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# A Critical analysis of public participation in parliamentary ratification of oil and gas agreements

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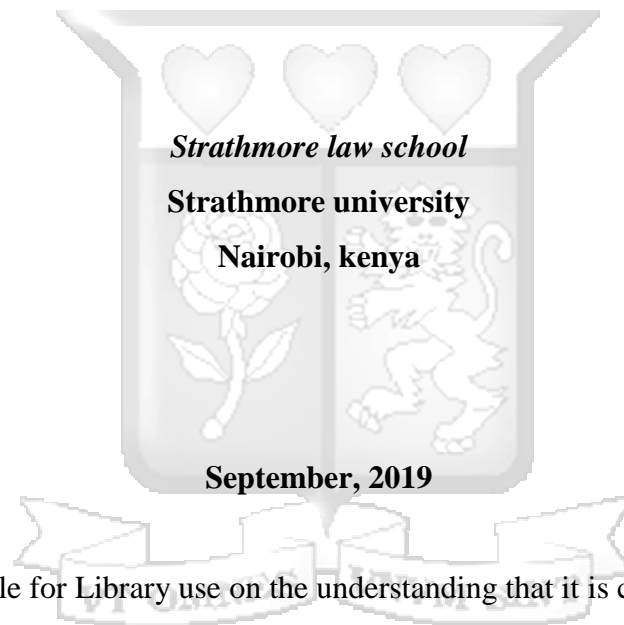
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**A Critical Analysis of Public Participation in Parliamentary Ratification of Oil and Gas Agreements.**

**Nyamai Abel Mwongela**

**Submitted in Partial Fulfilment of the Requirements For the Degree of Master of Laws  
at Strathmore University**



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**ABEL MWONGELA**

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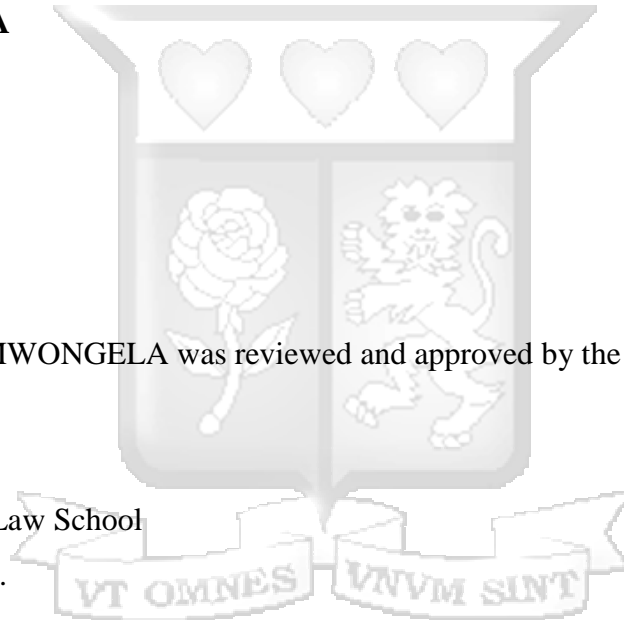
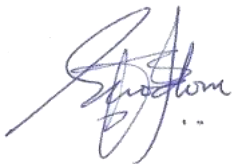
### Approval

The thesis of ABEL MWONGELA was reviewed and approved by the following:

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## ABSTRACT

The oil and gas sector in Kenya is seen as an opportunity to catalyse social economic development. Instead of contributing towards economic growth, oil and gas development leads to unparalleled corruption, underdevelopment and internal conflicts. This greatly compromises the relationship between the Government and the people and leads to loss of trust.

However, the only way to realise the maximum benefits of the oil and gas industry is by upholding principles such as public participation, accountability and transparency. The result of bad governance in the oil and gas industry is it spurs corruption and internal conflicts. This is what is referred to by many authors as the 'Resource Curse'. The importance of principles such as public participation and transparency cannot be overemphasised, this as is shown by this paper is one of the ingredients that leads to sustainable development of oil and gas resources.

Parliament as an arm of government has a critical role to play in the oversight of the oil and gas industry. One of the ways which Parliament does this is through the ratification of oil and gas agreements. The ratification process provides an opportunity for Parliamentarians and members of the public to scrutinize and question the agreement between the Executive and the oil and gas company. Parliament is meant to act as a voice of reason, represent the people and influence policy of the Executive. However, the experience of other jurisdictions shows that parliamentary approval of oil and gas contracts does not automatically lead to public participation in the ratification process. The problem this paper is investigating is if the current parliamentary ratification process under Article 71 of the constitution allows individuals or groups to participate effectively. This is done by a critical examination of Article 71 of the constitution to investigate the current avenues of participation in the legislative process.

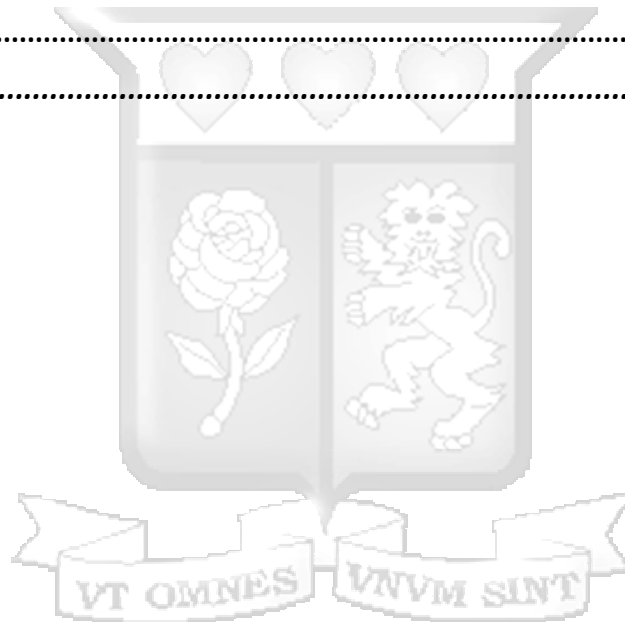
The paper has adopted a qualitative trajectory including literature review and benchmarking with South Africa. Secondary sources such as books and authoritative scholarly articles will heavily be used in the research.

The findings of this research show that the current process of parliamentary ratification of oil and gas contracts is not able to dispense public participation. It also shows that Parliament is required to analyze an agreement that they know very little about. This not only leads to poor decision making but also creates an avenue for corruption and collusion by the government and International Oil Companies( IOC).

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## LIST OF STATUTES

- 1) The Natural Resources (Classes of Transactions Subject to Ratification) Act (No 41 of 2016).
- 2) The Tanzania Extractive Industries (Transparency and Accountability) Act (2015).
- 3) The Petroleum Act, 2019.



## LIST OF CASES

- 1) *Robert N. Gakuru v The Governor Kiambu County & Another* [2014] eKLR
- 2) *Centre for Minority Rights Development and Minority Rights Group International (on Behalf of Endorois Welfare Council) v Kenya ACmHPR Comm.276/2003, 301.*
- 3) *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* 2006,311.
- 4) *Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others (CCT 41/07) [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 968 (CC) (13 June 2008)*
- 5) *Republic Vs Attorney General & Another ex parte Hon. Francis Chachu Ganya* [2013] eKLR.
- 6) *Thuku Kirori & 4 Others V County Government of Muranga Petition No. 1 of 2014, [2014], eKLR.*
- 7) *Doctors for Life International v Speaker of the National Assembly and Others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) (17 August 2006).*
- 8) *Commission for the Implementation of the Constitution V Parliament of Kenya and another, Petition No. 454 of 2012, eKLR.*
- 9) *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others [2015] eKLR.*
- 10) *Diani Business Welfare Association and others v County Government of Kwale [2015] eKLR.*
- 11) *Matatiele Municipality and Others v President of the Republic of South Africa and Others (1) (CCT73/05) [2006] ZACC 2; 2006 (5) BCLR 622 (CC); 2006 (5) SA 47 (CC) (27 February 2006)*

## LIST OF ABBREVIATIONS

1. IOC – International Oil Company.
2. NGO- Non- governmental Organisation.



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# CHAPTER ONE

## 1.1 Background to the problem

The dependency of the world economy on the oil and gas sector to meet the demands of energy cannot be overemphasised.<sup>1</sup> Kenya, is not immune to this trend. Before the 2012 discovery of Turkana as a home to significant deposits of oil,<sup>2</sup> a quarter of goods imported by the country were dominated by petroleum products.<sup>3</sup> Subsequent discoveries have revealed that Kenya has substantial reserves of oil and gas.<sup>4</sup> Extracting mineral resources opens a country to a range of economic benefits, namely;<sup>5</sup> the creation of employment and infrastructure, the acquisition of skills for a significant number of the population, the development of socioeconomic facilities, the promotion of health care and the well-being of host communities, and the provision of water.<sup>6</sup> It is not surprising, therefore, that the country's Vision 2030 encapsulates the oil and gas sector as a critical tool for economic growth.<sup>7</sup> This vision was crafted in 2008 and has the aim of moving our country from a middle income economy to a modernised economy.<sup>8</sup>

The oil and gas industry is seen to be a poorly managed sector. It is highly characterised by corruption, secrecy and conflicts. One of the ways that states have tried to solve the above problem is through the approval of extractive contracts by the elected representatives of the people. The 2010 Constitution of Kenya provides under Article 71 that 'a transaction is subject to ratification by Parliament if it involves the grant of a right or concession by or on behalf of any person, including the national government, to another person for the exploitation of any natural resource of Kenya'<sup>9</sup> The same Article goes on to provide that Parliament shall enact a law on the types of transactions that are to be subject to parliamentary ratification.<sup>10</sup> This

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<sup>1</sup> Odiyo B, 'Future of oil and gas in Kenya', 2.

<sup>2</sup> Ministry of Devolution and Planning, 'Republic of Kenya: Turkana development profile: Towards a globally competitive and prosperous Nation', 2013, xx.

<sup>3</sup> Odiyo B, 'Future of oil and gas in Kenya', 4.

<sup>4</sup> Brunton L, 'Beating the resource curse: Transparency in Kenya's upstream oil and gas sector', Political science Masters Thesis, University of Stellenbosch, March 2018, ii.

<sup>5</sup> Francis Kariuki, 'Land rights issues in Kenyan extractives sector' in Osogo Ambani (ed) *Drilling past: Essays on the governance of extractives in Kenya*, 2018,139.

<sup>6</sup> Wasonga N and Vata P, 'Titanium mining benefits-sharing in Kwale county: A comprehensive analysis of the law and practise' in Osogo Ambani (ed), *Drilling past: Essays on the governance of extractives in Kenya*, 2018, 12.

<sup>7</sup> Omollo J, 'Oil and gas in kenya: The legal status on exploration and extraction', 2013, 2.

<sup>8</sup> Patey L, 'Kenya: An African oil upstart transition' Paper WPM53 The Oxford Institute of Energy Studies, 2014, iii.

<sup>9</sup> Article 71 (1) (a) *Constitution of Kenya* (2010).

<sup>10</sup> Article 71 (2) *Constitution of Kenya* (2010).

provision has the potential of promoting public participation and transparency in a meaningful way. However, the experience of other countries shows that parliamentary approval of extractive contracts does not automatically lead to public participation in the ratification process<sup>11</sup>.

Generally there is no standard process of parliamentary approval of extractive contracts. In almost all the cases Parliament is involved at the end of the contract negotiation process when the contract has already been agreed on by the national government and the International Oil Company (IOC). The approval most times is brought to the floor of parliament and subjected to a yes or no vote with little or no modifications on the provisions of the contract.<sup>12</sup> This paper will be questioning at what point should parliament ratify a contract in order to achieve public participation in the process of contract negotiation. The parliamentary approval of extractive contracts should also be done in an efficient manner so as not chase away investors and most importantly to ensure that the government has negotiated the best deal for the people.

It is important to note that extractive contracts and agreements are made in highly volatile and uncertain environment due to the unpredictable nature of the industry. This means that to achieve sustainable development of natural resource wealth there are certain practicing principles such as public participation, transparency and accountability that should be applied in the negotiation and approval of extractive contracts. The inter-generational nature of extractive contracts should push members of parliament to push for the best deal from government.

In conclusion, the importance of oil and gas investment has been emphasized over the years in reducing the economic gap between the rich and poor nations. However, the promotion of oil gas investment is a means to an end.<sup>13</sup> The end is the improvement of the lives of citizens while involving them in the process.

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<sup>11</sup> National Resource Governance Institute, *Parliamentary Guide for approval of natural resource contracts in Tunisia*, 2016, 1

<sup>12</sup> National Resource Governance Institute, *Parliamentary Guide for approval of natural resource contracts in Tunisia*, 2016, 1

<sup>13</sup> Lorenzo C and Kyla T, 'Reconfiguring investment contracts to promote sustainable development' *Oxford university press* (2013), 282.

## 1.2 Statement of the problem

The problem that this paper will be investigating is if the process of parliamentary ratification enables the public to participate effectively either as individuals or groups or through their elected representatives. In order for the oil and gas sector to thrive, public participation is of the essence. The citizens of a country have a right to know and be involved in the management of oil and gas resources. Further, this study will provide proper guidelines on the implementation of Article 71 of the Constitution as a critical tool to spare the country from the resource curse. Article 71 has the potential of promoting public involvement in oil and gas ratification which will guarantee success of Vision 2030. It is important that people are involved in processes that affect them. The constitution recognizes public participation as one of the national values in Article 10.<sup>14</sup> Parliamentary ratification of contracts allows citizen more access to extractive contracts through their elected representatives and as individuals.

## 1.3 Justification/Significance of the Study

The success of oil and gas contracts is highly dependent on the citizen involvement in the decision making process. The management of natural resources has proved to be filled with corruption and internal conflicts<sup>15</sup>. Civil society members, lawyers and political scientists have generally argued that in order to avert the resource curse, citizen participation, transparency and accountability mechanisms need to be integrated in the decision making process. It is important to note that many of the negative side effects associated with oil and gas exploration can be solved by active public participation and transparency.

