



STRATHMORE LAW SCHOOL

PUBLIC PARTICIPATION IN KENYA: A STUDY ON THE  
EFFECTIVENESS OF CITIZEN PARTICIPATION IN  
CONSTITUTION AMENDMENTS BY POPULAR INITIATIVE.

Submitted in partial fulfilment of the requirements of the Bachelor of  
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Table of Contents	
<b>ACKNOWLEDGEMENT</b> .....	I
<b>DECLARATION</b> .....	II
<b>ABSTRACT</b> .....	III
<b>LIST OF ABBREVIATIONS</b> .....	IV
<b>LIST OF CASES</b> .....	V
American Cases .....	V
South African Cases .....	V
Kenyan Cases .....	V
<b>LIST OF LEGAL INSTRUMENTS</b> .....	VI
International instruments .....	VI
National instruments .....	VI
<b>CHAPTER 1</b> .....	1
<b>INTRODUCTION</b> .....	1
1.0 Background .....	1
1.1 Statement of the problem .....	5
1.2 Aims and Objectives .....	6
1.3 Research Questions .....	7
1.4 Hypothesis .....	7
1.5 Methodology .....	7
1.6 Justification .....	7
1.7 Scope and Limitation .....	8
1.8 Chapter Summary .....	8
<b>CHAPTER 2:</b> .....	10
<b>THEORETICAL FRAMEWORK</b> .....	10
2.0 Introduction .....	10
2.1.1 Direct Democracy .....	10
2.1.2 Criticism of the theory .....	13
2.1.3 Application of the theory to the paper .....	14
2.2 Conclusion .....	14

<b>CHAPTER 3</b> .....	14
<b>LEGISLATIVE FRAMEWORK FOR PUBLIC PARTICIPATION IN CONSTITUTION AMENDMENT</b> .....	14
3.0 Introduction .....	14
3.1.0 Basis for public participation in constitution amendments .....	15
3.1.1 Constitution of Kenya 2010.....	15
3.1.2 Application of public participation in constitutional amendments.....	16
3.1.3 Lack of proper laws on constitution amendment and referendum process .....	17
3.1.4 Constitutional bodies role in public participation in constitution amendment process.....	19
3.1.5 Effect of lack of public participation on the outcome of constitution amendment process.....	21
3.2.0 Proposed laws on public participation in constitution amendment process .....	22
3.2.1 Public participation bill .....	22
3.2.2 Public participation in Referendum bill.....	23
3.2.3 Uncertainties with the draft bills .....	24
3.3 Conclusion .....	25
<b>CHAPTER 4</b> .....	26
<b>COMPARATIVE STUDY</b> .....	26
4.0 Introduction .....	26
4.1.1 Legal framework for public participation in South Africa. ....	27
4.1.2 Constitution amendment process in South Africa .....	28
4.1.3 Judicial Decisions on Public Participation. ....	29
4.1.4 Relevance to the Kenyan case .....	30
4.2 Conclusion .....	30
<b>CHAPTER 5</b> .....	30
<b>CONCLUSION AND RECOMMENDATIONS</b> .....	30
5.0 Introduction .....	30
5.1 Findings and Conclusion of the study .....	31
5.2 Recommendations .....	32

<b>BIBLIOGRAPHY</b> .....	33
A) Books.....	33
B) Chapter in Books.....	34
C) Journals .....	34
D) Online journal.....	35
E) Institutional report .....	35
F) Online resources .....	35
G) Thesis .....	36

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## DECLARATION

I, **MWANGOME ALLAN MBURA**, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

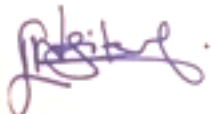


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This dissertation has been submitted for examination with my approval as University Supervisor.

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Lily Mburu

Date 5/7/2021

## **ABSTRACT**

Public participation is so fundamental that it is core among the national values and principles of governance, meaning it is binding upon all state organs, state officers, public officers. Key among the areas of applying public participation is when it comes to the area of constitution amendment. Constitution as the supreme law of the land, receives its power from the people; thus, requires a consensus when it comes to its amendment.

The main aim of this paper is analysing the levels of public of public participation during constitution amendment process. This will be done by looking at the present framework and proposed laws looking to implement public participation in constitution amendment process. The paper will look at the South African framework for public participation in constitution amendment process as a benchmark for Kenyan laws.

By finding that the public participation in Kenya's constitution amendment process is treated as a formality by the political class, the paper will recommend strict implementation of proper laws that ensure proper public participation in the constitution amendment process.

## **LIST OF ABBREVIATIONS**

SRC – Salaries and Remuneration Commission

BBI – Building Bridges Initiative

NCOP- National Council of Provinces

IEBC- Independent Electoral and Boundaries Commission

NASA- National Super Alliance

## LIST OF CASES

### American Cases

*Romer v Evans*

*In City of Eastlake v Forest City Enterprises*

### South African Cases

*Doctors for Life International vs. Speaker of the National Assembly and Others (2006) SAFLII*

*Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others (CCT 59/2004) [2005] ZACC.*

*King and others v The Attorney Fidelity Fund Board of Control (137/2008) (2009) ZASCA*

### Kenyan Cases

*REVEREND DR. TIMOTHY M. NJOYA AND 6 OTHERS v HONOURABLE ATTORNEY GENERAL AND ANOTHER [2004] eKLR*

*Republic v County Assembly of Kirinyaga and another Ex-parte Peter Kenda Muruiku & another (2019) eKLR*

*Republic v Independent Electoral Boundaries Commission Ex-parte National Super Alliance Kenya & 6 others (2017) eKLR*

*Speaker of the senate and another v Attorney-general & 4 others (2013) eKLR.*

*Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others (2015) eKLR*

*Robert N. Gakuru & others v Governor Kiambu County & 3 others (2013) eKLR*

*Okiya Omtatah and 3 others v Attorney General and 5 others (2013) eKLR*

*Commission for Interpretation of the Constitution v The National Assembly of Kenya and two others (2013) eKLR*

## **LIST OF LEGAL INSTRUMENTS**

### **International instruments**

Constitution of South Africa, 1996.

### **National instruments**

Constitution of Kenya, 2010.

Public Participation bill, 2018.

Referendum Bill, 2020.

# CHAPTER 1

## INTRODUCTION

### 1.0 Background

Kenya is a democratic society, clearly illustrated by the recognition of the right to sovereignty and the inalienable right to determine the form of governance and fully participating in the Constitution making process in the country.<sup>1</sup> The people can exercise their sovereign power either directly or indirectly through their democratically elected representatives.<sup>2</sup> In the description of democracy, Abraham Lincoln describes democracy as the government of the people, by the people, for the people, thereby placing emphasis on the place of the people in taking part in their day to day governance. Public participation is when citizens are actively taking part in the affairs of the government and community.<sup>3</sup> An amendment is any writing made or proposed as an improvement of some principal writing either by way of modification or alteration.<sup>4</sup> Thus a Constitution amendment is the legal process by which proposed changes are passed, either by way of parliament or referendum if they meet the conditions set out for proper amendment of the constitution.<sup>5</sup> This is because the special nature of the Constitution requires a special procedure to change it.

A referendum is a general vote by the electorate on a political question referred to the citizens from a direct question for determination, thereby creating an opportunity for the electorate to either accept or reject propositions having a bearing on the social contracts agreed in the Constitution.<sup>6</sup> A referendum is a form of direct participation by the citizens enabling them take part in decision making. For a referendum to take place it must affect issues directly relating to the supremacy of the Constitution, sovereignty, national values, term of presidency, functions of the national government and the object, principle and structure of devolved governments.<sup>7</sup>

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<sup>1</sup> Preamble, Constitution of Kenya, 2010.

<sup>2</sup> Article 1(2), Constitution of Kenya, 2010.

<sup>3</sup> Khobe O, Devolution of Government in Kenya as a means of engendering public participation in governance. University of Pretoria. Unpublished LLM thesis, 2012, 5.

<sup>4</sup> Black law dictionary, 5<sup>th</sup> edition.

<sup>5</sup> Article 255, Constitution of Kenya, 2010.

<sup>6</sup> Zoom seminar on the referendum laws, < [https://lawyershub-org.zoom.us/webinar/register/WN\\_VVqD7RRreS-6Ppz6uNfWFxg](https://lawyershub-org.zoom.us/webinar/register/WN_VVqD7RRreS-6Ppz6uNfWFxg) > accessed on 6TH July 2020.

<sup>7</sup> Article 255 (1), Constitution of Kenya, 2010.

Referendum by popular initiative is when citizens decide to review the constitution by way of general suggestion or draft bill,<sup>8</sup> the bill must be signed by at least 1 million registered voters.<sup>9</sup> The signatures are verified by the Independent Electoral and Boundary Commission before being forwarded for debate and voting in the county assemblies.<sup>10</sup> If the bill is approved by majority of county assemblies it is introduced in parliament for debate.<sup>11</sup> The bill is considered passed if it is passed by majority of both the national assembly and the senate. However, if the bill relates to matters as expressed under Article 255(1) it must be submitted to a referendum.<sup>12</sup> The Constitution further requires that parliament shall ensure proper public participation when it conducts its business.<sup>13</sup> The county assemblies should also ensure that they facilitate proper public participation in any business and legislative process they are involved in.<sup>14</sup>

The need for such stringent measure when it comes to Constitution amendments was so as to limit the unrestricted powers of the political class, who lacked transparency and used to take advantage of the weak constitutional reform process in order to further their interests.<sup>15</sup> The problem was clearly illustrated in the earlier discussions to change the post-colonial constitution at the time, many politicians did not take the Constitution of Kenya Review Commission process seriously because they assumed that they would have the last say through Parliament.<sup>16</sup> Kenya politics is all about capturing the state, then accumulating personal wealth. The key then is for politicians to build support by stimulating ethnic conflicts to solidify their base in their own ethnic community, and then look for suitable partners from other communities to ensure a majority vote. Public policy is the least of their concerns as they are only interested in benefiting themselves.<sup>17</sup> This led to conflicts on how best to involve the public in the constitution review process.

