

**RETHINKING THE PRACTICE OF REPRESENTATIVE  
DEMOCRACY: A CASE FOR INCREASED PUBLIC INVOLVEMENT  
IN THE LAW-MAKING PROCESS IN KENYA**

**A THESIS SUBMITTED IN PARTIAL FULFILMENT FOR THE  
AWARD OF THE DEGREE OF MASTER OF LAWS AT THE  
UNIVERSITY OF NAIROBI**

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I, **JAMES KIPLAGAT SITIENEI**, do hereby declare that this is my original work and has not been submitted and is not currently being submitted for a degree in any other University.

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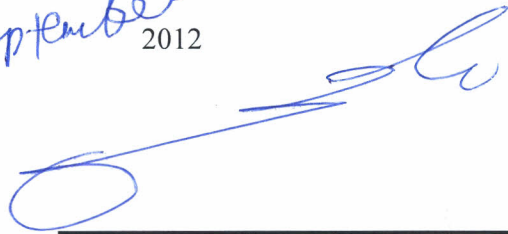


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**DEDICATION**

To my son Kibet Sitienei.

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## ABSTRACT

Every democracy ought to have a mechanism through which the public participate in the management of public affairs, including the law-making process. Sovereignty, including that of Parliament, belongs to the people but owing to the impracticability of every citizen participating in the legislative process; their representatives in Parliament represent their views. Kenya, a representative democracy has adopted this model.

However, the 2010 Constitution of Kenya introduces aspects of participatory democracy by requiring that the public be involved in, among others, the legislative process. These provisions are yet to be fully implemented since a framework to facilitate public participation has not been put in place. The practice prior to the new constitutional dispensation still obtains, although some attempts have been made to allow the participation of the public. That said, various pieces of legislation have been passed without public input. The lobbying preceding such legislation has invariably put Members of Parliament in a dilemma between serving their own interests and those of the electorate.

The concept of public participation is not entirely new; international instruments recognise the right to participate in public affairs, while some countries have put in place mechanisms for public participation in the law-making process and in some instances, the court has nullified legislation passed without the requisite participation of the public. Although the Kenyan Parliament has been strengthened over the years, it has not been responsive to public view.

This paper evaluates the existing mechanisms for public participation by examining the Constitution, Standing Orders of the National Assembly and the practices in place for public involvement in the legislative process. The evaluation is based on an analysis of print and electronic material and on the basis of data generated. This paper identifies the existing avenues for public participation and recommends measures to give effect to constitutional provisions on public participation in the law-making process.



## **LIST OF REGIONAL AND INTERNATIONAL INSTRUMENTS**

1. *African Charter on Human and People's Rights* adopted 27 June 1981, AU Doc. CAB/LEG/67/3 (entered into force 21 October 1986) *African Union Constitutive Act* adopted on 11 July 2000 AU Doc. AHG/Decl. 143 (XXXV) (entered into force 26 May 2001).
2. *International Covenant on Civil and Political Rights*, UN Doc. I-14668 (16 December 1966) (Entered Into force 23 March 1976), article 25.
3. *United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention)* adopted on June 25 1998,( entered into force on 30 October 2001), Pillar II: Public Participation in Decision-making, available at <http://www.unece.org>.
4. UN General Assembly *Vienna Declaration and Programme of Action*, UN DOC A/CONF.157/23 (adopted 25 June 1993).

## **LIST OF STATUTES AND CONSTITUTIONS**

1. Act No. 331 Session Laws of Hawaii, 1989
2. Anti-Corruption and Economic Crimes Act, (No. 3 of 2003) - Kenya
3. Choice of Termination of Pregnancy Amendment Act, (No. 38 of 2004) - South Africa
4. Constituencies Development Fund Act (No. 10 of 2003) - Kenya
5. Constitution of Austria
6. Constitution of Greece
7. Constitution of Kenya 2010
8. Constitution of Kenya (Amendment) Act, (No. 40 of 1966)
9. Constitution of Kenya (Repealed)
10. Constitution Namibia
11. Constitution of the Republic of South Africa
12. Constitution of the United States of America
13. Dental Technicians Act, (No. 24 of 2004) - South Africa
14. Indonesian Law No. 53 of 2004, Article 53
15. Kenya Communications (Amendment) Act, (No. 1 of 2009)

16. National Assembly (Powers and Privileges) Act, Chapter 6 Laws of Kenya
17. Practitioners Amendment Act, (No. 35 of 2004) - South Africa
18. Sterilization Amendment Act, (No. 3 of 2005) - South Africa
19. Traditional Health Practitioners Amendment Act, (No. 35 of 2004) - South Africa

**LIST OF CASES**

1. *Doctors for Life International v the Speaker of the National Assembly & Others* (2006) (12) BCLR 1399 (CC).
2. *Matatiele Municipality and Others v President of the RSA and Others* (2007) 6 SA 477 (CC).
3. *Merafong Demarcation Forum v President of the RSA* (2008) 5 SA 171 (CC).
4. *Nyali Limited v Attorney General* (1956) 1 QB 1.
5. *King and Others v. Attorneys' Fidelity Fund Board of Control and Another* (2006) 1 SA 474 (SCA); (2006) 4 BCLR 462 (SCA).
6. *Ledema Ole Kina vs Attorney General and Others*, High Court of Kenya at Nairobi, Constitutional Petition No. 155 of 2011.

## CHAPTER ONE: INTRODUCTION

### 1.1 INTRODUCTION

A democratic nation, by definition, must have some mechanism through which leaders consult and account to the citizenry.<sup>1</sup> Typically, this mechanism of accountability and consultation is provided during periodic elections when the electorate holds Members of Parliament to account.<sup>2</sup> In recognition of the right to participate in public affairs, Article 118 of the 2010 Constitution of Kenya obligates Parliament to conduct its business in an open manner, including holding its sittings and those of its committees in public. In addition, the Constitution places a duty on Parliament to facilitate public participation and involvement in the business of Parliament and its committees including the legislative process.<sup>3</sup> Unless there are justifiable reasons in exceptional circumstances to be determined by the Speaker for exclusion of the public or media, they shall be allowed to participate in the sittings of Parliament or its committees.<sup>4</sup> The national values and principles of governance as provided in the 2010 Constitution underscore, among others, the importance of public participation.<sup>5</sup> These constitutional provisions reinforce the right of citizens to participate in public affairs.

Although the Constitution provides for public participation, the necessary measures are yet to be put in place to give effect to these provisions. The position obtaining before the 2010 Constitution came into force subsists and is, therefore, relevant for purposes of evaluating public participation in the legislative process in Kenya.

The right to participate in public affairs is not entirely a new phenomenon. In the international sphere, international human rights instruments recognise the need to involve the public. The International Covenant on Civil and Political Rights (ICCPR), 1966<sup>6</sup>, for

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<sup>1</sup> Czapanskiy Syma and Manjoo Rashida, 'The Right of Public Participation in the Law-Making Process and the Role of the Legislature in the Promotion of this Right' (2008) 19 *Duke Journal of Comparative International Law* 1 at 1.

<sup>2</sup> *Ibid*; Members of Parliament in Kenya may be recalled once Parliament passes legislation to operationalize Article 104 of the 2010 Constitution.

<sup>3</sup> *Constitution of Kenya*, Article 118 (1).

<sup>4</sup> *Ibid* Article 118 (2).

<sup>5</sup> *Ibid* Article 10 (2) (a).

<sup>6</sup> *International Covenant on Civil and Political Rights*, UN Doc. I-14668 (16 December 1966) (Entered into force 23 March 1976), article 25.

instance, through General Comment Number 25 adopted by the Human Rights Committee, requires the establishment of mechanisms for public participation. This is also reflected in the Universal Declaration of Human Rights, which in Article 21 (1) states that:

“Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.”

The Human Rights Committee of the United Nations (UN) in the General Comment 25 provides guidance to the member states on interpretation of rights provided in the ICCPR. The General Comments are, however, not binding and only assist States in clarifying the content of these rights, although they are persuasive and may become binding over time when it forms part of customary international law.<sup>7</sup> Comment 25 on Article 25 of ICCPR outlines the main features of the right to include extending the right to take part in public affairs to all in the exercise of political power including the legislative process.<sup>8</sup> The participation can either be directly or indirectly through representatives, but the General Comment does not state whether both direct and indirect forms of participation should exist in a political system or whether representative democracy precludes the need for direct participation.<sup>9</sup> Citizens may also exercise their right to participation through public debate and dialogue with their representatives.<sup>10</sup> It obligates states to take necessary measures to ensure that citizens have adequate opportunity to enjoy the right to participate in political processes.<sup>11</sup>

At the very minimum, Article 25 of ICCPR imposes a duty on states to ensure public participation in the law-making process. How States give effect to this right is however dependent on the context and political system of each country.

In Kenya, a representative democracy,<sup>12</sup> the citizens elect representatives, in particular, Members of Parliament to represent them in law-making. Ideally, legislators are expected to speak for their constituents in Parliament and carry out their will in enacting legislation. To achieve this, they are supposed to be accessible to their constituents, listen to their views and

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<sup>7</sup> Report of the Oxford University on Comparative Survey of Procedures for Public Participation in the law-making process for the National Campaign for People’s Right to Information (April 2011) at page 6.

<sup>8</sup> *Supra* note at 6 paragraph 5.

<sup>9</sup> *Ibid*

<sup>10</sup> *Ibid* at paragraph 8.

<sup>11</sup> *Ibid* at paragraph 1.

<sup>12</sup> *Constitution* of Kenya, Articles 1(2), 4 (2) and 32.

consider them as they take positions on legislative issues. In a democracy like Kenya, for the Government to fulfil its promises to the people, it is imperative that it engages meaningfully with the public and responds to public opinion.<sup>13</sup> This research sought to find out whether, or to what extent, the public are involved in the law-making process.

Before the 2010 Constitution of Kenya came into force, there were insufficient mechanisms for most Members of Parliament to consult their constituents. This position continues to obtain pending the operationalisation of current constitutional provisions on public participation through the establishment of mechanisms to facilitate such participation. Although offices have been set up in some constituencies through the Constituency Development Fund, until the new Constitution came into force, parliamentarians and Parliament collectively were not obligated to consult their constituents on legislative issues. However, it is important to acknowledge what some Members of Parliament, such as that for Karachuonyo Constituency in the 10<sup>th</sup> Parliament, have done to enhance public access to them. Besides setting up a website for his constituency like several of his counterparts, this Member of Parliament has installed teleconferencing equipment at his constituency offices through which constituents can reach him.<sup>14</sup> Although the facilities may not have been set up purposely for consultation on legislative issues, they do provide a forum for such consultation. Nevertheless, the internet as a mechanism for consultation comes with limitations since many Kenyans - particularly those in rural areas - have low computer literacy and low access to such facilities.<sup>15</sup> Mainly, parliamentarians account to their constituents after five years when they seek a fresh mandate through the electoral process. However, this is set to change once Article 104 of the Constitution on recall of Members of Parliament is operationalised. Unfortunately, by this time they may have taken actions in the discharge of their legislative role, which in some cases goes against the general will of their constituents but which would still be valid.

Although public involvement was allowed in the pre-2010 constitutional dispensation, it was not formalised. This is also the case in the United States where representatives are not under

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<sup>13</sup> Edigheji Omano 'Political Representation in Africa: Towards a Conceptual Framework' (2006) 31 *Africa Development* 3 at 93.

