

Seizing on a Mirage?

An Analysis of Public Participation in Kenya in the Constitutional Transition Period 2010-2016

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Abstract

This thesis examines how the constitutional principle of public participation was actualised in Kenya under the 2010 Constitution. It uses a case study approach to examine the 2010-2016 constitutional transition period. The thesis is placed at the intersection of political science and public law, and draws evidence from examination of policy documents, national legislation county legislation, legal judgments and interviews with key informants. It explores how key public participation provisions contained in the Constitution of Kenya 2010 have been implemented in the constitutional transition period in which new legislation was enacted. The focus of this thesis is on public participation outside of elections: that is, on non-electoral participation. Examining the opportunities that exist in law for people to participate in public decision making between elections is particularly important given that the 2010 Constitution was passed against a history of deep struggle to achieve a greater voice for citizens in government. The objective of the new constitution was to devolve power to county level government and provide for more direct participation that would enhance accountability in Kenyan public life.

This thesis offers an original contribution to knowledge on the implementation of public participation provisions under the 2010 Constitution. It does so in several ways. First, it identifies the new participatory legislative structures that have been realised in the constitutional transition period 2010–2016, and analyses the extent to which legislation has created a framework for ongoing opportunities for public participation in Kenya. Second, this thesis examines how public participation decisions have been determined by the courts, with a particular focus on county level decision making. Third, building on the analysis of court determinations, the thesis identifies emerging county models of public participation and

assesses how effectively the aspirations for public participation as expressed in the Constitution are being achieved at the county level.

The findings of this thesis indicate that while public participation legislative structures and guidelines have been developed extensively at a national level, only a few counties have established their own legislative structures to enable public participation. The findings also suggest that the differences in interpretation of public participation are leading to emerging models of public participation at the county level in the constitutional transition period. These models I have termed: “centralised coordination”, “integrative coordination” and “bi-symmetrical” models of public participation. In addition, the thesis examines court decisions that have been made regarding public participation and tests them using the decision-making framework derived from the common law. My analysis suggests that the courts have set a low standard for what is considered adequate public participation. The thesis also identifies some key tensions between representative democracy and aspirations for direct public participation under the 2010 Constitution.

Finally, this thesis asks what would be required to achieve full non electoral public participation in the constitutional transition period 2010-2016? It concludes that if the vision of full public participation as articulated in the Constitution 2010 is to be achieved then it is necessary not only to ensure a clear constitutional mandate for public participation, national and county legislation, and facilitative court decisions promoting public participation, but also a public prepared to participate in collective decision making.

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List of Abbreviations

AFRICOG	African Centre for Open Governance
CBEF	County Budget Economic Forums
CIC	Constitution Implementation Commission
FBO	Faith Based Organisation
ICCPR	International Covenant on Civil and Political Rights
KLR	Kenya Law Reports
NGO	Non-Governmental Organisation
NTA	National Tax Payers Association
PFMA	Public Finance Management Act
PPO	Public Participation Office
PSV	Public Service Commission
SLAA	Security Law Amendment Act
TA	Transitional Authority
UN	United Nations

Glossary of Terms

Constitutional Transition Period	The process or a period of changing from one state or condition to another. In this thesis the Constitutional transition period is used to refer to a process and period of transition. Specifically, the period of Constitutional implementation from 2010–2015/2016 in Kenya when fifth schedule “Legislation to be enacted by Parliament” of the Constitution was being implemented. However, this thesis extends the transitional period to 2016 because the implementation of the fifth schedule spilled over into 2016.
Wanjiku	A female name and refers to a hypothetical average Kenyan. The term came about during the Constitution making process as efforts were made to ensure that the Constitution would be understood by an ordinary Kenya. ¹
Amicus Curiae	A ‘friend of the court’. Someone who is not party to a case but assists by providing information or advice on some matter of law that directly affects the case in question.
Devolution	The territory of Kenya is divided into 47 counties. The governments at the national and county levels are distinct and inter-dependent.

¹ It all started with Moi (President Daniel Arap Moi) asking the question: “What does Wanjiku know about Constitution making?” In answering Moi, and mainly popularized by the brilliant cartoonist, Gado, Wanjiku has displayed all the great qualities of the ordinary Kenyan. She has been a humourist, philosopher, ideologue, politician, a patriotic feminist, a theologian, historian and literary critic. She delights in laughing at the visionless of the Kenyan elite and the opportunistic middle classes. She is multi-racial, multi-regional, multi-gendered, multi-generational, multiregional, multi-religious, and multi-ethnic. She constantly calls for nationhood and unity in our diversity. She is the political leader Kenya yearns for. She remains a beacon of the hope that a just Kenya and a just world are still possible.

— Willy Mutunga, Chief Justice of Kenya (Shitemi and Kamaara eds., 2014, preface)

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Chapter 1 – Introduction

1.1 Justification for the Research

The promulgation of the 2010 Constitution of Kenya was an important milestone for the country.² Kenya now faces the challenge of realising the Constitution’s “promise of more inclusive citizenship”.³ Many groups in civil society in Kenya had high hopes that they would have a greater voice in decision making through a variety of mechanisms, including “public participation opportunities through a new devolved system of government” with “reduced presidential powers and better separation of powers between the three arms of the government”. The Constitution also promised a “restructured and vetted judiciary; an expanded, enforceable bill of rights that includes social, economic, and cultural rights; security sector and land reforms; environmental protection; and other key changes”.⁴

Against these high aspirations I was interested in critically examining opportunities for public participation. Beyond my personal interest as a Kenyan citizen and as civic educator in democracy, the study of public participation under the Kenyan Constitution 2010 is warranted for seven reasons. First, after a long period of intense struggle, hopes are pinned on the 2010 Constitution and its Articles that state public participation is a national value and a principle of governance.⁵ As I will discuss later in Chapter 1, a great deal of concern and political unrest

² The Constitution of Kenya 2010 came in force on 27 August, 2010.

³ Akech, M. (2010). Institutional Reform in the New Constitution of Kenya. International Centre for Transitional Justice doi: <https://www.ictj.org/sites/default/files/ICTJ-Kenya-Institutional-Reform-2010-English.pdf>

⁴ Akech, M. (2010). Institutional Reform in the New Constitution of Kenya. International Centre for Transitional Justice. doi:<https://www.ictj.org/sites/default/files/ICTJ-Kenya-Institutional-Reform-2010-English.pdf>, see also Bannon, A. L. (2007). Designing a Constitution-Drafting Process: Lessons from Kenya. *The Yale Law Journal*, 116(8), 1824. doi:10.2307/20455777.

⁵ Constitution of Kenya 2010, art 10(2)(a).

has underpinned the early implementation of the Constitution.⁶ Citizens continue to struggle to address far-reaching problems, including “bureaucratic inefficiencies, lack of accountability and transparency, unequal distribution of national resources and minimal community participation in local development”.⁷ Some have described the new public participation provisions under the 2010 Constitution as a significant shift to “people centred” decision making while others have stressed there is a real need ensure that public participation does not remain a “mirage” but becomes a reality in day to day decision making.⁸ In this light, my own experience and interest in public participation was a direct result of the work that I did in Kenya through the Catholic Justice and Peace Commission. That professional work allowed me to interact with other Kenyans and be involved in a nation-wide civic education programme that focused on democratic governance and the civic education on the proposed Constitution and in the aftermath of the 2010 referendum the Constitution of Kenya 2010.

The principles that guided my work when I served at the Catholic Justice and Peace Commission of Kenya are located in the Compendium of the Social Doctrine of the Catholic Church that sets out a number of principles to guide its work, including participation. In beginning of this thesis it seems helpful to quote the Social Doctrine given it captures some of the aspirations of civil society groups in Kenya, my own initial motivation and echoes the 2010 Constitution of Kenya:⁹

⁶ Tripp, A. (2016). Women’s Movements and Constitution Making after Civil Unrest and Conflict in Africa: The Cases of Kenya and Somalia. *Politics and Gender*, 12(1), 78-106. doi:10.1017/S1743923X16000015.

⁷ Khaunya, M. F., Wawire, B. P., & Chepngeno, V. (2015, January). Devolved Governance in Kenya: Is it a False Start in Democratic Decentralization for Development? *International Journal of Economics, Finance and Management*, 4(1). Retrieved December 14, 2016, from http://www.ejournalofbusiness.org/archive/vol4no1/vol4no1_4.pdf

⁸ Alexx, N. (2014, December 11). The Mirage of Constitutional Participation in Kenya. *Kenya Monitor*. Retrieved December 20, 2017, from <http://www.monitor.co.ke/2014/12/11/the-mirage-of-Constitutional-participation-in-kenya/>; see also Mbondenyei, K. M., Asaala, E. O., Kabau, T. & Waris, A. (eds.) (2015). *Human rights and democratic governance in Kenya: A post-2007 appraisal*. Pulp University of Pretoria, Hatfield South Africa. Retrieved 30 January, 2018, from <http://www.pulp.up.ac.za/component/edocman/edited-collections/human-rights-and-democratic-governance-in-kenya-a-post-2007-appraisal>

⁹ *Compendium of the Social Doctrine of the Church*. Città del Vaticano: Libreria Editrice Vaticana, 2004, at para 407-408.

Participation in community life is not only one of the greatest aspirations of the citizen, called to exercise freely and responsibly his civic role with and for others, but is also one of the pillars of all democratic orders and one of the major guarantees of the permanence of the democratic system. Democratic government, in fact, is defined first of all by the assignment of powers and functions on the part of the people, exercised in their name, in their regard and on their behalf. It is therefore clearly evident that every democracy must be participative. This means that the different subjects of civil community at every level must be informed, listened to and involved in the exercise of the carried-out functions.

Second, besides these public hopes and aspirations, research into public participation between 2010–2016 is also warranted because this was the period during which it was intended that legislation would be fully realised as specified in the 2010 Constitution Schedule Five.¹⁰ Therefore, this study aims to shed insight into legislation that has been passed in this period that pertains to public participation, but also to identify remaining gaps, for example in knowledge, resources, or legislation to help ensure the legal reality can match the aspirations of the 2010 Constitution. In identifying these gaps, Tripp (2016) cautions that:¹¹

It is important to recognize that legal strategies are only a start. They set the normative bar and baseline for societal change, but they are no substitute for other political, economic changes in society that address power and resource imbalances.

Nevertheless, there is a need to consider the opportunities provided under new legislation to advance public participation and also the “constraints” and “limitations” that persist, including “literacy, cultural constraints, the corruptibility of courts and law enforcement”, which may act as barriers of and inhibit effective participation.¹² It is beyond the scope of this thesis to identify all the economic and social conditions required to achieve an effective Constitutional transition but this research is a first step in examining the new legal framework to identify when and

¹⁰ Constitution of Kenya 2010, sch 5.

¹¹ Tripp, A. (2016). Women's Movements and Constitution Making after Civil Unrest and Conflict in Africa: The Cases of Kenya and Somalia. *Politics & Gender*, 12(1), 78-106. doi:10.1017/S1743923X16000015.

¹² Tripp, A. (2016). Women's Movements and Constitution Making after Civil Unrest and Conflict in Africa: The Cases of Kenya and Somalia. *Politics & Gender*, 12(1), 78-106. doi:10.1017/S1743923X16000015.

where barriers and opportunities exist and what more might be needed to enable effective public participation.

Third, a study of public participation under the Constitution is also warranted because there are a number of processes and policies alongside legislation that regulate how participation is to occur in ways that make the aspiration of the Articles in the Constitution meaningful. For example, where legislation does exist, there have often been petitions made to the courts seeking redress for a perceived lack of real public participation in the process at the national and county level. According to the civic organisation *Article 19*, a “lack of a public participation framework deprives the people of Kenya of their Constitutional right to participate in the making of important decisions that affect them.”¹³ Critics of the way the law is implemented by county government also argue that, despite “clear Constitutional provisions for popular inclusion in law-making by these institutions, their law-making *processes* have not in any meaningful way engaged the people.”¹⁴ (emphasis mine)

Fourth, Non-Governmental Organisations (NGOs) and citizens as stakeholders involved in the implementation of Kenya’s Constitution have vital insights, experience, lessons, and information on the practice of public participation which can enhance decision making. The lessons that are emerging in the Constitutional transition period need to be documented to ensure that they provide a base-line for future practice. As part of the research for this thesis, I interviewed community advocates and public participation practitioners to gain insight into their observations to the current participation opportunities from the perspective of those who are using the legislation.

¹³ Country Report: Protest in Kenya 2015. 12th April 2016). Retrieved December 14, 2016, from <https://www.article19.org/resources.php/resource/38331/en/country-report:-protest-in-kenya-2015>

¹⁴ Mukuna, J. & Mbao, M. (2014). Popular Participation in Legislative Law-Making under the New Democratic Dispensation in Kenya. *Mediterranean Journal of Social Sciences* 5(20).

The fifth reason that this study of public participation under the 2010 Constitution is required is because the courts in Kenya provide the interpretation of the Constitution. Because of this, the judgments provided by the courts could present important insights into the understanding of, and the actual implementation of, public participation. These judgments provide a body of emerging law on public participation which is also important for Kenyan understanding as well as for other developing states who wish to enact greater public engagement in decision making.

Sixth, this study critically examines the notion that the 2010 Constitution is a “democratic” Constitution. The democratic intention of the Constitution is set out in several articles within the 2010 Constitution. Article 10 states that “The Republic of Kenya shall be a multi-party democratic state founded on the national values and principles of governance”.¹⁵ Article 1(2) clarifies that “The people may exercise their sovereign power either directly or through their democratically elected representatives”.¹⁶ Then, Article 19(1) states that “The Bill of Rights is an integral part of Kenya’s democratic state and is the framework for social, economic and cultural policies”.¹⁷ Article 22 (4) continues, “The values that underlie an open and democratic society are based on human dignity, equality, equity and freedom”.¹⁸ The Constitution also identifies in Article 94(4), that “Parliament shall protect this Constitution and promote the democratic governance of the Republic”.¹⁹ With regards to devolution, the 2010 Constitution Article 174(a) also states that, “the objects of the devolution of government are to promote the democratic and accountable exercise of power.”²⁰ Article 249(1) states, “The objects of the commissions and the independent offices are to protect the sovereignty of the

¹⁵ Constitution of Kenya 2010, art 4(2).

¹⁶ Constitution of Kenya 2010, art 1(2).

¹⁷ Constitution of Kenya 2010, art 19(1).

¹⁸ Constitution of Kenya 2010, art 22(4).

¹⁹ Constitution of Kenya 2010, art 94(4).

²⁰ Constitution of Kenya 2010, art 174(a).

people, secure the observance by all State organs of democratic values and principles; and promote Constitutionalism”.²¹ While these articles are commendable, the question remains: how is this democratic aspiration being achieved in everyday public decision making in courts and county decision making? These various articles illustrate the wider point made by Thornhill (2016) who suggests that in Kenya the courts have “Partly retained their position as organs of a measured constituent power, and international human rights law” and “continued to act as a source of general political structure, broadening the inclusionary force of the political system across society.”²²

Finally, in Kenya there is also an urgent need to understand public participation as part of a programme of conflict prevention. One of the key reasons for expanding public participation under the 2010 Constitution of Kenya was as an immediate response to the 2007–2008 post-election violence which led to the death and displacement of a significant number of Kenyans.²³ As a result it was felt that if the people of Kenya had an opportunity to participate in the governance process, future conflict would be minimised. The Kenyan Constitution of 2010 is an important achievement; it marked the culmination of a process that began two-and-a-half years earlier when United Nations Secretary-General Kofi Annan brokered a resolution between then President Mwai Kibaki and the then presidential aspirant Raila Odinga to the violent conflict that followed the disputed December 2007 general election leading to the signing of the National Accord.²⁴ However, it was only the first step towards achieving the aspirations of the citizens of Kenya and to facilitate new voices in peaceful decision making. Enabling the citizens of Kenya to determine their future in peaceful democratic ways is an

²¹ Constitution of Kenya 2010, art 249(1).

²² Thornhill, C. (2016). The Mutation of International Law in Contemporary Constitutions: Thinking Sociologically about Political Constitutionalism. *The Modern Law Review*, 79: 207–247. doi:10.1111/1468-2230.12177 at 240.

²³ Dercon, S., & Gutiérrez-Romero, R. (2012). Triggers and Characteristics of the 2007 Kenyan Electoral Violence. *World Development*, 40(4), 731-744. doi: 10.1016/j.worlddev.2011.09.015

²⁴ Crossley, N. (2013). A Model Case of R2P Prevention? Mediation in the Aftermath of Kenya’s 2007 Presidential Elections. *Global Responsibility to Protect*, 5(2), 192-214. doi:10.1163/1875984x-00502004.

important and long-term project which will take many years given ongoing levels of conflict in the country. The Constitutional transition period therefore sets the ground work for the reduction of future conflict in Kenya if public participation is implemented as envisioned in the 2010 Constitution.

1.2 Research Objectives

Against this background of hope and uncertainty about public participation under the Constitution, this research is intended to be of use at three levels. Firstly, this thesis seeks to assist citizens in understanding the extent of any new public participation opportunities and then to assess the extent to which these opportunities have been implemented as envisaged by the Constitution. Secondly, this research will be useful to county governments, enabling legislators and policy analysts to understand how citizens are participating and which legislation and policies must be developed or reformed to ensure that public participation is achieved effectively. And thirdly, this thesis will be relevant for state institutions that are mandated to oversee the implementation of the Constitution to see what lessons have been learnt regarding effective public participation in the Constitutional transition period. The analysis presented in this thesis can be built on to ensure the implementation of at least a minimum standard for public participation in financial matters and other key areas of governance.

Considering these concerns, the research objectives of this study in the Constitutional transition period are as follows:

1. To evaluate the extent to which legislation and policy have enabled effective public participation implementation;

2. To examine the extent to which public participation as currently practised in Kenya is aligned to the standards of public decision makers at common law and the 2010 Constitution;
3. To identify emerging public participation models in the Kenya; and
4. To consider the role of citizens in ensuring effective public participation in the Constitutional transition period.

To address these research objectives, I ask the following more specific research questions:

1. What is the practice of public participation in the Kenyan context since the Constitution of Kenya 2010?
2. What is the legal and policy framework for public participation?
3. What constitutes public participation implementation at a national level?
4. What constitutes public participation implementation at a county level?
5. What are the implications of the developing public participation legislation?

1.3 Scope and Delimitation of this Research

This study falls at the intersection of public law and political science. It is bounded by a time period of 2010 to 2016, as this period provided the formative part of the Constitution of Kenya in which law making was required to fulfill the requirements outlined in Schedule Five, Article 261(1) of the Constitution.²⁵ In this thesis, this period between August 2010 and December 2016 is referred to as the Constitutional transition period. Initially, the Constitution set a time

²⁵ Constitution of Kenya 2010, sch 5, art 261(1).

of 2015 to mark the transition period which could be extended by parliament if there was need. However, this period spilled over to 2016 to allow remaining key national legislation continued to be put in place.²⁶ This transition period may not be indicative of the future implementation of public participation and some issues that arise in this transition period could be solved with time and other adjustments, for instance, the development of other requisite policy and legislation. Even so, the issues that are identified in this period will set the scene for much future policy debate.

The thesis is also focussed on the legal and institutional framework that will guide public participation in everyday policy making. Significant media and research attention has examined the opportunities and barriers to fair participation in electoral processes, but the way people can participate in wider decision making between elections is less understood.²⁷ Elections and referenda are the most visible forms of public participation; however, this research is focussed on the important public participation that takes place in between elections, and therefore its scope is limited to the non-electoral public participation that occurred during the Constitutional transition period.

This examination of public participation in Kenya is heavily reliant on the analysis of both primary and secondary documents. However, because public participation in Kenya is still at its formative stage, there is limited availability of literature on its implementation in the context of the 2010 Constitution and the Constitutional transition period between 2010 and 2016. That there is such a gap in the literature provides a key rationale for this study of the

²⁶ Waiganjo, K. (2016). The Use of Specialised Commissions for Constitutional Implementation: An Insider View of the Kenyan CIC, in *The Implementation Of Modern African Constitutions: Challenges and Prospects*, Fombad, C. (ed.) Pretoria University Law Press.

²⁷ Brienen, H. (1974). *The politics of participation and control*. Princeton University Press: Princeton, New Jersey; Willis, J. & Chome N. (2014) Marginalization and political participation on the Kenya coast: the 2013 elections. *Journal of Eastern African Studies*. Volume 8(1), p115-134; Cheeseman, N. Lynch, G. & Willis, J. (2014) Democracy and its discontents: understanding Kenya's 2013 elections. *Journal of Eastern African Studies* Volume 8(1), p2-24.

Constitution and case law, and the use of interviews with key informants from civil society, to gain some greater insight into the implementation of public participation in Kenya.

This research applies the common law framework on decision making to examine court decisions made regarding public participation. The question of applying this standard to Kenya could rightly raise questions. Thornhill (2016) argues that Kenya is:²⁸

an unambiguous example of the hybridisation of judicial and political Constitutionalism and of the judicial use of international law as a source of political agency is visible in the recent process of democratic Constitutional transition in Kenya.

I am therefore applying this common law standard based on Kenya's legal history and the fact that although Kenyan law is uniquely Kenyan, it does have a strong historical reliance on English common law, as result of its British colonial history. The study will examine the direction the Kenyan courts are moving with regards to public participation and the degree to which this legal direction is in line with the public aspirations laid out in the Articles of the Constitution of Kenya 2010. By using a common law public decision maker's framework to analyse decisions around public participation made by the courts in Kenya, I consider the degree to which court decisions speak to and advance the Constitutional aspirations. In the process, this study contributes to a wider debate about whether Kenya has the necessary legal and political environment for meaningful public participation to flourish.

While recognising that they are specific groups in Kenya like women, the youth, persons with disability and persons coming from marginalised parts and ethnic groups of Kenya, that have and continue to be marginalised this scope of this study will remain at the

²⁸ Thornhill, C. (2016). The Mutation of International Law in Contemporary Constitutions: Thinking Sociologically about Political Constitutionalism. *The Modern Law Review*, 79: 207–247. doi:10.1111/1468-2230.12177 at 233.

to citizens and the public level when exploring public participation in the constitutional transition period

Given my work falls at the intersection of political science and public law, this study also contributes to the literature on the implementation of the new Constitution in Kenya in the Constitutional transition period of August 2010-August 2016. In particular, it asks if the idea of public participation (as appealing as it is to Kenyans) is perhaps more complicated than is often acknowledged, raising questions about who can participate and how. This research will therefore contribute to the study of public participation in Kenya by helping to address the knowledge gap of what public participation consists of in Kenyan policy making and court judgments in the context of the 2010 Constitution in the transition period, thereby helping to open this area to further research

For the purpose of this thesis, the public and citizen will be used interchangeably to refer to lay or non-expert and non-office bearing community members involved in decision making. As the Constitution notes however, within the broad term citizen there are a variety of differences and life experiences which should be heard and acknowledged. As Article 21(3) states:²⁹

“All State organs and all public officers have the duty to address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, members of minority or marginalised communities, and members of particular ethnic, religious or cultural communities.” While noting that an examination of these individual groups on the ramifications of the implementation of public participation in the constitutional transitional period 2010- 2016 is beyond the scope of this study.

²⁹ Constitution of Kenya 2010, art 21(3)

1.4 Overview of the thesis

Above are the reasons for identifying public participation as a central issue in the new Constitution, and provided a justification for the research, its aims, scope and contribution. This section lays out the structure for the remainder of the thesis. The rest of this chapter reviews literature about public participation in Kenya, and provides an overview of the social, historical and political context for the study.

Chapter 2 then provides a review of the research methods and the proposed conceptual framework for the research, as well as a literature review that examines how effective participation in democracies might be assessed, drawing on participation and examples of participation analysis in the context of Kenya. It examines the concepts of a participation, constitutionalism, justice and rule of law, before introducing a framework for evaluating public participation standards using a common law lens.

Chapter 3 sets out the political and constitutional background of Kenya and explores why Kenyans sought to protect and promote public participation within the Constitution. In particular, it draws attention to the resulting tensions and adjustments between representative democracy and participatory democracy. To address public demand for more inclusive citizenship, the 2010 Constitution delegated parliament and county assemblies with the responsibility to create secondary legislation to ensure that greater opportunities for public participation became a reality. The most important examples of secondary legislation that operationalise this aspiration of public participation are discussed in Chapter 3. These are: the Public Finance Management Act 2012, which creates a framework for public participation in Kenya in financial and economic matters derived from Article 201 of the 2010 Constitution; the Judicial Services Act of 2011; the County Governments Act 2012; the Urban Areas and Cities Act 2011; the Access to Information Act 2016; the Petition onto Parliament Procedure

Act; the Intergovernmental Relations Act No. 2 2012; Transition to Devolved Government Act; Public Service Values and Principles Act 2015; Statutory Instruments Act 2013; and the Public Participation Bill 2016. The discussion in this chapter considers the possibility for balancing the objectives outlined in these Acts within the Kenyan context.³⁰

Chapter 4 then examines the court decisions that were identified and sampled, based on whether matters concerning public participation have been raised and the judicial decision-making refers to matters concerning public participation.

Chapter 5 next sets out to interrogate the legislative opportunities, institutional structures and instruments that are intended to enable greater public participation. Included in the chapter also is an analysis of sample county public participation acts. These acts include: the Meru County Public Participation Act 2014; the Machakos County Public Participation Act 2014; Elgeyo/Marakwet Public Participation Act 2014; the Isiolo County Civic Education and Public Participation Act 2015; and the Nairobi City County Public Participation Act 2015.

Chapter 6 reports on the results of interviews with civil society stakeholders in the public participation processes. In interviews, civil society stakeholders and practitioners were asked their views of public participation in Kenya. The interviewees identified that they felt there some outstanding issues around implementation of these Constitutional articles that concern public participation. Data generated from the interviews is cross-examined against data obtained from document analysis.

Chapter 7 examines how key public participation provisions contained in the Constitution of Kenya 2010 have operated in the Constitution transitional period 2010–2016, drawing together the results reported in the previous chapters from interviews with key

³⁰ *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).

informants from civil society and the earlier discussion about how the new legislation has been implemented.

Finally, Chapter 8 provides a conclusion drawing together the emerging lessons of public participation in law and practice. The chapter offers recommendations for policy reform and legislative change with conclusions about the prospects for greater citizen empowerment under the Constitution. The discussion turns now to consider the literature review of public participation and to introduce key terms used in this thesis, before providing a brief overview of the political social, and economic context for this study.

1.5 Reviewing the Literature and Kenyan Context

Given the emphasis placed on the value of public participation the Constitution, it may seem surprising that public participation as a concept is not actually defined by the 2010 Constitution of Kenya.³¹ This may be reflective in part of the tensions that many states have grappled with over the years in defining public participation and its purpose. For example, is the aim of public participation to enable citizens to take part in making decisions directly, or is it to inform elected representatives about public view points?³² Nevertheless, while participation is not clearly defined in the Constitution, it is defined in subsequent legislation and legal decisions, as we will see later in the thesis. Moreover, in Kenya, there is growing recognition of the importance of public participation. According to Barton (2002), “Public participation is a matter of a nation’s legal, political, and administrative arrangements, and therefore a concern at the heart of national sovereignty and many other issues in international environmental

³¹ Constitution of Kenya 2010, art 10.

³² Nabatchi, T., & Leighninger, M. (2015). *Public participation for 21st century democracy*. Hoboken, NJ: John Wiley & Sons.

law.”³³ Thus Barton places public participation squarely in the discussion of how a nation processes and interprets sovereignty. As presented in the following section, public participation in Kenya is viewed as essential in the development process, advancing equity and inclusiveness in decision making by involving a wide range of voices in decision making. However, some argue that there needs to be careful thought paid to the quality of consultation, the methods, and purpose when it is used for example in development or Constitution building.

1.5.1 Studies of Public Participation in Kenya

An examination of the literature on public participation in Kenya shows that majority of the studies conducted have been about the extent of implementation of opportunities to participate in elections and development decision making and these were mainly carried out before 2010. The literature on public participation in the 2010–2016 period in the context of the new Constitution of Kenya remains sparse, and although some researchers have started tackling the issue, gaps remain. Some of the key studies assessing public participation before 2010 include Murui (2014) who explores how citizen participation affected decentralised service delivery in the 2002–2010 period.³⁴ McEvoy (2015) evaluates constitutional implementation in Kenya in relation to citizen political participation and concludes that the constitution and constitutional implementation positively impacted citizen political participation.³⁵ Otieno (2008) examines citizen participation in the process of using state devolved funds,³⁶ and Devas and Grant (2003)

³³ Barton B. (2002). Underlying Concepts and Theoretical Issues in Public Participation in Resources Development, in Zillman, D. N. et al (eds.). Oxford University Press, Oxford.

³⁴ Murui, A. R. (2014). How does Citizen Participation Impact Decentralized Service Delivery? Lessons from the Kenya Local Authority Service Delivery Action Plan (LASDAP, 2002-2010). Retrieved December 16, 2016, from <http://www.internationalbudget.org/wp-content/uploads/How-does-Public-Participation-Influence-Decentralized-Service-Delivery-Muriu-April-2014.pdf>

³⁵ McEvoy, F. (2015) An Evaluation of Constitutional Implementation in Kenya. Retrieved 20 January, 2018, from https://repository.usfca.edu/cgi/viewcontent.cgi?referer=https://www.google.co.nz/&httpsredir=1&article=1061&context=artsci_stu

³⁶ Otieno, F. (2008). Deepening Democracy at the Grassroots Level: Citizen Participation in State Devolved Funds (CDF) in Kenya. Retrieved June 16, 2016, from <http://searchproquestcomezproxycanterburyacnz/docview/1364888090?pq-origsite=summon&accountid=14499>

explore the relationship between citizen participation and local accountability in local government decision making.³⁷

Overall, these studies of participation tend to stress the importance of participation as a means to achieving conditions which enable investment and accountability – transparent economic development, rather than democratisation *per se*. Participation post-2010 is also often explored in this way in relation to various policy sectors in Kenya. For instance, Rigon (2014) investigates participation and elite capture of decision-making in slum upgrading in Kenya.³⁸ Similarly, Muigua (2014) examines meaningful public participation in natural resource management in Kenya and concludes that “if the current legislation in Kenya on the environment and natural resource management is fully implemented then the quality public participation will be enhanced.”³⁹

Major international institutions, in particular, the World Bank (2015) have also examined public participation in various policy sectors, primarily as a means of promoting the conditions that allow economic development.⁴⁰ Participation is also explored by Kanyiga (2014) who proposes that analysis of participation should examine how both the “institutional and legislative processes contribute to the consolidation of democracy.”⁴¹ Opiyo, Guyo, Moronge and Odhiambo (2017) examine the role of feedback mechanisms as a public

³⁷ Devas, N., & Grant, U. (2003). Local government decision-making? Citizen participation and local accountability: some evidence from Kenya and Uganda. *Public Administration and Development*, 23(4), 307-316. doi:10.1002/pad.281.

³⁸ Rigon, A. (2014). Building Local Governance: Participation and Elite Capture in Slum-upgrading in Kenya. *Development and Change*, 45(2), 257-283. doi:10.1111/dech.12078.

³⁹ Muigua, K. (2014). Towards Meaningful Public Participation in Natural Resource Management in Kenya. Retrieved 30 January, 2018, from www.kmco.co.ke/attachments/article/126/TOWARDS%20MEANINGFUL%20PUBLIC%20PARTICIPATION%20IN%20NATURAL%20RESOURCE%20MANAGEMENT%20IN%20KENYA.pdf

⁴⁰ Finch, C. & Omolo, A.A. (2015). Participation in Kenya. Kenya devolution; No. 3. Washington, D.C: World Bank Group. Retrieved 30 January, 2018, from <http://documents.worldbank.org/curated/en/666021468172488909/Participation-in-Kenya>

⁴¹ Kanyiga, K. (2014). (Rep) Retrieved June 16, 2016, from <https://www.opensocietyfoundations.org/sites/default/files/kenya-democracy-political-participation-20140514.pdf>

participation and argue that feedback can enhance the performance of devolved governance systems in Kenya. They conclude:⁴²

It's critically important that; counties develop feedback mechanisms for effective implementation of decisions reached through citizen participation for enhanced performance; all development and service delivery programmes in counties should be effectively monitored and evaluated for enhanced performance; during the planning processes, clear indicators (should) be developed with the participation of citizens to facilitate (facilitate) effective monitoring and evaluation.

Opiyo et al. (2017) also examine the role of conflict management as an essential element of public participation in enhancing the performance of devolved governance systems in Kenya and concludes, "that counties need to develop effective stakeholder identification processes to ensure inclusivity and equity in representation in planning and implementation forums to avoid stifling performance due to conflicts".⁴³ Gitegi and Iravo (2016) examine the factors affecting whether public participation in devolved governance in Uasin Gishu County, Kenya, has been effective, and concludes that access to information and citizen awareness is low and that further studies are required for all other counties in Kenya.⁴⁴

Democratic objectives for participation are alluded to in a study of the wider linkage between mobilisation and elite capture in participatory institutions by Sheely (2015).⁴⁵ However, of most relevance to this thesis are studies of political participation in the context of the Constitution. For example, writing more generally about public participation in the process

⁴² Opiyo, S., Guyo, W., Moronge, M., & Odhiambo, R. (2017). Role of Feedback Mechanism as a Public Participation Pillar in Enhancing Performance of Devolved Governance Systems in Kenya. *International Journal of Innovative Development & Policy Studies*, 5(1), 1-19. Retrieved March 22, 2017, from <http://seahipaj.org/journals-ci/mar-2017/IJIDPS/full/IJIDPS-M-1-2017.pdf>

⁴³ Opiyo, S. A., Guyo, W., & Moronge, M. (2017). Role of Conflict Management as an Essential Element of Public Participation in Enhancing Performance of Devolved Governance Systems in Kenya. *International Journal of Innovative Social Sciences & Humanities Research*, 5(1), 55-73.

⁴⁴ Gitegi, C.W. & Iravo, M.A. (2016). Factors Affecting Public Participation In Effective Devolved Governance In Kenya: A Case Of Uasin Gishu County. *The Strategic Journal of Business and Change Management* 3(4).

⁴⁵ Sheely, R (2015). Mobilization, Participatory Planning Institutions, and Elite Capture: Evidence from a Field Experiment in Rural Kenya *World Development*, 67, 251-266 doi:101016/j.worlddev201410024.

of Constitution making, Hart (2003) argues that especially in African states, participation is central to the effective Constitutional formation. It is worth quoting the argument at some length as it sets the context for this study:⁴⁶

Public participation is often taken to mean voting—for example, electing a Constitutional convention or ratifying a Constitutional text by referendum. Especially in developing nations in Africa and elsewhere, however, experiments with new forms of participation are attempting to place initiative in the hands of citizens and to create an open Constitutional conversation in which the public shares in agenda-setting, content, and ratification. Genuine public participation requires social inclusion, personal security, and freedom of speech and assembly. A strong civil society, civic education, and good channels of communication between all levels of society facilitate this process. Only a considerable commitment of time and resources will make genuine public participation possible.

Hart continues and makes the point that effective participation takes time to achieve, in discussing the Kenyan experience prior to the Constitution of 2010. She argues that the public participation process in the Constitution making process were often met with elite resistance:⁴⁷

Official ambivalence and continuing attempts to block the process in Kenya reveal how a participatory process initiated from perceived political necessity can threaten an elite with loss of control and incur their resistance. At the most cynical extreme, a determined elite or one that is confident of its continuing control may offer a participatory process as a charade, a democratic hoax intended to mollify unrest by granting the appearance of democracy without its substance. The achievements of participatory Constitution making, then, are not to be romanticized.

Given Hart's caution I am interested in considering how meaningful non-electoral public participation can occur and to assess the extent to which the implementation of the 2010 Constitution in the transition period avoids the risk of becoming a "democratic hoax, intended

⁴⁶ Hart, V. (2003, July). Democratic Constitution Making (Rep. No. 107). Retrieved December 16, 2016, from http://www.Constitutionnet.org/files/Module_4_5.1A.pdf pg. 1.

⁴⁷ Hart, V. (2003, July). Democratic Constitution Making (Rep. No. 107). Retrieved December 16, 2016, from http://www.Constitutionnet.org/files/Module_4_5.1A.pdf

to mollify unrest”,⁴⁸ and instead becomes a pathway to deeper democratic innovation. However, it is not enough to note the success or limits of different methods of participation in holding powerful elites to account; there are significant theoretical and empirical questions behind this discussion too. As Fung (2006) points out:⁴⁹

There are three important dimensions along which forms of direct participation vary. The first concerns who participates. Some participatory processes are open to all who wish to engage, whereas others invite only elite stakeholders such as interest group representatives. The second dimension specifies how participants exchange information and make decisions. In many public meetings; participants simply receive information from officials who announce and explain policies. A much smaller set of venues are deliberative in the sense *that citizens take positions, exchange reasons, and sometimes change their minds in the course of discussions*. The third dimension describes the link between discussions and policy or public action. This three dimensions-scope of participation, mode of communication and decision, and extent of authority-constitute a space in which any particular mechanism of public decision can be located.⁵⁰ [emphasis added]

Fung’s argument is significant for this thesis because I use it in the Kenyan context to explore who can participate and how by examining the opportunities created in the Constitutional transition period of 2010 to 2016, identifying legislation, court decisions, and the development of public participation models that have evolved in this period.

Effective public participation also needs careful legislative thought, as Leighninger (2014) notes when he calls for safeguards for public participation. Leighninger argues that:⁵¹

While advocates of public participation may all agree that our work relates somehow to democracy, we have not established or articulated a common vision of what that means. This

⁴⁸ Hart, V. (2003, July). Democratic Constitution Making (Rep. No. 107). Retrieved December 16, 2016, from http://www.Constitutionnet.org/files/Module_4_5.1A.pdf

⁴⁹ Fung, A. (2006). Varieties of Participation in Complex Governance. *Public Administration Review* 66, p. 66-75.

⁵⁰ Fung, A. (2006). Varieties of Participation in Complex Governance. *Public Administration Review* 66, p. 66-75.

⁵¹ Leighninger, M. (2014). What We’re Talking About When We Talk About the “Civic Field” (And why we should clarify what we mean), *Journal of Public Deliberation*, 10(1).

lack of clarity has dire consequences, producing rifts between academics and practitioners, community organisers and deliberative democrats, civic technologists and dialogue practitioners, policy advocates and consensus-builders.

To be effective, therefore, public participation requires clear agreement about its purpose. Leighninger comments on the tension in various disciplines about the definition, and purpose of participation and how differing definitions will in turn influence assessments of the effectiveness of participation.

For the purpose of this thesis, we can initially define public participation as the engagement in decision making by lay communities, and that it can involve a range of forms of engagement, from voting to petitioning, to direct discussion, local consensus and participatory budgeting. The International Association for Public Participation defines public participation in broad terms as the involvement of “those who are affected by a decision in the decision-making process.”⁵² The Association notes that for participation to be effective, participants should be “provided with the information they need to be involved in a meaningful way”, and given communication to know “how their input affects the decision”.⁵³ Direct participatory democracy will be defined at least initially as “the involvement of lay citizens in decision making using a variety of methods from deliberative forums to public petitions and referenda.”⁵⁴ In addition, the term representative democracy will be defined as participation by the public achieved through third party intervention, for example by choosing advocates or representatives through a ballot to make decisions, or by using citizen juries and panels.⁵⁵

⁵² International Association for Public Participation. (N.D.). Retrieved 30 January, 2018, from <https://www.iap2.org/>

⁵³ International Association for Public Participation. (N.D.). Retrieved 30 January, 2018, from <https://www.iap2.org/>

⁵⁴ Fung, A. (2006) Varieties of Participation in Complex Governance, *Public Administration Review*, p66-75.

⁵⁵ *Ibid*

Finally, non-electoral public participation will be defined as citizen engagement between regular election cycles.⁵⁶

However, these initial definitions of participation do not tell us why or how people participate in public decision making. Cho (1999) for example has argued that individuals have an underlying propensity to participate.⁵⁷ Fowler, Baker, and Dawes (2008) proposed that this interest in participation could be due to socialisation or genetic factors.⁵⁸ But more importantly than what drives participation, they argue that there are various democratic reasons for why public participation is important. Arguments for public participation often suggest there are legal obligations that require democratic governments to try to achieve the ideals of democratic participation and inclusion to enhance decision-making institutions. For example, Ghai (2009) has acknowledged that “contemporary Constitution making processes, which include participation do not necessarily lead to the writing of a democratic Constitution but rather involving the public increases the legitimacy of the resultant Constitution.”⁵⁹ Other advocates for participation argue that involving the public promotes social justice and enhances the quality of decision making because the outcomes of public participation can result in greater understanding of public problems and generate potential solutions and policies, plans and projects of higher quality regarding their content.⁶⁰

⁵⁶ *Ibid*; Fung argues that representative democracy does not need to be in competition with direct democracy, and that these different approaches can be used to complement each other but care needs to be given to the scale of decision making, the issue, the methods used and the context.

⁵⁷ Tam Cho, Wendy K. (1999), Naturalization, Socialization, Participation: Immigrants and (Non-)Voting The Journal of Politics, 61(4), p1140-1155.

⁵⁸ Fowler, Baker & Dawes (2008). Genetic Variation in Political Participation. American Political Science Review 102(2), p233-248.

⁵⁹ Ghai, Y. ND. A participatory process for making a new Constitution. Retrieved 25 January, 2018, from <http://www.Constitutionnet.org/sites/default/files/Participatory%20process%20English.pdf>

⁶⁰ Bryson, J. Quick, K. Slotterback, C.S. Crosby, B. (2013). Designing public participation processes. Retrieved 23 January, 2018, from: https://www.researchgate.net/publication/236735946_Designing_Public_Participation_Processes

In particular, it has been argued that the people of Kenya participate in their governance because, as maintained by Justice Ringera in *Njoya v. Attorney-General (2004)*, “the Constitution is supreme because it is made by them in whom the sovereign power is reposed, the people themselves.”⁶¹ Moreover, as a result they participate because “sovereign power is reposed in them.” In a sense, Justice Ringera is referring to the intrinsic value of participation: it is not simply important for instrumental reasons, such as legitimating decisions, but because it expresses the value of democracy. The intrinsic and instrumental values of public participation are summarised in the writing of the International Association of Public Participation, which lists the following as core values for the practice of public participation:

- Public participation is based on the belief that those who are affected by a decision have a right to be involved in the decision-making process;
- Public participation includes the promise that the public's contribution will influence the decision;
- Public participation promotes sustainable decisions by recognising and communicating the needs and interests of all participants, including decision makers;
- Public participation seeks out and facilitates the involvement of those potentially affected by or interested in a decision;
- Public participation seeks input from participants in designing how they participate;
- Public participation provides participants with the information they need to participate in a meaningful way; and
- Public participation communicates to participants how their input affected the decision.⁶²

⁶¹ *Njoya and others v Attorney-General and others*, AHRLR 157 (KeHc 2004).

⁶² International Association of Public Participation. (ND). Core values, Ethics, Spectrum. Retrieved 23 January, 2018, from <https://www.iap2.org/?page=pillars>

Public participation is practised around the world in very different political, social, and economic systems as Esping-Andersen (1990) has observed.⁶³ Participation innovations in the United States of America (USA) or the United Kingdom (UK) may have influenced formal drafting of the Constitution in Kenya, but it is also the ideas of direct participation, for example participatory budgeting models from Brazil, that have captured public imagination in Kenya as well.⁶⁴

Some of the problems and tensions that may occur in Kenya about public participation also occur in a variety of governance systems and have been highlighted in international literature. According to the Working Group on Legal Frameworks for Public Participation (2013), the case of the USA reveals a situation where multiple laws that can potentially conflict with each other in ways that can be problematic and continue to exist.⁶⁵

The legal framework for public participation in the United States is problematic. We have numerous local, state, and federal laws, rules, and regulations that exert a great deal of influence on how participation happens; however, in most cases, these laws are obsolete, unclear, or in conflict with one another.

In the context of the UK, some political commentators like Parris (2005)⁶⁶ and Taverne (2005)⁶⁷ have argued that participation is costly and might be a waste both of money and time, and can be captured by populist movements. There has also been some growing concern in the

⁶³ Esping-Andersen, G. (1990). *The three worlds of welfare capitalism*. Princeton University Press: Princeton, New Jersey.

⁶⁴ World Bank. (ND). *Participatory Budgeting in Brazil*. Retrieved 20 January, 2018, from https://siteresources.worldbank.org/INTEMPowerment/Resources/14657_Particip-Budg-Brazil-web.pdf

⁶⁵ Nabatchi, T., Ertinger, E., & Leighninger, M. (2015). The Future of Public Participation: Better Design, Better Laws, Better Systems. *Conflict Resolution Quarterly*, 33(S1). doi:10.1002/crq.21142.

⁶⁶ Parris, M. (2005). Don't ask my opinion; don't consult, engage or include; just lead: We should not tip bucket-loads of participation over every group and question. *The Times*, 26205.

⁶⁷ Taverne, D. (2005). *The March of Unreason: Science, Democracy, and the New Fundamentalism*. Oxford University Press: Oxford.
Press, Oxford.

more general academic literature that participation may be costly and not deliver all that it promises.⁶⁸

In Africa, public participation manifests its self in various ways. According to Olowu (2003), “a series of political reforms in the late 1990s drove attention to a wide range of management tools that could open the way for participatory democracy”.⁶⁹ In democracies in the Global South, issues about participation also focus on ethnic participation in multi-religious contexts and conditions of partisanship.⁷⁰ In South Africa, Article 42(3) and 42(4) of the South African Constitution, for example, requires:⁷¹

the National Assembly to represent the people, ensure government by the people, and provide a national forum for public consideration of issues in public participation that is facilitated in respect of the legislative and other processes of the national Assembly, National Council of Provinces, and provincial Legislatures.

Public participation, direct participatory democracy and representative has been defined in this section and discussion has introduced a variety of perspectives on what drives citizens to participate and some of the common the problems that are often experienced. Discussion now turns to consider why despite the challenges, participation has emerged as an important aspiration throughout the Constitutional transition period in Kenya.

⁶⁸ Cooke, B. & Kothari, U. (eds.) (2001). *Participation the New Tyranny*. Zed Books, London.

⁶⁹ Olowu, D. (2003). *Local Democracy, Taxation and Multi-Level Governance in Africa*. Paper prepared for Norwegian Association for Development Research (NFU) Annual Conference on Politics and Poverty, Oslo, October 23-24. As cited in Sintomer, Y., Herzberg, C., Röcke, A., & Allegretti, G. (2012). *Transnational Models of Citizen Participation: The Case of Participatory Budgeting*. *Journal of Public Deliberation* 8(2), Article 9.

⁷⁰ Cornwall, A. & Gaventa, J. (2001). *Bridging the gap: citizenship, participation and accountability*. Retrieved on 30 January, 2018, from

<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.195.6457&rep=rep1&type=pdf>

⁷¹ Constitution of the Republic of South Africa 1996, art 42(3&4).

1.5.2 Constitutional Transition Period (August 2010–December 2016)

For Bratton and Kimenyi (2008), there are a number causes of conflict in Kenya including ethnicity-based conflict, which has been a significant problem in Kenya.⁷² It appears that political conflict prevails among people of different ethnic groups, at the national level during elections; however, ethnic tension is not the only reason for ongoing election related violence. Other drivers of unrest have been identified such as economic injustices especially with regards to, historical injustices, leadership, corruption, a weak judiciary, weak legal framework, negative ethnicity, and land tenure disputes.⁷³ When people feel alienated, whatever the reason, they may resort to some form of violence. A number of these drivers of violence relate to issues of exclusion. For example, according to Hickman (2013), post-election violence threatens the individual's right to vote and deprives them of "the feeling of being involved and having political influence" and limits their "inclusion identity and self-determination."⁷⁴ Furthermore, Akech (2010) observes that:⁷⁵

In this respect, the new Constitution seeks to address the root causes of interethnic conflicts, by: establishing national values and principles of governance that seek to diffuse ethnic tensions often fueled by perceptions of marginalisation and exclusion; reforming the electoral system, which has been used as an instrument of inclusion and exclusion in sharing of national resources, with a view to ensuring that the voices of all segments of society are represented equitably in government and making elections less fractious; creating devolution mechanisms that seek to enhance fairness in the sharing national resources; and establishing mechanisms to ensure fairness in land administration and to address historical land injustices that have often reinforced perceptions of marginalisation and exclusion and triggered ethnic conflicts, especially during elections.

⁷² Bratton, M., & Kimenyi, M. S. (2008). Voting in Kenya: Putting Ethnicity in Perspective. *Journal of Eastern African Studies*, 2(2), 272-289. doi:10.1080/17531050802058401.

⁷³ Dercon, S., & Gutiérrez-Romero, R. (2012). Triggers and Characteristics of the 2007 Kenyan Electoral Violence. *World Development*, 40(4), 731-744. doi: 10.1016/j.worlddev.2011.09.015.

⁷⁴ Cited in Badu, K. (2016). The Ugly Face of Electoral Violence: Does it Worth Experiencing? *Modern Ghana*. Retrieved 23 January, 2018, from <https://www.modernghana.com/news/697420/the-ugly-face-of-electoral-violence-does-it-worth-experien.html>

⁷⁵ Akech, M. (2010). Institutional Reform in the New Constitution of Kenya. *International Center for Transitional Justice*.

Public participation is one of the key national values identified in finding ways to enable meaningful participation is an important part of peacebuilding as well as democracy building in Kenya. The implementation of the Constitution of Kenya 2010 was part of process that was meant to address these historical injustices.

The transitional period beginning 2010 saw the creation of institutions both temporary and permanent. The Commission for the Implementation of the Constitution (CIC) and the Transitional Authority (TA) were both mandated to ensure that the Constitutional implementation was undertaken in the first five-year period. The Parliamentary Committee for the Implementation of the Constitution is a permanent committee that was tasked with ensuring the 2010 Constitution is implemented and located within the parliamentary structure was also created.

Civil society groups have argued that the period of transition to implement the Kenyan Constitution is important because the 2010 Constitution brought a new emphasis on the sovereignty of the people. Under previous governance arrangements, citizens had opportunities to participate at the local level in decision making but these opportunities were frequently limited by lack of civic education, finances, or opportunity. Many NGO groups see the Constitutional transition period as important time for raising public awareness about the new legislation. To understand public participation in the Constitutional transition period, it is necessary to have some social cultural and political economic context a context provided in the next two sections.

1.5.3 The Kenyan Constitution: An Evolution

Prior to 1880, in what is today called Kenya, was a land that was made up of individual nation states that traded with each other and the occasionally with Arabs at the coast and the Portuguese that forayed into the interior and fought with each other. No one superior tribe

existed, they were as varied as they remain today. The Miji Kenda, the People of the Wanga Kingdom, the Agikuyu, the Akamba, and the Dhuluo, are among many nation states that have been referred to as tribes. They are distinct in language, culture and political systems, but the coming of the British would change all this.⁷⁶

Located in East Africa, Kenya was partitioned during the Berlin conference in 1884-1885.⁷⁷ It fell under the sphere of influence of the British whose primary area of interest was Uganda, described by explorer John Speke as the ‘pearl’ of Africa. Kenya was a by-product of this colonial period. Kenya at independence was a construct of the British Empire brought on as a result of the need to secure the source of the Nile which was in Uganda. In June 1895, Britain proclaimed a protectorate over East Africa which included present day Kenya.⁷⁸ This was an especially difficult time for the local Africans, with the arrival of Europeans and Asians and the taking of their ancestral land and displacement of communities especially in the Rift Valley and central parts of Kenya. The years after 1895 to the end of World War Two would dramatically change the country, with the influx of European settlers and Indians who were primarily brought in to build the railway that crossed Kenya to access Uganda. The forced acquisition of land from the Africans and the creation of reserves that served as areas the local African population was limited too as the British acquired the most fertile and productive land.⁷⁹

In 1923, the Devonshire declaration offered Britain’s commitments to protecting “native races”. The taxation of the African population by the British forced the Africans to work as labourers for the British on lands they were told were no longer theirs.⁸⁰ By the end of

⁷⁶ Bennett, G. (1963). Kenya: a political history – the colonial period. Oxford: Oxford University Press.

⁷⁷ Bennett, G. (1963). Kenya: a political history – the colonial period. Oxford: Oxford University Press.

⁷⁸ Anderson, D. (2005), Histories of the Hanged: The Dirty War in Kenya and the End of Empire. W.N. Norton.

⁷⁹ Anderson, D. (2005), Histories of the Hanged: The Dirty War in Kenya and the End of Empire. W.N. Norton.

⁸⁰ Parsons, T. (2007), The Lanet Incident, 2-25 January 1964: Military Unrest and National Amnesia in Kenya. International Journal of African Historical Studies 40(1).

World War Two, there were 5 million Africans in Kenya, 97,000 Asian immigrants and 29,000 Europeans, with the Europeans having appropriated the most fertile and arable land.⁸¹ This led to a period of agitation for African control of land, and in the 1950s these frustrations were expressed as the demand for freedom. When this demand was not met it led to the armed conflict and resistance, mainly in the central highlands of the country where the British had forced the Africans into reserves. Part of the local Agikuyu community took up arms, prompting a war demanding their land.⁸² This war came to be known as the Mau Mau War, which led to a state of emergency being declared by the governor general in October 1952. For the British, the war was considered a civil war, but for Africans this was a war of liberation. It led to the arrest of Africans who were considered leaders of the Mau Mau. The Kapenguria six led by Jomo Kenyatta were sentenced to jail and exiled to the northern province of the then Kenya Colony.

By then, however, the “winds of change” had swept the Kenyan colony and the British government could no longer ignore the call for independence, leading to a period of preparation for independence.⁸³ In November 1963, the British parliament passed a bill that prepared the way for the independence of Kenya, passed on 12 December 1963 with Jomo Kenyatta as the first president.⁸⁴ The Independence Constitution was intended to help Kenya transit into an independent country. However, it underwent a myriad of amendments that were a result of a succession of governments that moved to centralise power to the executive and to the political

⁸¹ Parsons, T. (2007). The Lanet Incident, 2-25 January 1964: Military Unrest and National Amnesia in Kenya. *International Journal of African Historical Studies* 40(1).

⁸² Elkins, C. (2005). *Imperial Reckoning: The Untold Story of Britain's Gulag in Kenya*. Henry Holt: New York.

⁸³ Fleshman, M. (2010). Winds of change that transformed a continent. *African Renewal* August On line <http://www.un.org/africarenewal/magazine/august-2010/%E2%80%98wind-change%E2%80%99-transformed-continent>

⁸⁴ The Learning Network (2011). Dec. 12, 1963, Kenya Gains Independence. *New York Times*. Retrieved 10 January, 2018, from <https://learning.blogs.nytimes.com/2011/12/12/dec-12-1963-kenya-gains-independence/>

elite of the day. As Okoth-Ogendo contends, this period of multiple Constitutional amendments 1963-1969 resulted in a concentration of political power:⁸⁵

All public activities of the state were concentrated in parliament, there was reduced public participation in the processes of government through loss of interest in political activity and the absence of a strong and freely functioning opposition party; but what is even more important, the parliamentarization of politics led to increased executive control over parliament.

In the late 1970s, the change of Constitution movement developed as a realisation from the political elite that the independence President Jomo Kenyatta's health was failing, and that they wanted to maintain Kenya's political hegemony within the Agikuyu elite.⁸⁶ This project was not successful, however. At the death of Kenyatta, the presidency then transited to Daniel Arap Moi in 1978 as President.⁸⁷ Moi ruled Kenya from 1978 to 2002 and in the process created a new centre of power with a different political elite. It was during Moi's presidency that the clamour for a new Constitution was intensified.⁸⁸

The overall process of constitution making was largely participatory in that it involved countrywide debate of the proposed constitutional articles and culminated with a Committee of Experts drafting a Constitution, resulting in a referendum to vote of the Constitution which was held in May 2010. Before examining the new Constitution, I now turn to provide a brief overview of the social context.

⁸⁵ Okoth-Ogendo, H.W. (1972). The Politics of Constitutional Change in Kenya Since Independence, 1963–69. *African Affairs*, 71(282), 9-34. doi: 10.1093/oxfordjournals.afraf.a096213.

⁸⁶ Karimi, J. (2013). Intrigues behind Jomo Kenyatta's succession, *Standard Newspaper*, 22 August. Retrieved 30 January, 2018, from <https://www.standardmedia.co.ke/article/2000091563/intrigues-behind-jomo-kenyatta-s-succession>

⁸⁷ Lynch, G. (2008). Moi: The Making of an African 'Big-Man'. *Journal of Eastern African Studies* 2(1), pp18-43.

⁸⁸ Bayart, J-F. (2009). *The State in Africa: the Politics of the Belly*. London and New York, Longman.

1.5.4 Social and Political economy of Kenya: A brief context.

The population of Kenya is estimated at 49 million as of 2016, and is extremely young with a median age of 19.5 years.⁸⁹ The main source of economic activity for the people of Kenya is agriculture. There are 47 counties of Kenya which are administrative units of devolved governance under 2010 Constitution of Kenya (see Articles 191 and 192, and the Fourth Schedule of the Constitution of Kenya and the County Governments Act 2012). At a county level, where public participation is most likely to occur, the 47 counties have populations ranging from about 3.1 million Nairobi to 250,000 in Samburu County which is sparsely populated.⁹⁰

Kenya is a multi-ethnic society, with more than 42 tribes.⁹¹ It is also multi-religious and multiracial. The diverse nature of the composition of the country is acknowledged in the 2010 Constitution. However, power has concentrated in a centralised system by the political elites over time through a series of Constitutional amendments, as noted in the previous section. As power was monopolised by a political elite and tribal elite, it exacerbated a key problem of corruption and lack of accountability on financial matters.⁹² For the new Constitution, many Kenyans sought power to be devolved into smaller units of governance and – furthermore – held an expectation of participatory engagement at the country level as a means of improving future governance.⁹³

⁸⁹ Kenya National Bureau of Statistics (2018). Statistical Abstract 2017. Retrieved 23 January, 2018, from <https://www.knbs.or.ke/statistical-abstract-2017/>

⁹⁰ Commission for Revenue Collection.

⁹¹ Lynch, G. (2014). Kenya has more than 42 tribes, so why is this still the magic number? Daily Nation online, Nairobi, 12 September.

⁹² Hope Sr., KR. (2014) Kenya's corruption problem: causes and consequences. *Commonwealth and Comparative Politics* 52(4), p493-512.