The Committee of experts tasked with coming up with a draft new constitution, guided by previous unconstitutional constitutional amendments foresaw the likely occasion where the political elite might want to further their own aims by or when seeking a constitutional

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<sup>8</sup> Article 257 (2), Constitution of Kenya, 2010.

<sup>9</sup> Article 257 (1), Constitution of Kenya, 2010.

<sup>10</sup> Article 257 (4), Constitution of Kenya, 2010.

<sup>11</sup> Article 257 (7), Constitution of Kenya, 2010.

<sup>12</sup> Article 257 (10), Constitution of Kenya, 2010.

<sup>13</sup> Article 118, Constitution of Kenya, 2010.

<sup>14</sup> Article 196, Constitution of Kenya, 2010.

<sup>15</sup> Ghai Y, Constitutional transitions and territorial cleavages; the Kenyan case, occasional paper series ,32.

<sup>16</sup> Ghai Y, Constitutional transitions and territorial cleavages; the Kenyan case.

<sup>17</sup> Ghai Y, Constitutional transitions and territorial cleavages; the Kenyan case.

amendment.<sup>18</sup> They set out to place some checks and balances on the unfettered constitution amendment power of the political class, in so doing placing in the citizens the express authority to determine what works and what needs to be changed in the Constitution. This led to the Constitution being very vocal about the express need for public participation when it comes to the amendment of the constitution.<sup>19</sup> Caution must be taken to ensure that there is no repeat of the previous attempts to review the repealed constitution for political elites' purposes which disadvantaged the country.<sup>20</sup>

Articles 255, 256 and 257 of the Constitution, on the amendment of the Constitution had not received much scrutiny prior to the move by the political class to agitate for an amendment of the constitution, in time for the next general election. The Punguza Mizigo bill, so coined in relation to the rising burden placed on the citizens by the wage bill of their elected leaders, the mantra being 'punda amechoka'<sup>21</sup>, was the first attempt at an amendment by popular initiative. The Punguza Mizigo bill flopped after failure to meet the constitutional threshold by failing to be approved by a majority of the 47 county assemblies as required by the constitution.<sup>22</sup> However the process was overshadowed with huge cases of being unconstitutional in that there was lack of proper public participation.<sup>23</sup> The county assembly hearings on the draft were conducted without any proper form of participation by the citizens. The Constitution envisaged that the public should be privy to any legislative business that is carried out by the county assembly and the same should be carried out in an open manner in public.<sup>24</sup>

In *Judicial review application no 271 of 2019, Republic V County Assembly of Kirinyaga and Speaker of the County Assembly of Kirinyaga Ex-parte Kenda Muriuki and another*, Third Way Alliance, the political party that sponsored the Punguza Mizigo bill, brought the case before the court on the basis that the county assembly hearings in Kirinyaga county did not achieve the proper standards needed for public participation. They argued that there had be

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<sup>18</sup> Ghai Y, Constitutional transitions and territorial cleavages; the Kenyan case.

<sup>19</sup> Article 257, Constitution of Kenya, 2010.

<sup>20</sup> *REVEREND DR. TIMOTHY M. NJOYA AND 6 OTHERS v HONOURABLE ATTORNEY GENERAL AND ANOTHER* [2004] eKLR.

<sup>21</sup> Alluding to the heavy financial burden placed on the citizens to pay the huge salaries for the numerous political positions created by the 2010 Constitution.

<sup>22</sup> Article 257(6), Constitution of Kenya, 2010.

<sup>23</sup> Mboga J, 'Punguza Mizigo Bill Flops after Failing to Meet Constitutional Threshold' 16<sup>th</sup> October 2019 <<https://www.standardmedia.co.ke/article/2001345742/punguza-mizigo-bill-flops-after-failing-to-meet-constitutional-threshold>> accessed 16 March 2020.

<sup>24</sup> Article 196, Constitution of Kenya, 2010.

no attempt by the county assembly to include the public or collect their views on the bill before they went ahead to discuss it and did not pass it. The court stated that the whole point of the process in the Constitution was to include the citizens in the Constitution amendment process. To determine this, one must look at the cumulative efforts at public participation at the end of the entire process. The lack of a clear set out law on how the process should be carried out has led each county assembly to come up with their own different laws on how to carry out the process, these laws are not only inadequate but also lack uniformity. The court in exercise of its judicial restraint recommends that it cannot determine which procedure should be used in the deliberation and approval of constitution amendment bills or make laws on behalf of the country. However, it directs parliament to come up with laws that ensure uniformity and set out the correct procedure to be used in line with constitutional requirements in Article 257. The court, in its obiter dictum, stated that the process did not meet the standards envisaged for proper public participation as envisaged in the Constitution.

Following the failure of the Punguza Mizigo Bill to be passed by most of the county assemblies in the country, there has been an increased shift by the latest political tactic to amend the 2010 Constitution. Building bridges Initiative, or BBI as it is commonly referred is another attempt by the political elite to try and amend the Constitution to best serve their interests. The aim of the BBI is to unite all Kenyans and to try and heal the wounds caused by the old election system and create a new system where the winner does not take all.<sup>25</sup> This would require a review on the powers of the president and the system of governance. However, to change the system, it would require a referendum under article 255(1) of the Constitution.<sup>26</sup>

The public participation bill, introduced in the senate last year, and the referendum bill, introduced in parliament this year, are an attempt by the national assembly to bring the constitutional requirements to life. The public participation bill is intended to provide proper framework that involves the citizens in important government decision making online with Article 10(1) of the Constitution. The referendum bill is intended to expound and address the procedural aspects demanded by article 257. The laws seem to be reactionary response to the clamour for constitution change by the political class. This paper will look at the suitability of the law in line with the constitutional requirements.

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<sup>25</sup>Ghai J, 'Why BBI won't solve Kenya's problem', Democracy in Africa, 6<sup>th</sup> Jan 2020 <<http://democracyinafrica.org/bbi-process-kenya/>> on 30<sup>th</sup> September 2020.

<sup>26</sup> Article 255(1), Constitution of Kenya, 2010.

## 1.1 Statement of the problem

The present 2010 Constitution was achieved after a lot of public participation by the committee of experts to ensure it reflected the view of the people, the attempts by the politicians to later on change it to suit their purposes were foiled by the special clauses put in to protect the Constitution against it.<sup>27</sup> Due to the high standards of public participation involved in coming with the Constitution, it is only right that any attempt to amend it would enlist the help of the citizens again. The constitution thus set out how it could be legitimately amended and even goes as far as to dictate that the principle of public participation is of uttermost importance in the process; coming up with the method of popular initiative.<sup>28</sup>

It is parliament's role to come up with legislation on how best to implement the ideas that have been set out in the Constitution. That is why there is special need for parliament to pass the referendum and public participation bill, which would come in to ensure that the spirit and letter of the Constitution in article 257 is achieved. The laws will clearly define the role different agencies and state bodies would play, how best to solve problems that are experienced in pursuit of public participation and cover up any legal loopholes that can be taken advantage of by the political class to sabotage the will of the people.

Failure to come up with the relevant laws required leads to a state of confusion between the bodies, such as county assemblies, parliament and the IEBC, tasked with effecting their mandates as per article 257. All these bodies start coming up with their own laws on how to handle the issue; leading to several laws lacking uniformity in a bid to solve the same issue. This is the case in the Kirinyaga county case where the court indicates it is not in its jurisdiction to come up with laws as this is the role of Parliament and they should form a concise law to deal with the procedural issues envisaged by the Constitution.<sup>29</sup>

The urgency and necessity for these laws to be passed comes from the increased push for Constitution review and amendment by the current political class. The failure to pass the Punguza Mizigo Bill is due to the lack of clear laws that enabled the Kirinyaga County Assembly failing to dutifully apply the principles of public participation. With the current push for the BBI, there is need to ensure that they set up effective mechanisms to enable the implementation of effective and adequate public participation in Constitution amendment

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<sup>27</sup> Ghai Y, Constitutional transitions and territorial cleavages; the Kenyan case.

<sup>28</sup> Article 257, Constitution of Kenya, 2010.

<sup>29</sup> *Republic V County Assembly of Kirinyaga and Speaker of the County Assembly of Kirinyaga Ex-parte Kenda Muriuki and another* (2019) eKLR.

process. These laws should be well thought and in place to guide the process for proper implementation of the constitutional principles.

The lack of necessary laws leads to the notion that public participation in making and passing of general legislation is just a procedural matter of fact with no serious emphasis placed on what the citizens really want, to ensure that the legislation passes as being 'constitutional'. This was clearly shown in the Kirinyaga county case where the process was not to the standards required. Proper public participation policies have not been formulated, clearly illustrated in the hearings for the Punguza Mizigo bill, this needs to change before the BBI hearings reach the county assembly stage.

