

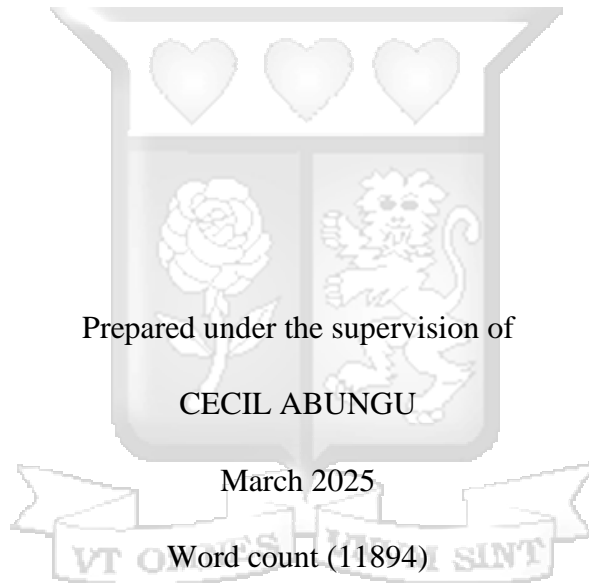
PUBLIC VOICES MATTER: AN ANALYSIS OF PUBLIC PARTICIPATION AND THE ROLE OF LEGISLATORS IN KENYA

Submitted in partial fulfilment of the requirements of the Bachelor of Laws Degree, Strathmore
University Law School

By

HOPE IMALINE ADALO

141657



Prepared under the supervision of

CECIL ABUNGU

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DECLARATION

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

Signed: 

Date: ..March.14.2025.....

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



Signed:

CECIL ABUNGU

Date: ..March.14.2025.....



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LIST OF LEGAL INSTRUMENTS

International Instruments

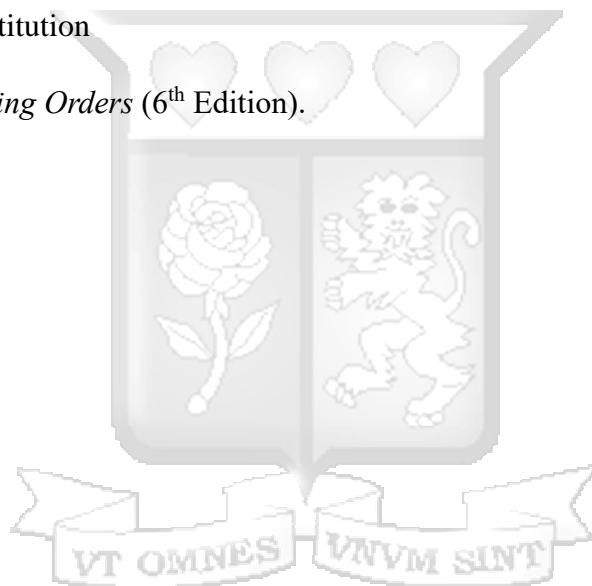
International Covenant on Civil and Political Rights

Domestic Laws

Constitution of Kenya 2010

1963 Independence Constitution

National Assembly Standing Orders (6th Edition).



LIST OF CASES

British American Tobacco Kenya, PLC formerly British American Tobacco Kenya Limited v Cabinet Secretary for the Ministry of Health and 2 others (2019) eKLR.

In the Matter of the National Land Commission, the Advisory Opinion Application 2 of 2014 (2015) eKLR.

National Assembly and another v Okiiti and 55 others (2024) eKLR.

Cabinet Secretary for the National Treasury and Planning and 4 others v Okiiti and 52 others (2024) eKLR.

South African Veterinary Association v Speaker of the National Assembly and others (2018), Constitutional Court of South Africa.

Law Society of Kenya v Attorney General and Another (2016) eKLR.

Pwani Super Capacity Transporters Saving and Another v County Government of Mombasa (2020) eKLR.

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

Legal Advice Centre and 3 others v County Government of Mombasa and 4 others (2016) eKLR.

Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others (2005), Constitutional Court of South Africa.

Kaps Parking Limited & another v County Government of Nairobi & another (2021) eKLR.

Katiba Institute and another v Attorney General and another (2017) eKLR.

Institute of Social Accountability and another v National Assembly and 4 others (2015) eKLR.

Pevans East Africa Limited and Another v Chairman, Betting Control and Licensing Board and 7 others (2018) eKLR.

Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others (2008), Constitutional Court of South Africa.

Gachagua v The Speaker of the National Assembly and 3 others (2024) eKLR.

Attorney General and 2 others v Ndi and 79 others; Dixon and 7 others (2022) eKLR.

Doctors for Life International v Speaker of the National Assembly and Others (2006), Constitutional Court of South Africa.

LIST OF ABBREVIATIONS

MCA's Members of County Assemblies

MPs Members of Parliament



Abstract

The Constitution of Kenya 2010 mandates that public participation is facilitated by the legislators in Kenya, yet the effort put into public participation is minimal to none. Notwithstanding the fact that these legislators have a history of treating public participation as a formality. Kenya is a democratic state, and the people are sovereign and being that as it is, they have a right to participate in matters concerning them. With the promulgation of the 2010 Constitution in Kenya, the expectations were that there would be active public participation and a culture of justification, since the 2010 Constitution brought the aspect of transformative constitutionalism to Kenya. Courts have also emphasized that the test to be used is that of reasonability where the citizens are given a reasonable opportunity to participate in matters governing them. However, the legislators are yet to show efforts they have taken to make public participation significant in Kenya or meet this threshold of reasonability.

This study investigates whether the Constitution of Kenya requires the legislators to materially take into account the information received during public participation when legislating. Doctrinal research was used to conduct this study through an analysis of constitutional ideas, scholarly work and cases.

The legislators in Kenya, barely give public participation the urgency and importance it needs. Therefore, there is need for reasons to be given for the rejection or acceptance of public opinions, there is need for inclusion of citizens who are directly affected by the proposed legislation in the process, there needs to be sufficient advertisement of an ongoing public participation process and lastly, the citizens need to be accorded a reasonable opportunity to participate in the process.

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1.0 Introduction

1.1 Background

Public participation is supported by many countries, it is said that democracy can best be upheld by allowing people to participate more actively in the decision and policy making processes that affect them,¹ and that public participation is a crucial pillar of democracy.² And in Kenya, which is at the centre of this study, the retired Chief Justice also emphasized the importance of public participation as a bedrock of democracy and good governance making it a major pillar in the Constitution.³

It is therefore important to define public participation, “public participation encompasses a range of public involvement, from simply informing people about what Parliament is doing, to delegating decisions to the public”.⁴ Democracy is enriched by improving decision making for the citizens who are sovereign in Kenya,⁵ and bolstering politicians’ accountability to the public.⁶ The politicians in question being the legislators in Kenya. The legislators, and especially parliament, are duty bound⁷ to promote public participation.⁸ This is supported by the Constitution of Kenya, in Article 118 which states “Parliament shall facilitate public participation and involvement in the legislative and other business of Parliament and its committees”.⁹ Furthermore, Article 10 of the Constitution of Kenya states that public participation is one of the principles of national governance,¹⁰ and advocates for transparency

¹ Msewa E, ‘Activating ‘citizen mode’ to support democracy from the ground up’ UN News Centre, 4 July 2023 — < <https://news.un.org/en/story/2023/07/1138292> > on 5 September 2024.

² Slijepcevic S, ‘Public participation as the pillar of democracy: The role of councillors in Croatia’ ECPR General Conference, Bordeaux, 7 September 2013,123.

³ *British American Tobacco Kenya, PLC formerly British American Tobacco Kenya Limited v Cabinet Secretary for the Ministry of Health and 2 others* (2019) eKLR.

⁴ Parliament of Kenya, *Public participation in the legislative process*, 2022, 4.

⁵ Article 1, *Constitution of Kenya* (2010).

⁶ ‘2015 – Public participation for democracy’ Inter-Parliamentary Union, 15 September 2015 — < <http://archive.ipu.org/idd/2015-participation.htm> > on 5 September 2024.

⁷ Article 10, *Constitution of Kenya* (2010).

⁸ ‘2015 – Public participation for democracy’ Inter-Parliamentary Union, 15 September 2015 — < <http://archive.ipu.org/idd/2015-participation.htm> > on 5 September 2024.

⁹ Article 118, *Constitution of Kenya* (2010).

¹⁰ Article 10, *Constitution of Kenya* (2010).

and accountability.¹¹ This is also supported internationally where it is stated that citizens have the right to participate in the conduct of public affairs directly or through representatives.¹²

The new form of governance, the 2010 Constitution, superseding the 1963 Independence Constitution,¹³ came with other challenges such as little backing from the political elite in the land.¹⁴ The political elite have a vital role in ensuring that significant public participation has been carried out.¹⁵ MPs and legislators at large, are the agents of the public and they are meant to exercise their role by voicing what the citizens have to say.¹⁶ In a bid to ensure efficient public participation, they inform citizens about a particular bill, solicit their input and share these opinions during decision-making discussions.¹⁷

However, even after the promulgation of the 2010 Kenyan Constitution, legislators have been acting contrary to their roles and one example is in the financial sector where MPs have failed to adequately represent the people's interests.¹⁸

During the decisions of the constitutionality of the Finance Act 2023, the Court of Appeal declared the Act unconstitutional and ruled that adding new parts to the bill after public participation has been conducted, paves way for the creation of a flawed process, even with the power to make changes post public participation.¹⁹ The reason for this is the risk of mischief, where new provisions can be mischievously added bypassing public participation which is an

¹¹ Governance and Social Development Resource Centre, *Helpdesk Research Report: Participation in transparency and accountability initiatives - the case of budgetary processes and extractive industries*, 25 October 2012, 3.

¹² Article 25, *International Covenant on Civil and Political Rights*, 16 December 1966.

¹³ Greste P, 'Kenya's new constitution sparks hopes of rebirth' BBC News, 27 August 2010 — < <https://www.bbc.com/news/world-africa-11103008> > on 6 September 2024.