<sup>14</sup> Cheron Stella, 'Face to face link with MP at the touch of a button', *Daily Nation* (19 May 2010) available at <http://www.nation.co.ke/News/regional> (Accessed on 1 June 2010).  
<http://karachuonyoconstituency.com/>

<sup>15</sup> 'Internet Use Low in Rural Areas Despite Better Access', *Business Daily* 31 August 2011 available at <http://www.businessdailyafrica.com> (accessed 10 October 2011).

any obligation to take into account the views of the public or of organisations in their legislative functions and only pay the price of ignoring public input when they seek a fresh mandate during elections.<sup>16</sup>

This research report analyses the avenues for public participation in the legislative process in Kenya both under the pre-2010 and the 2010 Constitution and proposes the establishment of a framework requiring parliamentarians to involve the public in the legislative process in line with the requirements and spirit of the 2010 Constitution. Such a framework would impose a duty to provide meaningful opportunities for public involvement in the legislative process and require that measures be put in place to enable the public to utilise the opportunities provided. This can be done by providing access to Parliament and providing opportunities for submissions and representations or providing a forum for public hearings. All these avenues for public involvement need to be consistent with representative democracy.

Courts in jurisdictions such as South Africa have examined the need for the establishment of mandatory mechanisms for public participation in the legislative process to actualise such participation as envisaged in the Constitution.<sup>17</sup> The Courts have ruled in support of the establishment of such mechanisms.<sup>18</sup> The position taken by the South African Constitutional Court is predicated on the concept of participatory democracy. This paper sought to place the jurisprudence in the context of representative democracy, while looking at comparative jurisdictions like Namibia,<sup>19</sup> which have constitutional structures for public participation in the legislative process.

There are many intrigues in the Kenyan legislative process, which are obviously not intended at serving the interests of the electorate. The lobbying that precedes the passing of bills in Parliament points to the reality that Members of Parliament invariably consider party affiliation and other vested interests whilst casting their votes. This takes the form of horse-trading of votes, bargaining for the inclusion of certain items in bills, amongst others. At no stage do they consult their constituents. What happens then when the legislators' interests or

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<sup>16</sup> *Constitution* of the United States of America.

<sup>17</sup> *Constitution* of the Republic of South Africa, Section 72 (1) (a) and 118 (1) (a).

<sup>18</sup> *Doctors for Life International v the Speaker of the National Assembly & others* (2006) (12) BCLR 1399 (CC) available at <http://www.commonlii.org/za/cases/ZACC/2006/11.html> (Accessed on 15 July 2009).

<sup>19</sup> *Constitution* of Namibia, articles 17 and 45 available at <http://www.orusovo.com/namcon> (Accessed on 15 July 2009).

those of their political parties are at variance with those of their constituents? Experience demonstrates that legislators pursue their own vested interests or those of their political parties. Others even abdicate their responsibility of law-making by abstaining from voting when the bills are being debated in Parliament. There have been allegations that bribery and other forms of inducement, under the guise of lobbying are rife in Parliament.<sup>20</sup> For instance, the Tobacco Control Bill, 2004 that was subsequently passed into law brought to light intense lobbying by interest groups on bills before Parliament that they have an interest in.<sup>21</sup>

In the past, the Kenyan Parliament passed laws that elicited a lot of resistance and outrage from some sectors of society and the public at large.<sup>22</sup> Such laws include the Statute Law (Miscellaneous) Amendment Act 2007 that amended various laws, among them, the Anti-Corruption and Economic Crimes Act (ACECA) which ended up being weakened, thereby compromising the anti-corruption legislative framework. Section 30 of ACECA was amended to preclude admissibility in criminal proceedings of evidence obtained from a suspect pursuant to a notice issued by the Kenya Anti-Corruption Commission (KACC). Several years later, in the new constitutional order that requires public participation, Parliament, while passing the Ethics and Anti-Corruption Commission Act, 2011, which amends ACECA and establishes the Ethics and Anti-Corruption Commission, did so in haste thereby locking out public participation and even deleting provisions that had been incorporated into the bill pursuant to a consultative process and public participation.<sup>23</sup> The passing of the Kenya Communications (Amendment) Act 2009<sup>24</sup> that gives the Government unfettered discretion to regulate media content has the effect of stifling freedom of the press. Section 88 of the Finance Act, 2008 that precludes Members of Parliament from paying

<sup>20</sup> Rugene Njeri, 'Bribery in Kenya's Parliament', *Daily Nation* (16 May 2009) available at <http://www.nation.co.ke/News/-/1056/599016/-/view/printVersion/-/6tkxp7z/-/index.html> (Accessed on 25 September 2009). Interview with Stan, a lawyer, in Nairobi on 8 October 2011 confirms the view that Kenya legislators put their personal interest before that of their electorate.

<sup>21</sup> Stapenhurst Rick, Johnson Niall, Pelizzo Ricardo, 'The Role of Parliament in Curbing Corruption' (World Bank: Washington, 2006) at 252, available at <http://books.google.co.ke?id> (Accessed on 25 September 2009).

<sup>22</sup> Ubwani Zephania, 'Regional law society condemns Act as an assault on democracy' *Daily Nation* (7 January 2009) available at <http://www.nation.co.ke/News/-/1056/511904/-/u.17p6j/-/index.html> (accessed on 15 December 2010) (statement by Dr. Allan Shonubi, chairman of the East Africa Law Society commenting on the Kenya Communication (Amendment) Act 2008).

<sup>23</sup> The author participated in the consultations during the development of the bill and observed the public give their input on it in a forum convened by the Commission on Implementation of the Constitution and later, when Parliament debated and passed the bill in one evening.

<sup>24</sup> *Kenya Communications (Amendment) Act No. 1 of 2009*, section 46 (c), (h).

taxes, albeit now unconstitutional in view of Article 210 (3) of the 2010 Constitution, is another legislation that was obviously passed contrary to public opinion.

This paper explores the extent to which the public could participate in the legislative process and the need to enhance its participation. Arguably, public input would improve the quality of legislation besides upholding the right of the public to give their input in the legislative process. Given the complexity of legislative issues, if more views are taken on board, the outcomes will certainly be better.

## 1.2 PROBLEM STATEMENT

Public participation is essential in decision-making including during the legislative process where the views and desires of the public should be incorporated and reflected in the laws passed by Parliament. Kenya is a representative democracy where the people elect individuals to represent them in Parliament. It is envisaged, that those elected will effectively represent the interests of the people. However, this has not been the case. This was because the entire legislative process was the preserve of Parliament and even if there were consultations, the views given were easily ignored since there was no legal requirement for public participation. The 2010 Constitution provides for public participation in the legislative process. However, despite this noble constitutional provision, the level and manner of public participation is still dismal and the factors contributing to this state of affairs have not been appropriately examined. There is need to evaluate the extent to which the law provides avenues for public participation and the extent to which.

## 1.3 CONCEPTUAL FRAMEWORK

Political representation does not have a universal definition. It is, however, a critical component in every modern democratic polity.<sup>25</sup>

Fairlie defines representative democracy as the type of democracy where powers of sovereignty are delegated to elected representatives who exercise them for the benefit of the whole nation.<sup>26</sup>

<sup>25</sup> John Mills (1862) in Edigheji Omano 'Political Representation in Africa: Towards a Conceptual Framework' (2006) 31 *Africa Development* 3 at 93-119 available at [www.codesria.org/IMG/pdf/7-edigheji.pdf](http://www.codesria.org/IMG/pdf/7-edigheji.pdf) (accessed on 6 April 2011).

<sup>26</sup> Fairlie Archibald, 'The Nature of Political Representation', (1940) 34 *The American Political Science*



One of the fundamental requirements of democracy is the capacity of the citizens to participate freely in governance without any hindrance.<sup>27</sup> The different conceptualisations of political representation are largely based on the different interpretations of the relationship between the representative and their constituents as well as the roles of the representative.<sup>28</sup> Representative democracy in this study is used in the context of the public's involvement and representation in the legislative process. The public's right to participate in decision-making, which is now a constitutional right,<sup>29</sup> is envisaged in human rights discourse and is provided for in several human rights instruments.<sup>30</sup> The framework for public participation and access to the business of Parliament in Kenya is provided for in the Constitution, legislation, parliamentary procedures and practices and administrative mechanisms as shown in Chapter Three of this paper.

#### 1.4 RESEARCH OBJECTIVES

1. To evaluate the laws relating to and the mechanisms for public participation in the legislative process.
2. To evaluate the extent of public participation and how legislation incorporates and is reflective of public views/opinion.
3. To recommend ways of enhancing public involvement in the law-making process.

#### 1.5 RESEARCH QUESTIONS

The study will be guided by the following research questions:

1. Are there sufficient laws and avenues that facilitate members of the public to participate in the legislative process as envisaged in the 2010 Constitution?
2. What is the extent of public participation in the legislative process and how does this affect the quality of legislation and efficiency of Parliament in carrying out its legislative function?

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*Review 2* in Edigeji Omano 'Political Representation in Africa: Towards a Conceptual Framework' (2006) 31 *Africa Development* 3 at 93-119, available at [www.codesria.org/IMG/pdf/7-edigejei.pdf](http://www.codesria.org/IMG/pdf/7-edigejei.pdf)  
Nwabueze Benjamin, *Democratisation*, (Spectrum Law Publishers: Ibadan, 1993).

<sup>27</sup>

<sup>28</sup>

<sup>29</sup>

*Constitution of Kenya* in Article 1 (1) declares that sovereign power belongs to the people and in 1(2) that the people may exercise such power directly or through their representatives, both at the national and county levels.

<sup>30</sup>

*African Charter on Human and People's Rights* adopted 27 June 1981, AU Doc. CAB/LEG/67/3 (entered into force 21 October 1986) *African Union Constitutive Act* adopted on 11 July 2000 AU Doc. AHG/Decl. 143 (XXXV) (entered into force 26 May 2001).

## **1.6 HYPOTHESES**

1. The existing laws and avenues for public participation in the law- making process in Kenya are inadequate.
2. Although the 2010 Constitution has provisions on the right of members of the public to be involved in the legislative process and have their views taken into account while enacting laws, these provisions are yet to be given full effect.
3. Effective participation of the public in the law-making process would improve the quality and ownership of legislation.

## **1.7 SCOPE OF THE STUDY**

Parliament has several functions in which legislators represent their constituents. However, this study focuses on the function of representation in the legislative process. The study draws comparisons with other jurisdictions such as South Africa and Namibia whose constitutional provisions on public participation are similar to Kenya's. The study also examines the legislative process in Kenya, in particular, existing avenues for public participation and the engagement of Members of Parliament with their constituents with regard to the law-making process.

## **1.8 LITERATURE REVIEW**

The existing literature on public participation emphasises the role of elections in legitimising the government and the opportunity to participate in governance and hold their representatives to account. In the absence of clear constitutional provisions on whom sovereignty is vested, the sovereignty of the Legislature, made it impossible to invalidate actions of Parliament, including legislation on the basis of procedural lapses. There have been allegations of bribery and manipulation in the Kenyan Parliament, while the discourse on direct and representative democracy has been ongoing for many years as a result of perceived inadequacy of representativeness in representative democracies. Some proponents of public participation have only focused on the inclusion of minorities, while discussions on the initiatives to strengthen legislatures in African countries, including Kenya, show that such initiatives have resulted in more assertive legislatures, but do not say whether there is any corresponding improvement on their responsiveness to public views.