## 1.2 Aims and Objectives.

The paper will analyse how the constitution is applied when the very core of its existence, the very nature of the document is called into question, the sovereignty of its people and their power to ensure the sovereignty of the Constitution is maintained by actively taking part in the amendment process.

It is from the above explanations that this paper will endeavour to analyse the proposed referendum and public participation bills, in line with the articles of the Constitution to determine how proper public participation is to be achieved when amending constitution by popular initiative.

This paper will help to establish how constitutional power is supposed to flow both horizontally and vertically to protect the need for citizens to take part in public participation as part of exercising their democracy when it comes to constitution amendment.

The objectives of the dissertations are as follows:

1. Identify problems in implementing public participation in Constitution amendment process by popular initiative in Kenya.
2. Analyse the adequacy of proposed laws on public participation and referendum.
3. Critique national assembly and county assemblies in the exercise of their function to implement the facilitation of public participation in constitution amendment process.
4. Analyse the effect of lack of proper public participation in the Constitution amendment process.

### 1.3 Research Questions

1. What are the problems when it comes implementation of public participation in Constitution amendment?
2. Are the proposed laws on public participation sufficient in dealing with the problems of implementation of public participation?
3. How should the legislative bodies properly facilitate public participation in Constitution amendment process?
4. What are the effects of lack of public participation on the process and outcome of constitutional amendment process?
5. How laws from more established jurisdictions might help us improve the implementation of public participation in Constitution amendment process?

### 1.4 Hypothesis

The research is based on the following hypotheses:

1. That for an amendment by popular initiative to be carried out there must be some minimum requirements on the form of public participation to be carried out.
2. Public participation is a base requirement for the amendment of the constitution to be declared constitutional.
3. Public participation is mandatory at all steps during the process of amendment by popular initiative.

### 1.5 Methodology

The study will use a doctrinal methodology. It will involve the review of relevant primary and secondary source. These sources will include statutes, case law, books, journals, caselaw, newspapers and online internet sources. These documents will be read and properly analysed in order to obtain the information on the study.

There will be a comparative study between Kenya and South Africa in chapter 4.

### 1.6 Justification

This study has an academic relevance as it serves to identify how far Kenya has progressed since the promulgation of the constitution, in terms of understanding the constitution both in word and in practice. This is important as it ensures that the national assembly and county assemblies clearly implement the correct procedures and laws as set out in the Constitution, on public participation in constitution amendment by popular initiative.

The paper is relevant in the current political push to amend the constitution as it provides a guide on how the process should be conducted in line with the Constitution.

### 1.7 Scope and Limitation

The paper will focus on the intersection between written law and the actual practice of the principle of public participation in constitutional amendment.

Emphasis will be placed on the legislative bodies and the laws they have proposed when it comes to public participation and referendum during constitution amendment.

Limitation in the paper is not to discuss the general public participation requirements in all legislation that are passed by the national and county governments. These are legislations that are not related to public participation in relation to constitution amendment processes.

### 1.8 Chapter Summary

The study will be structured as follows:

#### *Chapter 1-Introduction*

Introduces the subject of public participation. Gives a background of the study, the statement of the problem, research questions, objectives of the study and hypothesis used. It will serve as a roadmap of the paper's argument.

#### *Chapter 2 -Theoretical framework and methodology*

Deals with the different legal theories that can be applied regarding the issue of public participation and constitutional amendment processes. The chapter will look at the theory on direct democracy and how it relates to the issues of amendment by way of popular initiative and referendum.

It will attempt to outline the relevance of these theories to the principle of public participation especially in instances of constitution amendment process.

#### *Chapter 3 -Legislative framework on public participation in constitution amendment*

The chapter will thoroughly examine the proposed legislations of the public participation bill and the referendum bill that have yet to be passed in to law. How these laws seek to rectify the problems related to public participation in relation to Constitution amendment. The laws will be assessed to determine their relevance and suitability to solving the problem in question.

#### *Chapter 4- Comparative analysis*

Comparative study on countries such as South Africa with an evolved jurisdiction of public participation in constitutional Constitution review processes. It will be a relation and provide guide map on how best Kenya should implement relevant laws to better improve the process of public participation in constitution amendment process.

#### *Chapter 5- Recommendation and conclusion*

The chapter will be a summary of the findings of the research questions and hypothesis, giving recommendations on the finding.

## CHAPTER 2:

### THEORETICAL FRAMEWORK

#### 2.0 Introduction

The previous chapter gave a structural outline of this paper's argument. This chapter will give a theoretical principle and foundation of the arguments advanced in this paper. The theory that shall be considered is direct democracy.

#### 2.1.1 Direct Democracy

Aristotle in described the first principle of democracy as being the equal participation of all, in describing this he does not necessarily mean that each man has one vote when making changes ; but rather each man has an equal choice in what is chosen and to what end the choice will be achieved.<sup>30</sup> Aristotle in trying to describe how democracy works was in fact stating the very nature of direct participation in democratic societies or as he termed it participatory democracy. He later says that for true democracy to be implemented, the multiple, which is the citizens of the state, are allowed to be sovereign over themselves rather than being ruled by a few of the political elites.<sup>31</sup> This is also emphasised by Rousseau in *The Social Contract*, when describing a republic that participation is a requirement as all men are free and freedom is an end in itself.<sup>32</sup>

Direct democracy is a basic contract between representatives offering citizens the ability to have greater opportunities in a participatory democracy; it is a mechanism that allows for popular decisive vote that has a majoritarian characteristic.<sup>33</sup> This model of democracy has wider implications on the inclusion of citizens in decision making processes, it enables citizens to govern themselves as opposed to the political leaders chosen on their behalf.<sup>34</sup> The citizens do not actively govern themselves all the time, but they do so in particular occasions where basic policies are being decided and significant power distributed.<sup>35</sup> An example of such an occasion is during the amendment of key Constitution provisions which require the active participation of the citizens who will be affected by the changes proposed. Rousseau

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<sup>30</sup> Winthrop D, 'Aristotle on Participatory Democracy' 11(2), University of Chicago Press,1978.,155.

<sup>31</sup> Winthrop D, Aristotle in participatory democracy,159

<sup>32</sup> Winthrop D, Aristotle in participatory democracy,155

<sup>33</sup> Schiller T. Direct Democracy and Theories of Participatory Democracy—some observations, 2007 <[https://link.springer.com.ezproxy.library.strathmore.edu/chapter/10.1007/978-3-531-90579-2\\_4](https://link.springer.com.ezproxy.library.strathmore.edu/chapter/10.1007/978-3-531-90579-2_4) > accessed on 12<sup>th</sup> October 2020.

<sup>34</sup> Matsusaka J, 'Direct Democracy Works' ,19(2), The Journal of Economic Perspectives, 2005.187.

<sup>35</sup> Hanspeter K, Direct Democratic Choice: The Swiss Experience, Lexington Books, Estover Road UK, 2005, 4.

states that for the citizens of a republic to be truly sovereign, they must be able to come together to rule in a sovereign assembly. In a democracy, people must be able to make laws and administer them. His description of what an ideal republic is, can be termed as modern-day direct democracy.<sup>36</sup> The idea of democracy was to give the sovereignty and ability to the people to rule themselves, direct democracy by way of referendum is the closest ideology to the original envisioned concept of democracy; better than casting of votes every few years.

Direct democracy cares about what the people want, a majority vote tells us what the people need better than the representative process.<sup>37</sup> The statement the people have decided, best exemplifies this idea.<sup>38</sup> It is meant to give citizens a voice on questions of public policy, where by voting in the majority the people make decisions for the people as a whole.<sup>39</sup> This is because direct democracy allows for the citizens to express their majority preference without the interference and distortion of representative institutions.<sup>40</sup> The more direct the process, the clearer the people are likely to vote on issues. The use of directness ensures the people are heard as clearly as possible. The danger of diluting the voice of the people by legislative bodies misinterpreting their needs is done away with by the people directly voting.<sup>41</sup>

Justice Scalia in his dissent of *Romer v Evans*, emphasised that by use of the referendum process in the amendment of the Constitution, the question had been put directly to all the citizens of the state and was approved by the most democratic of procedures.<sup>42</sup> By use of the referendum and public participation process, the answer of legitimacy of the laws passed is answered.

The idea of direct democracy is achieved by enabling public participation which is carried on through institutions designed to facilitate ongoing civic participation while setting agendas, deliberations, legislation and policy implementation.<sup>43</sup> The idea is that the citizens have to be involved in every stage in the process of decision making to ensure that their true will and wishes are reflected in the final law that will be achieved through the process. The fast spread of direct democracy is increasing due to spread of communication technology which has

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<sup>36</sup> Dahh R, *Democracy and its Critics*, 1<sup>st</sup> ed, Yale University Press, New Haven London, 1989, 226.

<sup>37</sup> Sherman J, 'A Populist Critique of Direct Democracy', 112(2) *Harvard Law Review*, 1998, 440.

<sup>38</sup> Sherman J, 'A Populist Critique of Direct Democracy', 435

<sup>39</sup> Sherman J, 'A Populist Critique of Direct Democracy', 440

<sup>40</sup> Sherman J, 'A Populist Critique of Direct Democracy', 440

<sup>41</sup> Sherman J, 'A Populist Critique of Direct Democracy', 444

<sup>42</sup> Sherman J, 'A Populist Critique of Direct Democracy', 444.