⁹³ Kenya School of Government, Centre for Devolution Studies Integrating Social Accountability in Healthcare Delivery: Lessons Drawn from Kenya. Working paper No. 4. Retrieved 18 January, 2018, from <https://openknowledge.worldbank.org/bitstream/handle/10986/21666/94500.pdf?sequence=1&isAllowed=y>

Coupled with this increasing demand for devolution was a growing perception of a general lack of respect for the rule of law which led to a situation where the law existed but was not serving Kenyans and was not respected.⁹⁴ This general lack of respect for the law and selective application of the law was initially manifested by the colonial administration, followed by the post-independence leadership and the political elite. Eventually, it spread to society in general.⁹⁵ This lack of respect for the law led to a situation where it was believed that Kenyans, like other states in Africa, had to relook at the ideas of a social contract binding the country and communities to enhance a sense of justice, and this encouraged some reformers to rededicate themselves to advancing the rule of law.⁹⁶

Conflict related to the distribution of resources is a further area of contention in Kenya. The centralisation of power came hand in hand with the redirection of national resources to the centre and to the political elite. This reallocation of resources led to the marginalisation of some regions, especially in the north-eastern part of the country, the coastal region, the Tana delta region and the western part of the country. It also contributed to the 2007-2008 post-election violence, which led to the deaths of over 1,500 Kenyans and the displacement of a further 600,000 citizens.⁹⁷ This violence led to the signing of the power sharing agreement between the Party of National Unity's (PNU) Mwai Kibaki and the Orange Democratic Movement's (ODM) Raila Odinga. This power sharing agreement also elaborated the way forward for Kenya, including the delivery of a new Constitution for Kenyans.

94 John Mukum Mbaku (2017) Kenya: Presidential elections and the rule of law, Brookings Institute, September 6. Retrieved 23 January, 2018, from <https://www.brookings.edu/blog/africa-in-focus/2017/09/06/kenya-presidential-elections-and-the-rule-of-law/>

95 Ghai, Y.P & McAuslan, J.P.W.B (1970). Public law and political change in Kenya. A study of the Legal framework of Government from colonial times to the present. Nairobi: Oxford University Press at 517.

96 Leonard, D. Mugumo Mushi, F. & Vincent J. (2011) Social Contracts and Security in Sub-Saharan African Conflict States: The Democratic Republic of Congo, Sierra Leone and Somalia. Paper for presentation to the African Studies Association, Washington, D.C. November.

97 Human Rights Watch. (2017). Kenya: Post-election Killings, Abuse. Retrieved 23 January, 2018, from <https://www.hrw.org/news/2017/08/27/kenya-post-election-killings-abuse>

The marginalisation of women, young people, persons with disabilities and older persons in participating in the governance process has been overt in Kenyan political history.⁹⁸ Many Kenyans have argued that clearer laws are needed to stipulate minimum levels of participation for these marginalised groups to ensure protection by law. One hurdle to be crossed on this matter in respect of the law is to provide legislative opportunities for voices that have been excluded traditionally from decision making.

1.5.5 An Overview of the Constitution of Kenya 2010

A complete reading of the Constitution of Kenya 2010 enables one to evaluate the totality of the Constitutional vision that is greater than the extraction of each of the public participation aspects of it. The Constitution has a preamble, 18 chapters, 264 Articles and six schedules. The Preamble acknowledges the supremacy of God and honours past heroes, recognises the diversity of Kenya and her people.⁹⁹ In Chapter 1, Articles 1-3 proclaims the sovereignty of the people and the supremacy of the Constitution.¹⁰⁰ In Chapter 2, Articles 4-11 declares the Republic and territory of Kenya, devolution and accesses of services. It states the national, official and other languages, and clarifies the relationship between the state and religion, categorically stating in Article 8 that “There shall be no state religion”.¹⁰¹ It further elaborates on the national symbols and national days, national values and principles of governance, which includes Article 10(2) that discusses patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people.¹⁰²

⁹⁸ Freidenberg, L. (2013). Marginalisation of Rural Women in Kenya. Prospect: Journal of International Affairs. Retrieved 23 January, 2018, from <https://prospectjournal.org/2013/10/03/marginalization-of-rural-women-in-kenya/>

⁹⁹ Constitution of Kenya 2010, Preamble.

¹⁰⁰ Constitution of Kenya 2010, art 1-3.

¹⁰¹ Constitution of Kenya 2010, art 4-11.

¹⁰² Constitution of Kenya 2010, art 10(2).

In Chapter 3, Articles 12-18 deal specifically with the matter of citizenship. Entitlements to citizenship, retention and acquisition of citizenship, citizenship by birth, citizenship by registration, dual citizenship, revocation of citizenship and legislation of citizenship.¹⁰³ Chapter 4, Part 1, Articles 16-25 consider “general provisions relating to the Bill of Rights. More specifically, rights and fundamental freedoms, application of the Bill of Rights, the implementation of rights and fundamental freedoms, the enforcement of the Bill of Rights, authority of courts to uphold and enforce the Bill of Rights, limitation of rights and fundamental freedoms fundamental rights and freedoms that may not be limited.”¹⁰⁴

Part 2 of Chapter 4, Articles 26-51, discusses rights and fundamental freedoms. It outlines the right to life, equality and freedom, equality and freedom from discrimination, human dignity, freedom and security of the person, and privacy. It also discusses freedom of conscience, religion, belief and opinion, freedom of expression, freedom of the media, access to information and freedom of information. Collective rights are also covered, including freedom of association, assembly, demonstration, picketing and petition, political rights. Other considerations are freedom of movement and residence, protection of the right to property, labour relations, environment, economic and social rights, language and culture, family, consumer rights, access to justice, rights of arrested persons and fair hearing.¹⁰⁵

Part 3 of Chapter 4, Articles 52-57 discusses the specific application of rights in relation to children, persons with disabilities, minorities and marginalized groups, older members of society. Part 4 (Article 58) then addresses a state of emergency. Part 5 (Article 59) considers the establishment of Kenya National Human Rights and Equality Commission.

¹⁰³ Constitution of Kenya 2010, art 12-18.

¹⁰⁴ Constitution of Kenya 2010, art 16-25.

¹⁰⁵ Constitution of Kenya 2010, art 26-51.

Chapter 5 then addresses principles of land policy, private land, land holding by non-citizens, regulation of land use and property, national land commission, role of parliament in creating legislation on land, obligations in respect of the environment, enforcement of environmental rights, and agreements relating to natural resources and legislation relating to the environment.¹⁰⁶

Chapter 6 (Articles 73-80) states the responsibilities of leadership. It covers oath of office of state officers, conduct of state officers, financial probity of state officers and legislation on leadership.¹⁰⁷ Chapter 7, Articles 81-92, then addresses representation of people. Part 1 covers the electoral system and process, Part 2 discusses an Independent Electoral and Boundaries Commission and the delimitation of electoral units, and Part 3 rules around political parties.¹⁰⁸

Chapter 8, Articles 93-128, discusses the legislature, including the role and the establishment of Parliament, the role of the senate, membership of the National Assembly and Senate, promotion of representation of marginalised groups, and right of recall. Part 1 of Chapter 8 delineates the offices of parliament, speakers and deputy speakers of parliament, party leaders. Part 2 considers exercise of legislative power. It is also concerned with bills, special bills and ordinary bills concerning county governments, money bills and mediation committees. Part 3 addresses parliament's general procedures and rules, while Part 4 establishes the Parliamentary Service Commission.¹⁰⁹

Chapter 9 (Articles 129-151) states the principles and structure of the national executive. It further expounds on the authority of the president, functions of the president,

¹⁰⁶ Constitution of Kenya 2010, art 52-57.

¹⁰⁷ Constitution of Kenya 2010, art 73-80.

¹⁰⁸ Constitution of Kenya 2010, art 81-92.

¹⁰⁹ Constitution of Kenya 2010, art 93-128.

power of mercy, exercise of presidential powers during temporary incumbency, election of the president, qualification for election as president, questions as to the validity of presidential election, the assumption of office of the president. It also lays out the term of office of president, removal of president on grounds of incapacity, the removal of the president by impeachment and the equivalent actions with regards to the deputy president. Finally, it addresses the remuneration and benefits of the president and the deputy president. Articles 152-155 outline the composition of cabinet, its responsibilities and accountability, the issue of the secretary to the cabinet and principal secretaries.¹¹⁰ Articles 156-158 then expounds on the role of the Attorney-General and the Director of Public Prosecutions.¹¹¹

Chapter 10, Article 159-173, addresses judicial authority, the independence of the judiciary, judicial officers. It outlines the system of courts, including the Supreme Court, Court of Appeal, High Court, and the appointment of Chief Justice and other judges, the tenure of the Chief Justice and other judges. It also covers removal from office, Kadhi Courts, the establishment of the Judicial Service Commission and the functions of the Judicial Service Commission.¹¹²

Chapter 11 (Articles 174-200) expounds on the objects of devolution, county governments, membership of county assembly, speaker of a county assembly, the county executive committees, the election of county governor and deputy governor, and removal of the county governor and the legislative. It also covers respective functions and powers of the national and county governments, the transfer of functions and powers between levels of government, boundaries of counties, cooperation between national and county governments, and conflict of laws. Also discussed is the suspension of a county government, qualification

¹¹⁰ Constitution of Kenya 2010, art 129-151.

¹¹¹ Constitution of Kenya 2010, art 156-158.

¹¹² Constitution of Kenya 2010, art 159-173.

for election as member of the county assembly, vacation of office of member of county assembly, and the role of the county government during the transition period.¹¹³

Chapter 12, Articles 201-231, lays out principles of public finance, equitable sharing of national revenue, the equalisation fund, the consolidated fund and other public funds, revenue funds for county governments, and contingencies fund. Also covered is the power to impose taxes and charges, borrowing by national government, borrowing by counties, public debt, the functions and role of the commission on revenue allocation, the division of revenue, annual division and allocation of revenue bills, transfer of equitable share, financial control of public money, accounts and audit of public entities, the procurement of public goods, the roles of the controller of budget, the auditor general and the functions of the salaries and remuneration commission.¹¹⁴

In Chapter 13, Articles 232-237, the values of the public service commission, staffing of county governments, protection of public officers and the establishment of the teacher's service commission is laid out. Chapter 14, Article 238-247, then addresses national security. This chapter deals with principles of national security, the national security organs, the establishment of a national security council, the establishment of the defence forces, the defence council and the national intelligence service. The chapter further deals with the establishment of the national police service, its objects and functions, the command of the national police.¹¹⁵

Chapter 15, Articles 248-254, addresses the objects authority and funding of commission and independent offices, composition appointment and terms of office and the removal of office of members of commissions and independent offices. Chapter 16 (Article

¹¹³ Constitution of Kenya 2010, art 174-200.

¹¹⁴ Constitution of Kenya 2010, art 201-231.

¹¹⁵ Constitution of Kenya 2010, art 232-237.

255-257) presents the process of amending the Constitution, which ranges from referendum, parliamentary initiative, and popular initiative. Chapter 17 (Article 261) then addresses the enforcement of the Constitution. Chapter 18 finally offers transitional and consequential provisions.¹¹⁶

The schedules to the Constitution include, first, a list the 47 counties of Kenya,¹¹⁷ and second, a list of its national symbols.¹¹⁸ The third schedule then states the national oath and affirmations and the fourth shows the distribution of functions between the national government and the county government.¹¹⁹ The fifth schedule lists legislation to be enacted by parliament and the time specification and the sixth schedule lists the transitional and consequential provisions.¹²⁰

1.6 Summary

This chapter has set out the justification for the research, research objectives, scope and delimitation of research, and an overview of the thesis. It then defined the terms and provided a background of the Kenyan context and presented a review of public participation literature in the Kenyan context. The chapter has highlighted the aspirations and hopes which influence Constitutional transitional period, the evolution of various Constitutions of Kenya, the people of Kenya, the socio-political context of Kenya, and finally offered an overview of the Constitution of Kenya 2010. The following chapter considers the theoretical framework and research methods that this thesis will take when examining non-electoral public participation in Kenya in the Constitutional transition period.

¹¹⁶ Constitution of Kenya 2010, art 248-254.

¹¹⁷ Constitution of Kenya 2010, art 1.

¹¹⁸ Constitution of Kenya 2010, art 2.

¹¹⁹ Constitution of Kenya 2010, art 3.

¹²⁰ Constitution of Kenya 2010, art 5.

Chapter Two – Conceptual Framework and Research Methods

2.1 Introduction

This chapter presents the conceptual framework that is the basis of this thesis, then discusses the methods used to conduct this research, documenting the case study approach that draws on qualitative methods to collect data via document analysis and literature reviews and interviews with key informants and analysis of legal judgments.

2.2 Conceptual Framework

This section presents the conceptual framework that will inform this research. Miles and Huberman (1994) defined a conceptual framework as:¹²¹

a visual or written product, one that explains, either graphically or in narrative form, the main things to be studied—the key factors, concepts, or variables—and the presumed relationships among them.

According to Taylor, Bogdan and DeVault (2016), the “goal of qualitative research is to examine how things look from different vantage points.”¹²² In this thesis I draw on four key elements of democratic governance: participation, constitutionalism, rule of law and justice to examine the four aspects of public participation in the Kenya in the constitutional transition

¹²¹ Miles, M.B. & Huberman, A.M. (1994). *Qualitative data analysis: An expanded source book* (2nd ed). Thousand Oaks, CA: Sage, p18.

¹²² Taylor, S.J. Bogdan, R. & DeVault, M.L. (2016). *Introduction to Qualitative Research Methods: A Guidebook and Resource* (4th Ed). John Wiley, New Jersey.

period, the constitution of Kenya 2010, national and county public participation legislation, reported experiences of those participating in implementing of public participation framework.

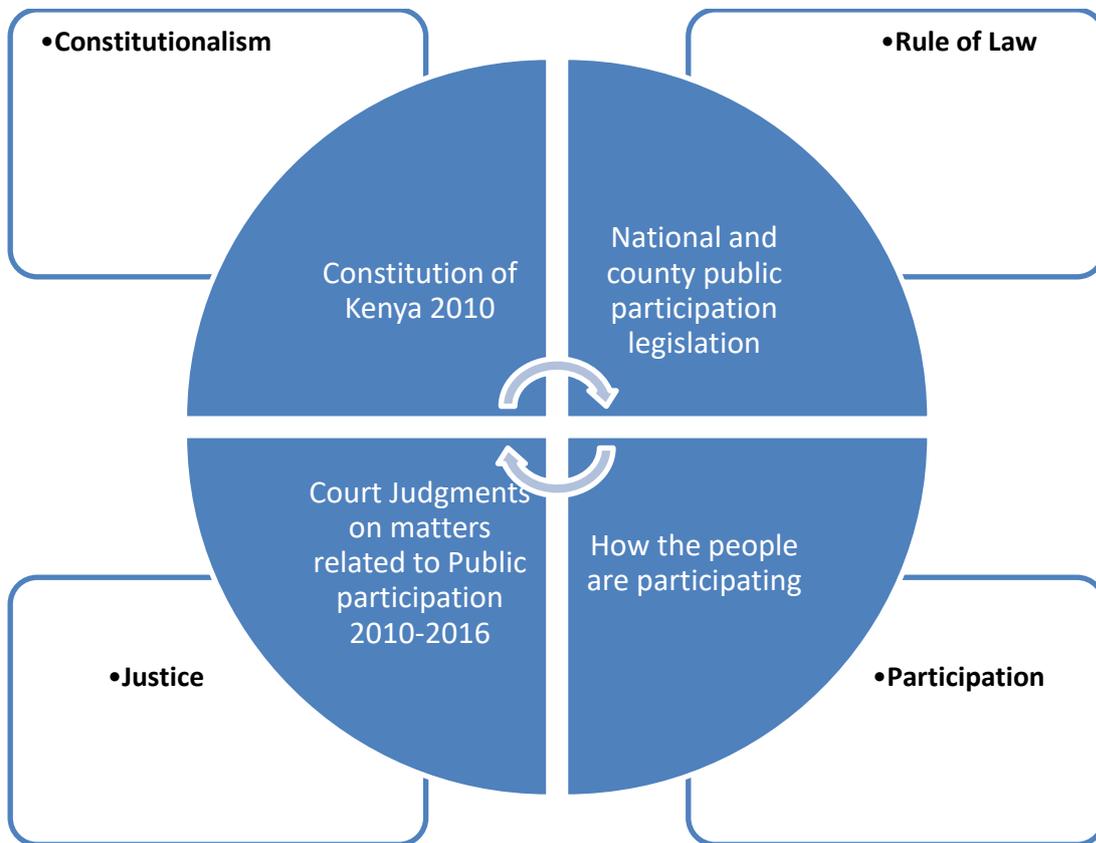


Figure 1 Conceptual Framework of Public Participation in Kenya in the Constitutional Transition Period 2010-2016. ¹²³

2.2.1 Public Participation

The first aspect of the conceptual framework that informs this thesis is that of public participation. Gelderloos (2014) asserts that participatory democracy has long been a feature of human society since the advent of hunter-gatherer tribes. It is not necessary to agree with the Gelderloos distinction between developed democracies and so-called “primitive societies”

¹²³ By Jane M. W. Marine

to note that participation has been valued by many over time. Today in many western democracies, citizen participation is often seen as a “potential cure against the acute, though enduring, “malaise” or “crisis” of democratic representation.¹²⁴ But public participation is also a concept that is so highly prized in Kenya, it has been listed in the values of the Constitution. So what do we mean by public participation? Building on Chapter 1, I now expand on the way public participation is defined.

Arnstein (1969) in her seminal work, claimed that “Citizen Participation is the redistribution of power that enables the have-not citizens ... to be deliberately included in the future.”¹²⁵ Arnstein distinguished between forms of participation that are merely tokenistic exercises in informing the public and methods of participation which enable communities to have direct control over decision making.¹²⁶ The International Association for Public Participation defines public participation as “any process that involves the public in problem-solving or decision-making and that uses public input to make better decisions.”¹²⁷ Creighton (2001) makes a similar point and describes public participation as a:

two-way communication and interaction process by which public concerns, needs and values are incorporated into government and corporate decision making with the overall goal of better decisions that are supported by the public.

According to the World Bank:¹²⁸

¹²⁴ Stinomer, Y. et al., (2008). Participatory Budgeting in Europe: Potentials and Challenges. *International Journal of Urban and Regional Research*. 32 (1). 164-178. [Online]. Available from: Wiley Online Library. <<http://onlinelibrary.wiley.com/doi/10.1111/j.1468-2427.2008.00777.x/epdf>>

¹²⁵ Arnstein, S.R. (1969). A ladder of citizen participation *Journal of the American Institute of Planners*, 354: 216-224.

¹²⁶ Arnstein, S.R. (1969). A ladder of citizen participation *Journal of the American Institute of Planners*, 354: 216-224.

¹²⁷ IAP2’s Code of Ethics for Public Participation Professionals,

¹²⁸ Strategic framework for mainstreaming citizen engagement in World Bank Group operations : engaging with citizens for improved results <http://documents.worldbank.org/curated/en/266371468124780089/Strategic-framework-for-mainstreaming-citizen-engagement-in-World-Bank-Group-operations-engaging-with-citizens-for-improved-results> 2014

Citizen engagement is defined as the two-way interaction between citizens and governments or the private sector within the scope of World Bank interventions—policy dialogue, programs, projects, and advisory services and analytics—that gives citizens a stake in decision-making with the objective of improving the intermediate and final development outcomes of the intervention.

As well as understanding the cultural inspiration for participation, incentives for effective participation also matter, as do social dynamics. Fung (2007) contends that:¹²⁹

Participatory democracy in a large and complex nation requires at least three novel political structures. First, the existence of a comprehensive national system of local assemblies in every rural, suburban, and urban place... Secondly, to curb the parochial tendencies of these assemblies, citizens should engage one another across great geographic distances and a... third important reform is a national initiative and referendum process.

These conditions exist in the context of the 2010 Constitution in Kenya, and therefore, according to Fung's framework, Kenya is a form of a constitutional participatory democracy.

Although public participation is identified as a key national value in the Constitution, there are those who note that it has limitations. The reasons they usually cite include one of the following. First, public participation is considered costly, and second, citizens are believed to be ill-equipped to participate. Cupps (1977), for instance, champions:¹³⁰

that public participation is both useful and desirable, but essentially within well-defined and manageable limits. In each case, the benefits to be derived from broadened participation will have to be weighed carefully against the costs in terms of delay and inconvenience to other parties.

¹²⁹ Archon Fung, A. (2007). Democratic Theory and Political Science: A Pragmatic Method of Constructive Engagement. *American Political Science Review*, 101(03), 443-458. doi:10.1017/s000305540707030x

¹³⁰ D. Stephen Cupps (1977), Emerging Problems of Citizen Participation *Public Administration Review*.

Furthermore, the nature of public participation is that it has various expressions, forms and modes. The Constitution of Kenya is clear that public participation should be undertaken and that what that participation looks like is a matter that is to be decided at the appropriate level of decision making, including both national and local level. However, the requirements as articulated in the Constitution imposes a responsibility to promote participation, as noted in Article 69(1) d for example, the state is required to *encourage* public participation (emphasis added).¹³¹ Additionally, in Article 118(1)b the Constitution requires that Parliament itself facilitates, participation therefore implying an active form of consultation is required.¹³² Finally, the Constitution engenders an expectation of public participation in financial matters in Article 201(a).¹³³ Thus we can conclude that in the Kenyan context the requirement of public participation includes an expectation that the administration has an *active* duty to encourage public participation and that merely allowing passive forms of public participation notice of participation and publications is not sufficient.

While noting that public participation has its critics and its limitations it remains a powerful instrument of ensuring inclusion in day to day governance. I now turn to examine the element of constitutionalism in the conceptual framework.

2.2.2 Constitutionalism

The second element of the conceptual framework that underscores this research is the concept of *constitutionalism*. I argue constitutionalism guides or normatively informs how a democratic country is meant to function as opposed to how it functions. It is described as “the idea ...that government can and should be legally limited in its powers, and that its authority

¹³¹Constitution of Kenya,2010 art 69(1) d

¹³² Constitution of Kenya, 2010 art 118(1)b

¹³³ Constitution of Kenya, 2010 art 201 (a)

or legitimacy depends on its observing these limitations.”¹³⁴ With this in mind, I turn to the Constitution of Kenya 2010 which states that, “This Constitution is the supreme law of the republic and binds all persons and all state organs.”¹³⁵

Constitutionalism is an expression of resistance to arbitrary government. Lane argues that:¹³⁶

The importance of the written Constitution may be seen not only in the formalities that surround a Constitution but also in how it works in the politics of a country. There are two possibilities either the Constitution effectively binds the political players restricting both state powers and powers of the different state organs, or the Constitution does not bind.

Here Lane is referring to a distinction in public law between binding conventions and non-binding political practice.¹³⁷ While these approaches differ they both share the objective of limiting the arbitrary or wilful exercise of power. It is important to note that the Kenyan Constitution is binding and this is important because the expectation is that as the 2010 Constitution of Kenya is the supreme law that provides the basis of how Kenya is to be governed. Furthermore, according to Lane (1996), “Modern constitutionalism has been influenced by two key texts Locke’s two treatises of civil government from 1690 and Montesquieu’s *The separation of powers*”.¹³⁸ This is key to this discussion of Kenya because the aim of the Constitution has been to ensure that each arm of government is able to work without interference, and that power is devolved to levels where it can be more effectively checked by local communities. However, this emphasis on the power of a Constitution residing in law is contested for example Chong (1993) presents an alternative view as to how the

¹³⁴ Stanford Encyclopedia of Philosophy: <https://plato.stanford.edu/entries/Constitutionalism/#ConMinRicSen>

¹³⁵ Constitution of Kenya 2010, art 2(2).

¹³⁶ Lane, J. E. (1996). *Constitutions and political theory*. Manchester: Manchester University Press.

¹³⁷ Faragher, C. (2017). *Public Law Concentrate*. Oxford: Oxford University Press.

¹³⁸ Lane, J. E. (1996). *Constitutions and political theory*. Manchester: Manchester University Press.

authority of a Constitution is derived, one that places greater emphasis on the engagement of people as the source of power and legitimacy.¹³⁹

The members of the now defunct Commission of the Implementation of the Constitution in Kenya had this to say, regarding constitutionalism at the end of their tenure: “the MPs’ agenda should be to focus on how Constitutionalism ... (the) ‘software of constitutional implementation’ – will be inculcated in the national psyche”.¹⁴⁰ What is clear from this observation is that the legitimacy and life of the Constitution of Kenya resides in the citizen’s participation as well as judicial rule. By this I mean that the Constitution requires public engagement in order to be operationalised. The reality is that a without a public culture that is actively engaged in the practice of constitutionalism, a constitution is unlikely to be sustainable. Tupaz (2009) makes this point strongly when he says that a transitional setting requires “dialogical deliberative politics as the normative model for Constitution-making, constitutional learning, and the cultivation of a widespread conviction for transformation and conciliation is a given.”¹⁴¹ However, when discussing about the prospects of constitutionalism in Kenya, Ghai and McAuslan in 1970 Kenya were not optimistic about its outlook mainly because of what appeared to be a propensity of the Executive to centralise power while flouting the Constitution.¹⁴² The question then to ask is the extent to which the people of Kenya will go to secure the Constitution by exercising their responsibilities under Article 3(1) to ensure constitutionalism will flourish under the 2010 Constitution of Kenya.

¹³⁹ Chong, D. (1993). How People Think, Reason, and Feel about Rights and Liberties. *American Journal of Political Science*, 37(3), 867-899.

¹⁴⁰ <https://www.standardmedia.co.ke/article/2000180390/cic-will-not-plead-for-term-extension-commissioners-say-decision-lies-with-mps>

¹⁴¹ Tupaz, E. F. (2009). *Deliberative Democracy and Weak Courts: Constitutional Design in Nascent Democracies*. *Touro International Law Review*, 12. Retrieved December 21, 2017, from <https://www.tourolaw.edu/ILR/uploads/articles/v12/Tupaz.pdf>.

¹⁴² Ghai, Y.P. & McAuslan, J.P.W.B (1970). *Public law and political change in Kenya. A study of the Legal framework of Government from colonial times to the present*. Oxford University Press, Nairobi at 517.

2.2.3 *Rule of Law*

The rule of law is also a key concept that underscores this thesis. It is key in the implementation process of the Constitution of Kenya 2010 and as a result in the actualisation of all the key aspirations that located in it including public participation. When we say that the rule of law exists, we generally mean that the law is applied in equitable and, impartial manner. The rule of law comprises two elements and both are relevant to this discussion. Again as Lane (1996) notes:¹⁴³

the Rule of Law has a narrow meaning limited to legality, and a broader meaning, derived from Anglo-Saxon Common Law, which includes the practices of non-judicial institutions such as political representation, the separation of powers and political accountability.

Saunders and LeRoy (n.d.) argue that the most important application of the rule of law is the principle that governmental authority is legitimately exercised only by written, publicly disclosed laws, adopted and enforced by established procedural steps that are referred to as due process.¹⁴⁴ Gleeson (2000) contends that “the law restrains, civilises power, acts as a safe guard”.¹⁴⁵ This suggests that the law is a means of containment of power and that it curbs what appears to be fundamentally human inclination to exceed the limits that bound power. Hayek (1944) provided an essential version of the rule of law:¹⁴⁶

one that means that government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one’s individual affairs on the basis of this knowledge.

Here Hayek’s emphasis is on the fixed nature of the rules, and the expectation of certainty.

The result of this emphasis is the individual’s ability to function without government interference. Tamanaha (2010) also stresses that in western democracy and beyond, the rule

¹⁴³ Lane, J. E. (1996). *Constitutions and political theory*. Manchester: Manchester University Press.

¹⁴⁴ Saunders & Le Roy (n.d.) *The Rule of Law in Lexis Nexus*: <http://www.lexisnexis.co.nz/en-nz/about-us/rule-of-law.page>

¹⁴⁵ Gleeson, M. (2000). *The rule of law and the Constitution*. Sydney, NSW: ABC Books.

¹⁴⁶ Hayek, Friedrich A.(1944) *The Road to Serfdom*. Chicago, IL : University of Chicago Press

of law may be considered a “given”.¹⁴⁷ Furthermore, Tamanaha notes that “The relationship between the rule of law and democracy is asymmetrical: the rule of law can exist without democracy but democracy needs the rule of law...”¹⁴⁸

However, the rule of law is also a contested ideal and as Fallon (1997) Pg 34 has noted the rule of law is perhaps “...best conceived as comprising multiple strands...”¹⁴⁹ This contested nature of the rule of law is further advanced by the World Bank which concludes that “...The rule of law has a number of different possible meanings. All of these definitions have problems, and which one is appropriate will depend on the task at hand.”¹⁵⁰ Yet again, as with the interpretation of natural justice, we see that the emphasis depends on the context. It is important to note for example, that in order for public participation in a democratic Kenya to be effective in the context of the constitutional transition period of 2010-2016, citizens need to have a variety of opportunities for meaningful participation and will experience the application of the rule of the law. The citizens are also able to experience the application of the rule of the law. John Mukum Mbaku for example argues that “the new Constitution established what most Kenyans believe is an independent judiciary, capable of making certain that government activities are only undertaken strictly in conformity with the Constitution.”¹⁵¹ Thereby ensuring that the rule of law is effected .

¹⁴⁷ Tamanaha, B. Z. (2010). *On the rule of law: History, politics, theory*. Cambridge: Cambridge Univ. Press.

¹⁴⁸ Ibid

¹⁴⁹ Fallon, R. H. (1997). "The Rule of Law" as a Concept in Constitutional Discourse. *Columbia Law Review*, 7(1), 1. doi:10.2307/1123446

¹⁵⁰ World Bank, 'Rule of Law and Development' <http://go.worldbank.org/9OTC3P5070>

¹⁵¹ Mukum Mbaku, J. (2017). Kenya: Presidential elections and the rule of law September 6 Brookings Institute Washington DC. <https://www.brookings.edu/blog/africa-in-focus/2017/09/06/kenya-presidential-elections-and-the-rule-of-law/>

2.2.4 Justice and Common Law

Justice and the concept of common law is a key pillar in the democratic infrastructure which informs this study of public participation under the Kenyan Constitution. Nyabira (2015) observed that:¹⁵²

The Kenyan courts are increasingly interrogating public participation requirements and providing direction regarding how participation should be implemented. Several pieces of legislation and guidelines have also addressed the issue of public participation, all of which explain the constitutional provisions further and can be relied upon by the courts.

Justice is used in this thesis to refer to how we define what is right and fair, based on our moral and ethical codes and traditions. In this justice varies across cultures and institutions. In the case of Kenya, the traditions of justice have been influenced by the Westminster practice of common law based on precedents. These precedents are maintained over time through the records of the courts. Concern to ensure a consistent and fair judicial system has been a key driver for the Constitution. As the Kenyan Judicial Transformation framework noted:¹⁵³

The Judiciary has been insular and remote both in its poise and processes giving rise to grave misunderstandings of how it runs its affairs. As a result, public confidence in the justice system has been greatly undermined. The Judiciary will engage the public in the administration of justice at various levels. It will develop and implement a structured approach to the achievement of successful public information, education and communication strategies as well as those for re-branding of the Judiciary.

This concern to promote justice, coupled with the need “to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human

¹⁵² Nyabira, B. (2016). Kenya’s Emerging Judicial Interpretation of Public Participation Under the Devolved System of Government. Animating Devolution in Kenya; The Role of The Judiciary. Conrad Bosire and Wanjiru Gikonyo. 1st ed. International Development Law Organization (IDLO), Judiciary Training Institute (JTI) & Katiba Institute, 2015. 266-291. Web. 26 Dec.

¹⁵³ Republic of Kenya, Judiciary Transformative Framework 2012-2016 , www.judiciary.go.ke/portal/assets/filemanager_uploads/Judiciary%20Transformation%20Framework%20-%20JTF.pdf

beings”¹⁵⁴ as expressed in the Bill of Rights,¹⁵⁵ helps us understand why enabling public participation is central to realising the Constitution’s intention. In the Kenyan context people need to see justice being done. In this research I will use the common law framework to examine the precedent used in individual cases that relate to public involvement, to understand how the courts have ruled on matters concerning public participation. Because the common law framework is a significant tool used in this research I will take time here to describe some of its key elements.

Kenya adopted common law as a result of the transfer of the Westminster legal system by British colonialists to Kenya. While there has been political debate about whether use of common law from English traditions can advance justice in African democracies, Chongwe (1989) contends that:¹⁵⁶

Modern African administrative states are characterised by a growing body of law designed to regulate citizen-state relations. This can be attributed to the consciously constitutional nature of modern African nations. It is also apparent in the establishment of numerous regulatory bodies to mediate citizen-state relations in the administrative field specifically.

This is the system of law that Kenya has observed at independence, and this framework of English common law granted the Kenya Independence Act 1963, legislation which the British parliament passed:¹⁵⁷

On 12th August 1897, the British Government promulgated the East African-Order-in-Council with a reception clause that applied to Kenya the substance of the English Common Law the Doctrines of Equity and Statutes of General Application in force in England as at that date and later the Kenya Judicature Act 1967.

¹⁵⁴ Constitution of Kenya 2010, art 19(2).

¹⁵⁵ Constitution of Kenya 2010, ch 4.

¹⁵⁶ Chongwe, R.M. (1989). Limitations on the principles of natural justice: An African perspective Commonwealth Law Bulletin, 15(2), 620-626 doi:10.1080/0305071819899986028.

¹⁵⁷ Tom, O. & Aloo, L.O. (2006, November). Researching Kenyan Law Retrieved July 21, 2016, from <http://www.nyulawglobal.org/globalex/Kenya.html>

There are other examples of nations using the test of common law to establish if a decision process is just. For example in the Australian context, Gleeson (2000) has noted that, “the coexistence of the role of parliaments in making law, and the role of the courts in developing the common law”.¹⁵⁸ This can be likened to the situation in Kenya where parliament creates law and the courts also develop the law through the court decision that they make. After Kenya joined the Commonwealth in 1963,¹⁵⁹ it continues to observe common law up to today. The Revised Judicature Act of 2015, promulgated under the Constitution provides recognition of common law and sets out a qualification as to the degree to which it is applicable in the Kenyan courts. In particular, according to the Revised Judicature Act 2015:¹⁶⁰

The substance of common law in the Kenyan context is acknowledged provided that the said the common law, doctrines of equity and statutes of general application shall apply so far only to the circumstances of Kenya and its inhabitant's permit and subject to such qualifications as those circumstances may render necessary.

It is because of this that this thesis uses common law requirements for public decisions makers as a lens for the analysis of the standards of public participation being upheld in the court systems in Kenya. Yandle (1991) states that the decisions made by common law judges are based on a “rational construal which is grounded on earlier precedent when making judgments.”¹⁶¹ Webb (2010) notes that a precedent is a result of law reporting which developed between the 12th and 17th century in England.¹⁶² This precedent-setting process ensured that previous rulings were captured and could be referred to.

¹⁵⁸ Gleeson, M. (2000). *The Rule of Law and the Constitution* (Boyer Lectures 2000). ABC Books.

¹⁵⁹ Kenya. Retrieved October 18, 2017, from <http://thecommonwealth.org/our-member-countries/kenya>

¹⁶⁰ Revised Judicature Act 2015, s 3.

¹⁶¹ Yandle, B. (1991). *Organic Constitutions and Common Law Constitutional Political Economy*, Volume 2 Issue 2, pp225-241.

¹⁶² Webb, D., Sanders, K. & Scott, P. (2010). *The New Zealand Legal System: Structures and Processes* LexisNexis NZ, Wellington.

The historical connection with the Commonwealth appears in the work of the Committee of Experts that delivered the 2010 Constitution document, a committee that was made up of three members from other Commonwealth jurisdictions: Uganda, South Africa, and Zambia and the rest of the membership of the committee of experts consisting of Kenyans.¹⁶³

Common law can be differentiated from statutory law the source of law created by parliament. In contrast to common law, which as noted above is determined by precedents established in the courts, statutory law is created by Parliament. In coming to a decision within the common law, R. Dworkin (1977) argues that “judges come to a decision on cases by principle by seeking to affect the rights of individuals as opposed to policy in a sense to giving effect to some social policy.”¹⁶⁴ Hence, according to the “law should not be treated as an autonomous, self-contained discipline, but should be set clearly and consistently in its social and economic context.”¹⁶⁵

Whether a society has a legal system depends on the presence of certain structures of governance, not on the extent to which it satisfies ideals of justice, democracy, or the rule of law. What laws are in force in that system depends on what social standards its officials recognise as authoritative; for example, legislative enactments, judicial decisions, or social customs. The fact that policy would be just, wise, efficient, or prudent is never sufficient reason for thinking that it is the law, and the fact that it is unjust, unwise, inefficient or imprudent is never sufficient reason for doubting it.¹⁶⁶

¹⁶³ Final Report OF the Committee Of Experts on Constitutional Review (2010, 11 October). Retrieved July 22, 2016, from https://katibaculturalrightsfileswordpresscom/2016/04/coe_final_report-2pdf

¹⁶⁴ Dworkin, R. (1977). *Taking rights seriously*. Harvard University Press.

¹⁶⁵ *Speaker of the Senate & another v Attorney-General & 4 others* [2013] eKLR 160-161

¹⁶⁶ Green, L. (2003). *Legal Positivism* Retrieved June 24, 2016, from <http://platostanfordedu/entries/legal-positivism/>

It is these infra structures of governance, statutes, and court decisions that are examined in this chapter in relation to public participation.¹⁶⁷

This interrogation is what I examine in Chapter 4 of this thesis. The Supreme Court of Kenya elaborates as to what the role of the courts are in this new order under the 2010 Constitution and states that the courts have a vital role to play in this transitional period:¹⁶⁸

The Constitution of 2010 was a bold attempt to restructure the Kenyan State. ...The success of this initiative to fundamentally restructure and reorder the Kenyan State is not guaranteed. ...This is why the Supreme Court Act imposes a transitional burden and duty on the Supreme Court. Indeed, constitutional relapses occur in moments of social transition, when an individual or institutional vigilance slackens. The Supreme Court has a restorative role, in this respect, assisting the transition process through interpretive vigilance. The Courts must patrol Kenya's constitutional boundaries with vigour, and affirm new institutions, as they exercise their constitutional mandates, being conscious that their very infancy exposes them not only to the vagaries and fragilities inherent in all transitions but also to the proclivities of the old order.

This observation regarding the envisioned role of the courts in a Constitutional transitional period is a key anchor of this chapter that examines court cases studies that show the direction that the courts are taking in the interpretation of the Constitutional aspirations. Natural justice is the bedrock of law in all common law jurisdictions and is recognised as key to creating space for the courts to function, and it certainly applies in the Kenyan context. The principle of Natural Justice is then reflected in the individual elements of public decision making in the context of common law. These elements are applied in this research to evaluate the extent to which public participation is implemented.

¹⁶⁷ Nyabira, B. (2016). Kenya's Emerging Judicial Interpretation of Public Participation Under the Devolved System of Government. *Animating Devolution in Kenya; The Role of The Judiciary*. Conrad Bosire and Wanjiru Gikonyo. 1st ed. International Development Law Organization (IDLO), Judiciary Training Institute (JTI)&Katiba Institute, 2015. 266-291. Web. 26 Dec.

¹⁶⁸ *Speaker of the Senate & another v Attorney-General & 4 others* [2013] eKLR 160-161.

Natural Justice is a fundamental principle at common law. Natural justice contributes to our understanding of the evaluative criteria of public participation because as a concept it underscores the value of fairness which was a key value driving public aspirations for constitutional change and the reform of governance of Kenya. According to MacDonald (1987) Natural justice is guided by two rules; *Audi alteram partem* (listen to the other side and *Nemo Judex in causa sua debet esse* (let no man be a judge in his own cause).¹⁶⁹The principles of Natural Justice are understood and applied contextually they are flexible and malleable in application. It is these characteristics that facilitate the application of the Natural Justice principles to the concept of Fordham (2012) captures the contextual and flexible nature of these principles and he notes on page 1007:¹⁷⁰

Natural justice has always been an entirely *contextual* principle (emphasis added). There are no rigid or universal rules as to what is needed in order to be procedurally fair. The content of the duty depends on the particular function and circumstances of the individual case.

In understanding natural justice as an evaluative criterion, it is also important to note that over the years natural justice has expanded its scope depending on the jurisdiction and the custom. For example it is possible to see the way that the concept has been interpreted in a variety of ways in Kenya. First, as a narrow concept of adjudicative natural justice, in the various court decisions that have been produced by the courts where the fundamental matter of procedural fairness is considered when these court decisions are being made. Secondly, natural justice informs common law consultation: for example in administrative adjudication entailing public participation processes. The administration not only must achieve procedural fairness but give notice and full disclosure. Finally we can see a more expansive or enabling version of natural

¹⁶⁹ MacDonald, R A. 1987 “Judicial Review and Procedural Fairness in Administrative Law: I.” McGill Law Journal , lawjournal.mcgill.ca/userfiles/other/1517455-macdonald.pdf.

¹⁷⁰ Fordham, Michael. Judicial Review Handbook. 4th ed., Hart Pub., 2012.

justice as common law ‘plus’ consultation in the context of the 2010 Constitution of Kenya where the expectation is that the administration facilitates and encourages public participation. By taking an active role the administration is not just setting the conditions for consultations but is expected under the Constitution to ensure that it occurs in a meaningful and genuine way.

Of the maxim *Audi alteram partem* (listen to the other side), Hart (1961) notes that the right to a fair trial is a requirement of justice, and in England and America, is often referred to as the principle of natural justice.¹⁷¹ The requirements of natural justice are that it is “flexible”,¹⁷² “adaptable”,¹⁷³ and “context specific”¹⁷⁴ as cited by Joseph (2014).¹⁷⁵ Chongwe (1989) contends that “the broadest interpretation and application of the principles of natural justice should be promoted by all jurists, including African jurists.”¹⁷⁶ Moreover, the 2010 Constitution notes that “the court while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities”.¹⁷⁷

The Constitution has set a standard of consultation that appears to require an active form of consultation in the decision-making processes and in line with common law. However, as noted earlier the expectation is that the administration is required to facilitate and encourage public participation thus taking it a notch higher than the common law duty to consult. Because common law requirements for public decision makers are applied to a Kenyan context, in this chapter I identify how public participation has been expressed by the courts and identify emerging county public participation models.

¹⁷¹ Hart, H.L. (1961). *The concept of law*. Oxford: Clarendon Press, p156.

¹⁷² *Webster v Auckland Harbour Board* - [1987] 2 NZLR 129 (CA) at [132],

¹⁷³ *Bradley v Attorney-General* - [1988] 2 NZLR 454 (HC) at [478],

¹⁷⁴ *Carroll v Auckland Coroner’s Court* - [2013] NZAR 650 at [35],

¹⁷⁵ Joseph, P.A. (2014). *Constitutional and administrative law in New Zealand* (4th ed). Wellington: Brookers.

¹⁷⁶ Chongwe, R.M. (1989). *Limitations on the principles of natural justice: An African perspective* Commonwealth Law Bulletin, 15(2), 620-626 doi:101080/0305071819899986028.

¹⁷⁷ Constitution, K. (2010). Article 22 3(d). Government Printer Nairobi, Kenya.

Although in many countries there is a separation of the power of the legislative and executive functions¹⁷⁸ The term *separation of powers* does not Appear in the Kenyan Constitution Barak explains why this is so:¹⁷⁹

The Constitution may not contain an explicit provision recognising the principle of separation of powers. Nevertheless, the principle of separation of powers is a Constitutional principle. Such recognition is required by the purposive interpretation of the Constitution. This principle may not be written in the lines of the Constitution, but it is written between the lines. It derives implicitly from the language of the Constitution. It is a natural outgrowth of the structure of the Constitution – which distinguishes between the three branches of government and discusses each of them in a separate chapter and from the entirety of their provisions.

Barak (2004) has been quoted at length above because this specifies the role of the courts in relation to the state in general and in particular to the parliament as the central organ of the Kenyan state:¹⁸⁰

When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty... Again, there is no liberty if the power of judging is not separated from the legislative and executive. If it were joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be the legislator. If it were joined to the executive power, the judge might behave with violence and oppression. There would be an end to everything, if the same man, or the same body, whether of the nobles of the people, were to exercise those three powers, that of enacting laws, that of executing public affairs, and that of trying crimes or individuals.

¹⁷⁸ Vile, M.J.C. (1967) *Constitutionalism and the Separation of Powers*. Clarendon Press, Oxford, p130.

¹⁷⁹ Barak, A. (2004). *The Judge in a Democracy*. Princeton University Press, Princeton, p76; citing John Alder, *Constitutional and Administrative Law* (4th edn), Palgrave Law Macmillan, 2002, pp44-45.

¹⁸⁰ Montesquieu, C. (1748). *De l'esprit des Lois/The Spirit of Laws*. Retrieved 20 January, 2018, from <http://etextlibvirginiaedu/toc/modeng/public/MonLawshtml>

The Constitution is the base of judicial authority on which the courts are based on and as result all court decisions must be rooted in the Constitution.¹⁸¹ The Constitution recognises that the judiciary is a state organ and in Article 1(3) it clearly states:¹⁸²

[T]hat sovereign power under this Constitution is delegated to the following state organs, which shall perform their functions in accordance with the Constitution:

- (a) Parliament and the legislative assemblies in the county governments;
- (b) the national executive and the executive structures in the county governments; and
- (c) the Judiciary and independent tribunals.

It further elaborates in Article 205(c) of the Constitution “the court, tribunal or other authority may not interfere with a decision by a State organ concerning the allocation of available resources, solely on the basis that it would have reached a different conclusion.”¹⁸³

Chapter 10 of the Constitution of Kenya expounds on the functions and the structure of the courts.¹⁸⁴ All courts, other than the Supreme Court, are bound by the decisions of the Supreme Court. Article 59 clarifies that judicial authority is derived from the people, rests in and shall be exercised by the courts.¹⁸⁵ In this section of the thesis, the systems of the courts in Kenya are considered. Article 2(1) states “This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government.”¹⁸⁶ Further, Article 2(2) clarifies “No person may claim or exercise State authority except as authorised under this Constitution”.¹⁸⁷ Articles 2(3) and (4) also state the supremacy of the Constitution, with

¹⁸¹ Masterman, R. (2010). *The Separation of Powers in the Contemporary Constitution; Judicial Competence and Independence in the UK*. CUP, Cambridge, p26.

¹⁸² Constitution of Kenya 2010, art 1(3).

¹⁸³ Constitution of Kenya 2010, art 205(c).

¹⁸⁴ Constitution of Kenya 2010, ch 10.

¹⁸⁵ Constitution of Kenya 2010, art 159.

¹⁸⁶ Constitution of Kenya 2010, art 2(1).

¹⁸⁷ Constitution of Kenya 2010, art 2(2).

Article 2(3) stressing that “The validity or legality of this Constitution is not subject to challenge by or before any court or another State organ.”¹⁸⁸ Article 2(4) states “Any law, including a customary law that is inconsistent with this Constitution, is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.”¹⁸⁹

As Joireman notes, the tradition of English common law has influenced Kenya since independence in 1963, when:¹⁹⁰

(t)here was a sentiment of inclusiveness that the common law would no longer be restricted in its application to the privileged classes and that the citizens were all now Kenyans and not Muslims, Christians or animists each with their own set of laws.

However, as Joireman goes on to argue, in reality after 1963 it quickly became apparent that the limited development of case law was a weakness that could be “exploited by a government uncomfortable with dissent and interested in developing its ability to control both the society at large and potential sources of opposition”.¹⁹¹ In this light, there is a need to carefully scrutinise how common law is developing in relation to public participation under the 2010 Constitution.

2.2.5 Understanding and applying a Framework of Common Law Standards for Public Decision Makers in Kenya

When considering the role of public decision makers in the context of this research, decision makers will include members of the national, county legislature, and public officials. It is crucial to consider the framework within which these officials make public decisions. Kenya, as explained earlier, is a country that adopted the common law as a system of law. Certain

¹⁸⁸ Constitution of Kenya 2010, art 2(3).

¹⁸⁹ Constitution of Kenya 2010, art 2(4).

¹⁹⁰ Joireman, S. (2006). The Evolution of Common Law: Legal Development in Kenya and India. The journal of commonwealth and comparative politics Vol 44 No 2, p. 190-210.

¹⁹¹ Joireman, S. (2006). The Evolution of Common Law: Legal Development in Kenya and India. The journal of commonwealth and comparative politics Vol 44 No 2, p. 190-210.

considerations ought to be observed at common law, by public decision makers while making a public decision. These are based on the principles of natural justice as expounded by Montesquieu, the principle against bias and the principle of the right to a fair hearing.¹⁹² It is from these principles that the common law standard for public decision makers framework are derived from.¹⁹³ According to Wabwile:¹⁹⁴

The unwritten law of England which has been imported into Kenya consists of: (i) the common law; (ii) the doctrines of equity; (iii) the law merchant (*lex mercatoria*); and (iv) the practice and procedure of English courts.

Furthermore, Wabilwe emphasises that the “The fundamental feature of the unwritten law of England is the importance accorded to the decisions of judges of superior courts of record as sources of law.”¹⁹⁵ This is key in the constitutional transitional period as the courts make decisions that have direct bearing on the development of public participation law and practice in Kenya.

Understanding the extent to which Kenyan decisions on public participation reflect the accepted common law standards of proper administration and public decision-making is one of the questions that motivates this research. In chapter four and five, the discussion will use the framework to determine the extent of public participation as present in the judgments of the identified case studies and in the county public participation acts.

In this section, the extent to which individual case studies of public participation are in line with the public decision-making framework is explored, including implemented factors

¹⁹² Montesquieu, C. (1748). *De l'esprit des Loix/The Spirit of Laws* Retrieved 12 June, 2017, from <http://etextlibvirginiaedu/toc/modeng/public/MonLawshhtml>

¹⁹³ Joseph, P.A. (2014). *Constitutional and administrative law in New Zealand* (4th ed). Wellington: Brookers.

¹⁹⁴ Michael Nyongesa Wabwile (2003). *The Place of English Law in Kenya*, Oxford University Commonwealth Law Journal, 3:1, 51-80, DOI: 10.1080/14729342.2003.11421422.

¹⁹⁵ Michael Nyongesa Wabwile (2003). *The Place of English Law in Kenya*, Oxford University Commonwealth Law Journal, 3:1, 51-80, DOI: 10.1080/14729342.2003.11421422

and principles which have been derived from common law. In the recent past, some decisions have been rendered by the courts that directly address the issue of public participation. This next section examines these judgments. Do they consider, as Joseph argues, “genuine evaluation of the criteria hedging decision-making using open and transparent reasoning”?¹⁹⁶

Bignami (2014), like Joseph, emphasises the importance of legal judgments in the interpretation of participation. Bignami, however, uses procedural rights, participation rights, and process rights interchangeably. These terms are taken to mean “a legal right or emerging institutional practice that enables individuals to influence a specific administrative determination before a final decision is taken.”¹⁹⁷ Bignami adds, “Notification of proposed action and the basis for such action; the right to object to the contemplated action; and administrative consideration of the individual's objections, generally evidenced in a written decision.”¹⁹⁸

The following section examines the framework of common law standards for public decision makers. The principle of prior notice states that notice of opportunities to participate in decision-making should, “provide sufficient particulars of the subject matter of the hearing including time date and the time of the hearing”, notice of potential outcomes, notice of change of policy.”¹⁹⁹ This principle exists to ensure a level of fairness in the decision-making process so that the stakeholders to a particular process receive notice.

¹⁹⁶ Joseph, P.A. (2014). *Constitutional and administrative law in New Zealand* (4th ed). Wellington: Brookers.

¹⁹⁷ Bignami, F. (2004). Three Generations of Participation Rights before the European Commission Law and Contemporary Problems, 68(1), 61-83 Retrieved July 1, 2016, from <http://www.jstor.org/proxy/canterbury.ac.nz/stable/pdf/27592077.pdf>

¹⁹⁸ Bignami, F. (2004). Three Generations of Participation Rights before the European Commission Law and Contemporary Problems, 68(1), 61-83 Retrieved July 1, 2016, from <http://www.jstor.org/proxy/canterbury.ac.nz/stable/pdf/27592077.pdf>

¹⁹⁹ Joseph, P.A. (2014). *Constitutional and administrative law in New Zealand* (4th ed). Wellington: Brookers.

Disclosure of relevant material is a duty that primarily belongs to the decision maker. Under this principle, fair public decision making requires an environment where as much full information is available as possible to the parties concerned.²⁰⁰ Weeks (2000) contends that:²⁰¹

Information is a necessary, but not sufficient condition for public judgment. Judgment requires deliberation. to deliberate is to act on information it is an application of creative intelligence and normative evaluation that leads ultimately to the formation of personal judgment.

As information is disclosed, then the next step is the expectation that this information is deliberated on by the public, thus ensuring that the information is utilised to inform better public decision making. The key to all public participation is information for the citizens to deliberate so that they may contribute to the decision making process.

Warnings as to adverse credibility findings lie with the decision maker and are considered a requirement in public decision making. Furthermore, according to Weeks (2000), “A public decision maker cannot withhold information that warns the parties involved of the potential of adverse credibility findings so that they may understand the context in which they might receive the decision and how it might affect them”.²⁰² This expectation from the public participation process allows for the public to contribute and deliberate with full facts especially those facts that may have a direct and adverse effect on them, ensuring that these decisions will be accepted by the communities affected if they have full information.

Joseph (2014) contends that “in issues of credibility and veracity always necessitate an oral hearing as well as written submissions are wholly unsatisfactory basis for decisions”.²⁰³ An oral hearing therefore allows the decision maker to observe the demeanour of the parties

²⁰⁰ Ibid.

²⁰¹ Weeks, E.C. (2000). The Practice of Deliberative Democracy: Results from Four Large-Scale Trials. *Public Administration Review*, 60(4), 360-372. doi:10.1111/0033-3352.00098

²⁰² Weeks, E.C. (2000). The Practice of Deliberative Democracy: Results from Four Large-Scale Trials. *Public Administration Review*, 60(4), 360-372. doi:10.1111/0033-3352.00098

²⁰³ Joseph, P.A. (2014). *Constitutional and administrative law in New Zealand* (4th ed). Wellington: Brookers.

involved. In *Osborn v Parole Board*, the United Kingdom Supreme Court came to a conclusion that “administrative savings and seeking efficiencies were not sufficient reasons to deny any party a chance to submit orally as oral hearing ensured an individual their dignity”.²⁰⁴ *Osborn v The Parole Board* is an illustration of case law, regarding the issue of participation and oral hearings as earlier indicated it examines the “circumstances in which the parole board is required to hold an oral hearing” one of the appeals concerns Osborn, a determinate sentence prisoner who was released on licence but then recalled to custody.”²⁰⁵ In another appeal that deals with Boothe and Reilly and concerns indeterminate sentence prisoners who have served minimum terms, it was found that:²⁰⁶

the board should hold an oral hearing before determining an application for release or for a transfer to open conditions to comply with common law standards of procedural fairness. Whenever fairness to the prisoner requires such a hearing in the light of the facts of the case and the importance of what is at stake.

The Court has continued to state that it was impossible to define exhaustively the circumstances in which an oral hearing will be necessary.²⁰⁷

While the substance of the case of *Osborn Vs The Parole Board*, is concerned with a narrow issue of oral hearing opportunities for prisoners, there is a wider implication in the underlying reasoning of the case which is relevant to this thesis, that is the importance of oral hearings in decision making *per se*. If one goes beyond the actual factual setting of *Osborn Vs The Parole Board*, to embrace the psychology behind oral hearings which is key in the promotion of individual dignity and engagement with the decision making process which *Osborn Vs The Parole Board* emphasises. I believe that this wider significance can be extrapolated and applied

²⁰⁴ R (Osborn) v Parole Board; & 2 other cases [2013] UKSC 61.

²⁰⁵ R (Osborn) v Parole Board; & 2 other cases [2013] UKSC 61.

²⁰⁶ R (Osborn) v Parole Board; & 2 other cases [2013] UKSC 61.

²⁰⁷ R (Osborn) v Parole Board; & 2 other cases [2013] UKSC 61

to enhance our understanding of broader public participation rights –the case reminds us that oral hearings matter.

Furthermore, in the public participation context in Kenya, oral submissions are especially important because Kenya has a strong oral culture that is highly reliant on a tradition of oral communication. According to Tidmarsh (2016) “Orality makes sense-and indeed is even necessary-in a world in which literacy levels are low and the written word is difficult and expensive to produce.”²⁰⁸ Therefore, this opportunity to express oneself orally in the context of public participation reinforces the dignity of the individuals as they participate in the governance process and as stated in Articles 19(2) & 28 of the Constitution of Kenya 2010. It is therefore in line the common law demands for oral hearings which includes factoring in the dignity of the individual.

Legal representation is not compulsory for the parties to the Kenyan court system however if the parties believe that they would require legal representation it is well within their rights to have legal representation. This is an important principle that bridges the legal issue of fair direct participation in legal decision making, and effective representation for citizens. In a typical public participation process, they would be no need for legal representation; however, when a matter needs the interpretation of the courts or is brought to the courts then the availability of legal representation will go a long way in providing counsel to the individual or the community that requires it. Cross-examination of the decision makers by the public during oral submissions is at times undertaken. The decision maker must also listen to the case of all the concerned parties. A decision cannot be based on the submission of one of the parties to

²⁰⁸ Tidmarsh, Jay, "The Future of Oral Arguments" (2016). Journal Articles. 1279. http://scholarship.law.nd.edu/law_faculty_scholarship/1279

the case thus ensuring natural justice is served. Decisions must furthermore be based on evidence.

According to Joseph (2014), the duty of public consultation of the stakeholders is vital in a participatory democracy. This is to encourage decision-making validity and general assent²⁰⁹ about a particular decision, key in ensuring that the stakeholders contribute to the public decisions. However, it must be noted that a duty to consult does not mean an obligation to agree. Draft decisions should be available to the relevant stakeholders so that they have full information as to what the final decisions will entail. When the decisions are made there is an expectation that the reasons as to why a decision was made in a particular way must be communicated to all the stake holders. Finally, for a notice of decisions to be in effect, it must be communicated. The parties concerned should have the decision at a reasonable time, and any decisions that are not communicated are not in force.

2.3 Research Methods

The preceding sections outlined core concepts which inform this thesis and the way the test of common law will be applied. The remaining sections of this chapter describe the wider methods and procedures that are also used in this study. The research design and research methodology selected for the study is discussed, as are the reasons for selecting these approaches. To examine the opportunities for public participation in the period of constitutional implementation (2010–2016), I used a number of methods, including: a detailed examination of legal documents (such as, acts of parliament, county legislation, and court judgments) that are related to public participation in the review of wider literature about public participation under the 2010 Constitution and key informant interviews.

²⁰⁹ Joseph, P.A. (2014). *Constitutional and administrative law in New Zealand* (4th ed). Wellington: Brookers.

2.3.1 *Why a Case Study Approach?*

A case study approach has been undertaken for the reason that it allows for the study of a phenomena within a a bounded time and place. Geering explains:²¹⁰

that a case connotes a spatially delimited phenomenon (a unit) observed at a single point in time or over some period of time. It comprises the sort of phenomena that an inference attempts to explain.