¹⁴ Mbithi A, Ndambuki D and Juma F 'Determinants of public participation in Kenya county governments' 54 *Journal of Asian and African Studies* 2, 2018, 2.

¹⁵ Mwakamba L, 'More and More, MPs need to Engage with Citizens for Representative Leadership to be a Reality' Mzalendo, 24 May 2024 — < <https://mzalendo.com/posts/more-and-more-mps-need-engage-citizens-representat/> > on 8 September 2024.

¹⁶ Mokua E, 'Outline clear roles for Members of Parliament' The Standard, 2017 — < <https://www.standardmedia.co.ke/commentary/article/2001238203/outline-clear-roles-for-members-of-parliament> > on 8 September 2024.

¹⁷ Mwakamba L, 'More and More, MPs need to Engage with Citizens for Representative Leadership to be a Reality' Mzalendo, 24 May 2024 — < <https://mzalendo.com/posts/more-and-more-mps-need-engage-citizens-representat/> > on 8 September 2024.

¹⁸ Odhiambo G, 'Parliament must take up role of safeguarding public interest' International Commission of Jurists, 13 September 2024 — < <https://icj-kenya.org/news/parliament-must-take-up-role-of-safeguarding-public-interest/> > on 1 October 2024.

¹⁹ *National Assembly and another v Okiiti and 55 others* (2024) eKLR.

essential right.²⁰ The Court went ahead to say that for public participation to be meaningful and reasonable, the state organs, have to give reasons as to why some views were not taken into account and why other views were preferred, this enhances the public's confidence in participatory democracy.²¹

However, the Supreme Court overturned the ruling by the Court of Appeal, declaring the Finance Act 2023 constitutional.²² The Supreme Court, with regards to public participation, decided on two issues and also gave recommendations.

The Supreme Court has always aimed to uphold public participation. One such instance is *In the Matter of the National Land Commission, the Advisory Opinion Application 2 of 2014* where the Supreme Court held that “public participation constituted one of the checks and balances in the discharge of obligation that the Constitution of Kenya has assigned various government institutions”.²³ This decision shows the role of public participation in constitutional law.

With regards to the constitutionality of the 2023 Finance Act, the Supreme Court said that to prevent the process of public participation from being a mere formality, it has to be purposive and meaningful.²⁴ This is done to prevent mischief by inclusion of new provisions that fail to be subjected to public participation.²⁵ The court needed to distinguish between the minor and substantive provisions of the Finance Act, where substantive provisions require further public participation²⁶ and out of the 17 new provisions, 15 were substantive provisions.²⁷ Although

²⁰ *National Assembly and another v Okiiti and 55 others* (2024) eKLR.

²¹ *National Assembly and another v Okiiti and 55 others* (2024) eKLR.

²² Wright C, 'Kenya Supreme Court declares the Finance Act 2023 constitutional' EY Global Tax News, 1 November 2024 — < [²³ \(2015\) eKLR.](https://globaltaxnews.ey.com/news/2024-2008-kenya-supreme-court-declares-the-finance-act-2023-constitutional#:~:text=The%20Kenya%20Supreme%20Court%20has,conducted%20by%20the%20National%20Assembly.> on 3 November 2024.</p></div><div data-bbox=)

²⁴ *British American Tobacco Kenya, PLC formerly British American Tobacco Kenya Limited v Cabinet Secretary for the Ministry of Health and 2 others* (2019) eKLR.

²⁵ *Cabinet Secretary for the National Treasury and Planning and 4 others v Okiiti and 52 others* (2024) eKLR.

²⁶ *South African Veterinary Association v Speaker of the National Assembly and others* (2018), Constitutional Court of South Africa.

²⁷ *Cabinet Secretary for the National Treasury and Planning and 4 others v Okiiti and 52 others* (2024) eKLR.

substantive, the amendments were made after incorporating public opinion and therefore there was no need to subject the amendments to another round of public participation .²⁸

The court ruled that public participation is not an administrative process and thus there is no obligation on parliament to give reasons for adopting or rejecting views received from a public participation process.²⁹ The recommendation given to further enhance transparency and accountability in public participation, was that Parliament should make sure the public is informed all through the various stages of the Bill being passed in Parliament and avail different versions of the Bill for review.³⁰

Following from the above, one of the recommendations from transformative constitutionalism and democratization under 2.0 is that the legislators should give reasons for the adoption or rejection of views collected during public participation because this would be in line with the culture of justification under the 2010 Constitution. This would then lead to the process to be substantiated and ensure that legislators give public participation the importance it deserves.

1.2 Statement of the problem

This study will examine whether the Constitution of Kenya requires the legislators to materially take into account the information received during public participation when legislating.

1.3 Research Questions

1. How has public participation been done by Kenya's legislators, that is, Members of Parliament, Senators and Members of County Assemblies, since 2010?
2. What does constitutional law in Kenya say in relation to public participation in Kenya?
3. What does constitutional law require legislators to do with the views collected during public participation in the process of legislating?

1.4 Research Objectives

1. To evaluate how public participation has been done by Kenya's legislators that is, Members of Parliament, Senators and Members of County Assemblies, since 2010.

²⁸ *Law Society of Kenya v Attorney General and Another* (2016) eKLR.

²⁹ *Cabinet Secretary for the National Treasury and Planning and 4 others v Okiiti and 52 others* (2024) eKLR.

³⁰ *Cabinet Secretary for the National Treasury and Planning and 4 others v Okiiti and 52 others* (2024) eKLR.

2. To assess what constitutional law in Kenya says in relation to public participation in Kenya.
3. To evaluate what constitutional law requires legislators to do with the views collected during public participation in the process of legislating.

1.5 Hypothesis

The Constitution of Kenya requires legislators to materially take into account the information received during public participation when legislating. This can be done through ensuring that the citizens are given feedback on the rejection or acceptance of public opinions, there are county departments dedicated to public participation and there are standard guidelines put in place for public participation.

1.6 Justification of the study

This study will benefit the legislators and judges as well. The judges would be able to determine better if the required standard for public participation by legislators has been met. The legislators, the MCAs, MPs and Senators, would go out of their way to ensure that this right has been upheld and conducted appropriately. The legislators would also ensure that the views given are materially taken into account, given that it is part of their duty to do so as shown later on in this paper. The legislators and judges would therefore ensure that the process of public participation is not treated cosmetically but given the importance it requires.

1.7 Conceptual framework: Deliberative democracy as a desirable outcome

Gutmann and Thompson placed an emphasis on four characteristics of deliberative democracy. However, of importance is the principle that “deliberative democracy is a form of governance in which free and equal citizens and their representatives justify decisions” which was termed the reason-giving principle.³¹

This is done in a process where the citizens provide justifications for their reasoning in a bid to reach a consensus between themselves on an acceptable conclusion and many scholars are of this view, that there must be a discourse among citizens about the matter in question and

³¹ Bianchi G, ‘Introducing deliberative democracy: A goal, a tool or just a context?’ 18 *Human Affairs* 1, 2008, 100.

delegation about it.³² This democracy aims to solve moral conflicts in politics by taking the collective discussions of the public on a particular issue, establishing what the central issue in the collective discussions is, and merging them to state policy by considering and establishing the relationship and therefore achieving deliberation.³³ The consideration of alternatives proposed by the citizens as a result of the collective discussions ought to be the standard for administrative actions.³⁴ These actions have to include these alternative views as a reciprocation of the common good of the citizens.³⁵

Gutmann and Thompson's view of deliberative democracy, particularly the emphasis on reason-giving, accessible justification, and binding yet open-to-challenge decisions, creates a basis. In Kenya's context, this means that legislators must not only gather public input but also substantively engage with it, ensuring that the legislative process remains transparent and legitimate. By failing to materially consider this input, legislators risk undermining the transparency of the process and the legitimacy of the laws passed, which directly contradicts the democratic ideals embedded in deliberative democracy.

The role of deliberative democracy in achieving legitimate collective decisions is quite big. In Kenya, the legitimacy of laws hinges on public participation, and therefore, legislators are constitutionally obligated to engage with public input in a meaningful way. Deliberative democracy encourages public-spiritedness and inclusivity, ensuring that diverse voices are reflected in legislative outcomes. This approach aligns with the Constitution's requirement for public participation by making it a tool for resolving conflicting moral and policy views while correcting legislative mistakes. By fostering collective reflection between societal discourse and state policy, deliberative democracy emphasizes the need for legislators to reflect public input in their legislative decisions, reinforcing the constitutional mandate.

Moreover, Ferejohn's assertion that public decisions must be responsive to diverse views of the common good strengthens the argument that public participation in Kenya is not merely a

³² Fleming J, 'Securing deliberative democracy' 72 *Fordham Law Review* 5, 2004, 1438.

³³ Bianchi G, 'Introducing deliberative democracy: A goal, a tool or just a context?' 103.

³⁴ Ferejohn J, 'Instituting Deliberative Democracy' in Shapiro I and Stephen M (eds) *Designing Democratic Institutions: Nomos XLII*, New York University Press, New York, 2000, 75.

³⁵ Ferejohn J, 'Instituting Deliberative Democracy' 75.

procedural formality. In a political environment where trust in government is fragile, a deliberative process that engages with public input can enhance public trust and make legislators more responsive to the needs of citizens. This makes deliberative democracy not only a constitutional necessity but also a desirable outcome, as it fosters inclusiveness, transparency, and legitimacy in the legislative process. Therefore, by applying the principles of deliberative democracy, the constitutional requirement for public participation is elevated beyond formality, becoming a vital tool for improving the quality and legitimacy of Kenyan legislation.

