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# THE SOCIAL THEORY OF LEGISLATION AND PUBLIC PARTICIPATION IN KENYA

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## 1 Introduction

The establishment of conventional democratic institutions in developing common law jurisdictions were closely linked to British colonial administrative strategies. They were founded on the English constitutional order with minor modifications to accommodate local circumstances, as was the case in Kenya. The emerging presidential and parliamentary democracies were founded on the ideals attributable to the principle of separation of powers bested in the thre arms of government, namely: (a) the Executive (which makes policy and enforces legislation); (b) the Legislature (which makes law to give effect to government policy); and (c) the Judiciary (which interprets legislation). The three arms of government play complementary roles in (i) the maintenance of social order; and (ii) the administration of justice and the rule of law, essentially for the good of society.

The constitutional structure of government in Kenya is premised on the principle that )[a[ll sovereign power belongs to the people of Kenya" and may be exercised "… either directly or through their democratically elected representatives".[1] The promulgation on 27th August 2010 of what is viewed as one of the most ambitious and transformative Constitutions ushered in a new order of governance in Kenya. The new system is characterized by a devolved system of government designed to place sovereign power in the hands of the people.

This paper examines the historical development of the legislature and the extent to which the democratically elected representatives in the Senate, the National and County Assemblies may be said to exercise their legislative authority on behalf, and in the interest, of the people of Kenya in accordance with article 1 of the Constitution. It explores the legislative process and the practical meaning of "public participation" in the law making process and highlights the reality of political dynamics in variance with the social theory of legislation in an ideal democratic state.

[1] The Constitution of Kenya, 2010 art 1(1) and (2).

The essay is premised on the hypothesis that "full public participation in the legislative process is attainable". In conclusion, it makes recommendations on policy and legislation to enhance and guide public participation in legislation by national and county governments.

# 2 The Basis of Legislative Authority in Kenya

## 2.1 The Legislative Process in Colonial Kenya

The pre-colonial Kenya was comprised of diverse indigenous communities defined by their ethnic and racial identity. These communities were governed by tribal chiefs or kings in accordance with their respective customary law and traditions. The aggregate number of these communities did not have a unified administrative authority or a formal judicial institution that define modern-day institutions of government. The immutable customary law and practices of those indigenous communities were tenaciously observed and passed from generation to generation. They served to preserved the communities' ethnic identity and the age-old social values by which they were closely bound. Accordingly, the individual members of those indigenous communities played no significant role in defining the content of their customs and traditions or the consequences of violation by any of them.

In time, the Sultan of Zanzibar established a system of administration over the coastal strip of East Africa in mid 1880s. The Sultanate was supported by a system of Kadhi's courts administered through Islamic law. The courts were designed to ensure effective administration of his dominions and resolve disputes between his Muslim subjects in furtherance of the Sultan's interests in the growing trade and commerce.[2] The Sultan was soon to lose his hold on the coastal and mainland territories as Britain pressed hard for the abolition of slave trade against the will of his subjects. As Ghai and McAuslan observe, the subsequent fall of the Sultan's control over his dominions was further hastened by Germany's bid for colonies and influence in East Africa, which grossly undermined his authority and gave impetus to the rapid augmentation of British administrative

[2] Kuloba R *Judicial Hints on Civil Procedure* (2nd ed Law Africa Kenya Publishing Limited Nairobi 2009) p.1.

control over the territory leading to the declaration of Kenya as a British Protectorate[3] soon after the 1885 Berlin conference.

The 1885 conference gave new impetus to the scramble for Africa and purported to set out the rules of international law relating to the acquisition by European nations and their establishment of authority over various territories in Africa coupled with moral injunctions to bring an end to the then rampant slave trade and take "civilization" to Africa.[4]

Notably, though, the General Act of the Berlin Conference signed in February 1885 and ratified in April 1886, and which dealt with acquisition of territories, was confined to the coasts of Africa. According to art 35, "[T]he signatory posers of the present Act recognise[d] the obligation to insure the establishment of authority in the regions occupied by them on the coasts of the African continent sufficient to protect existing rights and as the case may be, freedom of trade and transit …". However, the Conference declined to consider any definitive rules relating to the acquisition of mainland territories because little was known of them.[5] This left it open to the colonial powers to extend their dominion and spheres of influence over wide areas of unrestricted expansion beyond the initial coastal territories as delimited by bilateral agreements between rival powers with respect to defined boundaries of influence whereby the interior of Africa was partitioned and mapped out for future expansion of colonial administration[6] in total disregard of the will of the indigenous subjects.

The demarcation agreement made between Britain and Germany in October 1886 set out their respective spheres of influence in East Africa without reference to or consultation with the African

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[3] Ghai YP and McAuslan JPWB *Public Law and Political Change in Kenya: A Study of the Legal Framework of Government From Colonial Times to the Present* (Oxford University Press Nairobi Kenya 1970) p.4.
[4] ibid.
[5] Lindley MF *The acquisition and Government of Backward Territory in International Law* (Longmans London 1926) p.145.
[6] Ghai and McAuslan (1970) pp.4-5.

communities.[7] Soon thereafter, a concessional agreement was concluded in May 1887 by which the Sultan of Zanzibar made over to the British East Africa Association under the stewardship of William Mackinnon for a period of fifty years all the power he possessed on the mainland (together with the rights of administration) to be carried out in the Sultan's name and subject to his sovereign rights.[8] Consequently, the Association was viewed as an indirect but effective means of retaining and expanding British influence in East Africa. This motivated the lending by the British government of greater support by granting it a Royal Charter of Incorporation in September 1888.