<sup>43</sup> Hanspeter K, *Direct Democratic Choice*, 4

enabled the ordinary member of society to have precedented access to information, heightening their desire to actively take part in policy and decision making.<sup>44</sup>

The most ancient form of direct democracy can be traced to Athens by way of town hall, where people met at a place and time to make public decisions.<sup>45</sup> A modern form of direct participation is the use of initiatives or referendums.<sup>46</sup> An initiative is where a new law is proposed by ordinary citizens by collecting a predetermined number of signatures from eligible voters.<sup>47</sup> A referendum is a vote on a law by the general public already approved by the legislature and has a predetermined number of eligible votes required for it to pass.<sup>48</sup> These methods are clearly articulated in the 2010 Constitution in Article 257 and 255(2) respectively. This process enables ordinary citizens to take full control of the agenda and legislative measure is placed on the ballot directly by the legislature. The resolution could be non-binding to get sense of the public's opinion, or the Constitution may have a strict requirement that there must be a popular approval before a law goes through.<sup>49</sup>

In *City of Eastlake v Forest City Enterprises*, the court held that a referendum is not a delegation of power ;because under constitutional assumptions all power is derived from the people who can then delegate it to the representative institutions.<sup>50</sup> When creating these legislative institutions, the people can reserve for themselves the power to directly deal with matters that can ordinarily be assigned to the legislature.<sup>51</sup> This is due to the fact that indirect democracy is seen as a second rate form of popular sovereignty , with direct democracy enabling people to voice their concerns without risk of misinterpretation and dilution.<sup>52</sup>

When taking part in direct democracy, the majority rule is not only a necessity, but it must also be equally sufficient for the legal enactment of laws.<sup>53</sup> This means that the process to achieve the proper public participation in law making needs a majority decision for it to be approved however this majority has to be achieved according to the laws in place. For example, for a proposed amendment shall be approved by referendum if a simple majority of

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<sup>44</sup> Matsusaka J, 'Direct Democracy Works',186.

<sup>45</sup> Dahh A, Democracy and its critics,14.

<sup>46</sup> Matsusaka J, 'Direct Democracy Works',187.

<sup>47</sup> Matsusaka J, 'Direct Democracy Works',187.

<sup>48</sup> Matsusaka J, 'Direct Democracy Works',187.

<sup>49</sup> Matsusaka J, 'Direct Democracy Works',187.

<sup>50</sup> Sherman J, 'A Populist Critique of Direct Democracy,444.

<sup>51</sup> Sherman J, 'A Populist Critique of Direct Democracy, 444.

<sup>52</sup> Sherman J, 'A Populist Critique of Direct Democracy, 444.

<sup>53</sup> Dahh R, Democracy and its Critics,135.

voters support it.<sup>54</sup> However this majority should be made up of at least twenty per cent of the registered voters in each of at least half of the counties in the referendum.<sup>55</sup>

### 2.1.2 Criticism of the theory

The first criticism is from Rousseau who holds that for proper direct democracy to work it must be done in a small population like city states, as the system is not perfect and would require man to be godlike, a perfect being who wants the common good of all people and not himself alone.<sup>56</sup> This, however, is not a concern of this paper.

Schumpeter on the other hand believed that ordinary people are poorly informed, lack interest in matters of public affairs and are ill equipped for political participation and should only play a circumscribed role in public policy making. They should be allowed to influence it indirectly by choosing more superior minded people who get to make the choice on their behalf. Edmund Burke in his reflection of the French revolution prescribed that the participation of the people was due to the vastly simplified issue at hand.<sup>57</sup>

Plato suggested that in the republic only a minority of intelligent elites may be given the duty to be guardians of competent public policy, in most cases the elites were the ones suitable to govern. This is because the direct democracy would easily lead to cognitive incompetence, as it was easy for citizens to fall prey to manipulators leading public participation to be transformed from a tool of regular citizens to a tool of special interests.<sup>58</sup>

Direct democracy in the real world is affected by the lack of clear deliberations, voter ignorance, influence of money and special interest capture that undermine what would be the proper functioning of direct democracy.<sup>59</sup> The process is susceptible to powerful groups who have a vested interest who decide on the public policy, they can turn the process of public participation into a tool to court public support in a bid to further their own selfish aims.<sup>60</sup> This coupled with structural and procedural constraints makes it hard for direct democracy to be fully implemented.<sup>61</sup>

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<sup>54</sup> Article 255(2(b)), Constitution of Kenya, 2010.

<sup>55</sup> Article 255(2(a)), Constitution of Kenya, 2010.

<sup>56</sup> Dahh R, Democracy, and its Critics,226.

<sup>57</sup> Hanspeter K, Direct Democratic Choice,3.

<sup>58</sup> Hanspeter K, Direct Democratic Choice,4.

<sup>59</sup> Sherman J, 'A Populist Critique of Direct Democracy', 444.

<sup>60</sup> Alexander R, 'Direct Democracy as Necessary Evil? Perspectives from Interest Group Leaders' 90(1) International Social Science Review, 2005,1.

<sup>61</sup> Mukul Kumar, 'Perils of Participatory Democracy', 40(46) Economic and Political Weekly.2005, 4857.

Noting all the criticisms levelled against the theory, as to the suitability of the general public in taking part in the decision-making process; this paper will endeavour to try and look at structural and procedural policies to safeguard the inherent right of citizens to take active part in public participation.

### 2.1.3 Application of the theory to the paper

The theory of direct democracy enforces the belief that public participation is an important hallmark of any state that considers itself to be democratic. The theory sets out the importance of clear laws that need to be put in place to mitigate the problems related to the effective participation of the citizens in decision making. By applying this theory to this paper, I aim to further understand the role of the common citizens, the political elite and the different institutions mandated to effect proper and necessary public participation in popular initiative and referendum processes.

### 2.2 Conclusion

In conclusion, the chapter sets out the importance of proper public participation when conducting amendments by popular initiative and referendums. For this to happen there is necessity of clear and concise laws that have been set up in line with the constitutional requirements to actualise the proper outcome envisioned which is the true will and voice of the people.

## CHAPTER 3

### LEGISLATIVE FRAMEWORK FOR PUBLIC PARTICIPATION IN CONSTITUTION AMENDMENT

#### 3.0 Introduction

The second chapter considered the theories that will be the basis for this paper. It argued that for any state to be considered a democracy it must ensure citizens are involved in the decision-making processes of government; failure is an aversion against their sovereignty.

This chapter shall consider how public participation will be applied during constitution amendment, how the law has been constituted to enable public participation and the bodies

mandated in effecting public participation during constitution amendment. The process has some shortcomings that will be discussed in the chapter and how best to solve them.

### 3.1.0 Basis for public participation in constitution amendments

#### 3.1.1 Constitution of Kenya 2010

The 2010 was drafted with a view of redressing past wrongs, as a transformative constitution unlike other earlier conventional Constitutions of the earlier decades which sought after control and legitimisation of public power.<sup>62</sup> The goal of the 2010 Constitution is to institute social change, through values such as social justice, equality, devolution, human rights, rule of law, freedom and democracy.<sup>63</sup> A transformative constitution, is a long term project of constitutional enactment, interpretation and enforcement committed in a historical context with conducive political developments, whose aim is to transform a country's political and social institutions and power relationships in a democratic direction.<sup>64</sup>

A distinct feature of the constitution is the decentralisation of power to county governments, this move was to enable the devolve power to ensure the citizens are given the powers of self-governance and enhance the participation of people in decision making.<sup>65</sup> The public is privy to any legislative business that is carried out by the county assembly and the same should be carried out in an open manner in public.<sup>66</sup> The drafters of the Constitution in formulating the provisions for public participation were of the opinion that citizen participation in government decision making is essential to the proper functioning of a democratic system of governance.<sup>67</sup> They envisioned a system where the opinion of the people would be considered before any legislation was passed.<sup>68</sup> The requirement for proper public participation is of such a grave nature that failure to conduct proper public participation in public policy decisions renders the whole process unconstitutional and the law void.<sup>69</sup> The Kenyan courts in *Republic v Independent Electoral boundaries Commission ex parte National Super Alliance Kenya & 6*

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<sup>62</sup> *Speaker of the senate and another v Attorney-general & 4 others* (2013) eKLR.

<sup>63</sup> Eric K, Charles F, 'Transformative Constitutionalism and the Adjudication of Constitutional Rights in Africa' 17 African Human Rights Law Journal 2017,340.

<sup>64</sup> Klare E, 'Legal Culture and Transformative Constitutionalism' South African Journal on Human Rights,14,1998, 146.

<sup>65</sup> Article 174, Constitution of Kenya, 2010.

<sup>66</sup> Musyoka R, 'Model Policy Framework for Public Participation in County Government' Constitution and Reform Education Consortium, 2014, 12.

<sup>67</sup> National assembly, Factsheet 27, public participation in the legislative process.1

<sup>68</sup> Mugambi L, 'Popular Initiatives to Amend Kenya's Constitution: A Misdiagnosis of the Problem?' Constitution, 26 October 2018\_ <<https://constitutionnet>> accessed 22 March 2020.