A case study approach has further been utilised because public participation in a constitutional transitional period in Kenya is a unique instance as this period comes to an end and the implementation of the 2010 Constitution of Kenya presents a unique opportunity to examine an ongoing process. To do this, the study examines court judgments to evaluate the extent to which public participation is being effected.

There have been some studies of the effectiveness of public participation provisions under new Constitutions being formulated in Africa.²¹¹ Nyathi for instance examines the effectiveness of Merafong Municipality in Gauteng province in ensuring public participation is implemented by examining *Matatiele Municipality and Others v President of the Republic of South Africa and Others*.²¹² Mubangizi and Dassah (2014) also use the case study approach of analysing public participation by examining the role of court intervention in public participation matters in South Africa.²¹³ Equally, Fuo (2015) uses this approach and discusses court judgments in the context of public participation and decentralised governments in Africa, which include South Africa, Kenya, Zimbabwe, and Tunisia. Having noted this, I decided to

²¹⁰ Gerring, J. (2013). The Case Study: What it is and What It Does. In Robert E. Goodin(ed) The Oxford Handbook of Political Science. DOI: 10.1093/oxfordhb/9780199604456.013.0051

²¹¹ Nyathi, L. (2010) Public participation: What has the Constitutional Court given the public? *Law, Democracy and Development*, 12(2): 102-110.

²¹² *Matatiele Municipality and Others v President of the Republic of South Africa and Others (2) (CCT73/05A) [2006] ZACC 12; 2007 (1) BCLR 47 (CC) (18 August 2006).*

²¹³ Mubangizi, B.C., & Dassah, M.O. (2014). Public Participation in South Africa: Is Intervention by the Courts the Answer? *Journal of Social Science*, 39(3), 275-284. Retrieved October 28, 2016, from [http://www.krepublishers.com/02-Journals/JSS/JSS-39-0-000-14-Web/JSS-39-3-14-Abst-PDF/JSS-39-3-275-14-1620-Mubangizi-B-C/JSS-39-3-275-14-1620-Mubangizi-B-C-Tx \[4\].pdf](http://www.krepublishers.com/02-Journals/JSS/JSS-39-0-000-14-Web/JSS-39-3-14-Abst-PDF/JSS-39-3-275-14-1620-Mubangizi-B-C/JSS-39-3-275-14-1620-Mubangizi-B-C-Tx [4].pdf)

use court judgments as multiple case studies to examine the implementation of public participation in the constitutional transitional period 2010-2016 in Kenya.

These researchers have approached each court case as an individual case study. A *case study* is defined by Feagin et al. (1991) as an “in-depth multifaceted investigation using qualitative research methodologies of a single social phenomena”.²¹⁴ According to Baxter and Jack (2008), “rigorous qualitative case studies afford researchers opportunities to explore or describe a phenomenon in context using a variety of data sources”.²¹⁵ As argued by Yin (2003):²¹⁶

a case study design should be contemplated when: firstly you cannot manipulate the behaviour of those involved in the study; secondly the focus of the study is to answer ‘how’ and ‘why’ questions; thirdly you want to cover contextual conditions because you believe they are relevant to the phenomenon under study; or finally the boundaries are not clear between the phenomenon and context.

Yin’s arguments are relevant here because this thesis seeks to understand *how* public participation has been implemented in the constitutional transition period, *why* and *with what effect*. Miles and Huberman (1994) add that a case is, “a phenomenon of some sort occurring in a bounded context; the case is, in effect, your unit of analysis.”²¹⁷ In this thesis, the bounded context is the transitional period for the Constitution 2010–2016, the national acts of parliament, county legislation, court judgments, and interviews with members of civil society act as a unit of analysis. Thomas (2011) stated that “one of the important things about a case study is the creation of a three-dimensional picture because of looking at our subject from

²¹⁴ Feagin, J.R., Orum, A.M. & Sjoberg, G. (1991). *A Case for the case study* Chapel Hill: University of North Carolina Press.

²¹⁵ Baxter, P. & Jack, S. (2008). *Qualitative Case Study Methodology: Study Design and Implementation for Novice Researchers* The Qualitative Report, 13(4), 544-559 Retrieved from <http://nsuworksnovaedu/tqr/vol13/iss4/2> accessed on 17/06/2016

²¹⁶ Yin, R.K. (2003). *Case study research: Design and methods* (3rd ed.) Thousand Oaks, CA: Sage

²¹⁷ Miles, M.B. & Huberman, A.M. (1994). *Qualitative data analysis: An expanded source book* (2nd ed) Thousand Oaks, CA: Sage.

several directions.”²¹⁸ In this study within the transitional period selected as the overall case study, data were collected from a variety of sources, including analysis of two sets of legal units.

The first legal unit of analysis to be explored were the “case judgments” in the form of decisions that have been reached in the various courts in Kenya, regarding matters that concern public participation whether directly or indirectly. The analysis of case judgments is used in this study to understand the direction the courts are taking in their interpretation of what elements constitute sufficient public participation. The second set of legal units to be studied are a sample of the public participation acts in the form of documents that have been developed into law in some counties in the 2010–2016 period to help us understand the models of participation that are emerging in Kenya (see Chapter 5). In addition to legal documents, this thesis study also reviews literature published by the Government of Kenya and by secondary authors about public participation in the period (see Chapter 4 and 5). These documents were selected using a literature search and media reports. The literature review and legal analysis were also supported by 17 key informant interviews with civil society in Kenya about their experiences of public participation (Chapter 8). All these elements served to provide for a multidimensional study of public participation in Kenya in the constitutional transition period.

Thomas (2011) reminds us that case studies are not methods themselves, but researchers using the case study approach use a variety of methods to enhance the rigour of their study.²¹⁹ In the discussion that follows, I discuss how my methods were intended to enhance the rigour and validity of the analysis of the data used in this case study. Eisenhardt said that “At the end

²¹⁸ Thomas, G. (2011). *How to do your case study: A guide for students and researchers*. Los Angeles, CA: SAGE.

²¹⁹ Thomas, G. (2011). A Typology for the Case Study in Social Science Following a Review of Definition, Discourse, and Structure. *Case Studies*, 511-521. doi:10.4135/9781473915480.n27

of a case study, an opportunity exists for emerging theory”²²⁰ and in the context of this thesis this is discussed in Chapter 7 of this study.

2.3.2 Document Analysis

This thesis analyses a series of documents ranging from legislation, policy and court decisions. According to Corbin and Strauss (2008) document analysis is a methodical process for assessing documents – both printed, and electronic. Document analysis requires that data be studied and interpreted to draw meaning, gain understanding, and develop empirical knowledge.²²¹ As stated by Denzin (1970), document analysis is often used in combination with other qualitative research methods as a means of triangulation to enhance the rigour of a study.²²² The variety of documents used in this study facilitates the analysis and greater understanding of the public participation environment in the constitutional transitional period.

2.3.3 Thematic Content Analysis

This thesis identified thematic content analysis as the primary methodology for textual interpretation of the documents that had been identified and collected. The legislation, the court judgments and the 17 interviews were transcribed. Using NVivo to organise the material, word frequency, word cloud, word trees to determine the frequency of words, the content was analysed, and coded and then emerging themes were identified.

2.3.4 Interview Process

17 interviews with key informants were recorded between 2 September 2015 and 8 October 2016 on an audio recorder and then transcribed by the researcher. The transcripts were then

²²⁰ Eisenhardt, K. M. (1989, October). Building Theories from Case Study Research. *Academy of Management Review* 14, 4; *ABI/INFORM Global*, 14(4), 532-550. Retrieved October 31, 2016, from <http://www.archwoodside.com/wp-content/uploads/2015/09/Eisenhardt-BUILDING-THEORIES-FROM-CASE-STUDY-RESEARCH.pdf>

²²¹ Corbin, J. & Strauss, A. (2008). *Basics of qualitative research: Techniques and procedures for developing grounded theory* (3rd ed) Thousand Oaks, CA: Sage.

²²² Denzin, N.K. (1970). *The research act*. Chicago, IL: Aldine.

sent to the participants to be reviewed and then sent back to the researcher with various comments as to the accuracy of the transcription. The interviews were then read over and coded into a qualitative data analysis software package, Nvivo, which enabled me to organise and analyse code for repeated themes from the interviews. After coding reports were generated, and analysed the collected data was used to consider the wider question of what constitutes public participation in a time of constitutional transition.

The methodology applied to identify the research participants for the interview was purposive sampling.²²³ According to Palys purposive sampling “sees sampling as a series of strategic choices about with whom, where and how one does research.”²²⁴ Furthermore, Patton states that the “(purposeful) sampling strategy must be selected to fit the purpose of the study the resources available the questions being asked and constraints being faced.”²²⁵

In the case of this thesis, I focussed on collecting data from persons who work with public participation issues in the civil society, the legal profession and academia. All these groups were purposively selected following my literature review, to provide a distinct point of view as to the state of public participation in Kenya. The group of individuals interviewed was then identified based on two sampling methodologies- purposive sampling and snowballing sampling. Individuals were sought from the identified groups to provide insights to the research initially through online media searches, and then word of mouth or snowball referral.²²⁶ The literature surveyed indicated that civil society was working in the public participation arena in the constitutional transitional period of 2010-2016.

²²³ Patton, M. Q. (1990) *Qualitative Evaluation and Research Methods*. Newbury Park: Sage Publications

²²⁴ Palys, T. (2008). Purposive sampling. In L.M. Given (Ed.) *The Sage Encyclopaedia of Qualitative Research Methods*. (Vol.2). Sage: Los Angeles, pp. 697-8.

²²⁵ Patton, M.Q. (1990) *Qualitative Evaluation and Research Methods*. Newbury Park: Sage Publications

²²⁶ Patton, M.Q. (2002) *Qualitative Evaluation and Research Methods*. 3rd edition Newbury Park: Sage Publications

Interviews with 17 key informants were conducted for this study. The question of how many interviews are required remains up in the air. However, the number of interviews was determined by a number of factors. First I had access to limited funds, and so I was only able to interview participants on Skype and undertake phone interviews as I was unable to travel back to Kenya. Second, the subject matter was specific and somewhat sensitive, requiring individuals in the public realm with a certain level of expertise in the area and persons who could speak directly to the research questions as well as comment on the adequacy of public participation opportunities in Kenya. Another limiting factor was whether the person would be willing and available to respond to interview requests. I found that interviews were often difficult and took much persistence to achieve.

The interviews were either by Skype or telephone and ranged from 45 minutes to one hour and all were audio recorded. I began the interview with summarising the information that was given to the respondent in the letter of invitation to participate. I then used the interview guide/s and started the interview process (see Appendices). At the beginning of each interview, I came back to the issue of consent and on some occasions I received verbal consents. Those who had not provided for written consents when followed up after the interview some failed to provide even a response to the transcripts sent to them for approval. All the respondents were informed in the letter of the confidential nature of the interviews and that they were free to withdraw from the interview process at any time. The impression created by some respondents was that they were ready to participate in the interview; however, they found the follow-up process cumbersome. In addition, all the respondents who requested were sent their transcripts, and I continued with my analysis based on the consents that I had received from them and deemed these sufficient.

Gerring (2007) writes that: “Case study analysis focuses on a number of cases that are expected to provide insight into a causal relationship across a larger population of cases. This presents the researcher with a formidable problem of case selection. Which case should be chosen?”²²⁷ A process is therefore needed for sampling that allows for clarity of process and result. In reflecting on my sample size of respondents I encountered S. Dworkin (2012) who argues that:²²⁸

The sample size used in qualitative research methods is often smaller than that used in quantitative research methods. This is because qualitative research methods are often concerned with garnering an in-depth understanding of a phenomenon or are focused on meaning (and heterogeneities in meaning)—which are often centred on the how and why of a particular issue, process, situation, subculture, scene or set of social interactions. In-depth interview work is not as concerned with making generalizations to a larger population of interest and does not tend to rely on hypothesis testing but rather is more inductive and emergent in its process.

In addition and referring to case studies Gerring (2007) contends that:

Case study analysis focuses on a number of cases that are expected to provide insight into a causal relationship across a larger population of cases. This presents the researcher with a formidable problem of case selection. Which case should be chosen?²²⁹

A process is therefore needed for sampling that allows for clarity of process and result.

For this study the number of cases in each source of data was specific with 17 individuals identified for the in-depth interviews and 12 court cases identified for analysis. The key informants were identified as indicated above. They were initially contacted using various means of email, Facebook, WhatsApp, telephone calls and twitter. Contact was dependent on what means of communication was effective and available from New Zealand, from where I

²²⁷ Gerring, J. (2007). *Case study research: Principles and practices*. New York: Cambridge University Press, p.

²²⁸ Dworkin, S.L. (2012). Sample Size Policy for Qualitative Studies Using In-Depth Interviews *Arch Sex Behav Archives of Sexual Behaviour*, 41(6), 1319-1320 doi:101007/s10508-012-0016-6

²²⁹ Gerring, J. (2007). *Case study research: Principles and practices*. New York: Cambridge University Press,

was conducting the research. As noted by Chong (1993), the sample that is identified does not necessarily have to be representative; however, it would suffice if it were diverse.²³⁰ The key informants that were sampled were not representative in this research but they were diverse. Moreover, they came from a variety of backgrounds, including law, academia, local NGO workers, and international NGO workers.

I realised early on in contacting prospective informants that building some form of rapport was key to engaging with the potential respondent partly because of my distance from Kenya, but partly also because I then formally had to request their participation in the interviews. After the initial contact a formal email, detailing the background of the study, an information sheet, and a consent form was sent to them, along with a suggested date and time convenient to them for the interview. The respondent was expected to read and sign the consent form before the interview. However, a number of respondents' forms failed to materialise as the interview day arrived and given the difficulty of securing interviews over time and distance in the first place, the researcher had to receive a verbal consent before the start of the interview. This was followed up with a reminder to send the consent form as confirmation of the verbal consent. See appendices for consent form.

2.5 Data Analysis

Analysis of data was my next step in the research process. Before transcribing the audio files, they were labelled as follows: name of respondent and assigned a reference number and stored on the University of Canterbury password protected computer and on an external disc that was locked in my office desk at the University. The process of transcriptions was initially

²³⁰ Chong, D. (1993). How People Think, Reason, and Feel about Rights and Liberties. *American Journal of Political Science*, 37(3), 867-899. doi:1. Retrieved from <http://www.jstor.org.ezproxy.canterbury.ac.nz/stable/2111577> doi:1 on 28/10/2016

challenging and time-consuming, but I also found it to be a rewarding process because it resulted in the identification of new areas of inquiry that I then followed up with my reading. The transcription also provided an opportunity for me to reflect on the possible emerging themes. These emerging broad themes were coded. They included the role of citizens in ensuring the effective implementation of public participation, how citizens participated in the transitional period, participation under the 2010 Constitution and the resulting legal framework at the national and county level. Coding has been presented as one of the methods in data analysis. Saldana states that:²³¹

a code is a qualitative inquiry is most often a word or a short phrase that symbolically assigns a summative, salient, essence -capturing, and/ or evocative attribute for a portion of language-based on visual data.

In the case of this thesis, the codes were initially identified as the transcription was underway. However, this was revisited at the end of transcribing, and new codes created, or merged and revised with manual coding. After determining the codes, the data were grouped according to their similarities. Emerging themes were identified and compared to other data and legal cases to triangulate the research findings.

2.6 Ethical Concerns

I made application to the University of Canterbury Human Ethics Committee for approval for the research. After addressing concerns raised about the language to be used during the interviews, anonymity of respondents, the approval of transcripts, and the security of the interviewees, approval was granted.²³² The language used was English because it is one of the official languages of Kenya. All informants were given the option to choose to be anonymous

²³¹ Saldaña, J. (2011). *Fundamentals of qualitative research*. New York: Oxford University Press.

²³² See Appendix A: Human Ethics Committee Approval

and some of them clearly stated they did not mind either way and others were non-committal. However, for the purpose of uniformity I have chosen to maintain the anonymity of all the respondents.

At the beginning of each interview, I came back to the issue of consent and was able to receive verbal consents from those who had not provided written consents. When followed up after the interviews some failed to provide a response to the transcript that was sent to them for approval. All respondents had been informed in the by letter of the confidential nature of the interviews, however some did not respond in the follow up process. I continued my analysis based on the initial consents I had received from the respondents and deemed these to be sufficient.

2.7 Reliability

The general reliability of this study was undertaken by ensuring that interviews were audio recorded and transcribed.²³³ The question of the reliability of this research considering that it is being undertaken at a constitutional transition period could rightly be interrogated. Joppe (2000) defines reliability as:²³⁴

The extent to which results are consistent over time and an accurate representation of the total population under study is referred to as reliability, and if the results of a study can be reproduced under a similar methodology, then the research instrument is considered to be reliable.

For this research, the results possibly will not be consistent over time because the Constitution transitional period does eventually come to an end. However, if this same study were undertaken in the future using the data that is available to the researcher, then it is most likely

²³³ John W. Creswell, *Qualitative Inquiry and research design*

²³⁴ Joppe (2000), p. 1, as cited in Golafshani, N. (2003). *Understanding Reliability and Validity in Qualitative Research*. *The Qualitative Report*, 8(4), 597-606.
Retrieved from <http://nsuworks.nova.edu/tqr/vol8/iss4/6>

they would achieve the same results. On the other hand, the results could be consistent if the current environment does not evolve.

2.8.1 External Validity

When we assess the external validity of a research study we are in effect asking can this study be generalised, in this case can the results reported in this study be used to understand public participation experiences more widely in the Kenyan context? First, as Thomas notes, external validity is not easy to establish in qualitative research especially because, “ case studies cannot be easily generalised to other contexts.”²³⁵ In addition, Patton (1990) states that:²³⁶

An effort to understand situations in their uniqueness as part of a particular context and the interactions there. This understanding is an end in itself, so that it is not attempting to predict what may happen in the future necessarily, but to understand the nature of that setting – what it means for participants to be in that setting, what their lives are like, what’s going on for them, what their meanings are, what the world looks like in that particular setting ... The analysis strives for depth and understanding.

Gerring (2007) observes that “Case study research suffers problems of representativeness because it includes, by definition, only a small number of cases of some more general phenomena.”²³⁷

This study takes place in the first six years of the implementation of the Constitution in the constitutional transition period that will not occur again in the life of this Constitution and this itself makes it a singular process that is worthy of study because it captures an important moment in the history of Kenya. This study also provides a baseline for understanding changes to future legislation and public participation. Although it is not possible to generalise about the

²³⁵ Patton, M.Q. (2002). *Qualitative Evaluation and Research Methods*. 3rd edition Newbury Park: Sage Publications

²³⁶ Patton, M.Q. (1990). *Qualitative Evaluation and Research Methods*. Newbury Park: Sage Publications.

²³⁷ Gerring, J. (2007). Pg. 43 *Case study research: Principles and practices*. New York: Cambridge University Press.

state and extent of public participation beyond this phase, the study can shed light on the situation that occurred in the period and can indicate potential trends into the future.

2.8.2 Internal Validity

Internal validity looks at the relationship between cause and effect. The extent to which internal validity is important for this thesis is complicated by the fact that this case study is within a bounded period that is unique in various ways. This constitutional transition period 2010-2016 period will be a unique period in the history of the Constitution 2010 therefore replicating the exact study can happen in the future however the results will reflect those distinctive circumstances of the future. The internal validity of this thesis is key in ensuring that a causal relationship can be inferred in the future. Furthermore, Gerring states “case studies if well-constructed may allow one to peer into the box of causality to locate the immediate factors lying between some structural cause and its purported effect.”²³⁸ For this study this will be addressed by the triangulation of the various data and the presentation of auditable data in the form of documents, transcribed interviews and legislation that can easily lead to the replication of this study.

2.8.3 Triangulation

Triangulation has been defined by Cohen and Manion (1986) as the “attempt to map out, or explain more fully, the richness and complexity of human behaviour by studying it from more than one standpoint.”²³⁹ Triangulation is used in this research at two levels, first at a methodological level where the study used a variety of methods of data collection (interviews, document analysis, case-law) and second, the study triangulated data that it collected from the secondary documentation, legislation and court cases, and in-depth interviews. By using these

²³⁸ Gerring, J. (2013). The Case Study: What it is and What It Does. In Robert E. Goodin (ed) The Oxford Handbook of Political Science Sep 2013 DOI: 10.1093/oxfordhb/9780199604456.013.0051

²³⁹ Cohen, L., Manion, L., & Morrison, K. (1986). Research Methods in Education. London: Routledge.

various diverse methods and sources a greater understanding of public participation in the transitional period of 2010-2016 is gained. Denzin argues that triangulation in qualitative data analysis, “focuses in the agreement in the results obtained from the diverse, systematic and dissimilar uses of methods, theories, different data sources or investigators.”²⁴⁰ On the other hand, Johnson and Onwuegbuzie (2012) state that “triangulation is the seeking convergence and corroboration of results from different methods and designs studying the same phenomenon.”²⁴¹

2.9 Summary

This chapter outlined the conceptual framework and research methods of this thesis drawing on a conceptual framework from political science and public law. The chapter expanded on research methods that include a case study approach, document analysis, thematic content analysis and interview procedures. Further methods were discussed including sampling, access to respondents, ethical concerns, data analysis, reliability, external validity triangulation and internal validity of data. Discussion now turns to present the first findings of the wider study, which results from an analysis of the overall legal framework guiding public participation in Kenya in the context of the Constitution of Kenya 2010.

²⁴⁰ Denzin, N. K. (1989). *The research act. A theoretical introduction to sociological methods* (3rd ed.). Englewood Cliffs, NJ: Prentice Hall.

²⁴¹ R. Burke Johnson and Anthony J. Onwuegbuzie (2004). *Mixed Methods Research: A Research Paradigm Whose Time Has Come*, *Educational Researcher*, Vol. 33, No. 7, pp. 14-26.

Chapter 3 – The Legislative Framework for Public Participation in Kenya

3.1 Introduction

One of the key aims of this thesis is to examine the evolving legislative and policy framework for public participation under the 2010 Constitution in the transition period 2010–2016. As noted in Chapter 2, the methods that are used for this examination include document analysis (including legislation, policy documents and case law) and interviews with key informants. In this chapter, I analyse the emerging legislative framework, guiding public participation in Kenyan law. These include: the Constitution itself and ten significant national laws to public participation which have been passed in the transition period. The chapter also analyses the Public Participation Bill 2016 because of its potential importance as an Act in the public participation legislative infrastructure. Discussion also identifies and examines a significant policy documents and county guidelines for public participation. The chapter concludes with an examination of the role of the Public Service Commission in providing guidance and advice on public participation methods and practice in Kenya for those implementing the new legislation.

3.2 The Kenyan Constitution

The Constitution making process in Kenya was seen as a participatory process that influenced the content of the Constitution. Steeves states that:²⁴²

²⁴² Steeves, J. (2015). Devolution in Kenya: Derailed or on track? *Commonwealth & Comparative Politics*, 53:4, 457-474, DOI: 10.1080/14662043.2015.1089006.

Kenyans voted in a national referendum on 4 August 2010 to accept a new Constitution. 70 per cent of registered voters turned out to vote on the question, “Do you approve the proposed new Constitution?” The Yes side vote in favor was 68.55 per cent, while the No side vote was 31.45 per cent.

As Steeves notes, a substantial majority of Kenyans voted for the 2010 proposed Constitution. It perhaps follows that this Constitution would have some elements of public participation because it was coming from a constitutional making process that emphasised and centralised public participation. However, the question remains: how central is public participation to the Constitution of Kenya 2010? Critics such as Mateo (2012) argue that it is “both an aspiration to build a constitutional culture and anxiety as to whether this is possible”.²⁴³ Others such as Hassan argue it is hard to curb elite power.²⁴⁴ It is also difficult for the Kenyan political elite to move away from the previous practise of centralising power. According to Cheeseman et al:²⁴⁵

Public participation is stated in the preamble of the Constitution as the process which gives the Constitution legitimacy, as a document of the people of Kenya, high levels of public participation – through the submission of memoranda and relatively high turnout rates at the Committee of Expert’s public consultative meetings – enhanced the legitimacy of the new draft.

The declaration in the preamble of the Constitution of Kenya 2010 points to the ownership of the Constitution by people of Kenya. As it states:²⁴⁶

Exercising our sovereign and inalienable right to determine the form of governance of our country and having participated fully in the making of this Constitution: adopt, enact and give this Constitution to ourselves and our future generations.

²⁴³ Taussig-Rubbo, M. (2012). From the 'Stranger King' to the 'Stranger Constitution': Domesticating Sovereignty in Kenya. *Constellations: An International Journal of Critical and Democratic Theory* 19(2), pp248-266.

²⁴⁴ Hassan, M. (2013). Continuity despite change: Kenya's new Constitution and executive power. *Democratization*, 22(4), 587-609. doi:10.1080/13510347.2013.853174.

²⁴⁵ Cheeseman, N., Lynch, G., & Willis, J. (2016). Decentralisation in Kenya: the governance of governors. *The Journal of Modern African Studies*, 54(01), 1-35. doi:10.1017/s0022278x1500097x.

²⁴⁶ Constitution of Kenya 2010, Preamble.

The sovereignty and the supremacy of the Constitution is outlined in Chapter 1, when it states, “(a)ll sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution”.²⁴⁷ This reference to the people of Kenya has the effect of highlighting how the right to participate in the way citizens are governed has been constitutionally protected. However, how should this participation occur? Directly or indirectly through representatives? The Constitution in Article 1(2)(c) states that “The people may exercise their sovereign power either directly or through their democratically elected representatives.”²⁴⁸

In this chapter, I consider the ways public participation is discussed in the Constitution and highlight some of the tensions these differences create for interpreting participation in practice. The Constitution does not offer a definition of public participation, and I suggest this provides for a lacuna that secondary legislation fills by creating legislation that aims to fulfil this constitutional aspiration.

3.3 Interpretation of the Constitution

The Constitution clearly provides for the procedure of its interpretation. Akech (2010) contends that “The new Constitution establishes rules, values, and principles that if implemented will facilitate the realisation of equality and inclusive citizenship”.²⁴⁹ It is because of these high hopes for inclusive citizenship, which Akech describes, that the interpretation of the Constitution remains paramount. Regarding the interpretation of the Constitution, the responsibility is squarely put to the High Court.²⁵⁰

²⁴⁷ Constitution of Kenya 2010, art 1(1).

²⁴⁸ Constitution of Kenya 2010, art 1(2).

²⁴⁹ Akech, M. (2010) Institutional Reform in the New Constitution of Kenya. International Center for Transitional Justice. Retrieved 20 January, 2018, from <https://www.ictj.org/sites/default/files/ICTJ-Kenya-Institutional-Reform-2010-English.pdf>

²⁵⁰ Constitution of Kenya 2010, art 165(1).

There is established the High Court, which—of this Constitution including the determination of— (i) the question whether any law is inconsistent with or in contravention of this Constitution; (ii) the question whether anything said to be done under the authority of this Constitution or any law is inconsistent with, or in contravention of, this Constitution; (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and (iv) a question relating to conflict of laws under Article 191; and (e) any other jurisdiction, original or appellate, conferred on it by legislation. (4) Any matter certified by the court as raising a substantial question of law under clause (3) (b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.

This article is important because it clearly establishes the intention of the Constitution regarding the interpretation of matters like public participation will, therefore, be clarified by the High Court. This suggests that the courts will play a prominent role in upholding the Constitution, but the Constitution also emphasises the role of citizens in promoting and defending it.²⁵¹

3.4 Sovereignty of the People and the Supremacy of the Constitution

The sovereignty of the people is the key anchor of the Constitution, although concerns existed regarding influence from foreign interests supplanting the sovereignty of Kenyans in the Constitution making process.²⁵² As Mateo (2012) contends:²⁵³

While some construe the sovereignty of the postcolonial state as a gift from above, internally, the perceived or feared absence of a “true People” grounds the concern that some postcolonial states are communities under the sway of “tribal” identities. Imposed and funded from abroad and dominated by imperial executives, many of these states are now encouraged by foreign

²⁵¹ Constitution of Kenya 2010, art 3(1).

²⁵² Namunane, B. & Mayaka-Gekara, E. (2010). Foreign factors shape Kenya's referendum. Daily Nation, 11 July. Retrieved 20 January, 2018, from <https://www.nation.co.ke/kenyareferendum/Foreign-factors-shape-Kenya-referendum/926046-955962-fu2dagz/index.html>

²⁵³ Taussig-Rubbo, M. (2010). From the 'Stranger King' to the 'Stranger Constitution': Domesticating Sovereignty in Kenya. *Constellations: An International Journal of Critical and Democratic Theory* 19(2), pp248-266.

donors and their citizens, through processes such as Constitution-making and democratisation, Perhaps mindful of the criticism that a constitution must not to domesticate themselves.

The 2010 Constitution is to a great extent seen as a constitution that expresses the ideals that Kenyans aspire to. It is important to point out that Kenya had rejected a previous constitutional draft in a 2005 referendum as it was perceived as retaining centralised presidential powers.²⁵⁴ Therefore, the Constitution of Kenya 2010 was not only hard fought for but a clear choice by Kenyans after weighing different constitutional drafts.

In implementing the Constitution, the Commission of the Implementation of the Constitution, pressed Kenyans to:²⁵⁵

exercise their sovereignty and play an active role in both upholding the values and principles of the Constitution of Kenya and in being vigilant in ensuring that all implementing partners in the implementation process uphold and achieve their constitutional mandates in the constitutional process.

By doing this, the CIC refocuses on the role of the citizen in the 2010 Constitution, especially their responsibility of remaining vigilant and defending the Constitution. According to Steeves (2015), the 2010 Constitution can be seen as part of an ongoing struggle for popular sovereignty:²⁵⁶

From 1987 forward, civil society, opposition politicians, the church, professional associations such as the Law Society of Kenya, and *wananchi* or ordinary Kenyans sought to dismantle the highly centralised power structure through constitutional reform.

²⁵⁴ Fickling, D. (2005). Kenyans say no to new Constitution, The Guardian, online ed, London, 22 November.

²⁵⁵ Taussig-Rubbo, M. (2010). From the 'Stranger King' to the 'Stranger Constitution': Domesticating Sovereignty in Kenya. *Constellations: An International Journal of Critical and Democratic Theory* 19(2), pp248-266.

²⁵⁶ Steeves, J. (2015). Devolution in Kenya: Derailed or on track? *Commonwealth & Comparative Politics* 53(4), pp457-474, DOI: 10.1080/14662043.2015.1089006.

All this in the hope that they would be able to regain their sovereign power. Public participation as an expression of popular sovereignty is woven through the Constitution and I turn now to examine this.

3.5 Analysis of the Articles for Participation in the Kenyan Constitution

The national values and principles of governance as set out in the Constitution include, “patriotism, national unity, the rule of law democracy and *participation of the people*” [emphasis added].²⁵⁷ These principles reinforce importance of the participation of people in their governance and is viewed as a national value. The Constitution further encourages participation at the county level. It states that the county assembly shall “facilitate public participation and involvement in the legislative, and other business, of the assembly and its public participation and county assembly powers and privileges”.²⁵⁸ Article 201(a) then extends this opportunity where it states that public participation will also be a key guiding principle of all aspects of public finance.²⁵⁹

The insistence of the Kenyan citizen on identifying public participation as one of the key values in the new Constitution has been informed by a history of a highly centralised governance system that led to significant protest by groups of its citizenry being excluded from the process of governance especially in matters of public finance at all levels.²⁶⁰ The concern for greater public engagement and voice in governance continues to this day. Forty-seven county governments were established under the 2010 Constitution to check and balance the power of the presidency, to devolve power and resources to the local level, and to enhance

²⁵⁷ Constitution of Kenya 2010, art 102(a).

²⁵⁸ Constitution of Kenya 2010, art 196(b).

²⁵⁹ Constitution of Kenya 2010, art 201(a).

²⁶⁰ International Foundation for Electoral Systems. (2013). Elections in Kenya - March 4 General Elections (Rep.). Washington DC. Retrieved December 22, 2016, from https://www.ifes.org/sites/default/files/kenya_faq_clean_final2.pdf

citizen participation by developing and implementing public participation frameworks in their regions, as required by the new Constitution. Hassan (2013) argues that:²⁶¹

Ministry incentives have shaped the *National Administration* into a centralised agency almost identical to the *Provincial Administration* that envisages continuing unchecked executive power despite formal constraints embodied in the country's 2010 Constitution. In justifying this continuation, the ministry cites security threats as a need for a robust and centralised organisation.

These criticisms are important to bear in mind. The 2010 Constitution proposes an ideal for participation, but the environment in which public participation occurs will also be crucial if this ideal is to be operationalised and the aspirations actualised. The discussion now turns to consider some of the key ways that the Constitution aims to create the conditions which will enable effective participation.

3.6 Overview of the Structure of Authority in the Constitution of Kenya

In this section, I examine the Constitution of Kenya 2010 in greater detail and identify the structure of authority as stipulated in the Constitution. The structure of authority in the Constitution 2010 is distinct from the previous Kenyan Constitution mainly because now sovereign power to be exercised by citizens at both at a national and a county level. The following section will demonstrate sovereign authority in this new constitutional dispensation rests with the citizens. According to Mbondenyei, Lumumba and Odero (2011):²⁶²

The underlying theme in the country's constitutional history has been the question of how to establish a constitutional regime that can guarantee everyone equal participation in the nation's economic social and political activities.

²⁶¹ Hassan, M. (2013). Continuity despite change: Kenya's new Constitution and executive power. *Democratization*, 22(4), 587-609. doi:10.1080/13510347.2013.853174.

²⁶² Mbondenyei, M. K., Lumumba, P. L., & Odero, S. O. (2011). *The Constitution of Kenya: contemporary readings*. Nairobi, Kenya: Law Africa Pub.

Thus, there is a need to establish the centre of sovereign power and how it is exercised in the Constitution 2010 so that it rests with the citizens. Ensuring that this happens requires institutions of governance that reinforce citizen authority. In contrast, Schauer (2005) asserts that:²⁶³

Because laws of any kind must be enforced and internalised within an institutional structure, and because formal and informal institutional structures persist through regime changes and political transformations, transplanted laws and Constitutions typically entail some degree of mismatch between the provisions of the documents and the institutional structures that are needed to enforce them.

The constitutional ideals and aspirations must find institutional structures that will ensure that they can be achieved. This assertion speaks to the reality of Kenya where the new Constitution also arguably resulted in a regime change and a political transformation of values and political and legal infrastructure. In the context of public participation, the aspirations of the Constitution and the subsequent laws that are being developed at the national level and the laws that are being developed at the county level that pertain to the implementation of the public participation, need to be considered carefully.

Akech (2011) emphasises that the changes made by the Constitution are not sufficient.

As he observes:²⁶⁴

The new Constitution establishes principles and mechanisms that will enhance government accountability. However, these gains will be derailed unless the statutory order is transformed to conform to the values and principles of the Constitution. As examined previously, many of the arbitrary powers of government are derived from the statutory order. Democratisation initiatives in Africa have tended to concentrate on enhancing ballot-box democracy and enacting new Constitutions.

²⁶³ Schauer, F. (2005). On the Migration of Constitutional Ideas. *Connecticut Law Review*, 37(14). Retrieved January 25, 2017.

²⁶⁴ Akech, M. (2011). Abuse of Power and Corruption in Kenya: Will the New Constitution Enhance Government Accountability? *SSRN Electronic Journal*, 18(1). doi:10.2139/ssrn.1838102.

In the first instance, Article 1(1) of the Constitution 2010 as we have seen states that “all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution”.²⁶⁵ This indicates that power emanates from the people of Kenya and that the exercise of power and its application is limited by what the Constitution indicates.

In the second instance, Article 1(2) further elaborates that “the people may exercise their sovereign authority either directly or through their democratically elected representative”.²⁶⁶ This provision reminds us that the power is from the people to the elected officials. Sovereign power is also delegated to state organs particularly parliament and legislative assemblies, national executive, county assemblies and county governments, the judiciary and independent tribunals which are required to perform their functions by the Constitution.²⁶⁷ In summary, then, under the Constitution, the Kenyan people delegate power to the democratically elected representatives; however, the people also secure some of this power to be able to apply it directly.

These provisions for direct participation are discussed below and in Chapter 5. Discussion, however, turns first to outline the provisions of the Constitution which create new organs of government and opportunities for public participation. Barton (2002) argues that:²⁶⁸

While elections and representative institutions of government are certainly fundamental assurances of the accountability of those who govern, liberal democracy requires other opportunities for citizens to participate in politics. Otherwise, democracy will degenerate into the ‘tyranny of the majority’ no more than an elected dictatorship. Moreover, other opportunities are necessary to inculcate a sense of political interest in the citizens.

²⁶⁵ Constitution of Kenya 2010, art 1(1).

²⁶⁶ Constitution of Kenya 2010, art 1(2).

²⁶⁷ Constitution of Kenya 2010, art 1(3).

²⁶⁸ Barton, B. (2002). *Underlying Concepts and Theoretical Issues in Public Participation in Resources Development*. In Zillman, D.N. et al. (eds.). Oxford University Press, Oxford.

What is clear from this observation by Barton is that although the structure of authority in the Constitution of Kenya may retain a tension between representative and direct participation, the value of both approaches must be taken into account when implementing the Constitution.

3.7 National Assembly and the County Assemblies

The authority of Kenya's National assembly lies in representing the will of the people and exercising their sovereignty. This section will consider the role of Parliament to consider and pass amendments to the Constitution and even to alter county boundaries. Parliament has the specific role in Article 94(3)²⁶⁹ of protecting the Constitution, a role that in Article 3(1) is made obligatory for all Kenyans because they are required to respect, uphold, and defend the Constitution.²⁷⁰

Parliament is the only body (or person) with the power to make provisions that have the force of law in Kenya.²⁷¹ Parliament has the responsibility, by legislation, of ensuring that county governments have adequate support to enable them to perform their functions.²⁷² Article 93 of the Constitution defines Parliament, which consists of the National Assembly and the Senate.²⁷³ Article 94 indicates that the "legislative authority is derived from the people and at the national level is exercised by parliament."²⁷⁴ There are new features of citizenship representation in the National Assembly and Senate which potentially have significant and have far-reaching implications for great public participation. Discussion now turns to examine these.

²⁶⁹ Constitution of Kenya 2010, art 94(3).

²⁷⁰ Constitution of Kenya 2010, art 3(1).

²⁷¹ Constitution of Kenya 2010, art 94(5).

²⁷² Constitution of Kenya 2010, art 190(1).

²⁷³ Constitution of Kenya 2010, art 93.

²⁷⁴ Constitution of Kenya 2010, art 94.

3.8 National Assembly

of the people as articulated in Article 95.²⁷⁵ The National Assembly consists of 290 members elected by the registered voters of the constituency.²⁷⁶ A new feature of the National Assembly is that 47 women are each elected by the registered voters of the Counties and 12 members are nominated by Parliament. The authority of the National Assembly lies in the enacting legislation of Article 95(3) which states that “The National Assembly enacts legislation in accordance with Part 4 of this Chapter”.²⁷⁷ Furthermore, the National Assembly determines the allocation of national revenue between the various levels of government, appropriates funds for expenditure by the national government, and provides oversight over national revenue and its expenditure.²⁷⁸

Article 98(1)(a) states that the Senate consists of 47 members each elected by the registered voters of the Counties, and each County is represented in the Senate through a single member constituency elected through a first past the post system.²⁷⁹ However, 16 women members are also nominated by political parties, according to the strength of the political parties.²⁸⁰ Two members to represent youth are nominated by the political parties in the Senate, and two members male and female, representing persons with disability are nominated by the political parties in the Senate.²⁸¹ The authority of the Senate lies in representing the counties and serves to protect the interests of their governments and serves to limit the power of the

²⁷⁵ Constitution of Kenya 2010, art 95.

²⁷⁶ Constitution of Kenya 2010, art 97(1)(a).

²⁷⁷ Constitution of Kenya 2010, art 95(3).

²⁷⁸ Constitution of Kenya 2010, art 1(2).

²⁷⁹ Constitution of Kenya 2010, art 98(1)(a).

²⁸⁰ Constitution of Kenya 2010, art 98(1)(b).

²⁸¹ Constitution of Kenya 2010, art 98(1)(c&d).

President; they are intended to offer a check and balance and also a voice for local citizens in local decision making.

As Hornsby (2013)²⁸² and Maxon (2011)²⁸³ observe, Kenya attained independence from Britain under a transferred Westminster Parliamentary system; however, it has evolved significantly under the current Constitution. There is an elected President as Head of State who is supported by a Deputy President and a National Executive. Article 129(1-2) states that the authority of the National Executive originates from the people, and this executive authority is for the service to the people of Kenya.²⁸⁴ The National Executive is made up of the president, deputy president, and the rest of cabinet, who are appointed by the president with the approval of parliament.²⁸⁵ The authority of the president lies in the following areas, as stated in Article 131; the president is the both the head of state and the government and exercises executive authority of the Republic, with the assistance of the deputy president and cabinet secretaries. The president is the commander-in-chief of the Kenya Defence Forces, chairperson of the National Security Council, and is a symbol of national unity.²⁸⁶

3.9 County Governments

A key intent of the Constitution was to divest the presidency of powers that had, as Cheeseman et al. (2016) observed, “historically been over-centralised and dominated by a powerful president”,²⁸⁷ resulting in a political system that was perceived as non inclusive. The 47 county

²⁸² Hornsby, C. (2013). Kenya: A History since Independence. London: I.B. Tauris.

²⁸³ Maxon, R. (2011). Britain and Kenya's Constitution 1950-1960. Retrieved March 30, 2017, <https://books.google.co.nz/books?id=MV2IWE3VX-IC&pg=PT50&lpg=PT50&dq=kenya>

²⁸⁴ Constitution of Kenya 2010, art 129(1&2).

²⁸⁵ Constitution of Kenya 2010, art 130(1).

²⁸⁶ Constitution of Kenya 2010, art 131.

²⁸⁷ Cheeseman, N., Lynch, G., & Willis, J. (2016). Decentralisation in Kenya: The governance of governors. *The Journal of Modern African Studies*, 54(1), 1-35. doi:10.1017/S0022278X1500097X.

governments that are a result of the Constitution are the manifestation of the devolvement of power from the centre. According to Mamdani (1996):²⁸⁸

Direct rule was the form of urban power. It was about the exclusion of the natives from civil freedom indirect rule, however, signified rural tribal authority. It was about incorporating natives into a state-enforced customary order. Reformulated, direct and indirect rule are better understood as variants of despotism: the former centralised, the latter decentralised.²⁸⁹

In the 2010 Constitution, the “rural tribal authority” as proposed by Mamdani is located at the county level and is exercised by the 47 county governments. This view is debatable, however. The current counties mainly mirror the over 42 tribes of Kenya, but not all tribes have counties and those who do not find themselves in cosmopolitan counties where some tribes coexist. There are a handful of urban counties like Nairobi and Mombasa, for example, that are cosmopolitan in composition. Power sharing amongst various groups, peaceful coexistence and inclusive governance remains an ongoing challenge.

Article 176 states that there shall be a county government for each of the 47 counties, consisting of a county assembly and a county executive.²⁹⁰ The executive authority of the county is vested in, and exercised by, a County Executive Committee. As articulated in Article 179, it consists of the county governor, deputy governor, members appointed by the county governor, and the members of the County Executive Committee who are accountable to the county governor for the performance of their functions.²⁹¹ It is therefore at the county level that observation of how public participation is being implemented will be key to understanding of how the Constitution is implemented.

²⁸⁸ Mamdani, M. (1996). *Citizen and subject: contemporary Africa and the legacy of late colonialism*. Princeton, NJ: Princeton University Press.

²⁸⁹ Mamdani, M. (1996). *Citizen and subject: contemporary Africa and the legacy of late colonialism*. Princeton, NJ: Princeton University Press.

²⁹⁰ Constitution of Kenya 2010, art 176.

²⁹¹ Constitution of Kenya 2010, art 179.

In the Constitution 2010, Article 159 defines the judiciary and independent tribunals as:²⁹²

the third arm of government, the Judiciary plays a crucial role in the governance structure of Kenya under the new Constitution. Article 159 of the Constitution of Kenya states that judicial authority is derived from the people and vested and exercised by the courts and tribunals established under the Constitution.

Article 160 lays out the independence of the Judiciary. Further on, Article 161 sets out the offices of the Chief Justice, Deputy Chief Justice, the Chief Register of the Judiciary and that the Judicial Service Commission was empowered to establish other offices of the registrar.²⁹³ The courts are articulated in Article 162, specifically the superior courts being the Supreme Court and the Court of Appeal.²⁹⁴

As stated earlier, Article 1(2) of the Constitution of Kenya states that the “Kenyan people may exercise their sovereign authority either directly or through their democratically elected representatives.”²⁹⁵ However, *when* they exercise these powers that they have reserved for themselves to participate in the governances of Kenya is in question.²⁹⁶ The High Courts are the ones with the power to interpret the Constitution and, more specifically, as outlined in Article 165(d)(i), the question of whether any law is consistent with, or in contravention of, the Constitution.²⁹⁷ This Article therefore provides the clarity that is required when interpreting the Constitution of Kenya and ensures that matters that require interpretation are directed to the appropriate court. This delineation is key so that time and resources are used properly, and justice can be delivered promptly as matters appear in front of the court.

²⁹² Constitution of Kenya 2010, art 159.

²⁹³ Constitution of Kenya 2010, art 160.

²⁹⁴ Constitution of Kenya 2010, art 162.

²⁹⁵ Constitution of Kenya 2010, art (1)(2).

²⁹⁶ Constitution of Kenya 2010, art (1)(2).

²⁹⁷ Constitution of Kenya 2010, art 165(d)(i).

3.10 Wider Ways the Constitution Enables Public Participation

As discussed above, the Constitution sets out the expectation that Kenyans can participate in the election of representatives and provides for legislation and institutions to support this. There are some additional opportunities for both direct and indirect participation that are briefly reviewed here. First, in Chapter 7 of the Constitution, Article 83, the registration of voters is presented as an important means of public participation.²⁹⁸ To ensure Kenyans participate in elections at all levels, they need to register to vote at a required time and place.

Article 82 of the Constitution stipulates that Parliament shall enact legislation to provide for elections and referenda and that this particular legislation will take into account the particular needs of persons with disabilities, and other individuals, or groups, with special needs.²⁹⁹ In particular, the Constitution creates special provisions for women's participation at the Senate through Article 98(b) which states that "sixteen women members who shall be nominated by political parties according to their proportion of members of the Senate elected under clause (a) by Article 90."³⁰⁰

The Constitution also created significant new opportunities for disabled representation and participation, creating new provisions that ensure participation of previously marginalised members of society, such as women marginalised in communities and persons with disabilities (Article 232(i)).³⁰¹ In Article 55(b),³⁰² there is also provision for the participation by youth in political, social, economic, and other spheres of life, and provision for the participation of minorities and marginalised groups in governance and other areas of life Article 56.³⁰³ The

²⁹⁸ Constitution of Kenya 2010, art 83.

²⁹⁹ Constitution of Kenya 2010, art 82.

³⁰⁰ Constitution of Kenya 2010, art 98(b).

³⁰¹ Constitution of Kenya 2010, art 232(i).

³⁰² Constitution of Kenya 2010, art 55(b).

³⁰³ Constitution of Kenya 2010, art 56.

participation of older persons in the affairs of society is found in Article 57.³⁰⁴ These provisions are of substance because one of the most cited reasons by some researchers for the conflict Kenya has experienced in the past is because “groups have felt marginalised and these marginalised groups, in particular, the youth have been instrumentalised during periods of conflict as agitators and fodder of violence”.³⁰⁵

The intention to retain sovereignty of citizens is also signalled in other critical articles in the Constitution. For example, the electorate, as stipulated in Article 104, also has the right to recall a Member of Parliament representing their constituency before the end of the term of the relevant House of Parliament³⁰⁶ and Parliament is given the task to enact legislation to provide for the grounds on which a member may be recalled.³⁰⁷ This sovereignty is key because the people have reserved their right to participate in the eventuality of requiring the recall of a member of parliament.

The people are also sovereign in any changes to the Constitution. Article 257 “places the responsibility of amending the Constitution on the voters by proposing of a popular initiative to be signed by at least one million registered voters”.³⁰⁸ This ensures that the public can participate in the election calendar as stipulated in the law to amend the Constitution if they so wish and can garner the minimum one million signatures that are required. Public participation in the legislature is also described in Article 118(a) and (b) and in Article 119 where the emphasis is placed on the openness of Parliamentary Committees and the role of Parliament in facilitating public participation and the right to petition Parliament.³⁰⁹

³⁰⁴ Constitution of Kenya 2010, art 57.

³⁰⁵ Straight, B. (2009). Making Sense of Violence in the “Badlands” of Kenya. *Anthropology and Humanism*, 34(1), 21-30. doi:10.1111/j.1548-1409.2009.01020.x.

³⁰⁶ Constitution of Kenya 2010, art 104.

³⁰⁷ Constitution of Kenya 2010, art 104.

³⁰⁸ Constitution of Kenya 2010, art 257.

³⁰⁹ Constitution of Kenya 2010, art 118(a&b) & art 119.

Public participation in financial matters is also clearly emphasised. For example, Article 201(a) and Article 221(5) and highlight the role of participation in the development of budget estimates.³¹⁰ Article 129 sets out provisions for public participation at the county assembly level.³¹¹ Moreover, public participation is also provided for in the public service in Article 232(1)(d).³¹²

3.11 Public Participation in Subsidiary Legislation and Its Implications

In so much as the ideals of public participation have been laid out in the Constitution, the operationalisation of public participation is delegated to parliament by creating some Acts of Parliament. This research also reviews the following acts which contain significant provisions relating to public participation: the Public Finance Management Act 2012; the Judicial Services Act 2011; the County Governments Act 2012; the Petition to Parliament (Procedure) Act 2012; and the Access to Information Act 2016.

It is necessary to understand these Acts because this research will then study the judgments that have been passed from August 2010 to December 2016 which pertain to the matter of public participation (see Chapter 5 and 6).

3.11.1 Public Finance Management Act 2012

The objective of the Act as indicated in the Public Finance Management Act 2012 (PFMA) Section 3(a) is to guarantee that, “public finances are managed at both the national and the county levels of government by the principles that are set out in the Constitution”.³¹³ Section 3(b) identifies a second objective of “Public officers who are given responsibilities for

³¹⁰ Constitution of Kenya 2010, art 201(a) & art 221(5).

³¹¹ Constitution of Kenya 2010, art 129.

³¹² Constitution of Kenya 2010, art 232(1)(d).

³¹³ The Public Finance Management Act 2012, s 3(a).

managing the finances are accountable to the public for the management of those finances through parliament and County Assemblies”.³¹⁴ The Act indicates that the responsibility of the National Assembly budget committee in public finance matters. It states the responsibility of the national government on the management and control of public finance. The county government responsibilities for the management and oversight of public finance are also stated. The Act elaborates on the relationship between the national and county government over the budget and economic matters.³¹⁵ It further states that In Section 35(2) that the “Cabinet Secretary shall ensure public participation in the budget process provided for under subsection (1)”.³¹⁶

Regarding regulations on grant administration an expectation of “timely public disclosure to intended beneficiaries of the allocation and disbursement of grants to grant recipients timely public disclosure by grant recipients to intended beneficiaries of expenditure and performance achieved about the grant”.³¹⁷ With a specific focus on public participation, the Public Finance Management Act 2012 clearly states that regulations made may provide for the following matters:³¹⁸

structures for participation, mechanisms, processes and procedures for participation, receipt, processing and consideration of petitions, and complaints lodged by members of the community notification and public comment procedures, public meetings and hearings, special needs of people who cannot read or write, people with disabilities, women and other disadvantaged groups, matters with regard to which community participation is encouraged, the rights and duties of members of community; and any other matter that enhances community participation.

A focus of interest to this discussion is Section 137 of the PFMA 2012 which spells out the establishment of the County Budget and Economic Forum (CBEFs) for the county budget

³¹⁴ The Public Finance Management Act 2012, s 3(b).

³¹⁵ The Public Finance Management Act 2012.

³¹⁶ The Public Finance Management Act 2012, s 35(2).

³¹⁷ The Public Finance Management Act 2012, s 48(2)(a&b).

³¹⁸ The Public Finance Management Act 2012, s 207.

consultation process.³¹⁹ The responsibility falls on “The County Executive Committee member for finance who shall ensure that there is public participation in the budget process”.³²⁰

Section 137(2) elaborates on the membership of this forum and states that the Governor shall be the chairperson, the members of the county executive committee. A number of representatives not being county public officers equal to the number of executive committee members appointed by the governor from persons representing professionals, business, labour, issues, women, persons with disabilities, the elderly and faith-based groups at the county level.³²¹

These new provisions for a broad range of sectional interests have attracted significant comment and interest. One of the aims of the thesis is to understand how effective these provisions have been in enabling participation by new voices and a range of community interests. Section 177(3)(a) states that:³²²

the purpose of the County budget and economic forum is to provide a means for consultation by the county government on the preparation of county plans the county fiscal strategy paper, Budget review, and outlook paper for the county.

The section therefore expounds on the function of the county budget and economic forum. Section 137(3)(b) furthermore states that: “matters relating to budgeting the economy and financial management at the county level. All these consultations shall be by the consultation process provided in the law relating to the county governments”.³²³

To determine how effective the efforts to implement public participation have been, an analysis later in the thesis will discuss of how public participation is implemented in the

³¹⁹ The Public Finance Management Act 2012, s 137.

³²⁰ The Public Finance Management Act 2012, s 125(2).

³²¹ The Public Finance Management Act 2012, s 137(2).

³²² The Public Finance Management Act 2012, s 137(3)(a).

³²³ The Public Finance Management Act 2012, s 137(3)(b).

following processes: the county plan, the county fiscal strategy paper, budget review, and outlook paper. Therein lies the significance of the Public Finance Management Act 2012. It provides for a participation structure for all matters related to the budget making at the county level. As observed later, some individual counties, have drafted and passed their own public participation acts, however, this national Public Finance Management Act 2012 is important because provides uniformity and a national standard on matters concerning public participation on budget issues at the county level.

3.11.2 Judicial Services Act 2011

The Judicial Services Act 2011 presents a framework for effecting Article 159(1) of the Constitution which states that “Judicial authority is derived from the people and vests in and shall be exercised by the courts and tribunals established by or under this Constitution”.³²⁴ The object of the Judicial Services Act, as stated in Section 3, is to “ensure that the Commission and the Judiciary ... are well managed to facilitate the conduct of a judicial process designed to render justice to all just resolution of disputes committed to the determination of disputes”.³²⁵ The Act supports a sustainable judicial process that is committed to the protection of the people and their human rights and equity. Under Section 35(c) of the Judicial Services Act, the National Council on the Administration of Justice is tasked to “facilitate the establishment of a court user’s committees at the county level”.³²⁶ The aim of the court user’s committees is to ensure that public participation in the judicial process is facilitated to the extent required. This is key in a participatory context because it guarantees that court user committees “which acts as infrastructure for public participation has a legal framework”. This legal framework is the

³²⁴ Constitution of Kenya 2010, art 159(1).

³²⁵ Judicial Service Act 2011, s 3.

³²⁶ Judicial Service Act 2011, s 35(c)

key public participation infrastructure in the court system that provides room for users of the judicial system to exercise full participation in the system.

The importance of the court user committees is that they provide a gateway for court users to interact with the court systems. Thus, ensuring the alignment of courts towards a user centred focus that creates a structure for users to access full information about the court process and a feedback mechanism for the courts to be able to serve the greater public.

3.11.3 County Governments Act 2012

The County Governments Act 2012 is particularly significant to any discussion of public participation in Kenya. Under the Constitution:³²⁷

Devolution was meant to result in the promotion of democratic and accountable exercise of power, the fostering of national unity by recognising diversity, the giving of 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, recognising the right of communities to manage their own affairs and to further their development; the protection and promotion the interests and rights of minorities and marginalised communities, the promotion of social and economic development and the provision of proximate, easily accessible services throughout Kenya, ensuring equitable sharing of national and local resources throughout Kenya, facilitation of the decentralisation of State organs, their functions and services, from the capital of Kenya; and, The enhancement of checks and balances and the separation of powers.

The County Governments Act 2012 gives effect to Chapter 11 of the Constitution. Section 87 of the County Governments Act 2012 provides for what standards to consider when implementing public participation at the county level. They include timeliness, reasonable access, consideration of the rights of the minorities, that affected marginalised groups to review

³²⁷ Constitution of Kenya 2010, art 174.

decisions, the promotion of private public partnership and the shared responsibility of non-state actors and county government.³²⁸

Section 115 of the same Act provides for public participation in the new arrangements detailed above when it contends that:³²⁹

Public participation in the county planning processes shall be mandatory and be facilitated through— (a) mechanisms provided for in Part VIII of this Act; and (b) provision to the public of clear and unambiguous information on any matter under consideration in the planning process, including— (i) clear strategic environmental assessments; (ii) clear environmental impact assessment reports; (iii) expected development outcomes; and (iv) development options and their cost implications.

According to Steeves (2015):³³⁰

Devolution, it is held, will foster the transfer of power to minority ethnic communities who have for too long stood outside the pattern of ethnic dominance not only in power but as well in development. From now on, the level and quality of government services and the path of development will be under the control of elected and accountable local leadership. No longer, it is hoped, will critical service and development decisions be made by the dominant and unaccountable ethnic winners in the zero-sum game that has marked Kenyan national politics.

At the county level, each county assembly will develop laws and regulations giving effect to the requirement for effective citizen participation in development planning and performance management within the county and these laws and guidelines will adhere to minimum national requirements. Public participation is expected to be operationalised at the county level. The significance of the County Governments Act 2012 is primarily on set out mechanism and the expectation that each county shall provide for laws that will adhere to the minimum national requirements for public participation.

³²⁸ County Governments Act 2012, s 87.

³²⁹ County Governments Act 2012, s 115.

³³⁰ Steeves, J. (2015). Devolution in Kenya: Derailed or on track? *Commonwealth & Comparative Politics* 53(4), pp457-474, DOI: 10.1080/14662043.2015.1089006.

3.11.4 The Urban Areas and Cities Act 2011 (2012)

The Urban Areas and Cities Act 2011 (revised 2012) is another consequential law where governance for and participation of residents in urban areas and cities are provided. Its objective as stated in the Act is:³³¹

to give effect to Article 184 of the Constitution, provide for the classification, governance and management of urban areas and cities, provide for the criteria of establishing urban areas, provide for the principle of governance and participation of residents and connected purposes.

Section 22 of the Urban Areas and Cities Act 2011 (2012) provides for citizen fora and states that:³³²

Subject to the Second Schedule, residents of a city, municipality or town may— (a) deliberate and make proposals to the relevant bodies or institutions on—(i) the provision of services; (ii) proposed issues for inclusion in county policies and county legislation; (iii) proposed national policies and national legislation; (iv) the proposed annual budget estimates of the county and of the national government; (v) the proposed development plans of the county and of the national government; and (vi) any other matter of concern to the citizens.

