KENYA'S LEGAL FRAMEWORK FOR PUBLIC PARTICIPATION:

TOWARDS AN EFFECTIVE REALIZATION OF THE RIGHT TO PUBLIC PARTICIPATION

UNIVERSITY OF NAIROBI

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DECLARATION

I, **MMENE OSCAR EREDI**, do hereby declare that this is my original work and that it has not been submitted for the award of a degree or any other academic credit in any other university.

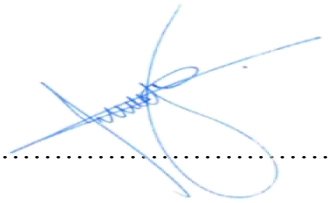
Date 19th October 2021

Signature……  …….

MMENE OSCAR EREDI

This research project has been submitted for examination with my approval as the University Supervisor

Date 19th October, 2021

Signature……  ……...

DR. WAMUTI NDEGWA

DEDICATION

To my parents, the Mr. William H. Eredi and Mrs. Lenah A Eredi

Foryour love, motivation, supportand constant encouragement to ensure I achieved this.

Thank you.

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I am most grateful to the Almighty God, for good health, grace and unconditional providence.

My special thanks go to my supervisor, Dr. Wamuti Ndegwa for his tutelage and astute guidance throughout the course of the study.

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I would like to extend my appreciation to my colleagues at the Attorney General'sChambers foryour encouragement and concern, insight, patience, and meddling in deserving timesand for your best wishes.

LIST OF CASES

Anthony Otiende Otiende v Public Service Commission & 2 others [2016] eKLR

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African Charter on Human and People's Right, 1982 Treaty No. 26363

International Covenant on Civil and Political Rights, 1966 Treaty No. 14668

International Covenant on Economic, Social and Cultural Rights Treaty No. 14531

Universal Declaration of Human Rights, 217A (III) 1948, UN General Assembly

LIST OF ABBREVIATIONS

EMCA- The Environment Management and Co-ordination Act

NEMA- National Environmental Management Agency

NET- National Environment Tribunal

ELC- Environment and Land Court

NCOP- the National Council of Provinces

ICCPR- the International Covenant on Civil and Political Rights

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ABSTRACT

This project investigates the substance, the structure and the threshold of the right to public participation in Kenya during the period 2010-2021. Although the Constitution of Kenya 2010 obligates the parliament to facilitate public participation in legislative processes, nevertheless the realization of the right is at best problematic with regard to ascertaining its scope and thethreshold required to satisfactorily discharge the parliament's duty. The study argues that this is because the right has not been defined in the Constitution, or statutes, or judicial decisions.

The study employs doctrinal research methodology in order to illustrate that the substance, structure and threshold of the right to public participation in Kenya is undefined and unsettled. By reviewing case law and the legislative and institutional framework, it demonstrates that Kenya's framework on the right to public participation is materially deficient. The right has not been defined in the Constitution, or statutes, or judicial decisions. Courts have not articulated 'the reasonability' test of determining threshold in definite terms but they have not demystified the qualitative and the quantitative aspects of the test. The Public Participation Bill 2018 does not cure most of the legal challenges identified by the study.

The study also employs comparative research methodology in order to illustrate lessonsthat Kenya can learnfrom South Africa's experience, especially from their courts which have defined the parliament's duty to facilitate public involvement in very definite terms, by simplifying the two aspects of the duty as well as the key ingredients of each aspect. The study offers the ideal definition of the right and demystifies the 'reasonability test' of determining the threshold required to discharge the duty.

CHAPTER ONE: INTRODUCTION

1.1 Background of the Study

The concept of public participation is well buttressed under the Kenyan Constitution under which parliament is bound to facilitate public participation and involvement in its legislative businesses.[1]The concept has progressively gained roots in the country and has become a common reference point for legislators, judges, policy makers and state agencies. Discourses on this subjectkeep recurring anytime a new law or policy is enacted. In case of a dispute on whether the concept of public participation has been observed in the enactment of a new law, parties approach the courts, which have correctly annulled Actsof parliament where the principle has been violated[2]as well as upheld those Acts whose legislative process adhered to the principle of public participation.[3]

However, given opportunity, judges continue to show that the threshold for satisfying this constitutional requirement is not here nor there. In some instances, courts have annulled some Acts for want of public participation, despite the presence of evidence to suggest that the public had a reasonable opportunity to contribute and express their views on the particular proposed legislation.[4] In other cases, the courts have upheld the constitutionality of some Acts, despite the abundance of overwhelming evidence to suggest that the principle of public participation had

[1] Constitution of Kenya, Article 118 (1) (b).
[2]*Kenya Human Rights Commission v Attorney General & another* [2018] eKLR, para 14. (There was no attempt on the part of the respondents to show that there was any semblance of public participation in the legislative process).
[3]*Institute of Social Accountability & another v National Assembly & 4 others* [2015] eKLR, para 36. (There had been a Task Force on CDF, which engaged various stakeholders. See also *Were Samwel & 14 Others v Attorney General & 2 others* [2017] eKLR, para 42. (There was an invitation sent out asking shareholders to attend workshops for five days with a view to discussing the proposed amendments, and the meetings took place. The National Assembly also invited submissions and Memoranda through an advertisement published in the News Pater).
[4]*Robert N. Gakuru & Others v Governor Kiambu County & 3 others* [2014] eKLR, Para 5 & 25.

been violated.[5]So much has emerged from the current practice in this area that one may wonder whether there is any established threshold on which the National Assembly can measure their success with respect to meeting the mandatory constitutional requirement.

1.2 Problem Statement

Although, the Constitution bestows upon Kenyans the right to participate in governance by enjoining the parliament and the county assemblies to facilitate public participation in their policy making and legislative business, nevertheless, the enforcement and realization of the right is at best problematic with regards to its definition, its structure and its threshold. Given every opportunity judges, legislators and policy makers continue to show that the threshold for satisfying this constitutional requirement is not here nor there, begging the question on the exact meaning, structure and scope of the right.

1.3 Research Objectives

1. To establish the theoretical underpinnings ofthe right to public participation.
2. To investigate the substance, structure and threshold of the right to public participation in Kenya.
3. To examine the efficacy of the Kenya's legal and policy framework in realizing the constitutional right to public participation.
4. To investigate positive lessons and best practices that Kenya can learn from the South Africa's experience on the right to public participation.

[5] *Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya &10; others* [2015] eKLR para 16-17.

1.4 Research Questions

1. What is the theoretical underpinning of the right to public participation?
2. What is the substance, structure and threshold of the right to public participation in Kenya?
3. What is the efficacy of the Kenya's legal and policy framework in realizing the constitutional right to public participation?
4. What positive lessons and best practices can Kenya learn from the South Africa's experience on the right to public participation?

1.5 Research Hypothesis

The study proceeds on the following research hypotheses;

1. That the substance, structure and threshold of the right to public participation in Kenyaare undefined and unsettled.
2. That the Kenya's legal and policy framework is not efficacious in realizing the constitutional right to public participation.
3. That Kenya can borrow lessons and best practices from South Africa's experience on the right to public participation.

1.6 Theoretical Framework

1.6.1 Deliberative Democratic Theory

The study will be based on the Deliberative Democratic Theory and the PositivismLegal Theory. Chapter two of the study discusses the theories more specifically. However, a brief snapshot of the theories is that the Deliberative Democratic Theory posits that the substance of the right to

public participation is the right of the subjects to participate in administration and governance as an expression of their political liberties.[6]It argues that the philosophical foundation of the right to public participation is that citizens should have more than voting to rely on to be involved in the political system and should be granted a continuous opportunity for involvement.[7] Its theorists argue that the nature of the right is underpinned by the principle of equality, rationality and a healthy discussion characterized by merit-centered weighing of ideas.[8]

1.6.2 The Positivism Legal Theory

On the other hand, the Positivism Theory requires the law be posited and publicly promulgated, and obligates the government to expressly notify its citizens of their rights, obligations and consequences.[9] In addition, it prevents the judges from making laws by requiring them to strictly and exclusively employ the applicable existing laws. In the pursuit of maintaining the integrity of the law, the theory obligates judges to decide cases in accordance with the law and not to seek guidance from subjective notions of equity.[10]The following chapter discusses the theories more specifically, with a view to illustrating their significance to the study.

The choice of the two theories is very significant. The Deliberative Democratic theory is the most advanced legal theory with regards to defining the right to public participation, its substance and its structure. The study will employ the theory as a yardstick to measure the efficacy of the Kenya's legal framework on the right as well as identify the essential parameters of ascertaining its threshold. The study will employ the Positivism Theory to argue that the

[6] Brett Cherniak, 'Critiquing the Role of Deliberative Democracy in EE and ESD: The Case for Effective Participation and Pragmatic Deliberation' (2009) (72) Examensarbete i Hållbar Utveckling 11, 11.
[7] Graham Smith, *Deliberative Democracy and the Environment* (Routledge 2003) 56.
[8] Ramya Parthasarathy and Vijayendra Rao, 'Deliberative Democracy in India' (Policy Research Working Paper 7995, World Bank Group Development Research Group, Poverty and Inequality Team March 2017) 3.
[9] Daniel Gebrie and Hassen Mohamed, '*Ethiopian Justice and Legal Research Institute Teaching Material on Jurisprudence*' (2008) 50.
[10] Ibid 47.

solution to the current crisis facing the area under investigation lies with the parliament and can be solved by a legislative intervention. The theory will be utilized to argue that the current uncertainty can be rectified by enacting a law which expressly defines the right, the structures and processes and the threshold of the right to public participation.

1.7The Justification of the Study

The significance of the study cannot be overemphasized. The concern that the current practice of public participation is yet to achieve its optimal realization came out during the Building Bridges Initiative (BBI) validation process, where Kenyans expressed frustration with the lack of meaningful public involvement, despite the presence of a robust constitutional framework on the right.[11]Importantly, Kenyans pointed out that the implementation of the current framework lacks effectiveness, inclusion and uniformity.[12]

For starters, the study will enhance and promote effective realization of the constitutional principle of public participation, as provided for under articles 10, 118 (1) (b), 196 (1) (b), 232 (1) (d) and article 174 (c) of the Constitution of Kenya, 2010. In addition, the findings of the study will be very helpful to judges, policy makers and legislators, as it will provide a yardstick with which to measure the success of the parliament in discharging its constitutional obligations with regards to facilitating public participation. Furthermore, the study is expected to influence the quality of future legislative developments, especially the current public participation bill, 2020, whose principal object is to provide an effective public participation framework both at the county and national government levels.[13]

[11] Government Printer (2020), Report of the Steering Committee on the Implementation of the Building Bridges to a United Kenya Taskforce 8.
[12] Ibid, 46.
[13] Ibid, Xviii.

1.8 Literature Review

Even before the ink of the Constitution dried, there were contestations about the concept of public participation with respect to its scope and applicability. This new concept sent shockwaves in the academia world, whereupon different scholars and academic commentators have undertaken to unpack the many aspects of the concept. The study conducted a systematic review of the relevant literature. It focuses on those who have analyzed the nature and the structure of the rightin Kenya,as well as those who have examined the efficacy of the Kenya's legal framework in realizing the right. The literature has been organized thematically based on the topics handled in the study.

Philosophical underpinning of the Right

Internationally, there is authoritative literature on the concept of public participation which offers helpful insight in unpacking its place in democratic governance, good governance and protection of human rights. Karen and Rashida have written extensively on the right to public participation in the legislative process and the role of the legislature in the promotion of the right. They argue that the right to political participation ought to be conceived as a fundamental human right, well buttressed by both international and regional human rights instruments.[14] The gist of their argument is that the quality of a legislation and citizenship is better when legislators are required to invite and attend to public input.[15]

The duo argues that according to the ICCPR, *the freedom of expression* right and *the political*right consists of two essential elements; a right to take part in the conduct of public

[14] Karen Syma Czapanskiy and Rashida Manjoo, 'The Right of Public Participation in the Law-Making Process and the role of Legislature in the Promotion of this right' (2008) 19 (1) Duke Journal of Comparative & International Law 1, 6.
[15] Ibid 4.

affairs and another right.[16] They posit that the ICCPR guarantees not only the 'right' but also the 'opportunity' to take part in the conduct of public affairs.[17] She says that such conception can be derived from the wording of the United Nations Human Rights Committee's General Comment No. 25[18] and the African Charter on Human and People's Rights (African Charter)[19] both of which anchor the freedom to participate in government directly, and places an obligation on the state to ensure that people are well informed of their political rights. Their work is useful to the current study as it helps it appreciate the theoretical foundations of the right.

Aida Girma[20] writes that public participation is a fundamental dimension of democracy and an essential factor in the strengthening and maturing of democracies. She argues that effective public participation in the legislative process not only safeguards and promotes citizen's Constitutional right, but it also places an obligation on the law-making institutions to provide feedback and share information in an accessible manner.[21]She says that access to information is not only a constitutional right but an important pre-requisite for effective public participation meaningful and responsive to the majority of the public. She argues that the right to access information is vital and essential in the pursuit of an effective public participation. Her work is vital to the current study as it makes the study appreciate the significance of information rights in the context of the public participation.

[16] The other tenet is the right to vote and/or to be elected.
[17] Karen Syma Czapanskiy and Rashida Manjoo (n 14) 7.
[18] Office of the U.N. High Comm'r for Human Rights [OHCHR], *International Covenant on Civil and Political Rights, General Comment No. 25*, adopted July 12, 1996, para 1.
[19] Article 9, 13, 25 of the African Charter.
[20] Aida Girma, 'Effective public involvement in the oversight processes of Parliaments and Provincial or Regional Legislatures' (South African Legislative Sector 2012 Consultative Seminar: Strengthening Democracy through Global Collaboration of Legislatures on Oversight, March 2012) 5.
[21] Ibid 6.

The Nature and Structure of the Right to Public Participation in Kenya

Yash Pal Ghai gives a practical guidance on how governments can enhance efficacy ofminorities' rights to participate in the economic, social, cultural and political life of a nation. He argues that a sound regime should provide for the right of the indigenous and minority persons to participate in decision making, while not undermining common values essential to a cohesive society.[22]He argues that modalities of participation should be designed in a manner which encourages political integration of minorities.[23]He posits that the choice of any modality and approach should be informed by two factors; the ultimate goals set by the government and the minorities and the balance between communal and individual rights.[24] The study is significant in that it illuminates the current study on how to assess that efficacy of the Kenyan law in enhancing the protection of minority and marginalized groups.

Yash Pal Ghai outlines the key modalities through which effective participation of the public can be secured. He argues that effective participation can be achieved by employing a mechanism which incorporates the widest possible range of groups and interests. The mechanism should incorporate professionals, religious groups, disadvantaged persons, regional representations, civil society organisations, trade unions, business persons and the political class.[25] He also argues that participation can be enhanced by undertaking a host of activities with a view to enhancing meaningful participation from the public. This would include conducting civic education, supplying required documents in good time, having special arrangements for special groups[26]

[22] Yash Ghai, *Public Participation and Minorities* (Minority rights group international 2003) 2.
[23] Ibid 27.
[24] Ibid.
[25] Yash Ghai, 'Toward Inclusive and Participatory Constitution Making' Presentation at The Constitution Reform Process: Comparative Perspectives 7 (Aug. 3-5), Technical Appendices to the Constitution of Kenya Review Process, 2000-2005 p. 8.
[26] For instance, women for whom separate meetings might be held at times convenient for them.

and minimizing the role of government agents.[27]His contribution is very essential to this current study as the study will employ the mechanisms as the gauge or parameter against which the study will assess the efficacy of the Kenya's legal framework on public participation.