<sup>69</sup> *Doctors for Life International vs. Speaker of the National Assembly and Others* (2006) SAFLII

*others*,<sup>70</sup> held that it was not intended when passing the 2010 constitution that public participation was just a superfluous process, they intended the provision should be enforced and implemented. Proper public participation policies during constitution amendment have not been formulated as illustrated in the hearings for the Punguza Mizigo bill.<sup>71</sup>

The drafters of the Constitution guided by previous constitution amendments foresaw the probability that politicians might further their own aims by seeking a constitution amendment, thus they placed some checks and balances on this power, in so doing placing in the citizens the express authority to determine what works and what needs to be changed in the Constitution especially in factors essential to the proper working of the constitution.<sup>72</sup> This led to the Constitution being very vocal about the express need for public participation when it comes to the amendment of the constitution.<sup>73</sup> The drafters understood that public participation is a necessary part of any modern-day society around the world. It is the most practical definition of democracy as explained by Abraham Lincoln that it is a government of the people by the people for the people. The special characteristic of a constitution requires there to be a special procedure to change it, thus by its very nature the document itself may outlaw some kinds of amendment.<sup>74</sup>

The recent push to amend the constitution despite it not being fully implemented is a clear attempt by the politicians to undermine the current constitution in favour of one that benefits them, revealing the problem does not lie with the Constitution but the people in charge of implementing it.<sup>75</sup>

### 3.1.2 Application of public participation in constitutional amendments

The ultimate measure of a constitution is how it balances the principle of entrenchment<sup>76</sup> and change, this power to amend ensures that the constitution withstands the test of time and can adopt to the changing times and status of the citizens it ought to protect.<sup>77</sup>

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<sup>70</sup> (2017) eKLR.

<sup>71</sup> *Republic v County Assembly of Kirinyaga and another Ex-parte Peter Kenda Muruiku & another* (2019) eKLR.

<sup>72</sup> Article 255 (1), Constitution of Kenya, 2010.

<sup>73</sup> Article 257, Constitution of Kenya, 2010.

<sup>74</sup> Walter F, *Constitutions, 'constitutionalism and democracy,'* in Greenberg G, Stanley N, Steven C, *Constitutionalism and Democracy, transitions in the contemporary world*, Oxford university press (US), 1988,13.

<sup>75</sup> Mugambi L, 'Popular Initiatives to Amend Kenya's Constitution.'

<sup>76</sup> Entrenchment works by use of a super majoritarian model which requires a specific number of votes unlike normal laws which only require a simple majority by use of a two-pronged test, inter-temporal and counter

A country's constitution is regarded as receiving its superiority and normative status bottom - up, derived from the political will of the people to act as a constitutional authority, through which the people manifest themselves as a political and social unit.<sup>78</sup> This means that the real power lies in the people any act by government should be construed as an instrument for majority number of constituents.<sup>79</sup>

The constitution has explicit methods that should be observed in case it has to be changed, these methods determine the means for any fundamental alteration and requires total compliance.<sup>80</sup> When trying to understand the purpose of a principle, the intention of the drafters should be considered the written and unwritten.<sup>81</sup>

Certain principles must bind anyone who has the amendment power, so any provision in violation of this principle is declared void.<sup>82</sup> An amendment must modify the system without altering the fundamental nature and must operate in the theoretical parameters of the constitution.<sup>83</sup> They must be present a constituent ingredient to foster an environment with proper intellectual discussions and opinions that is vital for democracy.<sup>84</sup> However, there are some instances that make the participation of citizens hard.

### 3.1.3 Lack of proper laws on constitution amendment and referendum process

The Kenyan constitution provides for different procedures for amendment of ordinary legislation and more robust constitutional amendments, in addition to usage and interpretation of statutes.<sup>85</sup> Though there are substantive limits to ensure valid constitutional change whereby if the documents text is authoritative and specifies limits, they should be observed

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majoritarian constructs. Intertemporal ensures that future generations who will be under the constitution's authority can also come into the discussion, while counter majoritarian prevents a simple majority from changing the constitution.

<sup>77</sup> Roznai y, 'Towards A Theory of Constitutional Unamendability: On the Nature and Scope of the Constitutional Amendment Powers', Oxford University Press, Oxford ,2017\_ <<http://juspoliticum.com/article/1183.html>> accessed 21 August 2020.

<sup>78</sup> Roznai y, 'Towards A Theory of Constitutional Unamendability.

<sup>79</sup> Walter F, 'Constitutions, 'constitutionalism and democracy', 6.

<sup>80</sup> Okoth O, 'Constitutions without constitutionalism, reflection on and African paradox' in Greenberg G, Stanley N, Steven C, *Constitutionalism and Democracy, transitions in the contemporary world*, Oxford university press (US), 1988, 67.

<sup>81</sup> Walter F, 'Constitutions, 'constitutionalism and democracy', 11.

<sup>82</sup> Walter F, 'Constitutions, 'constitutionalism and democracy', 13

<sup>83</sup> Eoin D, 'Translating popular sovereignty as unfettered Constitutional amendability ', *European Constitutional Review*, 15 (4), 2019, 622.

<sup>84</sup> Walter F, 'Constitutions, 'constitutionalism and democracy', 5.

<sup>85</sup> Walter F, *Constitutions, 'constitutionalism and democracy*, 14.

and any change is to the specifications required in those terms.<sup>86</sup> This is because the constitution establishes its sovereignty through the sovereignty clause as having flowed from the citizens of the republic.<sup>87</sup>

This nature of the document outlaws' amendments which are arrived at without the people's participation. This is a measure of a constitution's entrenchment powers thus ensuring it stand the test of time.<sup>88</sup> Constitutional amendments and referendums ought to be different from legislative amendments. This is derived from Kelsen's grund norm principle that ordinary and higher laws can be distinguished by the ability of the latter to offer a legally legitimate process for the creation and amendment of the former, this enables us to identify the validity of constitutional and lower order rule making.<sup>89</sup>

The legislative law-making is for ordinary lower order legislation, politicians practise indirect representative democracy to make laws and express them. At the constitutional level, the institutions of the constitution, first order laws, come into play to give the people a say in how their constitution provisions and principles should be amended.<sup>90</sup>

By their nature, the issues requiring of a constitution to be amended require wide spread dialogue between the political class, civil societies and the citizens so as to come to a political consensus on the best way forward and how best to reflect the people's views and interests in any amendment going forward.<sup>91</sup> Given the people driven approach adapted in coming up with the new constitution any less public participation will be an injustice to the civic right of the peoples in practising their sovereignty. Special rules should be formulated establishing, guidelines, timeframes and duties of different legislative and constitutional bodies in ensuring that people have access to information and their views are heard.<sup>92</sup>

Due to lack of laws on public participation the onus has been on the Courts to decide how the process should be conducted, they have fallen short of declaring how much public participation is enough to be legally binding. They insist the people should have adequate time to have their views heard, their view should be taken in consideration when making any

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<sup>86</sup>Walter F, Constitutions, 'constitutionalism and democracy, 13.

<sup>87</sup> Article 1, Constitution of Kenya, 2020.

<sup>88</sup> Roznai Y, 'Towards A Theory of Constitutional Unamendability

<sup>89</sup> Tierney S, Constitutional referendum, theoretical inquiry, Modern Law Review, 72(3),2009, 362.

<sup>90</sup> Tierney S, Constitutional referendum, theoretical inquiry, 367.

<sup>91</sup>Waikwa Wanyoike, 'Why It Is Highly Unlikely That the Constitution Can Be Amended Before 2022 ',The Elephant', 24<sup>th</sup> July 2020 \_<<https://www.theelephant.info/features/2020/07/24/>> accessed 7 August 2020.

<sup>92</sup> Wanyoike W, Ghai J 'There Are Problems with the Referendum Bill' The Elephant, 06 June 2020 \_<<https://www.the-star.co.ke/siasa/2020-06-06-/>> accessed 6 October 2020.

decision and the people have the right to access information and form association to help in discussing and participating in law making.<sup>93</sup> *In the Matter of Mui Coal Basin local Community*<sup>94</sup> the court set out the principles to determine if public participation has been reached; agency must provide a programme for public participation taking into account quantity and quality of participants, any mechanism may be used provided it is effective, programme must ensure access to and dissemination of information, process should be inclusive and diverse with the views of those most affected taken into account, does not impose duty to take the views as dispositive and the process is meant to enrich views of office holders and not usurp their role.<sup>95</sup>

The main hinderance to proper public participation in constitution amendment has been lack of political goodwill, the politicians have used the lack of clear public participation rules to aid them to change the constitution for their benefit.<sup>96</sup> By use of the political alliances to stifle any amendment that they do not consider to be in their interests without involving the public, this was the case in the Punguza Mizigo debates in the county assembly.<sup>97</sup> If they carry out assemblies for public participation, the meetings are open to a few members of the public in a bid to pass the constitutionality test, this was the case in the carrying out of BBI meetings in the counties when collecting views.<sup>98</sup> The politicians had been traversing the country rallying to inform the public of the issues in the BBI, this did not enable the people to give proper feedback to their issues. There is thus need for the control of the politicians' power in the constitution amendment process.

#### 3.1.4 Constitutional bodies role in public participation in constitution amendment process.

Legislative bodies form the regulation that will apply during the citizen participation phase of law-making processes. However, politicians control the laws to be used in constitution amendment process, even in cases of independent institutions that ensure citizens have their

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<sup>93</sup> Waikwa W, 'Why It Is Highly Unlikely That the Constitution Can Be Amended Before 2022

<sup>94</sup> *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others* (2015) eKLR

<sup>95</sup> Muhia L, Nganyi S, 'A critique of the public participation bill-A case study of the Al Gurhair Case', 10 February 2020 <<https://wamaeallen.com/a-critique-of-the-public-participation-bill-a-case-study-of-the-al-gurhair-case/>> accessed on 20<sup>th</sup> December 2020.

