibly influence decisions in a meaningful fashion. The objective is both symbolical and practical: the persons concerned must be manifestly shown the respect due to them as concerned citizens, and the legislators must have the benefit of all inputs that will enable them to produce the best possible laws.”³¹⁸

Doctors for Life case set the standard of the constitutional obligation to facilitate public participation. This authority has been a yardstick upon which all issues regarding public participation in South Africa are measured against.

³¹⁶ *ibid.*

³¹⁷ *Republic v. County Government of Kiambu Ex parte Robert Gakuru & Another* [2016] eKLR.

³¹⁸ *ibid.*

Similarly, the case of *Robert Gakuru* can be termed as a *locus classicus* in Kenya. The Court of Appeal stated that “the bottom line is that public participation must include and be seen to include dissemination of information, invalidation to participate in the process and consultation on legislation.”³¹⁹

Apart from the Constitution, South Africa has a legislation referred to as the Municipal Systems Act which provides for principles and mechanisms upon which South Africa’s municipalities are run. Section 16³²⁰ of the Act mandates municipalities to develop a “culture of municipal governance that complements formal representative government with a system of participatory governance.”³²¹

This provision demands that municipal authorities create conditions that will provides the community opportunities to take part in daily governance. This is very critical since the people take part in the planning and execution of the Government’s plans.

Section 17 provides the relevant mechanisms for local participation. Councilors must therefore bear the responsibility of promoting public participation even in ward committees and other committees legislated under the Municipal Structures Act, 117 of 1998 uphold public participation in matters of local Government.³²²

This provision reminds the authorities in the municipalities that the Government is meant to work for the people. Similarly, Justice Sachs reiterated in *New Clicks* (2005) that:”

“The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say.”³²³

³¹⁹ *Kiambu County Government & 3 Others v. Robert Gakuru & Others* [2017] eKLR

³²⁰ That municipalities must “develop a culture of municipal governance that complements formal representative government with a system of participatory governance, and must ... (a) encourage, and create conditions for the local community to participate in the affairs of the municipality, including in (i) the Integrated Development Plan; (ii) the performance management system; (iii) performance, (iv) the budget, and (v) strategic decisions relating to services”

³²¹ Betty C. Mubangizi and Maurice Oscar Dassah, ‘Public participation in South Africa: Is intervention by the Courts the Answer?’ <<http://www.krepublishers.com/02-Journals/JSS/JSS-39-0-000-14-Web/JSS-39-3-14-Abst-PDF/JSS-39-3-275-14-1620-Mubangizi-B-C/JSS-39-3-275-14-1620-Mubangizi-B-C-Tx%5B4%5D.pdf>> accessed 6 July 2020.

³²² *ibid.*

³²³ *Minister of Health v. New Clicks South Africa (Pty) Ltd* [2005] ZACC 14; 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC).

Hence, Parliament and parliamentary committees should come up with the processes and procedures to safeguard the interests of the people by giving them adequate opportunity to take part in decision making.

For instance, in *Matatiele Municipality and Others v. President of the Republic of South Africa and Others*,³²⁴ an urgent application for direct access was filed challenging the constitutional validity of the Constitution Twelfth Amendment, 2005 and the Cross-Boundary Municipalities Laws and Related Matters Act, 23 of 2005; which, according to the applicants unlawfully demarcated Matatiele from KwaZulu-Natal (KZN) to the Eastern Cape (EC).

Ngcobo J, writing for the majority, ordered that the Eastern Cape (EC) and KwaZulu-Natal (KZN) legislature be joined and appear before Court to give evidence with regard to public participation in the procedure of enacting the Twelfth Amendment.³²⁵ Sections 74(8) and 118(1)(a) were to be specifically addressed at a hearing on 30 March 2006.

The constitutional issue before the Constitutional Court was whether the correct procedure was followed when the legislature sought to pass the Twelfth Constitutional Amendment that would in effect alter the provincial boundaries of KwaZulu-Natal and the Eastern Cape. In its finding the Constitutional Court held that:”

“[T]he KwaZulu-Natal legislature was required to approve that part of the Twelfth Amendment that transfers the area that previously formed Matatiele Local Municipality from the province of KwaZulu-Natal to the Eastern Cape. The Constitution contemplates that the approval in terms of section 74(8) will be given by a provincial legislature concerned after complying with the provisions of section 118(1)(a)”.³²⁶

The reading of section 118(1)(a) of the South African Constitution demands that the right to public participation must be adhered to during the law making process. Thus, from the above authorities and many other South African case laws, it is clear that the right to public participation in Parliament is deeply entrenched in the Constitution. It is respected and upheld. Every one’s view in the process is considered and factored into the legislative process.

³²⁴ *Matatiele Municipality and Others v. President of the Republic of South Africa and Others* 2006 ZACC 12, Matatiele 2.

³²⁵ *Matatiele Municipality and Others v. President of the Republic of South Africa and Others (1)* (CCT73/05) [2006] ZACC 2; 2006 (5) BCLR 622 (CC); 2006 (5) SA 47 (CC) (27 February 2006) <<http://www.saflii.org/za/cases/ZACC/2006/2.html>>

³²⁶ *ibid.*

Compared to Kenya, the Constitution of Kenya, 2010 also demands that the right to public participation in law making process be respected and upheld. However, this is not the case all the time, as the process exhibited when Parliament wants to pass a law in favour of the then Government, it does not involve public participation.

This was debated especially in the context of budget making in Kenya.³²⁷ For instance, Article 201 of the Constitution 2010, and Section 7(d) of the Public Finance Management Act, 2012 promote public participation in budget making, but this is yet to be realized fully.³²⁸

Most legislation in Kenya, in the past and other legal instruments emanating from Parliament and Government ministries were declared unconstitutional because of insufficient public participation. A good example was the Security Laws (Amendment Act),” 2014 that raised concerns on the constitutional freedoms and rights in the legislative process.³²⁹ Another example is the Kiambu County Finance Act, 2013, which the court nullified due to lack of public participation.³³⁰

4.3 Public Participation in the South African Parliament

The South African National legislature of has a clear cut procedure on how to incorporate views of the public in any legislation they make. Section 42 (3)³³¹ of the Constitution, states that Parliament is the main body that represents citizens under the Constitution.