Dr. K I Laibuta explores the legislative process and practical meaning of the term public participation in the law making process in Kenya. He argues that the public has a constitutional right to be involved in, and the state has a corresponding duty to facilitate public participation in the legislative process.[28] He opines that public participation should not be perceived as derogation from parliamentary representation or representation at the County Assembly level.[29] He agrees with Justice Ngcobo's sentiments that the representative and participatory element of an ideal democracy should not be seen as being in tension with each other, but they must be seen as mutually supportive.[30]

He believes that the concept as provided for under the Constitution is in harmony with the democratic ideals on which public participation is established. Importantly, he discusses the role of the Kenyan courts in the realization of this right. He observes that the courts have upheld the sanctity of public participation in legislation-making and the failure to undertake or facilitate public participation has instigated judicial intervention.[31] However, much development has occurred since the publication of his paper, the paper does not interrogate the efficacy of the constitutional framework and the substantive legislations and regulations.

[27]Pg. 8.
[28] K.I. Laibuta, 'The Social Theory of Legislation and Public Participation in Kenya' (*Premier ADR Consultants*, 13 June 2017) 24. <http://adrconsultants.law/wp-content/uploads/2017/06/The-Social-Theory-of-Legislation-and-Public-Participation-in-Kenya.pdf> accessed 21 June 2019. He believes that these two are attainable depending on the mechanisms and the infrastructures provided for in regulations and the Standing Orders.
[29] Ibid.
[30]*Doctors for Life International v Speaker of the National Assembly and Others* (2006) 64-65.
[31] K.I. Laibuta (n 35) 27.

Efficacy of the Kenya's framework on the right to Public Participation

James Kiplagat Sitienei identifies the legal challenges impeding the realization of the right to public participation in Kenya for the periods immediately before the promulgation of the constitution in 2010.[32]He argues that the previous constitutional dispensation did not provide for mechanisms of public participation in the legislative process, and that this situation still largely remains since mechanisms to operationalize the constitutional framework are yet to be put in place.[33]

In order to achieve more effectiveness, he argues that there is no one-size-fit all model for public participation and that each jurisdiction's choice of model is majorly influenced by its overall circumstances, its legal regime and its unique social context.[34] He posits that the mechanisms for public participation ought to take into account the unique socio-political history and the disparities among the different groups of people.[35]His contribution is very significant as it helps the current study appreciate the role of social-economic context of a state as well as how the uniqueness of any country's history should shape and be reflected in their laws.

However, the research does not examine the efficacy of the Constitutional provisions, and the substantive legislations enacted under them since it was published, in 2012, barely two years of its promulgation in 2010 and nothing much had happened with respect to its implementation. In addition, much has happened since its publication with respect to the law on public participation in the legislative process. For instance, there is an emerging jurisprudence emanating from the

[32] James Kiplagat Sitienei, 'Rethinking the practice of representative democracy: a case for increased public involvement in the law-making process in Kenya' (LL.M Thesis, University of Nairobi 2012) 50.
[33]James Kiplagat Sitienei, 'Rethinking the practice of representative democracy: a case for increased public involvement in the law-making process in Kenya' (LL.M Thesis, University of Nairobi 2012) 54.
[34] James Kiplagat Sitienei (n 23) 72.
[35] Ibid 85.

courts on this issue, and majority of the cases were decided past 2012. Furthermore, there was the enactment of the County Government Act and the county public participation guidelines.

Macharia Muriuki[36] analyzes the implementation of the right to public participation at the county government levels. He argues that there are minimal meaningful structures and processes of public participation developed by county governments, since there is no specific law at the national level on public participation, apart from county public participation guidelines.Even though the study is significant in highlighting some of the challenges impeding the efficacy of the right, however, it focuses on participation at the county governments as opposed to the current study which takes a wider national view.

Frank Munyao writes on the efficacy of public participation forums and initiatives in attaining public accountability in Kitui County. He argues that an increase in the number of public forums being held in the County has not led into more public accountability because of lack of civic education, poor distribution and access of relevant documents, poor feedback to the communities, selective participation of people during the forums and short notices for the forums.[37] He also opines that the shared documents are in technical language which is not friendly to persons who cannot read and write and low literacy levels render newspapers an ineffective mode of advertisement.

He also attributes the inefficacy of the forums to the lack of a civic education Act as well as a public participation Act, both of which would be key in outlining guidelines on how to conduct meaningful public participation.[38] He argues that the lack an enabling Act hinders the citizens

[36] Macharia James Muriuki, 'Right to Public Participation in Devolved Governance in Kenya; A myth or a Reality' (LL.M Thesis, University of Nairobi 2016).
[37] Frank Muinde Munyao, 'The Influence of public participation on public accountability in Kenya: The case of Kitui County' (Master of Public Administration Thesis, University of Nairobi 2019) 49.
[38] Ibid 50.

from compelling the county government to undertake certain actions and leaves the manner and approach of carrying out public participation at the sole discretion of the county government to the prejudice of the public.[39] The study is useful to the current study as it illuminates on the challenges impeding efficacy of public participation. However, the study is too specific at it concentrates on Kitui County, while the current study focuses on the national arena.

Jane Ndiba analyses Kenya's law and policy on public participation in environmental decision-making. She argues that Kenya's legal framework is not efficacious in enhancing public participation in environmental matters due to lack constitutional anchorage of the right, lack of access to information rights, inadequate institutional framework and the absence of civic education and public awareness.[40]It also attributes the inadequacy to illiteracy, inadequate means of communication and fragmentation of law and policies on the environment.[41] The study will be useful to this current study in identifying the legal challenges which impeded the efficacy of public participation laws, especially for the periods before the promulgation of the Constitution 2010.

However, so much has happened since the publication of the research. Other than just listing the constitutional provisions on the right to public participation, the study does not reflect the subsequent major legal developments which have happened in the area since 2010. Since the publication of the study in 2011, Kenya has developed a rich jurisprudence on the implementation of the constitutional principles, characterized by major court pronouncements and subsequent legislative interventions in the area.

[39] Ibid 44.
[40] Jane Wanjiru Ndiba, 'Public Participation in Environmental Decision-Making in Kenya: Analysis of Law and Policy' (LL.M Thesis, University of Nairobi 2011) 66.
[41] Ibid 72.

Robert Opaat investigates the factors influencing the quality of public participation in project development within Busia County. He argues that training the public on public participation increases the quality of their participation since it enables them participate meaningfully.[42]He argues that public participation in project management has not been effective due to a host of factors namely inadequate structures to monitor and evaluate the efficacy of the initiatives, serious information asymmetry, lack of access to relevant information and insufficient structures for gathering and analyzing data on community issues.[43] The study is relevant in the current study in identifying factors hindering meaningful participation of the public. However, the study is too narrow as it only deals with Busia County. In addition, it does not pay attention to public participation in legislative activities which are the main concern for the current study.

Mugo Karimi writes on the adequacy of the Kenyan legal framework in enabling public participation in county government legislative processes. She argues that enactment of enabling legislation would warrant that public participation in the county legislative processes is obligatory and structured and simplified.[44] She points out that the law on public participation in legislative processes in the counties is inadequate and this state hampers the meaningful realization of the right.[45]The study is relevant to the current study as it helps it identify challenges impeding efficacy of the right at the county government levels. However, her study is limited in a number of ways, as far as this current study is concerned. First, her findings on the inadequacy of law in this area are not well founded on a critical analysis of the legal framework;

[42] Robert Opaat, 'Factors Influencing Public Participation in Project Development in Busia County Kenya' (Master of Arts Thesis, University of Nairobi 2016) 73.
[43] Ibid 78.
[44] Mugo Karimi Alice, 'Factors Affecting Public Participation in Legislative Procedures in County Governments (A Case Study of County Assembly of Embu)' (Project Paper, University of Africa 2017)16.
[45] Ibid 35, 40-41.

the relevant provisions of the Constitution, a host of statutes touching on public participation in the county government and the county public participation guidelines.

1.9Research Methodology

The study will chiefly utilize a combination of qualitative, doctrinal and comparative methodologies. Under the qualitative approach, it will majorly employdesk review, through which it will be concerned with the quality of the already available data. Doctrinal research will be utilized to analyze the legal, policy and institutional framework in Kenya, by examining the legal provisions, their source and implications. Through this approach, the study will critically analyze the constitutional provisions on the right to public participation, other enabling statutes and governing policies.

Lastly, the study will use the comparative methodology under which it will undertake a comparative study of South Africa. This approach will be essential in identifying, analyzing and explaining the differences between their experiences on their law on the right to public participation, with a view to identify any lessons which Kenya can emulate. It will also utilize secondary sources of data which will include constitutions, government reports, academic journal articles, statutes, books, newspaper articles and court decisions.

1.10 Chapter Breakdown

The study will be comprised of five chapters.

The first chapter will offer the general overview of the trajectory of the whole study. It features the introduction and background of the study which will set the groundwork and bring the research into context. It will also comprise a statement of the problem, which articulates the

particular legal question under investigation, alongside research objectives and research questions. Furthermore, the chapter will provide the hypothesis of the study; the fundamental assumptions which the study undertakes to prove or otherwise. Lastly, the chapter will discuss the methodology of the research and a comprehensive literature review.

The second chapter answers the first research objective by offering an in-depth discussion of the legal theories which inform the concept of Public Participation and on the basis of which the research is founded.

The third chapter answers the second and the third research objectives. It investigates the substance, structure and threshold of the right to public participation in Kenya. It also examines the efficacy of the Kenya's legal and policy framework in realizing the constitutional right to public participation.

The fourth chapter answers the fourth research objective by analyzingSouth Africa's jurisdictionwith a view to identifyinglessonsand best practices that can be drawn from her experiences.

The fifth chapter comprises of conclusions and recommendations. It contains suggestions on the necessary amendments and reforms to the Kenyan law on Public participation.

CHAPTER TWO

THEORETICAL FRAMEWORK

2.1 Introduction

This chapter discusses the theoretical underpinning on which the claim of the study is based. The study claims that the substance of the right to public participation is the right of the subjects to participate in administration and governance. It also claims that the structure of the right entails processes for notifying subjects of administrative decisions, processes for consulting them, and process of taking into account the views of the subjects. Further, it claims that the proper legal framework for exercising a right should define the right, provide structures and process for exercising it, set the threshold and remedies for violation and lastly that this uncertainty can be rectified by defining the right, the structure, and threshold of the right.

The chapter discusses two theories, the Deliberative Democratic theory and the Positivist theory, with a view to investigating whether and the extent to which these theories form the basis of the claim. Under the deliberative democratic theory, the study relies on the scholarly works of its major advocates and proponents, including Graham Smith, Iris Marion Young, Habermas Jürgen, Joshua Cohen, John Rawls and Christiano, all of whom have contributed immensely to the current statue of the Deliberative Democratic theory.

2.2 Deliberative Democratic Theory

The Deliberative Democratic Theoryis a theory of social organization, whose main proponent is Graham Smith and it is traceable to his 2003 work.[46] He is not the only theorist. In fact, his conception of the theory brings together and solidifies earlier views on the conception of the

[46] Graham Smith, *Deliberative Democracy and the Environment* (Routledge 2003) 34.

right to public participation. This notwithstanding, however, there is a common factor which runs through all the theorists in that they pursue a space for inclusiveness and unconstrained dialogue.But it is Joshua Cohen's contribution to the theory which has given it a more tangible body and formation. Joshua's four ideal requirements of deliberations: freedom, equality, reason and consensus.[47]

2.3 Participatory Democratic Theory Distinguished

Deliberative democratic theory must be distinguished from participatory democratic theory with which it is usually confused. Although the former is usually described as 'participatory,' such a description is faulty and misleading. Participatory democratic theory was propounded by Robert Dahl, Arnold Kaufman, John Dewey and Wright Mills.[48] The theory underscores maximum participation of citizens in their self-governance, especially in sectors of society beyond those that are traditionally understood to be political (for instance, the workplace and the household).[49]

The main difference between the two theories of democracy lies with the scope. For the deliberative democratic theory, its main focus on the mode of participation is deliberation amongst citizens and it fails to effectively address sectors of participation namely the workplace and the household.[50] This scope is overly narrow when compared to the scope of the participatory democratic theory. The participatory theory covers both modes and the sectors of participation on the understanding that both sectors and modes of participation are important facets of the theory. The participatory theory will not be discussed in this current study. Most

[47] Laura Fearnley, 'Deliberative Democracy: A Post-modern Utopia?' (2008) 25 (1) esharp Issue 65.
[48] Robert A. Dahl, *A Preface to Democratic Theory* (University of Chicago Press 1956) 47.
[49] Jeffrey Hilmer, 'The State of Participatory Democratic Theory' (2010) 32 (1) New Political Science 43, 43.
[50] Democratic theorists refer to a physical location at which participation occurs as the *Sector* of participation. They refer to the forms of political action as the *mode* of participation. A *sector* includes social, civil and economic realms, the household, neighborhood, associations and classroom etc. The *mode* might include deliberation and collective decision-making.

political scientists have lost interest in the theory, it has since been superseded by the deliberative theory and its state at the beginning of the 21st century is weak.[51]

2.4 Deliberative Democratic Theory

The study approaches the discussion on the theory under several thematic areas. The thematic areas are derived from the theory's conception and approach to certain aspects of the right to public participation. The areas include and start with a discussion on the conception of the right in terms of democratic legitimacy and political liberties. The second thematic area discusses the principles of equality, rationality and freedom of the participants in the process. The third area highlights the role of reason as a guide to reaching consensus during participation. The last thematic area discusses the place of the marginalized groups in the participation process. The approach is justified on the expansive nature of the theory as well as the need to give a clearer demonstration on whether and the extent to which the theory supports the claim of the study.