Wanjala S. et al posit that;

‘One of the main indicators of a democratic practice is the periodic holding of free and fair elections. The more competitive the election is, the more refined the democratic process. Elections normally offer a country’s citizens the chance to participate in governance. This they do by retaining residual power over the government and if possible, exercising the power to reject an errant government or one that did not fulfil the promises made at earlier general election.’<sup>31</sup>

The authors recognise the power that the public wield over government. However, this power is exercised only during elections which are held every five years. This would be limiting democracy to elections. It would be reductionist to conclude that elections in themselves, whether free and fair or not, are sufficient benchmark, hence, evidence of democracy. Elections must be accompanied by certain practices like consultation that add value to the citizens’ belief in those who represent them and the institutions to which they have ceded part of their sovereignty.<sup>32</sup>

In underscoring the difficulty of invalidating legislation, Nwabueze holds the view that the sovereignty of the legislature implies that any act purporting to have been passed by it is valid and effective, irrespective of any defect in procedure. This is because if a legislature is sovereign, a mere defect in procedure cannot operate to invalidate an act which is otherwise within the power of the legislature.<sup>33</sup> He however does not consider the duty of legislators to consult the public in the legislative process or to take into account their views.

While arguing for the entrenchment of public participation in the Kenyan constitutional order, which is the position now, Mbondenyei does not look at the mechanisms for public participation in the Kenyan legislative process or the absence of such mechanisms.<sup>34</sup> He also fails to suggest mechanisms to enhance such participation.

### 1.8.1 Allegations of bribery and manipulation in the Kenyan Parliament

There have been allegations that Members of Parliament take bribes as inducements during lobbying for passing of bills in Parliament.<sup>35</sup> When the then Minister for Health the Hon.

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<sup>31</sup> Wanjala Smokin, Akivaga Kichami and Kibwana Kivutha, *Yearning for Democracy: Kenya at Dawn of a New Century* (Claripress: Nairobi, 2000).

<sup>32</sup> Mitullah Winnie, Odhiambo Morris and Ambani Osogo, *Kenya’s Democratisation: Gain or Losses?*, (Claripress: Nairobi, 2005).

<sup>33</sup> Nwabueze Benjamin, *Constitutionalism in the Emergent States*, (C.Hurst: London, 1973).

<sup>34</sup> Morris Mbondenyei, ‘Entrenching the right to participate in Kenya’s Constitutional Order: Some Viable Lessons from the African Charter on Human and People’s Rights’ available at [http://works.bepress.com/morris\\_mbondenyei/10/](http://works.bepress.com/morris_mbondenyei/10/) (accessed on 11 July 2009).

<sup>35</sup> *Supra* note 20.

Charity Ngilu introduced the National Health Insurance Bill, 2004 in Parliament, some Members of Parliament were flown to five-star hotels in Mombasa and given gifts under the guise of lobbying to influence their voting in Parliament.<sup>36</sup>

Such actions could undermine the supremacy and autonomy of Members of Parliament as legislators who are expected to represent their constituents' interests are manipulated by persons with an interest in a bill that is before Parliament. The National Health Insurance Bill, 2004 would have promoted the social welfare of the majority of Kenyans, who, given a chance, would have overwhelmingly voted for it as it would have afforded them easy access to quality healthcare.

### 1.8.2 Discourse on direct and representative democracy

The disillusionment with representative institutions is not an African or Kenyan problem. Countries the world over have grappled with the inadequacy of representativeness in representative democracy, giving rise to discourse on direct and representative democracy.<sup>37</sup> Low voter turnout, weak political parties and representative institutions have been interpreted as disaffection for representative democracy and given rise to a shift by some democratic nations to a more participatory approach<sup>38</sup> as voters, having lost patience in all forms of intermediaries between their opinions and public policies want to run the show directly.<sup>39</sup> The proponents of representative democracy look at elections as the only avenue through which citizens show their preference and leave policy and law-making to their representatives, while direct democracy places control of government in the hands of the people.<sup>40</sup> Given the limitation of direct democracy in large polities like Kenya, representative democracy remains the most viable model. The discourse on direct and representative democracy only identifies weaknesses in the latter but does not offer solutions to strengthen it. Other proponents of direct democracy advocate the use of popular initiatives and, in some cases, referenda, and urge that the increasing role of direct democracy eclipses legislatures but does not do away with representative government entirely.<sup>41</sup>

<sup>36</sup> Martin Mutua, Andrew Teyie, 'Shame: MPs for hire', *East African Standard* (19 November 2004).

<sup>37</sup> Russell Dalton, Wilhem Burklin and Andrew Drummond, 'Public and Direct Democracy', (2001) 12 *Journal of Democracy* 4, available at <http://www.socsi.uci.edu/rdalton> (Accessed 10 December 2009).

<sup>38</sup> *Ibid.*

<sup>39</sup> Dick Morris, *The New Prince* (Renaissance Books: Los Angeles, 1999) in Russell Dalton, Wilhem Burklin and Andrew Drummond, 'Public and Direct Democracy', (2001) 12 *Journal of Democracy* 4, available at <http://www.socsi.uci.edu/rdalton> (Accessed 10 December 2009).

<sup>40</sup> *Supra* note 37.

<sup>41</sup> John Matsusaka, 'The Eclipse of Legislatures; Direct Democracy in the 21<sup>st</sup> Century', available at [www.rcf.usc.edu/matsusaka](http://www.rcf.usc.edu/matsusaka) (Accessed 1 December 2009).

Radical democrats, on the other hand push, for broader public participation in decision-making and maintain that citizens should have more direct roles in public choices. They also emphasise deliberation, which entails citizens addressing public problems by reasoning together on how best to solve those problems.<sup>42</sup> Radical democrats point out the deficiencies of representative democracy and advocate for direct participation and deliberation. They also talk of strengthening competitive representation so that the three models complement each other.<sup>43</sup> However, they do not say how responsiveness in representative democracy can be achieved. While recognising the various approaches to public participation, some proponents of public participation observe that there are diverse elements in the socio-political context that define the structure, scope and potential impact of such approaches. These include the balance of power between political actors, electoral competition, the relationship between social movements, political leaders and the capacity of organised groups and the attention expected by the citizens from the government.<sup>44</sup> The proponents, however, focus more on the factors that inhibit citizen participation without proposing measures to surmount the limitations to citizen participation.

### 1.8.3 Public participation

Some proponents of public participation have endeavoured to define what public participation entails and the importance of the right to participate in decision-making. They set out the legal foundations of the right to participate, as well as the pre-conditions for such participation, and proceed to suggest mechanisms to facilitate the participation.<sup>45</sup> The participation is however limited to inclusion and representation of minority groups in decision-making through legislative representation, power-sharing and self-government of minorities.

### 1.8.4 Efforts to Strengthen Legislatures in Africa

Since the resumption of multi-party democracy, a number of legislatures in Africa have undergone changes to strengthen them. Extant literature indicates that legislatures in Kenya, Uganda and South Africa have emerged as independent arms of government and have

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<sup>42</sup> Joshua Cohen and Archon Fung, 'Radical Democracy', *Deliberation et Action Republique*, available at <http://www.archonfung.net/docs/2004/cohen-fungdebate> (Accessed on 12 October 2009).

<sup>43</sup> *Ibid.*

<sup>44</sup> Paulo Resende, 'Participatory Democracy and Representative Dynamics: Liberal Limitations on Citizen Empowerment', (2007) available at [www.dsp.unito.it/download/summer\\_paper\\_darochoa.pdf](http://www.dsp.unito.it/download/summer_paper_darochoa.pdf) (Accessed on 28 January 2010).

<sup>45</sup> Yash Ghai, (2003) 'Public Participation and Minorities', available at <http://www.constitutionnet.org/files/Ghaipublicparticipationandminorities> (Accessed on 17 October 2011).

asserted their independence from the Executive.<sup>46</sup> The literature gives an account of the various initiatives to strengthen the legislature in Kenya and how the performance of Parliament has been enhanced in many respects. However, it does not evaluate or state whether the initiatives have enhanced the representativeness of Parliament or its responsiveness to public opinion, particularly in the discharge of its legislative function. In addition, available literature on the increasing assertiveness of the Kenyan and Ugandan legislatures does not consider avenues for public participation. While the literature mentions lobbying of government departments and public hearings by such departments, it does not address the effectiveness of these initiatives. Regrettably, the assertiveness has seen legislators in both Kenya and Uganda sometimes serve their self-interest by voting to increase their salaries in total disregard of the wider public interest.<sup>47</sup> The literature further does not measure the responsiveness of the legislatures or recommend interventions to enhance their responsiveness or their provision of mechanisms for public input. Besides evaluating the assertiveness of legislatures on the continent and how they operate, the findings of a research report on African legislatures also show that a majority of respondents were of the view that legislators should listen to the views of their constituents and that civil society in some countries including Kenya and South Africa, has been allowed access to parliamentary committees to give input.<sup>48</sup> Nothing, however, is said of the effectiveness of civil society participation, its extent, whether the views of civil society are reflective of public opinion and what should be done to broaden and enhance participation of the public in the affairs of Parliament.

This paper examines the existing mechanisms for public involvement in the legislative process and recommends measures to be taken to give effect to the Constitution's provisions on public involvement.

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<sup>46</sup> Joel Barkan, *Legislative Power in Emerging African Democracies* (Lyne Rienner Publishers: Boulder, 2009), available at <http://www.rienner.com/uploads/4q8db50eqcdfb.pdf> (Accessed on 4 March 2011).

<sup>47</sup> Robert Nakamura and John Johnson, 'Rising Assertiveness in Uganda and Kenya 1996-2002', available at <http://www.cid.suny.edu/publications1/Nakamura%20Rising%20Legisaltures%20in%20Uganda%20and%20Kenya> (Accessed on 4 March 2011).

<sup>48</sup> Joel Barkan, Robert Mattes, Shaheen Mozaffar and Kimberly Smiddy, 'The African Legislatures Project: First Findings', 7 January 2010, available at <http://www.africanlegislaturesproject.org/sites> (Accessed 4 March 2011).

## 1.9 METHODOLOGY

The research analysed available books, journal articles, statutes, treaties, court decisions and reports on the subject. It also carried out a comparative analysis of public participatory mechanisms in countries such as South Africa, Namibia, United States of America and Greece, among others. The choice of countries is random, but includes both more developed democracies and African countries with similar socio-political contexts to Kenya's. The methodology entailed observation and conducting interviews on persons from various backgrounds. Efforts to interview Members of Parliament to get their views on public participation in the legislative process were, however, unsuccessful owing to the difficulty of accessing them and their unavailability.

### 1.9.1 Field data were collected through interviews with:

:

- (a) Members of the public
- (b) Practising lawyers
- (c) Parliamentary staff

This categorisation was meant to facilitate gathering of expert information and informed opinions through in-depth interviews.

### 1.9.2 Sampling design

The sampling methods used in this study include:

- (i) Identifying experts who provided further references
- (ii) Random sampling, which took into account factors such as:
  - (a) Persons above 18 years
  - (b) Gender parity
  - (c) Diverse income groups
  - (d) Urban and rural groups
  - (e) Level of education
  - (f) Regional diversity.

While it is important to interview people drawn from across the entire spectrum, the nature of the research required specialised knowledge on the law and the legislative process. Lawyers,

therefore, comprised a majority of the categories of interviewees. Thirty one interviewees from varied professional, gender, regional and academic backgrounds were interviewed.

### **1.9.3 Data collection instruments**

The data was collected with the aid of an interview guide/checklist.

### **1.9.4 Data collection procedures**

The research collected two types of data.

- a) Primary data which was collected by use of interviews and observation.
- b) Secondary data which was obtained from basic text books, magazines and journals and previous research contained in books and journal articles.

Some of the statutes and constitutions of various countries and some books and journal articles were collected through the internet.

### **1.9.5 Data analysis**

Data analysis was qualitative.

## **1.10 CHAPTER BREAKDOWN**

This research report is broken down into three chapters apart from this introductory chapter.

### **Chapter Two**

This chapter sets out the theoretical framework of the research and examines the concepts of representation and public participation in the legislative process and the rationale, benefits and challenges of participation. It then explores the various models of public participation practised in select countries.