The National Assembly thus provides for a for national discourse on governance and policy matters.³³² Section 42 (4) of the Constitution of South Africa, 1994³³³ outlines the role of the

³²⁷ David Mwere, ‘MPs faulted over Lack of Public Participation in Budget Making’ *Daily Nation* (Nairobi, 23 March 2021) <https://nation.africa/kenya/news/mps-faulted-over-lack-of-public-participation-in-budget-making-3333068> accessed 24 September 2021.

³²⁸ *ibid.*

³²⁹ *Coalition for Reform and Democracy (CORD) & 2 Others v. Republic of Kenya & 10; Others* [2015] eKLR

³³⁰ *Robert N. Gakuru & Others v. Governor Kiambu County & 3 Others* [2014] eKLR.

³³¹ Section 42 of the South African Constitution 1996 states “the National Assembly and the National Council of Provinces participate in the legislative process in the manner set out in the Constitution. The National Assembly is elected to represent the people and to ensure government by the people under the Constitution. It does this by choosing the President, by providing a national forum for public consideration of issues, by passing legislation and by scrutinizing and overseeing executive action. The National Council of Provinces (NCOP) represents the provinces to ensure that provincial interests are taken into account in the national sphere of government. It does this mainly by participating in the national legislative process and by providing a national forum for public consideration of issues affecting the provinces.”

³³² *ibid.*

³³³ ‘Parliamentary Monitoring Group’ <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/PP_Survey_Final_Report_2.pdf> accessed 6 July 2020.

National Council of Provinces (NCOP), in the discussion of public participation, as providing a national forum for public consideration of issues affecting the provinces.

Section 59 of the Constitution of South Africa, 1994 addresses public participation in Parliament including through House committees, and second, conduct its business in an open manner, and those of its committees, in public.

Also, section 72 (1), the NCOP also promotes public participation in its processes. including conducting its business .”

4.4 Procedure for Public Participation in in South African Parliament

“According to the South African Parliamentary Monitoring Group Report, public participation makes up one third of the salient functions of Parliament, the other two being oversight and passing legislation.

In South Africa, parliamentary committees are the ideal platform for participation by the public. In other words, public participation in the legislative process is carried out by the committees on behalf of the Parliament. This is because the smaller size of the committee narrows focus, and its multiparty composition assists with broader discussion.³³⁴

These smaller committees are able to reach out to as many people as possible and correct raw information. The citizens feel directly involved, as such, there is always meaningful engagement and a legislation that emanates from this kind of interaction is widely accepted.

On the other hand, Kenya lacks this kind of approach. In a country where poverty level is still high, where the number of citizens accessible to electronics and internets is still low, the method used to collect and engage citizen for the sole sake of legislation making is still inadequate. Indeed, courts in Kenya have equally pronounced themselves on the various forms of public participation and relevant”

For instance, in *Robert Gakuru* (2014) wherein the Court quoted the *Doctor’s for Life International* case which stated that:

³³⁴ Foster Mijiga, ‘Public participation in the legislation process: A summary of results from a nation-wide regional survey and a national conference conducted by the National Council and the National Democratic Institute between April and October 2000’ (2001) https://www.ndi.org/sites/default/files/1408_na_publicpart_093101_5.pdf accessed 6 July 2020.

“...it is the duty of the County Assembly in such circumstances to exhort its constituents to participate in the process of the enactment of such legislation by making use of as many fora as possible such as churches, mosques, temples, public baraza, national and vernacular broadcasting stations and other avenues where the public are known to converge to disseminate information with respect to the intended action....”³³⁵

What is the comparative procedure of ensuring public participation in South African constitutional democracy?

4.5 Procedure in achieving the Right to Public Participation in South Africa

“When a Bill is introduced to the National Assembly, it is sent to the relevant portfolio committee. The responsible committee would then advertise and invite written submissions from the public.³³⁶ The committee then also invites the public to make oral submissions on a Bill – public hearings.

Together the written and oral submissions form part of the constitutionally-obligatory process of public consultations between the legislature and interested parties. The committee is meant to consider all public comments, whether written or oral, when processing the Bill. The Kenyan Court of Appeal has argued before in *British American Tobacco Ltd v. Cabinet Secretary for the Ministry of Health & 5 Others* (2017) that:”

“public participation does not necessarily mean that the views given must prevail. It is sufficient that the views are taken into consideration together with any other factors in deciding the legislation to be enacted.”³³⁷

In this context, consultation is seen as “using an audience as a sounding board and eliciting opinions, suggestions, advice and recommendations about an issue before and after a decision is taken.”³³⁸

Committees also utilize spaces like workshops to invite members of the public to key topical issues.³³⁹ Following the public hearings, a summary of the submissions is presented to the committee by its researcher and, where it involves policy or legislation, the relevant department considers the public’s responses.³⁴⁰

³³⁵ *Robert N. Gakuru & Others v. Governor Kiambu County & 3 Others* [2014] eKLR.

³³⁶ *ibid.*

³³⁷ *British American Tobacco Ltd v. Cabinet Secretary for the Ministry of Health & 5 Others* [2017] eKLR

³³⁸ *ibid.*

³³⁹ *ibid.*

³⁴⁰ See the decision of the Constitutional Court of South Africa in *the matter between Land Access Movement of South Africa & 5 Others and Chairperson of the National Council of Provinces & 17 Others*, Case CCT 40/15.

“In its deliberations, the committee is to the public comments and department responses and, ideally, independently make the best decision for each point of contention in the policy or legislation. The public is supposed to be given more than two (2) weeks to prepare for submissions before submitting. This is to mean they take time to read and understand the intended legislation in question. But most of the time it is only those public members with an interest in the legislation that often respond to the issues raised.

In conclusion, there are four stages towards achieving effective Public Participation in South Africa. They include; First, informing the public.³⁴¹ Parliament cannot undertake public consultation, involvement and feedback without first providing information and education relevant to the context of the public participation opportunity under pursuit. In this context, the public is informed and properly educated in order to effectively participated in decision making.