2.4.1. Democratic Legitimacy and Political Liberties

The theory supports the claim that the substance of the right to public participation is the right of the subjects to participate in administration and governance. Graham Smith posits that citizens should have more than voting to rely on to be involved in the political system and should be granted a continuous opportunity for involvement.[52] He postulates that public participation legitimizes political authority as it promotes structures for checks and balances through which the citizens have more opportunity for involvement in governance.[53] Similarly, Habermas posits that deliberative democracy is an effective tool of securing democratic legitimacy. He believes

[51] Jeffrey Hilmer (n 56) 44.
[52] Graham Smith (n 53) 56.
[53] Brett Cherniak, 'Critiquing the Role of Deliberative Democracy in EE and ESD: The Case for Effective Participation and Pragmatic Deliberation' (2009) (72) Examensarbete i Hållbar Utveckling 11, 11.

that the legitimacy of a collective decision is pegged on the extent to which the decision has included and considered the views of those who will be affected by the decision.[54]

The theory backs the claim that subjects of any system should be given an opportunity to participate in governance because it is an expression of their political liberties. Cohen advances the theory by fronting the principle of deliberative inclusion in which he argues that the concept of deliberative democracy is not just about the interests of others being given equal consideration. He argues that in addition, the concept demands that the policy makers must find 'politically acceptable reasons' which are acceptable to other persons who have different conscientious conviction.[55]

2.4.2 Equality, Rationality and Freedom of the Participants

Deliberative Democratic theorists argue that the nature of the right to public participation is underpinned by the principle of equality, rationality and a healthy discussion characterized by merit-centered weighing of ideas. John Rawls and Jurgen Habermasargue that effective deliberation ought to be informed by rationality, equality and free exchange of ideas. The duo believes that these three tenets make public participation the most effective tool for resolving reasonable differences within a pluralistic society.[56]They postulate that deliberation ought to be founded on three fundamental assumptions; that parties taking part are formally and substantially

[54] Wendy Russell and Lucy Parry 'Deliberative Democracy Theory and Practice: Crossing the Divide' (Deliberative Democracy Researcher and Practitioners Workshop, University of Canberra, Institute for Governance and Policy Analysis, March 2015) 6.
[55] Joshua Cohen, 'Procedure and Substance in Deliberative Democracy,' in James Bohman and William Rehg (eds), *Essays on Reason and Politics: Deliberative Democracy* (The MIT Press 1997) 417.
[56] Wendy Russell and Lucy Parry (n 61) 3.

equal and that the deliberations are informed by the quality of the arguments (best arguments), reason and not coercion.[57]

A sound regime of the right to public participation should place more premiums on the freedom of the participants to engage in the process and to be bound by the outcome. According to Joshua Cohen's articulation, which has been endorsed by most advocates of deliberative democracy, the ideal public deliberation should be free in the sense that the participants must regard themselves as ready to be bound by the outcomes of their deliberation.[58]

In addition, the regime should be founded on the idea of equality between the participants in the sense that none of them should have added advantage in the process of presenting views. Cohen postulates that participants ought to be formally and substantially equal in the deliberation process. Formally, the procedural rules governing the process should grant equal opportunities for contribution without singling out some participants. Substantially, on the other hand, the existing distribution of power and resources should not impact their chances to contribute to the deliberations. In addition, he argues that the participants should not feel restrained by the existing substantive rights except to the extent that such rights seek to enhance free deliberation among equals.[59]

2.4.3 Reason as a Guide to Consensus

Cohen argues thatthe deliberations should be purely informed by reason, informed proposals and not by private preferences of participants.[60] To some extent, Cohen's argument that

[57] Ramya Parthasarathy and Vijayendra Rao, 'Deliberative Democracy in India' (Policy Research Working Paper 7995, World Bank Group Development Research Group, Poverty and Inequality Team March 2017) 3.
[58] Cohen Joshua, 'Deliberation and Democratic Legitimacy' In James Bohman and William Rehg (eds.), *Deliberative Democracy: Essays on Reason and Politics* (The MIT Press 1997) 74.
[59] Ibid.
[60] Cohen Joshua (n 65) 74.

deliberationsshould be grounded upon reason is a restatement of the Jurgen Haberman's idea that consensus during deliberations ought to be arrived at by no force 'except the force of the better argument.'[61]Laura explains that the appeal to reason is based on two fundamental assumptions: that arguments should not be justified by private preferences and that participants ought to be willing to alter their preferences as a result of an objective and a reasoned debate.[62]

The right to public participation should have a structured way of reaching some level of consensus amongst the participants, even in circumstances where deliberations have hit a quagmire and participants cannot decide unanimously or cannot reach a strong consensus. In these occasions, Cohen proposes that participants should subject the deliberation process to a voting exercise, subject to some form of majority rule.[63]

2.4.4 Marginalised Groups

However, the 'majority rule' should be a general principle subject to exceptions especially where the majority view violates and excludes the interests of minority groups and the marginalized. Cohen's proposal for the majority rule has been criticized by Young for two reasons. Young argues that value pluralism in the contemporary societies makes consensus very unlikely and that a consensus arrived via the majority rule violates the plurality and may oppress or exclude certain identities, interests and ideas.[64] In what he refers to as 'a weak consensus account,' Young advocates for some form of consensus that is cognizant of the value plurality, and which does not exclude certain unpopular identities.[65]

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[61] Habermas Jürgen, *Theory of Communicative Action: Reason and the Rationalisation of Society* (Heinemann 1984) 25.
[62] Laura Fearnley (n 54) 67.
[63] Cohen Joshua (n 65) 75.
[64] Young Iris, 'Activist Challenges to Deliberative Democracy' (2001) 29 (5) Political Theory 671, 680.
[65] Laura Fearnley (n 54) 68.

A proper regime of the right to public participation should adopt mechanisms which will bring on board the views of the disadvantaged groups and the marginalized. Lucy Parry, while critiquing the representativeness of deliberative processes as being imperfect, proposes stratified sampling as the better option. She credits stratified random sampling as being effective especially for granting equal opportunities to those marginalized groups like persons with disabilities and minority ethnic groups, both of whom are usually excluded from deliberation processes.[66]

2.4.5 Flexibility of the Approach

The theory supports the idea that the manner of carrying out public participation is very flexible since it can take different forms and the choice of any approach should be informed by the surrounding circumstances and the nature of the policy being made. Habermas posits that deliberation can take the form of macro deliberation or micro deliberation or a combination of the two, better known as 'the deliberative system.' While as the first form involves structured deliberative forums involving small number of participants, the second form involves open and unstructured discussions involving the broader public sphere.[67] But best amongst the three forms is 'the deliberative system,' which combines the features of micro and macro deliberation and in encourages public deliberation in multiple spaces.

Habermas opines that 'the deliberative system' approach is the most effective tool of steering public participation in a pluralistic society because it goes beyond the two distinct forms and adopts a more sophisticated, flexible and robust form, able to appreciate the variant views and interests of a pluralistic society. And what is more about the 'deliberative systems approach' is

[66] Wendy Russell and Lucy Parry (n 61) 8.
[67] Wendy Russell and Lucy Parry (n 61) 6.

that it facilitates deliberations in a broader context comprising multiple, differentiated, yet interconnected spaces and allows a flexible procedure ranging from loose informal social gatherings to highly structured forums.[68]

2.5 The Legal Positivism

2.5.1 Introduction

The study also discusses the Legal Positivism theory with a view to investigating whether and the extent to which the theory supports the claim of the study. It analyzes the major proponents led by David Hume, Jeremy Bentham, John Austin, Hans Kelsen and HLA Hart. Essentially, the study discusses how their different contributionssupport the claim of the study with respect to the nature of the right to public participation. The theory grew in response to the failures of the Natural law theory which assumes that there is duality of systems: man-made law versus natural law derived from principles of morality and nature. On the basis of this assumption, the theory emphasizes that man-made law must conform to the principles of morality and nature.

2.5.2 Major Proponents and Their Contribution

The nature of the Positivism theory is defined by three theses: the separability thesis, the pedigree thesis and the discretion thesis, each of them underscoring an important tenet of the theory. The separability thesis asserts that there is a necessary separation between law and morality because law and morality are conceptually distinct and that laws do not have to satisfy certain demands of morality for them to gain legitimacy. The pedigree thesis, on the other hand, asserts that the legal validity of a particular norm is a question of certain social facts. The third

[68] Ibid 7.

thesis, the discretion thesis, asserts that judges decide difficult cases by making new law in the exercise of discretion.[69]

Although it is John Austin who gave the theory a more concrete form, the scanty history of the theory can be traced back to the earlier writings of Jeremy Bentham. In his previous works, Bentham had criticized the then nature of common law, which he felt was chiefly guided by natural law and customs. His major concern was that the practice of common law could be equated to 'dog-law'-the practice of waiting for one's dog to do something wrong, and then beating it.[70] He claimed that as a result of the practice, the courts' decisions turned out to be a capricious selection of whichever precedent suited the judge's prejudice. He proposed that the remedy lies in a universal rational legislation and a conscious separation of law and morality.[71]

John Austin advanced the command theory in which he defined law as a command of the sovereign backed by a threat of a sanction. John Austin's contribution would later be criticized by HLA Hart, who felt John's description of the law was very restrictive, as it was only concerned with laws which took the form of criminal law, excluding other laws like contract law and the law on will in which the there was no identifiable threat of a sanction.[72] HLA Hart proposed that a legal system is a combination of primary and secondary rules. While as he acknowledged that the primary rules include the criminal laws which had been earlier discussed

[69] Kenneth Einar Himma, 'Legal Positivism' (*Internet Encyclopedia of Philosophy*, June 2018) <https://www.iep.utm.edu/legalpos/>accessed 5 February 2020.
[70] Daniel Gebrie and Hassen Mohamed, '*Ethiopian Justice and Legal Research Institute Teaching Material on Jurisprudence*' (2008) 50.
[71] Ibid 51.
[72] Andrew Stumpff Morrison, 'Law Is the Command of the Sovereign: H. L. A. Hart Reconsidered' (2016) 29 (3) International Journal of Jurisprudence and Philosophy of Law 364, 366.

by John Austin, the secondary rules include principles on how the primary rules came into force, how they can be changed and how disputes at to their legality could be adjudicated.[73]

Hans Kelsen advanced a pure theory of law in which he argues that the law is a system of norms. In addition, he explains the role of a basic norm-Grundnorm in a legal system and the hierarchy of norms. His contribution underscores two principles: that norms that derive validity from a basic norm belong to the same legal system and that all legal norms of a particular legal system derive their validity from one basic norm.[74] Kelsen used the theory to explain the unity of a legal system and the reasons for the legal validity of norms. But at the centre of the theory is the principle the validity of a norm is determined by its conformity with the grund norm.

2.5.3 The Contribution to Human Rights and Application of the Law

The legal positivism theory supports the claim of the study on the possibility of rectifying the current uncertainty by enacting a law which expressly defines the right, the structures and processes and the threshold. Taken wholesomely, the positivism theory underscores two key tenets, which are fundamental in the promotion and protection of human rights. First, by requiring that the law be posited and publicly promulgated, the theory obligates the government to expressly notify its citizens of their rights, obligations and consequences. Consequently, this leads to uniformity and certainty in regulating conduct. With this, citizens and litigants are assured certainty and they can easily predict their lives and the chances of their litigation respectively.[75]

[73] Michael Payne, 'Hart's Concept of a Legal System' (1976) 18 (2) (4) William & Mary Law Review 287, 288.
[74] Andrei Marmor, 'The Pure Theory of Law' (*Stanford Encyclopedia of Philosophy*, June 2016) <https://plato.stanford.edu/entries/lawphil-theory/>accessed 5 February 2020.
[75] Daniel Gebrie and Hassen Mohamed (n 77) 46.

The second tenet of the positivism theory addresses the role of judges in adjudication of disputes. Essentially, it prevents the judges from making laws by requiring them to strictly and exclusively employ the applicable existing laws. In the pursuit of maintaining the integrity of the law, the theory obligates judges to decide cases in accordance with the law and not to seek guidance from subjective notions of equity.[76] The theory does not allow the judges to go before the parliament in the sense that should a judge be dissatisfied by the application of a particular statute, the recourse lies with notifying the parliament of the shortcomings of the statute, upon which the parliament will exercise its legislative role.

The evidence on the shortcomings on the right and shortcoming of the legal framework is to be found in amorphous definition in Constitution, statutes and judgments as well as in conflicting interpretations by court, administrators, subjects and legislators. The evidence of how the shortcoming in the legal framework for exercising the right is to be found is in conflicts between administrators and subject's contradictory decisions. In addition, the evidence of how the legal framework can be reformed to make facilitated exercise of the right is to be found in the success of the legal framework of other jurisdictions such as South Africa.

2.6 Conclusion

The chapter reveals that the two theories, the Deliberative Democratic theory and the Legal Positivism theory, do indeed support the claim of the study. Largely, the deliberative democratic theory forms the basis of the claim with respect to the substance of the right to public participation, the structure of the right, the structures and processes for exercising the right and the threshold of the right. On the other hand, the chapter shows that the Legal Positivism theory

[76] Ibid 47.

supports the claim especially with regard to the possibility of rectifying the current uncertainty by enacting a law with a view to defining the right, the structure and the threshold of the right.

CHAPTER THREE

KENYA'S LEGAL FRAMEWORK ON PUBLIC PARTICIPATION

3.1 Introduction

In chapter two, the study has established its hypothesis that lack of definitions, structures and the unsettled state of the legal framework for exercise of the right to public participation makes the right problematic. The study proceeds on a fundamental assumption that this hypothesis is a sound theory of a model legal framework for public participation. The current chapter employs this theoretical model to test the Kenya's legal framework on the implementation of the right in terms of its definition, structure and threshold. The chapter seeks to investigate and determine the extent to which the Kenyan legal framework conforms with or deviates from the theoretical model.

The chapter has three parts. It starts with a discussion on the constitutional framework of the right. Thereafter, part two deals with sectorial approach to public participation in four thematic areas namely, governance and devolution, legislative process, environmental law and public finance. Part three examines the extent to which Kenyan courts have conformed with or deviated from the theoretical model on interpretation of the right to public participation with respect to its definition, its nature, and its threshold.

3.2 Constitutional Framework

The drafters of the Constitution 2010 placed a high premium on the right to public participation and underscored its role in public decision making. Throughout its body, the constitution apportions duties to various state organs with respect to the realization of the right. The state is mandated to encourage public participation in the management, protection and conservation of

the environment.[77] With respect to legislative processes, Parliament is required to facilitate public participation and involvement in the legislative and other business of Parliament and its committees.[78] Similarly, involvement of the people in policy making is a value of public service[79] and public participation has been enlisted as one of the guiding principles of public finance.[80]

This constitutional recognition sent shockwaves across the legal system and soon statutes were enacted to substantiate the constitutional provisions. Majority of the statutes enacted after the promulgation of the new Constitution have elaborate provisions on how the public should be engaged in the legislative and decision making processes. These include the Public Finance Management Act,[81] the County Government Act,[82] the Urban Areas and Cities Act[83] and the Public Procurement and Disposal Act.[84]

3.3 SECTORIAL APPROACH TO PUBLIC PARTICIPATION

Due to lack of a single unifying statute on public participation, the right has been enhanced under various statutes bringing forth different regimes for different sectors. The study has singled out four key thematic areas. It undertakes to investigate how the concept of public participation has been enhanced in these particular sectors as well as determine the extent to which the approach conform with or deviate from the theoretical model. The four thematic areas are governance and devolution, legislative process, land and environment and public finance.

[77] Constitution of Kenya, 2010 Article 69 (1) (d).
[78] Constitution of Kenya, 2010 Article 118 (1) (b).
[79] Constitution of Kenya, 2010 Article 232 (1) (d).
[80] Constitution of Kenya, 2010 Article 201 (a).
[81] Public Finance Management Act, No. 18 of 2012.
[82] County Governments Act, No. 17 of 2012.
[83] Urban Areas and Cities Act, No. 13 of 2011.
[84] Public Procurement and Disposal Act Cap 412C.