1.8 Literature review

1.8.1 On the importance of public participation

The foundation of democracy is to achieve the active involvement of citizens in the decision-making process.³⁶ Arnstein used the analogy of a ladder in trying to expound on this and she did so by categorizing public participation into three stages, the most important one however, is the stage that involves the citizens having power, therefore having a direct impact on the process.³⁷ This stage has the sixth, seventh and eight rungs in the analogy of the ladder which are partnership, delegated power and citizen control respectively.³⁸ They encompass a partnership between the citizens and those in authority, control vested in the citizens thus those in power need to negotiate with the citizens before decision-making, and the citizens having the authority to make decisions.³⁹

Participation should therefore be looked at by considering three important dimensions; “who participates, how participants communicate with each other and make decisions together and how discussions are linked with policy or public action”.⁴⁰ This three dimensional approach is important because the participants in a democracy are the citizens, and their involvement is important because they are the most knowledgeable on the difficulties they encounter and

³⁶ Berg-Schlosser D, 'Modes and Meaning of Political Participation in Kenya' 14 *Comparative Politics* 4, 1982, 399.

³⁷ Adede P, 'An analysis of the concept of public participation in Kenya' 1 *International Journal of Law and Policy* 2, 2017, 49.

³⁸ Arnstein S, 'A ladder of citizen participation' 35 *Journal of the American Institute of Planners* 4, 1969, 221-222.

³⁹ Arnstein S, 'A ladder of citizen participation' 221-222.

⁴⁰ Fung A, 'Varieties of participation in complex governance' 66 *Public Administration Review* Special Issue, 2006, 66.

therefore would be the best for finding solutions.⁴¹ It is important therefore that public participation is seen as the remedy for finding solutions to the problems encountered by the citizens.⁴²

Despite its importance, participation is often reduced to a really low extent by the representatives of the people such that only the eruption of protests or activities related to elections would elicit participation due to the very few opportunities presented, for participation to happen.⁴³ Therefore, it can be seen that public participation is hardly given the importance it requires.

Reviews of public participation initiatives internationally have also noted that there exists an evaluation gap between the efforts made by governments to better citizen involvement in decision making, and the consciousness given to assess the success of such efforts.⁴⁴ It is quite clear therefore that more effort needs to be put into public participation by legislators seeing that it has an essential impact on public policy.⁴⁵

1.8.2 On constitutional law in Kenya in relation to public participation

Kenya is a democratic state. Many scholars argue that constitutionalism and sovereignty are essential elements leading to democracy.⁴⁶ However, of importance is popular sovereignty because people actually take part in the process of deciding on significant and concerning matters.⁴⁷ Therefore, the inclusion of public participation in a democratic state is crucial because people are the sovereign of the land. Constitutionalism, encompasses a written constitution that has a bill of rights with a robust system of constitutional rulings.⁴⁸ It entails

⁴¹ Maling'a S, 'Public participation in county governance in Kenya: A withering eucalyptus in a desert middle' Published LLB Thesis, University of Nairobi, Kenya, 2014, 20.

⁴² Maling'a S, 'Public participation in county governance in Kenya: A withering eucalyptus in a desert middle' Published LLB Thesis, University of Nairobi, Kenya, 2014, 20.

⁴³ Smith T, *Politicizing digital space: Theory, the internet and renewing democracy*, University of Westminster Press, London, 2017, 72.

⁴⁴ Research Gate, *Assessing the impacts of public participation: Concepts, evidence and policy implications*, March 2006, 4.

⁴⁵ Research Gate, *Assessing the impacts of public participation: Concepts, evidence and policy implications*, March 2006, 4.

⁴⁶ Rudebeck L, 'Beyond democratic constitutionalism: On the two fold meaning of democracy and democratization' 6 *African Sociological Review* 1,2002, 175.

⁴⁷ Rudebeck L, 'Beyond democratic constitutionalism: On the two fold meaning of democracy and democratization' 174.

⁴⁸ Romeo G, 'The conceptualization of constitutional supremacy: global discourse and legal tradition' 21 *German Law Journal* 5, 2020, 907.

restrictions to the authority of the state and government, establishing constraints within which the rights of citizens can be protected to ensure that power is not misused by those who are vested with it and establishes a system of checks and balances where power is allocated formally through the governance system.⁴⁹ Therefore, from the above, public participation is a right that is protected by a written constitution, the Constitution of Kenya 2010 and those in power are meant to use that power to protect and uphold this right.⁵⁰

Onto the concept of transformative constitutionalism, a single definition barely exists for it.⁵¹ But there are key elements to it and these are that States and by extension the courts, have a critical role in liberating their citizens and promoting freedom and egalitarianism.⁵² Many scholars emphasize that the constitution, being the supreme law, has various rights and freedoms as well as values that need to be defended.⁵³ Transformative constitutionalism establishes a system of justification for the authorities for the actions they take, the courts and also the state, and this system advocates for a transparent democracy.⁵⁴

Transformative constitutionalism embodies a societal transformation into a system that values equality, participation and democracy, therefore advocating for transparency and democratization but requires a rule of law that evolves to accommodate this.⁵⁵ Parliament cannot deliver as it needs to, if its left on its own and the judicial process is bound to have some flaws.⁵⁶ This is because judges as shown by their past decisions, have shown little reasoning for their judgements, therefore leaving room for the need for justification.⁵⁷ Transformation is not limited to courts and the state however, but extends into the society.⁵⁸

⁴⁹ JSTOR, Building freedom? Securing constitutionalism and civil liberties in Africa: An analysis of evidence from the APRM, 1 February 2016, 22.

⁵⁰ Article 10, *Constitution of Kenya* (2010).

⁵¹ Langa P, 'Transformative Constitutionalism' 17 *Stellenbosch Law Review* 3, 2006, 351.

⁵² Priya S, 'Transformative Constitutionalism' 2 *International Journal of Law Management and Humanities* 5, 2019, 108.

⁵³ Langa P, 'Transformative Constitutionalism' 2006, 354.

⁵⁴ Mureinik E, 'A bridge to where? Introducing the interim Bill of Rights' 10 *South African Journal on Human Rights* 1, 1994, 32.

⁵⁵ Klare K, 'Legal culture and transformative constitutionalism' 14 *South African Journal on Human Rights* 1, 1998, 147.

⁵⁶ Klare K and Davis D, 'Transformative Constitutionalism and the Common and Customary Law' 26 *South African Journal on Human Rights* 3, 2010, 502.

⁵⁷ Klare K and Davis D, 'Transformative Constitutionalism and the Common and Customary Law' 501.

⁵⁸ Langa P, 'Transformative Constitutionalism' 2006, 361.

In light of the above, my work is contributing to the existing discussion on public participation by looking at the way in which public participation is conducted by the legislators in Kenya who are elected to be the representatives of the people. This is essentially the starting point of making any bill into law and therefore, public participation as an essential right, ought to be conducted in a meaningful manner. It is a national principle of governance and therefore legislators should materially take into account the information they get after conducting public participation.

1.9 Methodology

This study will employ doctrinal research. It will involve analysing case law, constitutional ideas, statutes, and scholarly literature on public participation.

Deductive reasoning will be employed, beginning with an existing theory, formulating a hypothesis and combining premises to reach a conclusion. Sections of the Constitution of Kenya and an Article of the International Covenant on Civil and Political Rights will be relied on. Such as Article 10 and 118 of the Constitution of Kenya and Article 25 of the International Covenant on Civil and Political Rights.

The question, on how public participation been done by Kenya's legislators since 2010, will be answered by analysing cases and news reports.

The question on what constitutional law in Kenya says in relation to public participation in Kenya, will be answered by an analysis of scholarly work and constitutional law ideas.

The question on what constitutional law requires legislators to do with the views collected during public participation in the process of legislating, will be answered by answering the previous two questions.

In answering these questions then the question of whether the Constitution of Kenya requires legislators to materially take into account the information received during public participation when legislating, will be answered.

1.10 Chapter breakdown

This study will be broken down into chapters. Chapter one discusses the background, outlines the research questions and objectives as well as the hypothesis. It does a review of the literature on the topic at hand, expounds on the conceptual framework and ends in discussing the contribution of the work to existing literature.

Chapter two will evaluate what constitutional law in Kenya says regarding public participation and whether constitutional law ideas such as transformative constitutionalism and democratization apply.

Chapter three will explore how public participation has been done by Kenya's legislators since 2010, it will explore how not only Members of Parliament have been conducting public participation, but also how Senators and Members of County Assemblies have been conducting public participation after the enactment of the 2010 Constitution into law.

Chapter four will examine what duties are imposed on legislators by constitutional law, with the views collected during public participation when legislating.

2.0 Constitutional Law Analysis of Public Participation in Kenya

2.1 Introduction

The previous chapter sought to give an overview of what the study will cover, circling around what the Constitution of Kenya requires legislators to do once public participation has been conducted. This chapter will look at public participation in Kenya, its importance, being that it is at the core of a democracy, how public participation has been conducted historically in Kenya, what Constitutional Law says regarding public participation, particularly transformative constitutionalism and lastly, the challenges public participation faces in Kenya regardless of the importance it is given in Constitutional Law.

2.2 Decoding Public Participation

It is crucial to define public participation, however, no single definition has been given to public participation by authors, because it is broad, and the process conducted cannot be confined to

one single definition.⁵⁹ Many scholars have attempted to define it, and the following definition represents a comprehensive overview: Public participation is the process by which citizens are accorded the opportunity to express their opinions⁶⁰ and those in power protect this process and guarantee that the outcome of this process has an impact on policy-making,⁶¹ therefore the process of public participation is effective rather than a mere formality.⁶²

Public participation has its benefits, one being that it legitimizes a democracy.⁶³ Public participation generally also improves the decision-making process.⁶⁴ Furthermore, accountability and transparency are promoted to ensure meaningful participation.⁶⁵ Social justice, as another benefit, is promoted and one such scenario is where a marginalized group can influence the decisions being made.⁶⁶ And lastly, studies have shown over and over again that a project that involves the public from the onset greatly lessens surrounding controversy and opposition which means that the risks of expensive delays, bureaucratic roadblocks, public relations disasters and lawsuits are mitigated.⁶⁷

2.3 History of Public Participation in Kenya

Colonial Kenya saw public participation characterized by disparities among tribes and tribal politics which is still the case today.⁶⁸ Kenya, was the one of the countries under the common law regime and as part of the administrative tactics of the British, the countries under this rule had to establish the conventional democratic approach.⁶⁹ This approach of democracy was comprised of presidential and parliamentary aspects that were founded on the principle of separation of powers vested in the three arms of government; the Executive, the Legislature and

⁵⁹ Davies J, 'Environmental ADR and public participation' 34 *Symposium on Environmental Alternative Dispute Resolution* 2, 2000, 391.