<sup>96</sup> Okoth O, 'Constitutions without constitutionalism, 76.

<sup>97</sup> *Republic v County Assembly of Kirinyaga and another Ex-parte Peter Kenda Muruiku & another* (2019) eKLR.

<sup>98</sup> Akoko A, 'Building Bridges or Walls? BBI Charades Masquerading as 'Public Consultations'', The Elephant, 18<sup>th</sup> July 2019 <<https://www.theelephant.info/features/2019/07/18/building-bridges-or-walls-bbi-charades-masquerading-as-public-consultations/>> accessed on 10<sup>th</sup> October 2020.

voices heard they are subject to legislative laws. An example is the IEBC is tasked to verify signatures in the popular initiative bill however they have no right to infer how collection of the signatures was carried out. There is thus need for an institution to keep the political power in check.

The judiciary is tasked with ensuring that in any attempt by the political class to change the constitution the public is adequately involved.<sup>99</sup> In *Robert N. Gakuru & others v Governor Kiambu County & 3 others*, the court held that citizen participation should not be treated as an illusory formality for the purpose of passing constitutionality clause and must not be equated to consultation.<sup>100</sup>

Judiciary has an important role to perform in the constitution amendment process by ensuring that rules are followed and any violators are punished, arbitrate disputes and ensure a smooth transition in case of a successful referendum.<sup>101</sup> Failure by the judicial organs to nurture and protect the constitution has led to many unconstitutional changes in the past, this has led the political class to label constitutions as per the regime in power and as such they can be changed as regularly as the regimes themselves change.<sup>102</sup>

Judicial organs gain their power from the constitution which protects its independence from governmental interference, they have no power to control the process that establish the laws for constitution amendment due to separation of powers. This is however an advantage when it comes to performing its purpose of checks and balances as a guardian of the spirit of constitutionalism, which dictates the supremacy of the constitution and any powers conferred on any governmental bodies is exercised as consistent with principles in the constitution.<sup>103</sup> This would explain the tendency of political elites stifling the independence of the judiciary and its officers in order to force through their unconstitutional amendments.<sup>104</sup> By placing the power to declare any amendment process that leaves out the citizens as unconstitutional ensures that the political class have an initiative to involve the public in all steps during constitutional amendment.

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<sup>99</sup> Wairoto J, 'Public Participation and the Public Participation Bill, 2018', 20<sup>th</sup> October 2019 <<https://mwc.legal/bill/>> accessed 30 December 2020.

<sup>100</sup> *Robert N. Gakuru & others v Governor Kiambu County & 3 others* (2013) eKLR.

<sup>101</sup> Wachira M, 'How drafters of 2010 Constitution ensured MPs won't abuse it for political expediency.

'27<sup>th</sup> March 2015 <<https://nation.africa/kenya/-1079846>> accessed 12 September 2020.

<sup>102</sup> Juma L, Okpaluba C, *Judicial Intervention in Kenya's Constitutional Review Process*, 11(2), Washington University Global Studies Law Review, 2012,288.

<sup>103</sup> Juma L, Okpaluba C, *Judicial Intervention in Kenya's Constitutional Review Process*, 289.

<sup>104</sup> Wachira M, 'How drafters of 2010 Constitution ensured MPs won't abuse it for political expediency.

### 3.1.5 Effect of lack of public participation on the outcome of constitution amendment process.

The political class cannot decide to change a constitution when the citizens whom it will affect have no idea of what is involved in the amendments, they should know the implications of any amendment and have their views heard. Therefore, all possible avenues to educate the public on the proposed amendments should be taken, failure will lead to the constitution amendments to be declared as being unconstitutional.<sup>105</sup>

For an amendment to be considered unconstitutional, it should affect the basic structure, substantive content and process that the constitution has provided for its amendment.<sup>106</sup> Basic structure includes the national values and principles of governance, where a constitution has placed specific procedure or its amendment, the consequences of not complying with the procedure results in any amendment being an unconstitutional constitution amendment.<sup>107</sup> It was held in a dispute between SRC and the national assembly, any attempt to amend the constitution which would interfere with its basic structure or internal coherence would be invalidated.<sup>108</sup> The members of the national assembly in contravention of the constitution had vested in themselves the power to determine their own salaries, a duty that was expressly given to the SRC by the constitution.<sup>109</sup> In deciding the matter, the court found that it has discretion to interrogate the reasoning behind any amendment proposed and to invalidate constitution amendments that are being pushed for selfish political convenience.<sup>110</sup> The court in carrying out this duty should ensure that it in no way trespasses on the legislatures role of rulemaking.<sup>111</sup>

The legislature should therefore come up with laws to enable the proper participation of citizens in constitution amendment process, the public participation bill and referendum bill are some of the laws intended to regulate the public participation in constitution amendment process.

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<sup>105</sup> 'Citizen Participation in the BBI Process' 5<sup>th</sup> December 2019 <<https://www.mzalendo.com/blog/2019/12/05/>> accessed 16 March 2020.

<sup>106</sup> Eoin D, Translating popular sovereignty as unfettered Constitutional amendability, 623.

<sup>107</sup> Jaclyn L Neo, 'A Contextual Approach to Unconstitutional Constitutional Amendments: Judicial Power and the Basic Structure Doctrine in Malaysia' Asian Journal of Comparative Law 15(69) 2020,70.

<sup>108</sup> *Okiya Omtatah and 3 others v Attorney General and 5 others* (2013) eKLR

<sup>109</sup> *Okiya Omtatah and 3 others v Attorney General and 5 others* (2013) eKLR

<sup>110</sup> Waikwa W, 'Why It Is Highly Unlikely That the Constitution Can Be Amended Before 2022

<sup>111</sup> *Commission for Interpretation of the Constitution v The National Assembly of Kenya and two others* (2013) eKLR

### 3.2.0 Proposed laws on public participation in constitution amendment process

#### 3.2.1 Public participation bill

The bill intends to set guidelines on how public participation would be carried out in government processes. It aims to provide solutions to issues that inhibit the public participation process in Kenya; this will ensure proper civil participation during the constitution amendment push.

Application of public participation would be informed by the following principles: affected citizens have the right to be consulted and take part in the decision making, provision for effective mechanisms for public involvement to any party likely to be affected, participants have equitable access to information so as to take meaningful part in the process, public views should be considered, development of proper feedback procedures and adherence to national values.<sup>112</sup>

The factors to be considered before conducting public participation shall depend on the: purpose of the exercise, level of participation needed, urgency of the matter, the number and circumstances of the intended parties affected and take into consideration the ability of participants to access the necessary information and venue.<sup>113</sup>

The draft bill demarcates government entities and organs in charge of developing guidelines for public participation, these include: parliament through relevant committees in each house, the judiciary, independent commissions and offices, government ministries, county assemblies.<sup>114</sup> The duty of giving adequate notice to the public to give input on issues requiring proper participation rests on the relevant institution obligated to implement it in decision making.<sup>115</sup>

The relevant authorities shall establish mechanisms to enable the widest reach to the citizens, by use of; television stations, information communication, technology centres, websites, community radio stations, public meetings and any traditional media.<sup>116</sup> To ensure the public receives all relevant information for active participation. The authorities shall also publish and distribute all relevant documents for consideration as widely as possible in a form and

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<sup>112</sup> Section 4, Public Participation bill, 2018

<sup>113</sup> Section 3 of the schedule, Public Participation bill, 2018

<sup>114</sup> Section 2 of the schedule, Public Participation bill, 2018

<sup>115</sup> Section 4 of the schedule, Public Participation bill, 2018

<sup>116</sup> Section 4(2) of the schedule, Public Participation bill, 2018

language that can be used by the public.<sup>117</sup> The public shall have interpreters for the participants not conversant with the national languages.<sup>118</sup>

The relevant authority must conduct the entire process with credibility and integrity to ensure the public has faith in the process, with any conduct being professional, courteous, respectful and civil.<sup>119</sup> Any person may request for this information in relation to an issue under consideration subject to the laws under article 35 of the Constitution of Kenya on access to information.<sup>120</sup> Under section 13 any person aggrieved by a decision of a state organ may petition a public office of state organ to review the decision, this would be appropriate especially for unconstitutional constitution amendments.

### 3.2.2 Public participation in Referendum bill

The aim is to explain how the constitutional provisions during a referendum process should be implemented. The bill institutes timeframes within which the IEBC shall verify that the initiative has been supported by at least a million registered voters, within three months after submission of signatures to the electoral body.<sup>121</sup> The procedure and regulation used to govern during the signature verification period shall be made by the IEBC. The IEBC may draft the bill to make sure it conforms with the constitution in line with article 257 and the format and style as prescribed in the parliament standing orders without altering the substantive nature of the bill.<sup>122</sup> Upon receiving the bill from the IEBC, county assemblies shall have a period of 90 days to send a copy of the draft bill to the speakers of the respective houses of parliament if it has been approved after debating.<sup>123</sup>

In the county assemblies, upon receipt of the bill a notice shall be placed in the gazette and two newspapers of national newspapers.<sup>124</sup> The notice shall contain a summary of the proposed amendments, timeline for submission of views and timelines for consideration and debate of the bill by the county assembly.<sup>125</sup> The county assemblies cannot amend the bill, they can either reject or accept it in its entirety.<sup>126</sup> If approved through a simple majority of

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<sup>117</sup>Section 10(1) of the schedule, Public Participation bill, 2018

<sup>118</sup> Section 5(3) of the schedule, Public Participation bill, 2018

<sup>119</sup>Section 12 of the schedule, Public Participation bill, 2018

<sup>120</sup> Section 10(3) of the schedule, Public Participation bill, 2018

<sup>121</sup> Section 4(2), Referendum bill, 2020

<sup>122</sup>Section 4(2), Referendum bill, 2020

<sup>123</sup> Section 4(5), Referendum bill, 2020

<sup>124</sup> Section 5(1), Referendum bill, 2020

<sup>125</sup> Section 5(2), Referendum bill, 2020

<sup>126</sup> Section 5(8), Referendum bill, 2020

cast votes in 24 county assemblies it can be introduced in parliament, all rules for passing of legislation by parliament shall apply.