3.3.1 Public Participation in Public Finance

Kenya has a robust framework incorporating the right to public participation in the budgetary preparation process. The framework apportions duties to different actors including the Parliamentary Budget Office, the Cabinet Secretary for Finance and member of the County Executive committee for finance and the parliamentary finance committee. During budget preparation, the Parliamentary Budget office is required ensure public participation in the entire process.[85] The Cabinet Secretary, on the other hand, is mandated to incorporate public participation in the various stages of budget making for the national government.[86]

For the county governments, the duty is bestowed on the County Executive Committee member for finance.[87] In addition, public participation has been extended to cover budget making processes for urban areas and cities. For instance, during the preparation of the annual budget estimates, the accounting officer of the urban area is required to ensure that the public has an opportunity to participate in the preparation process as well as the optional duty to publish guidelines for public participation.[88]

And what is more is the articulacy with which the law has incorporated citizen participation in management of public finance. Subsidiary legislation is required to address various facets of public participation including the manner of conducting public meetings and hearings and the various procedures and processes for participation. In equal measure, the law has addressed human rights concerns and embraced the diversity of the members of the society. It incorporates

[85] Public Finance Management Act, s 10 (2).
[86] Public Finance Management Act, s 35 (2).
[87] Public Finance Management Act, s 125 (2).
[88] Public Finance Management Act, s 175 (9) (b).

the voice of the marginalized and special groups like the women and people with disabilities.[89] It expounds the idea of community participation by highlighting matters with regard to which community participation is encouraged and setting out the rights and duties of the members of the community.[90]

Noteworthy, the Kenyan law seeks to empower the members of the public by granting them necessary information rights. The National Treasury is obligated to avail relevant data in the pursuit of meaningful participation. It should publish budget estimates therein explaining and summarizing budget proposals. It is also required to communicate the date and venue for sectoral forums a week prior to their scheduled time. Further, at the beginning of each financial year, the Treasury is required to release a calendar indicating the events to be undertaken throughout the year.[91] And in what seems as a bid to enhance accountability in the entire process, the cabinet secretary is required to account on the extent to which members of the public were consulted.[92]

Another striking feature of the regime is the dynamism and flexibility of the participatory process. While the various strategies give the participants a free hand in going for the most suitable channel, they also embrace technology. The participation can take the form of written submissions, open forums, media and online platform.[93] In the same lengths, there are safeguards incorporating formality and necessary order in the participatory process. The cabinet secretary is required to prescribe how the written submissions should be submitted and the timelines within

[89] Public Finance Management Act, s 207 (2) (a-i).
[90] Public Finance Management Act, s 207 (2) (a-i).
[91] The Public Finance Management (National Government) Regulations, 2015 s 6 (2).
[92] The Public Finance Management (National Government) Regulations, 2015 s 7 (4).
[93] The Public Finance Management (National Government) Regulations, 2015 s 7 (1) (a).

which they should be publicised.[94] With respect to open forums, the process is done at designated venues and specified dates.[95]

3.3.2 Public Participation in Governance

To a great extent, public participation is an integral part in the governance of urban areas, cities and municipalities. The Kenyan regime paints a picture of a system which has empowered the citizens to present their views, opinions and concerns on the governance of cities and other urban areas of residence. To begin with, institutionalization of residents' participation is an underlying principle in the management of the affairs of an urban area.[96] In addition, institutionalization of participation by residents is a factor for consideration when classifying a governance unit as either a city or a municipality.[97] Towards this end, the board of a city or municipality is required to ensure resident's participation in decision making and its programmes.[98] On top of this, the law prescribes duties and right of residents with respect to achieving effective participation in the management of urban areas.[99]

Residents have been clothed with rights designed to achieve effective participation in governance of urban areas. There are detailed guidelines on how the right to contribute to the decision making processes should be realized. The manner of doing the contributions is by submitting presentations to the town committee through designated persons.[100] In return, residents have a

[94] The documents submitted to Parliament and any other published documents are to be published and publicised within 7 days of presentation.
[95] The Public Finance Management (National Government) Regulations, 2015 s 7 (1).
[96] Urban areas and Cities Act s 11 (d).
[97] Urban areas and Cities Act s 5 (1) (f); 9 (3)(f).
[98] Urban areas and Cities Act s 21 (1) (g).
[99] Urban areas and Cities Act, Second Schedule on –Rights and Participation by Residents in Affairs of their City or Urban.
[100] These persons include city or municipal manager or the town administrator.

right to prompt responses to the concerns they have raised.[101] Perhaps in a bid to enhance the enforceability of the right, the law has imposed corresponding duties on the authorities. These duties are designed to empower the public in attaining full enjoyment of the right. The authorities are required to inform the public of decisions affecting their reasonable expectations, property and rights. In addition, they are under an obligation to regularly disclose the state of affairs of the urban area.[102]

The legal framework is at best a suitable balance between the need for a flexible regulation and the need for an orderly and formal way of carrying out the process. On the one hand, the system underscores flexibility of the entire procedure by prescribing the various forms through which participation can be achieved. It can take the form of a petition, a complaint, public comments procedure, public meetings and hearings and consultative sessions.[103] On the other hand, the system emphasizes the need for an orderly procedure by setting out the parameters within which participation is to be done. The urban area is required to set out the suitable conditions for participation as well as ensuring non-interference with the relevant body's right to govern. [104]

In addition, the legal framework appreciates the diversity of the members of the public and the principle of inclusivity. The urban area is required to reach out to the needs of marginalized groups in the society who would otherwise have no equal footing on the participation process. These persons include the illiterate members of the society, persons with disabilities, the youth, issues of gender equity and minority and marginalized groups.[105] With all these positive

[101] Urban areas and Cities Act, Second Schedule, 1 (1) (a).
[102] Urban areas and Cities Act, Second Schedule, 1 (1) (c-d).
[103] Urban areas and Cities Act, Second Schedule, 2 (1) (d).
[104] Urban areas and Cities Act, Second Schedule, 2 (1) (a).
[105] Urban areas and Cities Act, Second Schedule, 2 (3).

attributes, the on law urban areas and cities can be regarded as the most comprehensive in terms of institutionalizing the ideal concept of public participation in a contemporary society.

3.3.3 Public Participation and Environmental Concerns

In environmental law discourses, the right to public participation has been viewed as a principle of sustainable development. The Environment Management and Co-ordination Act (EMCA) is one of the earliest Acts which introduced and institutionalized the concept of public participation in the country. The principle of public participation is a requirement in the development of processes, plans and policies for the management of the environment.[106]

The onus is placed on the National Environmental Management Agency (NEMA) to ensure that there is sufficient and credible public participation before issuing licenses under EMCA. Failure to do so such licenses can be challenged in the National Environment Tribunal (NET) and subsequently in the Environment and Land Court (ELC) through an appeal. The principle of public participation is a requirement in the development of processes, plans and policies for the management of the environment.[107] The Environment and Land court is bound, whenever exercising its jurisdiction, to uphold the principle of citizen involvement in the development of policies for the management of land.[108]

3.3.4 Public Participation and Devolution

Post 2010, there have been considerable legislative developments designed to operationalize public participation at the county governments. One of such laws is the County Governments Act 2012, whose purpose is to provide for public participation in the conduct of the businesses of

[106] Environmental Management and Co-ordination Act, s 3 (5) (a).
[107] Environmental Management and Co-ordination Act, s 3 (5).
[108] Environment and Land Court Act, s 18 (a) (1).

county assemblies.[109] The Act makes public participation a compulsory requirement in every aspect of county planning.[110] In the pursuit of promoting public participation, the county government is mandated to incorporate the role of non-state actors in its planning process.[111]

Citizens have essential access-to-information rights designed to place them at a better position in the deliberating process. They have a right to receive sufficient information on matters being considered in the planning process.[112] The information to be supplied and the documents to be provided include strategic environmental assessment reports, environmental impact assessment reports, expected development outcomes, development options as well as their cost implication.[113] These requirements underpin meaningful and informative engagements during the public participation. County assemblies have a duty to develop laws and regulations to institutionalize citizen participation in performance management and development planning.[114]

3.3.5 Public Participation in the Legislative Process

Parliament has taken commendable steps in actualizing its constitutional mandate of facilitating public participation in its legislative businesses. In practice, much of citizen involvement takes place when a Bill is at the Committee stage. The committee facilitates participation through a combination of several mechanisms the diversity of which seeks to encompass meaningful participation. Participation can be done through memoranda, public hearings, stakeholder consultations and expert consultations.[115] And what is commendable about the practice is that the views of the public do matter. The committee usually considers the views of the public when

[109] County Government Act s 3 (f).
[110] County Government Act s 115 (1).
[111] County Government Act s 104 (4).
[112] County Government Act s 115 (b).
[113] County Government Act s 115 (1)(b).
[114] County Government Act s 115 (2).
[115] The National Assembly, *Public Participation in the Legislative Process* (Factsheet No. 27) 3.

deliberating on the Bill and in the preparation of its report to the House.[116] The duty to facilitate public participation applies to enactment of Acts of parliament and subsidiary legislations.[117]

Moreover, the framework pays special attention to subsidiary legislations touching on business interests and competition. Before issuing such rules, the regulation-making authority is under a duty to consult persons who are likely to be affected by the proposed legislation.[118] Noteworthy, the framework is interested in the substance of the consultations rather than the form. For instance, the consultations should be informed by knowledge of experts from the field being legislated and interested persons should have had an adequate opportunity to express their views.[119]

The right of public access to parliamentary proceedings is jealously guarded on grounds of public policy and national security. While the members of the public and the media have a right to attend parliament sittings, this right is not absolute and it might be limited on several occasions where the Speaker has justifiable grounds for the limitation.[120] A chairperson of a committee can allow in camera sessions when satisfied that there exists enough reasons to exclude members of the public in the activity.[121] Perhaps in a bid to insulate the process from possible misuse, a request for in camera session must be supported by reasons for the request.[122]

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[116] Ibid.
[117] *Kenya Association of Manufacturers & 3 others v Cabinet secretary, Ministry of Environment and Natural Resources & 3 others* [2018] eKLR 91. (A gazette Notice banning the use, manufacture and importation of all plastic bags was subjected to public participation). See also *Anthony Otiende Otiende v Public Service Commission & 2 others* [2016] eKLR 63. (Promulgation of prescribed LRA Registration forms required public participation). Subsidiary legislation also applies to rules, orders, direction, form, by-law, resolution. See Statutory Instruments Act, 2013 s 2. (The section on the definition of a statutory instrument).
[118] Statutory Instruments Acts, 2013 s 5 (1).
[119] Statutory Instruments Acts, 2013 s 5 (2).
[120] The Constitution of Kenya 2010, Article 118 (2).
[121] The National Assembly, *Public Participation in the Legislative Process* (Factsheet No. 27) 5.
[122] Ibid.

The practice adopted by the Parliament is based on in-build processes designed to underscore transparency and credibility of the process. For starters, the Parliament has adopted a commendable mode of operation which aims at optimal citizen engagement. The process kicks off with creation of awareness by placing advertisements in print and visual media. This is followed by identification of interested groups and key stakeholders, after which they are contacted and invited to attend meetings and submit memoranda.[123] This is not a mere procedural event, and the parliament is equally concerned with the substance in the procedure. Potential participants have a right to receive necessary information prior to the session as well as being afforded enough time to prepare written or oral submissions.[124]

3.4 COURT'S INTERPRETATION OF THE RIGHT TO PUBLIC PARTICIPATION

3.4.1 Introduction

This part discusses the jurisprudence emanating from Kenyan courts with a view to testing it against the theoretical model established under chapter two. It has special focus on several issues namely the definition of the term 'public participation,' the threshold for attaining public participation, the reasonability test of gauging the threshold and the two aspects of the reasonability test. In addition, the part will investigate whether public views do matter in terms of whether the parliament has a duty to incorporate them into the final legal document. Furthermore, it will analyze the role of the court in all these. It will also outline other legal principles which can be derived from the Kenya experience.

3.4.2 Definition and threshold for public participation

[123] The National Assembly, *Public Participation in the Legislative Process* (FactSheet No. 27) 4.
[124] The National Assembly, *Public Participation in the Legislative Process* (FactSheet No. 27) 5.

Kenyan courts have devised an objective test for determining the threshold of public participation. The objective test of 'reasonableness' was first advanced in *Nairobi Metropolitan Psv SaccosUnion Limited v County Of Nairobi Government*.[125] The court established that it should not matter how the participation is effected, what counts is whether the public has been accorded some reasonable level of participation.[126] This basic rule was developed later in 2016, where the court demystified the idea of reasonableness. The court in *Republic v County Government of Kiambu* held that the measure or gauge for public participation is twofold; that the public has had a reasonable opportunity to know about the issue *and* reasonable opportunities to have an adequate say.[127] Perhaps to achieve more clarity, the Court held that what amounts to a 'reasonable opportunity' will depend on the circumstances of each case.

In principle, the objective test of reasonableness underscores the substance of the process and not a mere satisfaction of the procedural part of it. Courts are not concerned with the manner adopted, provided the public is granted a reasonable level of participation.[128] The Court of Appeal has held that the idea public participation should include and be seen to include three aspects: dissemination of information, invitation to participate in the process and consultation on the proposed legislation.[129]In most instances, courts will readily agree that there were deliberate attempts to achieve public participation, leaving the question for determination to be whether the attempts met the test of reasonableness.

[125]*Nairobi Metropolitan Psv Saccos Union Limited &25; others v County of Nairobi Government & 3 others* [2013] eKLR 47.
[126] Ibid.
[127] Ibid para 50. 'The yardstick for public participation is that a reasonable opportunity has been given to the members of the public and all interested parties to know about the issue and to have an adequate say.'
[128]*Nairobi Metropolitan Psv Saccos Union Limited &25; others v County of Nairobi Government & 3 others* [2013] eKLR para 47.
[129]*Kiambu County Government & 3 others v Robert N. Gakuru & Others* [2017] eKLR para 22.

3.4.3 The two aspects of the reasonability test: quantitative and qualitative aspects

In determining whether public participation has met the reasonableness test, courts have impliedly approached the question by analyzing two key aspects of the participation process: the quantitative and the qualitative aspect. This two-aspect approach can be traced to 2014, where the court in *Robert N. Gakuru v Governor Kiambu County* held that the spirit of public participation ought to be attained both quantitatively and qualitatively.[130]The quantitative aspect is interested in the numbers, and seeks to answer the question whether the mode of soliciting participation reached out to the possible maximum number of the members of the public. The qualitative aspect on the other hand is concerned with the substance in the procedure. It addresses itself on whether the manner and process of participation enabled the participants engage meaningfully and adequately.

3.4.4 The quantitative aspect

The quantitative aspect requires the parliament to take all reasonable measures to notify and inform as many persons as possible. The law-making bodyis required to utilize a combination of extensive fora like places of worship, public barazas and other avenues where the public are known to converge, national radio broadcasting stations as well as vernacular stations.[131] Courts emphasize on the popularity of the radio station as well as publication of the bill in the dailies with the widest circulation.[132] Better still, if the publication has a timetable with dates and designated venues for engaging the stakeholders and the public.[133] This principle has granted

[130]*Robert N. Gakuru & Others v Governor Kiambu County & 3 others* [2014] eKLR para 75.
[131] Ibid.
[132]*Lucy Wanjiru & another v Attorney General & another* [2016] eKLR 20.
[133] Ibid para 33.

law-making bodies a broad measure of discretion on how to reach the maximum number of participants.[134]

In several occasions, courts have invalidated legislations for failure to meet the quantitative aspect. This includes a case where a few people were huddled in a five star hotel for one day, cases of one day newspaper advertisement and instances where participation was done through tweeting.[135] Courts have declined to approve a participation channel which focuses on the media, while leaving out other more efficient alternatives like hall meetings, public fora, notice boards and ICT based platforms.[136]

3.4.5 Qualitative Aspect

The qualitative aspect requires the parliament to provide the invited participants with sufficient information and enough time to prepare for the participation. The aspect revolves much around information rights and the public's right to timely access to information and documents.[137] The aspect seeks to examine whether, looking at the whole process, the participants had an adequate opportunity to prepare and make meaningful contribution to the debate.