In Subsection 3(c), this legislation elaborates on the participation of the residents in urban areas. In Subsection 11(d), it provides a participation framework for the residents in particular local areas. The second schedule also provides that the “A city or urban area shall develop a system of governance that encourages participation by residents in its affairs”.³³³ They are also to make sure that proper conditions for participation exist by ensuring a budget is prepared, a strategy and integrated plan is developed performance management is reviewed and decisions regarding the delivery of service of participation in the urban areas and cities are undertaken.³³⁴

³³¹ The Urban Areas and Cities Act 2011.

³³² The Urban Areas and Cities Act 2011, s 22(a).

³³³ The Urban Areas and Cities Act 2011, sch 2.

³³⁴ The Urban Areas and Cities Act 2011, sch 2(1).

In the Urban Areas Act 2011, like the County Governments Act 2012, there is an acknowledgement that certain conditions are necessary for the implementation of public participation. Support for citizen's engagement is crucial because public participation cannot take place in a vacuum and the necessary conditions need to exist to ensure that participation is supported.³³⁵ This particular Act recognises that cities and urban areas will have unique circumstances and therefore differentiated from a county. These circumstances include challenges of communication, of rapid population change and infrastructure needs as well as local urban planning challenges.

3.11.5 The Access to Information Act 2016

Access to information is the next Act that shall be examined in the context of public participation. As noted in the *Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters* popularly known as the Aarhus Convention, "The right to access to information goes hand in hand with public participation".³³⁶ As observed earlier, Kenya is a signatory to this international convention. The Access to Information Act was assented on 31 August 2016 and commenced on 21 September 2016 after a prolonged period of debate in the legislature.³³⁷ One of its objectives according to Section 3(d) of this Act is to "promote routine and systematic information disclosure by public entities and private bodies on constitutional principles relating to accountability, transparency and public participation and access to information".³³⁸ This legislation is important because access to information is key in the public participation process. Without timely and pertinent, access to information then they are challenges in the public participation process; however, because it recently assented the public participation process 2010-2016 has not had the

³³⁵ The Urban Areas and Cities Act 2011, s 5(f).

³³⁶ Resolution on access to information, public participation in decision-making and access to justice in environmental matters. (2014). The Aarhus convention, 179-182. doi:10.18356/df79acf3-en.

³³⁷ The Access to Information Act 2016.

³³⁸ The Access to Information Act 2016, s 3(d).

opportunity to experience the advantages of the Act and is key to ensuring that the Constitution is implemented fully.

The Access to Information Act also provides for the management of records with the expectation that “Every public entity shall keep and maintain; records that are accurate, authentic, have integrity and useable; and its records in a manner which facilitates the right of access to information as provided for in this Act”.³³⁹ It recognises that not all public entities are ready with their information and provides a window for providing this information “not later than three years from the date from which this Act begins to apply to it, computerise its records and information management systems to facilitate more efficient access to information”.³⁴⁰ Thus, legislating that on 21 September 2019 it is expected that all public entities have electronically available records. This ensures wider access to information that is held by public entities and that by law can be accessed. This is key for the future of the implementation of public participation.

3.11.6 Petition to Parliament (Procedure) Act 2012

The Petition to Parliament (Procedure) Act was assented to on 27 August 2012.³⁴¹ However, its date of commencement was premised “upon the final announcement of the results of the first elections under the Constitution” which turned out to be 30 March 2013.³⁴² The objective of the Act is:³⁴³

to give effect to Article 37 or 119 of the Constitution on the right to petition Parliament; to make provision for the procedure for the exercise of the right pursuant to those Articles; to

³³⁹ The Access to Information Act 2016, s 17(2).

³⁴⁰ The Access to Information Act 2016.

³⁴¹ Petition to Parliament (Procedure) Act 2012.

³⁴² Petition to Parliament (Procedure) Act 2012, s 1.

³⁴³ Petition to Parliament (Procedure) Act 2012.

enhance public participation in the parliamentary and legislative process and for connected purposes.

The Act elaborates on the types and the form of Petition that may be presented to Parliament.³⁴⁴ This includes submission to the clerk, or the presentation by a member of the house, however, noting that a member shall not present on their behalf.³⁴⁵ It further states the procedure for presenting petitions in Section 4 of the Act.³⁴⁶ It also provides for “Clerk of each House of Parliament keeping and maintaining a register in which all petitions and supporting documents, and the decisions of the house are recorded”.³⁴⁷

This Act provides for a specific procedure that legislates petitions to Parliament to further enhance public participation in Kenya in the context of the Constitution. By doing this, it provides clarity around the procedure and preciseness on the rights and responsibilities of the citizens and the responsibilities of the various duty bearers with regards to the petitioning of Parliament procedure.

3.11.7 Intergovernmental Relations Act, No. 2 2012

The objectives of this Act are multiple and include:³⁴⁸

providing a framework for consultation and cooperation between the national and county governments; providing a framework for consultation and cooperation amongst county governments, establishing institutional structures and mechanisms for intergovernmental relations, providing a framework for the inclusive consideration of any matter that affects relations between the two levels of government and amongst county governments.

The Act then states that “The framework for public participation in the transfer or delegation of powers, functions or competencies by either level of government under this Part shall be

³⁴⁴ Petition to Parliament (Procedure) Act 2012, s 3.

³⁴⁵ Petition to Parliament (Procedure) Act 2012, s 3.

³⁴⁶ Petition to Parliament (Procedure) Act 2012, s 4.

³⁴⁷ Petition to Parliament (Procedure) Act 2012.

³⁴⁸ Intergovernmental Relations Act No. 2 of 2012.

provided by Regulations”.³⁴⁹ The Act further state that the cabinet secretary may provide for the procedures for public participation in the Act.³⁵⁰

The Act thus provides a framework for public participation in intergovernmental relations under the 2010 Constitution. This is significant since it addresses the relationship between the national and the county governments and the expectation that public participation has a specific role to play.

3.11.8 Transition to Devolved Government Act 2012

The objective of this Act is to create a framework for the transition from the previous Constitution to the 2010 Constitution. The Act defines public participation as “the involvement of the public in the decision-making”.³⁵¹ The Act requires “that there has to be public participation in making the decision to transfer the assets or liabilities”.³⁵² This is a key requirement for public participation in the transfer of assets and liability:³⁵³

ensuring and co-ordinating the participation of communities and locations in governance at the local level and assisting communities and locations to develop the administrative capacity for the effective exercise of the functions and powers and participation in governance at the local level.

This Act recognises that a transition period and process will be undertaken as the 2010 Constitution is implemented and that key to this transition is public participation so that the aspirations of the 2010 Constitution can be met.

³⁴⁹ Intergovernmental Relations Act No. 2 of 2012.

³⁵⁰ Intergovernmental Relations Act No. 2 of 2012, s 38(2).

³⁵¹ Transition to Devolved Government Act 2012, s 2.

³⁵² Transition to Devolved Government Act 2012.

³⁵³ Transition to Devolved Government Act 2012, s 11.

3.11.9 Public Service Values and Principles Act 2015

The objectives of this Act are to provide a “general code of the values and principles of public service, public participation in the promotion of the values and principles of, and policy making by, the public service; and reporting on the status of the promotion of values and principles of public service”.³⁵⁴ With regards to public participation this Act states that the public service shall facilitate it.³⁵⁵ Public participation and involvement may be through citizen forums, village, or elected leaders.³⁵⁶ Citizens can include faith-based organisations or groups, boards of management of learning institutions but other organisations such as welfare associations, residents’ associations, market-users’ committees, self-help groups, and such other registered or unregistered groups at the sub-county level may also participate.³⁵⁷

The public service will then develop guidelines and ensure that the public is given adequate opportunity to review a draft policy, adequate opportunity to make comments on a draft policy, opportunity to be heard by the makers of a policy and then notified of the final draft of the policy, as well as whether or not it incorporates their views.³⁵⁸ The expectation is that the public service has a role to play in ensuring that citizens have opportunities to participate policy making processes.

3.11.10 Statutory Instruments Act 2013

The objective of this Act is to provide a comprehensive regime for the making, scrutiny, publication and operation of statutory instruments. Section 2 of the Statutory Instruments Act sets out standards for:³⁵⁹

³⁵⁴ Public Service Values and Principles Act 2015, s 3(a,b&c).

³⁵⁵ Public Service Values and Principles Act 2015, s 11(1).

³⁵⁶ Public Service Values and Principles Act 2015, s 11(2).

³⁵⁷ Public Service Values and Principles Act 2015, s 11(3).

³⁵⁸ Public Service Values and Principles Act 2015.

³⁵⁹ Statutory Instruments Act 2013, s 2(a&b).

Determining whether any consultation that was undertaken was appropriate, as follows the extent to which the consultation drew on the knowledge of persons having expertise in fields relevant to the proposed statutory instrument; and (b) ensured that persons likely to be affected by the proposed statutory instrument had an adequate opportunity to comment on its proposed content.

Furthermore, the Act requires that:³⁶⁰

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

Consultation is expected when statutory instruments are being developed and an expectation that the persons who will be affected by the instrument participate in the process thus ensuring that the public participation framework percolates to all levels.

3.11.11 The Public Participation Bill 2016

The Public Participation Bill 2016 was presented for its first reading in February 2017 and is still undergoing debate with the Senate as of January 2018. It is, however, included in this discussion because it is an indicator that such a process is in place and perhaps shortly will be concluded. The main objective of the Public Participation Bill is to:³⁶¹

provide a general framework for effective public participation to give effect to the constitutional principles of democracy and participation of the people under Articles 1(2), 10(2), 35, 69(1Xd), 118, 174(c) and (d), 184(1Xc), 196(2)(a) and 232(1)(d) of the Constitution; and for connected purposes.

It presents the guiding principles of public participation and of note is the requirement that “adherence to the principles of public participation as may be prescribed by any written law”,³⁶²

³⁶⁰ Statutory Instruments Act 2013, s 3(a&b).

³⁶¹ The Public Participation Bill 2016, s 3(a).

³⁶² The Public Participation Bill 2016, s 4(h).

which reinforces existing laws that set out the principles of public participation. It further outlines the responsible authorities for public participation:³⁶³

Parliament, the relevant committee, in each House, responsible for public participation for purposes of House business in each House, the Judiciary, the Chief Justice, independent commissions or offices, boards, authorities or any other public body, the respective secretaries or chief executive officers of the public body.

This proposed law will provide a holistic framework that further buttresses public participation in Kenya. The Bill also provides some practical guidance on the implementation of public participation, noting for example the importance of providing sufficient time and information to enable communities to participate, and requiring authorities to document how participation was responded to in their annual reports.

3.12 Participation and the Legislative Process in Kenya

The Kenyan legislative process itself also provides an opportunity for further public participation. Article 118 of the Constitution states that “Parliament shall conduct its business in an open manner and its sittings and those of its committees shall be open to the public”.³⁶⁴ In the same Article, Parliament is also tasked with the role of facilitating public participation in the legislative and other business of Parliament.³⁶⁵ Furthermore, Parliament is not to exclude the public or media from any sitting unless in exceptional circumstances the relevant speaker has determined that there be justifiable reasons for this exclusion.³⁶⁶ In these ways the Constitution clearly sets the conduct of Parliament in relation to public participation and the limitation of its powers as to the exclusion of public participation.

³⁶³ The Public Participation Bill 2016, s 5.

³⁶⁴ Constitution of Kenya 2010, art 118.

³⁶⁵ Constitution of Kenya 2010, art 118.

³⁶⁶ Constitution of Kenya 2010, art 118.

In Article 82 of the Constitution Parliament has the task of ensuring that it enacts legislation to provide for, amongst some things, the continuous registration of citizens as voters the conduct of elections and referenda and the regulation and efficient supervision of elections and referenda.³⁶⁷ Parliament is further tasked with “enacting legislation on the progressive registration of citizens residing outside Kenya and the gradual realisation of their right to vote.”³⁶⁸ Rodrigues (2016) contends that:³⁶⁹

The challenge in countries grappling with conflict or its immediate aftermath, however, is that the mechanics of enabling public participation and dialogue can be very difficult logistically and, in some contexts, ongoing conflict can make it impossible.

The role of the executive is to ensure that public participation is implemented at every level and the implementation of policies and guidelines that the government has developed about public participation.

3.13 National Government and Public Participation

The national government has made a number of forays into public participation as it exercises its national mandate. But as contended by Akech (2011) it is also important to appreciate the amount of power that is still retained by the government under the Constitution of Kenya 2010. Akech states:³⁷⁰

While these reforms are important, they have failed to grasp the fact that much of the power of government is exercised by the President through bureaucrats, who regulate the daily lives of citizens and therefore effectively exercise broad delegated powers. In the course of exercising their duties, bureaucrats do not simply implement laws and regulations, but often interpret them.

³⁶⁷ Constitution of Kenya 2010, art 118.

³⁶⁸ Constitution of Kenya 2010, art 82.

³⁶⁹ Rodrigues, C. (2016). Letting off Steam: Interim Constitutions as a Safety Valve to the Pressure-Cooker of Transitions in Conflict-Affected States? Constitution-making and Political Settlements in Times of Transition, research paper series no 2016/23. Retrieved January 26, 2017.

³⁷⁰ Akech, M. (2011). Abuse of Power and Corruption in Kenya: Will the New Constitution Enhance Government Accountability? SSRN Electronic Journal, 18(1). doi:10.2139/ssrn.1838102.

For example, such laws and regulations often give bureaucrats broad discretion. In practice, the breadth and lack of effective regulation of these powers mean that the bureaucrats do as they wish, for the most part, irrespective of constitutional prescriptions. Also, judicial review is not an adequate tool for regulating these.

Akech's concerns remind us that legislative guidelines, frameworks and regulations are also important because they can influence bureaucratic practice in a more inclusive way.

3.13.1 The Annual National Budget Policy Statement

The national budget policy statement usually states the government's budget policy. The 2017 the budget policy statement stated that "Public Sector Hearings of October 2016 which provided inputs to this 2017 BPS, in addition to comments from several other stakeholder."³⁷¹

The statement stressed that the Constitution provided for public participation. This reminder to the public service to listen to the public is reinforced by the Public Finance Act 2012, Section 25(5) which requires the national Treasury to seek the views of various institutions and the public, when preparing the Budget Policy Statement. The views received were from various sector working for groups in the following areas "Agriculture, Rural and Urban Development Sector, Energy, Infrastructure and ICT Sector, Health, Education, Governance, Justice, Law and Order Sector, Public Administration and International Relations Sector and the Social Protection Culture and Recreation Sector".³⁷² The intention of these guidelines is to ensure community views are incorporated in the budget making process, and that the sectors affected by decisions can funnel some feedback to stakeholders. The opportunity for inclusion is limited, however. The composition of the sector working group will also determine the nature of the feedback and how feedback is processed and collated.

³⁷¹ Republic of Kenya (2016). The National Treasury, Medium Term Budget Policy Statement: Consolidating Economic Gains In An Environment Of Subdued Global Demand, November.

³⁷² Public Finance Act 2012, s 25(5).

3.13.2 A Framework for the Implementation of Values and Principles in Articles 10 and 232 of the Constitution in the Public Service

As a result of a need for guidelines on public participation, the public commission of Kenya has also developed a framework for the implementation of values and principles in Articles 10 and 232 of the Constitution in the public service. Article 249 of the Constitution states that “the objects of the commissions and the independent offices are to protect the sovereignty of the people, secure the observance by all State organs of democratic values and principles; and promote constitutionalism”.³⁷³

This framework is applied to the various government departments. It thus gives the Commission “the mandate to examine, monitor and evaluate the organisation, administration and personnel practices of the public service and to ensure that the public service is efficient and effective”.³⁷⁴ It is within this framework that is developed that the public participation process cycle is presented amongst other processes that ensure the implementation of Articles 10 and 232. In this thesis, the focus is on the public participation process cycle, which illustrates the steps that are to be considered and implemented in the public participation cycle in the public service in Kenya.

3.13.3 The National Committee on Implementation on Citizen Participation in Security in Kenya

This committee was established on 7 November 2015 for a period of three years with the following objectives that relate to citizen participation. Firstly, the committee aimed to “develop a forum that promotes citizens’ participation in security matters and facilitate local community leadership structures”.³⁷⁵ Secondly, it sought to “recommend an appropriate legal

³⁷³ Constitution of Kenya 2010, art 249.

³⁷⁴ “The National Committee on Implementation on Citizen Participation in Security in Kenya” (22nd April 2016) No 2007, The Kenya Gazette.

³⁷⁵ “The National Committee on Implementation on Citizen Participation in Security in Kenya” (22nd April 2016) No 2007, The Kenya Gazette at 2(a).

framework that will entrench the citizen participation in security matters build on a thorough review of the existing policy, legal and institutional instruments.”³⁷⁶ Furthermore, it sought to “review and recommend Information Communication Technology (ICT) usage framework to reduce transaction costs of citizens’ participation in security matters.”³⁷⁷

3.14 County Government and Public Participation

3.14.1 The County Fiscal Strategy Paper

In accordance with Section 117 of the Public Finance Management Act 2012, various stakeholders are to be consulted in the preparation of the county fiscal strategy paper.³⁷⁸ These stakeholders include County Budget & Economic Forum (CBEF), the media is also used to inform the public of the anticipated public participation forums. According to the International budget partnership the following are the key elements of the county fiscal strategy paper:³⁷⁹

A description of budget implementation for the first half of the year (July to December), including revenue and expenditure performance. A description of any changes to the budget during the year, such as the introduction of a supplementary budget. 3. An overview of the expected revenue and expenditure totals for the coming year, based on an assessment of the economy and any other factors, such as changes in national transfers, which will affect the county. Ceilings (or limits) on the amount of money each sector (health, education, etc.) will get in the upcoming budget and narrative explaining these.

³⁷⁶ The National Committee on Implementation on Citizen Participation in Security in Kenya” (22nd April 2016) No 2007, The Kenya Gazette at 2 (c).

³⁷⁷ “The National Committee on Implementation on Citizen Participation in Security in Kenya” (22nd April 2016) No 2007, The Kenya Gazette at 2(d).

³⁷⁸ Public Finance Management Act 2012, s 117.

³⁷⁹ A Joint Brief by Institute of Economic Affairs, Hakijamii, I Choose Life Africa, TISA, Water and Livelihoods Reform Network, World Vision Kenya, and the International Budget Partnership Toward Better County Fiscal Strategy Papers In Kenya: A Review <https://www.internationalbudget.org/wp-content/uploads/Formatted-joint-Kenya-CFSPs-JL-FINAL-exp.pdf>

3.14.2 County Public Participation Guidelines

The County Public Participation Guidelines were developed by the Ministry of Devolution and they provide non-mandatory guidelines that may be used at the county level to guide public participation. These guidelines, however, unlike a policy, remain unenforceable. The Government is yet to develop a national public participation policy, but these guidelines provide some direction. At the same time, there are some counties that have developed public participation laws that are enforceable. These are discussed in Chapter 6.

Meanwhile there exist guidelines that deal with a range of other issues, such as who is in charge of public participation at the various levels. Section 30(3)(g) of the County Government Act 2012 states that the Governor should “promote and facilitate citizen participation in the development of policies, plans and service delivery in the county”.³⁸⁰ This provides the governor of the county with the overall authority and places the responsibility of ensuring public participation at the county level. At the county level, Section 46(2)(g) of the County Governments Act provides that “the County Executive Committee facilitates participatory decision-making.”³⁸¹ Thus ensuring that at county level facilitation of public participation is clearly located. According to Section 50(3)(g) of the County Governments Act, at the sub-county level it is “the Sub-County Administrator that is responsible for the coordination, management and supervision of the general administrative functions in the sub-county including the facilitation and coordination of citizen participation in the development of policies, plans, and service delivery. The Ward Administrator, under Section 51(3)(g) of the County Governments Act, is responsible for the coordination, management, and supervision of the general administrative functions in the ward, including the facilitation and coordination of citizen participation in the development of policies, plans and service delivery”.³⁸² This

³⁸⁰ County Governments Act 2012, s 30(3)(g).

³⁸¹ County Governments Act 2012, s 46(2)(g).

³⁸² County Government Act, 2012, s 51(3)(g).

localisation of public participation roles at sub-county and ward level is key to ensuring that maximum coverage is achieved and that the voice of the local citizen is heard.

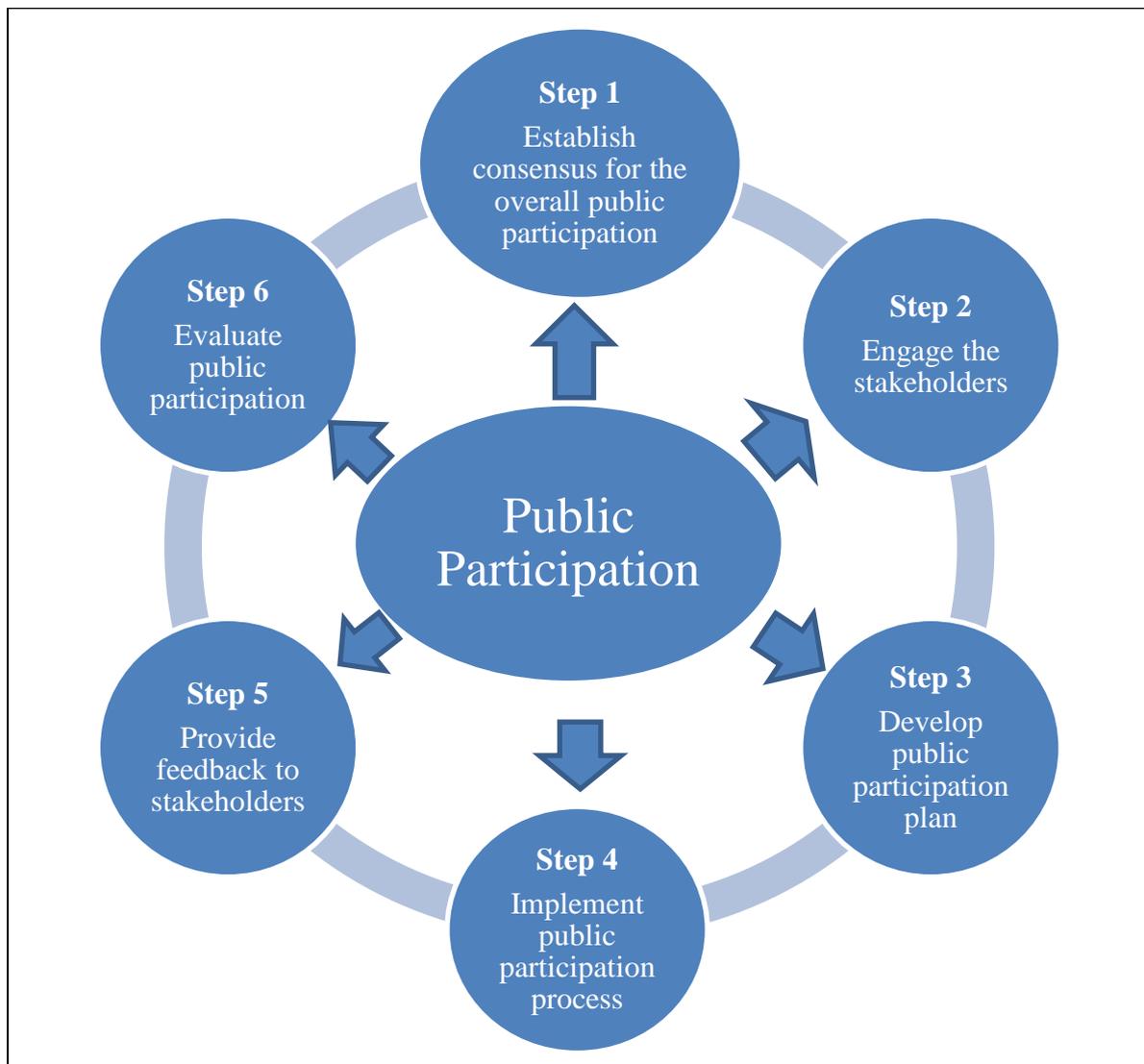


Figure 2 A Reality or a Mirage? Envisioning: The public participation process cycle in Kenya³⁸³

³⁸³ A Framework for the Implementation of Values and Principles in Articles 10 and 232 of the Constitution in the Public Service (Rep.). (2015). Nairobi, Kenya: Public Service Commission. doi: http://www.kenyaforestservice.org/documents/hr_policy/A_FRAMEWORK_FOR_THE_IMPLEMENTATION_final.pdf

3.15 Summary

This chapter has laid out the subsidiary legislative framework that has been developed from 2010 at the national level to ensure that the public participation constitutional transformational promise is actualised. Figure 4 shows a broad model of participation elaborated by the Public Service commission of Kenya. However, this broad model of participation needs a legislative framework that is reflective of the constitutional promise of public participation and which has the infrastructure in which it can launch public participation . Given that, this research seeks to understand how effective public participation provision are by reviewing the existing public participation infrastructure and examining the legislative framework that support the Constitution of Kenya 2010.

This chapter has examined the laws that pertain to public participation that have been developed in the constitutional transitional period. It has reviewed the structure of authority in the Constitution of Kenya, in Parliament, in the National Executive, in the Legislative Assemblies, and in the Counties. To do this I have identified the Articles on Public Participation in the constitution that hold the constitutional promise of public participation. I then examined significant references to public participation in the wider legislation at the national level, including the Public Finance Management Act 2012, Judicial Services Act 2011, County Governments Act 2012, the Urban Areas and Cities Act 2011, Access to Information Act 2016, Petition to Parliament (Procedure) Act 2012, and the Public Procurement and Asset Disposal Act 2015, Transition to Devolved Government Act 2012, Public Service Values and Principles Act 2015, Statutory Instruments Act 2013 and I have also examined the Public Participation Bill 2016 because of its potential importance in the infrastructure of public participation in Kenya when it is passed and becomes an Act. I have also examined the available policies, guidelines, and frameworks that are directly concerned with public participation.

This discussion has established that during the transitional period a substantial number of laws that were set to be established under Schedule 5 of the Constitution concerning public participation have been developed. Some of the legislation took much longer to develop than initially expected. After this examination, what is clear is that a robust enabling legal framework at the national level exists. The next step is the full implementation and enforcement of the legislative framework by bureaucrats, the public, and all other constitutional bodies. This has already begun during the 2010–2016 period.

Thus, the legislative frameworks and policies are part of the foundational blocks required in the journey towards realising the public participation aspiration of the Constitution and this chapter shows that a significant number of these legislative frameworks are in place. In the next chapter, I examine aspects of the court judgments of cases that relate to public participation, and I also assess how these judgments are setting the tone and standard for the implementation of public participation.

Chapter 4 – The Courts and Public Participation

4.1 Introduction

This chapter examines twelve court judgments that were identified and sampled based on whether matters concerning public participation were raised and whether the judicial decision making refers to *public participation*. As noted in Chapter 1, the 2010 Constitution does not define public participation, leaving this to secondary legislation and to the courts. The focus of analysis here are the twelve court judgments. This chapter will consider, first, whether the court decisions indicate that genuine engagement and public participation has taken place and, second, what elements of the common law public decision-making framework are referred to in the judgments. In this chapter I also determine criteria for evaluating the opportunities for participation by individuals, assess the opportunities for public engagement, and the effectiveness of public participation by civil society, individual citizens, and constitutional bodies, seeking clarification of public participation processes and standards.

The twelve court judgments analysed in this chapter were sampled from www.kenyalaw.org, a website that is operated by the National Council for Law, the official publisher of the Kenya Law Reports and the Laws of Kenya.³⁸⁴ The sampled cases were identified using the topic search *public participation* from the court judgment section.

The sampled cases were identified using the topic search “public participation” from the court judgment section. I also considered what other term could be used by the Courts to denote public participation and identified “consultation”. However, after referring to the Constitution of Kenya, 2010, I noted that the latter term consultation was used more narrowly to refer to the

³⁸⁴ National Council for Law Reporting Act (1994) Rev. (2012), s 3(a).

discussions held between two constitutional offices or the national government and the county government.³⁸⁵ As a result, I continued my search for court decisions using the term “public participation”. This was a progressive process with a final search in December 2016, by which time the search had brought up 99 court decisions, including one court opinion.

This was a progressive process with a final search in December 2016, by which time the search had brought up 99 court decisions, including one court opinion. The intention was to identify court petitions that raise the matter of public participation and the judicial rulings that consider whether or not public participation was undertaken as per the 2010 Constitution and the existing legislation. Two cases per year from 2010–2016 were sampled. Of the 99 cases that potentially met the criteria that they mentioned public participation, twelve cases were chosen for analysis as the matter of public participation was key. Selection of the final twelve was to ensure that there included a range of petitioners. The twelve came from the following three categories of petitioner: eight from civil society, three were individual petitioners, and one was a constitutional body as a petitioner.

This chapter demonstrates that the public in Kenya is participating in the democratic process by petitioning the courts individually, as part of civil society, and also through constitutional institutions. I argue that by petitioning the courts, the public is expressing voice, exercising agency and sovereign power. The discussion also highlights that the courts are crucial in the matrix of public participation implementation because it clarifies the nature of public participation and since these court judgments are in the context of common law, therefore the courts are concurrently making public participation law.

³⁸⁵ Constitution of Kenya 2010, arts 205, 220 (c), 261(4) & 24(c)

4.2 Civil Society as the Petitioner

In this first cluster of eight cases, I examine decisions where the case was brought by members of civil society, particularly NGOs and associations demanding greater public participation in decision-making processes. These cases include disputes about participation in appointing a public official, scrutinising the use of public finances and the level of engagement required for public meetings and the passage of legislation. The variety of cases will provide insight to the various ways public participation is being applied in the context of the Constitution of Kenya 2010 in the constitutional transitional period.

4.2.1 *Constitution Petition 101 of 2011*

Kenya Youth Parliament and 2 others v Attorney-General and 2 others [2012] eKLR

The 2010 Constitution in Article 157 provides for an Office of the Director of Public Prosecutions, to be independent of the judiciary. A request for applications for appointment to Office of Director of Public Prosecutions was advertised in the Kenya Gazette, on 16 March 2011 in Gazette Notice No. 2649. The petitioners were Kenya Youth Parliament, Kenya Youth League. In addition, Patrick Njuguna, Kenyans for Peace with Truth and Justice (also referred to by the abbreviation KPTJ) and the African Centre for Open Governance (also referred to by the abbreviation AFRICOG) joined the petition as interested parties. The first respondent was the Attorney-General and the second respondent was Tobiko Keriako, the Director of Public Prosecution.³⁸⁶ The petitioners sought clarification from the court as to: “whether the appointment of the second respondent as the Director of Public Prosecutions would be inconsistent with the 2010 Constitution and the Public Officers Ethics Act 2003 in the light of allegations of corruption, incompetence, conflict of interest, and lack of reform credentials”.³⁸⁷

³⁸⁶ Kenya Youth Parliament & 2 others v Attorney-General & 2 others [2012] eKLR

³⁸⁷ Kenya Youth Parliament & 2 others v Attorney-General & 2 others [2012] eKLR

Regarding public participation, the petitioners argued that “the nomination panel did not encourage public participation in a meaningful and purposeful manner”.³⁸⁸ Furthermore, “Mr Ndubi for the interested parties further raised the issue that Professor Yash Pal Ghai referred to the second respondent’s suitability and argued that the relevant organs did not interrogate serious allegations about the nominee's suitability which were presented to them”.³⁸⁹ Mr Ndubi further asked the Court “to consider that Executive power has to be exercised as per the Constitution and that the Constitution should always be considered in its entirety”.³⁹⁰

The court held that the petitioners did not demonstrate that the 2010 Constitution had been contravened and that the court was therefore not required to intervene. The Court stated that the petition was lacking merit, although it did hold that the Respondents had acted wrongly by failing to provide material evidence.

The court requires evidence to act one way or the other. In this particular petition, the decision states that without “the necessary evidence” to show that constitutional provisions were violated in this case (the public participation provision), then the Court has to rule against the petitioner.³⁹¹ It is notable, however, that the petitioners raise the issue of “encouraging public participation in a meaningful and purposeful manner”.³⁹² By doing so, the Petitioner is proposing a standard that should be upheld: “However the court is adamant that there is no evidence provided of the Constitution being violated”.³⁹³

³⁸⁸ Kenya Youth Parliament & 2 others v Attorney-General & 2 others [2012] eKLR

³⁸⁹ Kenya Youth Parliament & 2 others v Attorney-General & 2 others [2012] eKLR

³⁹⁰ Kenya Youth Parliament & 2 others v Attorney-General & 2 others [2012] eKLR

³⁹¹ Kenya Youth Parliament & 2 others v Attorney-General & 2 others [2012] eKLR.

³⁹² Kenya Youth Parliament & 2 others v Attorney-General & 2 others [2012] eKLR.

³⁹³ Kenya Youth Parliament & 2 others v Attorney-General & 2 others [2012] eKLR.

In the Constitution, public participation is promoted as a national value but, as I have already noted, it is not defined. The petition attempted to have the court speak to the nature of public participation. The court, however, steered clear of this. Nevertheless, this case suggests that civil society has a standard or expectation of what effective participation should require, by contending “that the nomination panel did not encourage public participation in a meaningful and purposeful manner”.³⁹⁴ In petitioning this case, the petitioners wanted the court’s ruling on whether public participation was carried out.

In this case, the civil society petitioners referred the court to the 2010 Constitution (Article 10) in determining the standard of participation. This Article states that:³⁹⁵

The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them— (a) applies or interprets this Constitution; (b) enacts, applies or interprets any law.

With the expectation that an identified national value, in this case, public participation should be considered when the 2010 Constitution or law is being interpreted. The court does not believe that sufficient evidence was presented by the Petitioner and therefore could not rule on whether the genuine engagement and public participation had been undertaken. The core concern of the court was that it could not make decisions on the matter based on available evidence. Judicial decisions in the Kenyan jurisdiction are guided by evidentiary standards that are found in the Evidence Act, which states that “Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist”.³⁹⁶ Because of this, if the court is of the opinion that the petitioners did not demonstrate the facts, then the court has no choice but to rule accordingly.

³⁹⁴ Kenya Youth Parliament & 2 others v Attorney- General & 2 others [2012] eKLR.

³⁹⁵ Constitution of Kenya 2010, art 10 (a&b).

³⁹⁶ Evidence Act, Laws of Kenya -Revised Edition 2014 [2012] s 107(1).

This court decision is significant for my research because this judgment indicates that the public is seeking clarification on what constitutes public participation and an understanding of the standards of public participation from the courts. It also suggests a growing public expectation of more meaningful participation that is derived from the constitutional promise of public participation.

Furthermore, it raises the issue of the standard of evidence that is being applied by the court on a matter brought before it that directly concerns the 2010 Constitution and the court's readiness to offload all the burden of proof on the Petitioners when the matter before the court is weighty. While understanding that public participation is a legal right as per the 2010 Constitution of Kenya, the Evidence Act Revised 2014 (2012) would require the Petitioner to provide the necessary facts. It still raises the question as to whether the courts are quick to be blind to a glaring omission when the 2010 Constitution itself is very clear on value public participation.

4.2.2 Petition No. 56 of 2014

The Association of Gaming Operators – Kenya and 41 others vs. the Attorney-General and four others

The Petitioners stated that the National Assembly did not conform to Articles 118 and Article 201 of the Constitution, which made public participation in the legislative process, openness and accountability in matters of public finance, obligatory. The petitioners also stated the “National Assembly failed to invite written submissions and conduct public hearings on the Finance Bill 2013.”³⁹⁷

³⁹⁷ The Association of Gaming Operators – Kenya and 41 others vs the Attorney- General and four others (Petition No. 56 of 2014).

The counsel for the Petitioner illustrated how parliament ought to have facilitated public participation. He referred to the way the Nairobi County has implemented its obligation to ensure that there is public involvement in the County Governments Act 2012 by calling for the public to submit a memorandum and argued this should have been the case, but no such request was issued.³⁹⁸

There were a number issues to be determined in this case; however, the particular issue that is of concern to this research is “whether the Finance Act 2013 was unconstitutional for lack of public participation.”³⁹⁹ The determination of the court was that “the opportunity availed to the petitioners to forward their memorandum was sufficient and established that there was adequate public participation.”⁴⁰⁰ The court continued to determine that, what is expected of the legislature regarding the opportunity to participate, “all that is required of the legislature is to provide an opportunity for some form of public participation, for instance, allowing the public to make either written or oral submission at some point in the legislative process.”⁴⁰¹

The court contended that “[p]ublic participation as a national value is an expression of the sovereignty of the people articulated in Article 1 of the Constitution. The golden thread running through the Constitution is one of the sovereignty of the people of Kenya and Article 10 that makes public participation a national value is a form of expression of that sovereignty.”⁴⁰² The representative of the Attorney-General submitted “the petition did not

³⁹⁸ The Association of Gaming Operators – Kenya and 41 others vs the Attorney- General and four others (Petition No. 56 of 2014).

³⁹⁹ The Association of Gaming Operators – Kenya and 41 others vs the Attorney- General and four others (Petition No. 56 of 2014).

⁴⁰⁰ The Association of Gaming Operators – Kenya and 41 others vs the Attorney-General and 4 others (Petition No. 56 of 2014).

⁴⁰¹ The Association of Gaming Operators – Kenya and 41 others vs the Attorney-General and 4 others (Petition No. 56 of 2014).

⁴⁰² The Association of Gaming Operators – Kenya and 41 others vs the Attorney-General and 4 others (Petition No. 56 of 2014).

raise any constitutional issues for determination as the Constitution does not define public participation and it is left to the legislature to determine the nature and the scope of public participation.”⁴⁰³

In coming to this determination, the court referred to the South African Supreme Court of Appeal’s observation in *King v Attorney's Fidelity Fund Board of Control and Another 2006 (4) BCLR 462 (SCA) at 23-24 (S Afr)* where it was stated:⁴⁰⁴

Public involvement might include public participation through the submission of commentary and representations, but that is neither definitive nor exhaustive of its contents. It is plain that by imposing on parliament the obligation to facilitate public involvement in its process the Constitution sets a base standard but then leaves Parliament significant leeway in fulfilling it.

The court noted the petitioner’s complaint appeared to suggest that they were not given an opportunity to make an oral submission and again stated that although public participation in the law-making process is required:⁴⁰⁵

all that is needed of the legislature is to provide an opportunity for some form of public participation. This may mean allowing the public to make written or oral submissions at some point in the legislative process.

In this particular case, the court appears to limit public participation to the presentation of the memorandum and oral submissions, and no effort is made to connect the content of the Finance Act 2013 with the submissions to determine if the public participation that took place was an adequate reflection of the expectations of the Finance Act of 2013.⁴⁰⁶ It appears that the right to oral hearings is context specific and not determined by the 2010 Constitution of Kenya.

⁴⁰³ The Association of Gaming Operators – Kenya and 41 others vs the Attorney-General and 4 others (Petition No. 56 of 2014).

⁴⁰⁴ *King and Others v Attorneys Fidelity Fund Board of Control and Another* (561/2004) [2005] ZASCA 96; [2006] 1 All SA 458 (SCA); 2006 (4) BCLR 462 (SCA) (29 September 2005) at para 22.

⁴⁰⁵ The Association of Gaming Operators– Kenya and 41 others vs the Attorney- General and 4 others (Petition No. 56 of 2014).

⁴⁰⁶ Finance Act 2013.

This is important because the courts appear to be hesitant in determining the mode of public participation but rather leave it up to the administration to decide what form of public participation will be undertaken including oral hearings. However, at the same time the courts determinations are informed by a concern ¹⁰that public participation is a right that resides in the Constitution and must therefore be actualised by the administration. This may require, in the particular context of decision making, the holding of oral hearings or meetings. The ruling appears to suggest that because the Constitution does not define public participation then Parliament is therefore not compelled to create a law that ensures a definition. However, on the question of providing for participation, the impression generated by this ruling is that the bare minimum requirement for public participation, when met by Parliament, is sufficient. This ruling also suggests that the court is only interested in the minimum application of the law as opposed to both the spirit and the intention of the Constitution for any fuller participation. The court, in referring to the legislature, states the requirement is, “to provide an opportunity for some form of public participation.”⁴⁰⁷ Here, the court appears to disclaim any obligation to define and assent what is required by the constitutional requirement, thus maintaining and respecting the separation and function of the two organs of government.

It is then left to Parliament to act within its powers in creating legislation that defines public participation. As is discussed earlier, the Constitution, Article 118(1) stipulates that:⁴⁰⁸

Parliament shall— (a) conduct its business in an open manner, and its sittings and those of its committees shall be open to the public; and(b) facilitate public participation and involvement in the legislative and other business of Parliament and its committees.

⁴⁰⁷ The Association of Gaming Operators – Kenya and 41 others vs the Attorney-General and 4 others (Petition No. 56 of 2014).

⁴⁰⁸ Constitution of Kenya 2010, art 118 (1).

Furthermore, Article 118 (2) determines that “Parliament may not exclude the public, or any media, from any sitting unless in exceptional circumstances the relevant Speaker has determined that there be justifiable reasons for the exclusion.”⁴⁰⁹

Parliament also has standing orders that outline how public participation shall be undertaken in the legislative process. The standard of application of public participation is not explained in the parliamentary standing order, and one of the objectives of this research is to evaluate the extent that a common law decision-making standard is applied that can clarify and advance public participation. The court has therefore ruled that there was adequate public participation and “emphasised that it can be an oral submission or written memorandum”.⁴¹⁰ The importance of oral submissions cannot be downsized the right to be heard orally in some instances is key in public participation as it provides relief for the citizen and provides and opportunity for them to be heard.⁴¹¹

4.2.3 *Petition No. 486 of 2013*

Nairobi metropolitan PSV Sacco’s Union Limited and 25 others v County of Nairobi Government and three others

The petitioners submitted that following the enactment of the County Governments Act 2011 the duty to consult and public participation had been elaborated, as set out in Sections 88 to 91 of County Governments Act of 2011 but was not fulfilled.⁴¹² They submitted that it was:⁴¹³

⁴⁰⁹ Constitution of Kenya 2010, art118 (2).

⁴¹⁰ The Association of Gaming Operators–Kenya and 41 others vs the Attorney-General and 4 others (Petition No. 56 of 2014).

⁴¹¹ R (Osborn) v Parole Board & 2 other cases [2013] UKSC 61.

⁴¹² County Governments Act of 2011, s 88 to 91.

⁴¹³ Petition No. 486 of 2013 Nairobi Metropolitan PSV Sacco’s Union Limited and 25 others v County of Nairobi Government and three others.

Not enough to call a public meeting and “brand” it as a stakeholder meeting because there is no evidence, in any case, to demonstrate that the 1st Respondent summoned stakeholders with the intention of having their views aired on proposed parking fee increments.

The 1st and 2nd Respondent submission was that they had involved the public in enacting the Nairobi City Council Finance Act 2013 because five advertisements were carried in local daily newspapers of national circulation and on the first Respondent’s website. The 1st and 2nd Respondents conducted two separate forums with the first attracting up to 301 stakeholders and the second 70 stakeholders.⁴¹⁴

Relevant to this thesis is the concern:

That paragraph 6:1 of the Schedule to the Nairobi County Finance Act 2013 is unconstitutional to the extent that there was no public participation in the process of the making and enactment of the said Nairobi County Finance Act 2013.⁴¹⁵

The determination by the court was that, “the 1st and 2nd Respondents involved the public in enacting the Nairobi City County Finance Act as stipulated by Article 10(2) and Article 196(1) (b) of the Constitution”.⁴¹⁶ The court was also in agreement with the sentiments expressed by Justice Chaskalson, Chief Justice of South Africa in the Constitution Court of South Africa case of *Minister of Health v New Clicks South Africa (PTY) Ltd (supra)* where he stated that:

It cannot be expected of the lawmaker that a personal hearing will be given to every individual who claims to be affected by regulations that are being made. What is necessary is that the nature of the concerns of different sectors of the public should be communicated to the law-maker and taken into account in formulating the regulations.⁴¹⁷

⁴¹⁴ Petition No. 486 of 2013 Nairobi metropolitan PSV Sacco’s Union Limited and 25 others v County of Nairobi Government and three others.

⁴¹⁵ Petition No. 486 of 2013 Nairobi metropolitan PSV Sacco’s Union Limited and 25 others v County of Nairobi Government and three others.

⁴¹⁶ Petition No. 486 of 2013 Nairobi metropolitan PSV Sacco’s Union Limited and 25 others v County of Nairobi Government and three others.

⁴¹⁷ *Minister of Health v New Clicks South Africa (PTY) Ltd (supra)*.

The court was of the opinion that the petitioners had not made a case and that the petition should be dismissed. The reasoning of the court was that:⁴¹⁸

Advertisements for public input were numerous, they were public forums, meetings with stakeholders, media reports lobbying and the submission and receipt of written memorandum, all these were provided to the court as evidence.

The court is of the same opinion as Sachs J in *Minister of Health v New Clicks South Africa (PTY) Ltd (supra)*, stating that:⁴¹⁹

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

The court went on further to state that, “Petitioners had failed to demonstrate how the Respondents failed to achieve public participation and said that public participation is not the same as saying that particular public views must prevail.”⁴²⁰

⁴¹⁸ Petition No. 486 of 2013 Nairobi metropolitan PSV Sacco’s Union Limited and 25 others v County of Nairobi Government and three others.

⁴¹⁹ Petition No. 486 of 2013 Nairobi metropolitan PSV Sacco’s Union Limited and 25 others v County of Nairobi Government and three others.

⁴²⁰ Petition No. 486 of 2013 Nairobi metropolitan PSV Sacco’s Union Limited and 25 others v County of Nairobi Government and three others.

The question of exactly what public input consists of at a national and a county level arises in this case. The determination suggests that to the extent that submissions were made and taken account of, however limited, is more significant than the fact the submissions reflected what the public wanted in the particular matter. Public participation is articulated in the law. Kenyans have a responsibility on their part to participate as the occasion rises and should ensure that the minimum requirements of the law are met before they go to the courts to claim that public participation did not take place.

The courts also emphasised that a duty towards public participation and consultation does not mean that there is an equal obligation to agree with the public view. This interpretation, coming from the courts, further articulates a standard of public participation that has to be considered when measuring how effective participation is. The interpretation appears to set a comparatively low bar for what is required for public participation; however, the extent that the public is aware of this particular standard in this court judgment remains to be seen. The significance of this court decision lies in the court stating that the duty towards public participation and consultation does not mean that there is an equal obligation to agree with the public view. This position of the court in the context of the 2010 Constitution is open to debate. That approach is fully understandable and whether there has been adequate public participation must be determined contextually, but recognition of that reality should not obscure the judicial duty to expound the law of public participation.

4.2.4 *Petition 16 of 2013*

Kenya Small Scale Farmers Forum and 6 others v Republic of Kenya and 2 others [2013] Moses Munyendo and 908 others petitioners and the Attorney-General (1st Respondent), Minister for Agriculture (2nd Respondent)

The petitioners claim that they “sought an audience with the Agricultural Sector coordination unit, the Minister of Agriculture and Parliament to raise concerns about the content of the bills, but their efforts to be heard directly were in vain.”⁴²¹ They stated Parliament did not comply with Article 118(1)(b) of the Constitution which provides that Parliament shall “facilitate public participation and involvement in the legislative and other business of Parliament and its committees.”⁴²² The Respondent was opposed and stated the following, “That the said Acts of Parliament were prepared after extensive consultation with stakeholders in the agricultural section and the public through their elected representatives in Parliament.”⁴²³ The point “for consideration in this matter was whether the Crops Act 2012 and the Agriculture Fisheries and Food Authority Act 2012 passed into law and assented to by the President on 14th January 2013 are unconstitutional on the basis that they were enacted without public participation.”⁴²⁴

The matter of interest for this research, in this petition, is that the petitioners allege that the preparation of the Bills leading up to enactment was “undertaken in an environment of secrecy and that they were no public consultations or participation and that the Bills only came to light when they were introduced in Parliament on 9th October 2012.”⁴²⁵ Furthermore, “the petitioner contends that Parliament did not comply with Article 118(1)(b) of the Constitution which provides that Parliament shall, “facilitate public participation and involvement in the legislative and other business of Parliament and its committees.”

In making the determination, the court referred to *Republic vs. Ministry of Finance and Another Ex Parte Nyong'o Nairobi HCMCA No. 1078 of 2007 (HCK) [2007] KLR 299*. In that

⁴²¹ Petition 16 of 2013 Kenya Small Scale Farmers Forum & 6 others v Republic of Kenya & 2 others [2013] Moses Munyendo & 908 others.

⁴²² Constitution of Kenya 2010, art 118(1)(b).

⁴²³ Petition 16 of 2013 Kenya Small Scale Farmers Forum & 6 others v Republic of Kenya & 2 others [2013] Moses Munyendo & 908 others.

⁴²⁴ Petition 16 of 2013 Kenya Small Scale Farmers Forum & 6 others v Republic of Kenya & 2 others [2013] Moses Munyendo & 908 others at 1.

⁴²⁵ Petition 16 of 2013 Kenya Small Scale Farmers Forum & 6 others v Republic of Kenya & 2 others [2013] Moses Munyendo & 908 others.

decision, the court held that: “Once a decision had been made after a public participation process by the decision making authority, then the outcome is not subject to judicial review as the decision can only be interrogated on the merits, and that is beyond the jurisdiction of judicial review.”⁴²⁶ The court further stated that “participation of the public should be authentic and the facts surrounding it should be as detailed as possible, documented, provided for sufficient notice with public announcements in radio and print.”⁴²⁷ This statement reinforces the criteria required for public participation.

This decision creates a clear distinction between the two ways in which people can ensure that they are participating: the first through delegation to elected representatives and the second through direct participation by the public. While maintaining that each is a legitimate means of exercising sovereign power under the 2010 Constitution, the emphasis here is on representative participation and the appearance that it creates (that it is a more legitimate form of participation because it is being undertaken by a representative) does not accurately reflect the intention of Article 1(2) of the 2010 Constitution which equates representative and direct participation. This decision is similar to *The Association of Gaming Operators – Kenya and 41 others vs. the Attorney- General and four others (Petition No. 56 of 2014)* in that the courts remove themselves from interfering with what they view to be parliamentary business to maintain the separation of powers and functions that is the basis of the 2010 constitutional arrangements. At the same time the courts appear to be walking away from their constitutional duty to expound the law.

However, in some of the cases, the court presents a standard for what it considers real public participation: prior and sufficient notice so that the public can make contributions. The

⁴²⁶ Petition 16 of 2013 Kenya Small Scale Farmers Forum & 6 others v Republic of Kenya & 2 others [2013] Moses Munyendo & 908 others.

⁴²⁷ Petition 16 of 2013 Kenya Small Scale Farmers Forum & 6 others v Republic of Kenya & 2 others [2013] Moses Munyendo & 908 others.

court furthermore elaborates on the standards of participation such as the location of the meeting, the record of attendance and contributions being shown.⁴²⁸ By insisting that the place of the meeting be stipulated, the court rightly raises the concern that a public meeting can only be held in a publicly accessible place to qualify as a public meeting. By insisting on having minutes that record attendance at a public participation activity, the court is also cognisant of the fact that the meeting must be attended by the public and relevant stakeholders to be meaningful and more so, the contributions of the public must be recorded.

The importance of this court decision is that the court delivers further standards of public participation when it determines that relevant stakeholders must be in attendance of a public participation meeting, that such a meeting requires to be documented, and that the location of the meeting is key in ensuring public access.

4.2.5 Constitution Petition No. 318 of 2012

Law Society of Kenya v Attorney-General & 2 others [2013] eKLR

The Petitioner is the Law Society of Kenya, and the Respondents are as follows: the 1st Respondent is the Attorney-General, the 2nd Respondent is the judicial service commission, and the 3rd Respondent is the Chief Justice. The Law Society of Kenya took issue with the constitutionality of the Statute Law Miscellaneous (Amendments) Act 2012, which amends the Advocates Act (Chapter 16 of the Laws of Kenya which will result in the amendments of the Law Society of Kenya Act). With regards to public participation, the petitioners sought a determination of whether Article 10 and Article 118 of the Constitution of Kenya were

⁴²⁸ Petition 16 of 2013 Kenya Small Scale Farmers Forum & 6 others v Republic of Kenya & 2 others [2013] Moses Munyendo & 908 others.

considered in the passing of the Statute Law Miscellaneous (Amendments) Act 2012. The court stated that:⁴²⁹

In order to determine whether there has been public participation the court is required to interrogate the entire process leading to the enactment of the legislation; from the formulation of the legislation to the process resulting in the enactment of the statute.

This emphasis by the court is on the whole process in the development of public participation law that recognises a multitude of stages that require the same level of attention. The court further observed that:⁴³⁰

there is public participation in all the stages a bill passes through in parliament and the same is provided for by parliamentary standing orders which provide for advertisement of the bill and public hearing and invitation to the public to submit written memorandum and give their inputs.

The court emphasised that that the “issue of public participation is a core value in our Constitution and an open democratic state such as ours and should be taken seriously by all public bodies and state organs.”⁴³¹ The court argued that the burden of proof remained on the petitioner, the Law Society of Kenya, and that they was no evidence on the affidavit present to the court indicating that there was no public participation.

The court emphasised that the onus is on the parties to address the courts on the standards to use to measure the level of public participation. Again, as with the preceding cases, which included disputes about participation in appointing a public official, scrutinising the use of public finances and the level of engagement required for public meetings or the passage of legislation, the courts determined that the parties that have brought the concern did not demonstrate how public participation was absent. Yes, the emphasis yet again is that the legal onus is on the Petitioner to establish lack of public participation. But is this a legitimate

⁴²⁹ Law Society of Kenya V Attorney- General & 2 others [2013] eKLR.

⁴³⁰ Law Society of Kenya V Attorney- General & 2 others [2013] eKLR.

⁴³¹ Law Society of Kenya V Attorney- General & 2 others [2013] eKLR.

approach for the court to take as we are talking about constitutional obligation on organs of the state?

The expectation that the petitioner is to provide the evidence is the established standard in law in Kenya and several court decisions I sampled have found a lack of provision of required evidence in different petitions. However, if courts are being compelled to remind the petitioners of the need to provide evidence in multiple petitions then this suggests that this matter of providing sufficient evidence needs to be addressed. What is not clear is why this is happening on a regular basis, do we need greater public education about how to present petitions? Is it a question of building the capacity of the petitioners considering they ranged from individuals, and civil society groups, to constitutional bodies? Or could it be a particular understanding of the law regarding what constitutes sufficient evidence needs to be clarified by courts?

I recognise that this matter of provision of evidence resides with the petitioner and is not simply a matter of procedural technicality and therefore cannot be done away with. I believe it requires further examination mainly because the Constitution of Kenya, 2010 states in Article 159(2)e that “the purpose and principles of this Constitution shall be protected and promoted” therefore it is important to ensure that the capacity of petitioners to exercise their constitutional rights is reinforced to in line with the Constitution. Furthermore, other court precedents on constitutional rights for instance *Minister of Home Affairs v Fisher* [1980] argue for a more “generous and purposive” interpretation of rights that are contained in constitution. It therefore seems sensible to pass the legal onus on the administration (as they have a constitutional obligation to ensure public participation is facilitated) to point to the evidence suggesting sufficient public participation has been undertaken. Only the

administration will have evidence as to whether or not the obligation of public participation has been met.

The significance of this court decision to my research is that on the matter of standards this court appears to volley the ball back to the public to point out the standards that exist in the Constitution. At the same time the court states that the whole process must be examined. This requires a public that has a high level of knowledge of the exact standards that are set out in the 2010 Constitution. A high level of civic and constitutional education is also required of the public; the level of constitutional and civic education in Kenya and the ramifications will be examined in chapter six and seven.

4.2.6 Petition No. 314 of 2016 (consolidated with petition No. 314 of 2016 and No. 306 of 2016)

Trusted Society of Human Rights Alliance & 3 others v Judicial Service Commission & another [2016] eKLR

For this case that has civil society as a petitioner, the first petitioner, the Trusted Society of Human Rights Alliance (the 1st Petitioner herein), is described as a duly registered Human Rights Society. The 2nd Petitioner was Arnold Magina, the third petitioner, Yash Pal Ghai, was a Kenyan citizen and a retired professor of law and former Chairperson of the Constitution of Kenya Review Commission, and the 4th Petitioner was Samwel Mohochi. The 1st Respondent was the Judicial Service Commission and the second 2nd Respondent was the Attorney-General. The *amicus curiae* was the organisation Article 19-East Africa and the Law Society of Kenya was an interested party.⁴³² The case was provoked by the “decision of the Commission to

⁴³² Trusted Society of Human Rights Alliance & 3 others v Judicial Service Commission & another [2016] eKLR, para 8.

commence the recruitment of suitable persons for the positions of the Chief Justice, the Deputy Chief Justice and a Judge of the Supreme Court of Kenya.”⁴³³ As the petition stated:⁴³⁴

on the 16th June 2016 the Commission advertised vacancies in the positions of the Chief Justice (CJ) and Deputy Chief Justice (DCJ) and a Judge of the Supreme Court of Kenya for the Judiciary of the Republic of Kenya pursuant to which interested applicants had up to the 6th of July, 2016 to submit their applications.

The 1st Petitioner stated that in the said advertisements, the Commission enumerated a raft of qualifications, required from applicants, located both in the 2010 Constitution and outside the Constitution of Kenya including clearance from Higher Education Loans Board for beneficiaries and non-beneficiaries, Kenya Revenue Authority, Directorate of Criminal Investigations, Advocates Complaints Commission, Ethics and Anti-Corruption Commission and a recognised credit reference bureau According to the 1st Petitioner, whereas the Constitution in Articles 10, 73 and 166(3) has set the qualifications for the positions in question, malice, impunity and greed drove the Respondents to oust the provisions of the Constitution and instead set criteria unknown to the law.

The 2nd Petitioner stated that, “all applicants who meet the minimum qualifications are shortlisted for an interview where at any other higher threshold/advantage criteria may be tested and applied in the interest of equal opportunity”. This listed a standard that was used in the shortlisting. Furthermore, according to the 2nd Petitioner:⁴³⁵

consequential short listing of candidates for the position of Chief Justice of the Republic of Kenya was an administrative action that affected the rights of the interested candidates to equal

⁴³³ Trusted Society of Human Rights Alliance & 3 others v Judicial Service Commission & another [2016] eKLR, para 9.

⁴³⁴ Trusted Society of Human Rights Alliance & 3 others v Judicial Service Commission & another [2016] eKLR, para 10.

⁴³⁵ Trusted Society of Human Rights Alliance & 3 others v Judicial Service Commission & another [2016] eKLR, para 39.

opportunity and the general public to public participation in the eventual determination of who will be the next Chief Justice of the Republic of Kenya.