In 1897, the Queen of England appointed a commissioner as the chief executive with power to, among other things: (a) set up the necessary administrative machinery; (b) make law; and (c) establish courts of law.[9] Despite the existence of self governing indigenous communities, the Commissioner was not accountable to any local official or body. He was only subject to the instructions of the Secretary of State for the colonies. Soon thereafter, an Ordinance passed in 1902 empowered the newly-established Legislative Council to make Ordinances for the administration of the occupied territory.[10] Subsequently, the title of Commissioner was changed to Governor and Commander-in-Chief in 1905. The Governor served as the Speaker of the Legislative Council until 1948. In this capacity, he made all the necessary regulations and Standing Orders to guide the operations of the Legislative Council. Notwithstanding these legislative powers, the British Government reserved the right to legislate directly for the territory, which became a colony in 1920. On the other hand, the Governor had executive power to sanction or veto any ordinance proposed for promulgation by the Legislative Council, which did not draw representation from any of the indigenous communities.[11] In effect, the African communities were in no way consulted or engaged in the legislative process, which only served the interests of the colonial administration.

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[7] ibid p.5.
[8] Hertslet E *The Map of Africa by Treaty* (HMSO London 1896) pp.339-45.
[9] Macharia Nderitu et al "History of Constitution Making in Kenya" (Media Development Association Nairobi 2012) p.3.
[10] Prof. Ojwang JB Constitutional *Development in Kenya; Institutional Adaptation and Social Change* (African Centre for Technology Studies Press Nairobi 1990) p.30.
[11] ibid p.33.

The exclusion of Africans in the legislative process served to impose colonial rule and the appurtenant legal system over indigenous communities against their will. It was not until 1944 when the first African was nominated by the Governor to the Legislative Council. The nominees, Mr. Eliud Mathu, was by no means representative of the collective will of the African community. His nomination to the Council was an insignificant gesture of colonial tokenism that nonetheless provided a window of opportunity for the subsequent engagement of African representatives in law making albeit in the general interest of the colonial government.

Increased agitation for an inclusive government and the heightened political activity on the part of the emergent African leadership in the 1950s made inroads towards enhanced representation of Africans in the Legislative Council. The 1954 Lyttelton Constitution introduced policy measures to give Africans a limited degree of participation in the constitutional machinery. The reforms created a limited franchise of Africans who were to elect eight members to the Legislative Council.[12] For all practical purposes, the Council was neither independent nor representative of the popular will of the local communities. It merely constituted an additional cog in the machinery of colonial administration of a people who had no stake in the government of the day.

The 1958 Lennox Boyd Constitution increased African membership in the Legislative Council to fourteen and provided for Specially Elected Members, who were elected by the Council sitting as an electoral college,[13] an arrangement that defied all democratic ideals and basic principles of representative government. Yet the Council so constituted passed Ordinances that had the force of law for the administration of the colony. In addition, the Council of State appointed by the Governor and serving at the pleasure of the Monarch, scrutinized and sanctioned all proposed legislation.

[12] ibid p.32.
[13] ibid p.34.

Notably, African leaders were not consulted at the conception and formulation of the Lyttelton and Lennox Boyd Constitutions. The colonial government had adopted a strategy of imposing non-negotiated constitutions in Kenya, with no attempt to promote negotiation among the leaders of dominant political groups comprised of African majority,[14] and which had been banned at the wake of the declaration of a state of emergency in 1952. Accordingly, the Secretaries of State for the colonies for the time being imposed constitutional plans on Kenya. They consulted European and Asian representatives to the exclusion of the majority African populations, which led to intense political strife resulting in the breakdown of the Lennox Boyd Constitution in 1959. It then became clear that consultation with the African majority was inevitable. This created the opportunity for the first Lancaster House conference held in January and February 1960.

During the 1960 conference, African leaders pressed for the opening up of democratic process to indigenous Africans and negotiating for commanding positions in government and in the Legislative Council based on the principle of majority rule. Following disagreement among the different racially-defined groups present at the conference, the Secretary of State for Colonies, Iain MacLeod imposed a new constitution presumably to address issues of enhanced representation of Africans in the Legislative Council, among other things. The 1960 MacLeod Constitution increased membership of the Legislative Council to 65 of which 53 were to be elected on a common roll. The remaining 12 were to be national members elected by an electoral college. 20 seats were reserved for Europeans, Asians and Arabs, all of whom had a voice in the determination of the colony's legal framework. The 1960 Constitution prescribed minimum qualifications for election to the Legislative Council and was implemented in April 1961 amid overwhelming demands for more constitutional reforms.[15]

As a precursor to an African democratic government, a second Lancaster House conference was convened in 1962 for the purpose of breaking the stalemate between the two main political parties- the Kenya African National Union (KANU) and the Kenya African Democratic Union (KADU) over what would be the most desirable system of government. The conference sought to foster

[14] Maxon R "Constitution Making in Contemporary Kenya: Lessons from the Twentieth Century" Vol 1 KSR (December 2009)
[15] ibid.

agreement over a constitution for internal self-government. It was proposed that there be a quasi-federal structure of government with a strong central government responsible to a bicameral Parliament. Following deliberations at the conference, the Internal Self-Government Constitution was unveiled on 1st June 1963. This gave way to the ensuing democratic government that represented the political will of the majority African populations. For the first time in the history of law making in Kenya, the Constitution reflected their collective will in the emergent State in which meaningful public participation in legislation, weighed against vibrant party politics, would invariably face the test of time.

## 2.2 Legislation Under the Independence Constitution

### 2.2.1 The Bicameral Legislature (1963-1966)

The 1962 Lancaster Constitution paved way for internal self-rule. It provided the conceptual framework for the 1963 independence Constitution, which introduced, among other things, (a) the notion of constitutionalism; (b) a diverse range of democratic values; and (c) a Bill of Rights (which guaranteed the protection of ethnic and racial minorities), hitherto unknown to the embryonic African nation. It was based on the principles of parliamentary government founded on the Westminster model.

The 1963 Constitution symbolized the birth of a new nation and affirmed that the African majority were capable of exercising political power. It introduced a Parliamentary form of government with a bicameral legislative system comprised of the Senate and the House of Representatives, which replaced the Legislative Council.[16]

The composition of the two Houses of Parliament was indicative of democratic ideals pursuant to which legislation would presumably reflect the collective will of the people on whose behalf the legislators held office. The Senate was composed of 41 members (one drawn from each of the 40 Districts), 1 from Nairobi area, and the Speaker. The House of Representatives was comprised of

[16] Kirui K and Murkomen K "The Legislature: Bicameralism under the New Constitution" Constitution Working Paper No. 8 (Society for International Development Nairobi 2011) pp.13-15.