Courts have invalidated legislations where they deem that the public did not have a fair opportunity to offer meaningful participation. The courts presuppose that for fruitful participation to happen, the public must be aware of the contents of the proposed legislation. This rule was applied in 2014 to rule out a newspaper advert which had invited the public to offer their views on the proposed bill. Although it sought to invite the public, the advert did not

[134] *Moses Munyendo & 908 Others v The Attorney General and Minister for Agriculture* [2013] eKLR 31. See also *Josephat Musila Mutual & 9 others v Attorney General & 3 others* (2018) eKLR 49.
[135] *Robert N. Gakuru & Others v Governor Kiambu County & 3 others* [2014] eKLR para 76. The holding was informed by the level of illiteracy in some parts of the country and the fact that many could not afford/access print media.
[136] *Simeon Kioko Kitheka & 18 others v County Government of Machakos & 2 others [2018] eKLR* para 102.
[137] Constitution of Kenya, 2010 Article 87 (a).

mention much about the bill.[138] It was also employed to decline a case where the public had 4 days to internalize a bill and make meaningful contributions.[139] Likewise, courts declined to recognize a meeting in which the participants were not given a chance to comment on the proposed enactment.[140]Through the aspect still, the High Court has declined to recognize a *Taifa Leo* advertisement and a *Daily Nation* advert which did not disclose the details of the document which the members of the public were to contribute.[141]

The qualitative aspect requires clarity on how the public should obtain copies of the proposed bill. Courts have ignored a letter inviting the public for public participation for failing to indicate where copies of the bill would be obtained and for serving the letter two days to the scheduled date.[142] In all these instances, courts have held that the law-making authority should inform the public where the document in question can be obtained and the charges if any.[143] Courts have upheld a procedure where a *Standard* Newspaper advert gave adequate details, there were vernacular radio announcements, the public was given eight days to submit written views, and they in addition had oral presentations. Moreover, the public was advised on how to obtain copies of the bill.[144]

3.4.6 Does the public views matter? Is there a duty to incorporate them?

Generally, the public views do matter and there is a corresponding duty to incorporate them as far as possible. Courts opine that public participation is not equivalent to mere consultation and that public views ought to be considered as far as possible. According to the courts, public

[138]*Robert N. Gakuru & Others v Governor Kiambu County & 3 others* [2014] eKLR para 79.
[139]*Kiambu County Government & 3 others v Robert N. Gakuru & Others* [2017] eKLR para 26.
[140] Ibid para 11.
[141]*Simeon Kioko Kitheka & 18 others v County Government of Machakos & 2 others [2018] e*KLR para 98.
[142] Ibid para 101.
[143] Ibid para 98.
[144]*Okiiya Omtatah Okoiti v County Government of Kiambu* [2018] eKLR para 90.

participation is not an ornamental procedure done for formality purposes, neither is it a mere cosmetic venture nor a public relations exercise. Thus, it has been held that the procedure should be real and not illusory and that it should not be treated as a mere formality for the purposes of fulfilling the dictates of the constitution.[145]Making the views count by considering them in the law making processensures that the end product truly reflects the public participation and bears the public's seal of approval.[146] A contrary interpretation, the courts opine, would negate the principle of public participation as provided for in the Constitution.

Courts have designed a sophisticated jurisprudence on the extent to which public views should be incorporated into the final document. Generally, the 'duty to consider public views' does not require that all public views be incorporated into the ultimate document. In the same vein, public participation does not imply that certain public views must prevail.[147] In addition, the fact that a particular view has not been incorporated into the policy does not, in itself, constitute a justification for invalidating the law.[148] This has been justified on the grounds that public views are not necessarily binding on the legislature.[149] And perhaps in a bid to avoid participation in vain, parliament is mandated to give the public views 'due consideration' before dismissing them.[150]

The provisions of the final Act must correspond fundamentally to the provisions of the Bill deliberated upon during the public forums. Accordingly, courts have annulled sections of a statute introduced into the Bill after the public hearings and which were not a product of the

[145]*Robert N. Gakuru & Others v Governor Kiambu County & 3 others [2014] eKLR* para 75.
[146]*Republic v County Government of Kiambu Ex parte Robert Gakuru & another* [2016] eKLR para 46. See also *Simeon Kioko Kitheka & 18 others v County Government of Machakos & 2 others* [2018] eKLR 84.
[147]*Nairobi Metropolitan Psv SaccosUnion Limited &25; others v County Of Nairobi Government & 3 others* [2013] eKLR para 48.
[148]*Republic v County Government of Kiambu Ex parte Robert Gakuru & another* [2016] eKLR para 51.
[149] Ibid para 54.
[150]*Simeon Kioko Kitheka & 18 others v County Government of Machakos & 2 others [2018] eKLR* para 113.

public input. A section of an Act which sought to insert a figure of Kshs 5, 000 instead of Kshs 1, 300 as per the Bill was declared unconstitutional for want of public participation as the petitioner could not explain at what stage the alterations were made.[151] For more clarity, the courts have specified the circumstances under which amendments can be introduced subsequent to public participation. It must be the case that the amendment is a product of the public participation and should not be completely new provisions which were neither incorporated in the Bill as published nor the outcome of the public input.[152]

3.4.7 The role of the Court

The courts have restrained themselves from directing the legislature on how to carry out its legislative role. They have reasoned that they should not interfere with the parliament's exercise of its legislative authority, thanks to the doctrine of separation of powers. In a case where the applicants feared that the passing of a bill would be unconstitutional for want of public participation, the court held that the applicants could only approach the court for appropriate orders upon the enactment of the Act.[153] It opined that as far as the legislative role is concerned, the courts have no mandate to intervene however unjust, undesirable, fanciful or arbitrary the Bill may appear.[154]

Courts have pointed out at the inadequacy of the legal framework on public participation. Although the courts agree that the constitution has robust general principles on public participation, they have also pronounced on the paucity of statutes in substantiating the realization of the principle. The Court of Appeal has held that the constitutional provisions have

[151] *Simeon Kioko Kitheka & 18 others v County Government of Machakos & 2 others [2018] eKLR* para 124.
[152] Ibid para 119.
[153] *Robert N Gakuru & another v Governor Kiambu County & 3 others* [2013] eKLR para 20.
[154] Ibid para 22.

been criticized for not going far enough to provide the legal parameters for gauging the nature, extent and amount of acceptable public participation.[155] On the basis of this observation, the courts have signaled the need for a specific statute offering guidance to the public and state actors on these aspects of public participation.[156]

Courts have been evasive on defining key terms indispensable in public participation discourses. The farthest the courts have gone with respect to interpreting the key terms is reiterating the South African jurisprudence. So far, courts have not defined key terms like 'public involvement,' 'public participation' and the phrase 'facilitate public involvement' in the context of law-making process. In addition, although the courts have insisted on the reasonability standard, they have not demystified this standard leaving its meaning fluid and ambiguous. The classification adopted by the study is purely derived from the emanating jurisprudence and has never been authoritatively buttressed on the Kenyan legal framework.

3.4.8 Other general principles

However, the right should not be construed in a manner that hinders the parliament from exercising its law-making authority. While the parliament has the duty to facilitate public participation, the courts have warned that the legislature should not be indebted to the public in a manner which enslaves it to the public.[157]Courts have reasoned that personalized approach to public participation would make the law-making process difficult since it would require much time to reach a consensus on a particular issue.[158]The right to public participation does not

[155]*Kiambu County Government & 3 others v Robert N. Gakuru & Others* [2017] eKLR para 21.
[156] Ibid.
[157]*Republic v County Government of Kiambu Ex parte Robert Gakuru & another* [2016] eKLR para 46.
[158]*Malindi North Resident Association (Manra) & 6 others v Kilifi County Government & 2 others* [2017] eKLR 33.

insinuate a personal hearing for every affected individual.[159] In cases where there are oral public hearings, courts have insisted that not all persons must be heard orally.[160] Similarly, the courts hold that it is not a mandatory requirement that views of each resident must form the basis of the legislation in question.[161]

In addition, courts have not been sympathetic to a petitioner who actually did participate despite having been given a short notice. Courts will not nullify a statute in circumstances where the person seeking invalidation actually took part in the participation. To achieve nullification in these circumstances, the petitioner is required to demonstrate either of two things: that a member of the public was as a result of the short notice locked out from presenting his views[162]*or* that as a result of the short notice, he (the petitioner) was unable to adequately prepare and meaningfully participate in the process.[163]Thus, a petitioner who had personally expressed his views during the participation process lost a petition because he could not demonstrate that he was deprived of an opportunity to offer meaningful participation and neither could he prove that a member of the public had been prejudiced by the short notice.[164]

The scope of public participation is not a one-case-fits-all but rather it's pegged on the significance of the proposed legislation. Courts have held that the nature and the extent of public participation ought to depend on the nature of the legislation.[165]For instance, the duty is higher where the legislation touches vital aspects like payment of taxes and levies.[166] Courts hold that a

[159]*Republic v County Government of Kiambu Ex parte Robert Gakuru & another* [2016] eKLR para 50.
[160]*Robert N. Gakuru & Others v Governor Kiambu County & 3 others* [2014] eKLR para 67. See also *Simeon Kioko Kitheka & 18 others v County Government of Machakos & 2 others [2018] eKLR* para 116.
[161]*Malindi North Resident Association(Manra) & 6 others v Kilifi County Government & 2 others* [2017] eKLR 33.
[162]*Simeon Kioko Kitheka & 18 others v County Government of Machakos & 2 others [2018] eKLR* para 107.
[163] Ibidpara 110.
[164] Ibid para 108.
[165]*Robert N. Gakuru & Others v Governor Kiambu County & 3 others* [2014] eKLR para 59.
[166] Ibid para 75.

bill that has financial ramification on the public deserves a more serious treatment.[167] And what is more is that courts have issued a disclaimer that such a classification should not be used to disregard public participation. It has been held that such a virtual classification does not permit a complete blackout of the public from participation.[168]

3.4.9 Contradictory Trends

The above observations notwithstanding, some courts have also adopted a rather problematic and irregular approach to the concept of public participation. Indeed, they have had no regard to the reasonableness test and have not subjected themselves to the qualitative and quantitative aspects of the test. The upshot is a jurisprudence which cannot be handled with clarity, and which occasion uncertainty amongst administrators, members of the public, academicians, judges and litigators.

In some occasions, for instance, the courts have upheld the constitutionality of some Acts, even where there is overwhelming evidence to suggest that the principle of public participation has been violated. Such was the case in the enactment of the Security Laws (Amendment) Act 2014. On 8th December 2014, the Security Laws (Amendment) Bill 2014 was published in the *Kenya Gazette*, the Bill was introduced for the first reading in the National Assembly the following day and its period for publication was reduced from 14 days to 1 day.[169] An advertisement in the local dailies indicated that public participation with respect to the bill would be held for three days; 10th, 11th and 15th December 2014 in which members of the public would submit their representations on the Bill, through either orally to a parliamentary committee or through written

[167] *Simeon Kioko Kitheka & 18 others v County Government of Machakos & 2 others [2018] eKLR* para 102.
[168] *Robert N. Gakuru & Others v Governor Kiambu County & 3 others* [2014] eKLR para 59.
[169] *Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya &10 others* [2015] eKLR para 16.

memoranda.[170] Against this background was a Standing Order which requires that after its first reading, a Bill ought to be committed to a committee which in turn shall conduct public hearings and incorporate the views and the recommendations of the public in its report.[171]

Notwithstanding the publication of the dates in the dailies, and contrary to the Standing Order, the bill was tabled for the 2nd reading on 11th December, 2014, on the understanding that public participation would continue after the 2nd reading.[172] Attempts to debate the Bill flopped on the morning of 18th December 2014, when it had been tabled for consideration by the Committee of the House, thanks to great disorder in the house, occasioning adjournment of the morning session.[173] Later in the evening of the same day, the Bill was placed before the Committee of the whole house, substantial amendments were proposed and the Bill was finally passed into law amid acrimony and disorder, and without having reflected the proposals made in the House.[174] A petition questioning the legality of the law for want of public participation was dismissed and the Courts were satisfied that the National Assembly had met the constitutional requirement on Public Participation.[175]

This was not the first case where the court upheld a matter in which the legislature was irresponsive to the public views and opinions, as a similar situation happened in 2011, during the appointment of Ms. Winfred Osimbo Lichuma and Mr. Simon Joni Ndubai as the chairperson and member of the National Gender and Equality Commission respectively. During the approval stage at the National Assembly, a departmental committee heard and took submissions from the

[170] Ibid para 17.
[171] Standing Order No. 127.
[172] *Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya &10 others* [2015] eKLR para 18.
[173] Standing Order No. 133.
[174] *Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya &10 others* [2015] eKLR para 20.
[175] Ibid 198.

public and prepared a report for consideration by the full house, in which it recommended the appointment of Mr. Simon Joni, while disapproving Ms. Lichuma's.

Subsequently, the report was passed with some amendments which substantially altered the committee's report by approving Ms. Lichuma's nomination.[176] Even though the appointments were later challenged on grounds of lack of public participation, the court nonetheless found that it was not well suited to determine matters which are best discussed and agreed upon at a policy level in an environment that fosters public participation, consensus building and civic education.[177]

3.4.10 Inadequacy of the Proposed Public Participation Bill and the Draft Policy

Statutory instruments being proposed to address these legal challenges are inadequate in material ways. The Office of the Attorney General has since drafted a Draft Policy on Public Participation while the Public Participation Bill of 2018 has been introduced into the Senate. It's praiseworthy that the Draft Policy offers a basic definition of the term public participation, it provides for information rights and it calls for inclusion of marginalized groups like the youth, women, the elderly and ethnic minorities.[178] However, the Draft Policy does not illuminate the discussion on the reasonableness test, it does not cover persons who cannot read and write. It does not guide on how to examine whether a particular exercise met the constitutional threshold for public participation.

To a large extent, the proposed Public Participation Bill 2018 does not cure the legal challenges identified by the study. If the Bill were to pass in its current form, its enactment to an Act would

[176] *Community Advocacy and Awareness Trust & 8 others v Attorney General* [2012] eKLR Para 12.
[177] Ibid 147.
[178] Office of the Attorney General & the Department of Justice, *Kenya Draft Policy on Public Participation* 24.

not address pertinent legal issues on the concept and the threshold of public participation. The Bill does not define public participation, it does not offer a breakdown of gauging the 'reasonableness test' and it does not provide special rights for marginalized and minority groups like the women and the youth. With respect to timeframes for participation, the Bill leaves it at the discretion of the responsible authority making the legislation vulnerable and open to misuse.

In addition, the Bill does not set a standard approach on the concept of public participation. Instead, it assigns this standard setting role to other persons like the Chief Justice, Cabinet Secretaries, County Assembly Committees and the relevant parliamentary committees.[179] This sectorial approach adopted by the Bill is likely to occasion unstructured jurisprudence in the definition, implementation and realization of the principle of public participation.

And in fairness to the Bill, it should be noted that it partly addresses some of the issues missing in the current legal framework. It provides for access to information rights in preparation of the participation[180] and it is sensitive to the rights of persons with disabilities.[181]The Bill also offers special protection to persons who cannot read and write. The relevant authority is mandated to provide an interpreter for such persons.[182]

3.5 Conclusion

Generally, the chapter reveals that the Kenya's legal framework on the right to public participation deviates from the theoretical model established in chapter two. The framework lacks definitions, structures and processes, and a defined threshold for the right.

[179] The Public Participation Bill, 2018 s 5.
[180] The Public Participation Bill, 2018 s 10.
[181] The Public Participation Bill, 2018 s 5 (2).
[182] The Public Participation Bill, 2018 s 5.

To begin on a positive note, and in fairness to the Kenya's legal framework, it is not all doom and gloom, as there is evidence of partial conformity to the theoretical model. Occasionally, the courts have conformed to the theoretical model as far as they have devised and upheld the objective test for determining whether the requisite threshold of the right has been met.In some way, the courts have stabilized and settled the jurisprudence on ascertaining threshold by employing both the qualitative and the quantitative aspects of the test. Partial conformity with the model has been observed in public finance, governance and devolution in so far as they embrace information rights, dynamism and flexibility of the participatory process and the principle of inclusivity.