As a result of this the 2nd Petitioner further argued that: “The public has an over-arching interest in the whole process being conducted in strict compliance with Constitutional requirements and passing the test of the kindred good governance concepts of constitutionalism and the rule of law.”⁴³⁶

With regards to public participation the decision of the court on this matter was “where the right to public participation is required, it ought not to be abrogated simply because there is in place some form of delegated representation.”⁴³⁷ In relation to public participation the court found that the Commission did not violate the requirement of public participation.⁴³⁸ According to the court:⁴³⁹

A decision making process in my view is a process whereby the concerned authority is confronted with two or more causes of action and is required to choose one or some of them, It does not in my view encompass a situation where the choice has already been made either by the Constitution or legislative instrument and the role of the authority is simply [to] authenticate the state of affairs.

The court clarified that direct representation cannot nullify public participation and in doing so reinforces Article 1(2) of the Constitution, as was noted earlier. At the same time the court reinforced that there are two equal ways in which Kenyans can be represented – directly through public participation or through representatives. The court also states that if the matter

⁴³⁶ Trusted Society of Human Rights Alliance & 3 others v Judicial Service Commission & another [2016] eKLR, para 39.

⁴³⁷ Trusted Society of Human Rights Alliance & 3 others v Judicial Service Commission & another [2016] eKLR, para 254.

⁴³⁸ Trusted Society of Human Rights Alliance & 3 others v Judicial Service Commission & another [2016] eKLR.

⁴³⁹ Trusted Society of Human Rights Alliance & 3 others v Judicial Service Commission & another [2016] eKLR, para 256.

has already been decided by the Constitution or by the law then it is therefore not available for consideration for decision making.

The significance of this court decision to my thesis is that the courts set out the tension that is present in Article 1(2) of the Constitution of Kenya and asserts that public participation cannot be done with and be replaced by delegated representation. This is in direct contrast with previous court decisions and at the same time raises the ongoing tension in Article 1(2) which equates direct public participation and representative democracy and fails to resolve this constitutional conundrum.

4.2.7 *Petition No. 628 of 2014*

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

The Coalition for Reform and Democracy (also referred to by the abbreviation (CORD) was the 1st Petitioner, the Kenya National Commission on Human Rights (also referred to by the abbreviation NCHR) was the second petitioner, Samuel Njuguna Ng'ang'a was the 3rd Petitioner. The Respondents are the Republic of Kenya and 10 others. This petition argued that:⁴⁴⁰

the advertisement in the *Daily Nation* and the *Standard News* was not sufficient for public participation. It noted that the period for publication of the Bill was reduced from fourteen days to one day and the advertisement was only made on the 10 December 2014 for a consultative meeting with the relevant committee of the National Assembly to be held on 11 December 2014 without proper circulation of the notice or the Bill itself.

It was the petitioners further argument that the public participation on the Bill was limited to Nairobi County only out of 47 Counties. There was no attempt to carry out civic education and

⁴⁴⁰ Petition No. 628 of 2014 Petitioners Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & 10; others [2015] eKLR.

to widely reach the majority of Kenyans who would be affected by limitations of rights under the Bill, by saying advertising on local community radio or other media.⁴⁴¹

With regards to the timing of the public participation, it was reiterated that:⁴⁴²

the time allocated to the public for participation was grossly inadequate considering the nature and content of the Bill and that on Wednesday 18th December 2014 the relevant committees considering the Bill held meetings at night way past 10:00 pm making it impossible for the conduct of business in an open manner or public as required under Article 118 (1) of the Constitution of Kenya.

The Kenya National Commission on Human Rights asserted that on 10 December 2014, a public notice in the newspapers was issued for public participation to take place on 10, 11 and 15 December 2014. Then on 11 December 2014 the Kenya National Commission on Human Rights urgently organised a press conference highlighting that the proposed Security Laws (Amendment) Bill changes sought to introduce to the law were not minor as indicated in the Bill's Memorandum of objects.

The Attorney-General did not dispute that there is a constitutional obligation on the National Assembly to facilitate public participation in the process of enactment of legislation. His contention, which was challenged by the petitioners, was that there was sufficient public participation before the enactment of the Security Laws (Amendment) Act 2014.⁴⁴³ The question before the courts then was whether the public participation allegedly afforded in the passing the Security Laws (Amendment) Act, was reasonable under the circumstances.

⁴⁴¹ Petition No. 628 of 2014 Petitioners Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & 10; others [2015] eKLR.

⁴⁴² Petition No. 628 of 2014 Petitioners Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & 10; others [2015] eKLR.

⁴⁴³ The Security Laws (Amendment) Act 2014.

In the case of *Matatiele Municipality and Others vs. President of the Republic of South Africa and Others (2)* (CCT73/05A) [2006] ZACC 12; 2007 (1) BCLR 47 (CC) to which the petitioners have referred the Court, the constitutional Court of South Africa proceeded to examine what amounts to reasonable participation and held that:⁴⁴⁴

The nature and the degree of public participation that is reasonable in a given case will depend on a number of factors. These include the nature and the importance of the legislation and the intensity of its impact on the public. The more discrete and identifiable the potentially affected section of the population, and the more intense the possible effect on their interests, the more reasonable it would be to expect the legislature to be astute to ensure that the potentially affected section of the population is given a reasonable opportunity to have a say. Also, in evaluating the reasonableness of the conduct of the provincial legislatures, the Court will have to regard what the legislatures themselves considered to be appropriate in fulfilling the obligation to facilitate public participation in the light of the content, importance and urgency of the legislation.

The court in *Petition No. 628 of 2014* consolidated with *Petition No. 630 of 2014* and *Petition No.12 of 2015* states that:⁴⁴⁵

There is certainly no doubt that the parties that participated and gave their representations during the legislative process of Security Laws (Amendment) Act, No 19 of 2014 (“SLAA”) represent the various and diverse interests of Kenyans. They are also undoubtedly well versed with the contents and areas that SLAA touched on ... while acknowledging that an opportunity could have been availed for greater public participation, it would be to expect too much to insist that every Kenyan’s view ought to have been considered prior to the passage of SLAA or any statute for that matter.

The court by addressing the issue of who gets to participate is clear that the standard of participation in the Kenyan context does not envisage every Kenyan participating in every governance process. However, the court equally does not state what then is sufficient

⁴⁴⁴ In *Matatiele Municipality and Others vs. President of the Republic of South Africa and Others (2)* (CCT73/05A) [2006] ZACC 12; 2007 (1) BCLR 47 (CC), para 68.

⁴⁴⁵ *Petition No.628 of 2014 Consolidated with Petition No.630 of 2014 And Petition No.12 OF 2015*, para 199.

participation in terms of numbers that would be reflective of the aspirations of the Constitution of Kenya 2010. The court further reiterated that that:⁴⁴⁶

In any event, the members of the National Assembly pursuant to Articles 1(2), 94(2), 95(1) and 97 of the Constitution also represent the people of Kenya. While such representation cannot be said to dispense with the need for public participation, we take the view that taken together with the views expressed by the organisations set out above, there was reasonable public participation and Security Laws (Amendment) Act, cannot be held unconstitutional on account of lack of public participation.

The court appears to blur the role of public participation and representative democracy while at the same time stating that they are distinct. The court does this by inferring that the members of the National Assembly expressing their views on the Security Laws (Amendment) Act, plus some public view put together make for reasonable public participation. This reduces public participation to its minimalist form. The Constitution in Article 1(2) makes a distinction between how Kenyans are to exercise their sovereign power either directly (as public participation) or indirectly through representative models of public engagement). Whichever method Kenyans chose is legitimate but there is a perceived tension between these two forms of exercising of sovereign power. The standing orders of Parliament are clear on matters regarding public participation; they require that “The departmental Committee to which the Bill is committed shall facilitate public participation and shall take into account the views and recommendations of the public.”⁴⁴⁷ This ensures that the representatives of the people present their views and that the public also get an opportunity to do the same and thus fulfilling the requirements of Article 1(2) of the 2010 Constitution.

This debate has also been played out with attempts by academics trying to clarify the role of the Judiciary vis-a-vis Parliament with the emphasis put on the separation of powers,

⁴⁴⁶ Petition No. 628 of 2014 Consolidated with Petition No. 630 of 2014 and Petition No.12 OF 2015.

⁴⁴⁷ Standing Orders Parliament of Kenya, s 127(3).

the role of checks and balances, and also the primary role of Parliament in creating the legislation and the Judiciary in interpreting the laws.⁴⁴⁸ Ghai (2015), for example, clarifies the position of the Constitution of Kenya 2010 on the separation of powers by noting that the separation of powers is not stated in the 2010 Constitution however what is clear is that each body has a specific mandate that it is to execute.⁴⁴⁹ I argue that a common law decision-making framework requires that stakeholders are consulted, and in this case the stakeholders include the public outside the parliament. The decision of the court was not favourable to the public as the stakeholders and it appears to have held that representatives are standing for the public which is valid and lawful. However, the 2010 Constitution states that direct public participation and representative participation are equally valid and thus not mutually exclusive.⁴⁵⁰

The implication of this court case to this research lies in identifying the existing tension in the equally lawful representative participation on behalf citizens and direct participation by the public as the courts do not provide clarity on the distinction of the means of participation. However, keeping in mind the 2010 Constitution delegates the sovereignty of the people to the representatives and at the same time the people of Kenya retain their sovereign power hence creating what appears to be an ongoing constitutional challenge that cannot be resolved by depending on constitutional norms because the paradox lies in the Constitution itself. Article 1(2) is clear, however its implementation in the constitutional transition period has shown that it will continue to be a challenge.

⁴⁴⁸ Ngirachu, J. (2014, July 29). Leave Courts to Interpret Law, MPs Told *Daily Nation*. Retrieved September 5, 2016, from <http://www.nation.co.ke/news/politics/Parliament-Week-Lecture-University-of-Nairobi/1064-2402362-12dyjf/indexhtml>

⁴⁴⁹ Ghai, Y.P. (2015). Separation Of Powers: A La Montesquieu Or The 2010 Constitution? *The Star*, 7 February. Retrieved 30 January, 2018, from https://www.the-star.co.ke/news/2015/02/07/separation-of-powers-a-la-montesquieu-or-the-2010-Constitution_c1079944

⁴⁵⁰ Constitution of Kenya 2010, art 1(2).

4.2.8 Petition 2 of 2016

Dricon Transporters Savings and Credit Co-Operative Society Limited v County Government of Machakos & another [2016] eKLR

The Petitioner was the Dricon Transporters Savings and Credit Co-Operative Society Limited. This petition was first filed on 3 February 2016. The 1st Respondent was the Government of Machakos County and the 2nd Respondent was the county assembly of Machakos County. The petitioner requested the courts to “declare that the Respondents had failed to undertake adequate public participation in the enactment of Machakos County Finance Act contrary to Article 10, 196 of the Constitution and County Governments Act Section 117.”⁴⁵¹

The petitioner argued that it was the responsibility of both the county government and the county assembly to ensure that the public participation process was undertaken sufficiently and that the citizens were notified about legislative matters.⁴⁵² The 1st Respondent asked the court to decline the request of the petitioner because they had failed to present how their constitutional rights were disregarded. The petitioner stated that the Respondents did not consult or involve its membership on matters where they had the scope of influence and experience before passing the law.⁴⁵³ The petitioner requested the court to declare “an order of mandamus compelling the Respondents to resubmit any variation in fees and licence.”⁴⁵⁴

The decision ruled that the Machakos County Finance Act 2015 was unconstitutional as it was against provisions of Articles 196, which refers to public participation at the county assembly, and Article 201, which describes public participation in financial matters. The court

⁴⁵¹ Petition 2 of 2016 Dricon Transporters Savings and Credit Co-Operative Society Limited v County Government of Machakos & another [2016] eKLR.

⁴⁵² Petition 2 of 2016 Dricon Transporters Savings and Credit Co-Operative Society Limited v County Government of Machakos & another [2016] eKLR.

⁴⁵³ Petition 2 of 2016 Dricon Transporters Savings and Credit Co-Operative Society Limited v County Government of Machakos & another [2016] eKLR.

⁴⁵⁴ Petition 2 of 2016 Dricon Transporters Savings and Credit Co-Operative Society Limited v County Government of Machakos & another [2016] eKLR.

emphasised that it cannot instruct another arm of the government how to act because of the principle of separation of powers. However, it noted that public participation was insufficient and would, therefore, leave it up to the Machakos County government and County Assembly to decide how they would ensure that public participation was undertaken.

This court decision is of particular relevance to this research because it refers to the County Public Participation Act of Machakos, which sets down guiding principles for public participation in Machakos county which is one of the counties that I examine in Chapter 5. The basis for determining whether public participation did occur in the process of the development of the Machakos Finance Act of 2015 is based on the Machakos County Public Participation Act 2014.

The court's decision considers the level of literacy of Machakos citizens and declares that a notice through a newspaper advertisement published in English in some national newspapers was insufficient. The decision further considers the matter of full disclosure and prior notice in a Common-law decision-making framework. That the only published notice was in an English published newspaper resulted in the citizens of Machakos County not being subject to sufficient notice and disclosure. The court decision also acts as a demonstration of the development of public participation law in Kenya and further reinforces the need to have county public participation laws that provide guidelines for the specific counties. These guidelines will ensure that the matter of public participation at the county level is guided by specific standards that are tangible and within the law. The importance of this court case to this research lies in the determination that identifies disclosure, and prior and sufficient notice, as standards for sufficient public participation. These standards already exist in the Machakos County Public Participation Act 2014 guidelines and therefore must be adhered to.⁴⁵⁵

⁴⁵⁵ Machakos County Public Participation Act 2014, s 5(1&2).

4.3 Individual Citizens as Petitioners

In this section, I examine three court decisions which were sampled in the period 2010–2016 that are court decisions that touched on public participation, which were petitioned by individual citizens. They demonstrate that the individual Kenyan citizen petitions the courts on matters of public participation because they are aware of their constitutional participatory rights and equally aware of Article 3(1) of the Constitution of Kenya: “Every person has an obligation to respect, uphold and defend this Constitution.”⁴⁵⁶ Thus, these are examples of citizens using new opportunities as individuals to petition the courts regarding matters that affect them as a person or as part of a community.

4.3.1 *Petition No. 532*

Robert N Gakuru & another v Governor Kiambu County & 3 others [2013] eKLR

This petition was a consolidation of five petitions. In full, these five petitions are: Petition No. 12 of 2014 by Likambu Matatu Savings and Credit Co-operative Society Ltd and Others; Petition No. 35 of 2014 by Quarry Owners Association of Kenya; Petition No. 36 of 2014 filed by Eliud Ngugi Ngigi and another; Petition No. 42 of 2014 filed by Gacheru Kariuki; and Petition No. 72 of 2014 filed by Patrick Kamau Kungu and others variously against the Respondents.⁴⁵⁷ The particular issue of concern to this research was as follows: “whether public participation was carried out as stipulated in the County Governments Act 2012 in the process of formulating the Kiambu Finance Act 2013.”⁴⁵⁸ The petitioners argued that no consultation took place nor were invitations made to Respondents before the Act was enacted.

⁴⁵⁶ Constitution of Kenya 2010, art 3(1).

⁴⁵⁷ Petition No. 532 Robert N Gakuru & another v Governor Kiambu County & 3 others [2013] eKLR.

⁴⁵⁸ Petition No. 532 Robert N Gakuru & another v Governor Kiambu County & 3 others [2013] eKLR.

According to Petitioner No. 12, their opinions on the matter were obtained during a meeting at the Windsor Hotel with regards to an earlier Bill and the draft Bill, this Bill was rejected when it was tabled at the assembly. Petitioner No. 36 of 2014 raised the issue that they were left out in the Windsor Hotel meeting despite being members of the Kabete Sub-county business owners and services Association Petition No. 532.⁴⁵⁹

In making its decision, the court referred to a series of precedents. It held that “the Judges are the mediators between the high generalities of the Constitution text and the messy details of their application to concrete problems.”⁴⁶⁰ In the court’s view, “public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purpose of fulfilment of the constitutional dictates.”⁴⁶¹ The court determined that public participation was not carried out as stipulated in the County Government 2012 Act⁴⁶² and went on to declare that “the Kiambu Finance Act 2013, gazetted in the Kiambu County Gazette Supplement No. 8 (Act No. 3) violates the Constitution of Kenya and the same is null and void.”⁴⁶³

This decision shows that the County Governments Act of 2012 was not applied in matters relating to public participation in this case. A standard of public participation was insisted upon when the court stated that, “sufficient notice was not provided to the public”⁴⁶⁴ and that the public participation activity was held in a private establishment that was not open to the general public. This decision implies that sufficient notice and public access to a public participation process is an absolute minimum for having participation occur. In this decision, the court in 2013 set a standard with regards to public access to a public participation process and activity. The voice of the residents of Kiambu county was heard in this particular case

⁴⁵⁹ Petition No. 532 Robert N Gakuru & another v Governor Kiambu County & 3 others [2013] eKLR.

⁴⁶⁰ Nation Media Group Limited vs. Attorney- General [2007] 1 EA 261 as cited in Petition No. 532 Robert N Gakuru & another v Governor Kiambu County & 3 others [2013] eKLR.

⁴⁶¹ Petition No. 532 Robert N Gakuru & another v Governor Kiambu County & 3 others [2013] eKLR.

⁴⁶² Petition No. 532 Robert N Gakuru & another v Governor Kiambu County & 3 others [2013] eKLR.

⁴⁶³ Petition No. 532 Robert N Gakuru & another v Governor Kiambu County & 3 others [2013] eKLR.

⁴⁶⁴ Petition No. 532 Robert N Gakuru & another v Governor Kiambu County & 3 others [2013] eKLR.

where they petitioned the courts to provide clarity on this matter. That an individual took this case to court also indicates an interest from the individual residents of Kiambu in the standards that should be applied when implementing public participation. While this is only one case, it demonstrates civic responsibility on the part of the individual resident which was what the public participation requirement in the Constitution of Kenya 2010 intended to engender.

The impact of this court decision to this research also lies on its emphasis on the standards that have to be observed in the implementation of sufficient public participation. On the matter of public access, this is a specific standard that has been developed from this case, although it is not unique to Kenya. The issue of insufficient notice on the part of Kiambu Government speaks to a lack of considerations of the operations of the public participation process and is at odds with the standard of common law in the matters that require consultation. The court has set an expectation of fair notice and access that is required for public participation.

4.3.2 *Petition No. 3 of 2016*

Simeon Kioko Kitheka & 2 others v County Government of Machakos & 3 others [2016] eKLR

This petition was dated 18 February 2016 and the parties stated that:⁴⁶⁵

on 4th December 2015 the 2nd Respondent assented to the Machakos Finance Act 2015 and that the residents of Machakos County were left out of the process leading to the enactment of the Act That the new rates provided by the Act are oppressive to the poor and /or ordinary traders and residents of the County, and detrimental to their socioeconomic well-being.

The petitioners in this matter were officials of the Kenya National Chamber of Commerce and Industry (Machakos Branch), being the Chairman, Vice Chairman, and Treasurer, respectively.

⁴⁶⁵ Petition No. 3 of 2016 Simeon Kioko Kitheka & 2 others v County Government of Machakos & 3 others [2016] eKLR.

The 1st Respondent is the Government of the County of Machakos and the 2nd Respondent is the Governor and Chief Executive Officer of the said Government.⁴⁶⁶ The Petitioners sought a declaration that the said Act is unconstitutional, that the Machakos residents’ “right to participation in the process leading to the enactment of the Act had been violated, and an order of prohibition stopping the operations and implementation of the said Act.”⁴⁶⁷ This is clarified by the court statement:⁴⁶⁸

That under Article 2(4) of the Constitution, any law that is inconsistent with the Constitution is void to the extent of the inconsistency, and any act or omission in contravention of the Constitution is invalid. In addition, under Article 165(3)(d)(i) and (ii) the High Court is clothed with the jurisdiction to hear any question respecting the interpretation of the Constitution including the determination of the question whether any law is inconsistent with or in contravention of the Constitution and the question whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of, the Constitution.

The court decision that was determined about public participation in this case was that, “The submissions on behalf of the Petitioners in this respect were that they had established a prima facie case that the Machakos Finance Act 2015 was enacted in contravention of the legal provisions on public participation. According to the Petitioners, the Budget Statement delivered on 25 June 2015 and the notice of invitation to members of the public which they annexed were both mere formalities by the Respondents and did not amount to public participation.”⁴⁶⁹ Further, the court determined that the 1st and 2nd Respondents:⁴⁷⁰

⁴⁶⁶ Petition No. 3 of 2016 Simeon Kioko Kitheka & 2 others v County Government of Machakos & 3 others [2016] eKLR.

⁴⁶⁷ Petition No. 3 of 2016 Simeon Kioko Kitheka & 2 others v County Government of Machakos & 3 others [2016] eKLR.

⁴⁶⁸ Petition No. 3 of 2016 Simeon Kioko Kitheka & 2 others v County Government of Machakos & 3 others [2016] eKLR.

⁴⁶⁹ Petition No. 3 of 2016 Simeon Kioko Kitheka & 2 others v County Government of Machakos & 3 others [2016] eKLR.

⁴⁷⁰ Petition No. 3 of 2016 Simeon Kioko Kitheka & 2 others v County Government of Machakos & 3 others [2016] eKLR.

did have not available any memoranda and that newspaper advertisements and attendance schedules provided by the 1st and 2nd Respondents are not proof of public participation for the following reasons: There are no minutes of the meetings that were held. The only attendance schedules are from Mavoko Sub-County and no other Sub-County within the entire Machakos County.

The documented attendance roll from the Mavoko sub-county meeting were not legible, and so it is not clear who exactly participated. The only names that could be deciphered were those of members of the County Assembly. Finally, it was determined that a newspaper advertisement was not considered to be sufficient as public participation because levels of illiteracy and poverty in Machakos County are high and more needed to have been done.⁴⁷¹

This case is highly relevant to this thesis, setting as it does the standard of public participation that the court determined should be met including the disclosure levels that are required for the people of Machakos. The judgment acknowledged the level of poverty and literacy of the residents of Machakos County and noted this required further effort to ensure the proper dissemination of information. The fact that people attended a meeting is not tantamount to public participation. The case is also significant for highlighting that what exactly went on in the public participation meeting is of interest to the courts and should have been documented.

In this case study, the courts relied on the ruling made in *Doctors for Life International v Speaker of the National Assembly and Others*⁴⁷² on what entails effective public participation: access to information, and the facilitation of learning and understanding to achieve meaningful involvement by ordinary citizens. These requirements are in line with the public decision-

⁴⁷¹ Petition No. 3 of 2016 Simeon Kioko Kitheka & 2 others v County Government of Machakos & 3 others [2016] eKLR.

⁴⁷² *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).

making framework of common law, and enabled the court to rule that there was not sufficient public participation.

The impact of this court decision also lies in the court identifying that the sufficient level of disclosure was not met by the Machakos County Government who were the Respondents. There was inadequate disclosure of information without considering the level of literacy of the public and disseminating the information in a form that could be easily consumed by the public in Machakos County. A consideration of the level of English literacy of the population was not made. This places the onus on the Machakos County Government to consider what type of information they are disseminating and how they are doing it. The emphasis is on the need for the Machakos County Government to respect the rule of law with regards to public participation that is provided for by the Machakos County Public Participation Act.

4.3.3 *Petition No. 163 of 2016*

Wamatangi Kimani Paul v Commission on Revenue Allocation & another [2016] eKLR

The Petitioner was Wamatangi Kimani Paul, the 1st Respondent was the Commission on Revenue Allocation and the Honourable Attorney-General is the 2nd Respondent. According to the courts, it was apparent that a number of stakeholders were consulted by the 1st Respondent including: the National Treasury, the Kenya Institute for Public Policy Research Analysis (KIPPRA), the Kenya National Bureau of Statistics (KNBS), public and private universities, the now-defunct Committee on Implementation of the Constitution, the Law Society of Kenya, the Kenya Tax Payers Association, and the Kenya Association of Manufacturers.⁴⁷³

⁴⁷³ Petition No. 163 of 2016 Wamatangi Kimani Paul v Commission on Revenue Allocation & another [2016] eKLR.

The court commented that it appeared that the 1st Respondent was attempting to facilitate “meaningful public participation”.⁴⁷⁴ The court made the following decision:⁴⁷⁵

The revised recommendation should have been subjected to another round of public participation. I take the preliminary view that though public participation and stakeholder engagement was necessary, it was not necessary to start the entire process again simply because comments collected from some of the stakeholders, including even the Senate, were necessary. The substance of the report after revision apparently remained largely constant. At this stage of the proceedings, the Petitioner has not demonstrated to the court that the substance of the second revenue sharing formula as developed a second time so substantially differed from the original version as to warrant an inference that it was not the same document that had been subjected to public participation.

The court states that the petitioners have failed to demonstrate the difference in the revenue formulas, while noting that the revised recommendation should have been subjected to another round of public participation. In this case, it appears that the courts have considered the fact that the public should have been privy to the revised recommendation. However, the court concludes that the two versions are not sufficiently different to warrant another round of public participation. In fact, the court places the onus on the public to show how the two versions were different thus justifying a second round of public participation.

This opportunity to participate in giving input to a revised recommendation does not necessarily require another round of public participation, perhaps instead the publication of an explanation and the welcoming of comments thus ensuring that aspect of common law decision making framework was fulfilled. Another aspect of the common law decision making framework that the courts did not appear to consider was the possibility of a draft decision being made available to the public so that there is full disclosure. Assuming the changes made

⁴⁷⁴ Petition No. 163 of 2016 Wamatangi Kimani Paul v Commission on Revenue Allocation & another [2016] eKLR.

⁴⁷⁵ Petition No. 163 of 2016 Wamatangi Kimani Paul v Commission on Revenue Allocation & another [2016] eKLR.

to the document were not substantial then this would have provided a means of full disclosure and an opportunity or the public to input if they felt the need to do so.

These cases that refer to public participation have been brought by individuals concerned to clarify the standards of meaningful public participation. The discussion now turns to consider cases where a constitutional body has sought a judgment to clarify what constitutes effective public participation.

4.4 Constitutional Body as Petitioner

In this section, I consider a constitutionally mandated body petitioning the courts on, and raising the matter of, public participation. The Commission for the Implementation of the Constitution was “mandated to monitor, facilitate, and oversee the development of legislation and administrative procedures required to implement the Constitution”⁴⁷⁶ and “work with each constitutional Commission to ensure that the letter and the spirit of the Constitution are respected.”⁴⁷⁷ As a temporary commission, it operated after October 2010 and was dissolved in 2015 after its five-year mandate came to an end.⁴⁷⁸

4.4.1 *Petition No. 496*

Commission for the Implementation of the Constitution v National Assembly of Kenya & 2 others 2013

The judgment stated that the petitioner, the Commission for the Implementation of the Constitution (CIC) had challenged the Constitutionality of Kenya Gazette Supplement No. 100 (National Assembly Bill No. 15) by which the National Assembly published. The Constitution

⁴⁷⁶ Commission for the Implementation of the Constitution Act 2012 [2010], s 4(a&b).

⁴⁷⁷ Commission for the Implementation of the Constitution Act 2012 [2010], s 4(c).

⁴⁷⁸ Commission for the Implementation of the Constitution Act 2012 [2010], s 1.

Amendment Bill 2013 sought to amend Article 260 of the Constitution to remove the offices of the Members of Parliament, Members of County Assemblies, judges and magistrates.⁴⁷⁹

The 1st Respondent, the National Assembly of the Republic of Kenya, stated they had “already published the Bill and that the Act of Publication is the first step in the legislative process. The Bill was published in the local dailies, and the public was requested to submit their views.”⁴⁸⁰ The Counsel for the Salaries and Remuneration Commission, an interested party, in this case, supported the petition. They contended that “it was not enough for Parliament to publish the Bill in the *Daily Nation* of 15th August 2013 but that it must engage in public debate or public hearings as envisaged under Article 256(2) of the Constitution.”⁴⁸¹ That Article 118 of the Constitution also “enjoins Parliament to seek public input and opinions in all enactments including that of statutes”. However, Article 256(2) “enjoins Parliament to fulfil a higher threshold of engagement by engaging the public in a dialogue regarding any proposed amendments it seeks to pass.” Article 256(2) further requires that “parliament publicise any Bill to amend the Constitution of Kenya 2010 and facilitate public discussion about it”. The Counsel for the interested party submitted:⁴⁸²

that this provision was a limitation on Parliament’s power to legislate to the extent that the Constitution required the direct exercise of the sovereign power of the people in constitutional amendments by way of extensive dialogue especially where the amendments go to the core of the foundation of the Constitution. He submitted that it was not enough for parliament to publish the Bill in the *Daily Nation* of the 15th of August 2013 but that it must engage in public debate or public hearings as envisaged under Article 256(2) of the Constitution.

⁴⁷⁹ Petition No. 496 Commission for the Implementation of the Constitution v National Assembly of Kenya & 2 others 2013.

⁴⁸⁰ Petition No. 496 Commission for the Implementation of the Constitution v National Assembly of Kenya & 2 others 2013.

⁴⁸¹ Petition No. 496 Commission for the Implementation of the Constitution v National Assembly of Kenya & 2 others 2013.

⁴⁸² Petition No. 496 Commission for the Implementation of the Constitution v National Assembly of Kenya & 2 others 2013.

The *amicus curiae*, Katiba Institute, submitted that, “the time to involve the public had passed and that the submission of memorandum does not amount to public participation.”⁴⁸³ He relied on the precedent found in the *Doctors for Life International vs. Speaker of the National Assembly and Others* case to argue that the legislature has the responsibility of ensuring that public involvement is greater when the issue at hand is the amendment of the Constitution. The Katiba Institute also submitted that:⁴⁸⁴

public participation required public education and certainly full information and that there is actual violation of the Constitution and not merely possible threat, as parliament had subverted the public participation process.

In its decision on the matters relating to public participation, the court stated that “the petitioners did not demonstrate how the National Assembly was unsuccessful in ensuring public participation during the process of the enactment of the Bill.” Furthermore, the court stated that:⁴⁸⁵

The Petitioner did not address the court on the standard to apply to consider the level of public participation. Consequently, the court was not able to claim that the Act was unconstitutional for lack of public participation.

The court appears to be stating the following regarding public participation in this case. First, the more conservative rulings are pointing out that it is the role of parliament, as stipulated in the Constitution, to come up with the necessary legislation to ensure that it can be operationalised. In this case, parliament has come up with the County Governments Act 2012, Judicial Services Act 2011, and the Public Finance Management Act 2012 which were discussed in Chapter four of this thesis. Second, the courts are also restraining themselves when

⁴⁸³ Petition No. 496 Commission for the Implementation of the Constitution v National Assembly of Kenya & 2 others 2013.

⁴⁸⁴ Petition No. 496 Commission for the Implementation of the Constitution v National Assembly of Kenya & 2 others 2013.

⁴⁸⁵ Petition No. 496 Commission for the Implementation of the Constitution v National Assembly of Kenya & 2 others 2013.

it comes to declaring that public participation has not been fully implemented when there is evidence of partial implementation or “reasonable participation when the question is of sufficient public participation”. Third, the courts are only declaring that no public participation has occurred when there is full evidence that none occurred, not insufficient public participation. Fourth, the burden of proof is squarely on the Petitioner to prove that no public participation took place. Therefore, as a result, the petitioners who are presenting the case to the courts should have well-prepared cases that provide the standard for which the matter in question should be evaluated against. The significance of this court decision to my thesis lies in noting the court’s restraint in determining what reasonable and sufficient public participation is.

4.5 Summary

This chapter reviewed and demonstrated how the courts in Kenya ruled on matters regarding public participation, and how the courts interpreted public participation at common law through an analysis of twelve court judgments. The underlying principles that guide the courts when making decisions on matters about public participation are of interest to this thesis. The expectation is that the courts are guided by the Constitution, existing laws and judgments when making these decisions.

Based on how these court decisions vary, I have argued that the 2010 Constitution has not been used uniformly by all the courts when interpreting how public participation is to be implemented. The trend that has been noted with these court decisions is that the two or three judges tend to vote for public participation and the rest require a higher bar for public participation to be met. This can be attributed to their reading of the Constitution in a transitional period as they move to divest from the past and move forward in the context of the

Constitution 2010. Occasional flashes of decision making that are reminiscent of the previous constitutional order are visible in the court decisions that are being made. The journey towards the full realisation of the aspirations of the 2010 Constitution is a three step forward two step backwards dance, leading to what appears to be one step forward amid a great flurry of activity. The standards that the courts have been using to progressively move towards greater public participation are conservative but are in line with the common law framework of decision making. It is to be noted that some degree of deference does apply as the Constitution of Kenya 2010 delegates the responsibility to create legislation that spells out the mode and means of public participation, to the National and County assemblies. In other words, it appears that the selection of the means and modes of participation as articulated by the legislation is in the hands of the National and the County governments of Kenya. On the other hand, the twelve cases I sampled provides evidence that the supervision of whether this has been actualised is being exercised by the courts. However the courts in these determinations were clear that it is up to the individual administration to remedy any departures from legislation. For instance in the court decision *Petition 532 of 2013 Robert N Gakuru & another v Governor Kiambu County & 3 others* [2013] eKLR the court urges Kiambu County to ensure it implements public participation that meets the terms set by the county itself.

In opening this chapter, I asked: first, whether the court decisions indicate that genuine engagement and public participation was undertaken and, second, what elements of the common law public decision-making framework referred to in the court decisions. Of the twelve sampled cases reviewed here the courts ruled in five of them, that genuine public participation had occurred, however, in four cases it was determined by the courts that no public participation took place, and in three of these cases, it was found that the courts ruled that the Petitioner did not provide sufficient evidence for the courts to decide that no public participation took place and therefore ruled for the respondent.

Some issues arise from these cases. First, there is a presumption on the public to provide evidence of a failure of participation and demonstrate how these standards of the Constitution are not being met or how and other existing legislation have been violated. As indicated earlier, three of the judgments indicate the petitioners did not provide sufficient evidence or state the standard they expected the court to assess participation on. The burden of proof remains with the petitioners and they would do well to ensure that they have well-prepared petitions with the relevant evidence. The fact that the petitioners have in some cases failed to provide evidence or failed to state which standard of the Constitution has been breached speaks to some issues with regards to the level of expertise of the Petitioners and the lack of proper documentation of the public participation process and the fact that a significant number of counties have not passed and gazetted public participation legislation. It also raises the issue of placing the full onus for the burden of proof on the Petitioner on a constitutional matter when the 2010 Constitution itself is clear on the significance of greater public participation. The catalyst that moves the duty to provide opportunities for participation from neutral to active resides in the 2010 Constitution of Kenya. As noted earlier the Constitution expects the administration to facilitate and encourage public participation. Therefore, there is an implicit expectation that under some conditions the courts should ensure that the form of participation that is practised is an active one. However, in only four of the twelve court decisions which were sampled was there intervention by the courts based on the lack of notice or sufficient notice. The only other court intervention was based on the lack of sufficient disclosure was *Petition No. 3 of 2016. Simeon Kioko Kitheka & 2 others v County Government of Machakos & 3 others [2016] eKLR*.⁴⁸⁶ While there is insufficient evidence in these diverse cases to identify common factors

⁴⁸⁶ *Petition No. 3 of 2016. Simeon Kioko Kitheka & 2 others v County Government of Machakos & 3 others [2016] eKLR.*

that might catalyse the courts to intervene to require a more active encouragement of public participation.

Second, the courts appear to be failing to consider the need for revised recommendations also to be subject to some form of public participation. This is mainly because according to the court these were minimal changes thus resulting in failure to provide full disclosure which is part of the of a common-law decision-making framework. In two instances the courts have not seen the need for further disclosure to be made to the public when there have been changes to a document during a public participation process. This is a minimum standard being applied by the courts and is not in line with the common law decision making framework of full disclosure and availing draft decisions.

Third, the matter of representatives versus direct public participation has presented itself as an area that the courts seek to clarify in the cases discussed above, and petitioners keep raising this matter. In the cases and rulings discussed here, the courts appear to apply greater weight to the role of representatives input as opposed to direct participation by the public. The determinations suggest that having participation through methods of representation were sufficient and there was no expectation that more direct participation was required.

It is also apparent that over the six-year period from 2010–2016 the laws concerning public participation are developing and expectations about what effective public participation entails, are evolving. It is, therefore, necessary for all counties to draft, debate, and properly gazette public participation laws so that these laws can provide guidelines for the public and

standards of public participation that can be established and tested in courts of law. I have argued that by evaluating the court decisions that have been made by the courts in the 2010–2016 period on matters that concern public participation it is clear that standards do exist in the guidelines and the legislation that has been developed although these guidelines are frequently a minimum, rather than reflecting the full aspirations of the 2010 Consitution.

The discussion in the following chapter now turns to an analysis of how emerging public participation county models can be derived from existing county public participation laws and discussion considers the implications of these models.

Chapter 5 – Emerging County Public Participation

Models 2010-2016

5.1 Introduction

Public participation at the county level in governance decision-making is now examined by analysing county public participation acts passed under the Kenya Constitution of 2010. In Chapter 2, I argued that public participation has not been defined under the Constitution; however, the role of public participation is more concrete at county government level.⁴⁸⁷ In this chapter, I examine participation at the county level with the understanding that county level legislation is one of the key steps for legislative and democratic development. Section 115(2) of the County Government Act 2012 states that:⁴⁸⁸

Each county assembly shall develop laws and regulations giving effect to the requirement for effective citizen participation in development planning and performance management within the county and such laws and guidelines shall adhere to minimum national requirements.

I argue that effective public participation in the governance process can be achieved when a diverse public participates in development at the county and the national level in a genuine and tangible manner. The chapter opens by providing a background to county participation, followed by a thematic analysis, as discussed in Chapter 2, using data from the comparative analysis of the County Public Participation Acts. I then identify which models of public participation are emerging at the county level, and examine the extent to which these county

⁴⁸⁷ An earlier version of this chapter was presented at the 2015 African Studies Association of Australasia and the Pacific (AFSAAP) conference and published as Proceedings of the 38th AFSAAP Conference: 21st Century Tensions and Transformation in Africa, Deakin University, 28th-30th October 2015 entitled *A Preliminary Comparative Study of Public Participation Acts in Kenya: A Case Study of Meru, Elgeyo/Marakwet & Machakos Counties* in February 2016.

⁴⁸⁸ County Government Act 2012, s 115(2).

participation acts have aligned themselves to the public decision-making framework in common law and the Constitution of Kenya 2010.

In particular, the chapter reviews the available county public participation acts passed in the transitional period ending October 2016. These include the Machakos County Public Participation Act 2014, the Meru County Public Participation Act 2014, the Elgeyo/Marakwet Public Participation Act 2014, the Isiolo County Civic Education and Public Participation Act 2015, and the Nairobi City County Public Participation Act 2015.

5.2 Background to County Public Participation

The principles for public participation are set out in Sections 87-91 of the County Governments Act 2012. Section 87 specifically defines access to timely information, reasonable access to the process of governance, protection and the promotion of the marginalised and minorities, a balance between the roles of county governments and non-state actors and the promotion of public-private partnerships.⁴⁸⁹ In Section 88, the constitutional right of citizens to petition is expounded on by establishing the right to petition the county government.⁴⁹⁰ Section 89 states that the county government authorities have a duty to respond quickly to citizens' petitions.⁴⁹¹ Section 90 states that the county government can call a local referendum on county laws and county and planning and investment decisions.⁴⁹² Section 91 lays out the modalities of public participation.⁴⁹³

County governments are therefore required to facilitate public participation by creating legislation that leads to actual participation. Article 174(c) of the Constitution places the

⁴⁸⁹ County Governments Act 2012, s 87.

⁴⁹⁰ County Governments Act 2012, s 88.

⁴⁹¹ County Governments Act 2012, s 89.

⁴⁹² County Governments Act 2012, s 90.

⁴⁹³ County Governments Act 2012, s 91.

counties as the centre of participation. It requires counties “to give powers of self-governance to the people and enhance the participation of individuals in the exercise of the powers of the State and in making decisions affecting them.” This ensures that the sovereign right of the people is preserved at the county level.

A court ruling in 2014 was pivotal in maintaining that county assemblies are representatives of the people at the county level and must ensure that public participation is achieved and not treated as mere ritual. In a judgment delivered on Petition 532 of 2013 *Robert N Gakuru & another v Governor Kiambu County & 3 others* [2013] eKLR in the High Court of Nairobi, Kenya, Justice G V Odunga stated:⁴⁹⁴

It is my view that it behooves the County Assemblies in enacting legislation to ensure that the spirit of public participation is attained both quantitatively and qualitatively. The County Assemblies ought to do whatever is reasonable to ensure that as many of their constituents in particular and the Kenyans, in general, are aware of the intention to pass legislation and where the legislation in question involves such important aspect as payment of taxes and levies, the duty is even more onerous.

This judgment urges the representatives of the people at county level to ensure that the public are involved in the making of county legislation. This also speaks to the tension in the implementation of Article 1(2) that holds that directly elected representatives and direct participation by the public are equally lawful and valid. Although the members of the county assembly are representatives as articulated by Article 1(2), they also have a constitutional duty to ensure direct public participation. The expectation, therefore, is that as the laws are created at the county level, then the legislators have to make sure that there is full public participation.

The role of the Constitution in creating the space for public participation was observed by Kanyinga (2014), who argues that, “The new Constitution promises a clear path to

⁴⁹⁴ Robert N. Gakuru & Others v Governor Kiambu County & 3 others [2014] eKLR.

democracy. It recognises the sovereignty of the people as the anchor of the nation and provides for participation of the people in decision-making at all levels.”⁴⁹⁵ As discussed previously, the Constitution, by devolving power, intended to localise decision making authority and bring it closer to the people so that they may be able to contribute to decision-making at a local level.

However, the public participation value in the Constitution 2010 as a potential instrument for the redistribution of power is subdued by the reality that is emerging from the county context. Despite the ideal of full public participation, the extent to which counties have implemented public participation appears to be low. County research data from Oxfam (2017) suggests that only 2 percent, 1.6 percent, and 2.5 percent of the surveyed respondents in Nairobi, Turkana, and Wajir counties respectively have been involved fully by the county government’s decision making towards county budget making and expenditure.⁴⁹⁶ This is in comparison to a majority of the surveyed respondents in Turkana County (74.9 percent), Wajir County (64.1 percent) and Nairobi County (52.2 percent) who stated that they have not been involved in decision-making in county budget making and expenditure.⁴⁹⁷ It is important to note that this survey was undertaken during the formative stage of the Constitution implementation which I have described as the constitution transitional period, and that the future may hold the promise of fuller public participation but its findings suggest we should be cautious about the pace of change.

⁴⁹⁵ Kanyinga, K. (2014). Kenya: Democracy and Political Participation. Nairobi: Open Society Initiative for Eastern Africa.

⁴⁹⁶ Oxfam Kenya (2017). Tax Justice Baseline Report Baseline Survey for The Domestic Resource Mobilisation Project Conducted in Nairobi, Wajir And Turkana Counties. Retrieved May 15, 2017, from https://kenya.oxfam.org/sites/kenya.oxfam.org/files/file_attachments/DRM%20Baseline%20Report%20Summary%20Published%20January%202017_0.pdf.

⁴⁹⁷ Oxfam Kenya (2017). Tax Justice Baseline Report Baseline Survey for The Domestic Resource Mobilisation Project Conducted in Nairobi, Wajir And Turkana Counties. Retrieved May 15, 2017, from https://kenya.oxfam.org/sites/kenya.oxfam.org/files/file_attachments/DRM%20Baseline%20Report%20Summary%20Published%20January%202017_0.pdf.

Debate thus far indicates that there is an expectation that direct public participation is implemented at the county level with the full support of the people's representatives at the county level. This raises the question: what form will this public participation take at the local level? Fung (2006) proposes that "unlike the small new England town or even the Athenian city-state, there is no canonical form of direct participation in modern democratic governance; modes of contemporary participation are and should be legion."⁴⁹⁸ Fung is suggesting that there is an expectation that in the modern democracies there should be multiple expressions of various forms of participation and that this should be the norm as opposed to the exception. Fung (2012) further states:⁴⁹⁹

In every society in many arenas, the reality of collective decision making falls far short of the democratic ideal in countless ways. These shortfalls include disenfranchisement, unequal influence operating through formal and informal mechanisms, political apathy and alienation, misinformation, and misperception. Part of the solutions to these challenges lies in a sound democratic Constitution. But there is no once-and-for-all solution. Instead, approaching the democratic ideal requires political practices of continuous democratic innovation. ... That innovation, in turn, requires a certain civic infrastructure and political practices.

What, then, does it mean to have multiple forms of participation in the context of the Constitution of Kenya 2010 and at the same time press for democratic improvements? What does Fung's argument mean for the implementation of the constitutional value of public participation? The Constitution of Kenya 2010, in its provision for public participation, provides for a journey towards dynamic democratic advancement at both national and county government level, in particular at the county level where "public participation infrastructure"⁵⁰⁰

⁴⁹⁸ Fung, A. (2006). Varieties of Participation in Complex Governance. *Public Administration Review*, 66(S1), 66-75. doi:10.1111/j.1540-6210.2006.00667.

⁴⁹⁹ Fung, A. (2012). Continuous Institutional Innovation and the Pragmatic Conception of Democracy. *Polity*, 44(4), 609-624. doi:10.1057/pol.2012.17.

⁵⁰⁰ Nabatchi, T., & Leighninger, M. (2015). *Public participation for 21st century democracy*. Hoboken, NJ: John Wiley & Sons.

and “civic infrastructure”⁵⁰¹ can be innovated in the Kenyan context. It is especially so at the county level where the 47 counties represent the diversity of Kenya, and if innovation in governance and in particular in public participation will manifest itself, it will be at this level. The county governments have major responsibilities for health, urban services, infrastructure, agriculture and at the same time new opportunities for public participation.⁵⁰²

Specifically, in the Kenyan context, what these forms of public participation should appear like has been proposed in the County Public Participation Guidelines 2016, developed by the Ministry of Devolution and Planning which set out three options for the management and coordination of public participation in Kenya.⁵⁰³ These include the following:

- Option 1 – provides for the office of a public participation coordinator. As stated in the guidelines: “The county government appoints a county public participation coordinator who acts as the administrative head for public participation. The coordinator works with the County Executive Committee, County Assembly and administrators in the county units.”⁵⁰⁴ I would term this model as a form of “centralised coordination” of public participation, because public participation is led from an office with a coordinator that works with the county executive and assembly.
- Option 2 – The guidelines state: “The County Assembly and County Executive put in place independent administrative structures for their public participation and civic education.”⁵⁰⁵ This model I would term a bisymmetrical coordination of public

⁵⁰¹ Fung, A. (2012). Continuous Institutional Innovation and the Pragmatic Conception of Democracy. *Polity*, 44(4), 609-624. doi:10.1057/pol.2012.17.

⁵⁰² Finch, C and Omolo, A. (2015). Kenya devolution working paper No. 1 overview, ppl-20.

⁵⁰³ Ministry of Devolution and Planning & Council of Governors (2016). County Public Participation Guidelines (Rep.), p42. Retrieved January 4, 2017, from <http://www.devolutionplanning.go.ke/wp-content/uploads/2016/04/County-Public-Participation.pdf>

⁵⁰⁴ Ibid.

⁵⁰⁵ Ibid.

participation and civic education by this I mean that each step of the public participation processes there is equal emphasis on civic education.

- Option 3 – offers an integrated administrative approach, “where a county resolves to adopt an integrated administrative approach to public participation.”⁵⁰⁶ This third model I term the “Integrative coordination” of public participation. Unlike the centralised model there is not new distinct office set up for participation rather already existing offices in the county assembly and executive are used to engage the public.

According to the Fifth Schedule of the Constitution, all 47 counties in Kenya were expected to have developed public participation legislation within the three-year period after the 2013 elections when the counties were first operationalised.⁵⁰⁷ However, a review of legislation suggests that only five counties have passed the laws in the constitutional transitional period: Machakos, Meru, Elgeyo/Marakwet, Nairobi, and Isiolo.⁵⁰⁸ These public participation laws were purposively sampled as the counties that have first developed public participation law at the local level. Article 199(1) of the 2010 Constitution states that “County legislation does not take effect unless published in the Gazette”⁵⁰⁹ and as a result of this only the county legislation that has been published in the Kenya Gazette is analysed in this chapter.

⁵⁰⁶ Ibid.

⁵⁰⁷ Constitution of Kenya 2010, sch 5.

⁵⁰⁸ The question of how many County Public Participation Acts have been passed by counties is difficult to verify. I did manage to contact the Editor in Chief of the Council of Law Reporting who informed me via email that 14 counties have proposed Bills for public participation and they could only confirm that five of them had gone through the legislative process and gazetted by October 2016: Machakos, Meru, Nairobi, Isiolo, and Elgeyo/Marakwet. In other reports and literature, Laikipia County has been referred to as one of the earlier counties to develop a public participation Act. However, I have been unable to get an actual copy of the Act. In Laikipia County, the assembly link to the “Public Participation Act for Laikipia” leads to the Bill that was proposed. Efforts were made to contact the county directly via email, however I am yet to receive a reply. I have also sought information from various stakeholders, but no one that I have contacted seems to have a copy of the Act, only the Bill. This snapshot is illustrative of the process of trying to access information in the Kenyan context. As a result, I have therefore limited this study of County Public Participation Acts in this Chapter to Machakos, Meru, Elgeyo/Marakwet, Nairobi and Isiolo, because I have confirmation that the public participation acts in those counties have been gazetted.

⁵⁰⁹ Constitution of Kenya 2010, art 199(1).

It is important to note, however, that the legal opportunity to participate is only one part of the story, because effective public participation also rests on ensuring funds are available to enable decision making at ground-level to support citizens who want to engage in the decision-making process and to ensure this participation is meaningful and can be sustained.⁵¹⁰ Moreover, despite significant legislative changes, many of the challenges of the past seem to continue, regarding accountability of public officials for the usage of funds, with reports from the Auditor General of Kenya indicating that a significant number of counties in Kenya are not audit compliant.⁵¹¹ Correspondingly, inadequate action is being undertaken by the county assemblies to ensure effective public participation in the usage of funds.⁵¹² Without demanding that the funds tagged for participation be accounted for, it is unlikely action at the county level can ensure more effective public engagement in the short term, nevertheless, it is still important to examine the opportunities if any, that have been created to enable public participation at the county level, and assess their long term prospects for advancing the values embedded in the Constitution.

Through literature reviews and interviews (see Chapter 6), I was able to identify five counties which have developed a framework of public participation legislation out of 47 devolved county governments. In this section, I examine the public participation acts of Elgeyo/Marakwet, Meru, Machakos, Nairobi, and Isiolo counties to identify the public participation models which are emerging in these five counties. Discussion here provides a brief overview of each act and then a thematic analysis of the experiences of these countries. The

⁵¹⁰ Kenya School of Government: Centre for Devolution Studies (2015). Kenya Devolution Working Paper 1. Retrieved 20 January, 2018, from

<https://openknowledge.worldbank.org/bitstream/handle/10986/21663/94497.pdf?sequence=1>

⁵¹¹ Standard Team (2016). Audit report shows misuse of billions in counties. *The Standard*, 23 November. Retrieved January 3, 2017, from <https://www.standardmedia.co.ke/article/2000224426/audit-report-shows-misuse-of-billions-in-counties>

⁵¹² Kunow, A. (2017) Auditor General's office to enhance oversight of projects in counties. *The Standard*, 16 December. Retrieved 20 December, 2017, from <https://www.standardmedia.co.ke/business/article/2001263263/auditor-general-puts-counties-on-notice-over-funds-use>

differences in interpretation of public participation between the five counties are leading to distinct models of public participation that are emerging in practice which were described in the County Public Participation Guidelines as Options 1, 2 and 3⁵¹³ and I have termed as: “centralised coordination”, “integrative coordination” and “bi-symmetrical” models of public participation.

5.3.1 *The Elgeyo/Marakwet Public Participation Act 2014*

Elgeyo/Marakwet (population 369,998) is located in the Rift Valley area of Kenya, its capital is Iten, the seat of the county government.⁵¹⁴ The Elgeyo/Marakwet Public Participation Act 2014 date of commencement was 30 June 2014.⁵¹⁵ This Act gives effect to paragraph 14 of Part 2 of the Fifth Schedule of the Constitution by establishing the means and creating a platform for public participation in the governance of the county.⁵¹⁶ As shown in Figure 5, it also creates a Public Participation Office whose funding and expenses are provided by the County Assembly. The Office Of Public Participation has the following functions: establishing public participation structures, ensuring the inclusivity of public participation activities, and informing the public on public participation processes (including financial resources and timelines). The Act also establishes a feedback mechanism and any other public participation related function,⁵¹⁷ however, the act does not provide a definition of public participation, leaving it up to the interpretation of the users of the act.

⁵¹³ Ministry of Devolution and Planning & Council of Governors (2016). County Public Participation Guidelines (Rep.), p42. Retrieved January 4, 2017, from <http://www.devolutionplanning.go.ke/wp-content/uploads/2016/04/County-Public-Participation.pdf>

⁵¹⁴ Commission on Revenue Allocation. (n.d.). Retrieved January 4, 2017, from <http://www.crakenya.org/county/elgeyo>

⁵¹⁵ The Elgeyo/Marakwet Public Participation Act 2014.

⁵¹⁶ The Elgeyo/Marakwet Public Participation Act 2014.

⁵¹⁷ The Elgeyo/Marakwet Public Participation Act 2014, s 8(2).

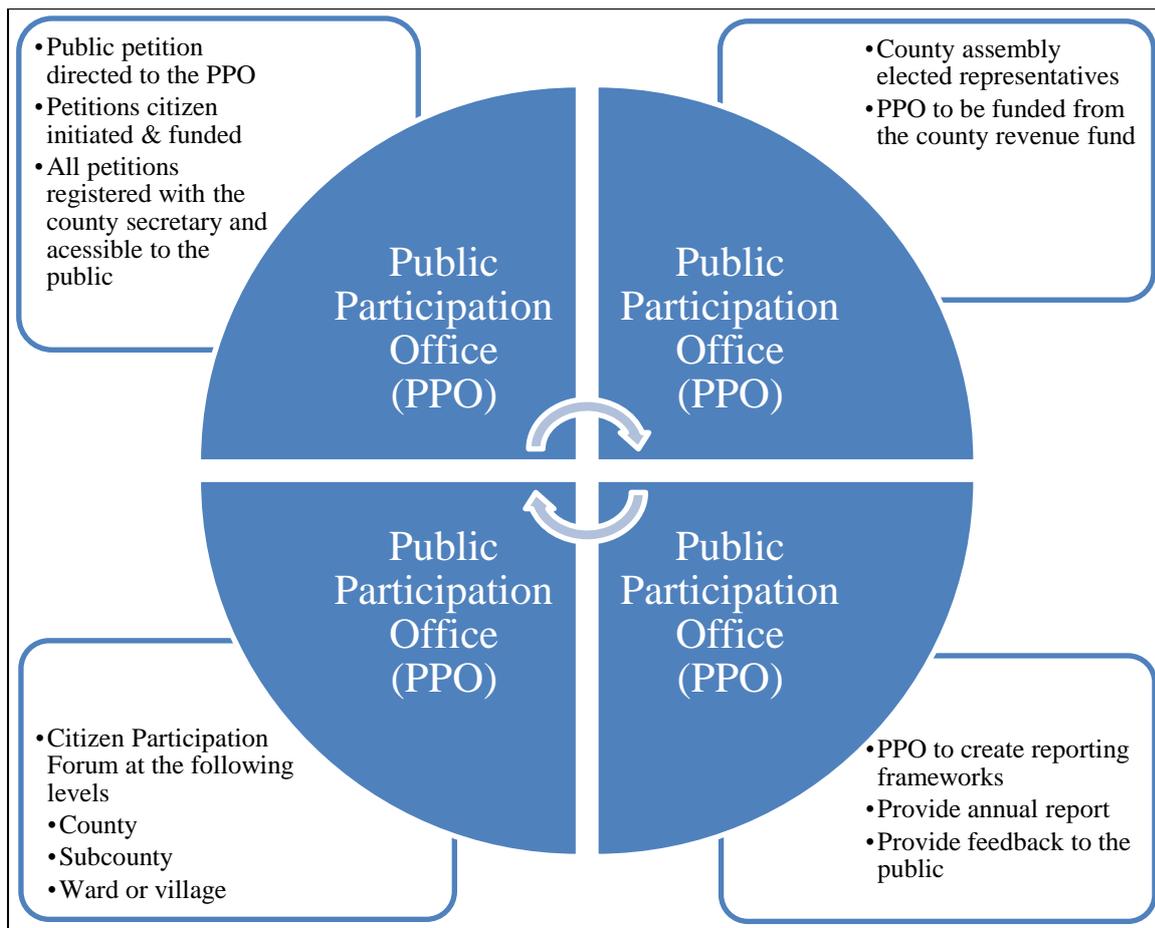


Figure 3 The Emerging Model of Public Participation in Elgeyo/Marakwet County as derived from the Elgeyo/Marakwet Public Participation Act 2014 Act.⁵¹⁸

County citizens’ participation forums are to be set up under the Act, and the Public Participation Office is tasked with “publicising and organising a citizen’s participation forum every three months.”⁵¹⁹ These forums are at the sub-county and city-urban level. The office is also required to “convene a citizen’s participation forum.”⁵²⁰ At the ward and village level, it is expected that a ward or village administrator or member of the County assembly will initiate the citizen forums.⁵²¹

⁵¹⁸ By Jane M. W. Marine.

⁵¹⁹ The Elgeyo/Marakwet Public Participation Act 2014, s 22(1).

⁵²⁰ The Elgeyo/Marakwet Public Participation Act 2014, s 22(1).

⁵²¹ The Elgeyo/Marakwet Public Participation Act 2014, s 24(1).

The public exercising their role as responsible citizens through public petitions is important and highlighted to the Act, which states that petitions should be submitted to the county secretary.⁵²² These petitions, initiated by citizens, are then forwarded to the County Executive Committee, or other relevant body for consideration. The procedure of investigation is invested in a relevant body related to the petition. This might include the county executive, or a committee appointed for a particular matter. The law requires the county secretary to communicate the decision to the Petitioner within 14 days. The petitions are registered by the county secretary who has the task of maintaining a county register of petitions.

The Act also makes clear financial provisions for public participation in Elgeyo/Marakwet County. Sections 34 through to Section 38 of the Act provide clear direction on the sourcing of funds, budget making, and borrowing capabilities for the office together with the accounting required of the office and auditing.⁵²³ At the end of the year, an annual report is undertaken of the financial and a description of the activities of the public participation office.

5.3.2 The Meru County Public Participation Act 2014

Meru County is located on the eastern side of Mt Kenya, covering 6936 square kilometres.⁵²⁴ The capital is Meru town, and the County population is estimated to be 1,356,301 million.⁵²⁵ The Meru County Public Participation Act 2014 commenced 19 September 2014. The purpose of the Act is to facilitate public participation as set out in the Constitution and give the effect of the public participation framework under the County Governments Act 2012; the Public Financial Management Act 2014; and the Urban Areas and Cities Act 2011.⁵²⁶

⁵²² The Elgeyo/Marakwet Public Participation Act 2014, s 27(1).