Citizen participation in the contracting process provides an incentive for government officials to improve the quality and terms of a contract, it also ensures that government officials put the interest of the citizens first as opposed to self-interest. The lack of effective public participation leads to poorly negotiated contracts that are based on self-interest and a purely commercial angle. Investment contracts should allow for public participation and transparency in order to attract investors who respect social and environmental issues, in many cases where there is limited public participation contracts are usually guided by commercial aspects. There needs

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<sup>14</sup> Article 10 *Constitution of Kenya* (2010).

to be a change in the way we view public participation if oil and gas agreements are to have positive impact on the people<sup>16</sup>.

The intensified exploration taking place in Turkana forms that background and importance of this study. Kenya is set to benefit largely from the exploration of oil in Turkana, However public participation in the ratification process is important if Kenyans are to enjoy the full benefits of the project. The biggest lesson that Kenya can draw from rich natural resource countries is that such mineral wealth is not a guarantee for the improvement in the economy and local livelihoods<sup>17</sup>.

#### 1.4 Research Objectives

- a) To analyse the current parliamentary ratification process under the lens of public participation to establish if the current process satisfies the prerequisites of public participation.
- b) To investigate at what point should parliamentary ratification of oil and gas contracts be done to get full benefit of public involvement.
- c) To make recommendations on the measures to be taken to facilitate public involvement in the ratification of oil and gas agreements.

#### 1.5 Research questions

The study will be guided by the following research questions

- a) Is the current process of parliamentary ratification of oil and gas contracts enough to dispense public participation?
- b) At what point should parliamentary ratification of oil and gas contracts be done?

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<sup>16</sup> Lorenzo C and Kyla T, 'Reconfiguring investment contracts to promote sustainable development' *Oxford university press* (2013),309.

<sup>17</sup> Ministry of Energy and Mineral Development, *Enhancing National Participation in the Oil and Gas Industry in Uganda*, 2011,4.

## 1.6 Hypotheses

- i. This study hypothesises that parliamentary ratification as is structured is not enough to dispense public participation.
- ii. The ratification of oil and gas contracts after negotiation by the government and International Oil Company is a limitation to effective public participation.

## 1.7 Literature Review

### The Importance of Public Participation in the Parliamentary Ratification Process.

To pave way for economic growth from activities related to oil and gas, there has been a global move towards upholding public participation in oil and gas agreements. Public participation is one of the tenets of democracy. All citizens have stake in decisions and processes that affect them. A successful democratic society is one where citizens participate actively in Government decision making<sup>18</sup>. It is a constitutional principle under Article 118 that Parliament should conduct its business in an open manner to facilitate public participation and involvement in the legislative and other business of Parliament and its committees.<sup>19</sup> The High Court in a bid to underscore the importance of public participation asserted that public participation ought to be real and not just an illusionary concept, the court said *‘It is not just enough in my view to simply “tweet” messages as it were and leave it to those who care to scavenge for it. The County Assemblies ought to do whatever is reasonable to ensure that as many of their constituents in particular and the Kenyans in general are aware of the intention to pass legislation and where the legislation in question involves such important aspects as payment of taxes and levies, the duty is even more onerous.’*<sup>20</sup>

Oil and gas investment has the potential to improve people’s economic lives. At the same time, the activities of international oil companies have the potential to fuel conflicts, degrade the environment and harm people. The negative impact that multinational companies have on poor countries has been seen around the world.<sup>21</sup> Lorenzo Cotula notes that there is a major mismatch between the narrative of positive impact brought by foreign investment in oil and

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<sup>18</sup> Chapter one, *Constitution of Kenya*, (2010)

<sup>19</sup> Article 118, *Constitution of Kenya*, (2010)

<sup>20</sup> Robert N. Gakuru v The Governor Kiambu County & Another [2014] eKLR

<sup>21</sup> Lorenzo C, ‘Lifting the lid on Foreign Investment Contracts: The real deal for sustainable development’ *Sustainable development briefing paper* (2005), 2.

gas and the actual impact of such activities on the local community.<sup>22</sup> In most cases the local community affected by the exploration are not consulted and involved in decision making and ultimately suffer adversely. Lorenzo Cotula further notes that for policy makers and investment companies to achieve sustainable development, the input of the local public cannot be undermined. The core principles of sustainable development are access to information and public participation. The lack of the two breeds corruption and erodes liberal democracy by denying the people who will be affected a chance to give their opinions.

The importance of public scrutiny and involvement of investment contracts cannot be overemphasized. Elected governments have a mandate of acting in the best interests of the citizens and meeting public policy goals, the only way the public can assess if this is happening is through public scrutiny. Lorenzo Cotula notes that it is possible to argue that the legislature should hold the executive to account but there is the risk of collaboration of the parliamentarians and the elected government. Lack of capacity by the members of parliament to scrutinise contracts and give valuable input points to the need for the involvement of the public in the scrutiny and ratification process.<sup>23</sup>

Professor John Ruggie and his team carried out a significant study and came up with 10 “Principles on Responsible Contracts”<sup>24</sup>. Community involvement, public participation and transparency feature strongly in the guide, the involvement of the public and the disclosure of the contract to the public is one of the ways that a state ensures respect for fundamental human rights. The lack of involvement of the public, the affected community and interested individuals leads to loss of trust. Disclosure of the contracts and public involvement reduces suspicion among people and reduces unrealistic expectations.

The Rio declaration of 1992 remains the most universally accepted statement of rights and obligations despite the facts that it is not binding<sup>25</sup>. Principle 10 of the Rio declaration unequivocally asserts “Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the

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<sup>22</sup> Lorenzo C, ‘Lifting the lid on Foreign Investment Contracts: The real deal for sustainable development’ *Sustainable development briefing paper* (2005), 2.

<sup>23</sup> Lorenzo C, ‘Lifting the lid on Foreign Investment Contracts: The real deal for sustainable development’ *Sustainable development briefing paper* (2005), 3.

<sup>24</sup>[https://www.ohchr.org/Documents/Publications/Principles\\_ResponsibleContracts\\_HR\\_PUB\\_15\\_1\\_EN.pdf](https://www.ohchr.org/Documents/Publications/Principles_ResponsibleContracts_HR_PUB_15_1_EN.pdf) on 20<sup>th</sup> August, 2019.

<sup>25</sup> Principle 10, *Rio declaration on environment and development* (1992).

opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available”<sup>26</sup> The Rio declaration proposes that it is impossible to achieve sustainable development without putting people at the center of the development process<sup>27</sup>.

As Kyla Tienhaara and Lorenzo Cotula assert that there may be significant reasons to negotiate an oil and gas investment contract privately, one of the reasons is that international oil companies are concerned that their competitors are able to access critical information in the contracts that gives them business advantage<sup>28</sup>. Host governments also argue that in future contracts the investors will negotiate for favorable terms in previous contracts. The IMF gives very good direction on this matter and asserts that the obligation to be transparent and involve the public through the parliamentary process of ratification puts pressure on the government to negotiate for the best deal<sup>29</sup>.

#### Public participation as a Human Right

Public participation is defined as ‘the real involvement of all social actors in social and political decision-making processes that potentially affect the communities in which they work and live’<sup>30</sup> The constitutional duty to facilitate public involvement is found in Article 10, it imposes a duty on state organs, state or public officers to facilitate involvement of the public in processes that affect them<sup>31</sup>. It is interesting to note that despite the fact that citizens have voted for the government of the day to represent their best interests, our democracy comprises of both representative and a participatory aspect. The two are not mutually exclusive and it would be elusive to favour one over the other, the two ought to be inclusive as it is impossible to separate them. Further contextualisation of the right to public participation in environmental matters is found in Article 69 and 70 of the Constitution<sup>32</sup>.

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<sup>26</sup> Principle 10, *Rio declaration on environment and development* (1992).

<sup>27</sup> Lorenzo C and Kyla T, ‘Reconfiguring investment contracts to promote sustainable development’ *Oxford university press* (2013), 284.

<sup>28</sup> Lorenzo C and Kyla T, ‘Reconfiguring investment contracts to promote sustainable development’ *Oxford university press* (2013), 287.

<sup>29</sup> International Monetary Fund, *Guide on resource revenue transparency* 2007,17

<sup>30</sup> Picolotti R and Taillant J. D, *Linking Human Rights and the Environment*, University of Arizona Press, 2003, 50.

<sup>31</sup> Article 10, *Constitution of Kenya*, (2010).

<sup>32</sup> Article 70, *Constitution of Kenya*, (2010)

Principle 10 of the Rio declaration<sup>33</sup> and the Stockholm Declaration<sup>34</sup> underscore the importance to involve citizens in environmental decision making. Public participation in environmental matters is recognized as a fundamental right that ensures that all decisions that are a subject of sufficient consultation and acceptable to all affected individuals. Principle 10 under the Rio Declaration obligates states to facilitate the right to public participation, access to information and access to justice in environmental matters. The right to public participation enforces other rights such as right to live in a safe environment, its only in citizens obtaining information about the environment and participating in policy making that they will feel they are in a safe environment<sup>35</sup>. Principle 22 of the Rio Declaration further grounds public participation and provides that indigenous communities and local people should actively participate in order to achieve effective participation. Public participation has many facets, first, it can be viewed as information dissemination and consultation for relevant stakeholders. Secondly, it can be seen as the provision of natural justice and procedural fairness to people who have been afflicted<sup>36</sup>.

In the case of *Mohamed Ali Baadi and others v Attorney General and 11 others*<sup>37</sup> the petitioners claimed that the implementation of the LAPSSET Project violates constitutional principles such as public participation and transparency. The court was faced with the task of analysing whether there was sufficient public participation in the implementation of the LAPSSET project. The court noted that public participation in environmental issues consists of access to information, public participation in decision making processes and access to justice in case of grievances. The court observed that the involvement of people in decision and policy making results in better implementation and sustainable development, this is because consultation leads to more knowledge and input from concerned persons. In addition, public participation helps identify possible environmental problems which saves time and financial resources . It also assures the members of public of a credible, effective and people-centered process. The court asserted that it is an infringement on the inherent right to dignity to deny a person the constitutional and statutory right of public participation<sup>38</sup>. The inclusion of people in decision making process that involve them is deemed appropriate and fair conduct of the government.

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<sup>33</sup> Principle 10, *Rio declaration on environment and development* (1992).

<sup>34</sup> *Stockholm Declaration on the Human Environment*(1973).

<sup>35</sup> United Nations Economic Commission for Europe, *The Aarhus Convention: An Implementation Guide*, 2000.

<sup>36</sup> Petts, J., "Public Participation and Environmental Impact Assessment" in *Handbook of Environmental Impact Assessment Volume 1: Environmental Impact Assessment Process, Methods and Potential*, 1999, ed. J Petts, pp. 145–177. Oxford: Blackwell Science Ltd

<sup>37</sup> *Mohamed Ali Baadi and others v Attorney General and 11 others*[2018]eKLR

<sup>38</sup> Article 28, *Constitution of Kenya*, (2010)

The *Save Lamu & others v National Environmental Management Authority (NEMA) & another*<sup>39</sup> the court questioned whether there was proper and effective public participation, the court observed that it is imperative that people are allowed to participate in decision making. Further, the court added that access to information provides an incentive for members of the public to participate in decision and policy making. It is impossible to consider all the views given by the public and this would not vitiate the obligation of public participation.

Undeniably after analysing local law and jurisprudence and how the right of public participation has been grounded, it is correct to assert that public participation in environmental matters is generally accepted as a principle of customary international law<sup>40</sup> and is regarded a fundamental human right.

## 1.8 Theoretical Frameworks

This study will be led along the lines of 2 theoretical frameworks, all of which are elaborated below.

### a) **Deliberative democracy**

Secondly, reference will be made to the deliberative democracy theory which propagates the idea that all political decisions should be a subject of reasonable consultation and debate among citizens. It generally rejects the notion of decision making authority held exclusively by state officials<sup>41</sup>. Deliberative democracy pushes public participation a notch higher as it involves holding state officials into account for their actions and all interested persons give input on what they think is reasonable. It leads to consensus based decisions which many times is critical for developing the public good. The deliberative democracy theory argues that public participation should not occur after decisions have been made and thus means that the result will favour other parties<sup>42</sup>.

One of the key foundations of deliberative democracy is its *reason-giving* prerequisite, this means that at times leaders can make decisions for the people they govern but the reasons of arriving at that decision have to be given in a deliberative process. The people should be treated

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<sup>39</sup> *Save Lamu & others v National Environmental Management Authority (NEMA) & another*[2019] eKLR

<sup>40</sup> Principle 10 of the *Rio Declaration on Environment and Development*, 1992

<sup>41</sup> Shaun F, 'Right to public participation in Alberta: The right to public participation in resources and environmental decision-making in Alberta'(2010), 572.

<sup>42</sup> Shaun F, 'Right to public participation in Alberta: The right to public participation in resources and environmental decision-making in Alberta'(2010), 572.

as autonomous agents who have a say in the decisions that affect them and not merely as passive subjects to be governed<sup>43</sup>. Citizens express their will through voting in elections, however this is not enough, all decisions made on behalf of the people need to be supported by reason. Aristotle asserts that citizens who openly discuss and justify their decisions to one another reach better decisions than those of experts in that field<sup>44</sup>.

In the oil and gas field that is characterized by internal conflicts and politics, a deliberative forum presents an opportunity for collective and individual understanding, participants in the discussion are able to learn from each other, reduce expectations and develop new ideas and policies. Citizens in the process of deliberative democracy not only bargain for what they want but they also expand their knowledge on the project.

The relevance of this theory to this study is to underscore the importance of inclusion in decisions that affect them. It is sometimes easy for politicians and parliamentarians to assume that they already know the best choices to make on behalf of the people, however this is not true, if we refuse to give deliberation a chance we forsake the ability to make choices that are based on moral compromise<sup>45</sup>. In conclusion deliberative democracy is not just about the decision that is made but the process of arriving at that decision.