However, on the other hand, there is evidence to suggest that in most cases the courts have deviated from the theoretical model in material respects. They have been evasive on defining key terms inevitable in public participation discourses. In addition, some courts have adopted a rather problematic and irregular approach to the concept of public participation. Indeed, several courts have had no regard to the reasonableness test and have not subjected themselves to the qualitative and quantitative aspects of the test. The upshot is a jurisprudence which cannot be handled with clarity, and which causes uncertainty amongst administrators, members of the public, academicians, judges and litigators.

In some occasions, for instance, the courts have upheld the constitutionality of some Acts, even where there is overwhelming evidence to suggest that the principle of public participation has been violated.In addition, although the courts have insisted on the reasonability standard, they have not demystified this standard leaving its meaning liquid and ambiguous. The classification adopted by the study is purely derived from the emanating jurisprudence and has never been authoritatively buttressed on the Kenyan legal framework.

Further, the statutory instruments being proposed to address these legal challenges do not conform to the theoretical model.The Draft Policy on Public Participation does not illuminate the discussion on the reasonableness test and it excludes certain persons especially those that cannot read and write.If the Public Participation Bill were to pass in its current form, its enactment willnot address pertinent legal issues identified in the study. For instance, the Bill does not define public participation, it does not offer a breakdown for gauging the 'reasonableness test' and it does not provide special rights for marginalized and minority groups like the women and the youth.

CHAPTER FOUR

SOUTH AFRICA'S LEGAL FRAMEWORK ON PUBLIC PARTICIPATION

4.1 Introduction

By way of comparison, this chapter uses the theoretical model developed in chapter two to investigate the extent to which the South Africa's legal framework complies with the model. The chapter will use the model to analyze and gauge South Africa's level of compliance with the theory developed in chapter two in terms of the definition of the right, its scope and its application.Chapter one of the study has made a sub-claim that Kenya can borrow lessons and best practices from South Africa's experience on the right to public participation. The current chapter seeks to investigate and determine whether the South Africa's experience indeed has any positive lessons for Kenya, and the extent to which Kenya can borrow from her experience.

Basically, the examination seeks to identify positive attributes and achievements of the South Africa's regime in terms of legislating on, interpreting and implementing the right to public participation. First, the chapter justifies the choice of the jurisdiction. It then gives a critical interrogation of her statutory framework. And most importantly, it investigates the jurisprudence emanating from the courts with respect to the nature, scope and threshold for the right to public participation.

4.2 The Choice of South Africa

South Africa is the most suitable jurisdiction for this study given its shared similarities with Kenya in terms of their constitutional dispensations. There is a general agreement amongst scholars that Kenya's constitution borrows much from South Africa's especially on the Bills of rights and in promotion of participatory democracy.[183]In addition, public participation is expressly provided for in both constitutions, and theparliament's duty to facilitate public participation in the two countries has been coached in very identical terms.[184]Also, the two constitutions share the idea of sovereign power vesting in the people and the people being able to exercise iteither directly or indirectly through democratically elected representatives.[185]

Kenya's devolved governance structure is similar (but no identical) to the South Africa's in several aspects. South Africa's legislative sector comprises the National Assembly and nine provincial legislatures.[186]The functions of these ten institutions are principally similar and complementary, although the national assembly has more responsibilities of national competence.[187]In addition to these ten institutions, there is also the National Council of Provinces (NCOP). The council is a unique house that weaves all ten institutions together into a people-centered network designed for a common ultimate purpose.[188]

The South African parliament comprises two houses equivalent of Kenya's National Assembly and the Senate. The Constitution of South Africa vests national legislative authority in

[183] Oliver Fuo, 'Public participation in decentralised governments in Africa: Making ambitious constitutional guarantees more responsive' (2015) 15 African Human Rights Law Journal 167, 168.
[184] Section 59 (1), 72 (1) (a) and 118 (1) (a) of the South African Constitution corresponds with Article 118 (1) (b) of the Constitution of Kenya 2010.
[185] Article 1, the Constitution of Kenya 2010 corresponds with the Preamble of the South African Constitution. The Preamble provides that the Constitution lays 'the foundations for a democratic and open society in which government is based on the will of the people.'
[186] This is equivalent to Kenya's National Assembly and the 47 county assemblies.
[187] A similar position applies to the relationship between the Kenya's national assembly and the 47 county assemblies.
[188] Legislative Sector, 'Public Participation Framework for the South African Legislative Sector' *Legislative Sector* (June 2013) 17. This is an equivalent of the Kenya's Senate.

Parliament which comprises two houses namely NCOP and the National Assembly.[189] The two institutions represent different interests in the legislative process. The National Assembly represents 'the people' to ensure 'government by the people.' NCOP on the other hand represents the provinces to ensure that provincial interests are taken into account.[190]

4.2.1 The Right to Public Participation

The South African framework imposes various duties on law-making authorities with a view to infusing participation into their decision-making processes. The duties bind the National Assembly,NCOPand provincial legislatures. It's noteworthy that the duties are identical for the three authorities. The three authorities are mandated to facilitate participation in their legislative processes and those of their committees.[191] In addition, members of the public are allowed to make petitions, submissions or representations to three authorities or their committees.[192] Similarly, the three are obliged to have due regard to public involvement and participatory democracy when making orders and rules concerning their affairs and businesses.[193]

The duty to promote public participation is not restricted to the national government and the provincial governments but rather extends to local governments. Municipalities are obliged to provide accountable and democratic governance as well as encourage community participation in local government matters.[194] In addition, municipal councils are required to conduct their businesses in an open manner.[195]

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[189] Constitution of South Africa, 1996 ss 4, 42 (1), 43 (a) and 44 (1). This two houses are the equivalent of the Kenyan National Assembly and the Senate.
[190] Constitution of South Africa, 1996 s 42 (3) -(4).
[191] Constitution of South Africa, 1996 ss 59 (1), 72 (1) (a) and 118 (1) (a).
[192] Constitution of South Africa, 1996 ss 56 (d), 69 (1) and 115 (d).
[193] Constitution of South Africa, 1996 ss 57 (1) (b), 70 (1) (b) and 116 (b).
[194] Constitution of South Africa, 1996 ss 152(1)(a) and (e) and 195(e).
[195] Constitution of South Africa, 1996 s 160(7).

The constitutional duty of the municipalities has been substantiated by the Municipal Systems Act, 2000, which addresses key aspects of community participation at local government level. The statute outlines the role of the local community in municipality affairs like preparing and implementing integrated development plans, establishing and reviewing performance management systems, preparing of municipal budgets and in making strategic decisions with respect to provision of municipal services.[196] Basically, municipalities are required to encourage participation by creating conducive environment. The obligation requires them to budget and use their resources to build the capacity of key stakeholders namely municipal officials, local communities and municipal councils.[197]

Further, the framework has established finer structures designed to deliver participation deeper into the community. Such structures include the ward committees which comprise of 10 people, and which function as the major mode of communication between the local community and the council.[198]

4.2.2 A robust Legal and Policy Framework on Public Participation

South Africa has a robust legislative framework on the right to public participation. Two statutes, the Municipal Systems Act and the Municipal Structures Act establish a vibrant regime and structures for entrenching public participation in public affairs. The Municipal Systems Act offers the best statement of the country's ideals on public participation.[199] It has dedicated an entire chapter to public participation in which it offers detailed guidelines and structures of

[196] South Africa, Municipal Systems Act s 16(1) (a) (i)-(v).
[197] South Africa, Municipal Systems Act s 16(1) (b) and (c).
[198] South Africa, Municipal Structures Act of 1998. The Act also requires the local councils to consult communities on key municipal processes.
[199] Betty C. Mubangizi and Maurice Oscar Dassah, 'Public Participation in South Africa: Is Intervention by the Courts the Answer?' (2014) 39 (3) Journal of Social Science 246, 278.

conducting public participation.[200] Importantly, it charges the municipalities with the duty to create conditions for public participation, the duty to build the local communities' capacity to participate and the duty to budget and allocate funds for these obligations.[201]

The Municipal Structures Act, on the other hand, establishes various structures and their roles during public participation processes. Key of the structures established under it is ward committees, which are designed to function as the conduit of communication between local communities and municipalities.[202] The mandate of the committee is to make recommendations on issues concerning the ward to a ward councilor or to the local council or the metropolitan subcommittee through the councilor.[203] The Act also compels the municipalities to engage, involve and consult the local communities in their key processes.[204]

The South Africa's legislative framework is founded on a sound policy framework characterized by white Papers. The country has a comprehensive policy framework which enunciates the policy intentions of the government while at the same time issuing guidelines meant to ensure extensive public participation and efficacy of the established framework and structures.[205] The most relevant white papers include the 1997 white paper on Transforming Public Service Delivery[206] and the 1998 white paper on Local Government.[207] Also, some guidelines on operationalization of ward committees have also been enacted and published.[208]The instruments

[200] South Africa, Municipal Systems Act s 16.
[201] Betty C. Mubangizi and Maurice Oscar Dassah (n 206) 278.
[202] South Africa, Municipal Structures Act s 72 (3).
[203] Ibid.
[204] South Africa, Municipal Structures Act s 24 (1).
[205] Betty C. Mubangizi and Maurice Oscar Dassah (n 206) 279.
[206] South Africa (Republic) 1997, *White Paper on Transforming Public Service Delivery - Batho Pele*. (Pretoria: Government Printers).
[207] South Africa (Republic) 1998, *White Paper on Local Government* (Pretoria: Government Printers).
[208] South Africa (Republic) 2005, *Guidelines on Operation of Ward Committees* (Pretoria: Government Printers).

define how citizens should communicate their views on public governance and service delivery and also outline strategies and processes for carrying out community participation.[209]

In addition, the framework has an extensive national policy framework for public participation. The National Policy Framework on Public Participation[210] gives finer detains on the implementation of the legislative framework by giving crucial guidelines where the statutes are not very prescriptive.[211]Basically, the policy prescribes minimum requirements which bind all municipalities as they undertake their statutory duties with respect to facilitating public participation.[212] The policy prescribes three strategies through which the municipalities can enhance public participation. The three are: formulation of clear lines of communication between the citizens and the municipality, creation of ward committees as structures of participation and supporting and empowering integrated development planning.[213]

4.2.3 Positive Attributes and Achievements

The framework offers special protection to minority and marginalized groups. It reaches out to disadvantaged persons like women, persons who cannot read or write and persons with disabilities among others. Municipalities have a duty to ensure that the processes, procedures and mechanisms employed incorporate and include these vulnerable persons.[214] Granting special

[209] Betty C. Mubangizi and Maurice Oscar Dassah (n 206) 279.
[210] South Africa, 2005 *Draft National Policy Framework for Public Participation and Empowerment* (Chief Directorate, Department of Provincial and Local Government).
[211] The Framework derives from the South Africa's Local Government Systems Act, 32 of 2000.
[212] Ntombenhle Precious Ngwane, 'Implementation of The National Policy Framework on Public Participation In The Ugu District Municipality' (Master of Management Thesis, 2017 University of Witwatersrand) 5.
[213] Ibid 5-6.
[214] South Africa, Municipal Systems Act s 17(3) (a)-(d).

attention to persons who cannot read and write has been commended due to the county's high levels of adult illiteracy.[215]

At the national and provincial levels, the framework employs a wide variety of participatory mechanisms. These range from public hearings, public access to portfolio committee meetings, outreach programmes and information dissemination, petitions, Izimbizo[216] and Green/white processes. The public hearings, which are the most common and advanced, take the form of written and oral comments. In deserving circumstances, legislatures facilitate committee on-site visits and tours to community sites with a view to gathering information on community issues.[217]

The framework is designed to ensure the public can utilize and take advantage of the available opportunities. The rural communities usually have access to the venues for the hearings and in some instances, members of the public are provided with transport to the venues. In addition, the hearings can take place in local languages. And what is more is that some legislatures conduct pre-hearing exercises during which they brief the community by simplifying and explaining bills and policy documents.[218] The briefing exercise involves explaining the process for making submissions, highlighting the expected impact of a proposed legislation and providing information on how to prepare submissions.[219]

The legislating authorities have implemented the right in a manner which underscores timely dissemination of information. The significance of this cannot be overemphasized as it goes a

[215] J Aitchison & A Harley 'South African illiteracy statistics and the case of the marginally growing number of literacy and ABET learners' (2006) 39 Journal of Education 89, 112.
[216] They are the equivalent of Wazee Barazas in the Kenyan context.
[217] Imraan Buccus, 'Civil Society and Participatory Policy Making in South Africa: gaps and opportunities' 9.
[218] These pre-hearing initiatives are being conducted by Northern Cape, Gauteng and The Free State provincial legislatures.
[219] Buccus, Imraan, 'Towards developing a public participation strategy for SA's legislatures' (2008) 3 (2) Critical Dialogue: Public Participation in Review 8.

long way in giving the public sufficient time to prepare. For instance, the public is given a notice period ranging between five days to three weeks depending on the complexity of the matters.[220]

In addition, the framework has adopted other measures designed to increase awareness of the legislative process and build capacity of community groups. These include sect oral parliaments for special interest groups like the women and the youth, in which they raise policy issues concerning them. These forums also operate as educational opportunities during which the special groups get to learn about the role of the legislature in the participatory process. Further, the legislatures employ outreach programmes targeting rural communities as well as educational workshops to disseminate information to the communities.[221]

Legislatures have also adopted dynamic approaches with a view to enhancing community participation during portfolio committee meetings and through petitions. Members of the public have a reasonably regulated access to portfolio committee meetings at provincial and national levels.[222] And what is more commendable is that the committee meetings as well as sittings of some legislatures are sometimes conducted in towns in the more rural parts of their provinces, a practice loosely referred to as 'Taking Parliament to the People.' The process of making participation through petitions is well articulated, as the law has established petition standing committees with clear mandates on receiving and deliberating on the petitions as well as forwarding the issues raised. In addition, public comment takes a central place in policy making especially in green and white paper processes.[223]

[220] Imraan Buccus (n 224) 8.
[221] Ibid 9-10.
[222] Imraan Buccus (n 224) 8.
[223] Ibid 11. A "green paper" outlines a set of policy intention, while a "white paper" is an actual policy proposal.

Scholars have commended the South Africa's legislative framework on public participation. De Visser argues that the South African framework demonstrates a radical shift from a past constitutional order which was characterized by repression and exclusionary governance processes.[224] The Systems Act has been viewed as a concerted attempt to rejuvenate the battered relationship that existed between the society and the state in the old order.[225] To this end, the Act has established a social pact between municipalities and community residents.[226]

4.3 Jurisprudence Emanating from the Constitutional Court

The South Africa's jurisprudence on the right to public participation was authoritatively defined in the *Doctors for Life International vs. Speaker of the National Assembly and Others*[227] which has come to be well known as *the Doctors for Life* case. Petitioners claimed that the National Council of Provinces and several Provincial Legislatures had failed to facilitate public participation in the process of enacting four statutes, which are collectively referred to as the 'health statutes.'[228] By a majority, the court held partially in favor of the petitioners and consequently invalidated two of the four statutes.[229] As will be revealed later, the *Doctors for Life*has gained universal recognition and applaudand has authoritatively restated the South Africa's position on the right to public participation.

[224] J de Visser, 'Developmental local government: A case study of South Africa' (2005) 14-15
[225] Oliver Fuo (n 190) 174.
[226] J de Visser (n 231) 105.
[227]*Doctors for Life International vs. Speaker of the National Assembly and Others* (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC).
[228] The Traditional Health Practitioners Act, the Choice on Termination of Pregnancy Amendment Act, the Dental Technicians Amendment Act and the Sterilisation Amendment Act.
[229] The Court invalidated The Traditional Health Practitioners Act and the Choice on Termination of Pregnancy Amendment Act. As for the Dental Technicians Amendment Act, the court was convinced that the parliament had carried out reasonable and sufficient public participation. For the Sterilisation Amendment Act, the court declined jurisdiction on grounds that the legislative process was not yet over by the time of the application since the Bill had not been passed into law.

