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**An Assessment of Public Participation in KwaZulu-Natal Legislature in
Compliance with the Constitution of the Republic of South Africa, 1996.**

Faculty of Commerce, Administration and Law

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DEDICATION

This research dissertation is dedicated in memory of the late Advocate Moses Moeletsi who served as the main supervisor of this dissertation but passed away in the final stage of this work. He dedicated his time and energy reading and inspecting the work with great passion, love and constant motivation. I shall wholeheartedly declare him a legal guru in this piece of work. Without his painstaking supervision and encouragement, I would have given up, and this study would have come to a permanent standstill.

DECLARATION

I, Kwanda Talente Mngomezulu, hereby declare that the work contained in this document is my original work. For whatever purposes, it has not been submitted to any other institution. I also declare that all the secondary sources and information used herein have been duly acknowledged by way of footnote referencing and included in the bibliography.

A handwritten signature in black ink, appearing to be 'M. T. Mngomezulu', enclosed within a hand-drawn oval.

Mr Kwanda Talente Mngomezulu.

Date : 01 02 2022

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ABSTRACT

Since the inception of democracy in South Africa, public participation has become an essential element of democracy. This concept of public participation has become crucial in strengthening democracy as well as in trying to maintain a balance between representative and participatory democracy. The nation's Constitution imposes a constitutional imperative upon the legislature to ensure 'public involvement' using legislative processes. This concept of 'public participation' therefore is a concept encompassing all democratic participation processes. It is the most conventional avenue to consider and incorporate the voices and will of community members in the law-making process. Meanwhile, the legitimacy of the statutes enacted by the government has been challenged in numerous occasions because of flawed public participation processes. Wherefore public participation in the law making process becomes a subject of considerable research.

The main aim of this study was to establish the compliance by the KwaZulu-Natal Legislature (KZNL) with the constitutional mandate of 'facilitating public involvement' when laws are being made. The study provided an international and foreign perspective of public participation intended to obtain an overall global picture of public participation and how it should be understood in a democratic country. A number of international treaties were brought into discussion. The treaty declarations were found to emphasise the significance of public involvement in democratic countries to ensure the protection and promotion of human rights. It is therefore claimed that the treaties have played an increasingly important role in agitating for the advancement of public participation in South Africa. The study further considered foreign law, where few selected experiences of developed and developing countries were analysed, and most of these countries support public participation.

The study also explored public involvement in practise within the context of the KZNL. Various participation mechanisms were identified and analysed. The study revealed that there are significant and strenuous efforts by the KZNL in accomplishing its duty to facilitate public involvement. There is an established framework in place to regulate public involvement. It is however noted that despite the presence of this robust framework adopted to guide participation activities, which provides an overview and

insight within the KZNL on how to achieve meaningful participation, practically, the study reveals challenges ordinarily encountered in conducting public hearings. These challenges also serve as a threat to meaningful public participation that relates mostly to consultation processes, short notice for public hearings and limited periods to convene such hearings. The study revealed that such anomalies flow from the National Council of Provinces (NCOP) that is sometimes responsible for giving stringent turn-around time frames for Provincial Legislatures to convene public hearings.

The study concluded by providing a series of recommendations based on the study findings, as well as in relation to the reconfiguration of public hearings *modus operandi* and provision of relevant innovation. With those recommendations, it will be therefore possible to achieve meaningful participation, and most importantly, enact constitutionally compliant laws.

LIST OF ABBREVIATIONS

AI	Appreciative Inquiry approach
CBOs	Community Based Organisations
CTOP	Choice on Termination of Pregnancy Amendment Bill
DDP	Democratic Development Program
EPRE	Estimates of Provincial Revenue and Expenditure
GCIS	Government Communication and Information System
ICCPR	International Covenant on Civil and Political Rights
IHRLF	International Human Right Law Framework
IAP2	International Association for Public Participation
KZN	KwaZulu-Natal
KZNL	KwaZulu-Natal Legislature
KZNPL	KwaZulu-Natal Provincial Legislature
MPs	Members of Parliament
MPLs	Members of the Provincial Legislatures
MECs	Members of the Executive Council
LAMOSA	Land Access Movement of South Africa
NCOP	National Council of Provinces
NEPAD	New Partnership for Africa's Development
NGOs	Non-Governmental Organisations
RSA	Republic of South Africa
RIPAP	Report of the Independent Panel Assessment of Parliament
OHCHR	Office of the High Commissioner for Human Rights
UNFPA	United Nations Population Fund
UNECE	United Nations Economic Commission for Europe
UN	United Nations
PCOs	Parliamentary Constituency Offices
PLs	Provincial Legislatures
PPPU	Public Participation and Petitions Unit
PPF	Public Participation Framework
SAVA	South African Veterinary Association
SALS	South African Legislative Sector