⁶⁰ Boynton J, 'Acceptance of public participation' 24 *Administrative Law Review* 1, 1972, 46.

⁶¹ Crosby B, Bryson J, Quick K and Slotterback C, 'Designing public participation processes' 73 *Public Administration Review* 1, 2013, 28.

⁶² Simon A, 'Valuing public participation' 25 *Ecology Law Quarterly* 4, 1999, 757.

⁶³ Gomez-Velez N, 'Public school governance and democracy: Does public participation matter' 53 *Villanova Law Review* 2, 2008, 350.

⁶⁴ Cameron J, Denker M, Mailler K and Mills J, 'What's the value of public participation?' 110 *National Civic Review* 2, 2021, 14.

⁶⁵ Intergovernmental Relations Technical Committee, *The Status of Public Participation in National and County Governments*, 2016, 17.

⁶⁶ Crosby B, Bryson J, Quick K and Slotterback C, 'Designing public participation processes' 25.

⁶⁷ Cameron J, Denker M, Mailler K and Mills J, 'What's the value of public participation?' 14.

⁶⁸ Thuo L, 'Ending the oppression olympics: Promoting the concomitant political participation of marginalized groups in Kenya' 5 *Strathmore Law Journal* 1, 2021, 50.

⁶⁹ Premier ADR Consultants, *The social theory of legislation and public participation in Kenya*, 2017, 4.

the Judiciary.⁷⁰ The British colonial government ruled ruthlessly and believed that Africans had no right to give input on matters concerning them, this was based on the belief that Africans were uncivilized.⁷¹ Later on, 6 Africans were appointed to the Legislative Council in 1952, one who was Eliud Mathu, but this was just a mere formality intended to prevent Africans from rioting and fighting for their rights.⁷²

Public participation post-independence was no better than that during colonialism. The authorities at the time believed that the public need not be consulted when formulating policies and therefore passed laws without public participation.⁷³ The 1963 Independence Constitution placed little to no importance on public participation, and this was worsened by the fact that the Constitution recognized only one state party thus having less freedoms and rights.⁷⁴ In 1990, however, there was a change to allow a multi-party system therefore Kenyans could form associations and political parties of their choice, and this change led to a new dawn where citizens could engage in public affairs and hold decision-makers responsible, and therefore the discourse on constitutional reforms took place to solidify this people-centred governance.⁷⁵ However, this move was preceded by a struggle for civil rights and public participation especially in governance.⁷⁶ Which is why decades later is when these reforms were implemented and the 2010 Kenyan Constitution was adopted.⁷⁷ The 2010 Kenyan Constitution, sought to recognize the importance of public participation⁷⁸ and therefore it is now a national value and principle of governance under Article 10.⁷⁹ This will be looked into further in 3.0.

⁷⁰ Premier ADR Consultants, *The social theory of legislation and public participation in Kenya*, 2017, 1.

⁷¹ Weisiko C, 'Implementing the right to public participation in the legislative process in Kenya' Published LLB Thesis, University of Nairobi, Nairobi, 2021, 32.

⁷² Weisiko C, 'Implementing the right to public participation in the legislative process in Kenya' Published LLB Thesis, University of Nairobi, Nairobi, 2021, 34.

⁷³ Widner J, *The rise of a party-state in Kenya: From Harambee! to Nyayo!*, 1st ed, University of California Press, Berkeley, 1992, 83.

⁷⁴ United Nations High Commissioner for Refugees, *Restoration of multiparty government and Kenyans of Somali origin*, 1 March 1992.

⁷⁵ Ngore S, 'The test and place of public participation in Kenya's governance' 8 *Journal of Conflict Management and Sustainable Development* 5, 2022, 117.

⁷⁶ Ojwang J, 'Constitutional Law and Political Change: Recent Developments in Zambia and Kenya' 4 *African Journal of International and Comparative Law* 2, 1992, 334-335.

⁷⁷ Ngore S, 'The test and place of public participation in Kenya's governance' 117.

⁷⁸ Ondieki D, 'The power and necessity of effective public participation' International Commission of Jurists, 6 July 2024 — < <https://icj-kenya.org/news/the-power-and-necessity-of-effective-public-participation/> > on 3 February 2025.

⁷⁹ Article 10, *Constitution of Kenya* (2010).

2.4 Public Participation under the Centralized System of Governance in Kenya

Africa attained independence but many problems were witnessed continent-wide, particularly from the leaders; the constitutional rules that were written up after independence were ignored and so were the checks and balances; Kenya was no exception⁸⁰ Kenya had a one-party system in place supported by Kenyatta and Moi and anyone who dared criticize this system was faced with an untimely death.⁸¹ This system was a centralized system of governance where all aspects of governance were handled by the central government.⁸² As seen in 2.3 above, the Independence Constitution hardly placed any importance on public participation, and therefore this one-party system of governance violated many rights and silenced anyone who dared to speak against this regime.⁸³ And therefore this system was marked by bureaucracy, authoritarianism and exploitation where voting was the only way the public could participate⁸⁴ but this was also controlled by fear where voters had to line up behind representatives who held the photos of candidates.⁸⁵ Lest it is forgotten, this system supported the political isolation of many ethnic communities, hardly giving them a voice, a system designed by the colonialists and continued to be perpetuated by the presidential system that was ethnicized, centralized and personalized.⁸⁶

2.5 Public Participation under the Devolved System of Governance in Kenya

Devolution, expressed as ‘new federalism’, encompasses the legitimate transfer to state and local governments; the authority, duties, resources, decision-making and revenue generating capabilities needed, and separate from the delegating authority over matters that have been issued to them.⁸⁷ The levels of government under such a system have clear boundaries within

⁸⁰ Barrie G, ‘Paradise lost: The history of constitutionalism in Africa post independence’ 2009 *Journal of South African Law* 2, 2009, 298.

⁸¹ Barrie G, ‘Paradise lost: The history of constitutionalism in Africa post independence’ 315.

⁸² E-International Relations, *One party state: Is it good or bad for governance?*, 25 May 2018, 1.

⁸³ Odinge O, ‘Jaramogi’s struggle for multi-party politics and failed dream to lead Kenya’ *The Standard*, 27 May 2010 — < <https://www.standardmedia.co.ke/business/business/article/2000010306/jaramogis-struggle-for-multi-party-politics-and-failed-dream-to-lead-kenya> > on 4 February 2025.

⁸⁴ Ngore S, ‘The test and place of public participation in Kenya’s governance’ 116.

⁸⁵ Barrie G, ‘Paradise lost: The history of constitutionalism in Africa post independence’ 315.

⁸⁶ Nyabira B and Ayele Z, ‘The state of political inclusion of ethnic communities under Kenya’s devolved system’ 20 *Law, Democracy and Development* 1, 132.

⁸⁷ Tannenwald R, ‘Come the devolution, will states be able to respond?’ *New England Economic Review*, 1998, 82-83 — <

<https://citeseerx.ist.psu.edu/document?repid=rep1&type=pdf&doi=bc1b972f317b7f597d0d69291f572401488f638e> > on 4 February 2025.

which they are to carry out their public duties and exercise their political authority.⁸⁸ This power allows them to make decisions and these decisions are people-centred.⁸⁹ Devolution in Kenya was brought by the 2010 Kenyan Constitution and this system is made up of a national government and 47 counties.⁹⁰ One of the objects of devolution under the Constitution is “to give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them”.⁹¹ The goal of devolution is to improve political accountability⁹² which encompasses responsiveness, democracy, honesty, fairness and effectiveness in public participation.⁹³ Devolution aims to provide people with access to political power, reduce marginalization⁹⁴ and raise the citizens’ consciousness regarding the importance of their involvement in projects yet the record of devolution at the moment is quite far from this aim.⁹⁵ There has been progress with devolution; there are laws, constitutional requirements, regulations on top of the specialized institutions for public participation, however, effective participation is yet to be achieved at any level of government.⁹⁶

2.6 Public Participation through the Lens of Transformative Constitutionalism in Kenya

Constitutionalism examines a government’s legitimacy and whether its representatives carry out their public obligations in conformity with laws that have been predetermined or fixed in advance, merely having a constitution does not guarantee constitutionalism.⁹⁷ The elements of constitutionalism are: “doctrine of parliamentary sovereignty, separation of powers (checks and

⁸⁸ Rondinelli D, Nellis J, and Cheema G, ‘Decentralization in developing countries: A review of recent experience’ World Bank Group, World Bank Staff Working Paper Number 581, 1983, 77 — <https://documents1.worldbank.org/curated/en/868391468740679709/pdf/multi0page.pdf> on 4 February 2025.

⁸⁹ Debela K, ‘Democratization in devolved and federal systems of Kenya and Ethiopia: What lessons from the former to the latter?’ 13 *Oromia Law Journal* 1, 2024, 11.

⁹⁰ Nyabira B and Ayele Z, ‘The state of political inclusion of ethnic communities under Kenya’s devolved system’ 135.

⁹¹ Article 174, *Constitution of Kenya* (2010).

⁹² Timboi S, ‘Devolved governance and economic security in selected counties in Kenya (2010-2018)’ Published MA Thesis, University of Nairobi, Nairobi, 2020, 5.

⁹³ Ntara C, ‘Devolution and expected impact in Kenya’ 4 *International Journal of Professional Practice* 1, 2013, 9.

⁹⁴ Cottrell J, ‘Constitutionalizing Public Participation in Kenya’ in Singh M (ed) *The Indian Yearbook of Comparative Law*, Oxford University Press, England, 2018, 207.