Second, consulting the public.³⁴² This stage provides opportunity for public input in order to influence the relevant decision-making process. However, the public must first be informed before embarking on any consultative processes output. The public provided with information touching on the subject matter to be discussed. They then provide comments either individually or through group. The issue or the legislation in question is greatly discussed and before comments are given out.

Third, involving the public.³⁴³ This is a critical stage in the entire process of public participation. Through this, the public is included in the legislative process. In the end, they take pride in owning the legislation. Effective public involvement encourages two-way communication with the focus on consideration of public inputs, interests, issues and concerns.

Fourth, feedback to the public by the legislature.³⁴⁴ This stage provides opportunity for stakeholders to be informed about the status of issues and the plans intended as interventions to address the concerns identified.

On the other, in Kenya there is no requirement that the issues raised by members of the public during legislative process have to be responded to. It is quite unclear in Kenya whether issues

³⁴¹ ‘Parliament of South Africa website’ <https://www.parliament.gov.za/storage/app/media/Pages/2019/august/19-08-2019_ncop_planning_session/docs/Parliament_Public_Participation_Model.pdf> accessed 6 July 2020.

³⁴² *ibid.*

³⁴³ *ibid.*

³⁴⁴ *ibid.*

raised by members of the public are considered in the legislative process in Parliament that is the National Assembly and the Senate.

Of importance is that each and every suggestion made by members of the public is responded to. It is also critical to note that if legislation is given this kind of input and seriousness from the Public, its constitutionality and acceptance is greatly enhanced.

This issue is foreign to Kenya and more reasons why most legislation are passed without the knowledge of majority of Kenyans leading to a vast of them declared nullity by Kenya's Constitutional courts.

Citizen participation has therefore, been placed high on the South African national agenda, and democratic governance increasingly expects citizens to get involved in the process of sustainable democracy.³⁴⁵

4.6. Lessons on Public Participation from South Africa

“In South Africa, public participation is defined as the process by which Parliament and Provincial legislatures consult with the people and interested or affected individuals, organizations and Government entities before making a decision.”³⁴⁶

Provincial legislatures are charged with the responsibility to be the vanguard of the provincial citizens on issues of public governance and responsibilities that are to be carried by the provincial Government departments and related institutions.³⁴⁷ In the Kenyan context, this is bestowed upon the 47 County Assemblies as under Article 196 of the Constitution 2010.³⁴⁸

The responsibility in respect of the performance of legislative process in South Africa differs from province to province, as determined by the Constitution of South Africa, 1996, national

³⁴⁵ Liezel Lues, ‘Citizen participation as a contributor to sustainable democracy in South Africa’ (2014) <<https://journals.sagepub.com/doi/pdf/10.1177/0020852314533450>> accessed 6 July 2020.

³⁴⁶ ‘Legislative Sector; Concept defined’ <<file:///C:/Users/jgitiri/Desktop/MARWA/Thesis/SOUTH%20AFRICA/SOUTH%20AFRICA-CONSTITUTION.pdf>> accessed 6 July 2020.

³⁴⁷ ‘A publication of South African Legislative Sector’ Legislative Process, Induction Handbook for Members of Parliament and Provincial Legislatures’ <https://www.parliament.gov.za/storage/app/media/ProjectsAndEvents/2017-10-02_SALGA_Members_Induction_Programme/docs/Legislative_Process.pdf> accessed 29 July 2021.

³⁴⁸ See also the discussions under section 3.7.2 of Chapter 3, above on public participation under the County Government framework in Kenya.

legislation, and rules and orders of the provincial legislatures.³⁴⁹ This responsibility is realized through lawmaking, oversight and involvement of the citizens in the legislative responsibilities of the province.”

Public participation is geared towards promoting dialogue in a two-way mechanism to achieve broadly accepted decisions .³⁵⁰ Relatedly, section 42(3) of the Constitution of South Africa, 1996 to act in the public interests. It states:

“The National Assembly is elected to represent the people and to ensure government by the people under the Constitution.”

In other words, public participation in South Africa empowers the people to actively take part in their governance and political decision making.³⁵¹ Through public participation, they can air their opinions to Parliament and receive feedback from Parliament on the actions taken concerning their input in the legislative process.³⁵²

In Kenya much as public participation is well provided for in the Constitution in particular under Article 118 (1), the same is not as elaborate as it is in South Africa. For instance, while there is room for feedback in South Africa, there is none in Kenya. Much of Kenya’s public participation is limited to those who are able to access Internet or other electronics so they can make their contributions to Parliament. The risk is that a majority of the populace are not even aware of most legislations in Kenya.”

4.7 Public Participation in the United Kingdom

This section analyzes the concept and practice of public participation in the United Kingdom, as compared to Kenya.

4.7.1 History of Public Participation in the United Kingdom

In “the United Kingdom during the seventeenth and eighteenth century, public participation and governance were principally matters reserved for the political elite. This includes the

³⁴⁹ *ibid.*

³⁵⁰ *ibid.*

³⁵¹ See the case of *Doctors for Life International v. Speaker of the National Assembly* [2006] ZACC 11; 2006 (6) SA 416 (CC); 2006 (12) BCLR 1399 (CC).

³⁵² *ibid.*

incorporation of Wales into the United Kingdom where it was noted that majority of the citizens remained aloof of the centers of power, governance and public decision making.³⁵³

Active public participation in the UK can also be traced back to the *Skeffington Report* of 1969 which was the report on public participation. It concerned citizen involvement in planning. However, in the contemporary UK, there are still complaints that the impact of public participation in planning despite the 1969 report is not substantive.³⁵⁴

Alternatively, the Labour Government introduced “Compact” between 1997 to 2010 to enhance the place and role of citizen involvement in governance in the UK.

Some experts in the United Kingdom refer to public participation in the legislative process as consultation. “Consultation” is the term generally applied to the process by which a decision-maker seeks the views of the public, or a section of the public, on a proposal that may have a general impact, before it decides whether to implement that proposal.³⁵⁵

There is no general duty to consult in the United Kingdom unless there is a legitimate expectation of the same.³⁵⁶

4.7.2 Consultation in Parliament in the United Kingdom

“It’s important to note that generally, there is no duty to consult before introducing a Bill into Parliament in the UK.³⁵⁷ The Minister concerned is mostly asked to give oral evidence to the relevant House of Commons Departmental Select Committee during the pre-legislative scrutiny stage.