The IEBC shall within ninety days of receipt of the notice from parliament conduct a referendum, within seven days of receipt of notice should publish a question to be decided during a referendum.<sup>127</sup> Every question during a referendum shall require the voter to select an answer that is either yes or no.<sup>128</sup> The IEBC shall conduct civic and voter education on the question to be determined during a referendum.<sup>129</sup> Referendum petitions can be taken to the high court for determination in relation to election fraud.<sup>130</sup>

### 3.2.3 Uncertainties with the draft bills

The public participation bill directs that the different authorities will create their own procedures on how to conduct public participation, this will lead to multiplicity of laws which only hinders public participation. This is the case in the county assembly hearings of the Punguza Mizigo bill with the different assemblies using different procedures.<sup>131</sup> This enabled the Kirinyaga county assembly to reject the Punguza Mizigo bill without involving the public in the hearings.

Restating facts already in the constitution such as waiting for 90 days before the proposal debate in parliament does not mean there will be proper public participation. There should be a clear procedure to be followed in parliament and different county assemblies in the country.<sup>132</sup>

The credibility and intentions of the referendum bill is in question given the timing of the bill and clear urgency of the political class to pass the BBI. This can be viewed as a clear plan by the political class to force through some changes in the BBI bill without any opposition.<sup>133</sup> The referendum should not be formulated to aid the passage of BBI now but must consider any future attempt to carry out a referendum thus several issues still need clarification before the bill can be passed. The referendum bill says that county assembly are limited to either pass the initiative bill presented to them by the IEBC or reject it in its entirety, they cannot

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<sup>127</sup> Section 6, Referendum bill, 2020.

<sup>128</sup> Section 7(5), Referendum bill, 2020.

<sup>129</sup> Section 7(4), Referendum bill, 2020.

<sup>130</sup> Section 28, Referendum bill, 2020.

<sup>131</sup> *Republic v County Assembly of Kirinyaga and another Ex-parte Peter Kenda Muruiku & another (2019)* eKLR

<sup>132</sup> Waikwa W, Ghai J ‘There Are Problems with the Referendum bill.

<sup>133</sup> Waikwa W, Ghai J ‘There Are Problems with the Referendum bill.

amend the initiative bill and this limits the people's feedback in the process.<sup>134</sup> During signature collection there is need to ensure the process is fair and not undermined by political class through extortion and bribery and that everyone who appends their signature is aware of the details in the initiative

The is need for clarity on the number of amendment proposals that are included in a referendum ballot, should each proposal have its own question on the ballot or a simple yes or no over the whole process.<sup>135</sup> The referendum bill provides for one question or multiple questions the latter gives citizens a greater say of which amendments matter most. The costly and long process involved in constitution amendment by popular initiative would discourage the use of this method to pass amendments that could passed through the parliamentary process this is to ensure the more urgent matters that require the popular initiative route receive proper focus.

The referendum bill provides that the notice for referendum shall be communicated through gazette and two nationally distributed newspapers, but these disadvantages marginalised areas that cannot access essential services when there is need for inclusivity and diversity in the participation of the citizens in the process.<sup>136</sup>

Lack of public participation during the process of coming up with constitutional amendments will lead to unconstitutional constitution amendments.<sup>137</sup> The courts should be able to invalidate the referendum results if there is lack of proper citizen participation despite it not being an election irregularity.

### 3.3 Conclusion

Public participation is essential in constitution amendment process as the sovereignty of the constitution flows from the people. Any attempt to amend the constitution that interfere with its basic structure should be held unconstitutional and voided. The lack of clear laws on public participation in constitution amendment process has enabled the politicians to not carry out proper public participation in constitution amendment process. The draft bills will go a long way in regulating how public participation is carried out, however they are some issues that must be solved before they are made into laws. The constitution has its own

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<sup>134</sup>Waikwa W, Ghai J 'There Are Problems with the Referendum bill.

<sup>135</sup>Waikwa W, Ghai J 'There Are Problems with the Referendum bill.

<sup>136</sup>Waikwa W, Ghai J 'There Are Problems with the Referendum bill.

<sup>137</sup>Waikwa W, Ghai J 'There Are Problems with the Referendum bill.

checks to limit political influence in its amendment through independent bodies such as the judiciary.

## **CHAPTER 4**

### **COMPARATIVE STUDY**

#### **4.0 Introduction**

The 2010 Kenya Constitution borrowed greatly from the South Africa Constitution. Both constitutions are transformative having been promulgated after years of struggle, with a view of correcting past wrongs occasioned to their citizens through a comprehensive bill of rights and the process being more participatory in coming up with a constitution.<sup>138</sup> The structure of

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<sup>138</sup> Wanjiku F, 'Beyond Election Rituals: Rethinking Public Participation in Kenya's Public Finance Management', unpublished LLB Thesis, Strathmore University, Nairobi, 2017, 30.

government in both constitutions is similar with emphasis being on sovereignty, supremacy of the constitution, national values and citizenship.<sup>139</sup>

The South African Constitution has independent institutions that enforce the constitutional principles such as public participation in government decisions. Key among these institutions is the constitutional court.<sup>140</sup> The developed level of constitutionalism makes the jurisprudence a key factor to look at when seeking proper public participation features in constitution amendment process.

#### 4.1.1 Legal framework for public participation in South Africa.

The term public in a diverse society such that in South Africa should ensure inclusivity and diversity and should focus on the marginalised members of society.<sup>141</sup> The public participation framework for legislature and provincial legislation in South Africa uses the best fit method in pursuit of proper participation by considering minimal effort in facilitating public involvement. The considerations are based on the appropriateness of the issues at hand, the process to be used, content, importance and urgency of responses from the public.<sup>142</sup> This ensures provision of meaningful opportunities to the public to participate both written and unwritten and ensure proper consideration of any response. The aim of the public participation is to ensure increase the opportunities for public input to impact the legislative process, this is determined by the need to inform, consult, involve and collaborate with the public in decision making.<sup>143</sup> This is made possible by providing opportunities for public to access information, give reasonable input for decision making, engage in dialogue and interaction with decision makers and partnering to ensure the laws are beneficial to all members of the public,<sup>144</sup>

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<sup>139</sup> Wanjiku F, 'Beyond Election Rituals: Rethinking Public Participation in Kenya's Public Finance Management',30.

<sup>140</sup> Wanjiku F, 'Beyond Election Rituals: Rethinking Public Participation in Kenya's Public Finance Management',30.

<sup>141</sup> Legislative Sector South Africa, *Public participation Framework for the south African Legislative Sector*, 2013,7.

<sup>142</sup> Legislative Sector South Africa, *Public participation Framework for the south African Legislative Sector*, 2013,7

<sup>143</sup> Legislative Sector South Africa, *Public participation Framework for the south African Legislative Sector*, 2013,27.

<sup>144</sup> Legislative Sector South Africa, *Public participation Framework for the south African Legislative Sector*, 2013,28.

The Constitution of South Africa imposes a duty on the central and provincial legislative organs to involve the public in the making of laws and policies.<sup>145</sup> The Constitution of South Africa provides for its own amendment; the procedure differs from that of common legislation; as it is difficult to amend the constitution as compared to common legislation given the constitution is the supreme law of the land.<sup>146</sup> The amendment of the South African Constitution is by the initiative process, referendums may take place to gather the people's views before any decision is made by parliament.<sup>147</sup>

#### 4.1.2 Constitution amendment process in South Africa

Under the South African Constitution, any amendment to the South Africa Constitution has to be done by way of a bill that has been passed by the national assembly of its members<sup>148</sup>, and the National Council of Provinces by a minimum number provinces as required.<sup>149</sup>

When it comes to initiative bills seeking to amend the constitution, the bill cannot include any provision other than that is not connected to the intended amendment.<sup>150</sup> This ensures that the constitution amendment may not be included in another bill dealing with other matters to secure its passage.

In order to effect an amendment, the government must formulate the text of the draft bill proposing its amendment, at least 30 days before such a bill is introduced in parliament and the same should be published in the national gazette and should include the reasons and motivation for the amendment bill.<sup>151</sup> The details in the gazette of the amendment bill must be forwarded to the provincial legislature for their views and can only be tabled at the national assembly after 30 days have lapsed to ensure collection of the public views.<sup>152</sup> When introduced in the national assembly the government must also submit any written comments from the public and provincial legislature to the speaker for tabling in the assembly.<sup>153</sup> The constitutional court held that there was an imposed duty on the assembly and the NCOP to act

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<sup>145</sup> Section 59(1(a)) in relation to National Assembly, section 72(1(a)) in relation to National Council of Provinces, section 118(1(a)) in relation to provincial legislature.