117 constituency-elected members, 12 specially elected members chosen by the House sitting as an electoral college, the Speaker, and the Attorney-General.

To qualify for election as Senator for any particular region, a candidate had to be either (a) a resident of the particular District for a period of not less than five years preceding the election; or (b) a ratable owner of or occupier of property located in that District. Their property and other parochial interests in the respective regions were expected to motivate them to influence policy and legislation towards social-economic development of their Districts.

In addition to the protection of the basic rights and freedoms of minority groups, the Senate was also designed to (a) guarantee equitable representation in the upper House; (b) safeguard the autonomy of the regions; (c) protect the political interests of the peoples of various regions; and (d) provide a forum within the law-making body for the representation of local political interests over and above that provided by the ordinary electoral process.[17] It was also hoped that the newly-introduced Senate would (i) protect the regional governments; (ii) hold the central government accountable through question time and parliamentary committees; and (iii) ultimately safeguard the 1962 Constitution (which could not be amended without the Senate's input). In view of the facgt that the Senate had a stake in particular Districts, it was presumed that its legislative functions would be exercised in the interest of its constituents.[18]

Over and above its legislative functions, the Senate had power to (a) originate Bills (other than money Bills, which were the preserve of the lower chamber); and (b) scrutinize Bills from the House of Representatives. Conversely, the lower chamber had power to scrutinize Bills from the Senate. Where the House of Representatives proposed amendments, the two Houses were required to agree on the final Bill before presentation to the Governor or President for assent. Money Bills

[17] ibid.
[18] Ojwang (1990) p.115.

were only subject to debate by the Senate with no power to amend. The Senate could only discuss and propose amendments, which the lower chamber was not bound to adopt.

The overall architecture of the 1962 Constitution was to ensure that the majority did not trample on minority rights. In effect, it was designed to protect the interests of all the communities in Kenya. Gradually, the ruling party KANU employed its overwhelming majority in the House of Representatives to undermine and ultimately do away with bicameralism. In the end, the Senate was abolished in 1966.

Power politics and the battle of numbers in Parliament greatly influenced the legislative process. KANU tactfully dismantled the devolved system of government and consolidated its control over the legislature. This eroded the gains consolidated in the 1963 Constitution. KANU maximized on its majority in Parliament to purge any resistance to constitutional amendments, which often passed all stages in a single sitting of the House. The all-powerful KANU parliamentary group meeting would discuss proposed legislation before publication and tabling in Parliament for swift enactment. The parliamentary group meetings were designed to coerce and intimidate members towards an agreed party position.[19]

The period between 1963 and 1966 was marked by intense political discord between KANU and the opposition in a bid to control the legislative agenda in Parliament. This led to numerous constitutional amendments and the ultimate suppression of the opposition, resulting in a *de facto* one-party state that saw the demise of constitutionalism and the appurtenant democratic ideals.

### 2.2.2 The Unicameral Legislature (1967-2010)

December 1966 marked a turning point in Kenya's political history. The hitherto cherished bicameral Parliament succumbed to party politics and to KANU's legislative agenda designed to consolidate power and take control over national policy and legislation. The enactment of the

[19] Kirui and Murkomen (2011) p.18.

seventh Constitution of Kenya (Amendment) Act No. 19 of 1966 resulted in the merger of the House of Representatives and the Senate into one legislative chamber. As a political compromise, the constitutional amendment created 41 new constituencies to be represented by the 41 then sitting senators and came into force immediately after the prorogation of the Houses of Parliament on 3rd January 1967. The intention was to constitute a unicameral legislature in which KANU enjoyed an overwhelming majority.

The dissolution of Senate by Parliament was premised on its perceived ineffectiveness and insignificant role in the legislative process. It was viewed as having failed to assert its authority and to perform its constitutional functions. It was also viewed as having sought merely to protect tribal and parochial interests at the cost of national unity.

The transformative change in the architecture of the lawmaking institution barely three years after independence did not come as a surprise. The emergent democratic institutions were on trial in an environment in which all players sought a firm grip on political power. They had little or no regard for the values and principles that informed the design of the 1963 independence Constitution. On the other hand, the newness of the legislature at independence meant that it lacked effective expertise for effective law-making. It relied entirely on the understaffed office of the Attorney-General, which limited the number of private member Bills that were presented before the House.[20]

Robust party politics designed to consolidate executive power culminated in the Constitution of Kenya (Amendment) Act No. 7 of 1982, which transformed Kenya into a *de jure* one-party state.[21] The amendment gave impetus to party politics that from then on influenced the legislative environment to suit the political expediency of the ruling party-KANU. Section 2A of the Constitution outlawed the formation of opposition political parties, giving KANU monopoly over political power. The absence of opposition left it to the governing party to dictate policy and

[20] Mbai O "The Rise and Fall of Autocratic State in Kenya" (Heinrich Foundation Nairobi 2003) Available at <http://www.boell.or.ke/downloads/ThePoliticsofTransitioninKenyaPublication.pdf> (last accessed on 1st October 2015).
[21] The Constitution of Kenya (Amendment) Act No. 7, 1982 s 2A.

legislation in line with its political interests. In effect, KANU was the only party authorized under the Constitution to field candidates for election to Parliament. The ensuing crackdown on, and lockout from elections of, dissentious legislators led to the eventual demise of internal democracy within KANU. The erosion of democratic ideals grossly undermined the legislative process by stifling free debate, resulting in total disregard for the will of the people.

The ensuing political strife bore fruit nine years later, marking the end of one-party rule. The enactment of the Constitution of Kenya (Amendment) Act No. 12 of 1991 introduced section 1A, which declared Kenya to be a sovereign multiparty democratic republic. This amendment repealed section 2A and restored multiparty politics, leding to renewed impetus for more constitutional reforms that climaxed in the promulgation on 27th August 2010 of the current Constitution.