⁹⁵ Cannon B and Ali J, ‘Devolution in Kenya four years on: A review of implementation and effects in Mandera County’ 8 *African Conflict and Peacebuilding Review* 1, 2018, 2.

⁹⁶ Intergovernmental Relations Technical Committee, *The Status of Public Participation in National and County Governments*, 2016, 14- 15.

⁹⁷ Bazezew M, ‘Constitutionalism’ 3 *Mizan Law Review* 2, 2009, 358.

balances), responsible and accountable government, rule of law, independent judiciary, respect for individual rights and respect for self-determination”.⁹⁸ After the attainment of independence, many constitutions were discarded by the autocrats who placed little significance on constitutionalism and rule of law,⁹⁹ a situation Okoth Ogendo referred to as ‘constitutions without constitutionalism’.¹⁰⁰

Public participation, the core of this study, should focus on sincere discussion with the citizens to ensure effectiveness.¹⁰¹ This discussion is premised on deliberative democracy where the decision-making processes are inclusive, dialogue-based and knowledgeable.¹⁰² And it is important to remember that courts have a great role to play in shaping public participation.¹⁰³

With the promulgation of the 2010 Kenyan Constitution, Kenya shifted towards transformative constitutionalism.¹⁰⁴ Transformative constitutionalism is defined as “an enterprise of inducing large-scale social change through non-violent political processes grounded in law”.¹⁰⁵ Transformative constitutionalism embodies a constitutional interpretation of public participation that promotes democracy, transparency and inclusivity.¹⁰⁶ The actualization of transformative constitutionalism is dependent on the people, the authorities, those in power, where complementary political and socio-economic democratization, determined by public participation, are supported.¹⁰⁷ Its focus is on enabling former marginalized parts of society through strategies such as protection of socioeconomic rights and achievement of social

⁹⁸ Barnett H, *Constitutional and Administrative Law*, 14th ed, Routledge, London, 2021, 29-52.

⁹⁹ Prempeh H, ‘Africa’s “constitutionalism revival”: False start or new dawn?’ *5 International Journal of Constitutional Law* 3, 2007, 473-475.

¹⁰⁰ Okoth O, ‘Constitutions without constitutionalism: An African political paradox’ in Greenberg D, Oliviero B and Wheatley S (eds) *Constitutionalism and democracy: Transitions in the Contemporary World*, OUP, 1993, 65.

¹⁰¹ Arnstein S, ‘A ladder of citizen participation’ *35 Journal of the American Institute of Planners* 4, 1969, 221-222.

¹⁰² Nyabira B, ‘Kenya’s Emerging Judicial Interpretation of Public Participation under the Devolved System of Government’ in Bosire C and Gikonyo W (eds) *Animating Devolution in Kenya: The Role of the Judiciary*, International Development Law Organization, Judiciary Training Institute and Katiba Institute, Nairobi, 2015, 267.

¹⁰³ Nyabira B, ‘Kenya’s Emerging Judicial Interpretation of Public Participation under the Devolved System of Government’ 266.

¹⁰⁴ Southern African Legal Information Institute, *The 2010 Constitution of Kenya and its interpretation: Reflections from the Supreme court’s decisions*, 2015, 1.

¹⁰⁵ Klare K, ‘Legal culture and transformative constitutionalism’ *14 South African Journal on Human Rights* 1, 1998, 150.

¹⁰⁶ Klare K, ‘Legal culture and transformative constitutionalism’ 151, 172.

¹⁰⁷ Klare K and Davis D, ‘Two cheers for transformative constitutionalism’ *35 Law and Critique* 1, 2024, 500-502.

justice.¹⁰⁸ It entails a change in the lawyers' view of the law and how it affects politics and society, and lawyers include judges, when interpreting the constitution.¹⁰⁹ Legal culture is the problem with this ideology, because it is too formal such that even the application of various principles has stuck to that strict formal sense thus why public participation has been treated as a mere formality because the participants in the legal system are the ones who determine the rules, however, this should transform into adjudication that fosters inclusivity and public empowerment.¹¹⁰

Latin America, just like Kenya, had domestic constitutional transformations where they took a transformative stance on the law, and this was comprised of a bill of fundamental rights designed to increase democratic participation, either through direct or improved participation.¹¹¹ Public participation is a key factor to achieving the vision of transformative constitutionalism, and this is through placing it in law-making processes, in administration of the public and ensuring fair administrative action and socio-economic rights.¹¹² Therefore, an ideal constitution would have constitutional values that dictate a multi-party democratic system founded on accountability, responsiveness and openness.¹¹³

Transformative constitutionalism has had its fair share of criticism. One such criticism is that it is controversial for its inevitable involvement of the judiciary in the complex processes of policymaking and politics.¹¹⁴ It has also come under fire for being an inadequate solution to the pervasive inequality and poverty that still plagues Africa long after colonialism has ended.¹¹⁵

¹⁰⁸ Kibet E and Fombad C, 'Transformative constitutionalism and the adjudication of constitutional rights in Africa' 17 *African Human Rights Law Journal* 2, 2017, 353.

¹⁰⁹ Kibet E and Fombad C, 'Transformative constitutionalism and the adjudication of constitutional rights in Africa' 353.

¹¹⁰ Klare K, 'Legal culture and transformative constitutionalism' 188.

¹¹¹ Bogdandy A and Uruena R, 'International transformative constitutionalism in Latin America' 114 *American Journal of International Law* 3, 2020, 409.

¹¹² Rosa S, 'Transformative constitutionalism in a democratic developmental state' 22 *Stellenbosch Law Review* 3, 2011, 543-547.

¹¹³ Rosa S, 'Transformative constitutionalism in a democratic developmental state' 551.

¹¹⁴ Marle K, 'The spectacle of post-apartheid constitutionalism' 16 *Griffith Law Review* 2, 2007, 418.

¹¹⁵ Sibanda S, 'Not purpose-made! Transformative constitutionalism, post-independence constitutionalism and the struggle to eradicate poverty' 22 *Stellenbosch Law Review* 3, 2011, 482.

2.6.1 Culture of justification

Transformative constitutionalism embodies constitutional adjudication premised on a culture of justification¹¹⁶ where the authorities granted with power are expected to justify each and every exercise of their power.¹¹⁷ Accountability, responsiveness and openness are fostered through a culture of justification.¹¹⁸ This concept of transformative constitutionalism seeks to address the injustices of a parliamentary sovereignty system brought about by the British colonial rule that was used to rule the people but hardly incorporated the views of the people, thus why we see “perversion of the state for political ends”.¹¹⁹ This aforementioned system was premised on ‘culture of authority’ where whatever actions the state took were not subject to justification which is wrong.¹²⁰

2.6.2 Democratization

Transformative constitutionalism’s aim is to achieve democratization, fostered through a move from a single party to a multi-party-political system,¹²¹ with the aim of creating a fair and balanced economy.¹²²

The overarching goal of decision-making processes, no matter how public participation is integrated into these processes, can be defined as: “democratiz(ing) the decision-making process by increasing the quantity and quality of public influence”¹²³ which is transparent and active throughout law-making.¹²⁴ New federalism or rather, devolution, in 2.5 above, are the strategies for democratization in Africa, especially Kenya.¹²⁵

¹¹⁶ Klare K, ‘Legal culture and transformative constitutionalism’ 147.

¹¹⁷ Mureinik E, ‘A bridge to where? Introducing the interim bill of rights’ 10 *South African Journal on Human Rights* 31, 1994, 32.

¹¹⁸ Kgabo O, ‘Re-imagining a culture of justification through transformative constitutionalism and the philosophy of Ubuntu’ *Pretoria Student Law Review*, 2017, 26 — < <https://upjournals.up.ac.za/index.php/pslr/article/view/1904/1786> > on 5 February 2025.

¹¹⁹ Kgabo O, ‘Re-imagining a culture of justification through transformative constitutionalism and the philosophy of Ubuntu’ *Pretoria Student Law Review*, 2017, 27 — < <https://upjournals.up.ac.za/index.php/pslr/article/view/1904/1786> > on 5 February 2025.

¹²⁰ Mureinik E, ‘A bridge to where? Introducing the interim bill of rights’ 31.

¹²¹ Chabal P, ‘A few considerations on democracy in Africa’ 74 *International Affairs* 2, 1998, 290.

¹²² Klare K and Davis D, ‘Two cheers for transformative constitutionalism’ 512.

¹²³ Black M and Kohler E, ‘Diminishing democracy: A review of public participation in Michigan’s environmental decision-making’ 50 *Wayne Law Review* 2A, 2004, 221.

¹²⁴ Klare K and Davis D, ‘Two cheers for transformative constitutionalism’ 509.

¹²⁵ Debela K, ‘Democratization in devolved and federal systems of Kenya and Ethiopia: What lessons from the former to the latter?’ 2.

The multi-party political system introduced in Kenya, fosters competition which goes hand in hand with democracy, which is the biggest driver and agent of democratization.¹²⁶ In a rapidly growing economy, such as the Kenyan one, economic crisis or success, sets off democratization and the eventuality, is the creation of differences in socioeconomic status and therefore the call for widespread diverse public participation.¹²⁷ An economic crisis would on the other hand cause great opposition to an authoritarian government based on the belief that liberalization and democracy would reinstate growth, still creating a need for public participation.¹²⁸ The above statements prove that democratization and by extension, democracy go hand in hand with public participation and Kenya being a democratic, economically growing state, should facilitate public participation.¹²⁹ Therefore, for a democracy to thrive, public participation, as the key pillar of democracy, needs to be strengthened.¹³⁰

2.6.3 Challenges with the Actualization of Transformative Constitutionalism

Transformative constitutionalism has its challenges and one of them is corruption which is particularly rampant and the biggest hinderance to transformative constitutionalism, a desired outcome for Kenya, the authorities or 'leaders' believe that they are above the rule of law and therefore do as they well please.¹³¹ This is to the point that they are willing to scrap off the constitution, to continue their corrupt manifesto, because it requires them to act according to the rules of a democracy.¹³² There is also evidentiary ethnicity in politics,¹³³ the reluctance to leave power and personalization of politics, of which the latter has particularly limited public participation.¹³⁴ Due to this, many citizens then blame transformative constitutionalism and the Constitution for corruption and the failure of a progressive democracy.¹³⁵

¹²⁶ Njoroge H, 'Political parties' system in democratization and good governance entrenchment in post-colonial Kenya' 6 *Journal of Conflict Management and Sustainable Development* 5, 2021, 244.