## **b) Pluralism**

Lastly, this study will be informed by the pluralism school of thought which suggests that public participation by the affected persons is not simply enough, all interested persons should be allowed to participate. The definition of public participation according to pluralism is that all interested persons in a particular decision should be allowed to participate in the decision making process. It must be noted that this theory is a departure from liberal democracy and rational elitism which both seem to suggest that only affected persons are the ones who should participate in decisions<sup>46</sup>

The relevance of this theory to this study is; in the parliamentary ratification process, all individuals including those who are not directly affected should be given a chance to participate and give their views on the agreement. Members of parliament at times lack capacity to analyse

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<sup>43</sup> Amy G and Dennis T, *What deliberative democracy means*, Princeton University Press, New Jersey, 2004, 3.

<sup>44</sup> Amy and Dennis, *What deliberative democracy means*, 9.

<sup>45</sup> Amy and Dennis, *What deliberative democracy means*, 24.

<sup>46</sup> Shaun F, 'Right to public participation in Alberta: The right to public participation in resources and environmental decision-making in Alberta'(2010), 571.

oil and gas agreements, the inclusion of other parties in the process provides a good opportunity for experts and non-experts to shed light on the agreements.

## **1.9 Research Methodology**

This study is a doctrinal legal research that will rely on primary and secondary sources of legal information. Secondary sources such as books and authoritative scholarly articles will heavily be used in the research. Online sources that are proven to be academically rich and reliable will also be used.

The study will review legislation, policies and international standards that relate to parliamentary ratification. The study will also review the public participation international and national laws and policies.

Publicly available information relating to the role of parliament in enhancing public participation and the governance of oil and gas resources in other jurisdictions will be reviewed in order to determine the status and international trends. Such information will include but not limited to scholarly articles, data and reports concerning public participation in the parliamentary ratification process, reports and comments from intergovernmental agencies, articles and reports by civil society organisations and NGOs.

## **1.10 Delimitation**

This research only aims to address public participation in the ratification of oil and gas agreements and not in the governance of oil and gas resources.

## 1.11 Chapter breakdown

### Chapter one

The first chapter of this paper lays a foundation on the importance and significance of this study. The chapter also explores the background of the problem and attempts to give justification to why this study is important to this time.

### Chapter two

This chapter will attempt to review the parliamentary ratification process and the avenues available for public participation. This will involve an in depth analysis on the laws governing parliamentary ratification.

### Chapter three

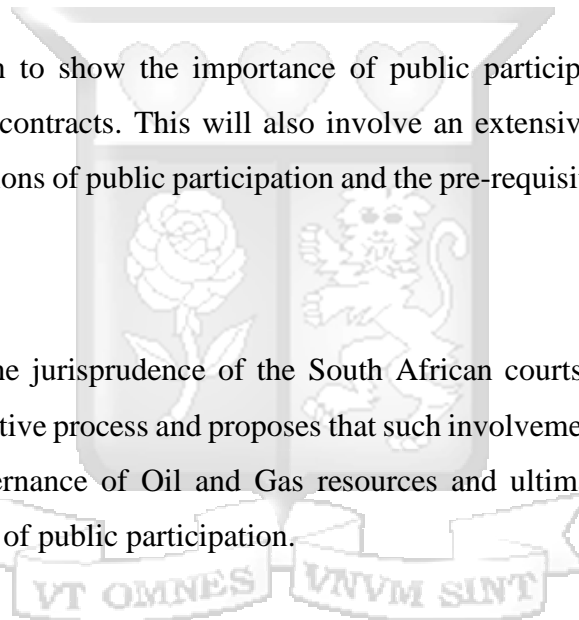
Chapter three will go on to show the importance of public participation in parliamentary ratification of extractive contracts. This will also involve an extensive discussion on public participation, the foundations of public participation and the pre-requisites for satisfying public participation.

### Chapter four

This chapter examines the jurisprudence of the South African courts with regard to public involvement in the legislative process and proposes that such involvement in the Kenya context will promote better governance of Oil and Gas resources and ultimately will promote the fundamental human right of public participation.

### Chapter five

This chapter will review the findings of the first four chapters and provide recommendations. Such recommendations will include policy and law amendments that will focus on the enhancement of public participation and transparency in the ratification process.



## CHAPTER TWO

### PUBLIC PARTICIPATION IN OIL AND GAS DECISION MAKING

#### 3.1 Introduction.

Public participation is regarded as one of the essential components in oil and gas decision making, it is elusive to try come up with an exact definition of public participation, however, public participation is concerned with people having an opportunity to influence decisions that affect them<sup>47</sup>. The term public participation is used interchangeably with other terms such as public involvement, multistakeholder participation, local community involvement etc<sup>48</sup>.

The people around extractive activities bear the biggest loss as they are directly affected by the activities. They are affected by environmental impacts such as noise, pollution and dust, loss of land through relocation and social impacts such as early marriages. The above reasons provide reason enough for people to be involved in oil and gas decision making, from the negotiation of the agreement to the extraction of oil and gas resources and , finally, to the sharing revenue from the project<sup>49</sup>.

Public participation is acknowledged as one of the pillars of sustainable development in the extractive industry worldwide, in the extractive industry the objective standard to make rational decisions based on sustainable development is not existent. Public participation allows for people to give valuable input and improves the quality of decisions. The extractive industry decision making process is based on indeterminate evaluations and resolution which are based on technical and political ambiguities which need to be resolved by contribution by all parties in order to come up with objective decisions<sup>50</sup>.

In a process that is crowned by suspicion and loss of trust, public participation is seen as one of the ways of guaranteeing procedural legitimacy<sup>51</sup>. People do not trust governments thus reducing government legitimacy, the involvement of the people attempts to de-politicise the process of making this agreements and thus making the agreements objective<sup>52</sup>. Increased

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<sup>47</sup> Shaun F, 'Right To Public Participation in Alberta', *The Right to Public Participation in Resources and Environmental Decision- Making in Alberta, Alberta Law Review* (2015),570.

<sup>48</sup> Chilenye N, A legislative Proposal for Public Participation in Oil and Gas Decision-Making in Nigeria, *Journal of African law* (2010), 9.

<sup>49</sup> Osogo A, 'From 'resource curse' to 'mis-rule penalty' *Drilling past the resource curse? An introduction*, Strathmore University Press, Nairobi, 2018, 6.

<sup>50</sup> Maria L, Carolyn Abbot, Public participation under the Aarhus Convention, *The Modern Law Review*, (2003), 83.

<sup>51</sup> R summers. 'Evaluating and improving legal process- A plea for process Values, *Cornell Law review* 1 (1974) 60.

<sup>52</sup> Maria L, Carolyn Abbot, Public participation under the Aarhus Convention, *The Modern Law Review*, (2003), 66

public participation also leads to the acceptance of the decision especially by those who disagree with the decision<sup>53</sup>. This reduces the number of potential challenges on the decision that has been made as people generally accept the outcome. This leads to peace, development and overall success of the project. Public participation is important not only because of promoting democracy but also it reduces the conflicts that come with new development<sup>54</sup>.

It is important that public participation is backed by access to justice, transparency and access to information. Public participation is a means to an end, the end is sustainable development. This has pointed governments, non-governmental organisations(NGOs) and local communities to work together towards the implementation of extractive projects. It is now a common principle in most Constitutions and laws and it is seen as a prerequisite to spur sustainable development in the extractive industry. This brings together local communities, civil society, members of parliament and government to deliberate on extractive issues for the benefit of present and future generations.<sup>55</sup>

The discussion below is centred around three distinct but interrelated parts, part one is a discussion around the law on public participation, part two delves into who should participate, part three sheds light on the prerequisites for satisfying public participation.

### **3.2 The Law on Public Participation.**

#### **(a) International law**

This section examines International law on public participation and sets the stage for a comprehensive discussion on regional and local laws governing public participation. The Constitution of Kenya in Article 2(5) provides that the general laws of international law shall form part of Kenya law<sup>56</sup>. It proceeds in Article 2(6) to provide that any treaty that is ratified by Parliament shall form part of the law of Kenya<sup>57</sup>.

The Declaration on the Right to Development which was adopted by the General Assembly in 1986 proclaims in Article 1 that the right to development is a human right which every human despite colour, sex, race, language, religion and other standing are entitled to participate and

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<sup>53</sup> Orts W and Deketelaere K 'is consensus an appropriate basis for regulatory policy?', *Environmental Contracts; Comparative Approaches to Regulatory Innovation, Kuwer Law International*, 2000, 110.

<sup>54</sup> Okello, Beavers, Douven, Leentvaar, *The doing and undoing of public participation in Environmental Impact Assessment*, Impact Assessment and Project Appraisal, 2009, 218.

<sup>55</sup> Jean-Claude A, *Public participation in environmental decision making in Cameroon- myth or reality*, (2018) 350.

<sup>56</sup> Article 2(5), *Constitution of Kenya*, (2010).

<sup>57</sup> Article 2(6) *Constitution of Kenya*, (2010).

contribute<sup>58</sup>. Article 2 further notes that the people should be at the centre of the development process and participate actively in the development<sup>59</sup>. In order for the development to be people driven they have to participate actively in the governance and management of oil and gas resources<sup>60</sup>. Article 3 imposes a duty on states to formulate national development policies that aim at the development of the well-being of all the people on the basis of their active, free and meaningful participation in development<sup>61</sup>.

Agenda 21 in Chapter 3 recognizes the value of genuine involvement of social groups in government programmes. One of the precepts of sustainable development is broad participation in development. There is a need for participation by groups, individuals and organisations, it is important that people participate in processes and procedures that have the potential of affecting their livelihood. In order for groups, individuals and organisations to participate effectively they need to have information regarding development and environment that is held by national authorities<sup>62</sup>.

The Convention on Access to information, Public Participation in Decision-Making and Access to Justice in Environmental Matters<sup>63</sup> was adopted in 1998. Article 4 of the Aarhus convention provides that public authorities should endeavour to provide environmental information to the public<sup>64</sup> without an interest having to be stated and in the form which has been requested unless there is a reasonable objection given for not giving the information in that form<sup>65</sup>.

The Aarhus Convention provides in Article 7 for early participation in environmental matters especially in planning and before permits are issued that have the potential of affecting the environment, it goes ahead to provide that during the preparation of executive regulations by public authorities the public should be notified and included<sup>66</sup>.

The International Covenant on Civil and Political Rights (ICCPR) provides in Article 25 that every citizen shall have the right and opportunity to participate in public affairs either directly

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<sup>58</sup> Article 1, *Declaration on the Right to Development*, 4 December 1986, 41/128.

<sup>59</sup> Article 2, *Declaration on the Right to Development*.

<sup>60</sup> Kariuki M, 'Towards meaningful public participation', 2014, 10.

<sup>61</sup> Article 2(3), *Declaration on the Right to Development*.

<sup>62</sup> Chapter 23, *Agenda 21*, 14 June 1992,

<sup>63</sup> Article 2, *Convention on Access to information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, 25 June 1998, UN Doc. ECE/CEP/43.

<sup>64</sup> Article 2, *Convention on Access to information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*.

<sup>65</sup> Article 2, *Convention on Access to information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*.

<sup>66</sup> Article 7, *Convention on Access to information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*.

or through freely chosen representatives<sup>67</sup>. The right to participate shall not be limited by distinctions such as colour, race, language, sex, political opinion and religion<sup>68</sup>.

The Rio Declaration on Environmental and Development of 1992 expresses itself on the issue of public participation on environmental matters, it states that environmental issues are best handled with the involvement of all people who are concerned<sup>69</sup>. The Rio declaration sets the foundation of public participation, it provides for three essential prerequisites for satisfying public participation. First, it provides that each citizen should have access to information that is held by public authorities. Secondly, it provides that each citizen should be provided with an opportunity to give their input and be heard in decision-making processes. Thirdly, every citizen shall be provided an opportunity to access redress and remedy in the event that their rights are infringed upon<sup>70</sup>.

#### **(b) Regional law**

The African Charter on Human and People Rights<sup>71</sup> which entered into force in 1986 provides in Article 13 that every citizen shall have a right to participate freely in the government of the country, either directly or through chosen representatives<sup>72</sup>. The Charter adopts a very broad approach and it generally gives the government the duty to respect the right of the citizens to participate in government activities either directly or through their elected representatives. The African Commission in the Landmark decision of Centre for Minority Rights Development and Minority Rights Group International on Behalf of Endorois Welfare Council V Kenya reiterated on the importance of this right. In 1973 the Government of Kenya disposed the ancestral land of the Endorois community after gazettelement of the area as a game reserve. The Endorois community is a small indigenous community that had settled in their ancestral land around Lake Bogoria. The Endorois community unsuccessfully tried to get recourse in the Kenyan courts, the Centre for Minority Rights Development and Minority Rights Group International moved to the commission on behalf of the Endorois people<sup>73</sup>. The commission declared in the case that for development to be in line with human right principles it has to be non- discriminatory, participatory, accountable and transparent. Kenya argued that there had

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<sup>67</sup> Article 25, *The International Covenant on Civil and Political Rights*, March 23 1966, 2200A (XXI).

<sup>68</sup> Article 2, *The International Covenant on Civil and Political Rights*

<sup>69</sup> Principle 10, *Rio Declaration*, 14 June 1992.

<sup>70</sup> Principle 10, *Rio Declaration*.

<sup>71</sup> *African Charter on Human and People's Rights*, 27 June 1981, OAU Doc. CAB/LEG/67/3 rev 5.

<sup>72</sup> Article 13, *African Charter on Human and People's Rights*.

<sup>73</sup> Centre for Minority Rights Development and Minority Rights Group International (on Behalf of Endorois Welfare Council) v Kenya ACmHPR Comm.276/2003, 301.

been consultation and adequate participation before and during the decision making process<sup>74</sup>. The court pointed out that Kenya had a duty to involve the Endorois community in the decision making process and it had failed to do so, the court also noted that the people who represented the Endorois people in the discussions were illiterate and thus could not participate fully in the discussions. The court asserted that the lack of public participation left the Endorois people feeling disenfranchised<sup>75</sup>. The court stated that the Government has a duty to disseminate information regarding a decision, it also noted that this entails constant communication between parties. The consultations that are made should be in good faith and within culturally accepted procedures and the main objective should be to reach an agreement<sup>76</sup>.