These constitutional reforms ushered in a wave of public awareness and participation in the democratic arena. This stepped up persuit for greater freedom and participatory engagement of ordinary Kenyans in their nation's public affairs. The heightened political activity presented the perfect environment for reforms in policy and legislation that culminated in the present constitutional order characterized by democratic ideals and principles that suit public participation in law making.

**2.3 The Legislative Process Under the Constitution of Kenya, 2010** The reintroduction in 2010 of the bicameral Parliament served to improve the quality and scope of representation in the two Houses of Parliament. The need for a second chamber (i.e. the Senate) was founded on the desire to represent the counties and to protect the interests of the counties and their governments[22] while the National Assembly represents the people of the constituencies and special interests in the National Assembly.[23]

[22] The Constitution of Kenya, 2010 art 96(1).
[23] ibid art 95(1).

The return of bicameralism under the Constitution of Kenya, 2010 restored the legislative authority of Parliament and opened the arena for vibrant debate and innovation in law making. The consequent enhancement of its sovereignty released Parliament for what amounted to shackles of executive powers.[24] The erosion of the hitherto imposing power of the executive effectively enhances the sovereign power of Parliament in view of the fact that (a) Parliament is able to determine its calendar; (b) the President does not have the power to prorogue Parliament; and (c) the President can be impeached and removed from office without any consequential effect on Parliament, i.e. without any fear of ending its own life.

It must be borne in mind, though, that the legislative authority of Parliament draws from the sovereignty of the people of Kenya. Article 1(1) states that "[a]ll sovereign power belongs to the people of Kenya …". This power is exercised "either directly or through their democratically elected representatives".[25] In effect, Parliament exercises its legislative authority as delegated by the people. Whether or not the legislature exercises this authority for the interest and in accordance with the will of the people is a question that requires a candid answer. In practice, this presumption raises more questions than answers.

As Kirui and Murkomen correctly point out, under the 2010 Constitution, the people of Kenya have limited the power of the legislature to make any constitutional amendments, a referendum a prerequisite making in certain cases.[26] In addition, the people have the constitutional right to ensure access to and participate in parliamentary matters.[27] For instance, they have the right to petition for the enactment, amendment or repeal of legislation.[28]It is no wonder that public participation constitutes one of the most treasured national values and principles.[29] The only issue is as to the extent to which meaningful public participation is attainable.

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[24] Kirui and Murkomen (2011) p.22.
[25] The Constitution of Kenya, 2010 art 1(1) and (2).
[26] ibid art 255.
[27] ibid art 118.
[28] ibid art 119. [29] ibid art 10.

Article 118(1) mandates Parliament to (a) conduct its business in an open manner and to ensure that its sittings and those of its committees are held in public; and (b) facilitate public participation and involvement in the legislative and other business of Parliament and its committees. Clause (2) prohibits Parliament from excluding the public or any media from any sitting unless in exceptional circumstances in which the relevant Speaker has determined that there are justifiable reasons for the exclusion.

# 3 The Theoretical Framework of Legislation in Democratic States

## 3.1 The Concept of Democracy

The concept of democracy, which has endured for a period of more than 2,400 years, may be traced to ancient Greece. The word "democracy" means "rule by the people"[29] or selfgovernment. The primary purpose for which the people establish democratic governments is to guarantee the protection and promotion of their basic rights, interests and welfare. As Bahmuller correctly observes, the notion of democracy requires that each individual be free to participate in the political community's self-government.[30] This presupposes free and fair elections, meaningful public participation and other forms of political freedom designed to serve the common good of society.

Democracy embodies the idea that "the people are the ultimate authority and the source of the authority of government".[31] The principle of popular sovereignty is enshrined in article 1(1) and (2) of the Constitution of Kenya, 2010. In principle, the just powers of government (including legislative authority) are founded on the will or consent of the governed, who determine the persons or institutions by whom political power shall be exercised on their behalf. This determination is made not only by the practical means of free, fair and frequent elections, but also by meaningful. participation in the law-making process. Legislation provides the platform from which the people

[29] Bahmueller CF "The Concept and Fundamental Principles of Democracy" in Hargrov DW (ed) *Elements of Democracy: The Fundamental Principles, Concepts, Social Foundations, and Processes of Democracy* (Centre for Civic Education Calabasas California USA 2007) p.12.
[30] ibid.
[31] Ibid.

oversee, monitor and influence their political and other representatives' conduct of the affairs of government.

The concept of popular sovereignty denotes that popular government is essentially "by the people and for the people"-for the benefit of the people, not for the benefit of those who govern in their name.[32] It follows, therefore, that the law-making power of Parliament shall be exercised on behalf and for the benefit of the people by whom the legislative process should be influenced. In other words, the people authorize, or delegate their authority to, the legislature to make laws, whether by direct or indirect participation of the public in the process.

Active participation in democratic elections, policy development and legislation, among other things, offers citizens of modern democratic governments the opportunity to express their collective will and signify their consent (albeit tacitly) to their desired political order and for their common good. The conception of "common good" is a critical factor that motivates meaningful participation of the people in public administration and in the development of appropriate policy and legislation that guides the affairs of government.

The term "people" in this context refers to both individuals and groups who agree to form themselves into a single whole for the purpose of living together in a state established by a constitution, which they create and hold in common. In doing so, they establish themselves into a politically united people[33] to which the 2010 Constitution refers as "we, the people of Kenya".[34] To form a "political people", they must mutually consent on the basis of equality (among the majority and the minority groups) to establish a single democratic state without any degree of forcible inclusion in the name of "majority rule".[35] The "people" are usually characterized by ethnic, religious, social and cultural diversity in relation to which they individually and collectively desire to influence policy and legislation for their common good.

[32] ibid p.14.
[33] ibid p.16.
[34] The Constitution of Kenya, 2010 preamble.
[35] Bahmuller (2007) p.16).

## 3.2 Law Making in Democratic States

While democratic rule denotes popular sovereignty, it is impracticable for tens of millions of citizens to convene on a common platform to legislate. For this reason, representative lawmaking becomes imperative. Accordingly, assemblies of elected members are established to represent the sovereign people who, in certain circumstances and jurisdictions, May directly vote on proposed laws or public policy in referenda and other elections.[36]

Kenya is a fitting example of jurisdictions in which the people exercise legislative authority by representation through the Senate, the National and County Assemblies and, in certain special cases, exercise their collective will by vote in a referendum on matters of fundamental constitutional reforms. Direct vote in such cases constitutes participation by individual citizens in the process of determining the content of the legislation in question.