The Committee also requests for information on compatibility with the European Convention on Human Rights and an Impact Assessment. This is normally done in public. After the pre-

³⁵³ Gary Kass, ‘Recent developments in public participation in the United Kingdom’ (2000) 9 *TATuP-Zeitschrift für Technikfolgenabschätzung in Theorie und Praxis*, 20-28.

³⁵⁴ Skeffington Committee, ‘People and planning: Report of the committee on public participation in planning’ (The Skeffington Committee report) Routledge (2013).

³⁵⁵ Victoria Butler-Cole and Jonathan Auburn, ‘Consultation: Recent Cases and Issues’ (2018) http://www.39essex.com/docs/seminars/ja_vbc.pdf (accessed 17/2/2020).

³⁵⁶ Carl Gardner, ‘Consultation: Requirement and process’ https://www.lexisnexis.com/uk/lexispsl/publiclaw/document/413481/5F57-MBG1-DYY6-G15J-00000-00/Consultation_requirement_and_process?utm_source=psl_da_mkt&utm_medium=referral&utm_campaign=Consultation:%20requirement%20and%20process accessed 17 February 2020.

³⁵⁷ *Unison v. Secretary of State for Health* [2010] EWHC 2655.

legislative scrutiny, the relevant departments, on introduction of the Bill, publish the list of changes so as to inform the members of the public.

4.7.3 Public consultation on Bills in Parliament in the United Kingdom

As the Bill goes through the stages in Parliament, i.e. the first reading and second reading, the members of the public are not involved. During the committee stage, the relevant committee is able to take evidence from experts and interested groups from outside parliament.³⁵⁸ This is where consultation comes in.

The amendments proposed by the House of Commons are published daily and reprinted as a marshalled list of amendments for each day the committee discusses the Bill.³⁵⁹ One of the most notable successes of the UK Parliament is the speed at which it publishes and updates any amendments made to a Bill.” This enables the public to keep up to date with the law making processes.³⁶⁰

4.7.4 Code of Practice in the United Kingdom

The UK Cabinet Office’s Code of Practice sets out the approach the government ought to adopt when it decides to run a formal, written, public consultation exercise. This is to ensure that there is a common standard across government for public consultation. However, this code does not have legal force and any statutory mandatory requirements prevail.

The Code gives the following five (5) guidelines for the Government when it conducts public consultation:³⁶¹ First, to build a realistic timeframe for consultation, allowing plenty of time for each stage of the process. Second, to be clear as to who is being consulted, about what and for what specific purposes. Third, to ensure that the consultation document is as simple and concise as possible.

Fourth, to always distribute the documents as widely as possible, using electronic means but not to the exclusion of others. Fifth, to make sure that all responses are carefully and open-mindedly

³⁵⁸ ‘Parliament of the United Kingdom website’ <https://www.parliament.uk/about/how/laws/passage-bill/commons/coms-commons-committee-stage/> accessed 6 July 2020.

³⁵⁹ *ibid.*

³⁶⁰ *ibid.*

³⁶¹ Aditi Aparaita, ‘A Comparative Survey of Procedures for Public Participation in the lawmaking process-Report for the National Campaign for people’s right to Information (NCPRI)’ (2011) *University of Oxford*, https://www.law.ox.ac.uk/sites/files/oxlaw/1.comparative_survey_of_procedures_for_public_participation_in_law_making_process_-_report_for_national_campaign_for_peoples_right_to_information.pdf accessed 6 July 2020.

analyzed, and the results made widely available with an account of the views expressed and the reasons for decisions finally taken.

Kenya does not have a codified legislation on public participation. Instead, courts have gone ahead to set the standards for public participation including to what extent the people can be involved in the legislative process.

However, it is noteworthy that Kenyan courts have borrowed heavily from the South African jurisdiction when advising the legislative arm on public participation. Thus, decided cases in Kenya have borrowed some notions such as timely notification of the people and involving them in the legislative process and also giving back the people the feedback.”

4.8 How the United Kingdom facilitates public Participation

Public participation in the United Kingdom are conducted online mostly. This is done through publication of the information and posting in the relevant points for access to information.³⁶²

Furthermore, the people can leave their comments or air their concerns through online available channels. The Government also responds to the people via the same platform and also keep them informed of the ongoing activities with regards to the legislative process. These have been discussed below.

4.8.1 Publication and Access to Information in the United Kingdom

“Most of the public participations are done online in the United Kingdom. This is done through the *London Gazette*, which contains all recent notices on consultations. All publications done by the Government can be obtained from the relevant department’s website and also in Her Majesty’s Stationary Office.

On the other hand, Kenya has a similar approach in the Public Participation Bill 2019 at part 4 of the schedule.” It is provided that the responsible authority shall provide the information on Television Stations, information Communication Technology centres; websites; Community radio Stations; public meetings and newspapers. However, it should be appreciated that this is just in the Bill that is yet to be assented to by the President as such it remains as a draft with no legal consequence.

³⁶² Dave McKenna, ‘UK local Government and public participation: Using conjectures to explain the relationship’ (2011) 89 *Public Administration*, 1182-1200.

Parliament under its standing Orders, should facilitate citizen participation and consider their recommendations during the Committee reporting stage.³⁶³ The issue then is on how effective is the process of ensuring that all or a larger number is consulted particularly where the legislation in question is one that affects a larger population. Most of the time many Kenyans are not even aware of any legislation because of ineffectiveness of the authority charged with the mandate of ensuring that information is easily accessible to citizens.

The Code of Practice states different versions of consultation papers ought to be considered for example, a youth's version, a braille version, an audio version and an easy-read version.³⁶⁴

4.8.2 Online consultation in the United Kingdom (UK)

By visiting the relevant Department's website,³⁶⁵ the members of the public can be guided to read the consultation papers outlining the Government's proposals and then send their comments. For online consultations, however, the duty to respond to public comments is limited and this has been an area where reforms have been proposed to improve its efficiency.