### **Chapter Three**

Chapter Three gives a historical background of the Kenyan Legislature with a view to showing how the Legislature came to be a representative institution and the efforts made towards strengthening it. It then gives an overview of the legislative process in Kenya, while identifying mechanisms for public involvement in the process. This chapter also examines how representative democracy is practised in Kenya by examining the extent to which Members of Parliament consult their constituents on proposed legislation, and avenues for the participation of civil society and the public. The chapter also identifies the inadequacies of



the Kenyan legal and administrative framework in ensuring participation of the public in the legislative process and draws comparisons with other jurisdictions.

#### **Chapter Four**

The final chapter explores how inadequacies in the legal and administrative framework should be addressed. This includes recommendations based on findings from field research and experiences from other jurisdictions on measures to enhance the involvement of the public in the law-making process. It also addresses possible ways to give effect to the constitutional provisions on public participation in the legislative process.

## CHAPTER TWO: DEMOCRACY AND POLITICAL REPRESENTATION

### 2.1 INTRODUCTION

This part discusses democracy and lays the theoretical basis for political representation. It then evaluates the concept of political representation and public participation as key ingredients of a democracy.

### 2.2 DEMOCRACY

There are many theories of democracy.<sup>49</sup> Although they differ from each other, these theories belong to one family and, therefore, share some basic similarities. For instance, they all disagree with the notion that one person or a few people have a right to rule over the rest.<sup>50</sup> The underlying reason is that most proponents of democracy hold the view that all people are equal in some important respects and deserve a voice on how they are governed. They also posit that each member of a political community possesses some degree of rational capacity that is sufficient to evaluate the conduct of government.<sup>51</sup> For them to be able to do this, they must enjoy certain liberties like speech, assembly and conscience. Ideally, power belongs to the people and those in authority exercise such power on behalf of the people and the law reflects public preferences.<sup>52</sup> The logic of a democratic model is based on the assumption that public officials, including representatives, are responsible for their conduct and are accountable to the public.<sup>53</sup>

Although all theories of democracy share a common vision of government by free and equal citizens who are involved in their governance, they interpret democracy disparately.<sup>54</sup> Democracy has also been defined in varied ways. However, the definitions are to some extent based on the original Greek notion of *demokratia*, which means government of the people.<sup>55</sup>

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<sup>49</sup> Robert Dahl, *Preface to Democratic Theory* (Chicago University Press: Chicago, 1965) at 1.  
<sup>50</sup> Ronald Terchek and Thomas Conte, *Theories of Democracy* (Rowman and Littlefield: Lanham, 2001) at 6.

<sup>51</sup> *Ibid.*

<sup>52</sup> *Ibid.*; Article 1 of Kenyan Constitution that provides for sovereignty of the people.

<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid.*

<sup>55</sup> Norman J, (2005) 'Human Rights and Democracy: Conceptualization and Application in Palestine', available at [http://www.phrmg.org/human\\_rights\\_democracy.htm](http://www.phrmg.org/human_rights_democracy.htm) (Accessed on 21 July 2009).

This concept still forms the crux of most of the latter definitions of democracy including the 1993 Vienna Declaration, which states that:

“Democracy is based on the freely expressed will of the people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives.”<sup>56</sup>

Initially, there was more focus on the political institutions and procedures that make up democracy, such as elections, political parties and government institutions. However, attention has shifted to the ideals and principles that undergird these mechanisms.<sup>57</sup> The building blocks of substantive democracy are that people have a right to a controlling influence over public decisions and that decision-makers should be treated with equal respect and as of equal worth in the context of decisions made.<sup>58</sup> The concepts of political representation and public participation in this study are discussed in the context of substantive democracy and premised on the principle that people have a right to participate and have control over decision-making.

### 2.3 POLITICAL REPRESENTATION

Political representation, like many social concepts, does not have one agreed definition and is therefore a contested concept. While underscoring its importance, J .S. Mills points out:

“The only government which can satisfy all the exigencies of the social state is one which the whole people participate.... But since all cannot, in a community exceeding a single small town participate personally in all but minor portions of the public business; it follows that the ideal type of perfect government must be representative.”<sup>59</sup>

According to Fairlie, representative democracy is the type of system where powers of sovereignty are delegated to elected representatives who exercise them for the benefit of the whole nation.<sup>60</sup> Political representation may also be defined as an institutionalised system of political responsibility, realised through the free electoral designation of certain fundamental

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<sup>56</sup> UN General Assembly *Vienna Declaration and Programme of Action*, UN DOC. A/CONF.157/23 (adopted 25 June 1993).

<sup>57</sup> *Supra* note 55.

<sup>58</sup> David Beetham, ‘Democracy and Human Rights: Contrast and Convergence’, a paper presented at a Seminar on the Interdependence Between Democracy and Human Rights in Geneva on 25 November 2002.

<sup>59</sup> *Supra* note 25.

<sup>60</sup> Fairlie Archibald, ‘The Nature of Political Representation’, (1940) 34 *The American Political Science Review* 2 in Edigeji Omano ‘Political Representation in Africa: Towards a Conceptual Framework’ (2006) 31 *Africa Development* 3 at 93-119, available at [www.codesria.org/IMG/pdf/7-edigheji.pdf](http://www.codesria.org/IMG/pdf/7-edigheji.pdf).

political organs such as parliaments.<sup>61</sup> In a representative democracy, representatives are accountable to their constituents. Such representatives are therefore enjoined to heed to the fullest extent possible the concerns, needs and priorities of the members of the public.<sup>62</sup> Representative democracy thus relies on the popularly-elected representatives to make decisions on behalf of their constituents.<sup>63</sup>

The concept of representation needs to be analysed in the different contexts in which it is used.<sup>64</sup> Representation may be seen in various ways. Formalistic representation entails the institutional arrangements that facilitate the representation.<sup>65</sup> This may be looked at from the point of view of conferment of authority to the representative, the responsiveness of the representative to the people they represent and the ability of those represented to sanction the representative for ignoring their wishes.<sup>66</sup>

Substantive representation, on the other hand, entails the content of the actions of the representative that are taken on behalf of those represented and in their interest.<sup>67</sup> Besides the two perspectives of representation which focus on representation from the point of view of the manner of acting and acting for those represented, there are other perspectives which focus on identifying with and standing for the represented.<sup>68</sup> These include descriptive representation, which refers to the extent to which the representation reflects the characteristics of the represented like gender or ethnicity and symbolic representation, which refers to the manner in which the representative stands for those he represents.<sup>69</sup> There is some tension between direct democracy, which entails the direct participation of the citizens, and representative democracy; the former employs mechanisms that give citizens a direct

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<sup>61</sup> Cotta Maurizio, Della Porta and Morlino Leonardo, *Scienza Politica* (2002) in Fabiana Sacchetti, 'Political Representation', available at [http://www.imtlucca.it/\\_documents/courses/005794-ML8TI-Political\\_Representation.pdf](http://www.imtlucca.it/_documents/courses/005794-ML8TI-Political_Representation.pdf) (accessed on 6 April 2011).

<sup>62</sup> Briand Michael, 'Democracy at the Core: Recalling Participation's Raison d'Etre', (2007), available at [http://www.iap2.org/association/4748/files/journal\\_issue\\_1](http://www.iap2.org/association/4748/files/journal_issue_1) (accessed on 6 April 2011).

<sup>63</sup> Monica Barczark, 'Representation by Consultation? The Rise of Direct Democracy in Latin America' (2001) 43 *Latin American Politics and Society* 3 at 37-59, available at <http://www.jstor.org/sici> (accessed 6 April 2011).

<sup>64</sup> Pitkin Hannah, *The Concept of Representation* (University of California Press: Berkely, 1967).

<sup>65</sup> *Ibid*; Fabiana Sacchetti, 'Political Representation', available at [http://www.imtlucca.it/\\_documents/courses/005794-ML8TI-Political\\_Representation.pdf](http://www.imtlucca.it/_documents/courses/005794-ML8TI-Political_Representation.pdf) (Accessed on 6 April 2011). *Also see* Stanford Encyclopedia of Philosophy, 'Political Representation' 2 January 2006, available at <http://plato.stanford.edu/entries/political-representation> (accessed on 7 June 2009).

<sup>66</sup> *Ibid*.

<sup>67</sup> *Ibid*.

<sup>68</sup> *Ibid*.

<sup>69</sup> *Ibid*.

voice in decision-making, thereby circumventing representative institutions like legislatures.<sup>70</sup>

Representation may also be looked at from the point of view of its political and socio-cultural features.<sup>71</sup> One of such feature is the focus of representation, that is, the type of constituency that the representative represents - such as a geographic area, as it is the case in Kenya. Other constituencies may be based on different classification such as ethnicity, gender or social class.<sup>72</sup> Another feature is the style of representation, which refers to how the representative acts. He can act as a delegate by following the preferences of his constituents, as a trustee by following his own judgment,<sup>73</sup> or politico if his style of representation is dependent on the circumstances that he finds himself in.<sup>74</sup> Responsiveness is another feature of representation.<sup>75</sup> Responsiveness may be viewed from the policy perspective where constituents expect their representatives to pass policies or enact legislation that conform to their needs, or with respect to service in the form of favours or intervention in bureaucratic processes<sup>76</sup> as is the case in Kenya where the Member of Parliament is the first port of call when a constituent has any need or difficulty in accessing services. Responsiveness may also be in relation to public goods, which constituents expect their representatives to provide to them through the various forms of allocation by government such the Constituency Development Fund or symbolic, where constituents expect their representatives to respond to their psychological needs.<sup>77</sup> These types of responsiveness are however not mutually exclusive.

Another way of looking at the concept of representation is in terms of collective or dyadic representation.<sup>78</sup> According to the dyadic perspective, the relationship between the legislator and his constituents is such that the maximum degree of representation would be attained if legislators go by the preferences of their constituents, while collective representation on the

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<sup>70</sup> *Ibid.*

<sup>71</sup> *Ibid.*

<sup>72</sup> *Ibid.*

<sup>73</sup> Edmund Burke in his 'Speech to the Electors of Bristol' on 3 November 1774, available at <http://press-pubs.uchicago.edu/founders/documents/v1ch13s7.html>. (Accessed on 23 March 2011).

<sup>74</sup> *Supra note 64.*

<sup>75</sup> *Ibid.*

<sup>76</sup> *Ibid.*

<sup>77</sup> *Ibid.*

<sup>78</sup> Robert Weissberg, 'Collective vs Dyadic Representation in Congress', (1978) 72 *The American Political Science Review* 2 at 535, available at <http://www.jstor.org/pss/1954109> (Accessed 4 March 2011).

other hand refers to the extent to which parliament as a whole represents the people, thereby implying that the preferences of constituents may be represented by both the representatives they elected and those they did not.<sup>79</sup> Representation in the Kenyan context, as envisaged in the 2010 Constitution, seems to focus more on the collective form of representation as it enjoins Parliament in Article 118 (1) (b) to allow public participation in its business. Collective representation is not necessarily an alternative to dyadic representation, but complements it so that the preferences of the public can be represented collectively even when particular Members of Parliament betray the preferences of their constituents.<sup>80</sup> This may to some extent explain why the electorate may not be keen on who is elected to represent them or are tolerant to unresponsive legislators.