¹²⁷ Barsh R, 'Democratization and development' 14 *Human Rights Quarterly* 1, 1992, 128.

¹²⁸ Barsh R, 'Democratization and development' 128.

¹²⁹ Article 118, *Constitution of Kenya* (2010).

¹³⁰ Maling'a S, 'Public participation in county governance in Kenya: A withering eucalyptus in a desert middle' Published LLB Thesis, University of Nairobi, Nairobi, 2014, 8.

¹³¹ Klare K and Davis D, 'Two cheers for transformative constitutionalism' 491.

¹³² Klare K and Davis D, 'Two cheers for transformative constitutionalism' 492.

¹³³ D'Arcy M and Cornell A, 'Devolution and corruption in Kenya: Everyone's turn to eat?' 115 *African Affairs* 459, 2016, 248.

¹³⁴ Debela K, 'Democratization in devolved and federal systems of Kenya and Ethiopia: What lessons from the former to the latter?' 24.

¹³⁵ Klare K and Davis D, 'Two cheers for transformative constitutionalism' 494.

2.7 Challenges of Public Participation in Kenya

2.7.1 Challenges under the centralized system of governance

This system of governance as shown in 2.4 above, was where all power was concentrated at the central government, this kind of ruling system was bound to have challenges with public participation. During the Moi single-party regime, MPs dominated the relationship between the government and the citizens, therefore there was ineffective public participation¹³⁶ and a loss of trust in the legislators causing the citizens to disengage from politics and the process of public participation.¹³⁷ In addition to this, this system of governance had a reputation of exploiting and marginalizing citizens therefore ensuring they had the least input in decision-making.¹³⁸

2.7.2 Challenges under the devolved system of governance

This system of governance as shown in 2.5 above encompasses delegating authority to various levels of government, such as local governments, and not centering it on one authority which would most likely abuse that authority as seen in the Moi and Kenyatta era.¹³⁹ Devolution sought to reduce the marginalization brought by centralization but it also had some challenges with regards public participation.¹⁴⁰ Despite devolution having given public participation the significance it requires in the constitution,¹⁴¹ there was still ineffective public participation and the key cause up until today, remains to be the lack of a consolidated policy framework for it.¹⁴² Furthermore, ineffective public participation is particularly propelled by the tendency of the rule-makers to spin and make the public participation process a formality and a means of fulfilling their needs rather than the citizens' needs.¹⁴³

¹³⁶ Berg-Schlosser D, 'Modes and Meaning of Political Participation in Kenya' 14 *Comparative Politics* 4,1982, 402.

¹³⁷ JSTOR, *Enhancing the Political Participation of Women and Youth*, 1 January 2015, 15.

¹³⁸ Intergovernmental Relations Technical Committee, *The Status of Public Participation in National and County Governments*, 2016, 13.

¹³⁹ Adar K and Munyae I, 'Human rights abuse in Kenya under Daniel Arap Moi, 1978-2001' 5 *African Studies Quarterly* 1, 2001,1.

¹⁴⁰ Cottrell J, 'Constitutionalizing Public Participation in Kenya' 207.

¹⁴¹ Article 118, *Constitution of Kenya* (2010).

¹⁴² Maling'a S, 'Public participation in county governance in Kenya: A withering eucalyptus in a desert middle' Published LLB Thesis, University of Nairobi, Nairobi, 2014, 61.

¹⁴³ Cottrell J, 'Constitutionalizing Public Participation in Kenya' 194.

2.8 Conclusion

Public participation in Kenya has evolved from oppressive colonial and post-independence era where it was disregarded, to a constitutional democracy that advocates for public participation as a core principle and value of national governance. While the 2010 Kenyan constitution sought to rectify injustices through transformative constitutionalism and devolution, challenges persist, such as, corruption, political personalization and the treatment of public participation as a mere formality. Effective public participation legitimizes democracy, enhances decision-making and fosters accountability, yet its implementation remains largely symbolic rather than substantive. For democracy to thrive, the legislators ought to promote a culture of justification and ensure that devolution facilitates rather than hinders inclusive public participation, thereby aligning governance with the true spirit of transformative constitutionalism.

3.0 An Examination of Public Participation by Kenya’s Legislators since 2010

3.1 Introduction

The previous chapter examines public participation in Kenya, its democratic significance, historical context, constitutional framework, particularly, transformative constitutionalism, and the challenges public participation faces despite its constitutional significance. This chapter will dive into the manner in which public participation has been conducted by legislators, since the promulgation of the 2010 Constitution, which gives public participation great importance. This chapter will particularly focus on how the Kenyan legislators, MPs, MCAs and Senators, have been conducting public participation.

3.2 Public Participation by Members of County Assemblies (MCAs) since 2010

3.2.1 Legislative Framework for Public Participation at the County Level

The Constitution of Kenya under Article 196, mandates that every county assembly should facilitate public participation in its businesses.¹⁴⁴ This is further supported by Section 3 of the County Governments Act which states that the county assemblies should provide for public

¹⁴⁴ Article 196, *Constitution of Kenya* (2010).

participation in the activities they carry out.¹⁴⁵ County assemblies consist of MCAs elected by the citizens of the wards to represent them.¹⁴⁶ The MCAs, therefore, are the representatives of the people at the county level. They are meant to conduct this process of public participation by informing the public about a bill proposed to the County Assembly after its deliberation, in 7 days, educate the citizens on the importance and process of public participation, collect public input and provide feedback on this input and reasons for rejection or adoption of the input.¹⁴⁷

3.2.2 Mode of Conduct of Public Participation by MCAs

Public participation, cannot be determined arithmetically and therefore judges have ruled time and again, borrowing from a South African case, that a reasonableness test is to be used to determine public participation; the public should be afforded a reasonable opportunity to give their opinions on decisions sought to be made.¹⁴⁸ The authority conducting public participation is free to choose the manner it deems best to conduct public participation.¹⁴⁹

In cases of public participation by MCAs, some of the methods that have been used to conduct public participation are meetings and stakeholder workshops,¹⁵⁰ questionnaires,¹⁵¹ as well as dedicating departments for public inquiries.¹⁵²

In cases where public participation has been done through online platforms such as uploading bills on a website, the courts ruled there has to be sufficient evidence that the citizens use the website on a daily basis and furthermore, uploading a bill to a website without notifying citizens of this upload and taking insufficient efforts to notify the public of the upload, would make the public participation process inadequate.¹⁵³

¹⁴⁵ Section 3, *County Governments Act* (Act No 17 of 2012).

¹⁴⁶ Article 177, *Constitution of Kenya* (2010).

¹⁴⁷ Ministry of Devolution and Planning and Council of Governors, *County public participation guidelines*, 2016,11.

¹⁴⁸ *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* (2005), Constitutional Court of South Africa.

¹⁴⁹ *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy and 17 others* (2015) eKLR.

¹⁵⁰ *Pwani Super Capacity Transporters Saving and Another v County Government of Mombasa* (2020) eKLR.

¹⁵¹ *Mui Coal Basin Local Community and 15 others v Permanent Secretary Ministry of Energy and 17 others* (2015) eKLR.

¹⁵² *Legal Advice Centre and 3 others v County Government of Mombasa and 4 others* (2016) eKLR.

¹⁵³ *Kaps Parking Limited & another v County Government of Nairobi & another* (2021) eKLR.

Judges have ruled that MCAs choosing to dedicate a whole department for public inquiries is quite an efficient way for them to conduct public participation.¹⁵⁴ And efforts have been seen by MCAs to include citizens in projects through asking for their input in various projects.¹⁵⁵ This is but one example of moments when MCAs conducted sufficient public participation. MCAs, however, usually conduct public participation in an insufficient manner as will be shown in the next paragraphs.

MCAs have a history of holding meetings for public participation and judges have ruled time and again, this is usually in an insufficient manner, and giving one example; MCAs held meetings in only 2 out of the 85 wards for a Finance Bill in Nairobi and the judges termed the public participation process insufficient.¹⁵⁶ The term given to public participation in counties is “sham public participation engagements in some counties” where it is treated as a formality and citizens are just included so that the process can be permissible.¹⁵⁷ Furthermore, MCAs have been notorious for using their power for extortion and blackmail to advance their interests with complete dismissal of fairness and rule of law.¹⁵⁸

All in all, from the above, although there are cases where MCAs have conducted and vouched for sufficient public participation, and the important role it has in the country as shown in Chapter 2, it is largely treated as a mere formality and citizens’ input is hardly considered for meaningful engagement.

3.3 Public Participation by Members of Parliament (MPs) since 2010

3.3.1 Legislative Framework for Public Participation in the National Assembly

The Constitution of Kenya dictates that Parliament should facilitate public participation.¹⁵⁹ Parliament, in Kenya, is bicameral, and consists of two Houses, the Senate which shall be

¹⁵⁴ *Legal Advice Centre and 3 others v County Government of Mombasa and 4 others* (2016) eKLR.

¹⁵⁵ Hussein I, ‘Garissa MCAs walk out of consultation meeting on socio-economic inclusion of refugees’ The Eastleigh Voice, 11 February 2025 — < <https://eastleighvoice.co.ke/refugee%20integration/113942/garissa-mcas-walk-out-of-consultation-meeting-on-socio-economic-inclusion-of-refugees> > on 15 February 2025.

¹⁵⁶ *Kaps Parking Limited & another v County Government of Nairobi & another* (2021) eKLR.