⁵²³ The Elgeyo/Marakwet Public Participation Act 2014, s 34–38.

⁵²⁴ Commission on Revenue Allocation. (n.d.). Retrieved January 2, 2017, from <http://www.crakenya.org/county/elgeyo/>

⁵²⁵ Commission on Revenue Allocation. (n.d.). Retrieved January 2, 2017, from <http://www.crakenya.org/county/elgeyo/>

⁵²⁶ Meru County Public Participation Act 2014, s 3.

Unlike the Elgeyo/Marakwet Act, the Meru County Act does offer a definition of public participation. In Section 2, the Act states that public participation “includes the process and the methods designed to consult, involve and inform the public so that they may have some form of input in the process of decision making and governance”.⁵²⁷ The provisions of the public petition in Meru are also outlined in the Meru County Act 2014, which includes the procedure for consideration of petitions and the process for publication of decisions and how the petitions shall be registered.⁵²⁸ The Act also provides for the establishment of a public participation office and outlines its functions (which include the support of the county assembly and reporting on public participation).⁵²⁹ Figure 6 provides an overview of the emerging model of public participation in Meru as derived from the act. Again, like Elgeyo/Marakwet County, significant emphasis is placed on citizen participation via the petition process in Meru County, with the support of an office of public participation.

⁵²⁷ Meru County Public Participation Act 2014, s 2.

⁵²⁸ Meru County Public Participation Act 2014, s 25-37.

⁵²⁹ Meru County Public Participation Act 2014, s 5-6.

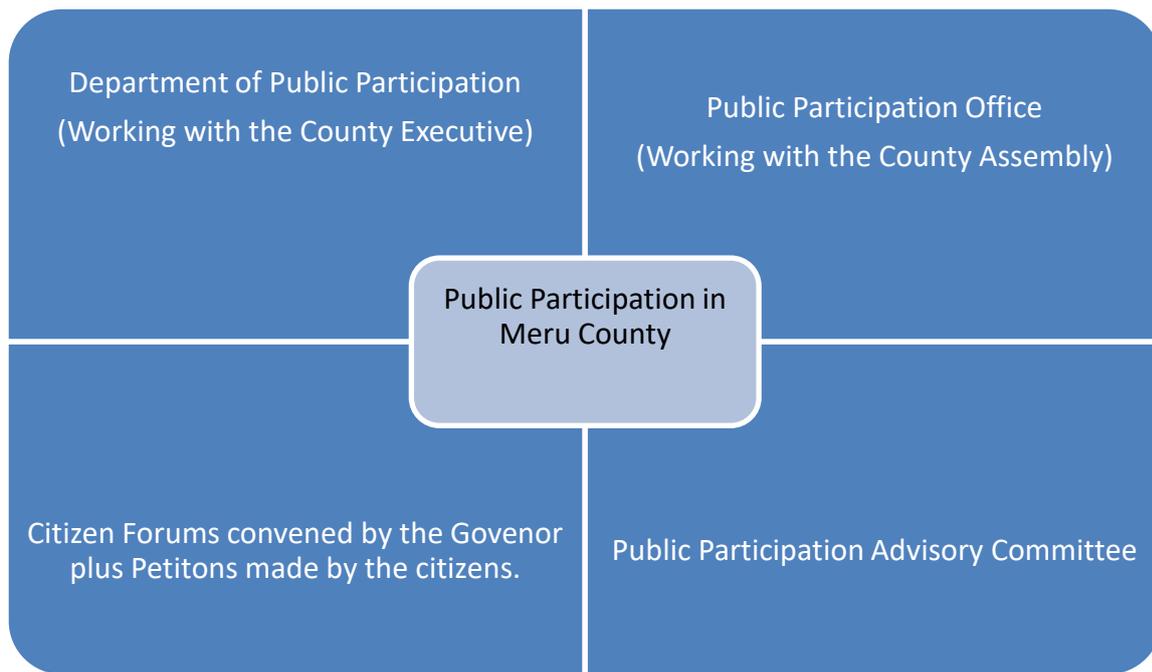


Figure 4 The Emerging Model of Participation in Meru as derived from the Meru County Public Participation Act 2014⁵³⁰

5.3.3 *The Machakos County Public Participation Act 2014*

Machakos County is located in Eastern Kenya. The capital is Machakos town, and it has a county population of 1,098,584.⁵³¹ The Machakos County Public Participation Act was enacted on 29 December 2014.⁵³² This Act provides a definition of terms including *public* when used about public participation. In this Act, *public* means the residents of the County, ratepayers, and resident civic organisation, or non-governmental private sector, or labour organisation, with an interest in the governance of the county, and a non-resident person.”⁵³³ Furthermore, public participation is defined as “an open democratic and accountable process of engaging a representative sector of the public in formulating policies and developing laws that affect them.”⁵³⁴ This definition of public participation appears to be potentially inconsistent with

⁵³⁰ By Jane M. W. Marine.

⁵³¹ Commission on Revenue Allocation. (n.d.). Retrieved January 2, 2017, from <http://www.craKenya.org/county/meru/>

⁵³² Machakos County Public Participation Act 2014.

⁵³³ Machakos County Public Participation Act 2014, s 2.

⁵³⁴ Machakos County Public Participation Act 2014.

Article 1(2) of the Constitution of Kenya as it does not fully consider the role of direct participation because it narrows the interpretation of stakeholders to representative sectors of the public.

The purpose of the Act is outlined in section 3, where it states that its purpose is “to establish a legislative framework to give effect to Articles 1, 10(2), 118, 119, 174 and 232(1)(d) and paragraph 14 of Part 2 of the fourth schedule of the Constitution.”⁵³⁵ It identifies that the Act will be guided by the principles of public petition, consultation with communities, organisations and citizens affected by any policy decision, and access to information so as to ensure meaningful participation. Petitions to the Machakos County Government are submitted to the county secretary and then to the county executive committee. Section 5(1)(d) of the Act provides guidelines for measures that ensure adequate financial resources are matched to public participation.⁵³⁶ A reporting framework and feedback to the citizens is set up with the proposed model, with public participation to be carried out through public consultative meetings annual citizen forums. Public participation is to be carried out within the laid down county governments structures and offices. These institutional provisions are summarised in Figure 7 which shows the emerging model of public participation in Machakos County.

⁵³⁵ Machakos County Public Participation Act 2014, s 3.

⁵³⁶ Machakos County Public Participation Act 2014, s 5(1)(d).

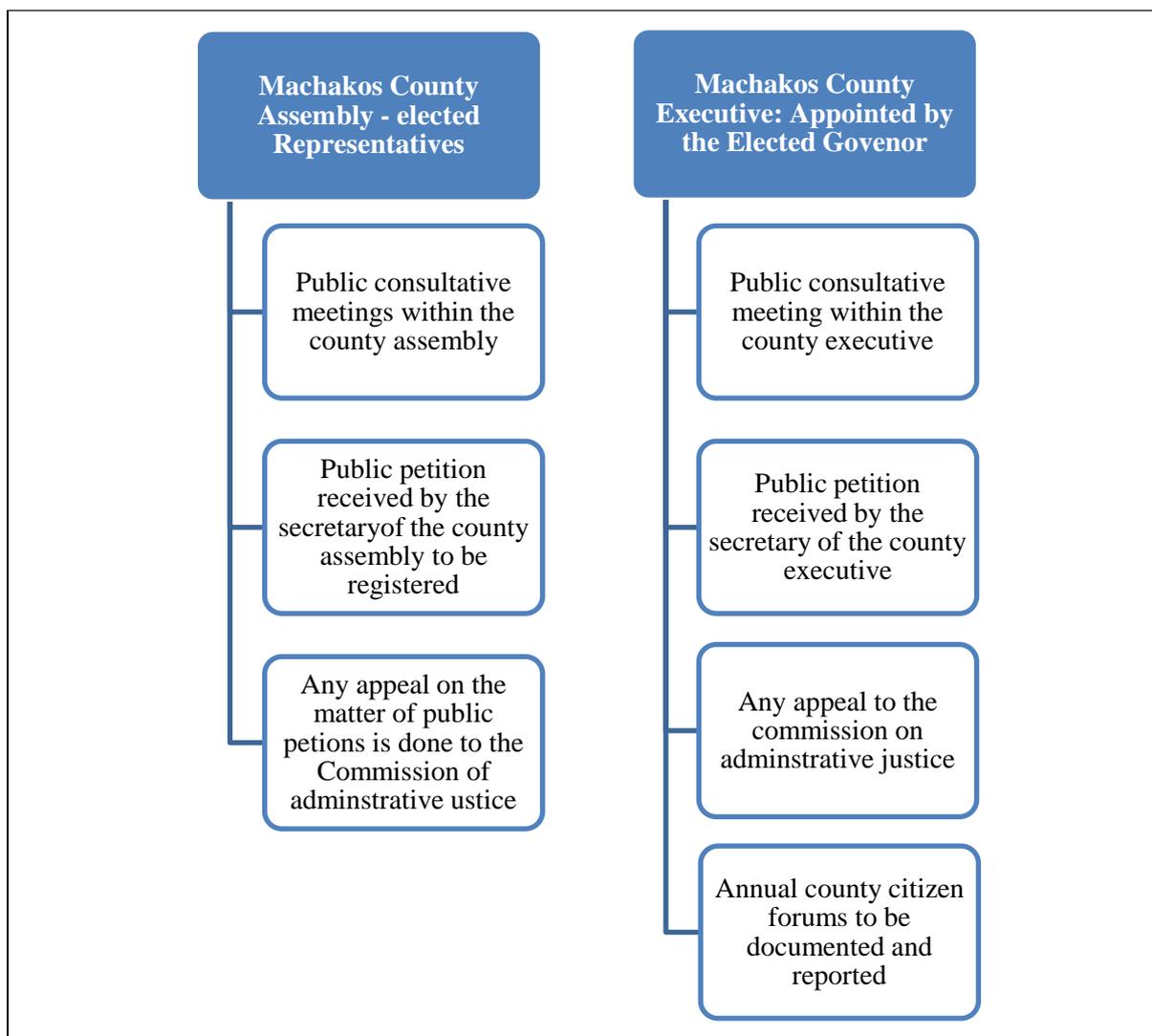


Figure 5 The Emerging Model of public participation in Machakos as derived from the Machakos County Public Participation Act 2014⁵³⁷

Despite these significant legal provisions, there are many significant practical barriers to achieving full participation under this legislation. In particular, the Governor of Machakos has noted that “unemployment and public participation are two of the challenges that Machakos County faces”.⁵³⁸ This is an important observation, acknowledging that achieving public participation is a challenge and perhaps has a direct relationship with underlying social

⁵³⁷ By Jane M. W. Marine.

⁵³⁸ 3 Citizen Kenya (2015, June 24). “Dr Mutua: Lack of public participation and unemployment are currently our main challenges in Machakos #Cheche” [Tweet]. Retrieved 1 July, 2015, from <https://twitter.com/search?q=public%20participation%20machakos%20&src=typd>

conditions for instance unemployment. It raises the following question: To what extent can citizens participate in governance effectively if their basic needs are not yet met? Despite legal provisions how can meaningful participation be achieved in practice under conditions of income insecurity or inequality? I return to these questions in Chapter 7.

5.3.4 The Nairobi City County Public Participation Act 2015

Nairobi City County is located in central Kenya and is the seat of National Government, and has a county population of 3,138,369 citizens.⁵³⁹ The date of the commencement of the Act was 2 April 2016. It defines public participation as:⁵⁴⁰

the involvement of individuals and groups that are positively or negatively affected by, or that are interested in, a proposed project, program, plan, legislation or policy that is subject to a decision-making process in an open, accountable and inclusive process through which individual citizens, community and interest groups, and other stakeholders can exchange views and make or influence the decisions that affect their lives.

The key objectives of the Act include giving effect to Chapter 11 (Articles 1 (2) and 10), Chapter 4 (Articles 35, 61, 69, 118, 119, 196, 174, 184, 201, and 232), and the Fourth Schedule of the Constitution, and to give effect to Part VIII of the County Governments Act 2012, which is to provide a framework for informed participation and enable citizens to hold the government to account.⁵⁴¹ The county government is further tasked with creating a culture of democratic governance that will ensure public participation.⁵⁴² The Act provides guiding principles of public participation⁵⁴³ and at the same time sets out the roles and responsibilities of the representatives in county government and states that the final responsibility of public

⁵³⁹ Commission on Revenue Allocation. (n.d.). Retrieved January 2, 2017, from <http://www.crakenya.org/county/nairobi/>

⁵⁴⁰ The Nairobi City County Public Participation Act 2015, s 2(e).

⁵⁴¹ The Nairobi City County Public Participation Act 2015, s 3.

⁵⁴² The Nairobi City County Public Participation Act 2015, s 3.

⁵⁴³ The Nairobi City County Public Participation Act 2015, s 4.

participation is held by the governor of the county.⁵⁴⁴ As shown in Figure 8, public participation is to take place at the county citizen level, the sub-county city and urban area participation forum, the ward or village citizen participation forum and in a citizen initiative forum.

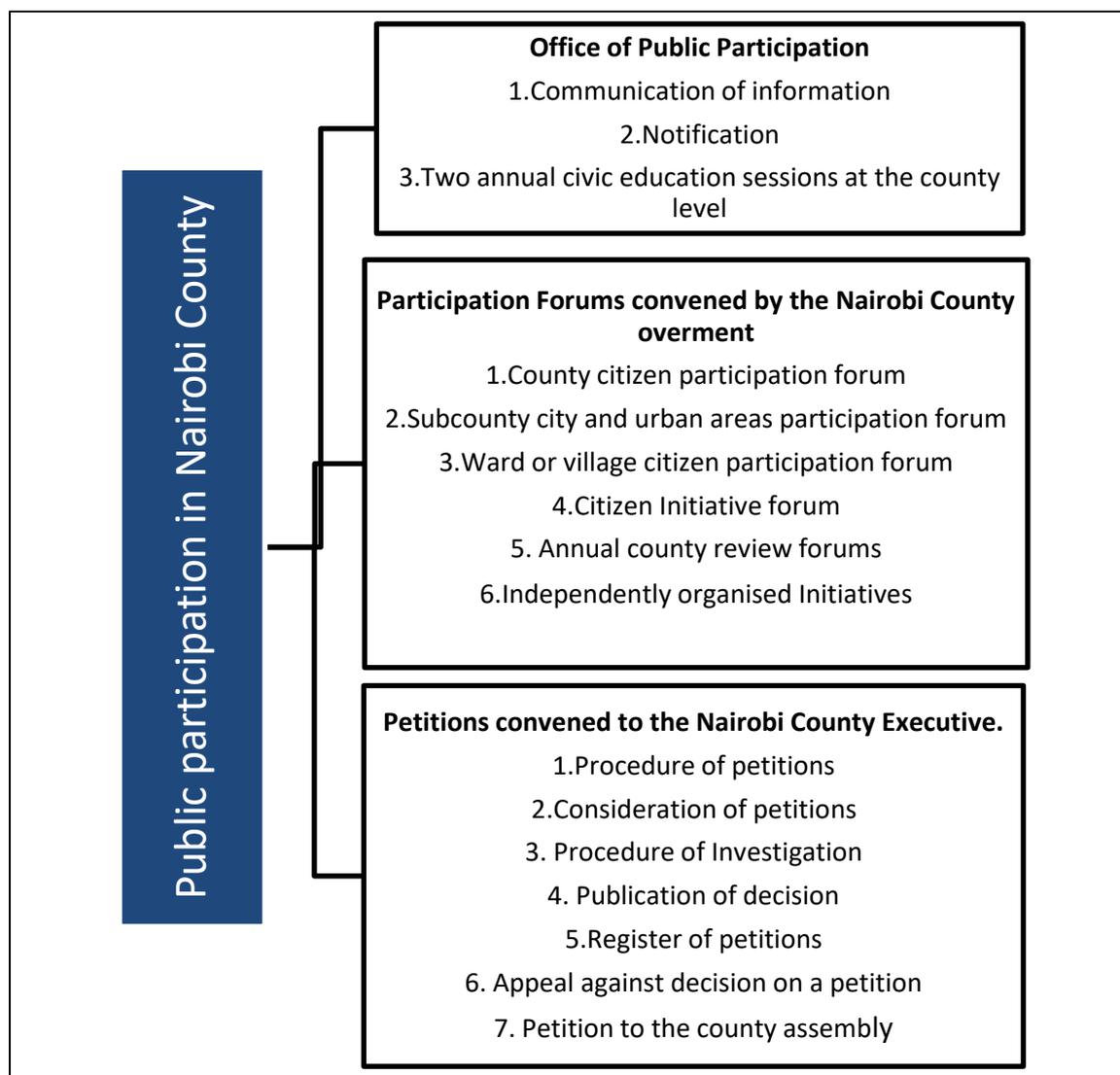


Figure 6 The Emerging Model of public participation in Nairobi as derived from the Nairobi City County Public Participation Act 2015⁵⁴⁵

⁵⁴⁴ The Nairobi City County Public Participation Act 2015, s 5

⁵⁴⁵ By Jane M. W. Marine

5.3.5 *The Isiolo County Civic Education and Public Participation Act 2015*

Isiolo is a county that located in the centre of Kenya. The county mission is “To improve livelihoods of Isiolo people through participatory engagement and the creation of a conducive environment for mobilisation and utilisation of available resources sustainably”. Isiolo has a population of 143,294 citizens.⁵⁴⁶ The Isiolo County Civic Education and Public Participation Act was enacted on 21 December 2015.⁵⁴⁷ The Act provides a definition for an extensive list of terms including public/citizens and communities.⁵⁴⁸ It further defines public participation as:⁵⁴⁹

Those processes and methods designed to consult, involve and inform the public or stakeholders in order to allow those who potentially be affected by a decision, any policy, legislation, program, project to have input into the Process.

This particular definition is in line with the 2010 Constitution because it recognises that participation can be carried out with both the general public and the stakeholders.

The purpose of the Act is to enhance, promote, and facilitate civic education and public participation in the county, so as to facilitate the implementation of the constitutional provision set out in the following Articles of the Constitution: 1, 10, 19, 35, 37, 48, 174, 201, 232, and Section 14 of Part 2 of the Fourth Schedule.⁵⁵⁰ The Act also gives effect to the County Governments Act 2012, the Public Finance Management Act 2011, and the Urban Area and Cities Act 2011.⁵⁵¹ The Act further gives effect to international conventions, including the International Convention on Civil and Political Rights.⁵⁵² The Isiolo county government aims to develop a culture of civic education and public participation.⁵⁵³ Civic education and

⁵⁴⁶ Isiolo County Government. (n.d.). Retrieved December 29, 2016, from http://www.isiolo.go.ke/about/mission_vision_functions

⁵⁴⁷ The Isiolo County Civic Education and Public Participation Act 2015, s 1.

⁵⁴⁸ The Isiolo County Civic Education and Public Participation Act 2015, s 2.

⁵⁴⁹ The Isiolo County Civic Education and Public Participation Act 2015, s 2.

⁵⁵⁰ The Isiolo County Civic Education and Public Participation Act 2015, s 3(a).

⁵⁵¹ The Isiolo County Civic Education and Public Participation Act 2015, s 3(b).

⁵⁵² The Isiolo County Civic Education and Public Participation Act 2015, s 3(c).

⁵⁵³ The Isiolo County Civic Education and Public Participation Act 2015, s 5.

participation is to take place within Isiolo County at a decentralised level.⁵⁵⁴ In Section 12(4)(a), the Act also emphasises that, while carrying out public participation, the county agency is to “inform the public to enhance understanding the problem, alternatives, opportunities and solutions.”⁵⁵⁵ Guidelines for public participation are also provided for in the Act in the first schedule. These guidelines number up to 12 and include, but are not limited to, the disclosure of information, fair and equal access to the public participation schedule, and a realistic time frame for consultation.⁵⁵⁶

⁵⁵⁴ The Isiolo County Civic Education and Public Participation Act, 2015,s 6(a)

⁵⁵⁵ The Isiolo County Civic Education and Public Participation Act 2015 ,s 6(a)

⁵⁵⁶ The Isiolo County Civic Education and Public Participation Act 2015, First schedule

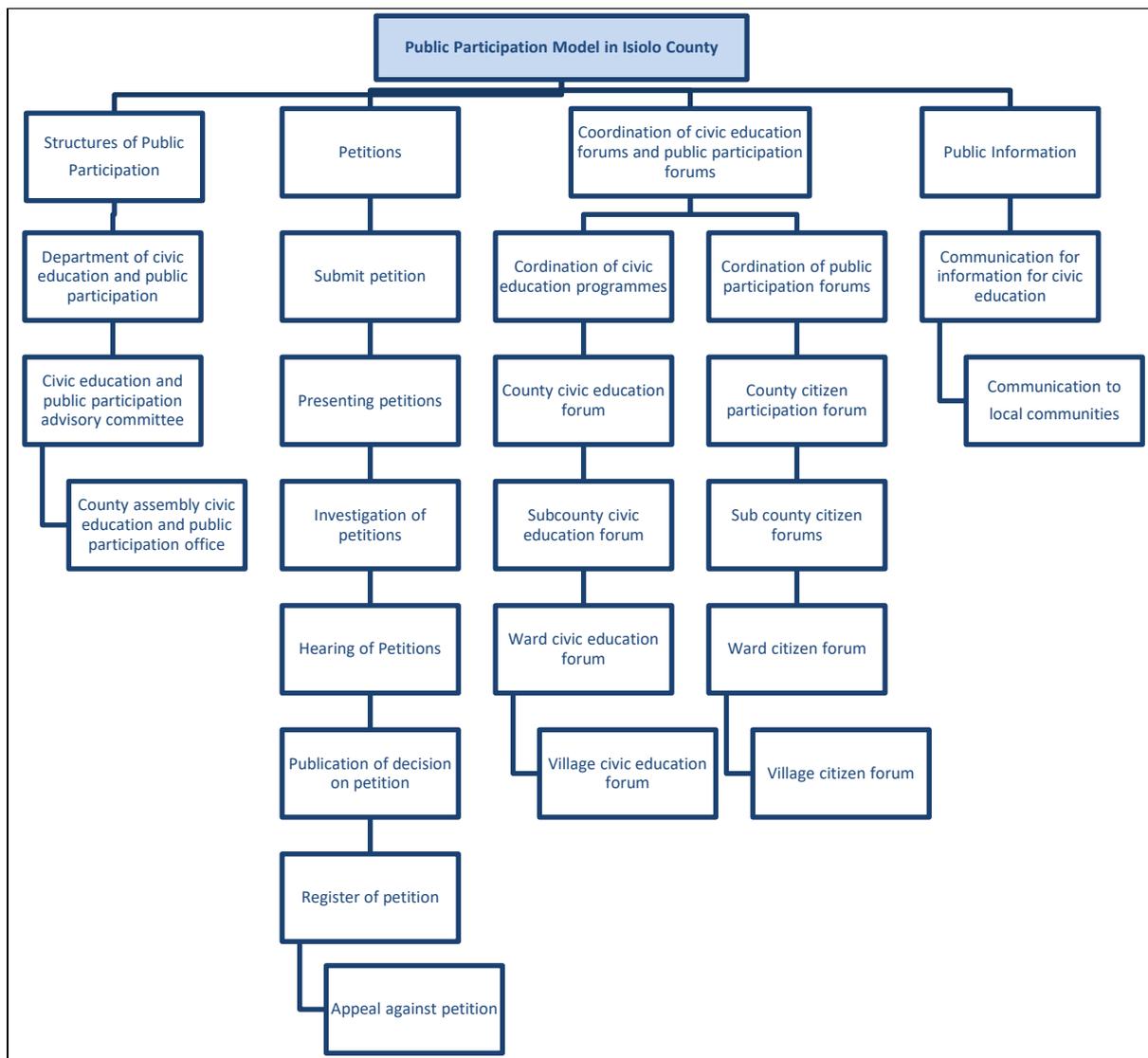


Figure 7 The Emerging Model of Public Participation in Isiolo as derived from the Isiolo County Civic Education and Public Participation Act 2015⁵⁵⁷

5.4 A Thematic Analysis of the County Public Participation Acts

All five public participation acts examined as part of this thesis were passed within the transitional period and are designed to achieve public participation at the county level. These counties developed public participation laws without the guide of a national policy framework for public participation. They took this action in advance of the ongoing process of facilitating

⁵⁵⁷ By Jane M. W. Marine.

the development of a National Public Participation Framework,⁵⁵⁸ with stakeholders to develop public participation guidelines.⁵⁵⁹

Although positive in some aspects, this move creates potential future problems because a national policy framework is expected to create clear standards of practice. It is not clear if the emerging county models will meet the constitutional standards. The move does, however, indicate that public participation legislation was a higher priority for some counties. The development and passage of only five acts also reflects the rate of work at county assemblies, which is considerably slow and possibly reflects a lack of capacity in law-making at the county level. A recent study of counties has also noted marked and growing inequality within and between counties and this is reflective of this reality at a technical level.⁵⁶⁰

Lack of capacity in law making and implementation together with social inequality, will affect how different counties access the public participation aspirations laid out in the Constitution. The following sections examine these particulars and, in conclusion, I highlight three emergent trends: namely, a shift towards a centralized coordination model, an integrative coordination model, and a bisymmetrical model of public participation at the county level.

5.4.1 Definition of public participation at the county level

Of the five Acts identified in this research, four of the county public participation laws provide for a definition of public participation. Elgeyo/Marakwet is curiously silent on this particular matter. Among the counties that did include a definition, a point of departure is that some

⁵⁵⁸ On 8 November 2016, a National Public Participation Bill was proposed at the Senate and is undergoing debate.

⁵⁵⁹ By a joint steering committee of the Transitional Authority together with the Office of the Attorney-General and Department of Justice the Constitution Implementation Commission, the Kenya Law Reform Commission, the Ministry of Devolution and Planning, as well as the Uraia Trust and Amekeni wa Kenya, the Transitional Authority, the Ministry of Devolution and Planning, and stakeholders.

⁵⁶⁰ Kenya National Bureau of Statistics (KNBS) & Society for International Development (SID) (2013). Exploring Kenya's inequality: Pulling Apart or Pooling Together? Retrieved 11 January, 2018, from: <http://inequalities.sidint.net/kenya/wp-content/uploads/sites/3/2013/10/SID%20Abridged%20Small%20Version%20Final%20Download%20Report.pdf>

counties confine the definition of public to sector representatives, while others refer to the individual citizenry, and appear to encourage direct participation. Machakos, for instance, clearly favours a sector representative model. Nairobi, on the other hand, speaks to the individual and group representation, thus covering all eventualities. This difference speaks to Article 1(2) of the Constitution of Kenya that states that the people may exercise their sovereign power directly or through their democratically elected representatives.⁵⁶¹ This is where a National Public Participation Act will be useful if it provides a definition of public participation, which can be utilised in the development of future legislation for a common understanding of the definition of public participation. Meru County and Isiolo County have the same definition of public participation, and this could simply be a reflection of the stakeholders that were involved in the development of the particular legislation. The two counties are physically contiguous with each other.

Definitions are the basis of court decisions, and varied definitions mean that the courts have to consider the individual definitions in each county. The differentiated definitions do not present a problem as long as they reflect the aspirations of the 2010 Constitution and the aspirations of the individual counties on matters related to public participation. Kenya should take the opportunity in this transitional period to evaluate how other jurisdictions have dealt the multiplicity of definitions and laws that govern public participation so as to prevent foreseeable policy conflict and to tie up the courts as earlier noted, that is, seek clarity and clear up inconsistency in the various public participation laws so that they are consistent with the 2010 Constitution. For example this future legislation could address the potential tension between an emphasis on representation by the leaders of sector groups and direct citizen engagement the 2010 Constitution.

⁵⁶¹ The Constitution of Kenya 2010, art 1(2).

5.4.2 Creation of public participation ‘space’

The five acts also differ in the institutional support that is offered to ensure meaningful participation can occur. An office/department of public participation is created in Meru and Elgeyo/Marakwet Counties. The Elgeyo/Marakwet model has the public participation office as the centre of the public participation activities.⁵⁶² In contrast, in Meru County, the public participation office is located within the county assembly service and, furthermore, a county Public Participation Advisory Committee is created.⁵⁶³ In Isiolo County, a department of civic education and public participation to be located in the office of the county public service is to be created.⁵⁶⁴ However, in Machakos County, public participation is to be carried out within the existing county government structures and offices in the county assembly and county executive. Nairobi is a fast growing city with great social and economic inequality, and effective participation may struggle to be achieved without provision of formal institutional structures of support. In the case of Nairobi, an office for participation has been established.

Public petitioning also differs among counties. Although public petitioning is provided for in all five the public participation acts and citizen forums are also provided for under all the acts, the way forums are used to listen to public petitions varies. The challenge, for example, is that is that forums are conceived as an annual activity in Machakos County and a quarterly activity in Meru and Elgeyo/Marakwet Counties. The more regular forum timing makes it possible for larger numbers of people to engage. The importance of having space legislated for public participation is to ensure that there is always a means of having it implemented. Even though space is created and people do show up to participate it is important to note that that the

⁵⁶² The Elgeyo/Marakwet Public Participation Act 2014.

⁵⁶³ Meru County Public Participation Act 2014.

⁵⁶⁴ The Isiolo County Civic Education and Public Participation Act 2015.

presence of people in a designated space of public participation does not necessarily mean that there was actual participation, nor that their comments are then taken into consideration.

5.4.3 Reporting of Public Participation

Reporting and evaluation of public participation are provided for in all the Acts. In Nairobi, an expectation of the County is to “prepare an annual report on public participation in the County Governments Act 2012.”⁵⁶⁵ The reporting is key because it allows for documentation of the public participation process, learning, and informing future decision-making. It is also important for the future improvement of public participation implementation, and in the process, it will demonstrate that the legislations are being complied with. However, this reporting of implementation of public participation coupled with evaluation can only be useful if real learning occurs.

5.4.4 Budgetary Implications of Public Participation

Allocation of public participation budgets also varies across the five counties. In Elgeyo/Marakwet County, financial provisions have been made for the office of public participation by ensuring that “Office of Public Participation remuneration, administration costs and other expenses shall be provided by the county assembly and payable from the County revenue fund.”⁵⁶⁶ In contrast, in Meru and Machakos Counties, the budgetary implications of public participation under placed under normal budget operations. In Isiolo County, it is expected that the director will prepare annual estimates of the revenue and expenditure of civic education.⁵⁶⁷

⁵⁶⁵ The Nairobi City County Public Participation Act 2015, s 5(f).

⁵⁶⁶ The Elgeyo/Marakwet Public Participation Act 2014, s 5.

⁵⁶⁷ The Isiolo County Civic Education and Public Participation Act 2015.

Nairobi County, on the other hand, is unequivocal and sets aside two percent of the annual county budget towards public participation.⁵⁶⁸ This is similar to the model law for public participation proposed by the Kenya Law Reform Commission which envisions a role for all levels of county government in the implementation of public participation which proposes that up to 1 percent of the county budget should be for the “exclusive” use of public participation.⁵⁶⁹

In theory, budgeting for public participation makes certain that the activities that are required to be done to ensure full and meaningful participation are budgeted for. But, as noted earlier, in the current Kenyan context, the unaccountability of public funds has overwhelmed many of the counties.⁵⁷⁰ The monies allocated for public participation could equally suffer the same fate that other budget allocations have where they are unaccounted for by the Auditor General, and the activities that were supposed to be undertaken were not achieved, this is particularly concerning where there is no institutional support and oversight of participation, for example a participation office. As discussed previously, public participation is important for accountability and, in the same token, its budgeted monies must be used for what they have been planned for.

5.4.5 Principles and Guidelines of Public Participation

Each of the five county participation acts provides for some form of guidelines on how public participation will be implemented. Machakos County, in the First Schedule of its Act, presents a “conduct of Public consultative meetings” of 16 points. In the First Schedule of its Public Participation Act, Elgeyo/Marakwet County presents what is referred to as “public participation guidelines” with 14 points. The Meru County Act in Section 4 lists “principles that shall guide

⁵⁶⁸ The Nairobi City County Public Participation Act 2015, s 22.

⁵⁶⁹ Draft County Model Law on Public Participation by the Kenya Law Reform Commission.

⁵⁷⁰ Kunow, A. (2017). Auditor General’s office to enhance oversight of projects in counties. The Standard, 16 December. Retrieved 20 December, 2017, from <https://www.standardmedia.co.ke/business/article/2001263263/auditor-general-puts-counties-on-notice-over-funds-use>

public participation” which consists of 11 points. The Isiolo Act in its first schedule also provides guidelines for public participation. The Nairobi Act presents ten principles that shall guide public participation in the county.

The guidelines of principles in the five county public participation acts share significant similarities with each other. At the same time, each county is informed by the principles of the County Governments Act 2012, including the need for a timeframe for public participation, meaningful dialogue, inclusiveness, and access and the need to provide for information before the public participation activity.⁵⁷¹ I now turn to examine the sustainability and accessibility of participation in each county.

5.4.6 Sustainability of Public Participation beyond the Constitutional Transition Period

The sustainability of public participation, or the ability to maintain ongoing, effective public participation, is highly dependent on a number of factors. A key factor is a budgetary allocation for public participation and the model of financing that is adopted.⁵⁷² The multiple functions of public participation roles in the Meru County process suggest that this particular model might face challenges in sustainability, yet it is paradoxically the model that most closely reflects the aspiration of public participation in the Constitution.

A similar challenge is faced by Isiolo County that has public participation at the village level; however, this might be more feasible because the population of the county is much smaller than others at only 143,294 people.⁵⁷³ The Isiolo County model has a duality that equally emphasises not only public participation but also civic education. Because of this, it may be more likely to be sustainable because the local citizenry build democratic knowledge

⁵⁷¹ County Governments Act 2012.

⁵⁷² County Governments Act 2012.

⁵⁷³ Commission on Revenue Allocation. (n.d.). Retrieved January 2, 2017, from <http://www.crakenya.org/county/isiolo/>

and have structure and support as they continue to participate. The quality of decision making is also likely to improve as the year's progress and the civic education element of the public participation is being implemented.

The Nairobi County model aims to develop a culture of democratic governance and build the capacity of its citizenry.⁵⁷⁴ This is key if the promise of public participation contained in the Constitution is to be realised then at the local level the public must build a democratic culture. However, evidence of how effective any institutional support for public participation, for example in the form of an office of participation in Nairobi, is still limited and this raises questions about how participation budgets can be allocated fairly and transparently. There are other issues that this review of the county acts have raised which could improve participation practice, which I now turn to examine.

5.4.7 Access to Information

The five county acts emphasise the need for access to information as provided for in the Constitution. Timely access to information is intended to lead to greater and more meaningful public participation. However, with only five county public participation laws passed out of a possible 47, the atmosphere of policy implementation does not seem conducive to a situation where the citizen's voice can be fully expressed in the governance process. The fact that Schedule Five of the Constitution had not yet been fully implemented by the end of 2016 is problematic when it comes to access to information. If indeed a particular law has not yet been legislated then the Access to Information Act 2016 is powerless to enforce where they are no such laws to enforce.

⁵⁷⁴ The Nairobi City County Public Participation Act 2015, s 2.

5.4.8 *Civic Education*

Civic education is key in the public participatory process as it ensures that the citizens can have informed dialogue with government on specific issues. Civic education has received a prominent and central position in the Isiolo Public Participation Act 2015. As stated earlier, there is a duality to how public participation is imagined in Isiolo County, with civic education going hand in hand with public participation. Nairobi County aims to:⁵⁷⁵

Conduct at least two civic education sessions to inform and receive feedback from county residents on issues including policy making; the law making processes; public finance management processes; development planning processes; monitoring and evaluating county budget implementation, and; evaluating periodic county reports.

Nairobi also appears to delegate the rest of the civic education to non-state actors who are meant to coordinate with the executive committee member in charge public participation.⁵⁷⁶ Elgeyo/Marakwet County states that as one of the roles of public participation of office is “creating the culture of, and respect for the principles of public participation, facilitate public education and training programmes in relating to public participation”.⁵⁷⁷ The expectations are that public education should be ongoing and facilitated by the public participation office.

By contrast, Meru County makes no mention of civic education and appears not to imagine its citizens requiring it. This silence on civic education in connection to public participation in Meru County legislation either suggests that the county does not see the need for civic education about public participation or that civic education is to be managed separately. Machakos County provides in as one of its guidelines the “provision for civic education programmes to promote public participation in public affairs” and an expectation that

⁵⁷⁵ The Nairobi City County Public Participation Act 2015, s 25.

⁵⁷⁶ The Nairobi City County Public Participation Act 2015, s 25(3).

⁵⁷⁷ The Elgeyo/Marakwet Public Participation Act 2014.

it shall be facilitated.⁵⁷⁸ Critics of Nairobi County argue that there is a complacency about participation in that county and too great an emphasis on traditional face to face town hall style meetings in practice, while citizens in a large urban area such as Nairobi might also benefit from support and education to engage in more digital participation.⁵⁷⁹

5.5 An Analysis of the County Participation Acts in view of the “Options for Management and Coordination of Public Participation in Kenya”

As discussed earlier in this chapter, three options have been proposed as options for the management and coordination of public participation in Kenya by the County Public Participation Guideline.⁵⁸⁰ This section examines each county to consider which model it most closely follows.

Option 1: “The county government appoints a county public participation coordinator who acts as the administrative head for public participation. The coordinator works with the County Executive Committee, County Assembly and administrators in the county units.”⁵⁸¹

In my review of the five County participation acts I could find no clear example of an appointed county participation coordinator who can coordinate participation processes as suggested by the Kenya guidelines, option one. Apart from the Nairobi county model that had an executive committee member in charge of public participation. However The Elgeyo/Marakwet County model is focused on a central coordination of direct participatory model and also uses petitions at all the different levels of county decision making. Machakos County by contrast has adopted

⁵⁷⁸ Machakos County Public Participation Act 2014, s 5(2)(c).

⁵⁷⁹ Sambuli, N. (2016) On Nairobi County’s tepid approach to digital public participation. Daily Nation Sunday 20 March <https://www.nation.co.ke/oped/blogs/620-3125954-format-xhtml-3k9mkaz/index.html>

⁵⁸⁰ Ministry of Devolution and Planning & Council of Governors (2016). County Public Participation Guidelines (Rep.), p42. Retrieved January 4, 2017, from <http://www.devolutionplanning.go.ke/wp-content/uploads/2016/04/County-Public-Participation.pdf>

⁵⁸¹ Ibid.

a *sector representative model* of public participation. This means that it has identified groups that are referred to when public decisions are being made that are considered as reflecting the local community. However, the Act also seems to be sensitive to the possible tensions between representative and participatory democracy, and it appears that it chooses this model as a more efficient, pragmatic model of doing the business of public participation. Conversely, Meru County presents a dual system of sector representation in public participation and provision of opportunities for the individual members of the public to participate by petitioning directly to the county executive and assembly. None of these models fit the option one exactly however Meru and Elgeyo/Marakwet comes a step closer with the creation of participation offices.

Option 2: “The County Assembly and County Executive put in place independent administrative structures for their public participation and civic education.”⁵⁸²

Meru County established an office known as the public participation office, which is an agency in the county assembly service.⁵⁸³ This suggests, therefore, it is also closer in design to Option 2. Equally, Elgeyo/Marakwet County set up an office of public participation thus making its public participation arrangements align with Option 2,⁵⁸⁴ but Isiolo County established an office to be known as the County Assembly Civic Education and Public Participation Office which shall be an office in the County Assembly Service.⁵⁸⁵ In the Isiolo model it is not clear how this office is “independent” but the emphasis on education is significant and returned to later in the discussion.

⁵⁸² Ministry of Devolution and Planning & Council of Governors (2016). County Public Participation Guidelines (Rep.), p42. Retrieved January 4, 2017, from <http://www.devolutionplanning.go.ke/wp-content/uploads/2016/04/County-Public-Participation.pdf>

⁵⁸³ Meru County Public Participation Act 2014.

⁵⁸⁴ The Elgeyo/Marakwet Public Participation Act 2014.

⁵⁸⁵ The Isiolo County Civic Education and Public Participation Act 2015, s 18.

Option 3: “where a county resolves to adopt an integrated administrative approach to public participation.”⁵⁸⁶

Machakos County appears to be most aligned to this option. It does not have a distinguishable public participation office or a county office that is primarily dedicated to public participation. Machakos also narrows its definition of participation to sector representation, and this, combined with the absence of an independent participation office, while meeting the third option of the Kenya guidelines, also leaves open a possibility that participation processes may be captured by well-established groups and elites.

In summary, of the five sampled counties it appears none falls under Option 1 in that no county has yet appointed an administrative head of participation. However, there is the possibility of having a county fall under two of the other options, creating independent structures to promote participation or integrating responsibility for participation into county governance. The findings also suggest that the differences in interpretation of public participation are leading to models of public participation that are emerging in practice at the county level in the constitutional transition period. These models I have termed as: “centralised coordination”, “integrative coordination” and “bi-symmetrical” models of public participation.

The “centralised coordination model” would entail a public participation office and some centralised resources for coordinating public participation. While none of the five counties examined in this thesis had an independent coordinating officer, Elgeyo Marakwet County does close to this model. Nairobi County also had a central office as did Meru.

⁵⁸⁶ Ministry of Devolution and Planning & Council of Governors (2016). County Public Participation Guidelines (Rep.), p42. Retrieved January 4, 2017, from <http://www.devolutionplanning.go.ke/wp-content/uploads/2016/04/County-Public-Participation.pdf>

In this review I also identified an “integrative coordination model” which is one that implements public participation through the existing structures of the county assembly and the county executive. This model was identified as emerging in Meru and Machakos counties. However, at the same time, Meru also has a public participation office, hence creating some overlap in the models.

Finally, I identified a “bisymmetrical model” of participation where there is equal emphasis on public participation and civic education and a prevailing emphasis on this duality of support required for participation. This model was identified in Isiolo County where civic education support is provided for every step of the public participation process alongside formal county level institutions for participation. Isiolo, one of the poorest of Kenya’s counties, thus offers support to citizens through civic education and advocacy, and may help ensure the public can take better advantage of the new participation opportunities.

Now that I have examined the counties in the context of the proposed options, in the next section I examine what it means to have a variety or myriad forms of public participation, and then what the implications are for Kenya as the Constitution is implemented.

5.6 An Analysis of the Extent of Alignment of the County Public Participation Acts to the Public Decision-Making Framework at Common Law

As discussed earlier, public decision making occurs in the context of the common law. Decision making must comply with the basic requirements of natural justice, such as the giving of notice of public decision making and the need for full disclosure of information on which the decision making is based.

As earlier noted, the notion of public participation in the context of the Constitution of Kenya 2010 promotes the expectation that the administration must facilitate and encourage public participation. This framework, with its potential limitations, provides a starting point of analysis of the extent of alignment of the county public participation acts to the common law public decision making framework.



Figure 8 The Public Decision-Making Framework at Common Law

5.6.1 *Prior Notice*

Prior notice is one of the key requirements of natural justice for public decision making. It ensures that the stakeholders are informed of the public decision-making processes. In the Machakos County Public Participation Act 2014 notice is only required for the publication of the public decisions and fourteen days are deemed sufficient for such.⁵⁸⁷ However, this is only ex post facto notice and not prior notice of the decision making process. For Nairobi County, notice pending decision making must be given to the public in a nationally published newspaper or by radio announcements in both Kiswahili and English the two national languages.⁵⁸⁸ In contrast, the Meru County Public Participation Act 2014 requires each county department to give “sufficient and adequate notice” to stakeholders.⁵⁸⁹ This Act also requires the public participation office to give reasonable notice of committee meetings.⁵⁹⁰ Under the Elgeyo/Marakwet Public Participation Act 2014, seven days notice is required for a meeting.⁵⁹¹ The Isiolo County Civic Education and Public Participation Act 2015 has also a seven day notice of a meeting, specifying the time, date, and venue of the meeting.⁵⁹²

There are two statutory *modus operandi*: public participation acts might specify the actual length of notice required and what must be included specify the number of days and the content of the notice, or those public participation acts that might require sufficient, reasonable, and adequate notice be given, but what constitutes that is not specified. The first type of notice leaves no room for doubt. The latter type of notice however is open to interpretation, creating potential for dispute as to what is reasonable and adequate notice. This may result in the courts being petitioned for a ruling as to what what is resonable and adequate notice.

⁵⁸⁷ Machakos County Public Participation Act 2014.

⁵⁸⁸ The Nairobi City County Public Participation Act 2015, s 9(1).

⁵⁸⁹ Meru County Public Participation Act 2014, s 14 (1)(c).

⁵⁹⁰ Meru County Public Participation Act 2014, s 13(4).

⁵⁹¹ The Elgeyo/Marakwet Public Participation Act 2014, sch 2(4).

⁵⁹² The Isiolo County Civic Education and Public Participation Act 2015, s 9(3&4).

5.6.2 *Disclosure*

As noted earlier, at common law prior disclosure of relevant material is a duty that lies on all decision makers. In the context of public participation, it is incumbent on the county government to disclose all relevant material in order for there to be genuine public participation. Without access to the relevant materials, stakeholders will lack capacity to engage meaningfully.

The Machakos County Public Participation Act 2014 requires disclosure of all information necessary for the public to understand and to evaluate the proposed decision under consideration in public consultative meetings.⁵⁹³ The Nairobi City County Public Participation Act 2015 specifies that “the public shall have timely access to appropriate information which shall be publicised or provided by the County to enable their participation in a meaningful manner.”⁵⁹⁴ Meru County, too, requires the provision of meaningful information in advance of consultative meetings and decision making.⁵⁹⁵ The Isiolo Act requires “disclosure of all information relevant for the public to understand and evaluate the decision.”⁵⁹⁶ The Elgeyo/Marakwet Act has an identical requirement on disclosure similar to the Isiolo County Act.⁵⁹⁷

It is apparent from the county public participation acts that all five counties are cognisant of their duty to disclose relevant material prior to decision-making. This aligns these five counties with the common law disclosure requirements of disclosure imposed on decision makers.

⁵⁹³ Machakos County Public Participation Act 2014, sch 1(6).

⁵⁹⁴ The Nairobi City County Public Participation Act 2015, s 4(e).

⁵⁹⁵ Meru County Public Participation Act 2014.

⁵⁹⁶ The Isiolo County Civic Education and Public Participation Act 2015.

⁵⁹⁷ The Elgeyo/Marakwet Public Participation Act 2014.

5.6.3 Consultation of Stakeholders

As noted earlier with reference to consultation of stake holders, consultation is important because it ensures decisions are “owned” by the stakeholders and affected parties. Instilling a sense of ownership is essential to ensuring that stakeholders and parties accept the outcome of the decision-making. The Machakos County Public Participation Act 2014 sets down in the first schedule the conduct for public consultation

Under the Nairobi County Act 2015 there must be consultation with the county residents on several issues each financial year. These issues include “county policy making, law making, public finance management, development of planning processes, monitoring and evaluating county budget implementation, and the, evaluating of periodic county reports.”⁵⁹⁸

Under the Meru County Public Participation Act 2015 there must be “mutual consultations and dialogue and exchange of views on matters affecting a community or group of persons.”⁵⁹⁹ In the Isiolo County Act 2015, consultation is listed as one of the standards of good practice in facilitating stakeholder engagement.⁶⁰⁰ In the Elgeyo/Marakwet Public Participation Act 2014, public participation guidelines and specify the need for a reasonable amount of time for consultation to ascertain who should be consulted.

All five counties recognise the centrality of consultation in the public decision-making framework. Their legislation comports with the common law requirements for public decision makers to engage in meaningful on consultations with stakeholders. However, the degree of consultation that is required, varies from county to county.

⁵⁹⁸ The Nairobi City County Public Participation Act 2015, s 25(1).

⁵⁹⁹ Meru County Public Participation Act 2014, s 4(b&c).

⁶⁰⁰ The Isiolo County Civic Education and Public Participation Act 2015, s 7(c).

5.6.4 Notice of Decision

A decision must be communicated to be valid and effective at law. An uncommunicated decision, at law, is no decision at all. Lack of notice of the decision means that the decision lacks legal effect. Accordingly, the Machakos County Public Participation Act 2015 provides that: “The County Secretary shall, within fourteen days of the decision of the County Executive Committee or other body notify the petitioner of the decision.”⁶⁰¹ The Nairobi City County Public Participation Act 2015 is equally clear about the need for notification of the decision to the Petitioner. Notice of the decision must be given within 14 days. The Nairobi City County Public Participation Act 2015, in contrast is more specific about the means of notification, which includes posting a copy of the decision in a conspicuous place, or on the Nairobi County website or in the County Gazette, or publicising the decision through the media.⁶⁰² The Meru County Public Participation Act 2014 is especially prescriptive. It states that: “The Clerk shall, within fifteen days of the decision of the County Assembly, in writing, notify the petitioner of the decision of the County Assembly.”⁶⁰³ For Isiolo County, “the Clerk of the County Assembly shall, within seven days after the decision is communicated to the petitioner or petitioners give notice of the decision to the public by posting a copy in a conspicuous place at the offices of the County government.”⁶⁰⁴ In Elgeyo/Marakwet, the county secretary, shall give notice within fourteen days.⁶⁰⁵

All the counties acknowledge that notice of the decision must be given. However, what is of interest is that they do not agree on what amounts to good notice, in that the notice period

⁶⁰¹ Machakos County Public Participation Act 2014, s 12(7).

⁶⁰² The Nairobi City County Public Participation Act 2015.

⁶⁰³ Meru County Public Participation Act 2014, s 27(3).

⁶⁰⁴ The Isiolo County Civic Education and Public Participation Act 2015, s 34(a).

⁶⁰⁵ The Elgeyo/Marakwet Public Participation Act 2014.

ranges from seven to fifteen days. Which represents a considerable range between different counties.

5.6.5 Cross Examination

At common law the requirements of fairness may import the right to cross examine witnesses. However, this right has little relevance in the context of public participation under the 2010 Constitution. None of the counties examined alluded to the need for of cross examination in decision making or petitions or otherwise.

5.6.6 Explanations as to why certain decisions were made

The obligation to explain why certain decisions were made corresponds closely with the common law requirement that decision makers must provide reasons for their decisions. Reasons must be made clear to all, so as to inform interested parties how and why decisions were made. Elgeyo/Marakwet County requires decision makers to:⁶⁰⁶

Ensure that all responses are carefully and open-mindedly analysed and the results made widely available to the public, including an account of the views expressed and the reasons for the decisions taken.

Machakos County has the same requirement to explain why a decision was made.⁶⁰⁷ Nairobi County goes further and requires “communication to the public on how their input affected the final decision.”⁶⁰⁸ Isiolo County imposes a requirement to give feedback on the action taken on the issues raised affecting the decision.⁶⁰⁹

⁶⁰⁶ The Elgeyo/Marakwet Public Participation Act 2014, sch 5(5).

⁶⁰⁷ Machakos County Public Participation Act 2014, sch 1.

⁶⁰⁸ The Nairobi City County Public Participation Act 2015.

⁶⁰⁹ The Isiolo County Civic Education and Public Participation Act 2015.

The Meru County Public Participation Act 2014 is an exception as it does not require a public explanation as to why certain decisions were made.⁶¹⁰ Meru County, is the only county that does not mirror the common law requirement of providing explanations for decisions. The other counties, to varying degrees, require that the public receive some form of explanation as to why public decisions were made in the way that they were.

5.6.7 Oral Hearings

The public participation requirement under the 2010 Constitution of Kenya does not align with the common law need for decision makers to provide oral hearing where the interests of justice require. It appears that all public submissions on proposed decision making will be by way of written submission. None of the five County Public Participation Acts specifically requires oral hearings. Public input, it appears, is assumed to be by way of written submission. The lack of provision for oral hearings in appropriate cases detracts from the common law right to be heard in person where the interest of justice require.⁶¹¹

Interestingly, the County Public Participation Guidelines developed by the Ministry of Devolution and Planning & Council of Governors in (January 2016) states the following:⁶¹²

The public is expected to participate in many ways. This includes; giving input, suggestions, opinions, reviews of content through oral or written memorandum, or (un)solicited feedback on access to service and quality.

The Ministry is clear that the guidelines “are not meant to replace existing county legislation on public participation, rather, they complement them where necessary.”⁶¹³ However, these guidelines would have better served the counties if they were developed before the development

⁶¹⁰ The Meru County Public Participation Act 2014.

⁶¹¹ R (Osborn) v Parole Board; & 2 other cases [2013] UKSC 61.

⁶¹² Ministry of Devolution and Planning & Council of Governors (2016). County Public Participation Guidelines (Rep.), p 42. Retrieved January 4, 2017, from <http://www.devolutionplanning.go.ke/wp-content/uploads/2016/04/County-Public-Participation.pdf>

⁶¹³ Ibid.

of public participation legislation. Not all decision making at common law requires an oral hearing.

5.6.8 Availing Draft Decisions

None of the five county public participation acts requires draft decisions to be presented before a final decision is handed down depending on the circumstances of the decision making, this may represent a departure from the common law requirements of natural justice.

5.6.9 Evidence Based Decisions

It is one of the fundamentals of good administration that public decision making be based on evidence. At least four of the county public participation Acts examined satisfy this aspiration. Before a final decision is handed down, the Nairobi City County Public Participation Act 2015 requires “any person holding public office to appear before the public decision maker to give evidence relating to a petition.”⁶¹⁴ Similarly, the Machakos County Public Participation Act invites “any public officer to appear before them to give evidence relating a petition.”⁶¹⁵ The Elgeyo/Marakwet Public Participation Act requires “individuals to submit memoranda or appear before the committee to give evidence on a petition.”⁶¹⁶ The Isiolo County Civic Education and Public Participation Act equally invites that that persons to and public office holders submit evidence the county assembly regarding public petitions.⁶¹⁷ The Act further reinforces the importance of providing evidence by stating that the witness will be protected under the Witness Protection Act of 2005.⁶¹⁸

⁶¹⁴ The Nairobi City County Public Participation Act 2015, s 17(b).

⁶¹⁵ Machakos County Public Participation Act 2014, s 12(a).

⁶¹⁶ The Elgeyo/Marakwet Public Participation Act 2014.

⁶¹⁷ The Isiolo County Civic Education and Public Participation Act 2015.

⁶¹⁸ The Isiolo County Civic Education and Public Participation Act 2015.

5.6.10 All Sides Must be Heard

It is imperative that all sides have an opportunity to be heard in the public decision-making process. This is in line with the common law principle of *audi alteram partem* (*hear the other side*). Machakos County Public Participation Act 2014 requires “that all responses are carefully and open-mindedly analysed.”⁶¹⁹ The Nairobi County legislation is especially detailed in ensuring that all interested parties are heard. It states that there is a requirement that:⁶²⁰

A ward or village administrator or a member of the County Assembly may convene a ward or village citizen participation forum, and the County Government shall facilitate the organisation of the forum... The forum may only be convened in consultation with the member of the County Assembly and shall be open to all interested parties.

This requirement ensures that all roles are clear and that at all levels the public have an opportunity to be heard.

5.6.11 Legal Representation

None of the county acts refers to the need for legal representation in the public participation process. This too represents a point of departure from the requirement of natural justice at common law; the requirements of fairness may signify a right for interested parties to be legally represented. This requirement is not usually found in the public participation context.

5.6.12 Warnings as to Adverse Credibility

As noted earlier, warnings as to adverse credibility findings lie with the decision maker and is considered a requirement in public decision making. The Machakos County Public Participation Act 2014 refers to the affected public but does not specify if the effect need be adverse or positive. In the Nairobi County definition of public participation, there is an acknowledgement that “public participation means the involvement of individuals and groups

⁶¹⁹ Machakos County Public Participation Act 2014.

⁶²⁰ The Nairobi City County Public Participation Act 2015, s 12.

that are positively or negatively affected.”⁶²¹ Meru County has a similar definition of public participation. The guiding principles of public participation in Elgeyo/Marakwet County – “facilitation of the involvement of communities, organisations and citizens potentially affected by or interested in a decision.”⁶²² Isiolo County has the same definition of public participation as Meru and Nairobi Counties.

Warnings as to adverse credibility of a decision are specific. The acts refer to the general idea that decisions will affect the public; however, warnings to adverse credibility have to be specific. This particular characteristic of public decision making is key. It is therefore clear there is partial alignment to the idea of informing the public in the event of a decision that negatively affects them in the county acts.

5.7 Summary

This chapter examined the five county public participation acts of Machakos, Nairobi, Meru, Isiolo, and Elgeyo/Marakwet. In the analysis of the county public participation acts, I have argued that they are “legion of modes of participation”.⁶²³ However, there are three options for “management and coordination of Public Participation in Kenya”.⁶²⁴ These options entail differing amounts of institutional support and I identified three approaches to participation I term a “centralised coordination”, “integrative coordination” and “bi-symmetrical” models of public participation. It is beyond the scope of the thesis to assess the impact of these emerging

⁶²¹ The Nairobi City County Public Participation Act 2015, s 2(e).

⁶²² The Elgeyo/Marakwet Public Participation Act 2014, s 4(d).

⁶²³ Fung, A. (2006). Varieties of Participation in Complex Governance. *Public Administration Review*, 66(S1), 66-75. doi:10.1111/j.1540-6210.2006.00667.x.

⁶²⁴ Ministry of Devolution and Planning & Council of Governors (2016). *County Public Participation Guidelines (Rep.)*, p 42. Retrieved January 4, 2017, from <http://www.devolutionplanning.go.ke/wp-content/uploads/2016/04/County-Public-Participation.pdf>

models, however it is useful to note that they each place different emphasis on the extent of institutional support for public participation and independence of the processes of participation.

I then discussed the extent of alignment of the county participation acts to the public decision-making framework at common law. In the analysis of the county public participation acts and emerging public participation models, I noted that the Constitution is still in a transitional stage. This chapter summarised and assessed the debates, while recognising the constraints of a transitional period. As the other counties draft and adopt public participation laws, the public participation infrastructure that will be created will open further avenues for discussion. The need for a national public participation act is overdue. This review of the counties with the public participation laws across in five counties reveals some variation in the extent to which participation is meaningful. A national framework and guidelines for participation are urgently needed to identify nationwide best practice models of public participation. As more is known about models of participation in practice, a better understanding will emerge as to why one model of participation might be preferred at a county level over another.

The variation that exists in the emerging models of public participation at the county level reflects on what each individual county believes is the best way forward. With time, room remains for the amendment of the public participation acts to create a more practical model depending on the experience of each county. At the same time, the variety of modes of participation should not divert attention from their efficacy. This is an area that requires further research.

Provision of public participation opportunities in law, no matter how diverse, remain a blunt instrument if there is no accountability, access to information, or transparency. Without mechanisms for scrutiny of spending, there can be no meaningful citizen participation.