The EAC Protocol on Environment and Natural Resources Management was signed on 3rd April 2006 and was ratified by Kenya in 2010. One of the guiding principles of the Protocol is the principle of public participation in the development of policies<sup>77</sup> and the principle of prior and informed consent in activities with transboundary impacts<sup>78</sup>. The EAC Protocol in Article 34(3) provides that the partner states of the Protocol guarantee their nationals the right to participate in environment management<sup>79</sup>. Article 34(4) goes ahead to provide how they will guarantee citizen participation in environmental management<sup>80</sup>. Article 34(4)(a) provides that public officials and public authorities will provide public information and facilitate participation in environmental management<sup>81</sup>. Article 34(4)(b) provides that each state shall endeavour to provide environmental education to its citizens<sup>82</sup>. Article 34(4)(e) provides that each state has a responsibility to provide equal treatment to all persons who may be affected by environmental activities<sup>83</sup>. The protocol also provides that partner states shall provide an environment that favours participation by members of the public, local communities, non-governmental organisations and civil society.

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<sup>74</sup> Centre for Minority Rights Development and Minority Rights Group International (on Behalf of Endorois Welfare Council) v Kenya ACmHPR Comm.276/2003,302

<sup>75</sup> Centre for Minority Rights Development and Minority Rights Group International (on Behalf of Endorois Welfare Council) v Kenya ACmHPR Comm.276/2003, 302

<sup>76</sup> Jean-Claude A, Public participation in environmental decision making in Cameroon- myth or reality, (2018), 353.

<sup>77</sup> Article 4(e), *EAC Protocol on Environment and Natural Resource Management*, 3<sup>rd</sup> April 2006.

<sup>78</sup> Article 4(f), *EAC Protocol on Environment and Natural Resource Management*.

<sup>79</sup> Article 34(3), *EAC Protocol on Environment and Natural Resource Management*

<sup>80</sup> Article 34(4), *EAC Protocol on Environment and Natural Resource Management*.

<sup>81</sup> Article 34(4)(a), *EAC Protocol on Environment and Natural Resource Management*.

<sup>82</sup> Article 34(4)(b), *EAC Protocol on Environment and Natural Resource Management*.

<sup>83</sup> Article 34(4)(e), *EAC Protocol on Environment and Natural Resource Management*.

Article 34 (5) asserts that each partner state shall ensure that owners and operators provide effective and timely communication to members of the public about activities that have significant environmental impact<sup>84</sup>.

**(c) National law.**

*Constitution of Kenya 2010.*

The Constitution of Kenya 2010 underscores the importance of public participation, Article 1 declares that all sovereign power belongs to the people<sup>85</sup> and the people can either exercise the power directly or through their elected representatives<sup>86</sup>. The Constitution goes ahead to provide for the principles of governance in Article 10(2), one of the national values and principles of governance is participation of the people<sup>87</sup>. *The Court of Appeal in Independent Electoral and Boundaries Commission v National Super Alliance Kenya and 6 others* (2017) noted that ‘Article 10(2) of the Constitution is justifiable and enforceable and violation of the Article can found a cause of action either on its own or in conjunction with other Constitutional Articles and Statutes as appropriate’<sup>88</sup>

Article 69 of the Constitution provides for obligations of the State with regard to the environment, the state possess a responsibility to encourage public participation in the management and protection of the environment<sup>89</sup>. All citizens have a responsibility to protect and conserve the environment and have a duty to ensure sustainable development of natural resources. This means that all citizens should participate in the management of oil and gas resources as they are directly affected by the exploitation and development of this resources<sup>90</sup>.

Article 118 of the Constitution requires that Parliament facilitates public participation, it states that Parliament shall conduct its business in an open manner and all sittings including committee sittings shall be open to the public<sup>91</sup>. There needs to be justifiable reasons to exclude the public from any sitting<sup>92</sup>.

It is important to engage communities that are directly affected by oil and gas activities as this provides an opportunity for them to air their needs and expectations of the project. Article 174(c) states that one of the objectives of devolution is to enhance the participation of the

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<sup>84</sup> Article 34(5), *EAC Protocol on Environment and Natural Resource Management*.

<sup>85</sup> Article 1(1), *Constitution of Kenya*,(2010).

<sup>86</sup> Article 1(2), *Constitution of Kenya*,(2010).

<sup>87</sup> Article 10(2)(a), *Constitution of Kenya*,(2010).

<sup>88</sup> *Independent Electoral and Boundaries Commission(IEBC) v National Super Alliance(NASA) Kenya and 6 others* [2017] eKLR.

<sup>89</sup> Article 69(1)(d), *Constitution of Kenya*,(2010).

<sup>90</sup> Article 69(2), *Constitution of Kenya*,(2010).

<sup>91</sup> Article 118(a) *Constitution of Kenya*,(2010).

<sup>92</sup> Article 118(2) *Constitution of Kenya*,(2010).

people in making decisions affecting them and to enable communities to govern their affairs and manage their development<sup>93</sup>.

One of the tenets of public participation is access to information, in order to achieve effective public participation members of the public should be provided with information. Article 35(1) of the constitution provides that every citizen has the right to access information held by the state<sup>94</sup>.

In light of the above salient provisions in the constitution, public participation is grounded as a constitutional right<sup>95</sup>.

#### ***Petroleum Act 2019***

The Petroleum Act 2019 in Section 31(3) expresses that Parliament in carrying out its ratification role as spelt out in Section 31(2) shall undertake public participation<sup>96</sup>. Section 31(3) does not provide for how Parliament should involve the people in the process of Parliamentary ratification. However, learned judge Sachs J in the case of *Minister of Health and Another v New Clicks South Africa* noted

*“the forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day, a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case”*<sup>97</sup>

The Court in *Merafong Demarcation Forum and Others V The Republic of South Africa and Others* pointed out that the process of public involvement in the legislative process is open to innovation and can be accomplished in many ways<sup>98</sup>. Parliament in carrying out its role can fashion a public participation plan as long as it satisfies the principles of access to information and an opportunity to give their opinion and be heard<sup>99</sup>.

#### ***The Public Participation Bill, 2018.***

The Public Participation Bill is drafted with the purpose of giving life to public participation in Kenya. The Bill also provides for a general framework for governing public participation in Kenya. The Bill provides in Section 4, the principles that should govern public participation<sup>100</sup>. It provides that any person, community or organisation that is likely to be affected by a certain

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<sup>93</sup> Article 174(c) *Constitution of Kenya*, (2010).

<sup>94</sup> Article 35, *Constitution of Kenya*, (2010).

<sup>95</sup> Kariuki M, ‘Towards meaningful public participation’, 2014, 14

<sup>96</sup> Section 31(3) *Petroleum Act*, 2019.

<sup>97</sup> *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* 2006, 311.

<sup>98</sup> *Merafong Demarcation Forum and Others V The Republic of South Africa and Others*, 2008, 10.

<sup>99</sup> *Republic Vs Attorney General & Another ex parte Hon. Francis Chachu Ganya* [2013] eKLR.

<sup>100</sup> Section 4, *Public Participation Bill*, 2018.

decision has a right to be involved, consulted and heard in the decision making process. Section 4 provides that all public participation mechanisms should be effective<sup>101</sup> and the participants should be provided with the relevant information in order to make an informed decision<sup>102</sup>.

The Bill provides that every relevant authority shall provide specific guidelines on how to carry out effective public participation, the Bill requires that all guidelines developed should be in line with the general guidelines of the Bill provided in the schedule<sup>103</sup>.

### 3.3 Who should Participate?

The discussion around who should participate is important as it determines who are the parties who should take part in decision making process and at what point should they enter the discussion depending on their interests, the level or knowledge and understanding and their needs<sup>104</sup>.

The Constitution of Kenya 2010 in Article 1(2) makes a very important statement, it states that all sovereign power belongs to the people of Kenya and the people may exercise the power either through their elected representatives or directly<sup>105</sup>. In Article 27 the constitution guarantees the principle of equality and non-discrimination which means all should be allowed to participate<sup>106</sup>. Article 174(d) provides that communities have a right to manage their own affairs and to further development.

The Aarhus Convention in Article 2(4) provides a definition of the public as one or more natural or legal persons, their associations, groups and organizations. The term public with regard to public participation in oil and gas activities refers to members of the public who live in proximity to the natural resource and people who are concerned or have interest about the extractive resource<sup>107</sup>. Citizens are concerned about the impact of extractive activities in their location, the impact is not only environmental but also it reaches out to wider areas such as health, cultural heritage and economic livelihood. The impact on their life calls for consultation and participation at each phase<sup>108</sup>. It is important that a public participation programme is driven by the subsidiarity principle which dictates that those individuals who are most affected

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<sup>101</sup> Section 4(b) *Public Participation Bill*.

<sup>102</sup> Section 4(c), *Public Participation Bill*.

<sup>103</sup> Schedule, *The Public Participation Bill*.

<sup>104</sup> Kariuki M, 'Towards meaningful public participation', 2014, 16.

<sup>105</sup> Article 1(2) *Constitution of Kenya*, (2010).

<sup>106</sup> Article 27 *Constitution of Kenya*, (2010).

<sup>107</sup> Article 2, *Convention on Access to information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*.

<sup>108</sup> *Save Lamu & Others v National Environmental Management Authority (NEMA) & another* [2019] eKLR.

by a legislation, policy, action or activity should have a bigger say and their views must be sought intentionally<sup>109</sup>.

Communities are the ones mostly affected by oil and gas activities, community members are those who are known as the owners of the land and who are traditional owners of the land. A community member is one who originated from the community not necessarily one who resides in the community<sup>110</sup>. The communities who are in close proximity to the activity are entitled to participate in the decision making process, the communities who may not be close to the activity but by principle of reasonable foreseeability may be affected by the activity should be able to participate in the decision making process<sup>111</sup>.

In the *Robert Gakuro* case, the learned Judge opined that public involvement is of great value to people who have been ignored, neglected and silenced historically, they should know that they have an opportunity to speak and be heard. This is also important for people who may feel politically disadvantaged because they lack resources, education or political connections. All parties should feel that they have an opportunity to contribute, receive consideration and be taken seriously as citizens. Public involvement will enhance our democracy and promote a sense of inclusion and eventually lead to transformation of the society<sup>112</sup>.

There is need to allow for broader public participation, in the case of *Thuku Kirori & 4 Others V County Government of Muranga*<sup>113</sup> the court held

“ My understanding of the concept of public participation as contemplated under Article 10 and 174 of the Constitution is that the participation of the public in affairs that concern them should not be narrowly interpreted to mean engagement of a section of people purporting to be professionals who are out to rip maximum profits out of services for which they are neither registered nor qualified to offer; the ultimate goal for public engagement as envisaged in the constitution is for the larger public benefit. In my view such benefit would include a county government’s provision of the basic infrastructure at a minimum cost for the economic empowerment of its people; this is certainly consistent with the national values and principles of governance enshrined in Article 10(2)(d) of the Constitution and the actualisation of the promotion of social and economic development which the same constitution subscribes to in Article 174(f) thereof ”.

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<sup>109</sup> *Save Lamu & Others v National Environmental Management Authority (NEMA) & another* [2019] eKLR.

<sup>110</sup> Chilenye N, A legislative Proposal for Public participation in oil and gas decision making, *Journal of African Law* (2010), 196

<sup>111</sup> Chilenye N, A legislative Proposal for Public participation in oil and gas decision making, *Journal of African Law* (2010), 196

<sup>112</sup> *Robert N Gakuru and Others v. Governor of Kiambu County and 3 others*, (2014), eKLR

<sup>113</sup> *Thuku Kirori & 4 Others V County Government of Muranga Petition No. 1 of 2014*, [2014], eKLR.

The above case calls for the inclusion of members of the public who are interested and affected by oil and gas activities with a goal of ensuring that people have access to information and everyone's opinion is heard and considered. The review of the above legal instruments and case law shows us that there are a number of individuals and groups who should participate from indigenous people, local community members, non-governmental organizations(NGOs), the public concerned and women and youth.

### **3.4 What entails Public Participation?**

In this part of the paper, I will delve into the issue of what are the requirements for satisfying public participation. I will focus on the elements laid out in different case law. I will also discuss requirements given by relevant regional and international instruments.

The *Gakuro case* makes insightful assertions about public participation in the legislative process, the Judge noted, public participation is a necessary ingredient for democracy, participation of citizens forms the basis for democracy. Public participation in the legislative process limits the arbitrariness of Parliamentarians and reduces irrationality in the making of law. The Judge pointed out that the involvement of the people in the legislative process ensures that legislators are aware of the concerns of the public and this will in turn promote legitimacy. The involvement of the people leads to acceptance of the legislation, failure to involve people not only leads to rejection but also leads to invalidation of legislation as it is not in consonance with the Constitution<sup>114</sup>.

The *Endorois case* that is discussed above will form the basis for assessment of what actions amount to adequate participation. In this case the African commission highlighted the essential elements for effective and adequate participation. In this case the Government of Kenya regarded the project as a *fait accompli* project and argued that it had already been planned and thus the Endorois people could not object to it<sup>115</sup>. The case laid out five requirements of realising public participation, the state should accept and disseminate information, the communication process between the state and the parties should be constant, all consultations made should be made in good faith, the consultation should be through culturally appropriate procedures, the goal of the consultations should be to reach an amicable agreement<sup>116</sup>.

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<sup>114</sup> *Robert N Gakuru and Others v. Governor of Kiambu County and 3 others* (2014), eKLR

<sup>115</sup> Jean-Claude A, Public participation in environmental decision making in Cameroon- myth or reality, (2018), 353.

<sup>116</sup> *Centre for Minority Rights Development and Minority Rights Group International(on Behalf of Endorois Welfare Council) v Kenya* ACmHPR Comm.276/2003, 288.