Table of Contents

DEDICATION.....	2
DECLARATION	3
ACKNOWLEDGEMENT	4
ABSTRACT.....	5
LIST OF ABBREVIATIONS	7
CHAPTER ONE	10
INTRODUCTION.....	10
1. Background.....	10
1.1 Rationale for the Study	12
2. Problem Statement	15
3. Aims and Objectives	16
3.1 Aim of the study.....	16
4. Key Research Questions.....	16
5. Methodology (Approach and Design).....	17
5.1. Data Collection and Analysis	18
6. Literature review	19
7. Delimitation of the study	22
8. Limitation of the Study.....	22
9. Outlining the Study.....	23
CHAPTER TWO.....	27
ESTABLISHING THE PERMUTATIONS OF EFFECTIVE AND MEANINGFUL PUBLIC PARTICIPATION	27
2.1 Introduction.....	27
2.2 Conceptualisation and theorisation of public participation	28
2.3 International perspective on public participation	39
2. 3.1 International treaties	39
2.3.2 Review of developing and developed foreign countries	42
2.4. South African perspective on public participation	45
2.4.1. Democracy and public participation.....	45
2.4.3 Mechanisms and Channels for Public Participation.....	50
2.4.5 An analysis of the concept of public participation	53
2.4.6 Case law on public involvement	56
2.5 Conclusion	61
CHAPTER THREE.....	63

UNPACKING PUBLIC PARTICIPATION IN PRACTICE WITHIN THE KZN LEGISLATURE	63
3.1. Introduction	63
3.2. An analysis of the mechanisms employed by the KZN legislature for public involvement	64
3.2.1. Public hearings	65
3.2.2. Request for written submissions on burning issues	72
3.2.3. Public education, outreach, and information dissemination	74
3.2.4. The Offering of “Reasonable Opportunity” to the public	80
3.2.5. Case Law on public involvement where the KZN legislature fell short in executing the required procedure	85
3.2.6. Conceptualization and Understanding of Public Participation	87
3.3 Conclusion	94
CHAPTER FOUR	95
ASSESSING THE LEGISLATURE’S DUTY TO FACILITATE PUBLIC PARTICIPATION IN THE LEGISLATIVE PROCESS	95
4.1 Introduction	95
4.2 The International human rights law framework	96
4.3 Key findings from documentation analysis: public participation activities within the KwaZulu-Natal Provincial Legislature	102
4.4 Conclusion	107
CHAPTER FIVE	109
REVIEW OF PUBLIC PARTICIPATION LEGAL FRAMEWORK, CONCLUSION AND RECOMMENDATION	109
5.1 Introduction	109
5.2 The Constitution	109
5.2.1 Theoretical Interpretation of Section 118	112
5.2.2. The Standing Rules of the Legislature	114
5. 2.3. The Petitions Act	115
5.3 Conclusion	117
5.4 Recommendations	119
BIBLIOGRAPHY	122

CHAPTER ONE

INTRODUCTION

1. Background

This study sought to establish whether the KwaZulu-Natal Legislature (KZNL) complies with the constitutional obligation of facilitating public involvement as contemplated in the Constitution.¹ By way of background, it bears mention that the legislative environment in the South African Legislature operates through more or less the same modalities and *modus operandi* across the legislative institutions in the three distinct spheres of government in South Africa in discharging the obligation to afford members of the public an opportunity to participate in decision-making that affects them.² Arguably, the challenges faced by the KZNL might be the same as those faced by other institutions as well. The findings and recommendations in this study might therefore be useful and instrumental towards the improvement of the efficiency and effectiveness of other institutions in the legislative environment in South Africa.