Even though the ideal democratic scenario would be to have the literal presence in the lawmaking process of all interested parties, as posited by Waldron (2008), In reality, the colossal numbers of those involved would render it impracticable.[37] The object of allowing "… every shade of opinion in the community to really and truly speak for itself" would be unattainable. For this reason, lawmaking is representative and the only course for concern is the extent to which the general populace articulates its individual or group interests in an atmosphere often charged with party politics and the personal or collective interests of the legislators.

In addition to the legislative assemblies, executive bodies have power to make what is commonly referred to as delegated or subsidiary legislation often comprised of regulations or administrative procedures designed to guide administrative action. The Constitution permits Parliament to delegate its legislative powers to executive bodies to give effect to a diverse range of sectoral

[36] ibid p.29.
[37] Waldron J "The Most Desparaged Branch: The Role of Congress in the 21st Century" a paper presented at Boston University School of Law, November 14th 2008.

legislation implemented by respective Cabinet Secretaries. The enabling legislation delimits the executive power and defines the subject matter of the delegated legislation. Accordingly, the executive bodies may adopt laws only on the basis of the powers delegated by Parliament.[38] The comprehensive procedure for subsidiary legislation in Kenya (including antecendent and subsequent publication of proposals for public views) is consultative and participatory. The procedure is beyond the scope of this paper. Suffice it to say that those groups affected by the legislation are accorded the opportunity to engage the executive bodies in the development of both policy and delegated legislation.

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### 3.3 The Sociological Jurisprudence of Legislation

In any civilized society, legislation is designed to meet the diverse social needs and interests of the general populace. These needs and interest include: (a) individual interests asserted for the titles of individual life; (b) public interests, which are claims or demands, or desires involved in life in a politically organized society and asserted as entitlements of that organisation; and (c) social interests comprised of claims, demands or desires involved in the social life and asserted in title of that life.[39]

The postulation of sociological jurisprudence is that the three categories of legal interests need to be balanced against each other under a legislative framework in respect of whose content all interested groups and individuals have a say in its formulation. It must be appreciated, though, that these interests are not mutually exclusive. They overlap and form what Pound (1943) views as "three perspectives of a single set of interests which co-exist in the context of unity and variation".[40]

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[38] Bogdanovskaia I "The Legislative Bodies in the Law-Making Process" available at https://www.google.com/search?q=lawmaking+in+democratic+states&ie=utf-8&oe=utf-8 (last accessed on 5th October 2015)

[39] Nalbandian E "Sociological Jurisprudence: Roscoe Pound's Discussion on Legal Interests and Jural Postulates" Hein Online available at http://heinonline.org (last accessed on 5th October 2015).

[40] Pound R (1943) "A Survey of Social Interests" 57 Harvard Law Review p.99.

According to Pound, "law is social engineering which means a balance between the competing interests in society in which applied science[s] are used for resolveing individual and social problems".[41] Therefore, it may be concluded that no sound balance between competing interests can be struck if those with claims, demands and interests sought to be balanced are excluded from the law-making process, which seeks to satisfy such interest as would be in the benefit of the majority.

To illustrate, it is in every person's interest that national legislation curbs corruption and imposes heavy penalties on economic crimes. The enactment and successful enforcement of such legislation would result in economic growth and stability attributable to investor confidence. Consequently, the economic growth results in increase in job opportunities and availability of resources to support state-funded social welfare programmes. In effect, laws are used as a means to shape society and regulate peoples' behavior for the common good of society.

In conclusion, Pound views law as "… a social institution [designed] to satisfy social wants-the claims and demands involved in the existence of civilized societies-by giving effect to as much as we need with the least sacrifice, so far as much wants may be satisfied or such claims given effect by an ordering of human conduct through politically organized society."[42] Political organisation of society in modern-day democracies recognizes the need for representation in legislative institutions to ensure that law making effectively accommodates and balances the competing needs and interests of society. However, the process is susceptible to party politics and other political intrigues to which we will now turn.

## 3.4 Politics, Policy and Legislation in Kenya

Policy making and legislation are invariably influenced by the dynamism of every politically organized society. In practice, party politics plays a decisive role in the legislative process. And in determining the content of policy and legislation. Kenya's experience during the period between

[41] ibid.
[42] Pound R *Jurisprudence* (West Publishing Company St. Paul Minnesota 1959).

1963 and 1966 is a fitting example of how party politics can influence far-reaching constitutional reforms and the erosion of fundamental rights and freedoms in complete disregard of the common good of society as a whole. Loyalty to one's party impels legislators to generate legislation that reflects their party's manifesto.[43] In the alternative, they are quick to criticize policies that conflict with the political aspirations of their party.

Political parties influence legislation by compelling representative legislators to make fundamental choices as between what is advocated in the legislative sphere and what is embraced by the party.[44] In effect, the content of legislation invariably reflects the majority or ruling party's belief system, policy and legislative agenda. A party's legislative programme almost invariably wins the support of its entire leadership in and outside Parliament, which explains why the legislative process is driven by the political vision and mission of the majority in Parliament.

It is not uncommon for political parties to advocate for the adoption of policies and legislation that appeal to the popular support of the electorate but which may not necessarily be sound from the economic, religious, moral or social point of view. A good example is the recent nearcollapse of the Greek economy was as a result of a flawed but populist policy position not to reduce public borrowing or spending, which resulted in unprecedented inflation and grave economic consequences.

Political parties play a significant role in shaping public opinion. They mobilize support for and party programmes, planning and perspectives among its members and the general public. In effect, they play a pivotal role in the flow of political information and mobilize the electorate to vote for

[43] Kanan A "How Do Political Parties Influence Policy Making?" available at www.enotes.com/homeworkhelp/how-do-political-parties-influence-policy-making-291376 (last accessed on 5th October 2015).
[44] ibid.

office holders in representative democracies by selling partisan messages and appeals.[45] Accordingly, mobilization for political support, policy and legislation in developed democracies is mostly dependent on formal institutional arrangements of the party on an ongoing basis.