The State argued that they had consulted the Endorois community, However, the African commission noted that the consultation was not adequate<sup>117</sup>. The State ought to have explained to the Endorois community that they would be denied all rights to return to that land. The Endorois community had a legitimate expectation that even after the eviction, they would still be allowed access to the grazing land and the salt licks for their cattle<sup>118</sup>.

Consultation needs to be in good faith The Endorois community argued that they had been denied meaningful participation by the state, they claimed the state forcefully coerced them with threats and intimidation when they rejected the granting of mining concessions<sup>119</sup>. The lack of consultations ‘left the Endorois feeling disenfranchised from a process of utmost importance to their life as a people’<sup>120</sup>.The African commission asserted that if proper consultations had been done the Endorois community would not be confused about their rights with regard to the project.

In the case the African commission noted that the state possesses a responsibility to obtain free, prior and informed consent from the people<sup>121</sup>. The individuals who represented the Endorois community in the discussions were illiterate and thus could not understand the documents provided by the Government, in light of the above circumstances the Endorois were denied their inalienable right to free, prior and informed consent. The African commission insisted that for any development projects that would have a major effect on the Endorois people and how they live, the state ought not only to consult but to obtain the free, prior and informed consent of the people<sup>122</sup>.

Public bodies such as Parliament have a wide array of options of how to achieve public participation, in the case of *Commission for the Implementation of the Constitution V Parliament of Kenya and another*, the court had a chance to delve into how should a public body achieve public participation. The court observed that the National Assembly has discretion in deciding how they intend to achieve public participation, the technique that Parliament chooses should be able to achieve a reasonable level of public participation. What

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<sup>117</sup> *Centre for Minority Rights Development and Minority Rights Group International(on Behalf of Endorois Welfare Council) v Kenya* ACmHPR Comm.276/2003, 290.

<sup>118</sup> *Centre for Minority Rights Development and Minority Rights Group International(on Behalf of Endorois Welfare Council) v Kenya* ACmHPR Comm.276/2003,291.

<sup>119</sup> *Centre for Minority Rights Development and Minority Rights Group International(on Behalf of Endorois Welfare Council) v Kenya* ACmHPR Comm.276/2003, 134.

<sup>120</sup> *Centre for Minority Rights Development and Minority Rights Group International(on Behalf of Endorois Welfare Council) v Kenya* ACmHPR Comm.276/2003, 297.

<sup>121</sup> *Centre for Minority Rights Development and Minority Rights Group International(on Behalf of Endorois Welfare Council) v Kenya* ACmHPR Comm.276/2003, 291

<sup>122</sup> *Centre for Minority Rights Development and Minority Rights Group International(on Behalf of Endorois Welfare Council) v Kenya* ACmHPR Comm.276/2003, 291

amounts to reasonable participation will vary in each case, whatever the method chosen by Parliament, the people should be offered a reasonable opportunity to know about the subject matter and contribute effectively<sup>123</sup>.

Section 31(3) of the Petroleum Act provides that Parliament in the ratification of the Production Sharing Agreement and field development plan shall involve the public in the process<sup>124</sup>. The Judge in *Doctors of Life International vs Speaker of the National Assembly and Others*<sup>125</sup> expresses himself as to what public involvement means. Judge Ngcobo J notes that public participation should not be seen as a derogation from the core Parliamentary legislative processes, Parliament should take steps to ensure that people are involved in the process, in assessing the extent of public participation, the court looked at the issue of public participation in the business of parliament as a twofold process, first Parliament possess a duty to afford members of the public opportunities to participate in the business of the house. Secondly, Parliament has a duty to ensure that people are in a position to take advantage of the opportunities provided. The court opined that public participation should be seen as “a continuum that ranges from providing information and building awareness, to partnering in decision-making”<sup>126</sup>.

The Court noted that the reasonable test should be applied, reasonableness is dependent of the facts and circumstances of each scenario, the court explained that the context when dealing with the issue of reasonableness is important. There are a number of factors that will show if the legislature has acted reasonably, First, the nature and importance of legislation will be assessed. Secondly, the intensity of the legislation on the public will also be examined. Many times when legislatures are questioned as to why they did not conduct extensive public participation, the two reasons given are time and resources. The Court observed that practicalities such as time and resources should be taken in to account when determining reasonableness, however, the saving of time and money does not justify lack or limited public involvement<sup>127</sup>.

Public participation has a quantitative and a qualitative aspect to it, quantitative participation refers to the number of people invited and the extent of information that has been disseminated. The basic principle is that as many people should be consulted. However the *Mui Coal Basin*

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<sup>123</sup> *Commission for the Implementation of the Constitution V Parliament of Kenya and another*, Petition No. 454 of 2012, eKLR

<sup>124</sup> Section 31(3) *Petroleum Act*.

<sup>125</sup> *Doctors of Life International vs Speaker of the National Assembly and Others*, 2006.

<sup>126</sup> *Doctors of Life International vs Speaker of the National Assembly and Others*, 2006.

<sup>127</sup> *Doctors of Life International vs Speaker of the National Assembly and Others*, 2006.

*Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others* provides that public participation does not call for every individual to give their view on issues of environmental governance, but rather a public participation programme should show inclusivity and diversity of people<sup>128</sup>.

Qualitative participation on the other hand refers to the extent of the information and the diversity of the citizens engaged to take part in meaningful proposals. It is important to provide a reasonable opportunity to participate, however, there is more to it. The method of presentation of information and the materials used in the proposals ought to be considered<sup>129</sup>. There should be intentional steps to include the relevant stakeholders. The subsidiarity principle should be applied deliberately, those that are the most affected by a decision should and must have a bigger say in that matter

There is no one size fits all model when it comes to public participation. Learned Judge Sacks J made a profound statement in the case of *Minister for Health Vs New Clicks South Africa*, he said “the forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variations”<sup>130</sup>. The *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others* echoed that public participation calls for flexibility and innovation when looking at how to dispense public participation, the public participation method that is used changes depending on the nature of the subject, culture and other factors. There is no single programme that can be prescribed, it is the duty bearer to choose from the infinite variations which is the best way to dispense public participation<sup>131</sup>.

### 3.5 Conclusion

In summary the duty to facilitate public participation in the Parliamentary ratification process must be seen as a manifestation of the local law, international law and case law regarding the right to political participation. The involvement of people in matters of governance is the basis on any democracy, the opportunity to be heard enhances civic dignity. The accommodation of plural opinions leads to legislation that is generally accepted. The involvement of the people strengthens legitimacy of the legislature and Executive. Finally, the involvement of people is important in a society like ours when many people feel discriminated based on wealth.

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<sup>128</sup> *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others* [2015] eKLR.

<sup>129</sup> *Diani Business Welfare Association and others v County Government of Kwale* [2015] eKLR.

<sup>130</sup> *Minister of health V New Clicks South Africa (pty) Ltd*,2006.

<sup>131</sup> *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others* [2015] eKLR

## CHAPTER THREE

### THE LEGAL FRAMEWORK GOVERNING PARLIAMENTARY RATIFICATION IN KENYA

#### 2.1 Introduction

This chapter will review the parliamentary ratification process and the avenues available for public participation. This will involve an in depth analysis on the laws governing parliamentary ratification. Resource rich countries are often characterized by large scale corruption, internal conflicts, illiteracy, lower life expectancy and poverty. The reason this occurs is because of the mismanagement of the extractive sector in many countries<sup>132</sup>. There is a move advocating for greater transparency in the sector, members of public and the parliamentarians have a responsibility of ensuring that actions of government are scrutinized to ensure that the management of the extractive sector is citizen centered and free from corruption<sup>133</sup>. Oil and gas resources when effectively managed can transform a country, effective management of natural resources calls for better transparency, public participation and accountability.

In almost all democratic states the legislators perform three major functions: the making of law, representation of the people and oversight over the executive. This thus means that legislators possess a responsibility of ensuring that resources are managed in a sustainable manner<sup>134</sup>. It is important to note that legislative bodies have the potential to be open and accessible to the citizens and other parties such as civil society groups, this means that parties can give their views and work together with legislators to review agreements and legislation. The involvement of other stakeholders in the legislative process ensures that the knowledge gap is filled in the event where legislators lack capacity to understand the extractive industry<sup>135</sup>.

Oil and gas discovery calls for strong institutions that are able to limit the negative effects that follow such discoveries. It is important to note that host governments many at times lack capacity to negotiate the most beneficial contract with International Oil Companies, The executive branch in many cases is not well equipped and lacks technical expertise to get the

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<sup>132</sup> Extractive Industry Transparency Initiative Guide for legislators, *How to support and strengthen resource transparency*, 2009, 13.

<sup>133</sup> Extractive Industry Transparency Initiative Guide for legislators, *How to support and strengthen resource transparency*, 13.

<sup>134</sup> National Democratic Institute for International Affairs, *Transparency and accountability in Africa's Extractive Industries: The role of the legislature*, 2007, 8.

<sup>135</sup> National Democratic Institute for International Affairs, *Transparency and accountability in Africa's Extractive Industries: The role of the legislature*, 2007, 10.

best deal. The legislature through its committees and through participation of the public is able to share knowledge that would assist the government negotiate the best deal. The legislature is the link between the people and government, Parliament provides an avenue where parliamentarians are able to influence government policy<sup>136</sup>.

## 2.2 The Parliament of Kenya.

Chapter 8 of the constitution of Kenya provides for the formation of Parliament. Article 93 of the Constitution of Kenya provides for the establishment of the National Assembly and Senate<sup>137</sup>. The National Assembly represents the interest of the constituencies<sup>138</sup> whereas the senate represents the interests of counties<sup>139</sup> and serves to protect devolution. The two houses have different functions, however, when it comes to matters of governance of national resources the Constitution of Kenya obligates Parliament (Senate and National Assembly) to ratify agreements relating to natural resources<sup>140</sup>.

The above statement shows that Parliament as an institution has a role to play in the extractive sector. There are different ways in which Parliament can execute its role of oversight of the extractive sector. One of the ways is through the committee system<sup>141</sup>, the parliamentary committee system allows for the members of Parliament to perform more specific functions at the same time. Committee system is one of the ways of involvement of the people and one of the ways of exercising oversight over the Executive<sup>142</sup>. The Parliament of Kenya has four committees which are in charge of the extractive sector. The National Assembly has two departmental committees; Environmental and Natural Resources Committee and Energy, Communication and Information Committee. The Senate on the other hand has two standing committees; Committee on Energy, Roads and Transportation and Committee on Land, Environment and Natural Resources<sup>143</sup>. Article 124 (4)(c) provides that the proceedings of the committee shall be open to the public<sup>144</sup>, committees have the potential of providing for meaningful public participation, committees enable Members of Parliament to focus on a

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<sup>136</sup> National Democratic Institute for International Affairs, *Transparency and accountability in Africa's Extractive Industries: The role of the legislature*, 2007, 26

<sup>137</sup> Article 93(1), *Constitution of Kenya* (2010).

<sup>138</sup> Article 95(1), *Constitution of Kenya* (2010).

<sup>139</sup> Article 96(1), *Constitution of Kenya* (2010).

<sup>140</sup> Article 71, *Constitution of Kenya* (2010).

<sup>141</sup> Article 124(1) *Constitution of Kenya* 2010.

<sup>142</sup> National Democratic Institute for International Affairs, *Transparency and accountability in Africa's Extractive Industries: The role of the legislature*, 2007, 32.

<sup>143</sup> Extractives Baraza, *Governing the Extractives Sector in Kenya: Understanding the Role of Parliament*, 2017, 2

<sup>144</sup> Article 124(4)(c), *Constitution of Kenya*, (2010).

specific issue and enable public involvement. In the committee hearings members of the public including civil society, professionals and interest groups are provided with a democratic opportunity to air their views on a particular subject matter.

### **2.3 The Parliamentary Ratification Process in Kenya.**

The discovery of oil and gas resources for any country creates anticipation from the government and also from the citizens. The natural resource is seen as a method to fast track development, the expectations run into a reality of transforming the underground resource into an exploitable asset. The government is faced with a choice, whether to exploit the resources or not. This is the time the government considers an array of issues from the environmental impact, social impact, economic impact and land management issues such as compensation for the affected people. It is important at this time to collect views from the public, involve the public in decision making and consider the interests of the indigenous communities.

The deficiency in skill, experience and commercial ability leads many nations to invite International Oil Companies (IOC) who have the experience and commercial power to assist the exploitation of the resource. The process of negotiation of oil and gas contracts is where the problem starts, this is because the International Oil Companies are well equipped with knowledge of the oil fields, financial resources and generally possess more experience in negotiating contracts<sup>145</sup>. The government on the other hand lacks staff who possess the skill and the motivation to push for the best deal. The government in many cases is motivated by greed and corruption, Oil companies on the other hand focus on how to recover their commercial investment. It is clear that a process that is supposed to be people-centred is fuelled by feisty International Oil Companies that are self-centred and corrupt governments.

One of the objectives of the 2010 Constitution is to strengthen transparency and public participation. Article 10 of the constitution provides a list of national values that should guide all state organs, public officers and state officers<sup>146</sup>. Article 10 provides for public participation and transparency as one of the values that should guide state organs such as Parliament<sup>147</sup>.

Article 71 of the Constitution of Kenya 2010 provides for the conditions that should be met for a transaction to be subject to parliamentary ratification<sup>148</sup>, they include;

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<sup>145</sup> Initiative for Policy Dialogue Working Paper Series, *How to negotiate an Oil agreement*, (2006), 88.

<sup>146</sup> Article 10, *Constitution of Kenya*, (2010).

<sup>147</sup> Article 10(2), *Constitution of Kenya*, (2010).

<sup>148</sup> Article 71(1), *Constitution of Kenya*, (2010).

- a) If it includes the grant of a right or concession by or on behalf of any person including the national government to another person for the exploitation of natural resource in Kenya<sup>149</sup>.
- b) If it is entered into after the effective date<sup>150</sup> which according to Article 263 is 27<sup>th</sup> August 2010<sup>151</sup>.