The discourse on political representation has been focusing on the formal procedures of representation and accountability. However, owing to political changes at the international and national levels, other actors such as international and national non-governmental organizations, interest groups and civil society associations now play an increasingly important role in advancing public interest, thereby acting as representatives of the public.<sup>81</sup>

As the institution specifically established to represent the diverse interests of society in government, parliaments in democratic societies promote vertical downward accountability of the state to the public.<sup>82</sup> Parliament provides an institutional mechanism through which the public realises representative governance.<sup>83</sup> The legislature in Kenya, Uganda, Nigeria and South Africa has emerged as an independent branch of government by asserting its independence from the executive on legislative issues.<sup>84</sup> In South Africa, the legislature has been able to refine legislation proposed by the executive, thereby enabling the executive to achieve policy objectives, which it would not have achieved without the help of the legislature, while the converse obtains in countries such as Ghana and Benin where the legislature remains relatively weak.<sup>85</sup> Public support for legislatures varies depending on the governance structure. In the United States of America for instance, where there are single-

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<sup>79</sup> *Supra* note 73, Edmund Burke refers to this as virtual representation.

<sup>80</sup> *Supra* note 65.

<sup>81</sup> *Ibid.*

<sup>82</sup> Barkan Joel, 'African Legislatures and the 'Third Wave' of Democratization', excerpted from *Legislative Power in Emerging African Democracies* (Lynne Rienner Publishers: Boulder, 2009) at 33 - 72, available at <https://www.rienner.com/uploads/4a8db50egcdfb.pdf> (accessed on 4 March 2011).

<sup>83</sup> *Ibid.*

<sup>84</sup> *Ibid.*

<sup>85</sup> *Ibid.*

member districts and candidate-centred campaigns, the individual representatives are friendly faces and their electorate identify with them and voters think highly of their representatives, but not of the legislature as an institution.<sup>86</sup> The legislature in the American context is seen as a faceless institution which can be blamed for any action that the citizens disagree with.<sup>87</sup> The converse position obtains in Norway which has a parliamentary system of government and proportional representation according to party lists. Under the Norwegian system, there is no tradition of constituency service among Members of Parliament and Norwegian voters think highly of the Storting, while they view their Members of Parliament as inattentive to their concerns and insensitive to public opinion.<sup>88</sup> It should however be appreciated that at times legislatures by their nature ought to make difficult decisions on intricate matters that may involve trade-offs and compromises which may make some sections of the public unhappy.<sup>89</sup> Representation is a paradox.<sup>90</sup> While a representative is expected to use his own knowledge, discretion and expertise, they are at the same time the mouth-piece of their constituents and the two responsibilities may at times conflict.<sup>91</sup> If the representative were to use their expertise and discretion to develop reasonable solutions to divergent positions then leave the ultimate choice on what solution to adopt to the public, this representational paradox would be significantly reduced.<sup>92</sup> In the Kenyan context, this would entail representatives using the available bill-drafting procedures to appreciate the contents of the draft law and then consulting their constituents with a view to obtaining their position before voting on the bill. This would then mean that the Members of Parliament exercise the mandates or instructions of their constituents.<sup>93</sup> The position prior to the 2010 Constitution - which remains - is the 'independence position' wherein the Member of Parliament is free to act as he or she deems best in pursuit of the constituency's interests.<sup>94</sup> While the mandate position guarantees that

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<sup>86</sup> Kurtz Karl, 'Legislatures and Citizens: Public Participation and Confidence in the Legislature', (1997) in USAID Handbook on Legislative strengthening (Washington DC: 2000) available at [http://www.usaid.gov/our\\_work/democracy\\_and\\_governance/publications/pdfs/pnacf632.pdf](http://www.usaid.gov/our_work/democracy_and_governance/publications/pdfs/pnacf632.pdf). (accessed on 6 April 2011).

<sup>87</sup> *Ibid.*

<sup>88</sup> Shaffer William, 'Loving Legislatures and Legislators: Norway and the United States', (1996) in Karl Kurtz, 'Legislatures and Citizens: Public Participation and Confidence in the Legislature', (1997) in USAID Handbook on Legislative strengthening (Washington DC: 2000) available at [http://www.usaid.gov/our\\_work/democracy\\_and\\_governance/publications/pdfs/pnacf632.pdf](http://www.usaid.gov/our_work/democracy_and_governance/publications/pdfs/pnacf632.pdf), (accessed on 6 April 2011).

<sup>89</sup> Kurtz Karl, 'The Public Standing of the Legislature', (1991) a paper presented during the National Conference of State Legislatures, Denver.

<sup>90</sup> *Supra* note 64; Robert Adams, (2009) 'The Representation Paradox'.

<sup>91</sup> *Supra* note 64.

<sup>92</sup> *Ibid.*

<sup>93</sup> *Ibid*; *supra* note 65.

<sup>94</sup> *Ibid.*

the Member of Parliament is bound by the will of his constituents, this may in a way blur the line between representative democracy and direct democracy and may reduce the role of a Member of Parliament to that of a mechanical tool through which his constituents act.<sup>95</sup> If applied strictly, the mandate position would render the Member of Parliament unnecessary. The independence position on the other hand, allows the Member of Parliament to rely on his ability, intellect and beliefs to decide what is best for his constituents.<sup>96</sup> The extreme case of this position is exemplified by the scenario in Kenya prior to the 2010 Constitution when Members of Parliament in some cases voted against the will of a majority of their constituents. If this were to continue, it would turn Members of Parliament into oligarchs.

Although the 2010 Constitution makes public participation an imperative to the legislative process in Kenya, it does not place the Kenyan position entirely in the mandate or independence position. It appears that aspects of the two positions are applicable, thereby striking a compromise between the two positions. There may, however, be controversy in situations where political representation is at stake, particularly where local and national interests are at variance.<sup>97</sup> The Senate in Kenya, which is based on regional representation, will most certainly have to grapple with this predicament. Resolution of this paradox on the basis of the two theories may be impossible.<sup>98</sup> There have however been attempts to examine the paradox conceptually;

“If a representative acts contrary to the known wishes of his constituents, some rationale is necessary. Acting contrary to their wishes is not necessarily wrong, not necessarily bad representation or a violation of a representative’s duty. It may, indeed, be required of him in certain situations. But it is abnormal in the sense that it calls for explanation or justification...Thus it will not do for a representative to assert that he did what he did for his own private interest; after all, he is not there for himself.”<sup>99</sup>

Much as the last part of the statement is correct, limiting the independence and discretion of the representative to merely providing a justification or rationalisation for violating the will of his constituents is not appropriate. This would give leeway to Members of Parliament to consistently take positions that are diametrically opposed to those of their constituents, as

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<sup>95</sup> *Ibid.*

<sup>96</sup> *Ibid.*

<sup>97</sup> *Ibid.*

<sup>98</sup> *Ibid.*

<sup>99</sup> *Ibid.*



long as they can provide a rationalisation for their actions. There is, therefore, need to find a consistent conceptual position with respect to the two theories.<sup>100</sup>

It is a fundamental requirement of democracy that citizens have capacity to participate freely in governance without any impediment.<sup>101</sup> The disparate conceptualisations of political representation are largely based on the varied interpretations of the relationship between the representative and their constituents and the role of the representative. The right of the public to participate in decision-making, which is now a constitutional right, is envisaged in human rights discourse and is provided for in some human rights instruments.<sup>102</sup> Legislatures also serve the function of linkage and legitimacy, which functions can be strengthened by providing ample opportunity to the public to have their concerns heard by the legislature.<sup>103</sup> Parliaments play the crucial role of voicing the concerns of diverse sections of the population.<sup>104</sup> The position of Parliament as a linkage between citizens and the government is closely related to the concept of legitimacy in the sense that citizens who regard their government as legitimate are more inclined to obey laws and support the government of the day. In every society ruled with the consent of the governed, public support is vital.<sup>105</sup> Norman Ornstein, while commenting on the importance of legitimacy says:

‘The real power and influence of the Kenyan National Assembly comes through the exercise of its informal powers. The most important informal function the legislature performs is to provide legitimacy to government actions. This in turn promotes support among the populace for the regime. The legitimising function is important in light of the revolts and bouts of instability that have plagued other nations in the region. By accommodating cultural and historical realities, the Kenyan Assembly allows for opposition and dissent within the system, yet also provides stability. As a result, the populace feels at ease about the strength and legitimacy of the system; at the same time, it feels it has some say in the political process.’<sup>106</sup>

Although he wrote at a time when Kenya had just reverted to multi-party democracy and was regarded as a haven of peace and stability within the region, Parliament played the function

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<sup>100</sup> *Supra* note 89.

<sup>101</sup> Nwabueze Benjamin, *Democratisation*, (Spectrum Law Publishers: Ibadan, 1993).

<sup>102</sup> *African Charter on Human and People's Rights* adopted 27 June 1981, AU Doc. CAB/LEG/67/3 (entered into force 21 October 1986), *African Union Constitutive Act* adopted on 11 July 2000 AU Doc. AHG/Decl. 143 (XXXV) (entered into force 26 May 2001).

<sup>103</sup> *Supra* note 82 at 3.

<sup>104</sup> *Ibid.*

<sup>105</sup> *Ibid.*

<sup>106</sup> Norman Ornstein, ‘The Role of the Legislature in a Democracy’, (1992) 3 *Freedom Papers*, available at <http://www.ait.org.tw/infousa/enus/media/pressfreedom/freedom3.htm> (accessed 16 April 2011).

of legitimising the actions of the Government, but conversely disapproved Government actions when the majority opinion was that the Executive had acted in breach of the law or contrary to public interest.<sup>107</sup> For instance, the re-appointment of Aaron Ringera and his two Assistants in 2009, as Director and Assistant Directors of the Kenya Anti-Corruption Commission in contravention of the statutory procedure that required the names of the appointees to be taken to Parliament for approval, put the Executive at loggerheads with Parliament.

The concept of representation is, however, based on the assumption that citizens are knowledgeable on the representative institution - in this case Parliament - and support it, and that the public can only influence the legislative or policy-making process if they understand how Parliament works, whereas the quality of democracy inevitably diminishes when the citizenry is ignorant about the legislative process.<sup>108</sup>

Representation and participation are not entirely western concepts. Most traditional African societies were ruled by kings who were assisted by a hierarchy of chiefs or advisors who were either close relatives of the kings or selected from their communities.<sup>109</sup> These African societies are reputed to have had a form of participatory democracy through general assemblies of all adult men where the community participated in making decisions on important matters that affected it. On the overall, leaders ruled with the consent of the people.<sup>110</sup> For instance, the Teso, like other kingdoms in Uganda operate alongside the Government of Uganda and its leaders are elected democratically right from the location to the district levels.<sup>111</sup>

## 2.4 PUBLIC PARTICIPATION

The concept of public participation, which is a key element of democracy, is based on the people-centred approach. It may include involvement, communication between the governors

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<sup>107</sup> *Ibid.*

<sup>108</sup> Baker John, Linda Bennett, Stephen Bennett and Richard Flickinger, 'Citizen's Knowledge and Perceptions of Legislature in Canada, Britain and the United States' (1996) 2 *Journal of Legislative Studies* at 44 - 62.