For starters, it's noteworthy that the South African jurisprudence on the right underscores her constitutional principles of openness, responsiveness and public accountability. Courts have based their reasoning on the spirit of the Constitution, especially on participatory democracy in the pursuit of an open and democratic government.

Also key to note is that the courts have recognized the right to public participation as a fundamental human right. This recognition has been attributed to international and regional human rights instruments which have accorded the right special attention. Courts have interpreted the scope of the right as provided for under the ICCPR with a view to identifying the role of the parliament. The Constitutional court has held that the citizen's right to participate in public affairs has a correlating duty on the parliament to ensure that the citizens have the opportunity to participate.[230]

4.3.1 The Nature of the Parliament's duty to 'facilitate public involvement'

The courts have defined key concepts related to the right. Most remarkably, they have defined the phrase 'facilitate public involvement.' Facilitation of public involvement in the legislative process has been defined to mean taking positive steps to ensure that the public participate in the legislative process.[231] The duty of the parliament in this respect has two mandatory aspects. The first aspect requires the parliament to provide meaningful opportunities for the members of the public to participate in law-making processes. The second aspect requires the parliament to take measures with a view to ensuring that the public has the ability to take advantage of the opportunities provided.[232] As such, South African courts conceptualize public involvement as a

[230] *Doctors for Life*, 2006 (12) BCLR 1399 (CC) at 92 (S. Afr.).
[231] *Doctors for Life*, 2006 (12) BCLR 1399 (CC) at 119 (S. Afr.).
[232] *Doctors for Life*, 2006 (12) BCLR 1399 (CC) at 24 (S. Afr.).

continuum that ranges from providing information and building awareness to partnering in decision making.[233]

The first aspect of providing meaningful opportunities requires the parliament to issue timely and extensive invitations for the public to prepare accordingly. Essentially, the invitations should target the largest number of persons possible as well as giving the participants enough time to prepare for the planned participation.[234] Such time should be adequate for them to read the Bill, come up with their position and formulate submissions to be made at the venue. In addition, the notification should specify the participation opportunities that are available.[235] This duty is also concerned with the timing of the event in that the public should be consulted before the final decision is made so that the participation has the capability to influence the decision to be taken.[236]

Basically, the first aspect requires the parliament to disseminate information regarding the statute being considered. The public should be notified of the bill, the objectives of the bill and clarity on when they can make submissions. And what is more is that the parliament is sometimes required to provide transport to and from the venue.[237]The parliament can achieve the extensive mobilization through a combination of initiatives including radio programs, road shows,

[233] Ibid.
[234]*Glenister vs. President of the Republic of South Africa and Others* (CCT 48/10) [2011] ZACC 6; 2011 (3) SA 347 (CC) ; 2011 (7) BCLR 651 (CC).
[235]*Doctors for Life*, 2006 (12) BCLR 1399 (CC) at 131 (S. Afr.).
[236]*Glenister vs. President of the Republic of South Africa and Others* (CCT 48/10) [2011] ZACC 6; 2011 (3) SA 347 (CC) ; 2011 (7) BCLR 651 (CC).
[237]*Matatiele Municipality and Others vs. President of the Republic of South Africa and Others* (2) (CCT73/05A) [2006] ZACC 12; 2007 (1) BCLR 47 (CC).

publication and regional workshops.[238] On important bills, the parliament is required to host radio programs in multiple vernacular languages.[239]

The second aspect of ensuring the public has the ability to take advantage of the opportunities revolves around access to information rights and the right to civic education. It requires the parliament to go further and take steps to ensure that members of the public have the capacity and ability to optimize or take advantage of the participatory opportunity.[240]Principally, the aspect requires the parliament to provideand conduct civic education for the purposes of capacity building in preparation for the participation exercise.[241] Courts have reasoned that without these key elements, the members of the public cannot take advantage and diminishes their ability to offer meaningful contribution.

The second aspect requires the parliament to facilitate and conduct public awareness in contemplation of a participation exercise. The parliament is required to facilitate learning amongst ordinary citizens as well as ensuring some level of understanding of the procedures. It should also create conducive environment for public participation exercises with a view to enhancing efficacy of the right. The law-making authority can utilize any of the initiatives or a combination of them to inform and educate members of the public on their role in law-making processes. And what is more is that legislative authorities are required to budget for and allocate resources for funding public awareness activities.[242]

[238]*Doctors for Life*, 2006 (12) BCLR 1399 (CC) at 132 (S. Afr.).
[239]*Matatiele Municipality and Others vs. President of the Republic of South Africa and Others* (2) (CCT73/05A) [2006] ZACC 12; 2007 (1) BCLR 47 (CC).
[240]*Borbet South Africa Ply Ltd & Others v Nelson Mandela Bay Municipality 3751 of 2011* [2014] ZA EA PEHC 35 [2014] 5 SA 256.
[241]*Doctors for Life*, 2006 (12) BCLR 1399 (CC) at 131 (S. Afr.).
[242]*Borbet South Africa Ply Ltd & Others v Nelson Mandela Bay Municipality 3751 of 2011* [2014] ZA EA PEHC 35 [2014] 5 SA 256.

4.3.2 The objective test

The courts have devised an objective test of reasonableness in determining whether the parliament has constitutionally fulfilled its mandate in facilitating public involvement. The constitutional court applies the standard of reasonableness to gauge the extent to which the legislature has satisfied its constitutional obligation.[243] The test has two limbs. The public should have a reasonable opportunity *to know* about the issues and a reasonable opportunity to *have an adequate say*.[244] In a bid to achieve more clarity, the courts have held that what amounts to a reasonable opportunity depends on the circumstances and peculiar facts of each case.[245]

The two limbs of the reasonable test correspond with the two mandatory aspects of the parliament's duty to facilitate public involvement. Thus, if the Constitutional court wants to determine whether the public has hadreasonable opportunity *to have an adequate say*, it will interpret how the parliament has discharged its duty to provide meaningful opportunities for the public to participate. Conversely, if the court wants to determine whether the public has had a reasonable opportunity *to knowabout the issues*, it willinterprethow the parliament has discharged its duty to take measures to ensure the public has the ability to take advantage of the opportunity provided. It will consider the depth and breadth of public awareness, sensitization and capacity building initiatives.

Courts have simplified the reasonability test further by outlining factors they will employ to determine the reasonableness of a particular initiative. The court's first port of call is the specific action(s) taken by the parliament. The court will review the actions with a view to examining

[243]*Land Access Movement of South Africa Association for Rural Development and others v Chairperson of the National Council of Provinces and others* [2016] ZAACC22
[244]*Minister for Health vs New Chicks South Africa Pty Ltd CCT* 59/04.
[245] Ibid.

whether the parliament is being reasonable in all the circumstances. Secondly, it will consider any special rules adopted by the legislature to facilitate or guide public involvement. Likewise, the court will scrutinize them with a view to assessing whether they are reasonable.[246]

Another key consideration will be the nature of the statute in question, its effect on the population and its importance.[247] If there is an identifiable section of the public which it likely to be affected, and the proposed law is likely to have intense impacts on them, courts have held that the parliament is more inclined in the circumstances seek their views and opinions.[248] Closely related to this factor is that the courts will also consider whether the bill is controversial and whether there is a reasonable degree of public interest in the Bill.

Lastly, the courts are responsive to the time factor. Essentially, the court will address its mind as to whether there was a felt necessity to have the legislation enacted in the shortest time possible.[249] In cases where time is of essence with respect to passing a certain law, the courts will consider the time factor to determine the reasonableness of the parliament's failure to provide meaningful opportunities.[250] An example of these circumstances is where there is an emergency deserving an urgent legislative response as well as short timetables.[251]

4.3.3 Parliament Autonomy and Restraint Judicial Interventions

The courts have restrained themselves from directing the parliament or micro-managing the modalities of facilitating public involvement. In principle, courts have insisted that the power to

[246] *Doctors for Life*, 2006 (12) BCLR 1399 (CC) at 146-147 (S. Afr.).
[247] *Matatiele Municipality and Others vs. President of the Republic of South Africa and Others* (2) (CCT73/05A) [2006] ZACC 12; 2007 (1) BCLR 47 (CC).
[248] Ibid.
[249] *Doctors for Life*, 2006 (12) BCLR 1399 (CC) at 146-147 (S. Afr.).
[250] *Doctors for Life*, 2006 (12) BCLR 1399 (CC) at 194 (S. Afr.).
[251] *Doctors for Life*, 2006 (12) BCLR 1399 (CC) at 194 (S. Afr.).

decide how participation is to be facilitated lies exclusively with the parliament.[252] Thus, courts have granted provincial legislators and the parliament a measure of discretion to determine how best they can fulfill the constitutional duty.[253] As such, the legislating authorities have the discretion to promulgate standard rules for public participation. They are also free to adopt any modalities they consider appropriate with respect to particular legislative programmes.[254] In other words, the courts will not impose on the courts the manner to facilitate public participation.

In addition, the courts have interpreted the right in a manner that does not frustrate the parliament's ability to undertake its law-making role. Courts have held that taking part in the participation process does not mean that the views of the participant must prevail.[255] During public hearing, it is not a mandatory requirement that all persons present must make individual oral contributions.[256] Instead, the parliament has the freedom to choose who to hear and whom not to, and the courts have adopted a restraint approach in second-guessing the judgment of the Parliament on this aspect. However, complainants will have recourse in the courts if they can demonstrate that it was clearly unreasonable for Parliament not to have given them an opportunity to be heard.[257]

Furthermore, courts have adopted a hands-off approach and they will not interfere with the legislative process until the statute is passed into law and subsequently challenged. The courts have reasoned that judicial intervention on ongoing legislative processes will essentially stall parliament's business and paralyze its operations as the legislatures will be spending their time to

[252]*Land Access Movement of South Africa Association for Rural Development and others v Chairperson of the National Council of Provinces and others* [2016] ZAACC22.
[253]*Doctors for Life*, 2006 (12) BCLR 1399 (CC) at 123 (S. Afr.).
[254] Ibid.
[255]*Merafong Demarcation Forum and Others vs. President of the Republic of South Africa and Others* (CCT 41/07) [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 968 (CC).
[256]*Minister for Health vs New Chicks South Africa Pty Ltd* CCT 59/04.
[257]*Doctors for Life*, 2006 (12) BCLR 1399 (CC) at 123 (S. Afr.).

defend their legislative processes before the courts.[258] Thus, the Constitutional court does not assume jurisdiction on matters challenging ongoing legislative processes.[259]

The court has insisted that the parliament ought to be free to undertake its legislative mandate without judicial interference. They have anchored this reasoning to the constitutional provisions which require that the parliament has power to determine and control its procedures, proceedings and internal arrangements.[260] In this way, the courts have upheld the doctrine of separation of powers and parliamentary autonomy.

4.3.4 Do the Public Views Matter?

The views and opinions of public do matter and stand a chance of being incorporated into the final document. Courts have held that the parliament is under no obligation to incorporate the views of the public but is should endeavor to incorporate them as far as possible. Whether the views will be incorporated or not depends on their conformity with the prevailing government policies. Public views are not binding on parliament if they are in direct conflict with government policies.[261] The courts have justified the supremacy of government policies over public opinions on several grounds. One of them is that the government is better placed to respond to the wishes and needs of minorities and special interest groups who might not be

[258] *Doctors for Life*, 2006 (12) BCLR 1399 (CC) at 36 (S. Afr.*). see also* Karen Syma Czapanskiy and Rashid Manjoo, 'The Right of Public Participation in The Law-Making Process and the Role of Legislature in the Promotion of this Right'(2008) 19 (1) Duke Journal of Comparative & International Law 13.
[259] In *Doctors for Life*, the court dismissed the petition with respect to the Sterilisation Amendment Act because the Bill had not been passed into law by the time of the application.
[260] The Constitution of South Africa, 1996 s 57 (1) (a).
[261] *Merafong Demarcation Forum and Others vs. President of the Republic of South Africa and Others* (CCT 41/07) [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 968 (CC)

represented in the public views. As a result, it has been held that binding the parliament with the public views hinders the functionality of the legislature.[262]

Courts have designed a flexible approach under which the parliament is obliged to consider and evaluate the public views before allowing or disregarding them. The law-making authority is required to keep an open mind during the participation process. In addition, it should consider all public views before deciding whether to incorporate them or disregard them altogether.[263]

4.3.5 The Role of the Court

The role of the courts is majorly to ascertain whether a particular initiative meets the constitutional threshold. Even though the legislative authorities have a leeway to prefer the modality of their choice, the courts have a duty to determine whether the public involvement undertaken meets the constitutional requirement.[264] In other words, although provincial legislatures and the parliament have the discretion to determine how best to facilitate public participation, the Constitutional court has powers to determine the reasonableness of that discretion against the degree of involvement envisaged in the constitution.[265]

The duty of the court in scrutinizing the parliament's conduct is a fair balance between two competing constitutional principles. One of the rights is the need to uphold parliamentary institutional autonomy while the other is enhancing the constitutional right to public participation. Essentially, courts have left it for the parliament to assess and determine participation methods appropriate for each case. The mandate of the court is to examine the

[262] Ibid.
[263] *Merafong Demarcation Forum and Others vs. President of the Republic of South Africa and Others* (CCT 41/07) [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 968 (CC)
[264] *Doctors for Life*, 2006 (12) BCLR 1399 (CC) at 124 (S. Afr.).
[265] Ibid.

reasonability of the parliament in choosing one method over another, given the unique circumstances of the case.[266]

Courts have expressed great caution when invalidating statutes for lack of public participation. The decision of the court to invalidate a law has been a very delicate balance between the duty to ensure fidelity to the Constitution and the obligation to observe the doctrine of separation of powers. Bearing the balance in mind, courts have invalidated statutes whose enactment process did not conform to the constitution with respect to the public participation requirements. The Constitutional court has held that it has powers to declare the resulting law invalid because such invalidation does not infringe the doctrine of separation of powers.[267] The court has held that such orders are quite necessary because they underscore the role of the court in protecting and ensuring fidelity to the constitution.

In circumstances where courts have invalidated statutes, they have done so with diligence to avoid vacuum and disruptions on already acquired rights. Courts are properly concerned that invalidating a statute will occasion vacuum and undesirable disruption especially where some rights had been acquired and obligations had been undertaken under the Act.[268] Under those circumstances, the Constitutional court issues an order to suspend the declaration of invalidity while at the same time giving the parliament the opportunity to rectify the defect within a specified time.[269]

4.3.6 The Contribution of the *Doctors for Life* Case

[266] *Doctors for Life*, 2006 (12) BCLR 1399 (CC) at 146 (S. Afr.).
[267] *Doctors for Life*, 2006 (12) BCLR 1399 (CC) at 70 (S. Afr.).
[268] *Doctors for Life*, 2006 (12) BCLR 1399 (CC) at 214 (S. Afr.).
[269] In *Doctors for Life International*, the court suspended that invalidity declaration for 18 months to enable the Parliament to enact the statutes afresh in accordance with the constitution. See *Doctors for Life*, 2006 (12) BCLR 1399 (CC) at 214 (S. Afr.).