<sup>146</sup> De Vos P, Explainer: what's involved in changing South Africa's Constitution, The Conversation, 3<sup>rd</sup> August 2018 < <https://theconversation.com/explainer-whats-involved-in-changing-south-africas-constitution-101044>> on 3<sup>rd</sup> January 2021.

<sup>147</sup> Adem K, Substantive Validity of Constitutional Amendments in South Africa, 131(14), South African Law Journal, 2014, 678.

<sup>148</sup> Section 74, Constitution of South Africa, 1996.

<sup>149</sup> Section 74, Constitution of South Africa, 1996.

<sup>150</sup> Section 74 (4), Constitution of South Africa, 1996.

<sup>151</sup> De Vos P, Explainer: what's involved in changing South Africa's Constitution.

<sup>152</sup> Section 74(5), Constitution of South Africa, 1996.

<sup>153</sup> Section 74(6), Constitution of South Africa, 1996.

reasonably in ensuring the voices of the ordinary people are considered before any legislation is passed, the more important the issue, the greater the public interests increasing the level of public participation needed.<sup>154</sup>

#### 4.1.3 Judicial Decisions on Public Participation.

The constitutional court has a duty that is binding and judicially enforceable to invalidate any a constitutional amendment if any of the legislative organs do not discharge their responsibility of facilitating proper citizen participation in proposed constitution amendments.<sup>155</sup> The constitutional court has a responsibility to consider the compatibility of the law-making process to facilitate public participation.<sup>156</sup> Given that constitution amendments in south Africa are mainly done through the legislature, because the Constitution does not make provision for its amendment through a referendum, there is need that the courts are enabled to ensure the amendments are in line with constitutional requirements.<sup>157</sup>

In *Ministry of Health v New Clicks South Africa Ltd*, the court held that proper public participation is achieved whereby there is a reasonable opportunity offered to the public and interested parties to know about issues in a proposed legislation and are given an adequate say on the issues to be decided.<sup>158</sup>

The constitutional requirement for public participation when the national assembly conducts its business was held in *King and others v The Attorney Fidelity Fund Board of Control*. The constitution requires that in conducting its business, the national assembly should abide by the principles of accountability, responsiveness and openness that constitute its founding values that the conduct of national assembly must be made in due regard to both representative and participatory democracy. If the assembly were to carry out its business by excluding the public and is indifferent to their participation and interests it would negate the essential pillars of the constitution impacting on parliaments legitimacy and its legislative capacity.<sup>159</sup>

In *Doctors for Life International v Speaker for the National assembly & Others*, the court held that the legislatures have a significant measure of discretion in deciding how best to

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<sup>154</sup> De Vos P, Explainer: what's involved in changing South Africa's Constitution

<sup>155</sup> Adem K, Substantive Validity of Constitutional Amendments in South Africa, 681

<sup>156</sup> Adem K, Substantive Validity of Constitutional Amendments in South Africa, 681.

<sup>157</sup> Adem K, Substantive Validity of Constitutional Amendments in South Africa, 678.

<sup>158</sup> *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* (CCT 59/2004) [2005] ZACC.

<sup>159</sup> *King and others v The Attorney Fidelity Fund Board of Control* (137/2008) (2009) ZASCA.

fulfil their duty to facilitate proper citizen involvement in legislative processes, despite the constitutional obligations varying on a case-by-case basis. The legislature must act reasonably, by taking steps to afford every party involved a say in the process and ensure they are taken seriously, their views matter and will receive due consideration at the moments when they could possibly influence decisions in a meaningful way.<sup>160</sup>

#### 4.1.4 Relevance to the Kenyan case

In setting out the procedure for popular initiative in Kenya the drafters borrowed heavily from the South African model, especially the relevance of the decentralised governments in implementing public participation during constitution amendment. The level of constitutionalism and matured democracy in South Africa ensures citizen participation, with the constitutional court ensuring that proper citizen participation is achieved.

However, the drafters of Kenya's Constitution guided by previous attempts by politicians to unilaterally change the constitution for their own benefit characterised by a subdued judiciary<sup>161</sup>, there was need to ensure a framework to protect the citizens voice thus the need for a popular referendum.

#### 4.2 Conclusion

Constitution amendment process in South Africa is carried out through initiative process with the emphasis on the legislature, especially the county assembly decentralising public participation to the people. The rules ensure that any attempt at public participation considers the views of the people before any decision is arrived at. While there is no provision for referendum, the law ensures that citizen is informed and any feedback is taken into account when arriving at a decision. The constitutional court acts as a safeguard to ensure that the citizen is effectively involved failure leads to an unconstitutional amendment.

## CHAPTER 5

### CONCLUSION AND RECOMMENDATIONS

#### 5.0 Introduction

Chapter 1 introduced the study by looking into the background of the study, aims, hypothesis and an overview of the study and the reasons for the research. Chapter 2 discussed the

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<sup>160</sup> *Doctors for Life International vs. Speaker of the National Assembly and Others (2006)* SAFLII

<sup>161</sup> Juma L, Okpaluba C, *Judicial Intervention in Kenya's Constitutional Review Process*, 293.

theoretical framework underpinning proper public participation in constitution amendment, the theory of direct democracy, this theory looked at the need for proper public participation in democratic governments and why there was need for proper public participation in constitution amendment. The theory faced some critics such as the suitability of public participation in making important decisions and the tendency of the political elites influencing the public for their own benefit.

Chapter 3 expounds the legislative framework in place to enable public participation in constitution amendment in Kenya and looked at the factors that would inhibit the proper involvement of citizens in constitution amendment process, the lack of political goodwill with the aim of benefitting themselves. Chapter 4 looked at foreign jurisprudence in the South African Constitution and legislation that enabled public participation in constitution amendment process. The aim was to provide a guide on how Kenya can better legislate matters of public participation in constitution amendment.

The final chapter looks to offer a conclusion on the nature of public participation in constitution amendment process and to offer recommendations.

### 5.1 Findings and Conclusion of the study

The first research question sought to identify the major problem in implementation of public participation in Constitution amendment process. From the discussions in the study, public participation is a requirement during the constitution amendment process, the lack of political goodwill is a clear issue in enabling proper public participation this has hindered the passing of proper laws to regulate the involvement of citizens in decision making during constitution amendment process. There is thus a need for proper laws to regulate constitution amendment and involve the public.

The second questions set out the role of legislative and constitutional bodies in facilitating public participation during constitution amendment process. The legislature is tasked with creating legislation to set out the procedures and laws to be followed. The county assemblies are tasked with devolving public participation laws to the county level for ease of access to the marginalised communities, however a lack of clear procedures at this stage has led to low public participation being achieved. The judiciary and IEBC are independent institutions tasked to check the politician's powers.

The third research question looks at the effect of lack of proper public participation in constitution amendment process. The judiciary is tasked to ensure any constitution

amendment is in line with the principles of the constitution failure to which it will be invalidate the amendment to protect the sovereignty of the constitution.<sup>162</sup>

The fourth research question looked at the suitability of proposed laws to regulate public participation in constitution amendment process by popular initiative.<sup>163</sup> The referendum and public participation bill have set out procedures that help to improve the quality of public participation in the constitution amendment process, however there are still some grey areas that need to be elaborated on such as the consideration of marginalised people in decision making and the need to ensure that the citizens feedback is not just a mere formality and will be taken in to account in the decision making process.

The final research questions looked at the established laws in South Africa in the Constitution and legislative framework which regulated the citizen participation in constitution amendment process and necessity of citizen feedback that is considered throughout the entire process.<sup>164</sup> Given that both constitutions resemble each other it is a sign that proper public participation during constitution amendment process is possible if properly legislated.<sup>165</sup> The study shows the importance of the judiciary in ensuring all constitution amendments abide by the principles of the constitution.

## 5.2 Recommendations

The public participation involved in the attempted constitution amendments such as Punguza Mizigo bill is not sufficient to consider the people's views, there is need for better legislation going forward, especially with the BBI bill yet to be forwarded to the county assemblies, to ensure that proper laws are formed to ensure proper public participation of the citizens when attempting to amend the constitution. The formulating of these laws should be carried out after proper public participation has been conducted.

The judiciary can help in the strengthening of the institutions of constitutions and the process needed to amend it, by interpretations that allow flexibility for an everchanging social,

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<sup>162</sup> Article 1, Constitution of Kenya, 2010.

<sup>163</sup> Article 257, Constitution of Kenya, 2010.

<sup>164</sup> Section 59(1(a), Constitution of South Africa, 1996.

<sup>165</sup> Ghai JC and Ghai Y, 'The Contribution of the South African Constitution to Kenya's Constitution', in Dixon R and Roux T (eds) *Constitutional Triumphs, Constitutional Disappointments: A Critical Assessment of the 1996 South African Constitution's Local and International Influence*, Cambridge University Press, Sydney, 2018, 273.

political and economic environment so as to be able to protect the individual rights and freedoms of its people.<sup>166</sup>

Given the costly and time-consuming nature of constitution amendment by popular initiative there is need to find consensus and proper engagement of citizens and consideration of their views is carried out.

Proper public participation is achieved by ensuring regulation seeks to give reasonable time to receive and consider the citizens views, there is proper citizen education on any intended amendment, the legislative bodies put reasonable effort to effectively involve the public in any amendment process and the courts have the jurisdiction to enforce the constitutional principles in constitution amendment attempt.

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<sup>166</sup> Juma L, Okpaluba C, Judicial Intervention in Kenya's Constitutional Review Process, 288.

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