¹⁵⁷ Nalianya J, ‘Lack of public participation blamed for poor governance’ The Star, 31 July 2021 — < <https://www.the-star.co.ke/counties/western/2021-08-01-lack-of-public-participation-blamed-for-poor-governance> > on 15 February 2025.

¹⁵⁸ Wagacha D and Aling’o P, ‘The tyranny of Kenya’s MCAs’ Institute for Security Studies, 14 January 2015 — < <https://issafrica.org/iss-today/the-tyranny-of-kenyas-mcas> > on 12 March 2025.

¹⁵⁹ Article 118, *Constitution of Kenya* (2010).

discussed in 2.4 below, and the National Assembly.¹⁶⁰ MPs are part of the National Assembly.¹⁶¹ After a bill is proposed to Parliament and read for the first time, it is committed to the relevant departmental committee which makes sure public participation is done.¹⁶² This is through 4 proposed ways: “inviting submission of memoranda, holding public hearings, consulting relevant stakeholders in a sector and consulting experts on technical subjects”.¹⁶³

3.3.2 Mode of Conduct of Public Participation by MPs

The courts in Kenya have declared that the fundamentals of governance are: “rule of law, accountability, democracy, and public participation”.¹⁶⁴ In the last decade however, courts have declared many decisions by MPs unlawful due to lack of public participation, which is quite concerning and a show of how Kenya is grappling with the idea of public participation.¹⁶⁵

Some of the ways in which MPs have conducted public participation, to mention a few, are, through letters to various stakeholders and media advertisements,¹⁶⁶ and even public hearings.¹⁶⁷

Judges, as shown above, have ruled on many decision-making cases. There is a recent 2024 case where public hearings were conducted and there were written submissions and oral presentations, which were the avenues for public participation as well as letters to various stakeholders that were used, and the judges ruled that while not every individual view can be taken into account, the process should ensure that a range of sincere opinions are taken into account which the MPs ensured.¹⁶⁸ In another decided case, there were opportunities for hearing representations from industry stakeholders provided by MPs for public participation for a Bill, now, Finance Act 2017, which the courts ruled was sufficient.¹⁶⁹ The court stated that even though a Bill returned to Parliament after Presidential Assent needs not undergo public

¹⁶⁰ Parliament of Kenya, *How parliament works*, 2022, 4.

¹⁶¹ Article 97, *Constitution of Kenya* (2010).

¹⁶² Section 127, *National Assembly Standing Orders* (6th Edition).

¹⁶³ Section 127, *National Assembly Standing Orders* (6th Edition).

¹⁶⁴ *Katiba Institute and another v Attorney General and another* (2017) eKLR.

¹⁶⁵ Nyabira B, ‘NYABIRA: Public participation in what, when and especially, how?’ *The Star*, 19 January 2023 — < <https://www.the-star.co.ke/siasa/2023-01-22-nyabira-public-participation-in-what-when-and-especially-how> > on 15 February 2025.

¹⁶⁶ *Cabinet Secretary for the National Treasury and Planning and 4 others v Okoiti and 52 others* (2024) eKLR.

¹⁶⁷ *Institute of Social Accountability and another v National Assembly and 4 others* (2015) eKLR.

¹⁶⁸ *Cabinet Secretary for the National Treasury and Planning and 4 others v Okoiti and 52 others* (2024) eKLR.

¹⁶⁹ *Pevans East Africa Limited and Another v Chairman, Betting Control and Licensing Board and 7 others* (2018) eKLR.

participation for every amendment, the threshold for public participation remains to be reasonable which the MPs and at large, the National Assembly, did meet, where those directly affected were given a say and their opinions incorporated.¹⁷⁰

But in most cases, the judges have ruled that the MPs have failed to afford meaningful participation.¹⁷¹ One such case is where newspaper publications were done for the public to submit their views on amendments to the Judicial Service Act and the court ruled that for it to be effective, the citizens must be directly involved in the process which was hardly the case.¹⁷² The Court also ruled that the introduction of new amendments to the Act after public participation has been conducted, sought to circumvent the fundamental aspect of public participation and evade the spirit¹⁷³ of the Constitution.¹⁷⁴

The Constitution in incorporating public participation, supports democracy and hardly supports its replacement.¹⁷⁵ However, contrary to the spirit of the Constitution, a 2024 Parliamentary scorecard revealed that bills passed in Parliament ignored public opinions, showed that the voting conducted by MPs in parliament is contrary to citizens' wishes and these very MPs are fighting constitutional provisions by introducing bills meant to disregard these provisions on public participation.¹⁷⁶ Furthermore, Parliament and the executive have shown consistent ignorance for public input as required by the Constitution of Kenya, MPs are implementing programs without following the law, they are continually passing laws too quickly without public input and refusing to learn from mistakes made during the era when the Independence

¹⁷⁰ *Pevans East Africa Limited and Another v Chairman, Betting Control and Licensing Board and 7 others* (2018) eKLR.

¹⁷¹ Owino S, 'Wanjiku is right: MPs losing streak extends as judges outlaw more laws' Nation, 30 September 2024 — < <https://nation.africa/kenya/news/wanjiku-is-right-mps-losing-streak-extends-as-judges-outlaw-more-laws-4780006#story> > on 13 March 2025.

¹⁷² *Law Society of Kenya v Attorney General and another* (2016) eKLR.

¹⁷³ *Law Society of Kenya v Attorney General and another* (2016) eKLR.

¹⁷⁴ Article 10, *Constitution of Kenya* (2010).

¹⁷⁵ *Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others* (2008), Constitutional Court of South Africa.

¹⁷⁶ Mwakamba L, 'Mismatched priorities: 2024 scorecard paints a Parliament at odds with citizen expectations, demands and priorities' Mzalendo, 8 December 2024 — < <https://mzalendo.com/posts/mismatched-priorities-2024-scorecard-paints-parlia/> > on 15 February 2025.

Constitution was the law of the land.¹⁷⁷ This just shows the poor state of public participation in Kenya by MPs.

3.4 Public Participation by Senators since 2010

3.4.1 Legislative Framework for Public Participation in the Senate

As shown in 2.3.1 above, Parliament consists of the National Assembly and the Senate. The Senate represents and protects the interests of counties and their governments as well as plays a role in law-making by debating, considering and approving bills that affect the counties.¹⁷⁸ The Senators are members of the Senate who are elected by registered voters.¹⁷⁹ Therefore, ideally from the aforementioned, Senators have a duty to incorporate public participation in public policy formulation in a bid to protect the interests of counties.

3.4.2 Mode of Conduct of Public Participation by Senators

In some cases, such as the impeachment of the former deputy president, Rigathi Gachagua, public participation by Senators was sufficient where it was conducted through publishing of a public notice inviting citizens to attend and give their opinions for two days in various constituencies.¹⁸⁰ The High Court ruled that public participation conducted by the Senate in this instance was sufficient because they had accorded the public the relevant opportunities for their voices to be heard.¹⁸¹

Another instance is where the Senate gave the public the opportunity to submit their opinions is the proposal of extension of terms of service for the president, governors and the legislators, from 5 years to 7 years.¹⁸² This opportunity was accorded when the public was asked to submit their opinions through emails and the system crashed due to the high number of responses, but

¹⁷⁷ Kiprono D, 'MPs, executive's continued disregard for public participation alarming' The Standard, 2024 — < <https://www.standardmedia.co.ke/opinion/article/2001487705/mps-executives-continued-disregard-for-public-participation-alarming> > on 12 March 2024.

¹⁷⁸ Article 96, *Constitution of Kenya* (2010).

¹⁷⁹ Article 98, *Constitution of Kenya* (2010).

¹⁸⁰ *Gachagua v The Speaker of the National Assembly and 3 others* (2024) eKLR.

¹⁸¹ *Gachagua v The Speaker of the National Assembly and 3 others* (2024) eKLR.

¹⁸² Kisia A 'Senators reject bill proposing extension of term limits' The Star, 1 November 2024 — < <https://www.the-star.co.ke/news/2024-11-01-senators-reject-bill-proposing-extension-of-term-limits> > on 15 February 2025.

this just shows that the public does participate when given a meaningful and reasonable opportunity to do so.¹⁸³

But in most cases, just like the MPs and MCAs above, this opportunity for the citizens to be heard, and given reasonable, meaningful public participation fortuities, is hardly afforded and one such instance is in the Building Bridges Initiative (BBI) case, where the public was invited to submit their views through newspaper advertisements and public hearings.¹⁸⁴ The judges ruled that the manner in which this was done, through limited and inaccessible publications and rushed hearings failed to meet the reasonable test mentioned in 3.2.2 above, of reasonable opportunity for people to give their opinions, and was void of meaningful participation and thus the BBI was unconstitutional.¹⁸⁵

Judges have ruled time and again that for meaningful participation by Parliament to be decided, it is done on a case to case basis, but in accordance with the reasonableness test in order for accountability and transparency to thrive.¹⁸⁶ This is not the case in Parliament, as both the Senate and the National Assembly, has been scrutinized for treating public participation like a formality when it is meant to uphold it and this is shown in the way that crucial matters are rushed when it comes to public participation.¹⁸⁷ Furthermore, times have shown that due to the lack of public participation by the Senate and the National Assembly, Parliament in June of 2024 was stormed by protestors due to the lack of public participation on the Finance Bill 2024, which caused a significant reckoning by the Senate on various matters including public participation.¹⁸⁸

Contrary to Kenya, the South African Parliament has demonstrated the best practices with regards public participation and some of them are transforming the vision of the constitution

¹⁸³ Kisia A ‘Senators reject bill proposing extension of term limits’ The Star, 1 November 2024 — < <https://www.the-star.co.ke/news/2024-11-01-senators-reject-bill-proposing-extension-of-term-limits> > on 15 February 2025.

¹⁸⁴ *Attorney General and 2 others v Ndi and 79 others; Dixon and 7 others* (2022) eKLR.