4.9 Adjudicative Mechanisms for consultation on Bills

The requirements of consultation were upheld by the Supreme Court in *R v. Brent London Borough Council ex parte Gunning*³⁶⁶. The requirements are:

“First, that consultation must be at a time when proposals are still at a formative stage. Second, that the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response. Third... that adequate time must be given for consideration and response and finally fourth, that the product of consultation must be conscientiously taken into account in finalizing any statutory proposals.”³⁶⁷

The above decision sets standards that must be met by the United Kingdom's Government in ensuring that there is public participation. Thus, where Parliament intends to legislate, it must consult the people while the legislation is still at a formative stage. Furthermore, it must give cogent reasons backing its proposal and the reasons must be insightful enough to generate intelligent response from the public.

³⁶³ 'National Assembly Standing Orders' <http://www.parliament.go.ke/sites/default/files/2020-10/Standing_Orders_2013.pdf> accessed 29 July 2021.

³⁶⁴ *ibid.*

³⁶⁵ 'UK Govt website' www.direct.gov.uk accessed 6 July 2020.

³⁶⁶ *R. v. Brent London Borough Council ex parte Gunning* [1985] 84 LGR 168.

³⁶⁷ *Ibid.*

Moreover, Parliament must give the people enough time to respond to the considerations and the people's feedback must be taken into consideration when preparing the final document.³⁶⁸ In Kenya, courts have generally adopted the yardstick of "reasonable time" which is understood to generally mean a minimum of fourteen (14) days.³⁶⁹

As Lord Wilson put it in *R (Moseley) v. Haringey London Borough Council* [2014]:³⁷⁰

"A public authority's duty to consult those interested before taking a decision can arise in a variety of ways. Most commonly, as here, the duty is generated by statute. Not infrequently, however, it is generated by the duty cast by the common law upon a public authority to act fairly. The search for the demands of fairness in this context is often illumined by the doctrine of legitimate expectation; such was the source, for example, of its duty to consult the residents of a care home for the elderly before deciding whether to close it in *R v. Devon County Council, ex parte Baker*."³⁷¹

The decision by Lord Wilson illustrates that public participation in the United Kingdom can either be a statutory responsibility or as a legitimate expectation where it emanates from the common law. Therefore, there is no way Parliament can escape public participation as the same is protected by the statutes and the common law.

Lord Reed in the same case put it as follows:

"There is however no general common law duty to consult persons who may be affected by a measure before it is adopted. The reasons for the absence of such a duty were explained by Sedley LJ in *R (BPIO Action Ltd) v. Secretary of State for the Home Department*."³⁷²

The decision by Lords Reed warns that citizen participation is not a compulsory in the common law. Therefore, the people of the United Kingdom might fail to achieve the right to public participation should they rely on the common law alone. As applied to Kenya, any legislation that is not subjected to adequate public participation is unconstitutional.³⁷³

³⁶⁸ Legislative Sector South Africa, 'Public Participation Framework for the South African Legislative Sector' (2013) 10.

³⁶⁹ [Coalition for Reform and Democracy \(Cord\) & Another v. Republic of Kenya & Another, Petition Nos. 628 & 630 Of 2014](#). See also the TDF petition to National Assembly on Public Participation timelines in the business of Parliament. They proposed two (2) months as the time reasonable for affective public participation in legislative processes.

³⁷⁰ *R (Moseley) v. Haringey London Borough Council* UKSC 56, [2014] 1 WLR 3947.

³⁷¹ *ibid*.

³⁷² *ibid* [27].

³⁷³ See Arts. 10 (national values and principles) and Article 184(1)(c) of the Constitution 2010.

However, it was also stated in *R (Harrow Community Support Ltd) v. Secretary of State for Defence* [2012] EWHC 1921 that:

“29. A duty to consult does not arise in all circumstances. If this were so, the business of government would grind to a halt. There are four main circumstances where consultation will be, or may be, required. First, where there is a statutory duty to consult. Second, where there has been a promise to consult. Third, where there has been an established practice of consultation. Fourth, where, in exceptional cases, a failure to consult would lead to conspicuous unfairness. Absent these factors there will no obligation to consult.”³⁷⁴

On the issue of the kind of information given to citizens consulted, the Court in *R (Brompton & Harefield NHS Foundation Trust) v. Joint Committee of Primary Care Trusts* (2012),³⁷⁵ noted that such information should not be vague, and be present in a form that is easily comprehensible to the stakeholders to enable them respond effectively. This was also reiterated in the Kenyan case of *Robert Gakuru* (2017) where the Court of Appeal argued that:

“the bottom line is that public participation must include and be seen to include the dissemination of information, invitation to participate in the process and consultation on legislation.”³⁷⁶

In *R (Green) v. Gloucestershire CC* (2011),³⁷⁷ consultation of four (4) weeks including during Christmas and poor weather, was upheld as lawful. While arriving at the determination, Judge McKenna stated that there was no duty to consult in the first instance, no statutory minimum period and a large number of responses were provided.

In effect, the question of what is reasonable time and opportunity even in Kenya, has aroused debate. Some court decisions including the South African case by Justice Ngcobo in *Matatiele Municipality and Others v. President of the Republic of South Africa & Others* who held that:

“the nature of the legislation and its effect on the provinces undoubtedly plays a role in determining the degree of facilitation that is reasonable and the mechanisms that are most appropriate to achieve public involvement... what matters is that the legislature acted reasonably in the manner that it facilitated public involvement in the particular circumstances of a given case. The nature and the degree of public participation that is reasonable in a given case will depend on a number of factors...”³⁷⁸

These are some of the challenges faced by the Parliaments in Kenya, South Africa and the UK.

³⁷⁴ *R. (Harrow Community Support Ltd) v. Secretary of State for Defence* [2012] EWHC 1921.

³⁷⁵ *R. (Brompton & Harefield NHS Foundation Trust) v. Joint Committee of Primary Care Trusts* EWCA Civ 472, (2012) 126 BMLR 134, para 9.