Every party mobilizes to propagate its systems of belief, specific objectives and political programmes that ultimately inform policy development and the legislative agenda of the party that emerges victorious in an election. Accordingly, parties are used as a means of assessing the suitability of their sponsored candidates and, therefore, provide a linkage between the electorate and their representatives, who are in turn expected to advocate and legislate for their social interests and the common good of society.

The extent to which party politics guides policy and legislation for the common good of society in Kenya remains to be seen. If the 1963-1966 and the 1982 constitutional reforms are anything to go by, it may be safely concluded that party politics in Kenya focuses on the means of consolidating political power with token reference to issues of concern to the general public. Even where social issues are addressed in political campaigns, most parties lack a clear vision and focus on rhetoric slogans cunningly coined to court the electorate. They pursue power for its sake and, if victorious, spend the remainder of their term investing on survival as the opposition remains infatuated with criticism and condemnation over anything and everything, including what may turn out to be sound policy and legislation.

[45] Fredrich Ebert Foundation "Institutionalising Political Parties in Kenya" available at https://www.google.com/search?q=how+party+politics+influence+legislators+in+kenya&ie=utf-h&oe=utf-8 (last accessed on 6th October 2015).

# 4 The Concept of Public Participation

## 4.1 The Theoretical Framework of Public Participation

The notion of popular participation in decision-making traces back to the Greek City-States, where it was believed that every citizen had the right to participate in decision-making.[46] Even though the Greek model of citizen participation has changed over the years as it adapts to the ideals of modern democratic governance, public participation may nonetheless be viewed as a fundamental element of planning and decision-making. According to Sala, "… participation through normal institutional channels of elections, has little impact on the substance of government policies, which [leads] to diminishing trust [and confidence] in government".[47] In effect, popular sovereignty in determination of policy and legislation does not end at the election of representatives to the legislative bodies. Rather, it finds full meaning in the engagement of individuals and interest groups in policy development and legislation. In order To balance the competing interests in society.[48]

In the context of public participation, the term "public" refers to "citizens…that are directly or indirectly affected by the decisions taken by the…government." This includes "the private sector and stakeholders or organisations that represent or claim to represent a group of people, as well as individuals from different backgrounds."[49] Examples of "the public" include men and women. People in different geographical areas, persons with disabilities, children, youth and interest group organisations.

Notably, there is not one but many ways in which public participation may be undertaken in an environment where traditional representative democracy has failed to effectively respond to the apparent decline in public participation In political processes. These ways include, among others:

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[46] Sala M *The Participation of Informal Settlement Communities in City-Level Policy-Making Processes* (University of Witwatersrand Johannesburg 2009) p.27.
[47] ibid p.29.
[48] Pound (1943) p.99.
[49] Maseko L *The Public Participation Strategy of the Gauteng Provincial Legislature* (Switchboard Gauteng Provincial Legislature Johannesburg 2001) p.10.

(a) participation through representative democracy and resultant institutions; (b) civil society action in advocacy and challenge; (c) direct action and protest; (d) communicative participation; (e) extended engagement with various committees; (f) co-optive engagement; and (g) participation in the core democratic institutions.[50]

It may be argued that, whatever the means, citizens must be accorded the opportunity to exercise meaningful control over decisions which affect their lives. This requires innovative programs that lend meaning to the principle of public participation without the need for statutory views on critical matters of interest in policy and legislation.prescription of the forms and arenas. Suffice it to say that, in addition to market mechanisms, there is need to improve the existing forms of citizen participation to enhance the opportunity to present public Public participation is premised on the presumption that every democratic nation has defined mechanisms through which elected representatives engage and receive views from their electorate. The question is whether a democratic nation should have mandatory mechanisms for give-and-take between legislative leaders and the public. This question was answered in the affirmative in South Africa in *Doctors for Life* v *The Speaker of National Assembly* and Others (2006).[51]

The Applicant complained that during the legislative process leading to the enactment of four health statutes, the National Council of Provinces (NCOP) and some of the Provincial

Legislatures failed to comply with their constitutional obligation to facilitate public involvement in their legislative processes. They argued that there has been failure to invite written submissions and conduct public hearings on these statutes. Denying the claim, the Respondent challenged the Applicant's assertion as to the scope of the duty to facilitate public involvement. They argued that, although the duty to facilitate public involvement requires public participation in the law-making process, essentially all that is required of the legislature to provide is the

[50] ibid p.14.
[51] *Doctors for Life* v *The Speaker of National Assembly* and Others (2006) (12) BCLR 1399 (CC) (S.Afr.) pp.36-37.

opportunity to make either written or oral submissions at some point in the national legislative process.

The issues before the Court were: (a) the nature and scope of the constitutional obligation over legislative organs of the state to facilitate public involvement in its legislative processes and in the processes of its committees, and the consequences of failure to comply with that obligation; (b) the extent to which the Constitutional Court may interfere in the process of a legislative body in order to enforce the obligation to facilitate public involvement in law-making processes; and (c) whether the Court was the only court that may consider the questions raised in the case.

The majority of the Court found that Parliament had failed to comply with its constitutional obligation to facilitate public involvement before passing the health statutes. Adopting a social and historical context approach, the Court held that certain statutes require mandatory public consultations depending on, among other things, (a) the nature and importance of the Bill; (b) whether there has been any request for consultation; and (c) whether or not promises had been made in response to such requests. In its considered view, public consultation in such circumstances would demonstrate respect for the views of those affected by the legislation.

As to the adequacy of public consultation, the Court was of the view that adequate consultation was even more crucial in situations where the affected groups have been previously discriminated against, merginalised, silenced, received no recognition and have an interest in laws that would directly impact them. The Court concluded that NCOP is not a rubberstamp of the provinces in relation to the duty to facilitate public involvement. It is required by the Constitution to provide a national forum for public consideration of issues affecting the provinces.