The contribution of the *Doctors for Life* cannot be overemphasized. The case addressed three fundamental issues which define the nature and the structure of the right in the South African context. First, it defined the nature and the scope of the parliament's duty to facilitate public participation as well as the legal consequences for failing to comply with the duty.[270] Secondly, the court defined timing issues and the scope of its interventions. The court established the appropriate stage and the extent to which the court should interfere with a legislative process with the view to enforcing the duty.[271] Lastly, the constitutional court answered whether it was the only court vested with jurisdiction at the exclusion of others.[272]

Above all, the *Doctors for Life* gave the right to public participation international prominence superior to national legislations. Essentially, the court viewed it as a fundamental right established under the international regime of human rights. The court observed that the right is anchored in the International Covenant on Civil and Political Rights (ICCPR),[273] the United Nations Human Rights Committee's General Comment No. 25[274] and the African Charter on Human and Peoples' Rights.[275] This way, the court affirmed that the international human rights regime places high premiums on the right and binds the state parties to take positive steps to ensure the citizens have the right and an opportunity to exercise the right.[276] In other words, the court re affirmed that the parliament's duty is an international obligation and not just a matter of municipal law.

[270] *Doctors for Life*, 2006 (12) BCLR 1399 (CC) at 36-37 (S. Afr.).
[271] Karen Syma Czapanskiy and Rashid Manjoo (n 14) 2.
[272] *Doctors for Life*, 2006 (12) BCLR 1399 (CC) at 36-37 (S. Afr.).
[273] International Covenant on Civil and Political Rights (ICCPR) Art 19 and 25.
[274] Office of the U.N. High Comm'r for Human Rights (OHCHR), International Covenant on Civil and Political Rights, General Comment No. 25, adopted July 12, 1996, para, 1.
[275] The African Charter on Human and Peoples' Rights Art 9, 13 and 25.
[276] Karen Syma Czapanskiy and Rashid Manjoo (n 14) 2.

4.4 Conclusion

The chapter reveals that South Africa is far more compliant with the theory developed in chapter two. The chapter confirms the claim of the study that indeed there are lessons and best practices which Kenya can borrow from South Africa's experience on the right to public participation.South Africa is far more compliant than Kenya because it has a more robust legal framework apportioning rights and duties among various stakeholders in public governance and administration.

In addition, it has an extensive policy framework on public participation on which their laws are based. And what is more is that her framework is sensitive to the rights of the marginalized, it upholds the principle of inclusivity, places high premiums on information rights and has adopted dynamic strategies towards effective public participation. To crown it all, her courts have interpreted the right in consonance with the tenets of the theoretical model.

South Africa's application of the right has been influenced and informed significantly by the jurisprudence emanating from the county's Constitutional court. Amongst the key things to take note of is the Court's clear and robust interpretation of the right, which underscores participatory democracy, parliament's autonomy and the centrality of the court in enhancing fidelity to the Constitution.Furthermore, the Constitutional court has simplified the definition and interpretation of the parliament's duty to facilitate public participation. By this simplification, the court hasbroken downthe parliament's duty as well as the identifiedfactors to consider when determining the reasonability of the parliament's conduct.

CHAPTER FIVE

CONCLUSIONS AND RECOMMENDATIONS

5.1 Introduction

The study's interest in the subject matter has been instigated by the peculiarKenyan jurisprudence emanating from the application of the right to public participation by various stakeholders including administrators, policy makers, legislators, academicians and the judiciary. The enforcement of the right by these organs and persons is at best problematic with regards to its definition, its structure and its threshold.

Recent concerns over this issue have been made more pronounced by the amorphous jurisprudence emanating from the courts, which has cast more uncertainty on the nature and scope of the right. Recent court pronouncements have occasioned some sort of confusion especially where courts have annulled Acts for want of public participation in instances where evidence suggests that the public had an opportunity to express their views. This confusion has also been observed where the courts have upheld the constitutionality of Acts in instances where evidence suggests that the principle of public participation had been violated.

Based on this background, the study sought to investigate the substance, structure and threshold of the right to public participation in Kenya. The objective of the investigation was four-fold.

First, it sought to establish the theoretical underpinning of the right to public participation. Secondly, it sought to investigate the substance, structure and threshold of the right to public participation in Kenya. Thirdly, the study sought to examine the efficacy of the Kenya's legal and policy framework in realizing the constitutional right to public participation. Lastly, the research sought to investigate positive lessons and best practices that Kenya can learn from South Africa's experience on the right to public participation.

The study proceededon the following research hypotheses. One, that the substance, structure and threshold of the right to public participation in Kenya are undefined and unsettled. Second, that the Kenya's legal and policy framework is not efficacious in realizing the constitutional right to public participation. Lastly, that Kenya can borrow lessons and best practices from South Africa's experience on the right to public participation.

The study utilized two legal theories to articulate the theoretical underpinning of the study. It utilized the Deliberative Democratic theory and the Positivist theory, with a view to investigating whether and the extent to which these theories form the basis of the claim. Under the deliberative democratic theory, the study relied on the scholarly works of its major advocates and proponents, including Graham Smith, Iris Marion Young, Habermas Jürgen, Joshua Cohen, John Rawls and Christiano, all of whom have contributed immensely to the current statue of the Deliberative Democratic theory.

The study employed a combination of qualitative, doctrinal and comparative methodologies to prove its claim. Under the qualitative approach, it majorly employed desk review, through which it was concerned with the quality of the already available data. Doctrinal research was also utilized to analyze the legal, policy and institutional framework in Kenya, by examining the legal provisions, their source and implications. Lastly, the study used the comparative methodology to

identify, analyze and explain the differences between the Kenyan experiences and the South African experience on the right to public participation, with a view to identifying any lessons which Kenya can emulate from South Africa.

5.2 Findings

Chapter two responded to the first research questionwhich required the study to investigate and establish the namelytheoretical underpinning of the right to public participation. The chapter established that the substance of the right to public participation is the right of the subjects to participate in administration and governance. It also established that the structure of the right entails processes for notifying subjects of administrative decisions, processes for consulting them, and process of taking into account the views of the subjects. The chapter revealed that a proper legal framework for exercising the right should define the right, provide structures and process for exercising it, set the threshold and remedies for violation.

Chapter three responded to the second and the third research questions. The former required the study to investigate the substance, structure and threshold of the right to public participation in Kenya, while the latter required the study to examine the efficacy of the Kenya's legal and policy framework in realizing the constitutional right to public participation.

With respect to the investigation on the substance, structure and threshold of the right in Kenya, the chapter revealedthat the courts have devised an objective test for determining threshold of public participation, which has two mandatory aspects; the qualitative and the quantitative

aspect. In addition, the public views and opinions expressed in the process do matter and there is a corresponding duty to incorporate them as far as possible.

The chapter also established that the exercise of the right is at best problematic since it has not been defined in the Constitution, or statutes, or judicial decisions. It also confirms that the views on the substance, structure and threshold differ and the law is not settled. Courts have been evasive on defining key terms inevitable in public participation discourses. They have not defined key terms like 'public involvement,' 'public participation' and the phrase 'facilitate public involvement' in the context of law-making process. In addition, although the reasonability test can be impliedly derived from the Kenyan jurisprudence, the courts have never articulated the test in definite terms. In particular, they have not demystified this standard in terms of the qualitative and quantitative aspects, leaving its meaning liquid and ambiguous. The classification adopted by the study is derived purely from the emanating jurisprudence and has never been authoritatively buttressed on the Kenyan legal framework.

Even though there are initiatives to rectify the position through enacting legal documents, the study reveals that the proposed laws are inadequate in material respects and as such cannot cure the current legal crisis. Although the Draft Policy on Public Participation makes major strides in terms of defining key terms, being sensitive to marginalized groups and providing information rights, the Draft Policy does not illuminate the discussion on the reasonableness test and it does not cover persons who cannot read and write. Thus, it does not guide on how to examine whether a particular exercise met the constitutional threshold for public participation.

In addition, the study reveals that the proposed Public Participation Bill 2018 does not cure the legal challenges identified by the study. The study admits that Bill is a good attempt in terms of granting information rights, being sensitive to the rights of persons with disabilities and factoring

in persons who cannot read and write. However, the study reveals that the Bill is inadequate as it fails to address pertinent legal issues on the right. The Bill does not define public participation, it does not offer a breakdown of gauging the 'reasonableness test' and it does not provide special rights for marginalized and minority groups like the women and the youth.

With regards to examining the efficacy of the Kenya's legal and policy framework in realizing the constitutional right to public participation, chapter three revealed that Kenya's legal framework on the right to public participation *largely* deviates from the theoretical model established in chapter two. However, in fairness to the legal framework, it should be recorded that there are some few instances of conformity with the theoretical model.

Such conformity is evident when one considers the laws infusing public participation in public finance and in governance of urban areas, cities and municipalities. In these two areas, Kenya's framework has achieved much in terms of upholding the principle of public participation as articulated under the theoretical model. The law relating to these two sectors has established structures empowering the public by granting them access to information rights and which are a suitable balance between the need for a flexible regulation and the need for an orderly and formal way of carrying out the process. To a large extent, the framework applicable to these areas upholds the principle of inclusivity and it is responsive to needs of the marginalized groups.

In addition, the study reveals positive achievements derivable from the jurisprudence emanating from Kenyan courts. To some extent, the courts have interpreted the right in a manner which upholds and maximizes the role of public participation in public governance and administration. Furthermore, the courts have interpreted the right in a manner that does not hinder the parliament from exercising its law-making authority. They have not been sympathetic to a petitioner who actually did participate despite having been given a short notice. The chapter reveals that the

magnitude of public participation is not a one-case-fits-all but rather it is pegged on the significance of the proposed legislation. It's noteworthy that the courts have restrained themselves from directing the legislature on how to carry out its legislative role.

However, the above positive attributes notwithstanding, the study reveals that the Kenyan legal framework does indeed deviate from the theoretical model. To a large extent, the study shows that the Kenya's framework on the right does not satisfy fundamental aspects of the theoretical model.

The reasonability test identified by the study is yet to acquire official recognition and appreciation by the courts. The study reveals contradictory trends whereby some courts have adopted a rather problematic and irregular approach to gauging the threshold of public participation. Some courts have had no regard to the reasonableness test and have not subjected themselves to the qualitative and quantitative aspects of the test. The upshot of these contradictory trends, the study reveals, is a jurisprudence which cannot be handled with clarity, and which occasions uncertainty amongst administrators, members of the public, academicians, judges and litigators.

The fourth chapter responded to the fourth research question which required the study to identify positive lessons and best practices that Kenya can learn from South Africa's experience on the right to public participation. The study reveals that the South Africa's legal framework is far more compliant with the theoretical model developed in chapter two. South African has a robust legislative framework clearly apportioning duties and rights amongst various stakeholders. And what is more is that her legislative framework is based on an extensive policy framework outlining the government's agenda and objectives with respect to public participation. The

legislative framework establishes institutions and structures charged with the responsibility of facilitating public participation.

In addition, the framework offers special protection to minority and marginalized groups including women, persons who cannot read or write and persons with disabilities. The framework is designed to ensure the public can utilize and take advantage of the available opportunities and the legislating authorities have implemented the right in a manner which underscores timely dissemination of information. Furthermore, the framework has adopted other measures designed to increase awareness of the legislative process and build capacity of community groups.

Significantly, South African courts have advanced a very robust interpretation of the right in line with the tenets of the theoretical model developed in chapter two. The courts have defined the phrase 'facilitate public involvement' and the parliament's duty to facilitate public involvement. They have simplified the two aspects of the duty as well as the key ingredients of each aspect. To crown it all, the courts have devised an objective test of reasonableness in determining whether the parliament has constitutionally fulfilled its mandate in facilitating public involvement. The objective test has two limbs which correspond with the two mandatory aspects of the parliament's duty to facilitate public involvement.

Noteworthy, courts have simplified the reasonability test further by outlining factors they will employ to determine the reasonableness of a particular initiative, which include the specific action taken by the parliament, any special rules adopted by the legislature, the nature of the statute in question, its effect on the population and its importance and the time factor.

Lastly, the courts' interpretation of the right underscores separation of powers, fidelity to the South African constitution and upholds the maximum recognition and enjoyment of the right. The courts have restrained themselves from directing the parliament or micro-managing the modalities of facilitating public involvement. Similarly, they have interpreted the right in a manner that does not frustrate the parliament's ability to undertake its law-making role. Courts have expressed great caution when invalidating statutes for lack of public participation. In circumstances where courts have invalidated statutes, they have done so with diligence and circumspection to avoid vacuum and disruptions on already acquired rights.

5.3 Conclusion

The study concludes that the Kenya's framework on the right to public participation is materially deficient and deviates from the tenets of an ideal regime. The right has not been defined in the Constitution, or statutes, or judicial decisions. The courts have not articulated the reasonability test of determining threshold in definite terms andthey have not demystified the qualitative and the quantitative aspects of the test.The Draft Policy on Public Participation and the Public Participation Bill 2018 do not cure the legal challenges identified by the study.

By way of comparison, the South Africa's framework is far more compliant with the tenets of an ideal regime. She has a robust legislative and institutional framework based on an extensive policy framework. The framework offers special protection to minority and marginalized groups, it underscores access to information rights and adopts measures designed to increase awareness and capacity building through sensitization initiatives. Her courts have defined the parliament's

duty to facilitate public involvement in very definite terms, by simplifying the two aspects of the duty as well as the key ingredients of each aspect.

5.4Recommendations

Based on the above findings, the study makes that following recommendations.

Formulating an extensive and robust Policy Framework

The study revealed that Kenya lacks a sound policy framework on the right to public participation. It also revealed that prior to the enactment of the Municipal Systems Act and the Municipal Structures Act, the South Africa' parliament formulated a very comprehensive policy framework on which it based the statutes. It recommends that the relevant ministries should come up with an elaborate policy framework, on which the parliament should use as a guide and base the substantive statutes on the right to public participation.

Enacting an Act of Parliament to advance the right to public participation

The study revealed that Kenya lacks a legislative framework on the right to public participation. It also showed that South Africa has enacted several statutes advancing the right to public

participation. It recommends that the Kenyan Parliament should enact a special legislation (s) to advance this right. Such Act should clearly apportion rights and duties amongst stakeholders, while defining key terms in public participation discourses.

Reviewing the Public Participation Bill 2018

The study revealed that the proposed Public Participation Bill does not cure some of the legal challenges identified by the study. It recommends that the Bill should be reviewed to define public participation, to offer a breakdown of gauging the 'reasonableness test' and to provide special rights for marginalized and minority groups like the women and the youth.

Reviewing the Draft Policy on Public Participation

The study revealed that the Draft Policy on Public Participation is deficient in material ways one of them being exclusion of persons who cannot read and write. It also revealed that the policy does not offer a guide on how to examine whether a particular exercise meets the constitutional threshold for public participation.It recommends that the Draft be reworked on to illuminate the discussion on the reasonableness test and to cover persons who cannot read and write.

Interpreting the parliament's duty to 'facilitate public involvement'

The study revealed that Kenyan courts have not defined the parliament's duty to 'facilitate public involvement' in clear and definite terms. It also showed that South African courts have defined the parliament's duty in very clear terms by outlining the two aspects of the duty as well as the key ingredients of each aspect. It recommends that Kenyan courts should authoritatively define

the parliament's duty, while being keen to define the aspects of the duty and the ingredients of each aspect.

Demystifying the reasonability test

The study revealed that although the reasonability test can be impliedly derived from the Kenyan jurisprudence, the courts have never articulated the test in definite terms. It also revealed that the South African Courts have simplified the reasonability test by outlining the factors they will consider to determine the reasonableness of a particular initiative. It recommends that Kenyan courts should demystify the objective test by outlining the factors to consider when assessing the reasonableness of a particular initiative.

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