Article 71(2) provides that Parliament shall enact legislation providing for the classes of transactions subject to ratification. The Parliament of Kenya ( National Assembly and Senate)<sup>152</sup> has enacted the Natural Resources( Classes of Transactions Subject to Ratification) Act 2016 which came into force on 4<sup>th</sup> October 2016 after presidential assent. The Natural Resources ( Classes of Transactions Subject to Ratification) Act 2016 breathes life into Article 71 of the Constitution by providing for the transactions that will be subject to Parliamentary ratification, the procedure of Parliamentary ratification and the administrative arrangements of transactions.

The Constitution in Article 260 defines natural resources to mean the physical factors that are either renewable or non-renewable which include sunlight, surface and groundwater, forests, biodiversity and genetic resources and rocks, minerals, fossil fuels and other sources of energy<sup>153</sup>. Section 4(1) of the Natural Resources ( Classes of Transactions Subject to Ratification) Act 2016 provides for transactions that will be subject to Parliamentary ratification, The Schedule of this Act states that among the transactions subject to Parliamentary ratification includes any authorisation to extract crude oil or natural gas.<sup>154</sup> Section 4(2) of the same Act maintains that ‘the grant of a concession or right to exploit a natural resource through a permit, licence or *other authorisation* issued in accordance with the requirements of national or county government legislation’ shall not be subject to Parliamentary ratification.<sup>155</sup>

A beneficiary of a natural resource transaction should submit the agreement and memorandum to the Cabinet Secretary in charge of the natural resource<sup>156</sup>. The Cabinet Secretary responsible for the natural resource should submit the agreement and the memorandum to Parliament<sup>157</sup> for

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<sup>149</sup> Article 71(1)(a), *Constitution of Kenya*, (2010).

<sup>150</sup> Article 71(1)(b), *Constitution of Kenya*, (2010).

<sup>151</sup> Article 263, *Constitution of Kenya*, (2010).

<sup>152</sup> Article 939(1) *Constitution of Kenya*, (2010).

<sup>153</sup> Article 260, *Constitution of Kenya*, (2010).

<sup>154</sup> Schedule, *The Natural Resources (Classes of Transactions Subject to Ratification) Act* (No 41 of 2016).

<sup>155</sup> Section 4 (1) (2), *The Natural Resources (Classes of Transactions Subject to Ratification) Act* (No 41 of 2016).

<sup>156</sup> Section 5, *The Natural Resources (Classes of Transactions Subject to Ratification) Act* (No 41 of 2016).

<sup>157</sup> Section 6, *The Natural Resources (Classes of Transactions Subject to Ratification) Act* (No 41 of 2016).

ratification within seven days of receiving the agreement and memorandum from the beneficiary<sup>158</sup>. Once the agreement has been submitted to Parliament, the Act provides that Parliament should deal with the agreement within 60 days. The Act provides that Parliament should consider a number of issues when ratifying the agreement, they include<sup>159</sup>;

1. The applicable Government policy
2. The recommendations of the relevant regulatory agency
3. The County Government Comments within whose area of jurisdiction the natural resource is located.
4. Sufficiency of stakeholder consultation
5. The extent to which the agreement has struck a fair balance between the interests of the beneficiary and the benefits to the country arising from the agreement.
6. The benefits which the local community is likely to enjoy from the transaction
7. Whether the applicable law has been complied with when granting the concession or right.

The process of approval of an agreement shall commence in the National Assembly<sup>160</sup> which shall consider the agreement within thirty days of submission and shall forward to the Senate for consideration<sup>161</sup>. In the event that the National Assembly has not forwarded its resolution to the Senate, the Senate shall commence consideration and forward the resolution to the National Assembly<sup>162</sup>. The speaker of the National Assembly shall notify the relevant Cabinet Secretary if both houses have approved the ratification agreement or if they have not approved the ratification agreement<sup>163</sup>. In the event that one house resolves to ratify the agreement and the other does not resolve to ratify<sup>164</sup>, the matter shall be dealt with in accordance with Article 112 and 113 of the Constitution which provides for a mediation committee which will attempt to agree on a version of the Bill that both houses will pass<sup>165</sup>.

The Cabinet Secretary may grant a request that the agreement or some parts of it should not be disclosed publicly for reasons such as commercial confidentiality, national security or other public interest considerations<sup>166</sup>. One is able to challenge the request for confidentiality by the

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<sup>158</sup> Section 5(1), *The Natural Resources (Classes of Transactions Subject to Ratification) Act* (No 41 of 2016).

<sup>159</sup> Section 9(1), *The Natural Resources (Classes of Transactions Subject to Ratification) Act* (No 41 of 2016).

<sup>160</sup> Section 10(1), *The Natural Resources (Classes of Transactions Subject to Ratification) Act* (No 41 of 2016).

<sup>161</sup> Section 10(2), *The Natural Resources (Classes of Transactions Subject to Ratification) Act* (No 41 of 2016).

<sup>162</sup> Section 10(3), *The Natural Resources (Classes of Transactions Subject to Ratification) Act* (No 41 of 2016).

<sup>163</sup> Section 10(4), *The Natural Resources (Classes of Transactions Subject to Ratification) Act* (No 41 of 2016).

<sup>164</sup> Section 11(1), *The Natural Resources (Classes of Transactions Subject to Ratification) Act* (No 41 of 2016).

<sup>165</sup> Article 113(1), *Constitution of Kenya* (2010).

<sup>166</sup> Section 13(1), *The Natural Resources (Classes of Transactions Subject to Ratification) Act* (No 41 of 2016).

Cabinet Secretary in the High Court on the grounds of Article 35 of the Constitution<sup>167</sup>, as read with the Access to Information Act 2016.

#### **2.4 Inadequacies of the current parliamentary ratification process as regards public participation**

The exploration of oil and gas resources usually takes a long time and many wells endure across human generations, the exploration produces many benefits and difficulties, thus the approval of this agreements should not be left to the Executive branch of Government. There needs to be proper participation of the people either through their elected representatives or individually or as groups<sup>168</sup>. Extractive agreements are public agreements and not private agreements as many people would think, the agreements deal with matters of public policy and the government negotiates on behalf of the public and for public benefit<sup>169</sup>. The Natural Resources Act gives guidelines on the process of ratification, the process lacks serious scrutiny and involvement of people in the process. Section 9 of the Natural resources Act discusses the issue that Parliament should consider when ratifying an agreement, one issue that should be considered by Parliament is the technical capability and financial capacity of the contracting firm. The other issue that Parliament should consider is the compliance history of the firm to national and international environmental standards in previous works undertaken<sup>170</sup>. International standards of environmental protection should be considered, Parliament should assess critically how the International Oil Company proposes to conserve and restore the environment.

One of the biggest issues with the current parliamentary ratification procedure is Parliament is forced to review an agreement that they know very little about because they have not been involved in the process of negotiating the agreement. The Executive arm of Government provides no account of the negotiations to Parliament. The agreement is made between the International Oil Company and State in closed doors and there is no public scrutiny of the process. The decision of the two parties is delivered to Parliament and Parliament is given 60 days to review the agreement. Parliament is not given sufficient information to make an informed decision about the agreement, it is important for Parliament to be involved from when the process starts so that they are able to understand clearly the obligations and compromises

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<sup>167</sup> Article 35, *Constitution of Kenya* (2010).

<sup>168</sup> IM4DC Action Research Report, *Parliaments and Mining Agreements; Reviving the numbered arm of government* (2015), 3.

<sup>169</sup> IM4DC Action Research Report, *Parliaments and Mining Agreements; Reviving the numbered arm of government* (2015), 5.

<sup>170</sup> Africa Centre for Energy Policy, *Licensing compliance in Ghana's upstream petroleum sector*, (2015), 18.

of each party<sup>171</sup>. The process should be very transparent and the legislative branch being representatives of the people should be involved. Many times the result of oil and gas exploration is detrimental to the host country because of internal conflicts, environmental degradation and many other issues, if Parliament is involved at the end of the process, the members of Parliament are not able to understand the cost-benefit analysis of the project. They are not provided with information of the benefits of the project in comparison with the negative effects of the project. It is not enough to submit the agreement without a comprehensive economic analysis of the project that shows the feasibility of the project. The executive branch should provide revenue projections of the project accompanied with the assumptions of prices and cost<sup>172</sup>.

There are times when the executive exempts the International Oil Company (IOC) from some national laws and fiscal exemptions. If Parliament is not provided with an opportunity to be in the negotiations and the Executive does not explain the rationale of the clauses, then this leads to loss of trust and suspicion. Parliament should be able to critically examine the exemptions and their rationale so as to consider whether to ratify the agreement or not. The Constitution provides that Parliament should question the Executive<sup>173</sup>, Parliament should be able to request for disclosure of all the exemptions, incentives and subsidies, the executive should then respond by giving the rationale of arriving at those particular decisions. The Executive should be able to provide information of the actions that they are taking to ensure that the International Oil Company (IOC) complies with national laws and the fiscal regime.

Parliament's role as envisioned by the Constitution of Kenya 2010<sup>174</sup> is an informed analysis of the agreement, it is not a mere rubber stamp of the agreement<sup>175</sup> between the Executive and the International Oil Company. The agreement that has been made is a consensus between the International Oil Company and the Government, if Parliament is involved at the end as is the case then Parliament is left with a choice either to approve and reject the agreement. The process for ratification should include briefings and opportunity for parliamentarians to be part of the negotiation process. They need to make decisions from an informed position, members of Parliament represent the people and their views and can be a voice of reason in this process.

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<sup>171</sup> Africa Centre for Energy Policy, *Licensing compliance in Ghana's upstream petroleum sector*, (2015), 18.

<sup>172</sup> Africa Centre for Energy Policy, *Licensing compliance in Ghana's upstream petroleum sector*, (2015), 18.

<sup>173</sup> Article 95(3)(c) *Constitution of Kenya*, (2010).

<sup>174</sup> Article 71, *Constitution of Kenya*, (2010).

<sup>175</sup> IM4DC Action Research Report, *Parliaments and Mining Agreements; Reviving the numbered arm of government* (2015), 17

The Act does not provide for the submission of regular reports over time on the progress and status of the project. The Executive branch of government is not able to monitor the project to check if the International Oil Company (IOC) is meeting the obligations of the agreement. The submission of regular reports is twofold, first there is submission of reports by the executive and secondly, the submission of reports by the International Oil Company (IOC). The reports include local content reports, environmental impact reports and financial reports that show the revenues that the state is receiving, this should be compared with the projections that have been provided by the government<sup>176</sup>. The reporting requirements of the parties should be in line with the separation of responsibility between the International Oil Company (IOC) and the Executive. It is important that Parliament should know the progress of the agreements it has ratified. The Tanzania Extractive Industries (Transparency and Accountability) Act has meaningful provisions on reporting and transparency, the Act provides in Section 4 that there shall be the Tanzania Extractive Industries (Transparency and Accountability) Committee<sup>177</sup>, the committee requires that the extractive industry company or the appropriate government entity provide an account of the money paid and received from the company at any period<sup>178</sup>. Section 10(2)(c) provides that extractive industry companies shall disclose to the committee accurate records of the cost production and capital expenditure at each stage of investment<sup>179</sup>. Parliament through its committees in the National Assembly and Senate can play this role in the Kenyan context to enable transparency and public participation.

Section 13 of the Natural Resources (Classes of Transactions Subject to Ratification) Act provides for confidentiality, it provides that the Cabinet Secretary may grant a request to Parliament requesting that the agreement or some parts of the agreement should not be publicly disclosed either for commercial confidentiality reasons, public interest or national security. In this case the Agreement is submitted to Parliament and the ratification process shall be done on camera and a summary of the agreement shall be made available to the public. The main objection that is raised by International Oil Companies and Government is commercial confidentiality, any company would not be at ease with disclosing the amount of money they pay for a certain good as it would put them in a point of disadvantage in future business<sup>180</sup>.

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<sup>176</sup> IM4DC Action Research Report, *Parliaments and Mining Agreements; Reviving the numbered arm of government* (2015), 19

<sup>177</sup> Section 4, *The Tanzania Extractive Industries (Transparency and Accountability) Act* (2015).

<sup>178</sup> Section 10(2)(b) *The Tanzania Extractive Industries (Transparency and Accountability) Act* (2015).

<sup>179</sup> Section 10(2)(c) *The Tanzania Extractive Industries (Transparency and Accountability) Act* (2015).

<sup>180</sup> Lorenzo C and Kyla T, 'International Investment Law & Policy', in Karl P(ed), *Reconfiguring Investment Contracts to Promote Sustainable Development*, 2013, 287.

The Government on the other hand is afraid that future investors may insist on the favourable terms offered to another company and the Government may not be willing to compromise at that time<sup>181</sup>.

Section 13 is prone to abuse by Governments and International Oil Companies, it is true to argue that there is strategic business advantage in ensuring commercial contracts are confidential. The value of disclosing commercial contracts is more than the strategic business advantage that the Government will have in future contracts, access to information in contracts is a pre-condition for the scrutiny of Government<sup>182</sup>. Oil and gas agreements have direct implications on public resources and as such are part public policy and citizens should be allowed access to these agreements. The Government manages oil and gas resources on behalf of the public, the public has a right to know how the Government is doing so. Access to information that is held by the state as prescribed by Article 35 is a fundamental human right and is a necessary ingredient for sustainable development<sup>183</sup>.

## **2.5 Conclusion**

The chapter started by critically examining Parliaments role as set out in law, then proceeded to discuss the current parliamentary process. The last part analysed the inadequacies in the current parliamentary process while using the lens of public participation. The discussions showed there are discrepancies in the current legal process, most importantly the discussion showed that there are still steps that can be taken to boost public participation in the ratification process either through elected representatives or through the people.

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<sup>181</sup> Lorenzo C and Kyla T, 'International Investment Law & Policy', 287.

<sup>182</sup> Lorenzo C and Kyla T, 'International Investment Law & Policy', 287.