Therefore, the lack of accountability, access to information, and transparency has the potential to negate emerging steps towards meaningful public participation. To argue there are definitive models of participation emerging in Kenya, however, would require a larger sample of the 47 counties than could be examined in this chapter. However, with the five that are examined here, and as time progresses, it may be possible to determine emerging overall trends.

This comparative case study examination of the five counties indicates the potential for a centralised office to deal with public participation, as outlined in the Kenya Guidelines for Participation, Option 1. As the preferred option, this approach has many strengths given the challenges of public participation in Kenya and is what I have described as a “centralised coordination” model of public participation. Critics may argue that the centralist political tendencies that characterised Kenyan politics prior the 2010 Constitution (and appear to linger on in the transitional period) will appear at the county level if this model is adopted. Nevertheless, providing central support for public participation appears to be the most likely method to promote public participation at the county level and ensure independence, and transparency in budgeting.

This chapter, therefore, notes there is diversity in emerging public participation infrastructure and that inevitably there will be variety. However, this variation should not be at the detriment of citizens trying to exercise their right to participate. By analysing the various public participation acts, this chapter illustrates that the constitutional obligation of public participation has been discharged through legislation at all levels. This applies to the county, sub-county, ward, and village level (this last is the smallest and most local level of the administrative structure in Kenya).

The recommendation to take from this chapter is that a review of the county public participation laws needs to be undertaken to ensure that the counties are in line with the 2010

Constitution and that any non-compliant legislation be made compliant. Furthermore, it is recommended that definitions of public participation be included in the national and county public participation frameworks. Another recommendation is that the counties that have not legislated and gazetted public participation laws ought to do so in order to discharge their constitutional obligation under the Constitution of Kenya 2010. The final suggestion from this chapter is that the gap between the existing public participation laws and their actual implementation in practice requires further study. I now turn to the results of interviews with practitioners, academics and community advocates, to gain their perspectives and deeper insight into the experience of public participation and how it was implemented in the Constitution transitional period.

Chapter 6 – Findings of the Semi-Structured Interviews and Document Analysis

6.1 Introduction

As presented in Chapter 1, the aim of this study is to examine how public participation provisions in the Constitution of Kenya 2010 have operated in the constitutional transitional period 2010–2016. The discussion so far has considered the national legislative framework for public participation, the judgments being made in the Kenyan courts regarding public participation, the county public participation acts, emerging public participation models, and an assessment of public participation standards emerging in the context of the public decision-making framework at common law.

This chapter now presents the findings from in-depth semi-structured interviews that were carried out with 17 members of civil society who have engaged in community or professional practice with the public and with the new public participation provisions in the transitional period. It also presents the findings of the interviews in the context of analysis of ‘grey’ literature, that is “which is produced on all levels of government, academics, business and industry in print and electronic formats, but which is not controlled by commercial publishers.”⁶²⁵ Relevant to public participation in this period, these documents include: policy papers and research reports. Both the interviews and the analysed documents were coded, as discussed in Chapter 3 and emerging themes identified in the discussion of results here.

⁶²⁵ GL'99 Conference Program. Fourth International Conference on Grey Literature: New Frontiers in Grey Literature .GreyNet, Grey Literature Network Service. Washington D.C. USA, 4-5 October 1999.

In the first section of this chapter I briefly introduce the background of the interviewees and then examine the challenges that these respondents have observed while engaged with public participation. This chapter reports what these respondents observed as challenges facing citizens identified the challenges of responsibility, apathy, access to information, civic education, funding, process and culture which were each topics identified in the interviews that need to be addressed to support the public's capability to participate in decision making. In the second section of this chapter I then report on the experiences of how citizens participated, and in the third section, I review observations made by interviewees about the provisions of the Constitution and the implementation of the legal framework for participation. In the fourth and fifth sections, I report on the literature about the perceived role of government and leadership in advancing effective participation under the Constitution and public assistance required to support the infrastructure necessary for effective participation. Finally, in the sixth section I return to present some insights from the interviews about the common law public decision-making framework.

6.2 The Interviewees

The study identified 17 respondents drawn from civil society in Kenya. These respondents were identified by using purposive and a snowball referral methodology which has been defined by in Chapter three to reflect the range of organisations and individuals working in the public participation field in civil society in Kenya in the period 2010–2016. These respondents included the following: six local NGO workers, one international NGO worker, three members of academia with expertise in public participation in Kenya, three community workers in faith-based organisations, two lawyers with national experience, and two private consultants. The majority of the respondents were male 71 percent and 29 percent female. The organisation that the respondents were based in, or worked for, were varied either based in specific counties or

organisations that had a national outlook. The national outlook organisations make up about 65 percent (11) of the sample and national focused insights and county based insights make up 35 percent (6). The profiles of respondents are summarised in Tables 1, 2 and 3.

Table 1 Respondents roles in public participation in the transition period

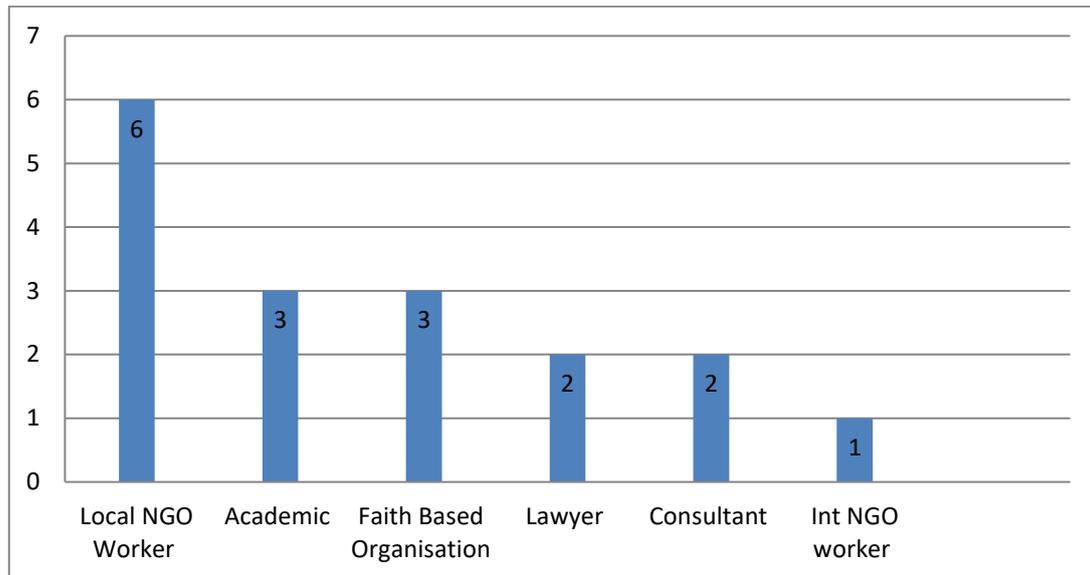


Table 2 Gender of the Interviewees

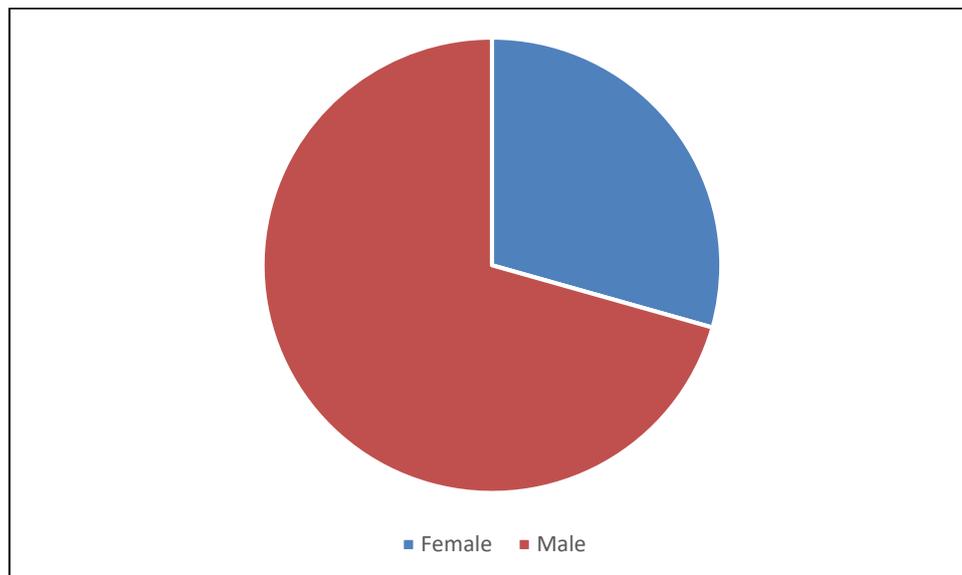
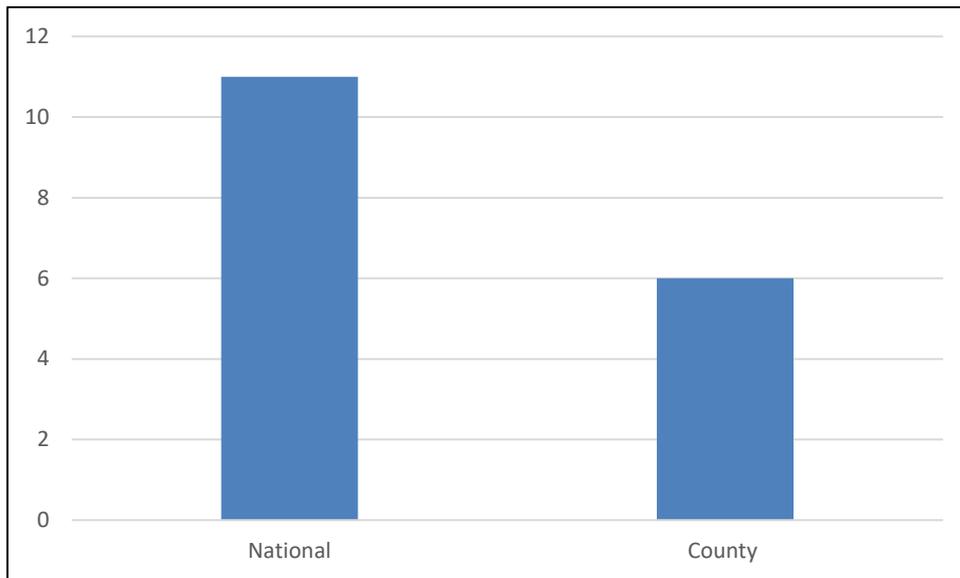


Table 3 The Organisations of the Respondents with a National or Regional Focus



The in-depth interviews with the 17 interviewees lasted from forty-five minutes to one hour. The respondents were interviewed by Skype and telephone and were all based in Kenya and drawn from various counties except for one of the academic respondents who was outside Kenya at the time of interview. The respondents were invited to comment on a range of issues, relating to the implementation of public participation in the context of the 2010 Constitution in the transition period of 2010–2016 (see Appendix B for the semi structured questionnaire). The interviews were then transcribed and coded by themes using Nvivo software as discussed in the methods chapter. The results of the data analysis are now presented.

6.3 Reported Observations of the Role of Citizens in Ensuring the Effective Implementation of Public Participation

The results of key informant interviews confirm the international experience reported in the literature about the significant challenges citizens face as they seek to become involved in

governance. Arnstein (1969),⁶²⁶ King et al. (1998),⁶²⁷ and Putnam (1995)⁶²⁸ all emphasise that one way of ensuring better citizenship is by making sure that the public has opportunities to be meaningfully engaged in decision-making about issues that affect their lives. The interviews reported here, however, suggest that the public participation process in this Constitution transition period are also challenging in significant ways. These challenges can be summarised as challenges of responsibility, apathy, access to information, civic education, funding, process and culture. The reporting of the interviews now examines each challenge in turn, and considers the implications of interviewee comments for understanding how to better support the capability of the public to participate in decision making.

6.3.1 Citizen Responsibility

Three of the 17 interviewees all volunteered that citizens are expected to be “active” participants in public participation process. It is not surprising that respondents suggest that much of the burden of responsibility to participate falls on the citizen because citizens have responsibilities that have been articulated by the legal framework of the Constitution, as has been presented in Chapter 1 and Chapter 4. Under the Constitution of Kenya, every person (citizen) has an obligation to “respect, uphold and defend this Constitution”.⁶²⁹ With regards to public participation responsibilities at the county level, Meru County Public Participation Act, 2014 also lists, “civic duty and responsibility” as a fundamental principle for public participation.”⁶³⁰ Meru County legislation states that “citizens can and should participate constructively in the forums and platforms created by the county government for public participation, share information, and make proposals to the county government during the law,

⁶²⁶ Arnstein S.R. (1969). A ladder of citizen participation *Journal of the American Institute of Planners*, 354: 216-224

⁶²⁷ King, C.S., Feltey, K.M., Susel, B.O’N. (1998). The question of participation: Towards authentic public participation in public administration *Public Administration Review*, 58(4): 317-326.

⁶²⁸ Putnam R.D. (1995). Bowling alone: America’s declining social capital. *Journal of Democracy*, 6(1): 65-78.

⁶²⁹ Constitution of Kenya 2010, art 3.

⁶³⁰ The Meru County Public Participation Act 2014, s 4(k).

policy, and decision-making processes as well as service delivery mechanisms. Citizens are also expected to contribute where appropriate and practicable, resources for developing or implementing public services delivery processes.⁶³¹ The following observation was made by Lawyer No. 2 who suggested that citizens need initial encouragement to exercise their new responsibilities to participate. He argued:

“A similar process then needs to take place in respect of public participation and that duty then lies in the legislature. As they [the members of the legislature] carry out the role of public participation it is then incumbent upon them to educate our populace and tell them, “Look, you have this responsibility, and this is the best way in which you can carry out that responsibility”. So in the absence of that sensitisation then you know it could take a very long time to take root, and there is a danger that perhaps it might not take root.” (Lawyer No. 2)

While discussing the role of citizens in public participation, Lawyer No. 2 also raised a concern, regarding the perception of the extent to which Kenyan citizens understand their responsibility and opportunity to participate:

“I do not think the average Kenyan citizen understands that they have a role in public participation. I don't think they understand that they have a role in, or that they can make inputs into both national and county legislations.” (Lawyer No. 2)

While discussing the responsibility of citizens to participate, the International NGO worker interviewed noted what appeared to be the conflicted role that organisations such as Christian churches can play in Kenya in supporting people to understand their responsibility to participate and fulfilling it:

“People say that the churches were more active in an earlier era around the pro-democracy movement in the 90s. I am not sure if this is exactly true. However, now they are not playing this role in making sure that the new Constitution is rolled out and

⁶³¹ The Meru County Public Participation Act, 2014, Part IV- s22

mobilising people to play their different roles and whatever else is required. These institutions have already captured many Kenyans hearts and minds, that gap is also a problem. If these institutions are not playing that role, I am not exactly sure what role they are playing. In some cases you see them playing the role of appearing to bolster the administration and in others it is a case of taking a back seat if they are not playing the role of taking advantage of the fact that they control institutions that already have engaged people to kind of leverage that and say okay then your roles and responsibility as citizens are x, y, and z to push ahead that agenda.” (International NGO Worker)

This same International NGO Worker suggested that failing to exercise the responsibility to participate can also rest with the experience the public has of groups and organisations. The view this worker presented provides an outsider view of someone in a position to be observing how the public participation process is being implemented while also working alongside these processes:

“Kenyans criticise a lot, they complain, but they do not participate when the avenues are organised. Either because they do not have personal responsibility, or maybe because the forums organised are not convenient to them, or maybe because they are not mobilised well through the existing structures. So the truth of the matter is that there’s still quite a bit to be done towards improving public participation and their knowledge and awareness that ‘Wanjiku’ has. She has to keep being frequently reminded about these things.” (International NGO Worker)

The comments by the International NGO Worker and Lawyer No. 2 quoted above also support the arguments of the Commission charged with overseeing the implementation of the Constitution. According to the Constitution Implementation Commission, “citizens have other responsibilities too, that are not limited to reading the Constitution, ensuring that they are not acting in violation of the Constitution, identifying any legislation or policy that is not in line

with the Constitution, or submitting their comments to ensure the success of the implementation of the Constitution.”⁶³²

In addition to these general responsibilities shared by all citizens under the Constitution, there are local citizen responsibilities which are beginning to be identified in county level law or regulations. For example, the Meru Public Participation Act 2014 states that the key guiding values for public participation include “civic duty and responsibility,”⁶³³ The interviewees concerns about supporting citizens to take up their responsibility to participate in decision making are also echoed by the National Taxpayers Association (also referred to as NTA), which describes itself as an, “independent, non-partisan organisation focused on promoting good governance in Kenya.”⁶³⁴ The National Taxpayers Association argues that good governance is supported “through citizen empowerment, enhancing public service delivery and partnership building”, and has prepared a “guide for citizens to highlight opportunities for them to engage with the budget process at the county level.”⁶³⁵ The National Taxpayers Association states that citizens:⁶³⁶

understand the Constitution and other legal frameworks governing the processes, demand constitutional and other rights; obtain the right information from the right sources, verify and interrogate the information that is provided. Mobilise other citizens and participate in public meetings demand feedback for any queries raised and carefully monitor county structures and processes. In addition to this extensive list of expectations, there is an expectation that citizens

⁶³² Report of The Conference on Development of a Public Participation Framework (2012, September). Retrieved July 07, 2016, from <http://www.cickenya.org/index.php/reports/other-reports/item/301-report-of-the-conference-on-development-of-a-public-participation-framework#V3327P195uk>

⁶³³ Meru Public Participation Act 2014.

⁶³⁴ National Taxpayers Association – pesa zetu, haki yetu. Retrieved 23 January, 2018, from: <http://nta.or.ke/index.php/en/about-us/our-history>

⁶³⁵ National Taxpayers Association – pesa zetu, haki yetu. Retrieved 23 January, 2018, from: <http://nta.or.ke/index.php/en/about-us/our-history>

will exercise oversight on projects demand accountability and follow up on promises by the leader.

There is no shortage of institutions and secondary legislation that outline the importance of citizen responsibility to participate actively.⁶³⁷ It is evident what citizens should be doing, but the question raised in the interviews is: what is the level of awareness that the citizens have regarding what is expected from them and do they have sufficient support to build their capability and capacity to participate or do many citizens simply not care?

6.3.2 Citizen Apathy

Apathy among citizens was also observed by three of interviewees in this study as a common concern and a possible explanation for non-participation. Some of the civil society leaders interviewed in this study reflected the concerns expressed in the literature, arguing that the public feel they have “done enough”. For example, one NGO worker observed to me that:

“some citizens...seem to deem that they did their part and voted in a new Constitution in 2010, and it is up to the government to implement the Constitution.” (Local NGO Worker No.1)

One interviewee expressed concern about the situation where you have an apathetic public not willing to participate fully because they feel they lack power to affect the final decision. He noted that this was one of the significant factors that held back effective participation:

“Ah, three things. One is apathy. A feeling that even if we give our views, so what? Those guys are elected, they are a ruling class, they decide what they do, and even if we give our views it might not, it will not influence the decision they make.” (Lawyer No. 2)

⁶³⁷ National Taxpayers Association – pesa zetu, haki yetu. Retrieved 23 January, 2018, from: <http://nta.or.ke/index.php/en/about-us/our-history>

Another interviewee also commented about apathy, saying, for example,:

“Well, I think it is a complex set of issues. You know there’s an, I think, apathy. You know? You will find the people in Nairobi, and they are very knowledgeable, they can read about an issue, they see news, you call a town hall meeting, and people do not attend. It is not that they are not informed; it is just there are an indifference and apathy to participation.”

These comments suggest there is some uncertainty amongst the interviewees about what causes apathy, is it simply indifference, or is it a symptom of a wider power imbalance? If it is that latter, this suggests that support might have to be given to support communities to feel they can make an impact when they participate.

6.3.3 Expectations of Monetary Compensation and Support

Another challenge of participation identified by two of the 17 interviewees was that some citizens view public participation as a transactional process where they should be compensated. This was expressed as expecting to be “‘reimbursed’ for attending and contributing to the public participation process, for example – a Sitting Allowance” (Local NGO Worker No. 6).

There can be a variety of drivers for this expectation of compensation, for example, one of the other interviewees noted that participation can be seen as another burden on women’s unpaid labour:

“In every county, there are organised groups Maendeleo Ya Wanawake, for example, and others, but then when you say to them what are you going to do? You need us to organise women so that they can talk about their priorities and engage in a larger process? Great- who is going to facilitate the meeting? Is the government going to give us money to hold these meetings?” (International NGO worker)

One difficulty raised by offering financial support, however, arises when compensation fails to meet the requirement of voluntary civic responsibility as earlier discussed. This observation is

illustrated in the following example of a report of public participation issues that arose during a public meeting in Nyamira County that was reported by the local media:⁶³⁸

The crowd led by political activists Charles Ondieki and John Kebaso demanded reimbursement for bus fare and "sitting allowance" before they would continue with the remainder of the exercise. 'We came early in the morning, and you cannot tell us to continue sitting here for only a soda and water, yet we are hungry. Give us money for consulting us on the budget estimates,' complained Mr Ondieki.

On first reading, this might appear like a form of clientelism and perhaps is a version of the citizen expecting the patron, in this case, a demand that the government to pay citizens for rendering participation services. However, on a second reading of the above situation, it is also evident that citizens are having to prioritise their basic needs of food before public participation. Viewed in this way, expectations of compensation can be as a result of a genuine need on the community's part and a need that should be addressed as the country continues building participatory capacity.

In the context of the socioeconomic environment of Kenya in the transitional period citizens have a valid expectation of having the public participation process be well funded, and as indicated in Chapter 5 some counties have ensured that public participation is budgeted for. However, this is for administration costs. The implications of supporting basic needs of citizens to enable participation will be further discussed in the following chapter.

6.3.4 Limited Access to Information

Access to information remains a challenging problem for public decision making that was identified in the interviews. It is not surprising that interviewees identified access to information as a key issue as the Access to Information Act 2016 was still being debated for most of the

⁶³⁸ Ogwae, S. (2016). Hungry Nyamira locals halt public participation over lunch. The Standard, 23 May. Retrieved June 1, 2016, from <http://www.standardmediacoke/article/2000202750/hungry-nyamira-locals-halt-public-participation-over-lunch>

transitional period. The Access to Information Act was still in the National Assembly undergoing debate until 2016 when the National Assembly passed it and sent to the Senate.⁶³⁹ Of the 17 persons interviewed, two spontaneously raised the issue of access to information as a challenge for effective participation. As one interviewee commented,

“So, for instance, I have not seen much effort, this is from the government side, to provide a framework for access to information. I am aware it is there, but it is moving rather slowly.” (Consultant No. 1)

According to Article 35(3) of the Constitution, the state has to publish and publicise any important information affecting the nation.⁶⁴⁰ This article is informed by Article 19 of the United Nations Declaration of Human Rights. The principle of maximum disclosure establishes a presumption that all information held by public bodies should be subject to disclosure and that this presumption may be overcome only in limited circumstances (see Principle 4).⁶⁴¹

The Constitution does not however stipulate what “relevant” information is. As a result, the Access to Information Act 2016 was developed. However, even where access to information is possible, the quality and type of information made available to the public has varied. Literature suggests that citizens in a representative democracy must have adequate information so they can communicate their preferences to elected representatives, who can then make binding decisions.⁶⁴² Moreover, if the public do not know how their political preferences are to be communicated to representatives to influence decision-making they will have less motivation and ability to engage effectively in political deliberation.⁶⁴³

⁶³⁹ Access to Information Act 2016.

⁶⁴⁰ Constitution of Kenya 2010, art 35(3).

⁶⁴¹ United Nations Declaration of Human Rights.

⁶⁴² Uraia (2016). What is public participation? Kenya’s national civic education programme

⁶⁴³ Bhatia, U. (n.d.). Deliberative Democracy and Illiteracy: Exploring a Theoretical Gap *Journal of Public Deliberation*, 9(2). Retrieved June 13, 2016, from: <http://www.publicdeliberationnet/jpd/vol9/iss2/art17>

According to Leighninger (2011), in “many countries governments seem to be moving quickly to embrace principles of transparency, and making data available online, transparency is now being used as a synonym for “public engagement” or “participation.”⁶⁴⁴ The trouble is that transparency is “only part of the picture”. Leighner continues and discussess the problem of dealing with vast amounts of information, and this was also an issue picked up in interviews. Take for example an official from a faith-based organisation in Kitui County who explained the challenge as follows:

“The documents produced by the county government are too bulky. For instance, in Kitui County the integrated plan was a 500-page report. People were invited from remote areas, ferried to Kitui by bus to discuss a 500 paged document, and they do not have a copy. It is only the person who is presenting who has a copy.” (Faith-based Organisation Worker No. 1)

In this particular case, let us assume that maximum disclosure has occurred in the form of a 500 page document, however, this disclosure has not been prepared for a lay audience. This experience further corroborates a similar experience reported by a Local NGO programme manager who stated his first-hand experience with county documents during a public participation exercise. While this comment was reported in grey literature and not part of the 17 interviews, it is worth reporting his remarks in full:⁶⁴⁵

Last year, I attended budget hearings in one of the sub-counties in Kisumu County. There were few citizens who were less than 50 [years old]. They convened as early as 9:00 am as per the notice. Four hours went by, and no county officer was present to lead the public through sector hearings. AT 1:00 PM, at least 12 county vehicles started streaming in to lead the sector hearings. Guess What? The distribution of over 200 paged budget documents began in earnest

⁶⁴⁴ Leighninger, M. (2011). Citizenship and governance in a wild, wired world: How should citizens and public managers use online tools to improve democracy?

⁶⁴⁵ Kongere, D. (2016, February 16). Where is Public Participation in the Counties in Kenya. Retrieved May 29, 2016, from <https://www.linkedin.com/pulse/where-public-participation-counties-kenya-kongere-denis>

with an expectation that the citizens present will read the report and submit their input before the function ends.

Another interviewee who was part of this study made similar observations after working with a local non-governmental organisation. This interviewee put the problem of dealing with large amounts of complex information this way:

“at times the citizens express that the discussions are too technical, and they do not have the capacity to participate, and then. As a result, they do not participate in public forums.” (Local NGO worker 3)

This was further put into context by a consultant working in the public participation sphere:

“Why I am saying this is because public participation only grows when there is information. I mean there is a three tier, there is, you know, the three-legged stool of public participation. You need information to give to the public, so you need to have communication and public information to be accessed. You need civic education for capacity building so that people need, you see you can give them information, but if the information is not received by person who has the capacity, it’s useless.”

A number of the 17 respondents similarly noted that much information that is presented is not prepared for lay citizens, and this is challenging because the citizen has to navigate technical documents without the necessary background. Also, it is not realistic to expect a citizen to read bulky documents. The question that remains is this provision of information intentionally daunting or is this simply a lack of capacity of public officials to better support the public? At the very least, the observations of the interviewees point to the lack of oversight of public participation especially around helping the public to understand information that is presented. This leads us to the next section that reflects on the challenge of civic education.

6.3.5 *Insufficient Civic Education*

A need for civic education in the public participation process was perceived by three of the individuals interviewed. These interviewees each saw civic education as important, in both legislation and literature. The County public participation guidelines state that:⁶⁴⁶

The Counties are to be steered by the national civic education guidelines and curriculum as developed jointly by the Ministry of Devolution and Planning, the Transition Authority, Commission on Implementation of the Constitution, Department of Justice, and Civil Society Organizations.

This development in the constitutional transition period has set the foundation for future civic education; however, four interviewees reported that effective civic education does not necessarily happen at the county level. For example, Nairobi County does not have any element of civic education for public participation in its legal framework for public participation. A lawyer while speaking about citizens and civic education stated that:

“A lot of public and civic education needs to take place to sensitise the public as to their rights and as to their roles and how they are then able to take those positions. Civic education and public education takes place or happens historically around elections and election choices and hopefully in time we will find that our voters will be able to make more sensible, more rational and more sophisticated political choices.”
(Lawyer No. 2)

One interviewee also observed that in the case where civic education had taken place it can make a difference but there must be government will to support public engagement too:

“There is no question we increased awareness of this process [by undertaking civic education] because when we return to them, we can tell by the type of things that they say. They seem to have a better understanding of the process, but it did not change the underlying organisation or the underlying engagement. Civic education is important,

⁶⁴⁶ Ministry of Devolution and Planning & Council of Governors Kenya (2016). County Public Participation Guidelines. Retrieved 12 January, 2018, from <http://www.devolutionplanninggoke/wp-content/uploads/2016/04/County-Public-Participation.pdf>

but I think there is too much reliance on the idea that a government that has an institutional interest in maintaining the status quo like any government will be the sole provider of civic education.” (International NGO worker No. 1)

This observation pinpoints that the expectation by citizenry that government will provide sufficient and continuous civic education may sometimes be misplaced. This interviewee suggests it is not always in interest of governments to encourage civic education, it is most often in the interest of the citizens. In the final chapter, discussion will reflect on this debate and the way in which it is not necessarily in the Government’s interest to have educated citizens.

Concerns about the need for civic education were echoed in this blunt observation by another local NGO worker:

“We have also realised that the knowledge that our people have as citizens about their rights to participate is minimal. From my observation, about 10% of them are aware that they are supposed to participate.” (Local NGO worker No. 5)

The interview comment by the local NGO worker reported above raises the question of how effective civic education is, and what type of civic education needs to be undertaken and by whom? For example, the need for civic education was limited to the citizens; however, in the interviews, some noted it is also a matter that affects the duty bearers (office holders) as illustrated in the following comment from the Ministry of Devolution and Planning and Council of Governors.⁶⁴⁷

The county government should ensure its officers have a good understanding of the public participation process, civic education and issues for discussion during public participation sessions. Hence, county governments should have periodic capacity building sessions for its officers. Capacity building may extend to key stakeholders that work with the Counties and

⁶⁴⁷ Ministry of Devolution and Planning & Council of Governors Kenya (2016). County Public Participation Guidelines. Retrieved 12 January, 2018, from <http://www.devolutionplanninggoke/wp-content/uploads/2016/04/County-Public-Participation.pdf>

civic education providers. Capacity building for county officers is best done through county departments, sectoral units or per specific technical expertise of the county officers.

6.3.6 The Challenge of Participatory Culture

With a new Constitution, the possibility of developing a culture that reflects the 2010 Constitution is ongoing, but the literature on public participation discussed in Chapter 1 is a reminder that this process can be uneven and challenging, like any other form of culture change. According to Rosenbaum (1975), “Political culture refers to the predominant political ideology, beliefs and traditions of a society and how masses of citizens evaluate their political institutions and officials.”⁶⁴⁸ Similarly, Barton (2002) suggests:⁶⁴⁹

A different aspect of the political content of public participation is the significance of the underlying political culture where new measures for participation are being introduced in a country. Their success will most likely depend on the particular political conditions present in that country and to a greater degree than many other law reform initiatives. It will be tied to the rule of law and basic human and political rights. New participation rights may not flourish if they get too far ahead of civic culture.

The results of the interviews supported the literature. Many of the 17 interviewees mentioned that a lack of a *political culture* of participation or similar concept expressed in their own words, was an important barrier to be addressed. The Constitution was meant to usher in new laws and as a result support the development of a new culture of public participation in governance.

Nevertheless, despite all these hopes, the reality of the ground as observed by those I interviewed show that this is a challenging task. As noted by a not-for-profit governance institution member:

“Our governance culture has not changed.” (Local NGO Worker No. 1)

⁶⁴⁸ Rosenbaum W. (1975). Political Culture. Praeger, p4.

⁶⁴⁹ Barton B. (2002). Underlying Concepts and Theoretical Issues in Public Participation in Resources Development. In Zillman D.N. et al. (eds.). Oxford University Press, Oxford, p119.

This was further reinforced by another local NGO worker who stated that:

“A culture of handouts still exists.” (Local NGO worker No. 5)

The nature of transition suggests that the seeds of a cultural shift of how citizens behave and the need for public participation in governance should have been planted at the Constitution making. Past that time we might expect some change should happen but these comments from the interviewees suggest that the seeds of change take time to germinate and therefore this transitional period may be too soon to expect significant cultural change. As noted from these interviewees systematic change in the citizens towards confident participation is yet to be observed. This also rings partly true in Kenya as over the years from independence the the ruling elite have attempted to centralise power which was a reflection of the constitution however they went one step forward and changed the Constitution to suit their intentions of centralising power.

6.4 Reported Observations of How Citizens Participated

In this section of Chapter 6, reports on the interviewee comments about how citizens participated in decision making and governance. A number of striking comments were made about how citizens can become *instrumentalised*, others commented that participation can occur through organisation, while others commented on the significance of participation through petitioning or through the opportunity of memoranda. In this section I examine these methods of participation in turn and report on the comments made in interviews.

6.4.1 Instrumentalisation of Public Participation

There is much discussion in the literature about the purpose of public participation. Is the intent to improve policy making by providing more information for decision making or is it to enhance democracy? Some concerns have been made that in participation, citizens may

sometimes be used in strategic or instrumental ways by a political class. This has been observed by Arnstein (1969) in her ladder of citizen participation, where in the first rung of the eight rungs of the *Ladder of Citizen Participation*, manipulation is rife and people are engaged in ways that further the interests of decision makers, not citizens. Arnstein observed that even on the third to the fifth rungs, citizens may not be determining decisions and the role of consultation may only be token (see also Chapter 1).⁶⁵⁰

Similar concerns were raised in one of the interviews, for example, a respondent who was a local NGO worker has observed that:

“[T]hey were a case of using citizens by public officials to rubber stamp public decisions.” (Local NGO worker No. 4)

Moreover, a further interviewee observed that the treatment of the citizens was either “tokenistic or instrumentalising the citizens that attempted to participate in the governance process” (Local NGO worker No. 1). Another local NGO worker commented:

“At times certain citizens are brought together for a public participation pre-planned meeting to enable them to support the agenda of a particular politician.” (Local NGO worker No. 2)

These form of citizens’ instrumentalisation serves to disenfranchise citizens of their right to participate by ensuring they do not contribute to a consultation process.

The Constitution states that the citizens are to participate, and the secondary laws developed state how they should be involved. According to Bingham, Nabatchi, and O’Leary (2005), citizens can and must play a major role in public policy and decision-making. They

⁶⁵⁰ Arnstein, S. R. (1969). A Ladder of Citizen Participation. *Journal of the American Institute of Planners*, 35(4), 216-224. doi:10.1080/01944366908977225.

have the right to decide what is important and how they can best achieve their objectives.⁶⁵¹ Kaase and Marsh (1979) argued that new forms of activity such as attending a demonstration may be particularly attractive to the young, as these forms of activities offer “the kinds of satisfactions beyond that attainable through conventional pathways of political action”.⁶⁵² In a similar vein, Inglehart and Welzel (2005) argued that non-electoral forms of political participation are becoming more common among the young.⁶⁵³ Others such as Blais et al. (2002),⁶⁵⁴ Gidengil et al. (2003),⁶⁵⁵ and Putnam (2000),⁶⁵⁶ however, argued that non-electoral participation is not becoming more widespread among the young.

6.4.2 Organisation of Citizen Participation and the Existence of Social Capital

Frameworks

Three of the people interviewed in this study spoke specifically on how citizens were being organised or were organising themselves. The comments by interviewees suggest citizens are organising themselves socially to pursue social goals and using new legal opportunities to participate to talk about what is a priority for them. This, however, is not universal experience as observed by the international NGO worker:

“If these groups cannot meet and talk about their interests without funding from the government, then I do not think that the separation of powers in a democratic system envisioned a situation where people would not organise themselves to participate but

⁶⁵¹ Bingham, L.B., Nabatchi, T. & O’Leary, R. (2005). The New Governance: Practices and Processes for Stakeholder and Citizen Participation in the Work of Government Public Administration Review, 65(5), 547-558 doi:10.1111/j.1540-6210.2005.00482x.

⁶⁵² Kaase, M. & Marsh, A. (1979b). Political Action: A Theoretical Perspective. In: Barnes, S.H. & Kaase, M. (eds.) Political Action: Mass Participation in Five Western Democracies Beverly Hills, CA: Sage Publications, p59.

⁶⁵³ Inglehart, R. & Welzel, C. (2005). Modernisation, Cultural Change and Democracy: The Human Development Sequence New York: Cambridge University Press.

⁶⁵⁴ Blais, A., Gidengil, E., Nevitte, N. & Nadeau, R. (2002). Generational Change and the Decline of Political Participation: The Case of Voter Turnout in Canada. Paper presented at Citizenship on Trial: Interdisciplinary Perspectives on Political Socialization of Adolescents Conference McGill University, Montreal, Canada, 20–21 June 2011.

⁶⁵⁵ Gidengil, E., Blais, A., Nevitte, N. & Nadeau, R. (2003). Turned Off or Tuned Out? Youth Participation and Politics. Electoral Insight: pp1–7.

⁶⁵⁶ Putnam, R.D. (2000) Bowling Alone: The Collapse and Revival of American Community. New York: Simon & Schuster.

where they would be waiting for the government to come and organise. It just not consistent.” (International NGO worker)

Another interviewee made a similar important observation. One of the lawyers observed that it appeared that the average Kenyan citizen did not understand that they have a role in public participation:

“I do not think they understand that they have a role in, or that they can make inputs into both national and county Legislation.” (Lawyer No. 2)

Another interviewee had a different view on this matter and stated that:

“Citizens are organised in their own different ways. They may not be organised for the sake of the public participation, but these are citizens with an organised life either through the self-help groups or through churches. You may find three neighbours have come together, maybe they help each in a social way. So what we’re doing is we always formalise and take advantage of the organisation of the citizens.” (Consultant No. 2)

As noted earlier Article 35(1) of the Constitution states that every citizen has the right to access information held by the State.⁶⁵⁷ Article 35(3) states that “the State shall publish and publicise any important information affecting the nation”.⁶⁵⁸ However, in a report reviewing the way organisations like Kenya’s Local Development Funds have been implemented is a reminder that this can’t happen in a vacuum, and citizen organisations need support:⁶⁵⁹

enhancing participation will require sustained efforts by government and civil society to establish structured processes that are efficient and inclusive. On the government side, this will include setting guidelines and mechanisms for sharing information and soliciting feedback around county government processes like planning, budgeting, and monitoring.

⁶⁵⁷ Constitution of Kenya 2010, art 35(1).

⁶⁵⁸ Ibid.

⁶⁵⁹ Participation in Kenya’s Local Development Funds: Reviewing the Past to Inform the Future.

The comments from the interviewees reported here suggests citizen organisations also depend on the Government providing guidelines and training of civil servants so that they can facilitate effective participation and transparency in these processes. Civil society actors as stakeholders can help to facilitate the priorities that the public would like county governments to operationalise first, and they can also help the Government put in place and initially roll out such systems.

6.4.3 Citizen Petitions as a Means of Public Participation

Sections 15 and 88 of County Governments Act state that citizens have a right to petition the County Assembly to consider any matter within its authority, including enacting, amending, or repealing any of its legislation.⁶⁶⁰ The public may petition on issues affecting a group of people, through village committees, ward, sub-County and county committees.⁶⁶¹

In Meru County, for example, a breakdown of how a petition should be presented and set out states it has to be “handwritten, printed or typed; in English or Kiswahili and be written in respectful, decorous, and temperate language, be free of alterations and interlineations in its text; be addressed to the County Assembly; have its subject-matter indicated on every sheet if it consists of more than one sheet.” One of the interviewees commented that petitions are enabling greater participation:

“So there has been a general, increasing awareness of what is being done by the National Assembly, of course. For the average citizen, they are pushing or following up their bread and butter issues. There may not be a tension but for the people who are stakeholders in the system as they have a greater awareness and ability to plug into the legislative process. You have an Act of Parliament on petitions to parliament which has

⁶⁶⁰ County Governments Act 2012, s 15.

⁶⁶¹ County Governments Act 2012, s 88.

even allowed members of the public to lodge petitions which can be considered by the Parliament of all kinds.” (Lawyer No. 1)

6.4.4 Participation through the Submission of Memorandum

Two interviewees highlighted the significance of encouraging public participation through a process known as submission of memorandum. One commented:

“Everything that they do is online and then even the committees of Parliament. Whenever they are discussing any deal, they can still put out advertisements asking for members of their public to submit memoranda and so on.”

Similarly, another interviewee commented that this process is useful for national level comments but relies on online access:

“You know, legislation affects different parts of the population. If you have a one solution fits all Bills situation like we have in Kenya where the National Assembly of the Senate takes out an advertisement and they tell you that the Bill that they are considering is available on their website, and it is and you can access it on their website, and you can then write a memorandum and email it or do you write to the office of the Clerk?” (Lawyer No. 1)

6.4.5 Public participation via Oral Submissions

Interestingly, comments on oral submissions were not made by the people interviewed; however, this evidence that the public are making oral submissions is available online on YouTube where various public participation meetings have been documented. In addition the courts are clear that oral submissions are part of the public participation continuum. The county guidelines also indicate that oral submission is one of the forms of submitting in the public participation process.

In Vihiga County, for example, the citizens take part in public participation three times in a year. These sessions are moderated by the County Governor Moses Akaranga and are said

to aim at delivering on Devolution.⁶⁶² The citizens of Vihiga are seen making oral submissions in English and Kiswahili, which are both national languages. Similarly, in Lamu County, the citizens are seen making oral submission on the 2016/2017 budget.⁶⁶³ The emphasis from the citizens is the need for the county government to prioritise the allocation of funds in a supplementary budget for fixing up the hospital theatre in Faza, Lamu County.

Why did the interviewees not comment about oral submissions in particular? It may be, for example, that the priority of the interviewees was on supporting the conditions that enable people to make submissions rather than the actual process of oral submissions.

6.4.6 Online and Social Media Public Participation

Literature suggests that the use of social media for participation is three-fold: to disseminate information; to use social media platforms like Twitter, Facebook, and WhatsApp to discuss issues before or during a public participation process; and to submit views directly to the concerned body or representatives. The importance of social media was noted by an interviewee discussing the participation process:

“We must ensure that one week before, or even two weeks before that we have distributed the document and the popular versions of it to so that we can even document that we have supplied this number of copies to the public, that we have sent invitations through electronic media, through print media, through social media and publicised the place you put posters and all that and the people come and attend and then, of course, there you are to guide them on what comments to make.” (Local NGO worker 7)

⁶⁶² Vihiga county, ordinary citizens host public meetings to hold county officials into account [Video file] (nd) Retrieved June 1, 2016, from <https://www.youtube.com/watch?v=QZ6HJsiWXV8>

⁶⁶³ Lamu county public participation 2015 [Video file] (2016, January 18). Retrieved June 1, 2016, from <https://www.youtube.com/watch?v=qIYywhrGVM8>
Al Wasila Communications Kenya

This local NGO worker appears to be proposing a minimum standard for the kind of social media support needed for an effective public participation process. What is notable is that he insists that a popular, that is a simplified, version of the document must be prepared and distributed through social media for the public. This is a reminder of the opening comments reported here that information must be in a format that can be easily understood. The last part of his comment is illuminating, however, and suggests there are risks in simplified material in that he appears to believe that the public requires guidance in the participation process.

Other interviewees also noted the importance of getting material online if not actually shared directly by social media. According to this interviewee:

“A report published by International Budget Partnership just about a month or two ago that showed what kind of information each County Government has online. I think only one County Government had 4 out of the eight documents that are required.”
(International NGO worker)

The availability of this type of online information that is tracking the county governments on this standard of disclosure of information is illuminating. Furthermore, it is key to understanding the extent to which the counties have been able to make available relevant documentation that is required in the public participation process.

6.5 Findings about Participation under the Constitution and the Legal Framework at the National and County Level

The semi-structured interviews reported in this chapter alongside a review of literature provide significant insights about the implementation of the Constitution and about the adequacy of the legal framework from a practitioner’s point of view.

One interviewee also felt there were a number areas of concerns about implementing the national framework at the county level and about the speed at which this legislation was being developed. For example, in discussing the Constitution itself this interviewee commented:

“The Constitution uses aspirational language; when it talks about the progressive realisation of certain rights even aspects of affirmative action, questions of representation of people, it is an aspirational Constitution. An autochthonous Constitution, is one that is driven by the people themselves and that has their aspirations, their values and on so. So, it does indeed stipulate for values that Kenyans want, however we do not currently necessarily this thus creating a situation where they will always seem to be deficiency in those values that are in the Constitution. It would, therefore, be quite unfair to evaluate or assess the Constitution based on what has been accomplished in five years alone – the Constitution has been designed to last for several generations.” (Lawyer No. 1)

This study is examining the Constitution transitional period that forms the baseline for how public participation aspirations of the Constitution might be implemented. This interviewee reminds us that the legal framework matters because future generations will be affected. We may not achieve all the aspirations immediately, but an autochthonous Constitution one that is owned by the people and from the people will take time to develop.

The comments echo the arguments of Justice Isaac Lenaola in Petition 486 who stated that “the Constitution was indeed the supreme law and binds the legislature and the executive and all the organs of state.” This clarification is essential because all public participation processes should, therefore, be viewed as sanctioned by the Constitution and therefore

protected by it, as the supreme law states.⁶⁶⁴ Here the Judge is stating that the Constitution is adequate, and an important base for participation law into the future.

While referring to the development of the legal framework for participation other interviewees also thought that the implementation of a legal framework at the county level was important but expressed concern at the slow pace this was happening for example:

“They are quite slow because I think so far I have seen only maybe about three, maybe three or four counties that have a legal framework on public participation or that have – and you have to dig in to be able to find them.” (Faith based worker No. 3)

This interviewee’s concerns are borne out by the fact that only a few of the counties had developed public participation laws by 2015 and as it has been earlier noted by October 2016 only five were confirmed to have been developed, debated, passed, and gazetted public participation laws.⁶⁶⁵ In other words, the great majority of the counties do not have a specific county public participation legal framework with a result that it can be assumed that this is contributing to the minimal public participation taking place at the county level.

Meanwhile, on the other hand citizens at the county level where public participation is ongoing are also involved in the development of legislative bills as articulated by a legal officer in Laikipia County who explains that in Dol Dol centre in Laikipia County they are undertaking a county wide exercise on public participation on a number of Bills that are to be presented to the county assembly. She also stresses that the move is away from opaque governments and the need to have legislation at the county level so that service delivery can be affected.⁶⁶⁶

⁶⁶⁴ Nairobi Metropolitan PSV Saccos Union Limited & 25 others v County of Nairobi Government & 3 others [2013] eKLR.

⁶⁶⁵ As confirmed by the Editor of the Kenya Law Report.

⁶⁶⁶ Laikipia County Assembly Legal Adviser: Grace Muthoni, 10th September 2014 ” Laikipia County Assembly Public Participation [Video File], Retrieved from <https://www.youtube.com/watch?v=3J4-ZSBfJIQ>

Another interviewee supported the hopes that the process might be moving toward greater public engagement, at least at the county level, but was pessimistic about whether this was really happening:

“As far as the National Government is concerned public engagement is still at a very - I would say at a very ad hoc, at a very loose level and largely organised around what we call the medium-term expenditure framework. So basically which is these big town hall meetings in the former provincial headquarters or now in the County headquarters which the public come and they are asked: ‘What do you think about this big budget?’ I mean there is very little input you can give to a two trillion budget as a Mwanainchi [citizen].” (Academic Consultant No. 1)

In this next section of the discussion, I report on the perceived role of government and leadership in advancing effective participation under the Constitution, the infrastructure required for effective participation and insights from interviews about the value of a common law public decision-making framework.

6.6 Findings on the role of Leadership and the Government in Public Participation

The semi-structured interviews also provided significant insights on the role of leadership in encouraging public participation. For example, the Transition to Devolved Government Act 2012 requires that leaders should “be accountable to the people of Kenya and ensure their participation in the transition process.”⁶⁶⁷

While commenting on leadership and the role of government in promoting public participation one of the leading theorist on public participation Fung (2015) stated that, “Public actors ought to view participation as a potential solution to some of the Democratic challenges

⁶⁶⁷ Transition to Devolved Government Act 2012.

they face”.⁶⁶⁸ This argument of Fung’s is echoed by an academic interviewed in this study who works for civil society organisation that observed the following:

“On one hand it is important to appreciate the growing tension; the tension between a sovereign state where the power belongs to the people and a state where the power is amassed or is controlled by the people by a few, by an elite leadership. When you look at what has been happening in Parliament you realise there is a fight to return the control fully to the direct representatives.” (Academic/Local NGO Worker No. 7)

According to the society of supported this concern for example one local worker volunteered:

“At the county level, the space for meaningful public participation is being reduced to tokenistic participation in county consultative processes.” (Local NGO Worker No. 1)

But the influence of leadership can encourage or discourage participation through the relationships the leaders form with the public as Local NGO Worker No. 6 stated:

“My impression is that there are two levels of interest when it comes to trust and attitudes: firstly trust and attitudes as it relates to the public officials and secondly trust and attitudes as it relates to the government bureaucracy. People tend to trust and have a positive attitude of public officials if they perceive them to be trust worthy and incorruptible. On the other hand, people tend to trust government if they see them as accommodative and easy to influence with new ideas. In other word if they are not too bureaucratic.” (Local NGO Worker No. 6)

Not everyone interviewed in this study was confident that the public were encouraged by leaders to participate and this was further emphasised by a lawyer who commented that:

“Public participation is looked at as a process we have to do it almost grudgingly; the leaders tend not to do much, to implement public participation. I think they do it but without too much enthusiasm. However, then when I have seen the interested leaders it is because they are trying to mobilise people in a certain direction, then you notice that

⁶⁶⁸ Fung, A. (2015). Putting the Public Back into Governance: The Challenges of Citizen Participation and Its Future Public Administration Review Public Admin Rev, 75(4), 513-522 doi:101111/puar12361.

they tend to become more vocal in asking for public participation or in using the public almost like a tool, using the public or making the public a tool to accomplish their agenda.” (Lawyer No. 1)

Other interviewees who worked as local advocates for community participation made similar observations for example:

“We then went to the governor’s office, and he said we do not need a public participation law we need guidelines. Then we told the governor we are ready to facilitate the process to develop guidelines and by that time there were some tensions between the civil society, the youth, the government because for us civil society and youth were seen to be interfering with county government.” (Faith Based Worker No. 1)

This state of affairs, where there is tension between the role of elected representatives and opportunity for direct citizen participation in decision making is also observed by Nabatchi, (2014) who has commented:⁶⁶⁹

The lack of a clear vision about the relationship between participation and the political system has dire consequences. It has produced rifts and misunderstandings between academics and practitioners, community organisers and deliberative democrats, civic technologists and dialogue practitioners, policy advocates and consensus builders.

The issue of the relationship between elected leaders and citizens also raises questions about the capacity of officials to support public participation, a question also raised by an academic consultant:

“I have been working with County Governments. I see a lot of struggle with officials especially those who are coming in from local authorities and also who have been seconded from the National Government to give even basic information ... some can be

⁶⁶⁹ Nabatchi, T. (2014). Deliberative civic engagement in public administration and policy. *Journal of Public Deliberation*,10(1): Article 21.

quick to blame the government officials 'they haven't done, they haven't done, they haven't done' but maybe they also don't know." (Consultant No. 1)

Moreover, this issue of capacity building was also highlighted by the Ministry of Devolution and Planning and the Council of Governors in the county guideline public participation guidelines they published in January 2016:⁶⁷⁰

Capacity building is a key aspect of ensuring both the county government officials and the public acquire the requisite skills, values and attitudes for effective public participation. It is futile to create mechanisms of engagement without having the human capacity to ensure that the desired engagement is undertaken. Capacity building should be seen as part and parcel of the public participation process and should be a continuous event.

Lack of public participation might be the result of lack of capacity but it can also be simply be a case of elected leaders asserting "political control" as observed by a faith based worker who was discussing the dynamics involved in ensuring that politicians are on board when undertaking public participation processes:

"We make sure the government buys in because unless you work closely with the politician at the beginning at the end, they might disassemble the whole programme." (Faith based Worker No. 3)

In contrast, Gaventa argues that much of this work relies on "creating situations where a public official or some other leader is in a room with people who are poor and disadvantaged and has to listen carefully to what they are saying."⁶⁷¹

⁶⁷⁰ Kenya, Ministry of Devolution and Planning & Council of Governors (2016). County Public Participation Guidelines. Retrieved 10 January, 2018, from <http://www.devolutionplanninggoke/wp-content/uploads/2016/04/County-Public-Participationpdf> on 29/05/2016

⁶⁷¹ Gaventa cited in Nabatchi, T. & Leighninger, M. (2015). Public participation for 21st century democracy Hoboken, New Jersey: John Wiley & Sons.

6.7 Findings on Public Participation Infrastructure

The development of public participation infrastructure emerged in the interviews and in the review of related county legal documents and as key to determining if public participation will develop successfully. According to Leighninger (2011), “Public engagement infrastructure can be sustained, online or off, only if it provides political and social incentives for people to participate.”⁶⁷² Innes and Booher (2004) have also noted the importance of public participation infrastructure to support citizens.⁶⁷³ This was similarly highlighted by interviews such as the International NGO worker who commented:

“So for me that is a tension I see, and that is where I see the tension will always be. Does Kenya want to continue to continually expand the direct representation framework as a mechanism of people’s representation or does Kenya want to pursue a direct participation? Moreover, direct participation then requires much more structuring, much more thinking around otherwise you keep getting all these opinions from everywhere and everyone, and there is no way of sieving them through, there is no way of sorting them out and then finally what you end up having is basically public outcry every day because people say ‘We said X, you did Y. We said Z’ but Z could have been said by somebody else.” (International NGO Worker)

This interviewee is suggesting that there is a tension between some of the legal infrastructure for budgetary processes and other frameworks for involving the public in broader policy.

According to Nizam & Rugo (2015) in a report on public participation and devolution in Kenya, ensuring that there adequate support for public participation is important so the ideas and input of citizens can be used effectively. On the whole, the five county governments have embraced provisions on public participation, However, proper and adequate mechanisms

⁶⁷² Leighninger, M. (2011), Citizenship and governance in a wild, wired world: How should citizens and public managers use online tools to improve democracy?. *Nat Civic Rev*, 100: 20–29. doi:10.1002/ncr.20056.

⁶⁷³ Innes, J.E. & Booher, D.E. (2004). Reframing public participation: strategies for the 21st century, *Planning Theory & Practice*, 5:4, 419-436, DOI: 10.1080/1464935042000293170.

provided for in the Constitution and County Governments Act to facilitate these principles are yet to be put in place in order to ensure structured engagements with the public. Furthermore, the requisite budget and capacity to institutionalise the minimum standards for participation are largely not in place across the 47 counties.⁶⁷⁴

In summary, these interview comments and document analysis suggest that thought has to be given to the way that public input is elicited, not simply getting input but then how those comments and ideas are sorted and used. Furthermore, some of the interviewees commented that to be effective, public participation requires predictable frameworks so that advance planning for participation may be undertaken in regular cycles. This need for predictability was discussed by one of the interviewees who put his concern like this:

“Whether you say the forum is an SMS forum, or it is a twitter forum or whatever you call it, but there need to be frameworks that are certain and that are predictable the outcomes for public participation do not have to be predictable, but the mechanism of engagement needs to be certain so that it is not ad hoc. So today you are at a meeting in the city stadium, and then tomorrow you are meeting in so and so’s hotel.”
(Consultant No. 1)

Other interviewees noted the need to plan the infrastructure of participation in laws like the Public Finance Management 2012 Act and the County Budget and Economic Forum. For example, according to a consultant:

“The other issue is an issue of time and resource management. You know you can have all the knowledge, but if you do not manage time well there is a bit of a problem.”
(Consultant No. 2)

The interviewees concerns are also borne out in the grey literature about local decision making which notes that the national frameworks framework in the Public Finance Management Act

⁶⁷⁴ Nizam, R. & Rugo, A. (2015, February). One Year On: Review of County Initiatives in Public Participation in the Roll Out of Devolution Kenya Devolution, Working Paper 5.

2012 for County Budget and Economic Forums exist, but many counties are yet to implement them fully. However, even without a county public participation law, Makueni County has developed a public participation framework that guides its actions:⁶⁷⁵

The Government of Makueni County will seek to utilise the various levels of participation, that is, the government is committed to the promotion of consultation, placation, and partnership and citizen control models of participation. The County government will promote and ensure people-centred and people-driven development as anticipated by the Constitution: Informing the public by providing information to help them understand the issues, options and solutions; Consulting with the public to obtain their feedback on alternatives or decisions; Involving the public to ensure their concerns are considered throughout the decision-making process particularly in the development of decision criteria and options; Collaborating with the public to develop decision criteria and alternatives and identify the preferred solutions; and Empowering the public by placing final decision making authority in their hands.

No interviewees volunteered confidence that there was sufficient public participation infrastructure in terms of all developed laws and bureaucratic processes to support public participation yet. However, many did comment on the role that the parliament plays and while electoral participation is outside the focus of this thesis it is worth considering how the interviewees felt parliament can influence participation.

6.8 Findings on the Role of Parliament in Influencing Public Participation

In the Constitution 2010, the parliament is tasked in Article 118(1) “to conduct its business transparently and its sittings and those of its committees and shall be open to the public, and facilitating public participation and involvement in the legislative and other business of

⁶⁷⁵ Government of Makueni (n.d.). Public Participation Framework | Government of Makueni County Retrieved June 2, 2016, from <http://www.makuenigoke/public-participation-framework>

Parliament and its committees”. The role of parliament was discussed directly by an interviewee who was reflecting on the passage of a Bill:

“Now, an interesting thing happened with that legislation. When it was, going through Parliament it had gotten to the Committee stage which is in between the second and third reading. Public participation is carried out before the committee stage. So the Bill was subjected to public participation in the committee stage. When it got to the committee, the committee made certain material changes to the Bill, and those material changes were not informed by public participation, they were made by the committee, those changes found their way to the Bill, they were enacted, and the Act has received Presidential assent. Now the matter is the constitutionality of those provisions has been challenged in court, and one of the grounds is that that particular amendment in the Judicial Service Commission Act was not subjected to public participation.” (Lawyer No. 1)

The parliamentary standing orders state that the “Departmental Committee to which a Bill is committed shall facilitate public participation and shall consider the views and recommendations of the public when the committee makes its report to the House.”⁶⁷⁶

According to a report by the Kenya Law Reform Commission,

It has become a permanent complaint that the enactment of legislation has not infrequently failed to meet the requirements of public participation generally as well as consultation of county governments. Much of the litigation challenging the constitutionality of legislation is thus as much procedural as it is substantive.

6.9 Findings on the Role of the Kenyan Courts in how Public Participation is Implemented

An Interviewee also noted that the courts play a particular role in the public participation process according. One interviewee discussed this in depth:

⁶⁷⁶ Standing Orders Parliament of Kenya 127(3).