<sup>109</sup> Sam Rugege, 'Traditional African Leadership and its Future Role in Governance', available at [http://www.dd.org.za/images/stories\\_for\\_publication/v7-2Traditional\\_leadership.pdf](http://www.dd.org.za/images/stories_for_publication/v7-2Traditional_leadership.pdf) (accessed on 14 October 2011)

<sup>110</sup> *Ibid.*

<sup>111</sup> Anthony Njagi, 'Village set up to Show Case Teso Culture', *Daily Nation* (31 October 2011).

and the governed and reciprocal influence.<sup>112</sup> There is no universally-accepted definition of public participation. It has been defined variously as an inclusive process aimed at deepening democracy through formal mechanisms of participation, involvement of the public in decision-making processes and the process through which concerns and needs of the public are adopted in governmental decision-making.<sup>113</sup> Such participation entails a two-way communication and interaction between the governed and the governors with a view to arriving at better decisions that have the support of the public.<sup>114</sup> Although there are numerous definitions of the concept of public participation, the various definitions include elements such as facilitating interaction with the public as opposed to just providing information to the public, an organized process for public involvement, and some degree of impact or influence on the decision being made. This would involve informing members of the public, listening to them, engaging them in problem-solving and developing agreements with them.<sup>115</sup> Public participation is not only central to democracy, but is also a critical feature of democracy.<sup>116</sup> Discourse on public participation is not new. As early as the 17<sup>th</sup> Century, proponents of democracy like Jean-Jacques Rousseau argued that the participation of every citizen in political decision-making is essential, as citizens only become public citizens through participation.<sup>117</sup> Others like Joseph Schumpeter, however, hold a different view and maintain that public participation is not essential to democracy and should be limited to electing leaders.<sup>118</sup> This view is advanced by Dahl in his theory in which he

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<sup>112</sup> Derica Kotze, *Development Administration and Management: A Holistic Approach*, (J L van Schaik Publishers: Pretoria, 1997) at 37, available at [http://openlibrary.org/works/OL8222794W/Development\\_Administration\\_and\\_Management](http://openlibrary.org/works/OL8222794W/Development_Administration_and_Management) (accessed on 6 April 2011).

<sup>113</sup> Davids Ismail, (2005) 'Voices from Below – Reflecting on Ten Years of Public Participation: The Case of Local Government in Western Cape Province' in Renee Scot, (2009) 'An Analysis of Public Participation in the South African Legislative Sector' available at <http://scholar.sun.ac.za/bitstream/handle/10019.1/1837/Scott.%20R.pdf?sequence=1> (accessed on 10 April 2011).

<sup>114</sup> Creighton James, *The Public Participation Handbook* ( Jossey- Bass: San Francisco, 2005) at 7.  
<sup>115</sup> *Ibid*, at 8; Renee Scot, (2009) 'An Analysis of Public Participation in the South African Legislative Sector', available at <http://scholar.sun.ac.za/bitstream/handle/10019.1/1837/Scott.%20R.pdf?sequence=1> (accessed on 10 April 2011).

<sup>116</sup> Ank Michels, 'Citizen Participation and Democracy in the Netherlands' A paper delivered at the National Tradition of Democratic Thought, ECPR Joint Sessions in Uppsala, Sweden on 13-18 April 2004.

<sup>117</sup> Jean-Jacques Rousseau, *Du Contrat Social* (Tilburg University Press: Tilburg, 1762) in Ank Michels, 'Citizen Participation and Democracy in the Netherlands' A paper delivered at the National Tradition of Democratic Thought, ECPR Joint Sessions in Uppsala, Sweden on 13-18 April 2004.

<sup>118</sup> Joseph Schumpeter, *Capitalism, Socialism and Democracy* ( Harper and Row: New York, 1942) at

identifies conditions such as elections that are necessary and sufficient for maximising democracy in the real world.<sup>119</sup> This is based on the presumption that voters make their choice for leaders and policies heard through elections. There are fears that massive public participation in the political process could lead to totalitarianism and that the political activity of the public should be minimised to reacting, but not acting.<sup>120</sup> Therefore, the role of the people, according to this view, is to elect a government, where after they ought to understand that political action is the business of their elected leader and not theirs.<sup>121</sup>

Many theories on democracy that have been advanced so far only give a limited role to public participation in political processes. Kenya has taken the bold step of constitutionalising public participation, presumably owing to the recognition of the critical role of such participation in decision-making and implementation processes.

The 2010 Constitution does not define the term public. The term may however be defined to include individual citizens, interest groups and communities in any society.<sup>122</sup> What constitutes public might be different in diverse issues. Invariably, public participation involves a sub-set of the public who choose to participate when they feel they have significant interest in the decision that is being made.<sup>123</sup> Public participation should, therefore, involve all members of the public who are interested in the issue at stake.

#### 2.4.1 Rationale for Public Participation

Although the extent and type of participation may vary depending on the type of democracy, it is inextricably intertwined with democracy.<sup>124</sup> Public participation has various facets and

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269 in Ank Michels, 'Citizen Participation and Democracy in the Netherlands' A paper delivered at the National Tradition of Democratic Thought, ECPR Joint Sessions in Uppsala, Sweden on 13-18 April 2004 at 1.

<sup>119</sup> Robert Dahl, *A Preface to Democratic Theory* (University of Chicago Press: Chicago, 1956) at 64 in Ank Michels, 'Citizen Participation and Democracy in the Netherlands' A paper delivered at the National Tradition of Democratic Thought, ECPR Joint Sessions in Uppsala, Sweden on 13-18 April 2004 at 1.

<sup>120</sup> Giovanni Sartori, *Democratic Theory* (Wayne State University Press: Detroit, 1962) at 77, available at <http://www.amazon.com/Democratic-Theory-Giovanni-Sartori/dp/0837165458> (accessed 10 April 2011).

<sup>121</sup> *Supra* note 113 at 295.

<sup>122</sup> Thomas Layton, *Public Participation in Public Decisions: New Skills and Strategies for Public Managers* (Jossey-Bass: San Fransisco, 1995), available at <http://www.lavoisier.fr/livre/notice.asp?id=OLSWL6AOR36OWR> (accessed 10 April 2011).

<sup>123</sup> *Supra* note 106 at 22-23.

<sup>124</sup> Renee Scot, (2009) 'An Analysis of Public Participation in the South African Legislative Sector', available at <http://scholar.sun.ac.za/bitstream/handle/10019.1/1837/Scott,%20R.pdf?sequence=1>

takes different forms such as lobbying, campaigning, voting, contacting leaders, consultation and even protesting.<sup>125</sup>

A discussion on public participation inevitably requires tracing the origins of democracy and the function of public participation in early democratic societies.<sup>126</sup> In the early days of Greek democracy for instance, important decisions that affected the citizens of Athens were made by a collective assembly of citizens.<sup>127</sup> This means the public were in control of decision-making by participating in the process of making such decisions. From this historical perspective, it is clear that democratic rule was not viable without listening to the voices of the people and what followed was the embedding of the principle of public participation in various ways in democracies the world over.<sup>128</sup> Ideally, every democracy is expected to provide for public participation by institutionalising mechanisms for such participation.<sup>129</sup> However, given the varied types of democracy, it is important to understand that not all who support democracy appreciate the importance of public participation as a critical indicator of democracy.<sup>130</sup> Distinction can, therefore, be made between realist theories of democracy that lay emphasis on representation, responsible leadership and responsiveness as the main elements of democracy, and those theories that find direct participation as an imperative of democracy.<sup>131</sup> Proponents of the realist school of thought do not deem it necessary that the public should be meaningfully involved in decision-making, while the elite model of democracy understands being voted into office as a political blank cheque for elected leaders to act as they deem fit.<sup>132</sup> This model finds it unnecessary for citizens to participate as the

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<sup>125</sup> Michael Bratton, Robert Mattes, Gymah-Boadi, *Public Opinion, Democracy and Market Reform in Africa* (Cambridge University Press: Cambridge, 2005) at 295, available at <http://catdir.loc.gov/catdir/samples/cam051/2004043555.pdf> (accessed on 10 April).

<sup>126</sup> *Supra* note 124.

<sup>127</sup> Valiant Clapper, 'Advantages and Disadvantages of Citizen Participation' in Koos Bekker, *Citizen Participation in Local Government* (Van Schaik publishers: Pretoria, 1996) at 55, available at [http://books.google.com/books/about/Citizen\\_participation\\_in\\_local\\_governmen.html?id=O-FEAQAAIAAJ](http://books.google.com/books/about/Citizen_participation_in_local_governmen.html?id=O-FEAQAAIAAJ) (accessed on 12 April 2011); See also Janette Hartz-Karp, 'How and Why Deliberative Democracy Enables Co-Intelligence and Brings Wisdom to Governance' at 3, on the exclusion of women, slaves, children and persons of unsound mind from participating in decision making.

<sup>128</sup> *Supra* note 124.

<sup>129</sup> *Ibid.*

<sup>130</sup> *Ibid.*

<sup>131</sup> Geraint Parry, George Moyser, 'More Participation, More Democracy?' in David Beetham, *Defining and Measuring Democracy* (Sage Publishers: London, 1994), available at <http://books.google.com/books?hl=en&lr=&id=rDTe4PBYNHwC&oi=fnd&pg=PR6&dq> (accessed on 8 April 2011) at 44.

<sup>132</sup> Ballard Richard, 'Participation Democracy and Political Movements', (2008) 4 *Critical Dialogue* 1 at 17, available at [http://www.cpp.org.za/publications/critical\\_dialogue/vol4no1\\_2008/art3.pdf](http://www.cpp.org.za/publications/critical_dialogue/vol4no1_2008/art3.pdf) (accessed on 8 April 2011).

representatives are deemed to have authority to act on their behalf.<sup>133</sup> Given that the type of direct democracy that was practised in the ancient Athenian assemblies is no longer feasible in view of the size and complexity of modern societies, democracy in the original Athenian sense is impracticable. To address this disconnect between representation and public participation, there is need to deepen the systems of representation to make them more accountable and to strengthen relationships between representatives and their constituencies.<sup>134</sup>

The concept of public participation features prominently in democracy discourse and the push for more direct participation involving broader sections of the society in decisions that affect them.<sup>135</sup> Citizens should be able to govern themselves, not necessarily on everything and at every stage, but regularly. This is especially so when basic policies are being decided or when significant power is being used.<sup>136</sup>

The theoretical assumption that underpins the concept of participation is that besides enhancing democracy, it plays an educative role and is of political significance.<sup>137</sup> Public participation also serves the purpose of strengthening representative government by providing representatives with information that is critical for responsive decision-making, which they would otherwise not have, particularly in spheres where only people who stand to be most affected by proposed legislation are seized of such information.

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<sup>133</sup> Young Iris, *Inclusion and Democracy*, (Oxford University Press: Oxford, 2000) at 128, available at [http://books.google.co.ke/books?id=Gonp8GXTxb0C&pg=PA10&lpg=PA10&dq=young+2000+inclusion+and+democracy&source=bl&ots=nJ9LGy6IrH&sig=BqbeZFM0YE5GAfNCqkeedCw\\_EsQ&hl=en&ei=-MyeTarzEojpOemzqfkE&sa=X&oi=book\\_result&ct=result&resnum=2&ved=0CCIQ6AEwAQ#v=onepage&q=young%202000%20inclusion%20and%20democracy&f=false](http://books.google.co.ke/books?id=Gonp8GXTxb0C&pg=PA10&lpg=PA10&dq=young+2000+inclusion+and+democracy&source=bl&ots=nJ9LGy6IrH&sig=BqbeZFM0YE5GAfNCqkeedCw_EsQ&hl=en&ei=-MyeTarzEojpOemzqfkE&sa=X&oi=book_result&ct=result&resnum=2&ved=0CCIQ6AEwAQ#v=onepage&q=young%202000%20inclusion%20and%20democracy&f=false) (accessed 8 April 2011). See also Renee Scot, (2009) 'An Analysis of Public Participation in the South African Legislative Sector', available at <http://scholar.sun.ac.za/bitstream/handle/10019.1/1837/Scott,%20R.pdf?sequence=1> (accessed 10 April 2011).

<sup>134</sup> *Ibid* at 124.

<sup>135</sup> Dahl Robert, *After Revolution? Authority in a Good Society* (Yale University Press: New Haven, 1990) at 62.

<sup>136</sup> Benjamin Barber, *Strong Democracy: Participatory Politics for a New Age* (University of California Press: London, 1984) at 151, available at [http://books.google.com/books?id=2YbevnCXAhgC&pg=PA139&source=gbs\\_toc\\_r&cad=4#v=onepage&q&f=false](http://books.google.com/books?id=2YbevnCXAhgC&pg=PA139&source=gbs_toc_r&cad=4#v=onepage&q&f=false) <http://books.google.com/books?hl=en&lr=&id=2YbevnCXAhgC&oi=fnd&pg=PR9&dq> (accessed on 8 April 2011).