<sup>183</sup> Article 35, *Constitution of Kenya*, (2010)

## CHAPTER FOUR.

### LESSONS FROM SOUTH AFRICA

#### 4.1 Introduction.

This section as it thesis examines the jurisprudence of the courts in South Africa with regard to public involvement in the legislative process and proposes that such involvement in the Kenya context will promote better governance of Oil and Gas resources and ultimately will promote the fundamental human right of public participation. The jurisprudence is discussed in this chapter is not laid out in the South Africa legislative process, However it offers a model that can be applied and used in the Kenyan context to facilitate public involvement and improve quality of ratified agreements.

South Africa and Kenya share a historical background and thus making South Africa a suitable country to draw lessons from. The Republic of South Africa is a sovereign and democratic state founded on national values such as human dignity, equality and democracy<sup>184</sup>. South Africa is a former british colony just like Kenya and both share the effects of colonial domination . The South African Parliament is also bi-cameral comprising of the National Assembly and the National Council of Provinces<sup>185</sup>. The above reasons indicate why South Africa is an appropriate country to learn from.

The first section of this chapter provides an in depth analysis of the South African law concerning public participation providing a foundation for review of jurisprudence from the South Africa courts in the second section.

#### 4.2 Legal Framework On Public Participation In South Africa.

South Africa's Constitution of 1996 intentionally changed the concept of public participation in the legislative process. It declares that South Africa is a democracy both in the representative and participative sense. The goal of public participation from the constitution is to influence government policy to echo the will of the people<sup>186</sup>.

The Parliament of South Africa is made up of the National Assembly and the National Council of Provinces (NCOP)<sup>187</sup>. The National Assembly is elected by the people and it responsible for electing the President. The National Council of Provinces on the other hand is responsible for

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<sup>184</sup> *The Constitution, Republic of South Africa*, (1996).

<sup>185</sup> Section 42(1), *The Constitution, Republic of South Africa*, (1996).

<sup>186</sup> Legislative Sector South Africa, *Public Participation Framework for the South African Legislative Sector*, 2013, 10.

<sup>187</sup> Section 42(2), *The Constitution, Republic of South Africa*, (1996).

representing the provinces ensuring that provincial issues are considered in the national sphere<sup>188</sup>.

Section 59(1) of the Constitution of the Republic of South Africa provides for public access and involvement provisions in the National Assembly, it provides that the National Assembly should facilitate public involvement in the legislative and other business of the house and its committees<sup>189</sup>. It further provides that the National Assembly should conduct its activities in an open manner and ensure that reasonable measures are taken to regulate public access either in the Assembly or its committees<sup>190</sup>. Section 72 of the Constitution of the Republic of South Africa provides for similar public access and involvement provisions for the National Council of Provinces<sup>191</sup>. This means that the National Assembly, National Council of Provinces and Provincial Legislatures should carry out in their functions embrace the values of openness and accountability.

Chapter 10 provides for the basic values and principles governing public administration, Section 195(1) provides that the needs of the people should be considered and acted upon, further, the public must be encouraged to participate in policy making<sup>192</sup>.

#### **4.3 Overview of Case Law.**

This section will focus on instances where the South African Constitutional court was called upon to give direction on the facilitation of public involvement in legislative processes. The court addressed this issue in the *Doctors for life international V The Speaker of the National Assembly* case, *Matatiele Municipality and Others v President of the Republic of South Africa and Others*, *King and Others v Attorneys Fidelity Fund Board of Control and Another* and also in the case of *Merafong Demarcation Forum and Others v President of Republic of South Africa and Others*.

##### ***(a) Doctors for life international V The Speaker of the National Assembly***

The applicant (Doctors for Life) filed a complaint indicating that the National Council of Provinces (NCOP) and the provincial legislatures failed to invite written submissions and conduct public hearings during the promulgation of the Choice on Termination of Pregnancy Amendment Act 38 of 2004, the Dental Technicians Amendment Act 24 of 2004, the

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<sup>188</sup> Section 42(4), *The Constitution, Republic of South Africa*, (1996).

<sup>189</sup> Section 59(1)(a), *The Constitution, Republic of South Africa*, (1996).

<sup>190</sup> Section 59(1)(b), *The Constitution, Republic of South Africa*, (1996).

<sup>191</sup> Section 71(1), *The Constitution, Republic of South Africa*, (1996).

<sup>192</sup> Section 195(1), *The Constitution, Republic of South Africa*, (1996).

Traditional Health Practitioners Act 35 of 2004 and the Sterilisation Amendment Act 3 of 2005 and by doing so failed to facilitate public involvement as required by Section 72(1)(a) and Section 118(1)(a) of the Constitution<sup>193</sup>. The respondents argued that they had taken reasonable steps to facilitate public participation. The respondents argued that all that is required to facilitate public involvement is for the legislature to provide an opportunity to make oral or written submissions in the legislative process, the court noted that South Africa is founded on the principles of democracy and indicated that there are various statutory provisions that breathe life into the principles of democracy such as public participation<sup>194</sup>.

Learned Judge Sachs J elaborated the meaning and effect of public participation to be;

*“All parties interested in legislation should feel that they are taken seriously as citizens and that their views matter and will receive due consideration at the moments when they could possibly influence decisions in a meaningful fashion. The objective is both symbolical and practical: the persons concerned must be manifestly shown the respect due to them as concerned citizens, and the legislators must have the benefit of all inputs that will enable them to produce the best possible laws<sup>195</sup>”*

The Court took time to analyse human rights instruments from an international and local perspective. The Court recognized that the right to public participation is well-established from the middle ages to almost all modern laws in different approaches. The court noted that human rights in their nature evolve over time and the court said *that “rights by their nature will atrophy if they are frozen, As the conditions of humanity alter and as ideas of justice and equity evolve, so do concepts of rights take on a new texture and meaning<sup>196</sup>.”* The court used a historical approach to show basic human right values such as human dignity are deeply entrenched in the principle of public participation in the legislative process<sup>197</sup>.

The Court established there are two parts to the duty to facilitate public involvement, first, there is the duty to provide meaningful opportunities in the legislative process. Secondly there is the duty to ensure that people are able to take advantage of the opportunities that have been provided. The court was tasked with establishing whether;

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<sup>193</sup> *Doctors of Life International vs Speaker of the National Assembly and Others*, 2006, 1.

<sup>194</sup> *Doctors of Life International vs Speaker of the National Assembly and Others*, 2006.

<sup>195</sup> *Doctors of Life International vs Speaker of the National Assembly and Others*, 2006.

<sup>196</sup> *Doctors of Life International vs Speaker of the National Assembly and Others*, 2006.

<sup>197</sup> Karen S and Rashida M ‘*The right of Pubic Participation in the Law making Process and the role of legislature in the promotion of this right*’ 2008, 11

- a) What the nature of the duty to facilitate public participation is;
- b) Whether the legislature had facilitated public participation in the passing of the health legislation;
- c) The impact of the legislation passed if the process of public involvement was flawed<sup>198</sup>.

The court in its wisdom set out a reasonable test and listed several factors that will be considered in testing reasonableness;

- a) The nature of the legislation concerned
- b) The importance of the legislation
- c) Intensity of the impact on the public
- d) Other relevant factors depending on the circumstances of each case.’

The court observes that *‘the duty to facilitate public involvement must be construed in the context of our constitutional democracy, which embraces the principle of participation and consultation. Parliament and the provincial legislatures have broad discretion to determine how best to fulfil their constitutional obligation to facilitate public involvement in a given case, so long as they act reasonably. Undoubtedly, this obligation may be fulfilled in different ways and is open to innovation on the part of the legislatures. In the end, however, the duty to facilitate public involvement will often require Parliament and the provincial legislatures to provide citizens with a meaningful opportunity to be heard in the making of the laws that will govern them. Our Constitution demands no less.’*<sup>199</sup>

In fulfilling its duty to facilitate public participation, the question will be what steps has Parliament taken to facilitate public participation. In every case before facilitating public involvement Parliament should take a step back and determine which way would be best to reach out to the citizens, Learned Judge Sachs J noted that the involvement of people in the legislative process enhances the quality of legislation and in this case would improve the quality of ratified oil and gas agreements<sup>200</sup>.

In conclusion, the Court expressed itself greatly on the issue of public participation and places a duty of Parliament to facilitate public participation in legislative processes. The ground breaking decision in *Doctors for life* has a potential of changing how legislators facilitate public involvement. The Court used international, regional and local law to set a background of what the right to public participation entails, the Court has advanced and set the bar for public participation in legislative processes such as parliamentary ratification.

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<sup>198</sup> *Doctors of Life International vs Speaker of the National Assembly and Others*, 2006.

<sup>199</sup> *Doctors of Life International vs Speaker of the National Assembly and Others*, 2006.

<sup>200</sup> *Doctors of Life International vs Speaker of the National Assembly and Others*, 2006.

***(b) Matatiele Municipality and Others v President of the Republic of South Africa and Others***<sup>201</sup>

In this case the twelfth amendment altered the boundary between the province of KwaZulu-Natal and the province of the Eastern Cape, the effect is the area of Matatiele Municipality was transferred from KwaZulu-Natal to the province of the Eastern Cape.

The Court noted that according to Section 74(8)<sup>202</sup> of the Constitution of South Africa was not complied with, the Court further gathered from the evidence before the Court that the people of Matatiele Municipality and the people of Matatiele were not afforded an opportunity to be heard by the provincial legislature of KwaZulu-Natal<sup>203</sup>.

The Court pointed out that a constitutional democracy is made up of two parts, the first is its representative and secondly it is participative. The two essentials form the foundations of any democracy. The Court added that all provisions in the Constitution should be understood in this manner. The Constitution contemplates that the people will be provided with an opportunity to air their views in the legislative organs either through their elected representatives or through active participation in the legislative process. The Court differed with the Governments argument that the provisions of public participation as provided on Section 118(1)<sup>204</sup> were met by the elected representatives considering the proposed constitution amendments with exclusion of the public.

The Court expressed itself on the limited understanding of Section 118(1) by the Government and said;

*“ the provincial legislatures have broad discretion to choose the mechanisms that, in their view, would best facilitate public involvement in their processes. This may include providing transportation to and from hearings or hosting radio programs in multiple languages on an important bill, and may well go beyond any formulaic requirement of notice or hearing. In addition, the nature of the legislation and its effect on the provinces undoubtedly plays a role in determining the degree of facilitation that is reasonable and the mechanisms that are most appropriate to achieve public involvement. Thus, contrary to the submission by the government, it is not enough to point to standing rules of the legislature that provide generally for public involvement as evidence that public involvement took place; what matters is that the legislature*

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<sup>201</sup> *Matatiele Municipality and Others v President of the Republic of South Africa and Others*, 2006.

<sup>202</sup> Section 78(8), *The Constitution, Republic of South Africa*, (1996).

<sup>203</sup> *Matatiele Municipality and Others v President of the Republic of South Africa and Others*, 2006.

<sup>204</sup> Section 118(1) *The Constitution, Republic of South Africa*, (1996).

*acted reasonably in the manner that it facilitated public involvement in the particular circumstances of a given case*<sup>205</sup>

The Court relied on the reasonable test to assess the nature and degree of public participation. The Court asserted that a number of factors will be examined when determining reasonableness. The factors include;

- a) The importance of the legislation
- b) The intensity of its impact on the public
- c) The distinctness and identifiability of the section of the population potentially affected by the legislation.
- d) The effect of the legislation on the interests of the population.
- e) The content, importance and urgency of the legislation<sup>206</sup>.

The Court found that the KwaZulu- Natal Legislature acted unreasonably in failing to hold public hearings and invite written representations from the public<sup>207</sup>. The Court further noted that the KwaZulu Legislature acted unconstitutionally and clearly violated Section 118(1)(a). The Court therefore declared the part of the Twelfth Amendment which transfers the area that previously formed the local municipality of Matatiele from the province of KwaZulu-Natal to the province of the Eastern Cape<sup>208</sup>.

***(c) King and Others v Attorneys Fidelity Fund Board of Control and Another.***

In this case the appellants challenged the legitimacy of a statute that was passed on the basis of Section 59 of the Constitution which provides for public access and involvement in the National Assembly, it provides that the National Assembly must facilitate public participation in the workings of the assembly and its committees<sup>209</sup>. The appellants asserted that there had been participation but it was not enough, they claim that the bodies that supported the legislation were informed and consulted but the people who would suffer the amendment were not consulted<sup>210</sup>.

The Supreme Court of Appeal defined public participation in the following words , “ *Public involvement*” is necessarily an inexact concept, with many possible facets, and the duty to

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<sup>205</sup> *Matatiele Municipality and Others v President of the Republic of South Africa and Others*,2006.

<sup>206</sup> *Matatiele Municipality and Others v President of the Republic of South Africa and Others*,2006.

<sup>207</sup> *Matatiele Municipality and Others v President of the Republic of South Africa and Others*,2006.

<sup>208</sup> *Matatiele Municipality and Others v President of the Republic of South Africa and Others*,2006.

<sup>209</sup> Section 59, *The Constitution, Republic of South Africa*, (1996).

<sup>210</sup> *King and Others v Attorneys Fidelity Fund Board of Control and Another*.2006

*facilitate it can be fulfilled not in one, but in many different ways. Public involvement might include public participation through the submission of commentary and representations: but that is neither definitive nor exhaustive of its content. The public may become involved in the business of the National Assembly as much as by understanding and being informed of what it is doing as by participating directly in those processes. It is plain that by imposing on Parliament the obligation to facilitate public involvement in its processes, the Constitution sets a base standard, but then leaves Parliament significant leeway in fulfilling it. Whether or not the National Assembly has fulfilled its obligation cannot be assessed by examining only one aspect of public involvement in isolation of others, as the applicants have sought to do here. Nor are the various obligations section 59(1) imposes to be viewed as if they are independent of one another, with the result that the failure of one necessarily divests the National Assembly of its legislative authority<sup>211</sup>”*

The court in this case noted that the public have a right to participate in legislative functions of the National Assembly, it noted that South Africa is a participatory democracy and the National Assembly must carry out its function with due regard to this right.