The constitutional duty to facilitate public participation is premised on the principle that government is founded on the popular will and sovereign power of its people, which constitute the

tenets of democratic rule. According to the learned judges, the emphasis on democratic participation is strongly reflected in South Africa's democratic Constitution and the entrenchment of public participation in Parliament and the legislatures.[52]

## 4.2 Public Participation and Law-Making In Kenya

The right to public participation in Kenya is a constitutional imperative realizable in different forms and processes, including the right to petition Parliament, present written submissions, complaints and requests, and the holding of referenda.[53] Article 10(2)(a) recognises "participation of the people" as one of the national values and principles of governance. By which all state organs (including the legislature), state officers, public offices and all person are bound in discharge of their duties relating to: (a) the application or interpretation of the Constitution; (b) the enactment, application or interpretation of any law; or (c) making or implementing public policy decisions. Accordingly, the Constitution mandates all state organs to facilitate public participation in policy development and legislation.

At the national level, article 118(1)(b) requires Parliament to facilitate public participation and involvement in the legislative and other business of Parliament and its committees. In addition, article 119(1) guarantees the right of every person to petition Parliament to consider any matter within its authority, including to enact, amend or repeal any legislation. Clause (2) mandates Parliament to make provision for the procedure for the exercise of this right. Indeed, the constitutional right to be involved in, and the corresponding duty of the state to facilitate, public participation are attainable depending on the forms and venues provided for in regulations and the Standing Orders of the two Houses of Parliament.

Public participation is one of the principal objects of devolution. Article 174(c) stipulates one of the objects of devolution as "… to give powers of self-governance to the people and enhance the

[52] ibid p.119.
[53] The Constitution of Kenya, 2010 arts 10, 118(1)(a) and (b), 119(1) and (2), 174(c), 196(1)(b), 201(a) and 255.

participation of the people in the exercise of the powers of the State and in making decisions that affect them". Similarly, article 196(1)(b) mandates County Assemblies to facilitate public participation and involvement in the legislative and other business of the Assembly and its committees. This is in harmony with the democratic ideals on which public participation is founded.

The principles of public finance set out in article 201 include public participation. Article 201(a) requires openness and accountability, including public participation in financial matters. Article 255 specifies the circumstances in which the public has a constitutional right to vote in a referendum to determine the fate of certain proposals to amend the Constitution.

At the county level, the County Government Act sets out the principles of public participation in county governments.[54] Section 115 of the 2012 Act makes public participation mandatory in matters relating to the planning process. Subsection (2) requires each County Assembly to develop laws and regulations giving effect to the requirements for effective citizen participation in development planning and performance management within the county.[55] Such laws and guidelines are required to adhere to minimum national requirements.

Public participation ought not to be viewed as a derogation from parliamentary representation or representation at the County Assembly level. The words of Justice Ngcobo accurately sums up the rationale for this principle. According to the learned judge, "[i]n the overall scheme of our Constitution, the representative and participatory element of our democracy should not be seen as being in tension with each other. They must be seen as mutually supportive. General elections, the foundation of representative democracy, would be meaningless without massive participation by the voters. The participation by the public on a continues basisprovides vitality to the functioning of representative democracy. It encourages citizens of the country to be actively involved in public affairs, identify themselves with institutions of government and become familiar with the laws as

[54] The County Governments Act, 2012 s 87.
[55] ibid s 115(2).

they are made. It enhances the civic dignity of those who participate by enabling their voices to be heard and taken account of. It promotes a spirit of democratic and pluralistic accommodation calculated to produce laws that are likely to be widely accepted and effective in practice. It strengthens the legitimacy of legislation in the eyes of the people. Finally, because of its open and public character, it acts as a counterweight to secret lobbying and influence peddling. Participatory democracy is of special importance to those who are relatively disempowered in a country like ours where great disparities of wealth and influence exists. Therefore, our democracy includes, as one of its basic and fundamental principles, the principle of participatory democracy."[56]

## 4.3 Upholding Public Participation in Legislation: The Role of Judicial Intervention

In practice, public participation in legislation is not confined to engagement with legislative bodies. The Judiciary plays a significant role in influencing the content of legislation. How so?

Article 165(3)(b)(i) provides that "the High Court shall have jurisdiction to hear any questions respecting any interpretations including the determination of whether any law is inconsistent with or in contravention of [the] Constitution".[57] This provision is premised on the recognition that "… democracy through Parliament is imperfect and fallible".[58] According to Prof. Ojwang, "… there is therefore need for an institution that can check the misuse of legislative power by Parliament. That institution is the judiciary".[59]

Judicial intervention in the context of the legislative authority of Parliament is invariably dependent on proceedings instituted by individual members of public, group of persons, corporate or unincorporated associations, whose constitutional right to influence legislation is sacrosanct. Accordingly, judicial intervention is one of the means by which public participation in legislation finds meaning.

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[56] *Doctors for Life International* v *Speaker of the National Assembly and Others* (2006) P.64-65.
[57] The Constitution of Kenya, 2010 art 165(3)(b)(i).
[58] Kirui and Murkomen (2011) p.23.
[59] Ojwang (1990) p.121.

Judicial intervention in lawmaking is indirect. It may be viewed purely as directive or consequential upon the courts' judgments and decrees. In other words, the courts' authority to interpret legislation is limited to its jurisdiction to determine its content, to clarify it when it is obscure and to supplement it when it is indeterminate.[60] John Austin (1885) drew the distinction between oblique and direct lawmaking. According to him, "judge-made law is an oblique form of lawmaking. on the other hand. The judges' direct or proper purpose is not the establishment of the rule, but the decision of the specific case to which he applies it. He legislates as *properly judging*, and not as *properly legislating*."[61]