<sup>137</sup> *Supra* note 124.

Presently, public participation is gaining significance as a critical attribute and prerequisite of democracy. Some proponents of public participation find democracy without citizen participation an empty and meaningless concept.<sup>138</sup>

It cannot be gainsaid that public participation is imperative in a democratic society. The challenge however, is in developing and putting in place mechanisms to empower the public and to give them incentives to participate. In addition, it is important to provide an environment within which members of the public are able to ascertain what their interests are.

#### **2.4.2 The Role of Public Participation in a Democracy**

Great value is attached to public participation because it is deemed to be fundamental to democracy. Initially, the defining feature of democracy was free and fair elections. However, systems that encourage or allow participation in elections may not be entirely democratic.<sup>139</sup> Public participation in the decision-making process in a democratic society is crucial.<sup>140</sup>

In a bureaucratic set up, public participation provides a direct linkage between the public and those in authority. It ensures that people vested with authority to make decisions which affect the lives of people must first consult the public before making decisions.<sup>141</sup> Looked at from the point of view of the public, participation gives them influence over decisions that affect them while, to those in authority, it provides a mechanism through which issues that are contentious can be resolved. Public participation therefore provides an avenue for addressing such differences through discussions among persons holding divergent views thereby ensuring interaction, while guaranteeing the public that all points of view are taken into account.<sup>142</sup>

Legitimacy is critical for the survival of any government. Participation may be an indicator of the system's legitimacy since people will only find it worthwhile to participate if they find the system legitimate.<sup>143</sup> Participation therefore contributes to the legitimacy of the government.

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<sup>138</sup> *Supra* note 114 at 2.

<sup>139</sup> *Supra* note 122.

<sup>140</sup> *Ibid.*

<sup>141</sup> *Ibid.*

<sup>142</sup> *Supra* note 131 at 17.

<sup>143</sup> *Supra* note 127 at 12.

Public participation is integral to good governance.<sup>144</sup> It provides a mechanism for communication between the public and policy makers, while democratising the making and implementation of policy and through participation; information is exchanged between the public and the government thereby enhancing responsiveness to public needs when decisions are made.<sup>145</sup>

Besides improving the quality of decisions by incorporating public values into decision-making, public participation educates and informs the public and enhances public trust in such institutions as the public engages with the policy-making institutions.<sup>146</sup> In addition, it may reduce the cost of making decisions and the possibility of conflicts arising as all points of view are considered.<sup>147</sup>

### 2.4.3 Principles of Public Participation

There are certain imperatives of public participation including inclusiveness in the decision-making process, openness, a proactive public, easy access and respect for public input.<sup>148</sup> For public participation to be effective, it requires more than just putting in place and following a set of procedures. It entails government listening to the views of the public and being agreeable to be influenced by such views. In order for public input to impact on decision-making, it has to be timely, adequate, formal and effective and should provide the requisite information to facilitate informed decision-making. It should also be characterised by consultation and responsiveness.<sup>149</sup>

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<sup>144</sup> *Supra* note 124; Renee Irvin and John Stanbury, 'Citizen Participation in Decision Making: Is it Worth the Effort?', (2004) 64 *Public Administration Review* 1at 55, available at <http://webprod.iheid.ch> (Accessed on 21 May 2010).

<sup>145</sup> Masango Reuben, 'Public Participation: A Critical Ingredient of Good Governance', (2002) 21 *Politeia* 2 at 52-65, available at [http://www.sabinet.co.za/polit/polit\\_v21\\_n2\\_a4.html](http://www.sabinet.co.za/polit/polit_v21_n2_a4.html) (Accessed on 14 April 2011); Renee Scot, (2009) 'An Analysis of Public Participation in the South African Legislative Sector', available at <http://scholar.sun.ac.za/bitstream/handle/10019.1/1837/Scott,%20R.pdf?sequence=1> (Accessed on 10 April 2011)

<sup>146</sup> *Supra* note 124.

<sup>147</sup> *Ibid*; John Randolph and Michael Bauer, 'Improving Environmental Decision-Making through Collaborative Methods', (1999) 16 *Policy Studies Review* 3 at 65-78 in Renee Irvin and John Stanbury, 'Citizen Participation in Decision Making: Is it Worth the Effort?', (2004) 64 *Public Administration Review* 1at 55, available at <http://webprod.iheid.ch>

<sup>148</sup> *Ibid*.

<sup>149</sup> *United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus*



Public participation requires that the larger public is kept informed of the possible impact of a decision to enable it decide whether it wants to be involved in the decision-making process through participation.<sup>150</sup> It is imperative, therefore, that an effective public sensitisation programme is initiated and sustained. In addition, the public participation programme must be easily accessible and visible so that when members of the public choose to participate, they have a good understanding of how and in which forum to participate.<sup>151</sup>

At the global level, the International Association for Public Participation has come up with a set of values for public participation which are meant to guide and provide a benchmark for public participation practices and principles. These values include the need for the public to have a say in decisions that may affect their lives, a promise by those in authority that the public's contribution will inform the decision, seeking out and facilitating the involvement of persons who are likely to be affected or are interested in the decision being made, providing the public with the information they need in order to participate meaningfully, seeking public input in the designing of mechanisms for participation, promotion of sustainable decisions through recognition and communication of the needs of all stakeholders and a feedback mechanism through which the public are informed on how their input informed the decision.<sup>152</sup>

#### 2.4.4 The benefits of Public Participation

Public participation is beneficial in a number of ways. Besides producing decisions that are responsive to public values and needs, it helps in resolving and avoiding conflict among various interest groups, educating the public and building public trust in the institutional decision-making framework.<sup>153</sup> Public participation also enriches the quality of policy

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*Convention*) adopted on June 25 1998,( entered into force on 30 October 2001), Pillar II: Public Participation in Decision-making , available at <http://www.unece.org> (accessed on 10 April 2011).

<sup>150</sup> *Supra* note 131 at 23.

<sup>151</sup> *Supra* note 145; majority of the interviewees underscored the importance of creating awareness among

<sup>152</sup> Michael Briand, 'Democracy at the Core: Recalling Participations' *Raison d' Etre*, (2007) 1 *International Journal for Public Participation* 1, available at <http://www.iap2.org> (accessed 10 April 2011) ;Renee Scot, (2009) 'An Analysis of Public Participation in the South African Legislative Sector', available at <http://scholar.sun.ac.za/bitstream/handle/10019.1/1837/Scott,%20R.pdf?sequence=1> (accessed 10 April 2011)

<sup>153</sup> *Supra* note 124 at 20; Renee Irvin and John Stanbury, 'Citizen Participation in Decision Making: Is it Worth the Effort?', (2004) 64 *Public Administration Review* 1 at 55, available at <http://webprod.iheid.ch>

outcomes and helps the public develop capacity to improve their lives.<sup>154</sup> From a good governance perspective, public participation is useful in checking dictatorship and promoting principles of good governance.<sup>155</sup>

Decisions arrived at through a participatory process are easy to implement as participation creates a sense of ownership and commitment to the outcomes of the process.<sup>156</sup> This eliminates resistance in policy implementation while serving as a mechanism for checking the abuse of authority.<sup>157</sup>

Through participatory processes, the public provides valuable information on their needs and preferences, which guides decision-makers in arriving at informed decisions.<sup>158</sup> In addition, participation instils some sense of commitment by the public to democratic ideals, principles and practices which, in the absence of public participation, a majority of the citizens would not observe.<sup>159</sup> This comes about as participation assures members of the public of their self-worth and dignity as citizens, thereby promoting some degree of equality.<sup>160</sup> By enhancing legitimacy and public support for legislation and government policies, public participation enhances democratic stability.<sup>161</sup>

Public participation also provides a platform on which communities engage with the government on issues that affect them. Through such engagement, the public are empowered

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<sup>154</sup> Francois Theron, Nicky Ceaser, Ismail Davids, 'Participation According to IAP2 Principles: Opportunity or Challenge for Integrated Development Planning in South Africa', (2007) 1 *International Journal of public Participation* 1, available at <http://www.iap2.org> (accessed 10 April 2011).

<sup>155</sup> *Supra* note 145 at 52.

<sup>156</sup> *Supra* note 130 at 76; Renee Irvin and John Stanbury, 'Citizen Participation in Decision Making: Is it Worth the Effort?', (2004) 64 *Public Administration Review* 1 at 55, available at <http://webprod.iheid.ch> (accessed 21 May 2010); An interview with Faruku, a businessman, in Nairobi on 15 October 2011 reinforces this argument as he holds the view that the lack of consultation in the development and subsequent enactment of the Alcohol Control Act, 2010 has impaired its enforcement.

<sup>157</sup> *Supra* note 145 at 59.

<sup>158</sup> Barry Hanyane, (2005), 'Defining the concept of civic interest in post-apartheid South Africa: A Question of Administrative Philosophy in the Making', 24 *Politeia* 2, at 255-270, available at <http://uir.unisa.ac.za/bitstream/handle/10500/2834/hanyane.pdf?sequence=1> (accessed on 14 April 2011).

<sup>159</sup> *Ibid.*

<sup>160</sup> Lawrence R, A Stanton, (1999), 'Effective Participation in Local Government Policy Matters? Water Services in Greater Pietermaritzburg', 33 *Saipa Journal* 4 at 233 in Barry Hanyane, (2005), 'Defining the concept of civic interest in post-apartheid South Africa: A Question of Administrative Philosophy in the Making', 24 *Politeia* 2, at 255-270, available at <http://uir.unisa.ac.za/bitstream/handle/10500/2834/hanyane.pdf?sequence=1> (accessed 14 April 2011).

<sup>161</sup> *Supra* note 124.

as they acquire knowledge and capacity, thereby shaping their thinking on democracy and governance.<sup>162</sup>

#### 2.4.5 Challenges of Public Participation

Although it is aimed at building consensus, public participation has the potential of producing varied opinion and viewpoints, thereby posing a challenge.<sup>163</sup> The sincerity with which authorities seek public participation is critical. Engaging the public merely as a public relations exercise to rubber-stamp decisions that have already been made neutralises the rationale for public participation.<sup>164</sup>

Apathy among voters in democratic societies may be a major impediment to public participation, if the turnout in elections were to be used to project the level of participation.<sup>165</sup> There may also be factors within democratic societies that negatively affect public participation, thereby negating the presumption that participation is effective in enhancing democracy.<sup>166</sup>

While it is desirable that every person who has an interest gets to participate, it may not be possible for interested persons to participate equally owing to differing degrees of access, the power that they wield and expertise.<sup>167</sup> In addition, public participation protracts the time it takes to pass legislation. For instance, in South Africa, it takes up to eighteen months to enact laws owing to the strict requirement for public participation.<sup>168</sup> Getting everyone's views on proposed legislation may also be logistically impractical.<sup>169</sup> The exigencies of the situation may at times demand that a decision be made quickly on the basis of available technical information.<sup>170</sup>

For a better analysis of public participation in the Kenyan context, it is necessary to have an understanding of how public participation is practised in other democracies. The countries sampled include developed and developing countries and will provide a benchmark against

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<sup>162</sup> *Ibid.*

<sup>163</sup> *Ibid.*

<sup>164</sup> *Ibid.*

<sup>165</sup> Voter turnout in elections in Kenya has been low.

<sup>166</sup> *Supra* note 124.

<sup>167</sup> *Ibid.*

<sup>168</sup> Interview with Warner, a legal consultant, in Nairobi on 3 March 2011.