¹⁸⁵ *Attorney General and 2 others v Ndi and 79 others; Dixon and 7 others* (2022) eKLR.

¹⁸⁶ *Doctors for Life International v Speaker of the National Assembly and Others* (2006), Constitutional Court of South Africa.

¹⁸⁷ Mumbi L, ‘Hasty passage of parliamentary bills raises concerns over public participation’ The Eastleigh Voice, 9 December 2024 — < <https://eastleighvoice.co.ke/public%20participation/95929/hasty-passage-of-parliamentary-bills-raises-concerns-over-public-participation> > on 15 February 2025.

¹⁸⁸ Pietromarchi V and Gadzo M, ‘Kenya tax protests updates: Ruto declines signing finance bill after unrest’ Aljazeera News, 26 June 2024 — < <https://www.aljazeera.com/news/liveblog/2024/6/26/kenya-protests-live-news-more-protests-expected-after-finance-bill-passed> > on 13 March 2025.

into formalized structures, adapting measures that incorporate historical events and adding measures such as assessment and monitoring to ensure that the constitutional objectives are achieved.¹⁸⁹ Kenya, and its legislators especially, can therefore borrow from this example of implementation of public participation into legal frameworks.

3.5 Conclusion

Public participation by Kenya's legislators remains largely inadequate, often treated like a mere formality rather than a meaningful public engagement. Despite constitutional mandates, courts have repeatedly found MCAs, MPs and Senators lacking at sufficient public participation and lacking to meet the required threshold of meaningful and reasonable engagement. With the selective meetings by MCAs, MPs blatantly disregarding public input and Senators ignoring public opinions to the point of protests, then it can be seen that public participation is hardly being given the urgency and importance it requires. Though there are efforts to improve public participation, it remains weak, undermining constitutional democracy.

4.0 The Legal Duty of Members of Parliament to Incorporate Public Participation in Legislation in Kenya

4.1 Introduction

The previous chapter did a comprehensive analysis of public participation by Kenya's legislators since the introduction of the 2010 Constitution in Kenya. The chapter showed a trend of public participation being treated like a mere formality rather than a right protected under the Kenyan Constitution. Despite the importance it has been given under Constitutional Law, legislators have still failed to conduct sufficient public participation. This chapter will dive into the obligations that the Constitution has placed on legislators, to incorporate public input in decision-making. This chapter will talk of the legal duty that legislators have to incorporate public participation effectively. This chapter will therefore focus on the specific obligations that legislators have to ensure that there is adequate, meaningful public participation.

¹⁸⁹ 'South Africa: Mainstreaming citizen engagement in the constitution' Inter-Parliamentary Union, 1 June 2022 — < <https://www.ipu.org/news/case-studies/2022-06/south-africa-mainstreaming-citizen-engagement-in-constitution> > on 12 March 2025.

4.2 The Constitutional Threshold for Sufficient Public Participation by Kenyan Legislators

Courts have ruled time and again that the test to be used for public participation is the reasonable test, discussed in 3.2.2 and this test dictates that the citizens must be given a reasonable opportunity to engage in public participation. And even though this reasonability may differ from case to case, there are certain parameters that have to be met. Therefore, building on this test, the following paragraphs will discuss the parameters that have to be met.

The legislators should ensure that the process of public participation incorporates accessibility. The legislators have to ensure that public participation is conducted through avenues that the public can access to ensure that historical injustices of inaccessibility are corrected. The legislators should therefore conduct public participation through the use of media such as newspapers, radios and even televisions to ensure that the highest number of people are aware of the process. The legislators should also dedicate county departments specifically for public participation as this would reduce inequality on the basis of location, economic status or levels of education.

The legislators should also ensure that the citizens are notified early enough and given adequate time to engage in the process. Rushed participation processes has been the trend in Kenya and lead to ineffective public participation. By giving the public adequate time to engage with the process, the citizens are able to review proposals and engage fully with the proposals to give well-reasoned opinions.

In addition to the above, even though participation does not have to involve everyone as that would be giving the legislators a tedious and lengthy task, the legislators should ensure that the process includes diverse input from the public. This ensures that diversity is incorporated in the process. Historically, marginalized groups have faced exclusion from this process and in a bid to correct this, the legislators should reflect diversity in the process to avoid disproportionately benefiting certain groups only.

It is important that public participation be transparent; therefore, legislators should ensure that the public is informed of how their opinions influenced the outcome. This ensures that the public has trust in the process, trust that has historically been abused and made the process

cosmetic rather than substantial. Transparency ensures genuineness and also allows the public to challenge laws that were passed without proper participation.

By incorporating the reasonableness test in the manner described above, then the legislators will have conducted sufficient public participation.

4.3 Obligations of Legislators in Considering and Reflecting Public Input

Legislators are required to show that they have actively taken into account the views of the public that they get through public participation. This process of participation must be real and meaningful. And in line with transformative constitutionalism in 2.6, accountability, transparency, and inclusivity have to be considered for meaningful public participation to be achieved in a true democracy. Therefore, the next paragraphs will discuss the manner in which legislators show they have actively incorporated public input.

Legislators are required to document the public participation processes and write down reports which would be submitted to the various county departments mentioned in 4.2 above. The reports would include details of the public participation processes such as the venue, date, and the number of people who participated as well as a summary of the views given by the public. Proper documentation prevents legislators from claiming that the process was conducted when it was not. Records also allow the public, who are sovereign in Kenya, and courts, to verify whether the process of public participation was conducted properly.

In alignment with the culture of justification in 2.6.1 that embodies a justification of the exercise of power by authorities, legislators are required to justify their views. This is particularly but not limited to, views that are rejected. This ensures that decisions made are not random but have aspects of transparency and reasoning. This also ensures that the process is credible by having rational decisions devoid of hidden interests.

The legislators are required to put in place feedback mechanisms where they communicate to the public the reasons for adopting or rejecting their views. The legislators should facilitate this through public statements or even through reports published on official government websites. This prevents the citizens from being discouraged in the process and ensures that the citizens participate in the process in the future. It also shows respect for public engagement and fosters trust between the citizens and the legislators.

Therefore, based on the above, the legislators will have demonstrated active incorporation of public input.

4.4 Conclusion

Legislators have a constitutional duty to ensure that public participation is reasonable, meaningful, transparent and ensure there that there is accountability for the decisions they make. The opportunities provided for public participation have to be accessible, diverse and inclusive and ensure that the public is given the feedback needed after the process has been conducted and decisions have been made.

Legislators are required to actively consider public input by documenting the process and writing reports, justifying their reasoning and ensuring the public is given feedback that aligns with the principles of transformative constitutionalism mentioned in 4.2 above.

Public participation is often treated as a formality rather than a right protected under the Constitution of Kenya, with its own significance. This leads to the public distrusting in the legislators thus leading to protests and distrust as shown in 3.4.2. Legislators have constitutional duties imposed on them by the Constitution of Kenya and in a bid to show this, they should emulate the implementation of good practices as done by South Africa demonstrated in 3.4.2 above. The legislators will have then actively taken into account the views they get after public participation has been conducted and shown embrace for public participation as a democratic tool.

5.0 Conclusion and Recommendations

5.1. Conclusion

This paper has explored public participation in Kenya, particularly by legislators, emphasizing on the significance that Constitutional Law in Kenya has given it, however much its cosmetic treatment in the country. This paper has also looked at the history of public participation, and the challenges it has faced over time. Public participation is protected by the Constitution of Kenya, and this is so because it is the centre of a democratic state as it promotes transparency, accountability and inclusivity of even marginalized groups in governance. Even though it has

received high constitutional significance, there are still shortcomings to its appropriate application in Kenya.

The treatment of public opinion as a formality is seen in the way legislators conduct public participation. MCAs have faced criticism for inadequate public participation as they often limit it to a few citizens and fail to notify the public of the call for public participation in decision-making. MPs are no better for they blatantly disregard public input or pass laws without sufficient public input, putting their interests first rather than serving the citizens who elected them. Senators, as well, follow the same line. They are responsible for protecting counties' interests but have failed to do so and serve their interests rather, and one example is the BBI case.

This paper has shown that public participation is largely superficial, with legislators either ignoring public participation completely or treating the process as a formality. This then shows the horrible position of public participation in Kenya and contradicts the vision of transformative constitutionalism that was brought about with the 2010 Kenyan Constitution.

Therefore, ideally legislators should materially take into account the information they get after public participation has been conducted. They should do this by providing reasonable opportunities for public participation and considering diverse opinions. They should also seek to emulate the example set out by the South African Parliament as mentioned in 3.4.2 above of practical implementation of constitutionally mandated public participation.

5.2 Recommendations

The following recommendations are proposed to judges, MCAs and Parliament:

Judges should mandate justification for public opinions. As shown in 3.0, legislators have a trend of ignoring public input and pursuing their interests rather than the citizens' interests. This would then necessitate judges to mandate that legislators should justify public input. This would entail detailed reasoning from legislators for rejected views and even justifications in parliamentary records for disregarded submissions. This ensures that there is transparency and accountability in governance.

Parliament should institutionalize thorough reporting on public participation. As shown in 3.3.1, Parliament is bicameral and has the Senate and National Assembly which house Senators

and MPs, who rarely provide feedback on how public input shapes decision-making. Therefore, parliament should mandate that the MPs and Senators document each step of the process of public participation and publish the reports on various government websites that the public has access to. This ensures that the MPs and Senators are prevented from treating public participation as a mere formality, the public has more trust in legislators and ensures that the process of public participation is credible.

MCAs should establish county departments for public participation in their various counties. As shown in 3.0 above, MCAs have a history of conducting insufficient public participation. Therefore, to curb this inefficiency, there should be an independent unit for public participation in every county. These units will be responsible for receiving public participation reports and assessing the conduct of public participation by the MCAs in the county assemblies. These units will also deal with public inquiries on the state of public participation. This improves efficiency, transparency and accountability of public participation at the county level. Furthermore, public trust is fostered, and the public is educated on public participation.

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