While the legislature is publicly dedicated to the explicit role of making and changing law, judicial decisions have the effect of making and changing law. on the other hand, judicial decisions may trigger parliamentary intervention by explicit legislation to address matters not adequately governed by statute law. The link between public participation and judicial intervention in the legislative process should be understood in practical terms. Judicial decisions are the product of a process commenced by parties in dispute, which judges seek to resolve by pronouncements that may result in rules of judge-made law. In effect, public participation is central to the judicial process by which statute law is supplemented albeit through motions of statutory interpretation or the restatement of the immutable principles of common law, as the case may be. This is notwithstanding the fact that the constitutional functions of the judiciary are limited to finding, interpreting and applying the law for the time being in force. In any event, judge-made law is the product of judicial authority derived from the people, and vested in and exercised by the courts and tribunals established by or under the Constitution.[62]

For this reason, courts in Kenya continue to uphold the sanctity of public participation in legislation, and failure to facilitate participation attracts judicial intervention. In *Robert N Gakuru and Others* v *Governor Kiambu County and Three Others*, The Kiambu County Government

[60] Goldsworthy Tom Mboya: The Man Kenya Wanted to Forget (Heinemann Publishers Nairobi 1982) p.73.
[61] Austin J *Lectures on Jurisprudence* (Robert Cambell ed 1885) pp.520-33.
[62] The Constitution of Kenya, 2010 art 159(1).

enacted and passed the Kiambu Finance Act, 2013(the Act), which sought to levy taxes on every stone transported from the County's quarries. The applicants petitioned the court seeking a declaration that the Act violated the provisions of the Constitution and was therefore null and void. They submitted that there was no public participation in the enactment of the impugned county legislation, which led to unreasonable and punitive provisions that sanctioned double taxation. They also argued that the taxes proposed to be levied under the Act were outside the scope of taxes that could be levied by County Governments pursuant to article 209 of the Constitution.[63]

The relevant issues in contention were, among others: (a) whether lack of public participation in enactment of legislation rendered the resultant legislation null and void; (b) whether a one-time publication in a newspaper was sufficient invitation to members of the public to participate in the enactment of legislation; and (c) whether public participation was required even where a Bill had been rejected by the assembly and a fresh Bill introduced as opposed to mere amendments. In its judgement, the Court held that the nature and the extent of public participation depended on the nature of what was at hand, but that this did not of itself permit complete blackout of the public from participation. In cases of oral public hearings, the court was of the view that the mere fact that a particular person was not heard did not render the whole process a nullity.[64]

In its considered judgment, the court observed that where a Bill had been rejected by the County Assembly and a fresh Bill introduced (as opposed to mere amendments), the principle of public participation had to apply. Otherwise, the principle could be defeated by the County Assembly simply rejecting a Bill in which the public had an input and substituting therefor its own Bill disregarding the input by the public.[65] In every case, it was the duty of County Assemblies to ensure that their constituents were aware of their intention to pass legislation. Where the legislation

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[63] *Robert N Gakuru and Others* v *Governor Kiambu County and Three Others* [2014] EKLR.

[64] *Doctors for Life International* v *Speaker of the National Assembly and Others* [2006] (CCT12/05) ZACC p.11; [2006] (12) BCLR p.1399 (CC); [2006] (6) SA p.416 (CC).

[65] *Merafong Demarcation Forum and Others* v *President of the Republic of South Africa and Others* (CCT 41/07) [2008] ZACC p.10; [2008] (5) SA p.171 (CC).

in question involved such an important aspect as payment of taxes and levies, the duty was even more onerous. Whereas the magnitude of the publicity required varied in different circumstances, a one day newspaper advertisement in a country where a majority of the populace survived on less than a dollar a day and to whom newspapers were a luxury, not to mention the level of illiteracy in some parts of the country, was not sufficient for the purpose of facilitating public participation. Consequently, the *Kiambu Finance Act, 2013 was declared null and void.*

> *A recent survey reveals that county governments and civil society are innovatively engaging citizens by publishing citizen-friendly budgets, holding structured planning and budgeting forums and using social media to share and receive information. However, these good practices are unique to only a few counties.*[66] *The World Bank report on Kenya observes that while there is a strong impetus towards conducting public participation, there is a wide gap between theory and practice. In addition, there are divergent views on what constitutes meaningful public participation.*[67]

# 5 Conclusion and Recommendations

A quick look at the legislative process and the statutory requirements for public participation reveals a spirit of willingness to engage individual members of public and interest groups and to accord them the opportunity to express views on the content of legislative proposals at both national and county levels. The narrow gap between theory and practice is not difficult to fill; provided that appropriate measures are taken to ensure meaningful public participation. The need to engage meaningful public participation in policy development and legislation cannot be overemphasized. However, this requires innovation and strategy to balance the influence of party politics and the often-overbearing executive authority. The challenges often posed by political interests in legislation are by no means minor. The following are a few of the recommended measures that would ensure a degree of success in realizing meaningful public participation, which is indeed attainable:

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[66] The World Bank "Public Participation Key to Kenya's Devolution" available at www.worldbank.org/en/news/feature/2015/04/30/public-participation-central-to-kenyas-ambitious-devolution (last accessed on 6th October 2015).

[67] ibid.

a() development of clear guidelines and minimum standards of public participation, civic education and outreach to create awareness and motivate voluntary engagement in public forums;

(b) adequate resource allocation and effective strategies to engage disadvantaged communities, especially in marginalized areas, including arid and semi-arid regions;

(c) adequate budgetary allocation to support effective public consultation and outreach;

(d) development of feedback mechanisms and building capacity of public officers to facilitate public consultations and disseminate user-friendly information;

(e) creation of units or desks dedicated to manage public participation in the affairs of key state organs involved in policy development and legislation;

(f) establishment of performance management systems to facilitate performance review by all state departments and agencies;

(g) creation of a system of knowledge management and sharing of data and experiences among public institutions on public engagement processes, outcomes and challenges;

(h) development of training programmes to build the capacity of public officers and their stakeholders and citizens on engagement skills and practices;

(i) adoption of more successful and participatory formats for public forums; and

(j) setting of annual or periodic participation goals and plans at the ward, county and national levels.

The foregoing recommendations are by no means exhaustive. However, they suitably inform the development of programmes, plans and actions to facilitate meaningful public participation in policy development and legislation. They serve to augment the existing mechanisms of public engagement founded on participatory democracy and popular sovereignty.