<sup>169</sup> Interview with Steve, a lawyer, in Nairobi on 11 October 2011.

<sup>170</sup> *Supra* note 122 at 2.

which public participation in Kenya will be measured. The next part looks at how public participation has been effected in other jurisdictions.

#### **2.4.6 Modes of Public Participation in Select Democracies and Judicial intervention to ensure Participation**

Various countries have adopted public participation in their law-making processes. There has also been judicial intervention to ensure that laws passed by parliament meet the requirements of public participation. The countries cited as case studies were chosen randomly both from developed democracies and African countries with similar social and political circumstances as Kenya, taking into account their varied avenues for public participation.

##### **2.4.6.1 National Caucus and Public Hearings**

Some countries such as Namibia have a National Council, which, besides reviewing bills after they are passed by the National Assembly, serves as a forum for regional caucus where regions are provided with an opportunity to articulate their views on legislation, either directly or collectively with other regions.<sup>171</sup> This framework provides an avenue for the Namibian public to participate in law-making and takes the Namibian Parliament closer to the people. Although the members of the National Council are elected to represent regions the same way Senators under the 2010 Constitution of Kenya will be elected to the Senate, the National Council is the only legislative body in Namibia with members who represent geographical constituencies, unlike the National Assembly that is based on proportional representation.<sup>172</sup>

The National Council has structures through which it acts as a link between the people and Parliament and provides an opportunity for the regions to give their input and scrutinise national policies.<sup>173</sup> Through national debate and consensus, the National Council enhances public participation in the legislative process. It is duty-bound to solicit and incorporate the views of the public into legislation, thereby determining the quality and extent of democracy

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<sup>171</sup> Foster Mijiga, 'Public Participation in the Legislative Process', (2001) Summary of Results from Nationwide Regional Survey and a National Conference Conducted by the National Council and the National Democratic Institute between April and October 2000.

<sup>172</sup> *Ibid.*

<sup>173</sup> *Ibid.*

in Namibia.<sup>174</sup> At the regional level, Regional Councils facilitate consultations on national legislation by soliciting and facilitating input from the public, local and traditional authorities, civil society and other interested persons or groups.<sup>175</sup>

Namibia and South Africa have constitutional provisions similar to those in the Kenyan Constitution requiring public participation in the law-making process.<sup>176</sup> Given the similarities between these countries and Kenya, it is useful to critique the avenues for public participation, especially those in Namibia, as this might offer useful lessons while setting up mechanisms for public participation in the law-making process in Kenya.

Despite the constitutional provisions for public participation in Namibia, access to representatives is a concern to many people as Members of Parliament are not regularly in touch with the people, even when they travel to the regions. This leads to a situation where the public is not informed of the business of Parliament, which results in minimal or even no public participation in the legislative process.<sup>177</sup> When parliamentary committees conduct public hearings in the region, many people do not make it to the venue of the hearing owing to difficulties in securing transport, short notices of the hearings and the often-inconvenient timings of the hearings which invariably coincide with the time most people are at work.<sup>178</sup> In addition, there is inadequate communication between the government officials and elected representatives on one part and the members of the public on the other, as representatives cannot respond to issues raised unless they consult experts. The public, therefore, do not get feedback on the issues they raise and are left with the feeling that they are consulted after decisions have already been made. Further, there may be the impression that the decisions made by the representatives are not reflective of the opinion of the public, but rather, that of the experts.<sup>179</sup> Reviews of the participatory mechanisms in Namibia have highlighted the need for elected representatives to identify practical mechanisms to attract and facilitate public participation. There are also proposals that such participation should be institutionalised in the legislative and policy-making processes.<sup>180</sup> However, the challenge is that while elected representatives are obligated to solicit public input, in some cases members

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*Ibid.*

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*Ibid.*

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*Constitution* of Namibia; *Constitution* of the Republic of South Africa.

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*Supra* note 171.

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*Ibid.*

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*Ibid.*

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*Ibid.*

of the public are reluctant to participate despite being invited to do so.<sup>181</sup> Such apathy may be equated to the reluctance of a sizable portion of the public in Kenya who are eligible to vote but opt not to, leading to low voter turnout during elections.

In addition, surveys on public participation have established that many people lack access to relevant information in parliament and formal mechanisms do not exist at the local level to facilitate dissemination of parliamentary information.<sup>182</sup> The lack of information at the regional level, which is supposed to facilitate public participation, means that the regions are unable to participate in the policy-making and legislative process. On the few occasions when information is relayed to the regions, it is disseminated late and the time for public input is limited.<sup>183</sup> This inhibits consultations and public input and is further compounded by the lack of expertise to analyse and comprehend the draft legislation, thereby denying the public the opportunity to make meaningful and informed contribution to the policy-making and legislative processes.<sup>184</sup>

#### 2.4.6.2 Access to Parliament

The legislature in some jurisdictions such as New Zealand is accessible to interest groups and the public. In the case of New Zealand, this is largely attributable to the size of the country<sup>185</sup> and the fact that the country has been ruled by coalitions or minority governments for several years. Owing to this, it has been imperative for governments to horse-trade for in order to get sufficient support to pass legislation.<sup>186</sup> Some legislatures, such the one in Alaska, have expanded their facilities to include a public lounge to enable the public to participate in the affairs of State Government with a view to enhancing access to the government.<sup>187</sup> The Arizona Legislature has on its part put in place a “Request-to-Speak System” where members of the public who are interested in speaking before a committee do not have to fill in “speaker slips” like they used to, but instead walk up to a kiosk right in front of the hearing room and

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<sup>181</sup> *Ibid.*

<sup>182</sup> *Ibid.*

<sup>183</sup> *Ibid.*

<sup>184</sup> *Ibid.*

<sup>185</sup> George Tanner, (2003) a paper presented in the New Zealand Legal Method Seminar in May 2003, in Geoff Lawn, ‘Improving Public Access to Legislation: The New Zealand Experience’, (2007) 4 *University of Technology, Sydney Law Review*, available at <http://www.austlii.edu.au/cgi-binodisp/au/journals/UTSL.Rev/2004/4.html> (accessed on 1 December 2010).

<sup>186</sup> *Ibid.*

<sup>187</sup> Western Legislative Innovative Report, (2010) available at <http://knowledgecenter.csg.org/drupal/content/western-legislative-innovations-report> (accessed 23 May 2011).

express their views on bills before the Legislature. This initiative is besides that of setting aside an entire floor to facilitate public access to its proceedings.<sup>188</sup> Some legislatures, like that of Colorado, have put in place a legislative information and communications system which uses a unified computer system and includes automatic internet postings to provide increased transparency and public access to the legislative process.<sup>189</sup> The website enables the public to stream audio of legislative hearings, audio and video of second and third reading debates and access to statutes, among others, and is considering facilitating persons who wish to testify on bills at the committee stage to sign up online.<sup>190</sup> Other legislatures like the Hawaii State Legislature have legislation that opens up government processes to public scrutiny; it has created the “Public Access Room” in the legislature for members of the public.<sup>191</sup> The law is based on the premise that “opening up government processes to public scrutiny and participation is the most viable and reasonable method of protecting democracy and the public interest.”<sup>192</sup> The Public Access Room renders a variety of services which have increasingly grown and include accepting, processing and delivering e-mail testimony to legislative committees.<sup>193</sup> This provides the public with opportunities to actively participate in the legislative process. Through an outreach programme, the Public Access Room offers workshops and tutorials on the legislative process and participation, where the public are not only taught the legislative process in theory, but also provided with background material and equipped with skills and resources to assist them become active participants in the legislative process.<sup>194</sup> These services have been enhanced to include a series of moderated online discussions.<sup>195</sup> These innovations are premised on the thinking that a better educated public can provide better input, which in turn contributes to the enactment of better laws based on the critical relationship between the law makers and the citizenry.<sup>196</sup> Technology has been used to enhance access to legislature. Legislatures such as that of Idaho have a physical infrastructure and information technology, which includes teleconferencing facilities that accommodate public participation in the legislative process.<sup>197</sup> Others, such as the Nevada Legislature, have put in place a Constituent Services Unit which handles different types of

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<sup>188</sup> *Ibid.*

<sup>189</sup> *Ibid.*

<sup>190</sup> *Ibid.*

<sup>191</sup> Act No. 331 Session Laws of Hawaii, 1989 available at <http://hawaii.gov/lrb/par/legfyi.html> (accessed 23 May 2011).

<sup>192</sup> *Ibid.*

<sup>193</sup> *Supra* note 187.

<sup>194</sup> *Ibid.*

<sup>195</sup> See [www.hawaii.gov/lrb/par](http://www.hawaii.gov/lrb/par) (Accessed on 23 May 2011).

<sup>196</sup> *Supra* note 187.

<sup>197</sup> *Ibid*; [www.legislature.idaho.gov](http://www.legislature.idaho.gov) (Accessed on 23 May 2011).

requests from constituents on behalf of legislators. Constituents can participate by sending their requests via e-mails which are logged in to a database,<sup>198</sup> or by taking part in an online opinion poll where they can give their views on matters before the Legislature. Users can either express their opinion online or call the Legislature and staff will enter the poll for them. The users are required to provide their addresses, which are entered in the database; legislators may request that letters be sent to constituents in their districts who expressed opinions on a specific bill.<sup>199</sup> This provides an avenue for public participation in the legislative process and a feedback mechanism on the input received. Some legislatures, such as the Washington State Legislature, hold electronic town hall meetings where members of the public are notified of the meetings. Those who wish to participate may dial a toll-free number to do so,<sup>200</sup> while those in Wyoming use an “Online Hotline” to support or oppose a bill before the Legislature and may leave a short comment on the bill.<sup>201</sup> Legislators then access the comments and recommendations electronically and are able to weigh the support for or opposition to a particular bill.<sup>202</sup>

#### 2.4.6.3 Parliamentary Procedures and Practices

In most countries, public participation in the law-making process is provided for in the standing orders of the legislature. For instance, in Indonesia it is provided in Law No. 10 of 2004 and Presidential Regulation No. 65 of 2005. The public may participate at the bill-preparation stage or during deliberations on the bill. This can be done either through dissemination of the bill to the public or adoption of public aspirations.<sup>203</sup> The purpose of dissemination is to create awareness among the public of the existence of the bill before the legislature, to enable them give input on it. Once dissemination is done through the electronic or print media,<sup>204</sup> the public are facilitated to exercise their right to give input either orally, during deliberation on the bill, or in writing to the legislature, for onward transmission to the relevant parliamentary committee. This may be done during the preparation of or deliberation on the bill.<sup>205</sup> At the preparation or deliberation stage, written submissions are made to the legislature for onward transmission to the relevant committee. In the case of oral

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<sup>198</sup> *Supra* note 187.

<sup>199</sup> *Ibid.*

<sup>200</sup> *Ibid.*

<sup>201</sup> <http://legisweb.state.wy.us/PostComments/HotlineDisclaimer.aspx>. (Accessed on 24 May 2011).

<sup>202</sup> <http://legisweb.state.wy.us>. (Accessed on 24 May 2011).

<sup>203</sup> Febrian S H, *Handbook on the Legislative Process* available at [www.parliamentproject.org/download.php?id=157](http://www.parliamentproject.org/download.php?id=157) (accessed on 16 April 2011).

<sup>204</sup> *Ibid.*

<sup>205</sup> *Ibid.*



submissions, the parliamentary committee invites members of the public to a meeting where they can give their input.<sup>206</sup> Such a meeting may be a public hearing or a meeting with the leaders of the parliamentary committee and its members.<sup>207</sup> The committees also hold legislative hearings with the public through roundtables, town hall meetings and forums convened to discuss bills where experts, interest groups, ministers and public officials are