³⁷⁶ *Kiambu County Government & 3 Others v. Robert Gakuru & Others* [2017] eKLR.

³⁷⁷ *R (Green) v. Gloucestershire CCEWHC* 2687 (Admin), [2012] Eq LR 225.

³⁷⁸ *Matatiele Municipality and Others v. President of the Republic of South Africa & Others* (2) (CCT73/05A) [2006] ZACC 12; 2007 (1) BCLR 47 (CC).

4.10 Challenges faced in the United Kingdom in implementation

There are numerous challenges facing implementation of public participation in the UK. First, inadequate time for effective participation. There have been reports that draft Bills were not published in adequate time. The Government gave a commitment to allow at least three months for pre-legislative scrutiny. There were also reports of delay in setting up joint committees on pre-legislative scrutiny and therefore delaying public consultation.³⁷⁹

4.11 Comparison between Consultation in the United Kingdom and Kenya

This chapter makes several findings in the comparison between the constitution, policy and practice of consultation in the United Kingdom (UK) and public participation in Kenya. At least three (3) are key.

“First, there is no general duty to consult in the UK while in Kenya while Article 118 of the Constitution of Kenya 2010 requires that before any statute is passed, there has to be public participation.

Second, consultation in the UK is much more developed and enhanced especially because of use of online consultation. The UK not only invites views and comments from the general members of the public but also gives a focus to representative groups, expert evidence and any other interested groups. This system is much more developed and efficient, unlike the Kenyan system.

Third, failure to conduct public participation in Kenya results in a statute being declared unconstitutional, void and invalid, unlike in the UK. The numerous nullification of legislations in Kenya is a continuous waste of public resources caused by avoided circumstances.”

4.12 Summary of Findings, Conclusion and Recommendations

This practice and implementation of public participation in the UK and South Africa revealed that both countries have a well put mechanism through which the countries engage the public in the legislative process. From the discussions above, it is clear that public participation is at the center of the democratic states. It is so imperative that it cannot just be ignored.

“The procedures of public participation in the UK and South Africa are a testimony that the public is a critical component of the Government. The two jurisdictions display a succinct example of participatory democracy. Constitutionalism is well developed and this is what Kenya

³⁷⁹ Vivien Lowndes, Lawrence Pratchett & Gerry Stoker, ‘Trends in public participation: Part 2–citizens’ perspectives’ (2001) 79 Public Administration.

must do in order to achieve the constitutional threshold as encapsulated in Article 118 of the Constitution.

This chapter draws three (3) major lessons from UK and South Africa. First, substantive public participation can be realized through the adoption of the South African four-stage model involving informing the public, consultation, citizen involvement and feedback.

Second, public participation can be implemented through enactment of an enabling legislation to give effect to the formal constitutional provisions like the UK Code of Practice. Implementation must also involve an enabling institutional framework that involves multi-sectoral practices.

Third, public participation in the UK and South Africa address local-context specific measures that best suits the relevant jurisdiction's unique situation. Hence, Chapter 5 of this thesis provides the findings, conclusions and recommendations of this study to promote effective implementation of public participation in Kenyan legislative processes.”

CHAPTER 5

SUMMARY OF FINDINGS, CONCLUSION AND RECOMMENDATIONS ON THE RIGHT TO PUBLIC PARTICIPATION IN THE LEGISLATIVE PROCESS IN KENYA

5.1 Introduction

This study focused on three (3) research objectives. “First, to examine and explore ways through which public participation in the legislative process can be implemented fully in Parliament as stipulated under Article 118 of the Constitution, 2010. “Second, to critically analyze the historical background of public participation in the legislative processes of Parliament in Kenya. Third, to evaluate the legal frameworks on public participation and their implementation in the legislative process in Parliament.

Fourth, to provide a comparative analysis of the right to public participation and its implementation in South Africa and the UK. Fifth, to make appropriate recommendations on the how the right to public participation in the legislative process can be effectively implemented in Kenya. These were specifically addressed in Chapters 2, 3 and 4 of the study.

The paper adopted a four-pronged typology of research questions. First, has Parliament effectively implemented the right to public participation in the legislative process under the Constitution of Kenya, 2010? Second, what is the historical background of public participation in the legislative processes of Parliament in Kenya? Third, what is the legal framework on the implementation of the right to public participation in the legislative process in Kenya? Fourth, how does the implementation of the right to public participation in the legislative process in Kenya compare to the practice in South Africa and the United Kingdom?”

5.2. Summary of Findings

From the discussions in Chapters 2, 3, and 4, this study made at least six (6) findings.

“First, the nature and extent of public participation is largely dependent on the political economy of Kenya. Second, the lack of effective implementation of public participation in Kenyan legislation making is largely attributed to the lack of clear legislations on public participation in the legislative process.

Moreover, the lack of effective implementation of public participation in legislative processes is a violation of the national values and principles under the Constitution 2010. The effect is the

declaration of at least 23 laws as unconstitutional by the High Court as null and void in 2020, including the Civil Procedure Rules, Order 22 rule 7(1).

Third, public participation in the legislative process in Kenya is formally anchored in the Constitution 2010, statutes and various policies. Kenya is also a party to international instruments that consider public participation as a democratic and a political right. However, the difference lies in the modality of implementation. Effective implementation of public participation in South Africa and the UK w provide best practices on promoting substantive public participation in legislative processes.

Public participation must also be substantive. Second, information must also be provided to the public as held in *Kiambu County Government & 3 Others v. Robert N. Gakuru & Others* (2017).

Fifth, the study finds that citizens must take part in the legislative process because of at least four (4) reasons. First, public participation in the legislative process is a constitutional right in the Constitution of Kenya, 2010. Second, involving the public in the legislative process enables the Government to evade potential conflicts that may arise between the people and the Government.

Third, people get to contribute to the process by giving ideas that will help the Government serve the people better. The involvement of the people in the legislative process improves the trust of the people in the Government as the same indicates transparency and accountability in the Government. Fourth, it offers acceptance and legitimacy of the laws passed by Parliament.