***(d) Merafong Demarcation Forum and Others V President of Republic of South Africa and Others.***

In this case a constitutional amendment changed the provincial boundaries just as in the *Matatiele* case, the boundary between Gauteng province and North West province. The applicants in this case contended that the Gauteng Provincial Legislature failed to facilitate public participation in the process that lead to the approval of the Twelfth amendment Bill<sup>212</sup>. The court in this case relied on the definition and interpretation of public participation as stated in *Doctors for life*<sup>213</sup> case, the Court went further to note that a legislature can fulfil its role to facilitate public involvement in a array of ways, however, the method used should be reasonable. The Court asserted that in assessing the reasonableness of a public participation mechanism, a number of factors should be considered<sup>214</sup>;

- a) The nature and importance of the legislation
- b) The intensity of its impact on the public.

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<sup>211</sup> *King and Others v Attorneys Fidelity Fund Board of Control and Another*.2006

<sup>212</sup> *Merafong Demarcation Forum and Others V President of Republic of South Africa and Others*, 2006.

<sup>213</sup> *Doctors of Life International vs Speaker of the National Assembly and Others*, 2006.

<sup>214</sup> *Merafong Demarcation Forum and Others V President of Republic of South Africa and Others*, 2006.

The Court in this case found that the decision by the legislature not to go back and get public opinion after circumstances changed was not necessary and did not amount to unreasonableness. It is not convincing how the Court arrived at such a conclusion considering that re-demarcation affects people directly<sup>215</sup>. However, the principle of reasonableness laid in the case sets a good standard to assess the quality of public participation in legislative processes. The shortcoming of the reasonableness test that is laid out in the case is that it lacks procedural safeguards which leaves the Legislature with arbitrary discretion to do the bare minimum to meet the standards of the reasonableness tests.

#### 4.4 Analysis of the Cases

The Court in the above cases took to question what is the meaning and true understanding of the principle of public participation, the Court in the *Doctors for life* case elaborated that the inclusion of people in matters that affect them will show people the respect due to them as citizens. The process of public participation will also lead to rich legislation as members of Parliament will benefit from the input of the citizens and other concerned members and groups<sup>216</sup>. The *Matatiele* and *Doctors for life* case examined the two principles of democracy; representative democracy and participate democracy<sup>217</sup>. The Court in both instances observed that no one is an alternative to the other and the two principles must both be observed for democracy to thrive.

The principle of participatory democracy is that it is not enough to collect views but the views should be reflected in the final piece of legislation, the Court in *Matatiele* and *Doctors for life* observed that the views that are collected by the legislators should not be collected for formality purposes but should influence legislation<sup>218</sup>. The Court in the cases above placed a responsibility on the legislative arm of Government to facilitate public participation. The facilitation of public participation should not be seen as a procedural hurdle rather it should be seen as a way to giving back the people their power. The *Doctors for life* case noted that because of the history of South Africa and the suffering of the people during the apartheid regime, it is only fair for the people who were marginalized and silenced to speak and be

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<sup>215</sup> *Merafong Demarcation Forum and Others V President of Republic of South Africa and Others*, 2006.

<sup>216</sup> *Doctors of Life International vs Speaker of the National Assembly and Others*, 2006.

<sup>217</sup> *Matatiele Municipality and Others v President of the Republic of South Africa and Others*, 2006.

<sup>218</sup> *Doctors of Life International vs Speaker of the National Assembly and Others*, 2006.

heard<sup>219</sup>. The public will participate more actively knowing that their views will be accommodated and considered.

In the *Merafong* case the Court adopted a very narrow approach on public participation, despite the case having very similar circumstances to the *Matatiele* case, the Court adopted a very narrow approach. The Court found that the Legislatures choice not to go back to get public opinion did not amount to unreasonableness. The Court further noted that the Legislature is not bound by the views of the people and the views of the people should not necessarily be reflected in legislation<sup>220</sup>. The whole purpose of public participation is for people to have influence over the final decision, this narrow school of thought will make legislatures view the whole process of public participation as a ritual and will add no value to the people. It can be construed that the Court in *Merafong* did not understand the purpose of public participation and limited itself to be guided by a formal view of the separation of powers principle<sup>221</sup>.

The great gulf between the *Matatiele* case and *doctors for life* case compared to the *Merafong* case shows the difference between a formal and limited understanding of public participation and a substantive and inclusive view of public participation. The *Merafong* case suggests that members of Parliament know what is appropriate for the people. This is not the case and a more logical approach is the view of the Court adopted in *Doctors for life* and *Matatile*. The two tenets of democracy should be balanced, the representatives of the people make decisions on behalf of the people, the process of arriving at decisions provides an opportunity for the public to be heard and for their views to be reflected in the final legislation.

In conclusion, public participation is one of the core tenets of any democracy, Learned Judge Sachs J in *Doctors for life*<sup>222</sup> noted “*in our country active and ongoing public involvement is a requirement of constitutional government in a legal sense*”. The legislature thus has a responsibility of ensuring that the oil and gas agreements that are ratified according to Article 71<sup>223</sup> should reflect what was collected and agreed upon during public consultations.

#### **4.5 Conclusion.**

It should be noted that this thesis does not concern itself with analysis of judicial interpretation in the formal and substantive view. However, the case law above provides direction and a standard that can be applied in parliamentary ratification of oil and gas agreements. The

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<sup>219</sup> *Doctors of Life International vs Speaker of the National Assembly and Others*, 2006.

<sup>220</sup> *Merafong Demarcation Forum and Others V President of Republic of South Africa and Others*, 2006.

<sup>221</sup> *Merafong Demarcation Forum and Others V President of Republic of South Africa and Others*, 2006.

<sup>222</sup> *Doctors of Life International vs Speaker of the National Assembly and Others*, 2006.

<sup>223</sup> Article 71, *Constitution of Kenya*, 2010.

standard of reasonableness that was set by the Court in the *Doctors for life* case can be used as a basis of public participation in the ratification of oil and gas agreements as provided for under Section 31(3) of the Petroleum Act<sup>224</sup>.

The objective standard of reasonableness is conscious of the surrounding circumstances of each case. The test does not adopt a limited approach and considers a number of factors including the context. The Court asserted that in assessing reasonableness it will consider what actions Parliament has taken to facilitate public involvement while considering importance and urgency of the legislation<sup>225</sup>. The court also added that in assessing reasonableness it will also consider the impact of the legislation, time and expenses<sup>226</sup>. If Parliament in ratification of oil and gas agreements is able to meet the standard of reasonableness in facilitating public participation then it will have conducted sufficient public participation.

The duty to facilitate public participation is twofold, first Parliament has to provide an opportunity for participation, and secondly should ensure that people, groups and communities are able to take advantage those opportunities<sup>227</sup>. This means that Parliament should provide the necessary information that the public needs to participate effectively<sup>228</sup>. The above case law shows that Parliament is not limited in ways to conduct public participation in the ratification of oil and gas agreements as long as it able to satisfy the reasonable test. The method chosen by Parliament to facilitate public participation should provide a reasonable opportunity for members of public, groups and affected communities to express their views.

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<sup>224</sup> Section 31(3), *Petroleum Act*.

<sup>225</sup> *Doctors of Life International vs Speaker of the National Assembly and Others*, 2006.

<sup>226</sup> *Doctors of Life International vs Speaker of the National Assembly and Others*, 2006.

<sup>227</sup> *Doctors of Life International vs Speaker of the National Assembly and Others*, 2006.

<sup>228</sup> *Doctors of Life International vs Speaker of the National Assembly and Others*, 2006.

## CHAPTER FIVE

### FINDINGS AND RECOMMENDATIONS

#### 5.1 Introduction

This chapter offers a summary of the findings of this thesis, the second part of the chapter will focus on giving recommendations that are directed towards the improvement of public participation of oil and gas agreements. It is important that members of Parliament should be custodians of participatory democracy, the Judge in the Merafong case noted '*the public participation in the legislative process, which the constitution envisages, is supposed to supplement and enhance the democratic nature of general elections and majority rule, not to conflict with or even overrule or veto them*'<sup>229</sup>. The view that is supported by this paper is one of inclusion. It is not enough for a state like Kenya to insist on representative democracy and subdue participative democracy, both aspects of democracy should complement each other especially in times of important decision making such as the ratification of Oil and Gas agreements.

#### 5.2 Findings

##### Chapter One

Chapter One of this paper provided the context of this research. The chapter discussed extensively the problem of lack of public participation in ratification of oil and gas agreements. This Chapter revealed that the exploration of oil and gas resources does not necessarily lead to development, there are detrimental effects of mismanagement of the oil and gas sector especially in African countries. In order to enjoy the full benefits of oil and gas resources principles such as public participation and transparency should be at the core of the process. The literature review laid a context to this paper by discussing the works of other authors regarding public participation in the legislative processes. The Chapter stipulated the two research questions that have guided this paper, the first research question, is parliamentary ratification enough to dispense public participation? and the second question is, at what point should parliamentary ratification of oil and gas contracts be done?

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<sup>229</sup> *Merafong Demarcation Forum and Others V President of Republic of South Africa and Others*, 2006.

## **Chapter Two**

This Chapter involved an extensive analysis on the law that governs public participation in oil and gas decision making. The chapter discussed local, regional and international law on public participation. This chapter sought to show that first public participation is of utmost importance in the extractive industry, second it revealed the pre-requisites of satisfying public participation by discussing case law surrounding public participation in the extractive sector. The discussion of case law revealed the importance that is placed on public participation in the extractive sector. Through the analysis of law on the Parliamentary ratification of oil and gas agreements in Chapter Two and the discussion on the prerequisites of satisfying public participation in this chapter answered the first research question and found that the current process of parliamentary ratification does not satisfy public participation.

## **Chapter Three**

Chapter Three involved an in depth analysis of law governing the parliamentary ratification process. The Chapter first discussed Parliament as an organ of representation and an avenue of participation. This Chapter disclosed that Parliament as an organ of Government has a role to play in the extractive sector and there are many benefits of Parliament getting involved in the process. The process of parliamentary ratification was discussed extensively and the inadequacies of the current process with regard to public participation. The Chapter clearly revealed that Parliament is required to analyze and approve an agreement that they know very little about. The investigation into the current process of Parliamentary ratification revealed that ratification of oil and gas agreements is done at the end, at a time where no major adjustments on the agreement can be done. This chapter answered the second research question that parliamentary ratification should not be done at the end, but that the legislature should be involved from the beginning of the process. It also showed that parliament should be provided with information surrounding the rationality and compromises of the clauses in the agreement for them to be able to make an informed decision.

## **Chapter Four**

The Chapter draws lessons from South Africa and used case law of South African courts on public participation in legislative processes to give direction and provide a standard of public involvement in parliamentary ratification. The opinions that were raised by Judges in the South African cases such as *doctors for life* case and *Matatiele* Case clearly give direction on the issue of public participation in the legislative process. The cases discussed above should be

considered as guidelines in the determining the level of public participation required in Parliamentary Ratification of oil and gas agreement's. The judges investigated the underpinnings of participative and representative democracy and debated that no one should trump the other. This paper opines that the level of public participation in oil and gas agreements should be evaluated based on the 'reasonable test' laid out in the South African cases.

### **5.3 Recommendations**

It is clear from the foregoing that there are a couple of reforms that should be implemented to ensure effective public participation in the parliamentary ratification process;

1. The process of parliamentary ratification should be seen as a legislative process and not an occasion to rubber stamp the agreement made by the Government and International Oil Company. An oil and gas agreement should be subject to the normal legislative process just like a bill, oil and gas projects endure for many years and thus parliament should not be in a hurry to ratify an oil and gas agreement. If the agreement is subjected to the normal legislative process it will allow other parties to understand and be involved in the process. This gives parties an opportunity to give comments or objections.
2. Parliament in a bid to facilitate public involvement in the process should take the following steps; there should be effective publicity through all available media including local and vernacular stations inviting members of the public to hearings and inviting comments, there should be clear provisions for the tabling of submissions from local communities, citizens, civil society and NGOs, there should be intentional and direct invitations to concerned members of public, relevant experts, marginalized and indigenous groups to give comments and concerns, public hearings should be organized where parliamentarians should share the benefits and negative effects of project, a public record of the submissions and meetings should be publicly available.
3. Parliament should take advantage of the four committees which are in charge of the extractive sector. The National Assembly has two departmental committees; Environmental and Natural Resources Committee and Energy, Communication and Information Committee. The Senate on the other hand has two standing committees; Committee on Energy, Roads and Transportation and Committee on Land, Environment and Natural Resources. The committees should examine the agreement before it is presented to the house, this will enable the committees to collect information

from the people who could potentially be affected by the agreement and present it on the floor of the house.

4. Parliamentary ratification can be strategically adapted to include regular reporting either orally or through written documents by the Government and International Oil Company. This will enable Parliament examine the operations and question if the Executive and IOC are adhering to the agreement terms. Such reporting should be consistent with the roles and responsibilities of the parties. This will enhance parliamentary oversight and improve transparency.
5. Parliament should enhance its capacity to properly examine an oil and gas agreement. This will enable parliamentarians to understand the rationale of the clauses and make an informed decision on whether to ratify or not. This will involve a thorough scrutiny on the financial and technical competence of the International Oil Company and a background check on the environmental compliance of the International Oil Company in previous works.
6. There are several informal platforms such as church meetings, public *barazas* and school meetings that Parliament can use to raise public awareness on the issues of the agreement. This will enable members of public who are not able to read newspapers and access a Tv or radio to get information on the proposed agreement.

## 5.4 Conclusion

In final conclusion, in a pluralist society such as Kenya, all laws, legal processes and agreements should “result from a fair and open participatory process in which all publicly available reasons have been respected, the outcome is such that citizens may continue to cooperate in deliberation rather than merely comply, the source of sovereign power is the public deliberation of the majority<sup>230</sup>”. It is important all citizens feel included, the final decision will not make each and every citizen happy but every citizen should be happy with the deliberative process.

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<sup>230</sup> James Bohman, *Public Delibearation: Pluralism, Complexity and Democracy*, 1996, 187.

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