“Because if you look at Article 165 I think, sub-article 3 of the Constitution, the responsibility of interpreting the Constitution and the responsibility of examining constitutional processes and declaring whether they have been done constitutionally is vested in the High Court, isn't it, and the High Court has prescribed a pathetically low standard of compliance for public participation. We have spoken about it previously. So it is for them to then prescribe a higher standard progressively, and it is then the responsibility of the High Court as the custodians of the Constitution to ensure that there is real and substantial compliance with that provision of public participation.”
(Lawyer No. 2)

6.10 Findings on the Extent to which Public Participation has been Successful

According to a local NGO worker view the actual success thus far of public participation in the context of the 2010 Constitution in the transitional period is debatable:

“In terms of the actual success of public participation, I think this is minimal. This is largely due to the fact that the guidelines have not yet been effected to guide the process. Hopefully, this will improve as time goes. However, I think there is remarkable success with regard to giving citizen a voice in the affairs of government and also holding officials and the bureaucracy accountable. Even though we cannot quantify the success of participation so far, we feel that a lot of progress have been made in enabling citizen to be involved in government financial matters which were earlier shrouded in secrecy. Citizens feel empowered since they know what budgets entail and can hold government accountable on what they said they would do.” (Local NGO worker No. 3)

The caveat that the NGO worker presents is that citizen voice in holding public officials to account has been successful although the whole public participation process is yet to be fully successful.

6.11 Summary

In this chapter the findings from interviews draws connections with these comments and analysis of local legal documents wider literature and media reports. They include findings on how the interviewees think Kenyan citizens understand their role in public participation and how they are participating. In ensuring public participation is achieved, barriers that are deterring public participation, how citizens are participating, public participation in the Constitution and the national and county legal framework, their role of the government and leadership in public participation, the need for predictable frameworks, the role of the courts in determining public participation and finally closing the information feedback loop in the public participation process.

Kenyan citizens are seemingly able to meet to organise themselves for socio economic without government intervention or support. However, interviews suggest that citizens appear to struggle to organise themselves for public participation without external support. Is this a reflection of the transition process or failings of the citizens of Kenyan or perhaps where Kenya has reached in its democratic journey? Sustained self-organisation of citizens is key for the future of non-electoral public participation.

The results of the interviews reported here suggest that the problems are less a question of a lack of citizen responsibility or apathy. Although concerns were raised about these issues, more of a problem was lack of institutional and leadership support for access to information that can be used by the public, and too little effective civic education which could help deepen a culture of participation and ongoing problems of transparency and accountability of process involving public funding.

At the same time, many media reports and observations suggest that citizens seem ready and organise themselves for protests, however, they find themselves challenged with

organising for more technical public participation for instance budget meetings or discussion around a change of law. This state of affairs can be linked to failure to access information and few resources to organise communities. It also points to an area of support and expertise that is required. The Constitution, by providing Kenyans with significant rights, has equally installed some responsibilities, which citizens must be aware of as they navigate public participation. An expectation to organise themselves is part of citizen responsibility.

The nature of transition suggests that the seeds of a cultural shift of how citizens behave about governance in a participatory way is yet to be observed. It also suggests that the “transitional period of five years indicates that the immediate future will continue to be riddled with the challenges that continue. Civic education from a society point of view seems to be valuable however this aspect needs to be further interrogated as some of those interviewed were civil society providers of civic education, and the interviews inevitably reflect their perspective.

Discussion now turns to reflect on the thesis and to consider the questions raised in Chapter 1 and 2 and the results of analysis of public participation in law, and in practice in the Kenyan constitutional transition period.

Chapter 7 – Thematic Discussion of the Impact of Constitutionalism, Rule of Law, Justice and Participation Ideals on Public Participation in Kenya, 2010–2016

7.1 Introduction

As I indicated in Chapter 1 of this study, the main objective of this research was to examine how the constitutional principle of public participation with a focus on non-electoral participation was actualised in Kenya in the constitutional transitional period of 2010–2016. This discussion chapter examines how key public participation provisions contained in the Constitution of Kenya 2010 have operated in that transitional period 2010–2016, drawing together the results reported in the previous chapter from interviews with key informants from civil society and the earlier discussion about how the new legislation has been implemented in case law and at the public participation legislation in sampled counties (Chapters 4, 5 and 6). I reflect on how questions of constitutionalism, rule of law, justice and civic experience of participation have influenced public participation in Kenya and on emerging issues that have developed in the constitutional transition period.

7.2 Constitutionalism

As noted earlier in Chapter 2, for the Constitution to be living up to its aspirations then a practise of constitutionalism must be in place. To expand on this point, in the opening chapter of this thesis, I argued that the constitutional framework set out in legislation is important, but

it is not sufficient. Effective constitutional government also needs widespread public values of constitutionalism supporting legislation which is implemented effectively. In this section that follows I reflect on the extent to which interviews and analysis of law provides evidence that Kenya is facilitating and achieving effective participation in everyday practice.

7.2.1 Articles in the Constitution on Public Participation

The 2010 Constitution has set out very clear articles which enshrine public participation as a national value (see the discussion in Chapter 3 and Articles 10, 118, 196, 174, 184). However, my review of the Constitution, case law and interviews with key informants makes clear that the Constitution of Kenya 2010, does not define public participation and as a result has led to the interpretation of public participation in many ways that are reflected in national and county public participation legislation. This gap in the Constitution has also left a window for various definitions that emphasise one aspect of public participation over the other. I have also argued that the differences in interpretation of public participation are leading to models of public participation that are emerging in practice at the county level. These models I have termed as: “centralised coordination”, “integrative coordination” and “bi-symmetrical” models of public participation that have emerged at the county level in Kenya in the transitional period.

The literature review reported in this thesis also indicates that defining public participation has been problematic over the years not only as a problem for Kenya but a problem with public participation practise in many democratic contexts where various context specific definitions exist and are used to inform decision making processes.⁶⁷⁷ While the Constitution has made it abundantly clear that public participation is a national value and is central to the governance process in Kenya,⁶⁷⁸ there is less certainty over what public

⁶⁷⁷ Nabatchi, T. & Leighninger, M. (2015). *Public participation for 21st century democracy*. Hoboken, New Jersey: John Wiley & Sons.

⁶⁷⁸ Constitution of Kenya 2010, art 10.

participation means in practice, particularly when counties are implementing public participation as a constitutional obligation.⁶⁷⁹ The Constitution has set an extremely high bar by enshrining public participation as a national value. The legal framework for public participation in the Constitution has been discussed in Chapter 3.

Given the range of new constitutional opportunities summarised above my interest was also in understanding how effectively these provisions were implemented at the county level. The following discussion will focus on the commissions and bodies charged with participation and discussion will consider how the practice of public participation could be enhanced to turn this constitutional aspiration into reality.

7.2.2 Commissions and Bodies Charged with Participation

When public participation was enshrined as a national value in the Constitution, several bodies were also tasked with ensuring that this constitutional value was implemented. This included the Commission for the Implementation of the Constitution, and the Transitional Authority. These organisations were all mandated to undertake their tasks in the first five-year period. The Parliamentary Committee for the Implementation of the Constitution for example is a permanent institution that was tasked with ensuring the 2010 Constitution is implemented and it is located within the parliamentary committee operations.

The Transition Authority was also important because its specific function was to “facilitate and co-ordinate the transition to the devolved system of government as provided under section 15 of the Sixth Schedule to the Constitution.”⁶⁸⁰ This Transition Authority did

⁶⁷⁹ Oduor, C., Wanjiru R. and Kisamwa, Fl. (2015). Review of status of Public Participation, and County Information Dissemination Framework; A Case Study of Isiolo Kisumu Makuani and Turkana Counties Institute of Economic Affairs, Nairobi

⁶⁸⁰ Transition to Devolved Government Act 2012, s 7(1).

facilitate the transition to the devolved governments but my research notes that the roll out of opportunities for participation has been far from uniform.

Constitutional implementation can also be understood as an intergenerational process. The fact that transitional period of up to six years has been important in this regard because of the extent of legislative change required and because of the need to begin to embed a culture of participation in everyday community and county level experience in Kenya.

Looking back on the recent experience of Kenya we can conclude that the expectation of a short transitional period of five years was misplaced. The reality is that the transitional period of the 2010 Constitution will take many years. Temporary institutions have served their time and have attempted to fulfil a significant part of their mandates however, outside of electoral participation (which is clearly contested but beyond the scope of this thesis), there are many issues of public participation left unresolved and I summarise the key issues I have identified in the discussion below.

7.2.3 Petitions to the Courts Seeking Clarifications on Public Participation

According to the findings of this research there were several petitions seeking clarification on what public participation was in the transition period. A number of the interviewees suggested that the public did not seem interested in participating however my analysis of the petitions in court tell a different story. The discrepancy between these perceptions found in the interviews and analysis of court cases could be because some interviewees do not view court petitions as a form of participation. By contrast, the citizen petitioners were seeking clarification on public participation that had supposedly taken place and the reason they petitioned was because at one level or the other, they were not satisfied that effective public participation had occurred. Many citizens using the petition process appear to be aware of their constitutional obligation to participate and all petitions raised public participation as a constitutional promise. Moreover,

as we saw earlier, petitioning is one of the ways that the public can exert their voice under the Constitution.

The existence of a Petition to Parliament (Procedure) Act 2012 further provides for legislation for the citizen to petition parliament on a matter, thus creating yet another avenue for citizen participation.⁶⁸¹ Thus, the observation of interviewees that the public is somewhat reluctant to participate should be treated with caution in that the civil society do appear to be petitioning the courts, however the number of petitions is relatively small. Nevertheless, these cases are building up a significant body of case law that is a valuable resource for the future.

7.2.4 Tension between Representative Democracy and Participatory Democracy

This thesis research has also identified tension that is present in Article 1(2) of the 2010 Constitution. This tension is between participation through a representative government and direct participation by individuals. This tension revealed itself in public participation in Parliament in the making of laws. When read together with Article 118 of the 2010 Constitution.⁶⁸²

Parliament shall— conduct its business in an open manner, and its sittings and those of its committees shall be open to the public; and (b) facilitate public participation and involvement in the legislative and other business of Parliament and its committees. (2) Parliament may not exclude the public, or any media, from any sitting unless in exceptional circumstances the relevant Speaker has determined that there are justifiable reasons for the exclusion.

The tensions in the Constitution are exacerbated because although the 2010 Constitution has obligated parliament to facilitate public participation it has also provided a caveat for “exceptional matters” which was used in the process of developing the of the Security Law Amendment Acts.⁶⁸³ It appears that this caveat can be easily applied, especially when one

⁶⁸¹ Petition to Parliament (Procedure) Act 2012.

⁶⁸² Constitution of Kenya 2010, art 118.

⁶⁸³ Constitution of Kenya 2010, art 118.

political party holds an overwhelming majority in the parliament and the opposition does not have sufficient numbers to counter this.⁶⁸⁴ While it is well within the rights of the speaker of the house to declare “exceptional matters”, this presupposes that the speaker remains impartial in his role.

In my discussion of county-level decision making, I have argued that the tensions between representative and direct democracy has been addressed by the courts at a number of court rulings, but it is not fully resolved as the court rulings appear to rule towards the supremacy of representative democracy on the one hand, and yet, on the other hand, they have ruled for the supremacy of the direct participation. Moreover, the courts often leave the onus on the public to prove standards of participation have not being met.

The ongoing tension underlying court rulings can be partially explained by the courts transitioning into the realm of the new Constitution which as indicated earlier is aspirational. The 2010–2016 period has been a period of transition not only for the development of laws but for the development of individuals who have to think, and process decisions based on the 2010 Constitution and the primacy it places on public participation as a national value that straddles the whole Constitution. Learning how to participate effectively requires a change of political culture amongst citizens as well as legislative change and this takes time.

In addition, the tensions that exist between representative and participatory democracy are not new to Kenya, these tensions have existed for at least long as representative democracy has been practised, as stated by Edwards.⁶⁸⁵ Some analysts suggesting the roots of this tension

⁶⁸⁴ Mutahi, E. (2017). Parliament moves to amend polls law. *Business Daily*, 27 September. Retrieved 10 January, 2018 from <https://www.businessdailyafrica.com/news/Parliament-moves-amend-polls-law-/539546-4115010-117v3me/index.html>

⁶⁸⁵ Edwards A. (2012). Tensions and New Connections between Participatory and Representative Democracy in Local Governance. In: Schaap L., Daemen H. (eds) *Renewal in European Local Democracies*. Urban and Regional Research International. VS Verlag für Sozialwissenschaften.

lie in the period of rapid resource, development decolonisation and foreign investment leading to competing constitutional governance objectives.⁶⁸⁶ Some political scientists in Kenya have also argued that this tension was inevitable because the experiences under representative democracy preceding the new Constitution had left many Kenyans disillusioned with elected officials and many demanded more direct say in day to day government.⁶⁸⁷ What is significant in Kenya's new Constitution, particularly in Article 1(2) is the way that the article highlights both forms of participation.

In Kenya, Article 1(2) of the Constitution of Kenya appears to promote both direct representation and representative democracy. As noted earlier, this can create tensions that continue in the 2010 Constitution architecture, therefore ensuring that a court ruling may result in determining that either representative democracy or participatory democracy is valid but will almost inevitably be contested.⁶⁸⁸ A future challenge for Kenya lies on the weight that Kenyan citizens give to representative institutions and the weight that they give to more direct forms of participation. It is not balanced yet; the effective implementation of the Constitution requires that it should achieve to be balanced. Perhaps as the Constitution moves beyond the constitutional transition period this tension could be resolved with the reinforcement of constitutionalism.

7.3 Rule of Law

7.3.1 National Laws on Public Participation

This thesis has taken two frames in analysis: drawing not only on the literature in political science about public participation, but also an analysis of the legal framework for participation,

⁶⁸⁶ Edozie, R.K. (2008). New Trends in Democracy and Development: Democratic Capitalism in South Africa, Nigeria and Kenya. *Politikon*, 35(1), 43-67. doi:10.1080/02589340802113055

⁶⁸⁷ <https://www.opendemocracy.net/alan-e-masakhalia/direct-democracy-in-kenya-case-to-be-made>

⁶⁸⁸ Constitution of Kenya 2010.

drawing on some of the insight of public law. The laws that refer to public participation at the national level are a result of the constitutional requirements set out in legislation and maintaining the rule of law is important for any nation wishing to ensure stable and accountable government. Having a clear legal framework for the Constitution also provides a tool as I have argued previously, to help the public understand and use new opportunities for participation.

My review of the way that public participation is implemented under the Public Finance Management Act 2012 suggests that legal provisions for participation are varied and there is a long way to go to ensure that public participation is implemented effectively and uniformly. The Public Finance Management Act 2012 for example is one of the laws that is cross cutting, it requires that implementation at multiple levels of government and all the 47 county governments and the national government yet implementing this Act in relation to public participation has been problematic. An example of the challenge it faces is in the setting up of functional County Budget Economic Forums at county level which is a requirement of the Act.⁶⁸⁹ The International Budget Partnership notes that in 2014 “18 months after devolution, the vast majority of counties have yet to establish a County Budget Economic Forum.”⁶⁹⁰ Thus illustrating the challenge that the rule of law is facing in the constitutional transition period.

7.3.2 County Public Participation Law

This thesis also examined five county public participation laws and there appeared to be three emerging models of public participation from the five-county public participation laws. These include “centralized coordination model”, while no county achieved centralised coordination as envisaged in the County Public Participation Guidelines, there were elements of central

⁶⁸⁹ The Public Finance Management Act 2012.

⁶⁹⁰ Muriu, A. R., Mbai, G., Lakin, J., & Flynn, R. (2014). County Budget and Economic Forums (CBEFs) and Public Participation in Kenya a Synthesis of Case Studies from Five Counties (Working paper). www.internationalbudget.org. doi:<https://www.internationalbudget.org/wp-content/uploads/County-Budget-and-Economic-Forums-CBEFs-and-Public-Participation-in-Kenya.pdf>

support which was found in Elgeyo Marakwet County. Nairobi County also had a public participation office and some centralised resources as it allocates two percent of its budget to coordinating public participation. The thesis also identified an “integrative coordination model” that implements public participation through the existing structures of the county assembly and the county executive. This model was identified in Meru and Machakos Counties. The “bisymmetrical model” was identified in Isiolo County where there is equal emphasis on public participation and civic education and a prevailing emphasis on this duality of support required for participation. Civic education support is provided for every step of the public participation process in Isiolo, one of the poorest and marginalised of Kenya’s counties, thus ensuring ongoing democratic development of citizens so that they can participate in a more meaningful manner.

In addition to these models, it was also noted that public participation definitions varied with some having individuals participating as key and others having community representatives and stakeholders as key in the public participation process. The other issue raised was the lack of technical capacity at the county at two levels. Firstly, the capacity to develop laws that could explain why only five out of 47 counties had gazetted public participation laws by October 2016. Secondly, the issue of whether government officials had sufficient technical and resource capacity to implement the public participation laws at the county remains up in the air. While acknowledging that Kenya is still undergoing democratic transition, I argue there is evidence that Kenya is moving along with the democratic transition, albeit in an uncertain and inconsistent manner.

One of the other emerging recommendations from this study which will be discussed in the conclusion is that further study is undertaken of a greater number of public participation

acts when they are gazetted to see if these three types of public participation models that have been identified in this study are reflected in the experiences across other counties in Kenya.

7.3.3 Access to Information

Critics of Kenyan governance argue that timely access to information is essential for both effective rule of law and effective public participation.⁶⁹¹ This thesis also suggests that access to information has been clarified by the courts as crucial in the public participation process. Observations from members of civil society which were reported in the interviews conducted in this thesis have noted that in extreme cases, a lack of access to information continues to be experienced by citizens during public participation processes. At times, the matter is simple and straightforward like the lack of access to documents. In other cases, the issue is that the information that was supplied was too technical, long and complex, and was presented in a way that cannot be easily processed by a citizen who has limited time and expertise in specific issues. As one of the interviewees shared, the public needs to be given information, and you also need that information to be accessible. Failure to provide access to information is addressed under the Access to Information Act 2016 which provides for penalties for bodies that fail to provide full information as required.⁶⁹² On the basis of my interviews and review of literature, I would recommend that the courts fully apply the law when dealing with public officials who fail to provide full information when required to do so by the law in a timely and comprehensible manner. Every public official should be aware of the access to information law as part of conducting their key duties.⁶⁹³

⁶⁹¹ Gathu, Peter & Kahindi, Henry (2017). Access to information in Kenya. Adili. Issue 155. Retrieved 24 January 2018 from: <http://tikenya.org/wp-content/uploads/2017/06/adili-155-access-to-information-in-kenya.pdf>

⁶⁹² The Access to Information Act 2016.

⁶⁹³ The Access to Information Act 2016.

7.3.4 Parliament and public participation

While this study did not consider public participation in elections, discussion did consider other parliamentary provisions that govern opportunities for public participation in decision making. For example, the National Assembly has managed to legislate several significant laws that are concerned with public participation. One exception is a national Public Participation law that was still being debated in 2017 when all other legislation was passed in the constitutional transition period of 2010- 2016.⁶⁹⁴ The objectives of the Public Participation Bill are to “provide a general framework for effective public participation to give effect to the constitutional principles of democracy and participation of the people under Articles 1(2), 10(2), 35, 69(1Xd), 118, 174(c) and (d), 184(1Xc), 1962.01(a) and 232(1)(d) of the Constitution; and for connected purposes.”⁶⁹⁵ This Bill requires more debate, however, in light of the challenges that the counties are experiencing when implementing public participation a national public participation act would help clarify issues around public participation. In particular, I recommend that the development of the National Public Participation Bill build from the experience of local counties who have already attempted to implement public participation laws at county levels.

7.3.5 Predictable Legislative Frameworks

The need for a predictable legal framework is important in moving forward with public participation in Kenya. Predictability in court decisions regarding public participation, the application of national laws that concern public participation, and the application of county laws on public participation is important, it helps businesses and communities plan and know what to expect. My analysis, however, suggests that experiences of participation vary widely across and between counties. External organisations like the Brookings Institute have

⁶⁹⁴ The Public Participation Bill 2016.

⁶⁹⁵ The Public Participation Bill 2016.

highlighted the important role county-level government plays in providing education, health and road services for example.⁶⁹⁶ All Kenyan citizens need to be assured that no matter where they live they will have similar opportunities to contribute to public decision making. This may take time to achieve, but the purposes of effective constitutional guidelines are to inform the development of consistent and predictable implementation of opportunities for participation that is essential for fair government at all levels

7.3.6 Public Participation Legislative Infrastructure

The existence of the Constitution of Kenya 2010 is the basis of national laws and county public participation laws and this forms the basis for public participation legislative infrastructure. This thesis has highlighted key aspects of new participatory legislation that is summarised in Figure 11. The figure shows how constitutional frameworks set obligations for national and county legislation. In addition to the opportunities identified in this thesis and summarised in the Figure 9 there is additional policy that is being developed by individual government bodies in response to demands for greater participation- this includes statutory instruments that are developed by a regulation making authority. The Public Participation Bill, for example, requires county government to report on how participation was achieved and responded to and this could be the first step in achieving feedback thus closing the public participation cycle and reinforcing the infrastructure.

⁶⁹⁶ Kimenyi, Mwangi S. (2013). Devolution and Resource Sharing in Kenya. Brookings Institute. October 22. Retrieved 24 January, 2018, from: <https://www.brookings.edu/opinions/devolution-and-resource-sharing-in-kenya/>

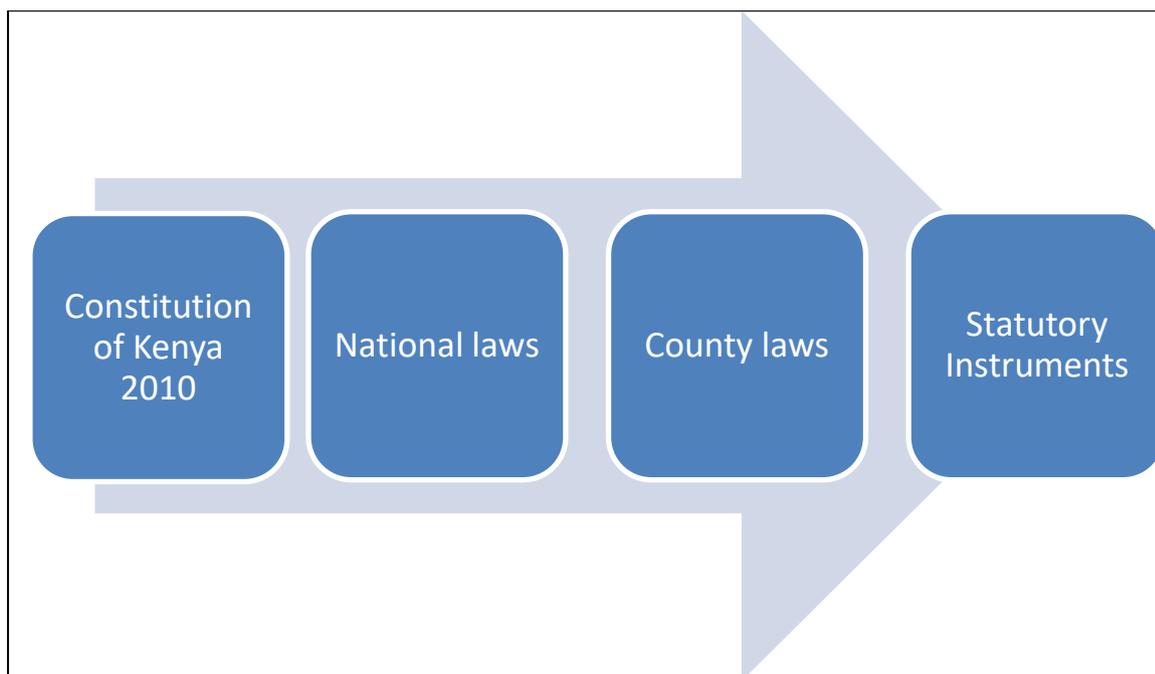


Figure 9 Public Participation Legislative Infrastructure in Kenya⁶⁹⁷

7.4 Common Law and Public Participation

7.4.1 Court Judgments

I have argued that the 2010 Constitution is not the sole guiding factor when interpreting how public participation is to be implemented although it is the final determinant. The courts as common law courts depend on precedent and in this case, have referred to commonwealth jurisdictions like court precedents from South Africa when delivering judgments on public participation.⁶⁹⁸ This trend is key in understanding how the rulings on public participation are developing and the common law influence on the standards of public participation that are being upheld by the courts.

⁶⁹⁷ By Jane M. W Marine.

⁶⁹⁸ see *Minister of Health v New Clicks South Africa (PTY) Ltd (supra)*, *Matatiele Municipality and Others vs. President of the Republic of South Africa and Others (2)* (CCT73/05A) [2006] ZACC 12; 2007 (1) BCLR 47 (CC)& *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).

It also appears that decision making that is reminiscent of the previous constitutional order is also visible in the court decisions that are being made. This result only reinforces that the period between 2010 and 2016 is a transitional period where previous constitutional practices are slowly falling away and leading to the adaptation of public decision-making that more closely reflects the aspirations of the 2010 Constitution.

However, courts appear to be failing to consider the need for revised recommendations to be also subject to some form of public participation. The courts, for example, seem to be leaving the decision of whether revised recommendations require further input from the public to the decision maker. *Petition No 163 of 2016 Wamatangi Kimani Paul v Commission on Revenue Allocation & another [2016] eKLR* illustrates the point.⁶⁹⁹ As a result of reviewing case law, I argue it is necessary for all counties to draft, debate and properly gazette laws so that they can provide guidelines for the public and standards of public participation can be established and tested in courts of law. Without public participation laws being properly gazetted, law remains void and cannot be implemented.

The 2010 Constitution recognises in Article 166(b) that the experience that a superior judge is expected to have is required under clause (3) to (6) as applicable, irrespective of whether that experience was gained in Kenya or in another Commonwealth common-law jurisdiction.⁷⁰⁰ By doing so, the article further reinforces that at common law is a component of Kenyan law and that a judge from a commonwealth common law jurisdiction would be suitable to hold a position as a superior judge. Thus, this article further underscores the existing common-law tradition in the Kenyan law system. While there is some level of public concern

⁶⁹⁹ *Petition No. 163 of 2016 Wamatangi Kimani Paul v Commission on Revenue Allocation & another [2016] eKLR.*

⁷⁰⁰ Constitution of Kenya 2010, art 166(b).

about imposed foreign and colonial law that is not reflective of who Kenyans believe they are. I argue that it is through building up our own public participation case law in Kenya that we can expand and deepen constitutional values and practice while acknowledging our common law nature.

7.4.2 Capacity of Citizens to Petition the Courts on Matters Relating to Public Participation

The fact that the petitioners have in some cases failed to provide evidence or failed to state which standard of the Constitution has been breached speaks to some issues with regards to the level of expertise of the petitioners, the lack of proper documentation of the public participation process and the fact that a significant number of counties have not passed and gazetted public participation legislation guidelines. The courts appear to be applying greater weight in the 12 court cases studied to the role of representatives input in decision making, as opposed to participation through direct participation by the public using petitions. The determinations suggest that many judges still believe that having participation through methods of representation is sufficient and there was no expectation that more direct participation was required. This finding again also highlights the ongoing tension between representative and direct participation which lies at the heart of the Constitution and was discussed at the opening of this chapter.

7.4.3 Public Participation Standard's as Upheld by the Courts of Kenya in the Constitutional Transition Period

This thesis has some interesting implications for our understanding of what public participation standards are being up held by the courts in Kenya. Firstly, the courts appear to be pressing the public to provide evidence of any failure of public participation and demonstrate how the standards of the 2010 Constitution are not being met or how and other existing legislation have been violated. As noted earlier, the Evidence Act requires the Petitioner to present his or her

evidence of the failure of participation process to the court. However, this thesis argues that on matters concerning constitutional standards the High Court should take it upon itself to address what standards have been disregarded with regards to implementing public participation.

Secondly, decision-making on public participation occasionally appears to echo the pre-2010 constitutional order. This has been observed in a number of cases. These observations have only served to emphasise that the period under study was indeed a transitional period into the 2010 constitutional framework and a process that requires the rights of citizens to be heard and to be recognised. Perhaps with hindsight, achieving public participation required better and continual preparation. More attention to ongoing public education of citizens and public servants for example would have been helpful in this period. However, as with any transition process there will be variability on the uptake of the new framework by the various concerned stakeholders but raising their awareness with ongoing education would help make public participation a reality.

Third, on the matter of giving sufficient notice, some of the court decisions appear to take the matter seriously and require the defendants to give sufficient notice. However, when it comes to public participation in parliament less attention seems to be given to these considerations. These uncertain and tentative steps towards greater public participation raises wider issues about the role of information and government leadership which I turn to discuss.

7.4.4 Role of Leadership and Government in Public Participation

The technical capacity of public officials to provide support in the public participation process has emerged as an important topic in this study, it was highlighted by interviewees and in review of the comments made by the public in various petitions. According to Renatus Kihongo and John Lubuva, “Government’s relationship with civil society organisations (CSOs) and the overall strength of democracy play a significant role in the quality of participatory

processes.”⁷⁰¹ The role of government in the public participation process is viewed as ambivalent yet some county governments that have set aside up to two percent of their county budget for the public participation process. The government also is involved in ensuring the statutes on public participation are implemented. Like the the public in this constitutional transition period this has also been a learning phase for the national and the county governments on how to engage with the public within the existing public participation legislative framework. Government continues to work with civil society albeit in a conflicted manner to enhance civic education and public participation at both the national and the county level.

7.5 Experience of Citizens with Public Participation in the Constitutional Transition Period

In this section I will examine the experience of Kenyans in public participation in the constitutional transition period. I have considered how citizens are participating and the themes and questions that are emerging about challenges of public participation in the existing socio economic environment.

7.5.1 Court Petitions

The results of this study indicate that citizens are participating by petitioning courts on various matters but more specifically on matters that are concerned with how the public participation process is being undertaken at the county and the national level. As noted in Chapter 4, individuals, civil society and constitutional bodies have petitioned the courts with mixed results. The courts are providing a variety of judgments with regards to public participation. Civil society appears to have undertaken this public interest litigation to get further clarity on

⁷⁰¹ McNeil, M. & Malena, C. eds. (2010). *Demanding good governance: Lessons from social accountability initiatives in Africa* Washington, DC: World Bank.

the law on public participation in the constitutional transitional period. However, the court cases, literature and interview highlight several challenges.

In addition, it is to be noted that the experience of citizens on matters related to public participation has led to various types of developments namely; democratic development, the redistribution of resources and the redistribution of power. With regards to democratic development the very fact that Kenyans are participating in the governance process in this constitutional transition period (albeit while facing significant challenges) is testament to the fact that for many there has been a paradigm shift in public expectations of participation which appears to be a direct result of the Constitution.

First this claim can be illustrated by a reading of the various court petitions that were examined earlier in Chapter 4, it is clear that public participation is becoming entrenched in the democratic culture of Kenya (ongoing questions of its effectiveness, and sufficiency notwithstanding). On the matter of the redistribution of resources as a result of public engagement, the participation of Kenyans in budget making at the national and at the county level and the petitioning of courts on matters related to public participation in budget making as illustrated by court petitions *Robert N Gakuru & another v Governor Kiambu County & 3 others [2013] eKLR* and *Simeon Kioko Kitheka & 2 others v County Government of Machakos & 3 others [2016] eKLR* indicate that the constitutionally mandated public participation will lead to not only better accountability but the redistribution of resources that enhance fairness and wider opportunities for communities to be served.

Finally, on the matter of redistribution of power, we can see how the various types of court petitions that are being submitted at the county level are challenging power and authority in decision-making. The fact that citizens are taking up this opportunity to have their concerns addressed at a local level suggests that citizens do see this as a meaningful opportunity.

Ultimately, the fact that court petitions can be undertaken not only by individuals, but also by civil society groups or constitutional bodies indicates that the opportunity to achieve redress in a matter is open to a wider group of people than merely a few well-resourced individuals, and this opportunity is as a result of the Constitution of Kenya 2010 thus cementing a constitutional process to begin to enable a redistribution of political power.

7.5.2 Challenges to Public Participation in the Constitution Transitional Period

Overall, it is clear that Kenya is still struggling with accountability of public officials for the usage of funds in many areas and this remains a fundamental challenge in the whole public participation process as public participation requires transparent and responsive interactions from all stakeholders.⁷⁰² As Kenya continues to transition into a full democratic state, full accountability must be addressed to ensure that public participation becomes more entrenched. Yet, paradoxically, public participation is also key in ensuring accountability.

7.5.3 Standards of Public Participation in Kenya

According the results of this study, while there are promising signs of change, many of the standards of public participation are not keeping up with what are well known international standards of public participation. Effective public participation is predicated upon the existence of predictable legislative frameworks of standards that reflect the constitutional aspirations. That the standards are at times are variable reflect the political and social reality that exists in Kenya. However, this constitutional transitional period has shown that the ensuring that these standards are met is key to the full realisation of the national value of public participation. To

⁷⁰² Institute of Economic Affairs. (2015). Sub-national budget transparency: Case of ten counties in Kenya.

start with, the of five county public participation laws appear to be generally in agreement with standards that require prior notice, some form of disclosure, the consultation with stakeholders and notice of decision. The county public participation laws, however, do not indicate that they is a need for cross examination, oral hearings.

7.5.4 Citizen Capacity to Participate in the Existing Socio-economic Environment

The ability of citizens to participate is partly precipitated by the existing socio-economic conditions of Kenya. As discussed earlier public participation requires citizens to be funded or at least resourced in some way to be able to engage in decision making, taking time off work, travelling to meetings, and printing and distributing information and holding meetings. While this does not necessarily require citizen groups obtain legal aid, where funds to support participation are distributed it is important that this is done in an equitable and transparent manner. Unless this funding is consistent then public participation will occur in spurts and bursts with some groups disadvantaged and others unfairly supported. The findings of this research indicate that some counties that have passed and gazetted legislation on public participation and have considered how this process will be transparently funded by the county governments by legislating that a percentage of the annual county budget is available for support. However, other counties are silent on this matter. Thus, catering for the budget of the public participation process remains an ongoing issue which is likely to become more contentious through time and has the potential to erode public confidence and encourage clientelism or corruption. This research suggest that public participation need to be much better supported at the national and county level for it to be effective.

The results also indicated that citizens have often expressed a need to be compensated when they are partaking in public participation processes. This is a result of the current existing economic environment and the experience of inequality may continue but as above, some clear

guidelines and transparent processes are required if costs of participation are to be met fairly and accountably.

7.5.5 Citizen Responsibility and Citizen Apathy

The level of awareness that the citizens have regarding what is expected from them with regards to public participation raises the question of whether they have sufficient support to build their capability and capacity to undertake meaningful participation. With the creation of counties in the 2010 Constitution, the development of social capital in the county context is at the beginning stages. There is awareness of the potential for peaceful democratic participation, but wider political events including election transitions are critical in setting the scene and tone for participation.

Political apathy has been described by Rosenberg (1951) as “a state where politics is avoided by the public because of feelings of psychological inadequacy or weakness”. Other factors associated with apathy that are identified in the literature include the “world view of the individual” which discourages political action, including a sense of “powerlessness and fatalism.”⁷⁰³ However, according to Fung (2015), “frustration, cynicism, or apathy can also be the results of a poorly designed public engagement process.”⁷⁰⁴ Caprini et al (2004) discuss the Hibbing and Theiss-Morse experiments which found that “the illusion of voice can lead to even greater frustration and disenchantment than having no voice at all.”⁷⁰⁵ This is a timely warning if county and national level participation is to be achieved much care is required in ensuring this.

⁷⁰³ Rosenberg, M. (1951). The Meaning of Politics in Mass Society. *Public Opinion Quarterly*, XV, 5-15.

⁷⁰⁴ Fung, A. (2015). Putting the Public Back into Governance: The Challenges of Citizen Participation and Its Future *Public Administration Review* *Public Admin Rev*, 75(4), 513-522 doi:101111/puar12361.

⁷⁰⁵ Carpini, M.X., Cook, F.L., & Jacobs, L.R. (2004). Public Deliberation, Discursive Participation, And Citizen Engagement: A Review of the Empirical Literature. *Annual Review of Political Science*, 7(1), 315-344. doi: 10.1146/annurev.polisci.7.121003.091630.

Apathy can be an expression of power imbalance and the citizens are only reflecting on what is their true and lived experience. Given the deeply divided community responses to the recent election it is unlikely that apathy is the product of disinterest in the future of Kenya, many citizens care deeply but the political context they find themselves in may mitigate against speaking out unless you can be assured of a fair process.

Coleman (1988) emphasised the importance of time spent in interaction and discussion as also being central to the production of some types of social capital. If a given respondent interacts with his or her discussants about political matters on a frequent basis, we expect that there is a greater opportunity for the communication of political information and expertise.⁷⁰⁶ This in turn will lead to greater engagement and capacity, and less citizen apathy. This result is in line with the observation made by Achen and Bartels that in a democratic reality citizens are too busy going about the business of life to fully invest in public participation.⁷⁰⁷ The findings also echo an Oxfam study that found low public participation rates at the county level.⁷⁰⁸

In the constitutional transition period it appears that the citizens are mixed in how they perceive their responsibility to participate. The interviews with key informants suggested there is a certain level of apathy that is a result of citizens not being able to see how their voice and input counts. This is a result of a level of frustration by citizenry and this frustration could possibly lead to political unrest. The citizens must also take up their responsibility in building the social capital required by engaging and participating as fully as they can.

⁷⁰⁶ Coleman, J. (1988). Social capital in the creation of human capital. *American Journal of Sociology*, 94(Suppl.), S95–S120; pp. S109–S110.

⁷⁰⁷ Achen, Christopher H., and Larry M. Bartels. (2016). *Democracy for Realists: Why Elections do not Produce Responsive Government*. Princeton, NJ: Princeton University Press.

⁷⁰⁸ Tax Justice Baseline Report Baseline Survey for The Domestic Resource Mobilisation Project Conducted in Nairobi, Wajir And Turkana Counties. (2017). Oxfam -Kenya. Retrieved May 15, 2017, from https://kenya.oxfam.org/sites/kenya.oxfam.org/files/file_attachments/DRM%20Baseline%20Report%20Summary%20Published%20January%202017_0.pdf

It is worth noting that citizen alienation from decision making, can also be expressed as apathy towards public participation. Whether it is alienation, apathy or both, the problem of achieving effective participation is likely to remain for as long as citizens are under the impression that their voices do not count. At this transitional period time in Kenyan political history, citizens also have a responsibility to continue participating but they need a reliable legal framework and judicial support. Sustaining public participation and ensuring peaceful government will require the concerted efforts of all citizens, the government and relevant stakeholders.

7.6 Summary

In this chapter I have had a thematic discussion of the emerging impact of the principles of constitutionalism, rule of law, justice and participation on public participation in Kenya, 2010–2016. In particular, under constitutionalism I have expounded on articles in the Constitution on public participation, commissions and bodies charged with participation, petitions to the courts seeking clarifications on public participation and the existing tension between representative democracy and participatory democracy. Under the rule of law, I expounded on the emerging themes observed regarding national laws on public participation, county public participation law, and access to information, public participation in parliament, the need for predictable legislative frameworks and the wider public participation legislative infrastructure. Under common law and public participation, I discussed the emerging themes in the court rulings, public participation standards as upheld by the courts of Kenya in the constitutional transition period, the role of leadership and government in public participation. Finally, I looked into the experience of citizens with public participation in the constitutional transition period and discussed the following emerging themes, court petitions, challenges to public participation in the Constitution transitional period, standards of public participation in Kenya, Citizen

Capacity to participate in the existing socio-economic environment and citizen responsibility and citizen apathy.

Chapter 8 – Conclusion

This thesis examined public participation in Kenya in the Constitution transitional period 2010–2016. Chapter 1 set out the justification for the research, research objectives, scope and delimitation of research, and an overview of the thesis. It then provided a background of the Kenyan context and presented a review of literature in the Kenyan context. Chapter 2 laid out the conceptual framework, conceptual framework and research methods, before in Chapter 3 analysing the legal framework of public participation in Kenya. Chapter 4 considered how the courts in Kenya ruled on matters regarding public participation, and how the courts interpreted public participation at common law through an analysis of twelve court judgments. Chapter 5 then analysed five county public participation acts in Machakos, Nairobi, Meru, Isiolo, and Elgeyo /Marakwet and Chapter 6 reported on interviews with civil society advocates. Chapter 7 drew together the results of this research. It argued that in order for full public participation to have been operationalised in an effective manner in the transitional period of 2010–2016, it would not have been sufficient to have a Constitution that requires and identifies public participation as a national value and implemented, nor to have national and county legislation enabling public participation, nor to have court decisions made regarding and for public participation, nor have citizens participate. Rather, these elements are interconnected and all four conditions were necessary for full public participation to have been achieved.

8.1 Main Findings and Contributions to Scholarship

This research adds to existing research of the 2010–2016 constitutional transitional period of the Constitution of Kenya and implementation period. The research is premised on the fact that the 2010-2016 is a constitutional transitional period as the paradigmatic change that is required

as aspired to in the 2010 Constitution is still in progress. It further provides insight into the development of court decisions and standards for public participation in the context of the 2010 constitutional framework.

This research also highlights the diverse nature of public participation at the county-level and the three emerging models from the counties that are emerging as partly as a result of the differences in definitions of public participation at the county levels are also leading to models of public participation that are emerging in practice at the county level. Discussion offers some insight to the extent to which constitutionalism is being practiced in Kenya in the context of the 2010 Constitution in the transitional period.

In my analysis, I examined the rule of law in the country in relation to the implementation of public participation and argued that significant work is required to advance respect for the rule of law as it is practised in Kenya with regards to public participation. Although interviewing stakeholders was limited in number and scope, these interviews highlighted some of the key problems that civil society and experts alike have in operationalising participation and demonstrates opportunities for other researchers in the future to explore the issues identified in this particular study.

8.2 Study Limitations

The size of this study is the first limitation and as a result the outcome of this study cannot easily be generalised to all counties or the experiences of the whole population of Kenya. However, it is indicative of the way public participation has been operationalised in the transitional period 2010–2016. A case study approach generally does not lend itself to easy generalisation however it provides insight of a unique system and period and generates further research questions and insights.

8.2 Contribution to the Field

As indicated earlier this study was particularly focussed on the legal interpretation and policy implementation of public participation under the 2010 Constitution at the level of county legislation, the courts and the country environment in a constitutional transition period. This work has contributed to the literature on the Constitution implementation process by providing a specific account of public participation in the constitutional transition period 2010-2016 in Kenya.

This study has also contributed in helping to minimise the knowledge gap of what public participation consists of in Kenya in the context of the 2010 Constitution and thus opening up this particular area to further research. As Turner (2015) has noted this area of transitional constitutionalism is little explored.⁷⁰⁹ So this research has contributed to filling the knowledge gap in this area of study.

The research will also examine what the period of constitutional transition means for the implementation of the articles of participation in the Kenyan Constitution. Second, the study examined the direction the Kenya courts are moving with regards to public participation and examined the degree to which this legal direction is in line with the aspirations laid out in the articles of the Constitution of Kenya 2010 and public aspiration and determined that it is an uneven journey with a number of contradicting court decisions that reflect the Constitutional transitional period.

Third, by using the common law public decision maker's framework to analyse decisions around public participation made by the courts in Kenya, this study has considered the degree to which court decisions speak to and are aligned to constitutional aspirations.

⁷⁰⁹ Turner, C. (2015). Transitional Constitutionalism and the Case of the Arab Spring. *International and Comparative Law Quarterly*.

Fourthly, this study has determined that Kenya as of 2016 does not yet have the necessary legal and political environment for meaningful public participation to take off. At the national level, the Public Participation Act is yet to be fully legislated and a national public participation policy is yet to be developed and not all 47 counties have public participation acts.

Fifth, this study has also identified that resolving the tension that is found in Article 1(2) of the 2010 Constitution in relation to public participation is pivotal to paradigm change that will result if clarity to this particular Article is attained. Currently, it presents that the people can exercise their sovereign power directly or through their elected representative as alternatives, not each as an absolute. This may set the stage for rising tensions between the public and their democratically elected representatives.

This study has broadly contributed to the literature of constitutional implementation in Kenya in the transition period of August 2010 to August 2016 and ask if the idea of public participation as appealing as it is to Kenyans, is perhaps more complicated than we imagine.

8.3 Recommendations on the Future Implementation of Public Participation in Kenya

This study has demonstrated that there are four key democratic elements that are crucial to public participation implementation, namely the 2010 Constitution of Kenya, the existing legislation, court decisions made on matters concerned with public participation and the need for a national public participation policy to be drafted, discussed and passed.

With regards to the Constitution of Kenya 2010, this thesis recommends the revisiting and opening up of Article 1(2) for debate. Reopening debate would help provide clarity on the primacy of public participation over representative democracy, if that is indeed what the people of Kenya believe. As it stands at the moment, constitutionally direct participation and

representative are equally valid. As an aspiration this makes sense, however in practise it is problematic. In the event when only representatives partake in the governance process, then the people feel left out of the process. If this debate does not happen, then extensive civic education on this matter needs to be undertaken to develop a democratic culture that understand the nuances of this Article 1(2).

In Kenya, however, the constitutional transition period has revealed the tensions at work in such a system and as a result tends to be more politically competitive as opposed to complementary. The Article is also based on historical and unwritten democratic norms that have become part of the fabric of those societies that have practised democratic governance for generations. Perhaps with time and after the constitutional transition period, a more nuanced application of this Article that recognises the need to balance direct and representative democracy may be possible. However, I remain wary as we have been here before in history. As Ghai and McAuslan noted in 1970 when discussing the prospects for constitutionalism in Kenya, “a consideration of the underlying trends of constitutional and legal developments ... makes it difficult to take an optimistic view of Kenya’s constitutional future.”⁷¹⁰

This thesis recommends that the public participation “guidelines” in the Acts form an integral part of public decision making under common law therefore need to be enforced. Furthermore, it suggests that already existing and upcoming public participation acts need to be evaluated to ensure that they are in line with the 2010 Constitution of Kenya. Also important is that the funding for public participation is factored in all the proposed county legislation for public participation to help ensure that public participation can be actualised. Finally, while noting the emerging models of county public participation are reflecting of individual county priorities, it is also important to emphasise that all Kenyans in all counties have a right to

⁷¹⁰ Ghai, Y.P & McAuslan, J.P.W.B. (1970). Public law and political change in Kenya. A study of the Legal framework of Government from colonial times to the present. Oxford University Press, Nairobi at 517.

experience the fullness of public participation as aspired to in the Constitution and that the individual county public participation acts should reflect this.

8.4 Research Implications

This research has implications on policy and practise in two fields. First, this research is relevant to the judicial realm that considers the importance of continued research in the decision making by the courts regarding various rulings being made in the context of the 2010 Constitution. Secondly, the matter of evidentiary requirements in constitutional petitions needs to be addressed and evaluated as court decisions that are made based on this principle appear to be in conflict with constitutional intentions however in line with the Evidence Act. On the matter of whether “democratic innovation” is occurring in Kenya in the context of the 2010 Constitution in the practise of non-electoral public participation, the constitutional transition period suggests there is still a long way to go. Innovation that has been observed in the five counties studied here suggest models for participation are beginning to emerge, but these are very tentative.

Is, then, public participation in the context of the 2010 Constitution of Kenya a “democratic hoax”⁷¹¹ or a mirage in the constitutional transition period? The possibility of non-electoral public participation becoming a hoax is real as we have seen that only a limited number of counties in the period have gazetted county public participation acts. However, if we are to seize the mirage that has drawn citizens for many years, we need public participation that is enforced by the courts and the rule of law with the consistent application of standards that exist in the law at the national and the county levels.

⁷¹¹ Hart, V. (2003, July). Democratic Constitution Making (Rep. No. 107). Retrieved December 16, 2016, from http://www.Constitutionnet.org/files/Module_4_5.1A.pdf

8.5 Future Research

This thesis identifies future possibilities for research and some new questions for further study. The first possibility is research on the remaining counties that are yet to implement public participation legislation – these need to be examined as soon as they are legislated and gazetted. The second possibility is research on future judicial decisions that are being made and discussion about long term implications for the communities affected. The third possibility is to extend the models of public participation that have been identified in this thesis and consider the extent to which they help us understand the valued experiences of citizens in differing counties in Kenya. Fourthly, I propose future research to be undertaken that will give voice to the variety of distinctive groups and communities in Kenya namely women, older members of society, persons with disabilities, children, youth, members of minority or marginalised communities, and members of particular ethnic, religious or cultural communities as the implementation of public participation continues. Finally, further research to be undertaken on the continued implementation of the Constitution and the end of the constitutional transitional period.

8.6 Postscript

The writing of this thesis has come to an end when Kenya has just had a general election on 8 August 2017 that declared the current incumbent Uhuru Kenyatta the presidential winner and as a result the opposition candidate Raila Odinga appealed the elections outcome at the Supreme Court of Kenya.⁷¹² On 1 September, the Supreme Court declared that the presidential election results were nullified and that Independent Electoral and Boundaries Commission

⁷¹² Odula, T. (2017). Kenya: President Uhuru Kenyatta's August election win is nullified by the Supreme Court. Independent (London online ed.), 1 September. Retrieved 20 January, 2018, from <http://www.independent.co.uk/news/world/africa/kenya-uhuru-kenyatta-supreme-court-election-win-nullified-president-electoral-irregularities-a7923656.html>

must hold a repeat election. On 22 September, they released a detailed judgment where they presented the assenting and dissenting positions of the various Supreme Court judges.⁷¹³ The new presidential elections that were a result of the nullification of the 8 August presidential elections were initially set for 17 October by the Electoral Commission. However, they were then postponed to 26 October. Meanwhile, the parliament was then opened by Uhuru Kenyatta. His party has the majority and they proposed an amendment to the election bill of particular concern to this thesis, The Election (Amendment) Act 2017, which was fast tracked and undertaken with minimum public participation that was restricted to ten days.⁷¹⁴ This national law which will affect future elections, was legislated in an environment that did not allow for full public participation or sufficient notice. However, it was still in line with Article 1(2) of the Constitution with its existing tensions between representative and direct participation. These developments indicate that as Kenya moves forward with this law there remains a significant part of its citizenry who believe that this law did not undergo sufficient *direct* public participation.

The fast-tracking of legislation without allowing for sufficient time for public participation does not bode well for the future of public participation in Kenya at the National Assembly. It is reminiscent of the post-Independence period of constitutional amendments that led to the centralisation of political power. However, in this fast-moving world, Justice Chacha Mwita of the High Court suspended the operation of the Elections Law Amendment Act until 16 March 2018 when the case filed by Katiba Institute challenging the law is determined.⁷¹⁵ So

⁷¹³ Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others.

⁷¹⁴ Njagih, M. (2017). How Jubilee's draft law seeks to change election rules. Standard newspaper (Online ed), 30 September. Retrieved 10 January, 2018, from www.standardmedia.co.ke/article/2001255891/how-jubilee-s-draft-law-seeks-to-change-election-rules

⁷¹⁵ Wambulwa, A. (2017). High Court suspends election laws over legality case. The Star, 13 December. Retrieved 20 January, 2018, from https://www.the-star.co.ke/news/2017/12/13/high-court-suspends-election-laws-over-legality-case_c1684687

at that point, the courts will consider the legality of the law and the standard of public participation that was applied in the process of legislating the law.

What is clear is that Kenya remains in a constitutional transitional period in a state of flux. Democratic norms of rule of law, equality of the vote, participation, constitutionalism and justice remain tenuous, and are still in the process of being firmly entrenched in the governance process in the country. As Kenya attempts to move forward towards full democracy and stability, the challenge is both with the citizens who must consistently participate in the governance process and with the government who must resist the urge to roll back the democratic gains no matter how tenuous they are.

It appears in the near future the 2010 Constitution will face attempted amendments. Only time will tell what the ramifications of amendments will be, and if indeed Kenyans are willing to roll back the gains made in the 2010 Constitution. Collectively, Kenyans must also deal with the fissures that have placed Kenya in jeopardy, including corruption, exclusion, ethnic conflict, unaccountability and the repeated disregard for the rule of law and historical injustices. At the same time, as Kenyans we must also look towards the future, beyond this constitutional transition period to a generation that lives the Constitution and is able to fully participate in a democratic governance process.

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Appendices

Appendix A – Human Ethics Committee Approval

HUMAN ETHICS COMMITTEE

Secretary, Lynda Griffioen

Email: human-ethics@canterbury.ac.nz

Ref: HEC 2015/73

20 August 2015

Jane Marine

Department of Political Science

UNIVERSITY OF CANTERBURY

Dear Jane

The Human Ethics Committee advises that your research proposal “Effecting public participation in Kenya during the 2010-2015 transition period of the Constitution of Kenya (2010)” has been Considered and approved.

Please note that this approval is subject to the incorporation of the amendments you have provided in your email of 13 August 2015. Best wishes for your project.

Yours sincerely

Lindsey MacDonald

Chair

University of Canterbury Human Ethics Committee

University of Canterbury Private Bag 4800, Christchurch 8140, New Zealand. www.canterbury.ac.nz

Appendix B – Semi-Structured Interview Guide

General Questions

- What best describes you or your institution?

Implementation

- In your experience how do you rate the implementation of the public participation Articles of the Constitution of Kenya 2010 in the “transitional period” 2010-2015?
- What are the outstanding success and emerging issues around implementation of these Constitutional Articles? For instance Article 1 (2).

Legal and Policy

- From your experience what aspects of the public participation legal framework works best and why?
- From your perspective to what extent should public participation acts at the county level be distinct from each other?
- Does the lack of a policy framework affect the implementation of public participation?

Role of the Courts

- From your experience and observation what role could the Kenyan courts play if any in ensuring public participation as aspired to in the COK 2010 is implemented?
- What is the trend in court rulings with regards to public participation by the High Court and appeal courts?

Citizens Role

- In your view to what extent does the Kenyan citizen understand their role in ensuring that public participation is achieved? Why?
- What barriers in your view exist and deter (human capabilities) the participation of the youth, women, and other groups?

Leadership

- To what extent have the various levels of leadership promoted public participation?
- How is public participation working in the current reality that is Kenya and how feasible is it?

Representative democracy and participatory democracy

- In your observation, how are the tensions between representative and participatory democracy as articulated in Article 1(2) currently being solved in Kenya?

Social, Economic and Political Environment

- In your observation, does a conducive social/economic/political environment as it relates to the ability of Kenyans to fully participate in public decision making exist in Kenya?

Appendix C- Interviewee Information Sheet

Study title: “Effecting public participation in Kenya in the transition period of 2010-2015”

My name is Jane M. W. Marine. I am a PhD candidate at the University of Canterbury, Christchurch, New Zealand. This research is being conducted as part of my PhD and its purpose is to research the implementation of public participation in Kenya in the context of the 2010 Constitution of Kenya.

Participation is voluntary and you have a right to withdraw at any stage. The interview should take 30- 45 mins of your time. This interview will be audio recorded. This data will be retained at the university of Canterbury for up to 10 years and then the data will be destroyed. The participants data in these interviews will be anonymised therefore the participants will not be identifiable.

I will ask questions in the following five areas:

1. Legal and policy framework of public participation
2. Implementation of public participation
3. The role of citizens in public participation
4. Leadership and public participation

For any questions or further clarification you can contact my supervisor or me;

Assistant Professor Bronwyn Hayward
Head of Department: Political Science ,University of Canterbury,
Christchurch, New Zealand Ph+64 21 2727069,
Email: bronwyn.hayward@canterbury.ac.nz

Jane M W Marine
PhD candidate: Political Science, University of Canterbury
Christchurch Canterbury, New Zealand Ph +64224128574
Email: jane.marine@pg.canterbury.ac.nz or janemarine@gmail.com

Thank you very much for your participation.

Regards,

Jane M. W Marine

Appendix D – Interviewee Consent Form

Political Science Department
Telephone: +6433642987 Ext 8386
Email: jane.marine@pg.canterbury.ac.nz

Title of Research: “Public Participation in Kenya 2010-2015”

Consent Form For:

Email:

Dear

I would like to interview you regarding public participation in Kenya between 2010 and 2015. The interviews will be conducted via Skype or telephone and I would further like to audio record the interviews so as to ensure I can accurately transcribe them. The interview will be conducted within a time period of 45 to 60 minutes. The data obtained will be used in my PhD thesis and in articles that could be published in the future.

Please tick the provided boxes if you are in agreement with the following statements:

- I understand that participation is voluntary and that I may withdraw at any time. Withdrawal of participation will also include the withdrawal of any information I have provided should this remain practically achievable.
- I understand that any information or opinions I provide will be kept confidential to the researcher and supervisor. And that any published or reported results will not identify me or my institution.
- I understand that a Thesis is a public document and will be available through the University of Canterbury library.
- I understand that all data collected will be kept in locked and secure facilities in password protected electronic form that will be destroyed after ten years.
- I have received full explanation of this research and I have had the opportunity to ask questions regarding this research work.
- I have the choice to be anonymous or not. I have a clear understanding of the risks involved in taking part and how the researcher shall manage them.
- I understand that I will receive a transcript of my interview via email.
- I understand that I am able to receive a report on the finding of the study contacting the researcher at the conclusion of the research project.
- I understand that I can contact the researcher Jane M. W. Marine, School of Language, Social and Political Sciences, Political Science Department, Private Bag 4800, New Zealand, [Telephone: +6433642987 Ext 8386, Email: jane.marine@pg.canterbury.ac.nz] or supervisor at bronwyn.hayward@canterbury.ac.nz for further information. If I have any complaints, I can contact the Chair of the University of Canterbury Human Ethics Committee, Private Bag 4800, Christchurch (humanethics@canterbury.ac.nz).

By signing below, I agree to participate in this research project.

Name _____

Date _____

Signature _____

Kindly sign and scan this consent form and return it before the end of the week to
jane.marine@pg.canterbury.ac.nz

Sincerely

Jane M. W. Marine

Appendix E – Anonymised list of Interviewees

No	Organisation	Reference	Sex	Area of focus
1	Civil society	Local NGO Worker 1	F	National
2	Civil society	Local NGO Worker 2	F	National
3	Law firm	Lawyer 1	M	National
4	Faith based	Faith-based Worker 1	F	County
5	Academia	Academic 1	M	County
6	Faith-based Organisation	Faith-based Worker 2	F	National
7	Academia/ Civil society	Local NGO Worker 3	M	National
8	International NGO	International NGO Worker 1	M	National
9	Civil society	Local NGO Worker 4	M	County
10	Civil society	Local NGO Worker 5	M	National
11	Academia	Academic/Consultant 1	M	National
12	Faith based organisation	Faith-based Worker 3	F	County
13	Consultancy	Consultant 2	M	County
14	Constitutional lawyer	Constitutional lawyer 2	M	National
15	Consultant	Consultant 2	M	National
16	Civil society	Local NGO worker 6	M	County
17	Law/academia	Academic/local NGO worker 7	M	National

Appendix F – Political Map of Kenya



Source: Nations Online Project.

Appendix G – Administrative Map of the 47 Counties of Kenya



Source: Commission on Revenue Allocation