Sixth, apart from the weakness of the current legislative framework on public participation in the legislative process, this thesis argues that understanding Kenya's colonial and post-colonial history is key in proposing appropriate reforms and implementation of the right to public participation in Kenya.

Relatedly, the present constitutional, policy and administrative framework empowers citizens to participate in the legislative process. The only thing left for Kenya is the full implementation of right to public participation in the legal provisions of the House, which significantly deteriorated under the 12th Parliament. Thus, binding guidelines and policies on the same should be enacted.”

5.2 Recommendations on realizing the Right to Public participation in the Legislative Process in Kenya

“The overarching argument from the discussions in Chapters 2, 3 and 4 of this study above, is that substantive reforms are necessary to enhance the place of public participation in law making in Kenya as conceptualized under the Constitution 2010.

First, the study acknowledges that direct public participation of the people in legislative processes was entrenched in Kenya through Article 118 of the Constitution, 2010. However, the Government has failed to implement the provisions on public participation fully. Thus, it is imperative that Kenya borrows from other jurisdictions including South Africa and the UK, that have managed to fully implement the principle of public participation.

Second, that apart from borrowing the ideas of other nations, it is important that the people brainstorm on the best way to implement the law on public participation that best suits their situation. Therefore, this thesis makes the following recommendations on how to ensure effective implementation of the principle of public participation in the legislative process in Kenya:”

5.2.1. Short-Term Recommendations

Generally, this study finds that the implementation of public participation in legislative processes in Kenya have not been equitable.

5.2.1.1. Uphold equality in public participation

This study proposes that Parliament should uphold equality by ensuring that all interested persons are not discriminated against as under Article 27 of the Constitution 2010. This can be done by giving the individuals equal opportunities to be heard and that their opinions are considered and that their input influences the decision on the legislation.

This would give effect to the holding in *Kiai Mbaki & Others v. Gichuhi Macharia & Another* (2005) that:

“The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard.”

“Relatedly, equality should also be administered by ensuring that persons with disabilities receive the necessary aid to help them fathom the basics of the proposed legislation and that their inputs are interpreted to influence the decision regarding the legislation. This can be realized in

the short-term as a remedy to the lack of public participation on pending legislation, but the impact would be long-term.

5.2.1.2. Translation of Legislation into indigenous languages

The enacting authority should ensure that measures have been put in place to help translate the provisions of the legislation or other relevant questions into the language that the interested persons can understand. This will promote the participation of indigenous and semi-literate persons.

5.2.1.3. Relevant training for Parliamentary officers

Additionally, for effective public participation to suffice in the legislative organs, particularly in Parliament, it is paramount that the organs train their officers on the essence of public participation and how to conduct effective public participation. The training should enable the officers to understand the relevance of public participation, that is, why the people are consulted when making legislation.”

5.2.2. Medium-Term Recommendations

This study makes at least three (3) recommendations that can be realized in the medium-term.

5.2.2.1. Promoting Public Participation by Marginalized and Vulnerable Groups

From the findings above, public participation is a core element of Kenya and South Africa’s transformative constitutional charter which sought to ensure equality, non-discrimination and equal protection of the law. This calls for significant broad-based constitutional, policy and administrative reform going into the future for effective implementation.

Kenya can adopt the South African model where municipalities design mechanisms that facilitate the inclusion of disadvantaged or groups likely to be affected, in municipal decision-making processes. These include individuals living with disability and people who cannot easily defend their interests in society because of age, gender and socio-economic status or circumstances they are in.

As discussed under Chapter 2 and 3 above, inclusivity, equality, equity and non-discrimination are key elements of evaluating the substance of public participation in Kenya and Africa.

Just like in the South African model, concerned parties need to evaluate and appreciate the literacy levels of the specific interest groups of people consulted in Kenya. Literacy has the potential to determine the ability and depth of their participation in key decision making processes such as law making process.

Therefore, this study argues that an inclusive public participation exercise is a prerequisite to realizing the engagement of marginalized and vulnerable persons in law making processes in Kenya and Africa.

5.2.2.2. Adequate notice

One of the reasons for ineffective implementation is the limited timelines allowed for public input and consideration of various Bills. Therefore, the enacting authority should ensure that the targeted interested parties are given adequate notice to enable them to prepare their inputs for the legislation.

To maximize its reach to the targeted interested parties, the enacting authority needs to utilize the various means of advertisement in Kenya that are most likely to be used by the interested party as discussed by the Court in *Robert Gakuru* (2014) where it held thus:

“...it is the duty of the County Assembly in such circumstances to exhort its constituents to participate in the process of the enactment of such legislation by making use of as many fora as possible such as churches, mosques, temples, public baraza, national and vernacular broadcasting stations and other avenues where the public are known to converge to disseminate information with respect to the intended action...”

The enacting authority ought to use websites, television stations, radio stations, traditional media, information communication and technology centers among others. These are generally available to a majority of ordinary citizens. There should also be an avenue to give feedback to members of the public on whether their views were factored in or not and the reason for rejecting their inputs.”

5.2.2.3. Adoption of modern technology

Modern technology can help in enhancing proper and adequate implementation on the right to public participation in the legislative process since it is easier to reach the highest number of people and collect views on proposed legislation. For instance, viable alternatives include the internet and social media platforms since almost every home in Kenya can easily access the platforms using their devices.

This will ensure that stakeholder participation is actual and or “real and not illusory and ought not to be treated as a mere formality for the purpose of fulfillment of the Constitutional dictates” as held by the court in *Robert N. Gakuru & Others v. Governor Kiambu County & 3 Others* (2014).

The internet can enable the enacting authority to pass any relevant notifications to the public, which will reach interested persons. Thus, the enacting authority may send a softcopy of the proposed legislation pointing out the purpose of the legislation and what is required of them.

5.2.2.4. Review the Feedback process in Public Participation in Kenya

In order to achieve full implementation of the right to public participation in the legislative process there ought to be access to, and exchange of information to and from the people. According to the World Bank (2015), quality participation is achieved through an informed citizenry, representative spaces, and enhanced Government systems for sharing information, consulting citizens, and receiving feedback.

The use of various feedback mechanisms for the public is as useful as the development of legislation on public participation itself. This paper therefore recommends that use of interactive social media platforms, including, Facebook and Twitter, to get feedback from citizens on laws, policies, implementation of projects, and service delivery.

The people should be made aware of what happened to their input. Were they relevant or not? Why were their views not factored in? Is what was factored in necessary in their view, and such like responses are critical in governance.

Parliament should also ensure that there are channels through which the interested persons can ask a question regarding the proposed legislation. The authority should also ensure that the questions are responded to within a reasonable time frame.

5.2.3. Long-Term Recommendations

One of the key findings of this study is that the failure in implementation of public participation is due to the lack of a comprehensive legislation to enhance citizen participation in legislative processes. The Bill would provide a coordinated framework for effective public participation in Kenya, which is critical in promoting participatory democracy.

Also, the Act should provide clear definitions of what amounts to public participation. It should also provide guidelines for any authority that seeks to conduct public participation in the legislative process.”

5.2.3.1. Enactment of a Public Participation Act in Kenya

From the analysis of the national and international legal frameworks in Chapter 2 and 3 of this study, it is important that the Kenyan Parliament enacts a Public Participation Act to implement the right fully in legislative processes.

(a) Guiding Principles

“The proposed Act should be guided by at least nine (9) guiding constitutional provisions. First, to uphold public participation as an exercise of sovereignty of the people under Article 1 of the Constitution 2010. Second, as a national value and principle of governance under Arts. 10(1) and 10(2). Third, as a form of seeking and sharing information on legislation under Art. 33(1)(a). Fourth, to enable citizen access to information under Art. 35 and the Access to Information Act, 2016.

Fifth, to promote citizen participation in land and environmental governance under Art. 69(1)(d). Sixth, public enhancing public participation as a core constitutional mandate of Parliament under Art.118, and a key principle of devolution under Arts. 174(c) and (d). Seventh, to promote public participation in urban area and cities’ planning and management subject to Art. 184(1)(c).

Eighth, to promote public participation through transparency and openness in the legislative affairs of county assemblies under Art. 196. Ninth, to promote public participation as a core principle of public finance management under Art. 201(a) and a core value of public service under 232(1)(d) of the Constitution of Kenya 2010. These were discussed in Chapter 2 of this study above.

The recommended Public Participation Act should also include provisions that would direct officers of the enacting authority to act in good faith, uphold the integrity and fully abide by the provisions of Chapter Six of the Constitution of Kenya 2010 when conducting and implementing public participation in the legislative process. Thus, they should avoid any socio-economic and conflict of interest or bias when gathering the public’s views on the proposed legislation.

Further, to instill discipline amongst the people participating in the legislative process, the recommended Act should make provisions that instruct participants to be respectful, courteous and civil in the process of public participation. Relatedly, there should also be a provision on how the responsible officers can deal with participants who fail to follow the protocols.”

(b) Giving effect to the purpose of the Law

“The study acknowledges that no public participation legislation has been enacted in Kenya. This continues to denigrate the legitimacy of laws passed by Parliament and County Assemblies.

Hence, the proposed Act should lead the enacting authorities to consider issues such as the purpose of the law. This means legislation should be evaluated based on the likely impact of such legislation on the people. This will determine the level of public participation needed and the urgency of such legislation. It should also consider the number of the interested parties to different legislation and their capacity to access the necessary information regarding the legislation. This will promote legitimacy of laws enacted by Parliament and entrench a culture of implementation.”

(c) Role of institutions and institutional actors in Public participation

This study recommends that the Act should have provisions that allow the Minister responsible for public participation or the Attorney General (A-G), through Parliament, to make Regulations on how the National Assembly, the Senate and the County Assemblies can implement the Act whenever legislation is being processed.

“The Attorney-General’s role ought to be limited to drafting Government Bills, as the principal legal adviser to the National Government, as per Art. 156 of the Constitution 2010 and section 5(1) of the Office of the Attorney-General Act, 2012. This will avoid interference with the law making function of Parliament.

Relatedly, the Constitution 2010 encourages cooperation and independence vertically and horizontally among institutions and arms of Government. Thus, mutual cooperation and respect should guide the relationship that is the Executive (Attorney-General) and Parliament, as the principal law making organ.

Chapter 3 and Chapter 4 of this study argued that this would offer guidance to the legislative organs. For instance, the regulations may establish committees within the legislative organs that could ensure that public participation in the legislative process is carried out within the parameters set by the Act.

5.2.2 Promoting inter-Governmental relations in Kenya

This thesis recommends that the proposed Act discussed above should apply to both the national and the 47 County Governments. This is because the Constitution 2010 does not make public participation a national or a county government's requirements, but rather a national value and principle that must be adhered to by both levels of Government. Hence, the Act should clarify the fact that its application is fundamental during the enactment of national Acts of Parliament and County Government laws.

In view of the findings and conclusions above, Parliament must incorporate public involvement in the law making process for the validity of laws or legislation to be attained. Thus, parliamentarians should always have the interest of their constituents at heart when legislating, and there is no other person that can express their interests better than their constituents. Hence, it is best to indulge them in governance, which includes legislation making.”

5.2.3.2. Future Areas for Research

“From the discussions in Chapters 2, 3 and 4 above, indeed, there are other alternative strategies for address the lack of adequate public participation in Kenya, Africa and beyond, which are probably equally relevant. There is therefore need for more research in this area in consideration of the dynamic changes of Kenya's political economy.

This study focused on the lack of proper implementation as the main challenge against the full realization of the right to public participation in legislative processes in Kenya. Relatedly, there are other intersectional factors that have not been adequately addressed in this study. This includes the role of the Judiciary, County Assemblies, media and civil society organizations (CSOs) in promoting effective public participation.

There is also need to ensure that legislative Bills, guidelines and policies on public participation in the legislative process meet the reality on the ground. A viable area of research would be data analysis and research on the efficacy and impact of research of legislation that were subjected to substantive public participation in Kenya.

Additionally, the place of multi-agency collaboration and cooperation, and cross-institutional frameworks in ensuring substantive participation in the legislative process, has not been adequately addressed in this study, hence a proper area for research.”

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