South African history is embedded in the colonial and thereafter, apartheid, regimes. A series of political transformation and governance systems (state reform) has been happening in South Africa since 1652.³ However, all these changes yielded no positive results for the majority of South Africans who remained excluded from the government decision making process.⁴ As far back as 1652 when South Africa was established as a Dutch VOC colony and later a British colony in 1806, South Africans were disenfranchised from political participation.⁵ The country was then transformed by the

¹ The Constitution of the Republic of South Africa, 1996. Section 118 provides that a “ provincial legislature must (a) Facilitate public involvement in the legislative and other processes of the legislature and its committees; and (b) Conduct its business in an open manner, and hold its sittings, and those of its committees, in public, but reasonable measures may be taken (i) To regulate public access, including access of the media, to the legislature and its committees; and (ii) To provide for the searching of any person and, where appropriate, the refusal of entry to, or the removal of, any person.”

² See the “Public Participation Framework compiled by the South African Legislative sector in 2013” (hereinafter referred to as a PPF of 2013). Available at <http://www.sals.gov.za/docs/pubs/ppf.pdf> . PDF file (accessed 15 March 2020).

³ E Oliver and WH Oliver ‘The Colonisation of South Africa: A unique case’ (2017) 73 (3) Pretoria.

⁴ D Nyalunga ‘An Enabling Environment for Public Participation in Local Government’ (2006) 1 (1) *International NGO Journal* at 1.

⁵ A Barratt...et al *Introduction to South African Law* Fresh Perspective 3rd edition (2019) at 20.

British Parliament when the South Africa Act was passed in 1909.⁶ Since then a series of regressive transition have been taking place including the election of the National Party which reigned from 1948 till 1994. During this epoch, it was only the minority whites who had the right to vote. It was the spirit of the emergence of apartheid that encouraged the then white only government to introduce the apartheid laws, which worsened racial segregation.⁷ Prior to 1994, the constitutional system was characterised by parliamentary sovereignty.⁸ Parliament could make any laws it deemed fit, as long as it followed the manner and form procedures.⁹ An overwhelming majority of South Africans were sidestepped by the colonial and apartheid governments in that they did not have a say in the kind of society they aspired to live in.¹⁰ The majority of South African citizens were not consulted in any government processes, and worse still, those processes relating to the enactment of laws.

The advent of democracy in 1994, and the Constitution emanating from the transition to democracy shifted the paradigm in South Africa in that it provided that the Constitution is the supreme law in South Africa.¹¹ Notably, the Constitution contains elements that confirm that South Africa is a country embedded in constitutionalism. Thus at all material times it seeks to introduce a balance between representative and participatory democracy.¹² Representative democracy suggests that the elected representatives are the vanguard acting at the behest of its citizens; and that these vanguards (MPs and MPLs) are mandated with the requisite authority to speak and cast votes in the best interest of their constituencies.¹³ In short, the representatives

⁶ This Act was passed in response to the 1909 Union Constitution.

⁷ A number of oppressive laws were enacted including the Reservation of Separate Amenities Act 49 of 1953 and Group Areas Act 41 of 1950 and the Prohibition of Mixed Marriages Act 55 of 1949 etc.

⁸ I Currie and J De Waal *The Bill of Rights Handbook* 5th ed (2013) at 3.

⁹ Ibid.

¹⁰ Ibid.

¹¹ The Constitution of the Republic of South Africa, 1996. Section 2 provides that “any law or conduct which is inconsistency with the constitution is invalid and the obligations imposed by it must be fulfilled.”

¹² L Nyathi ‘Public Participation: What has the Constitutional Court Given the Public?’ (2008) 12 *Law, Democracy and Development* at 102. Available at <http://www.saflii.org/za/za/journals/LDD/2008/15.pdf>. PDF file (15 March 2020); Currie and De Waal (note 3) above at 13, where they argue that South Africa’s democracy is representative, participatory and direct in its nature; See also B Nzimande ‘Public Participation, Socio-economic rights and NEPAD’, Keynote Address at The Conference on Public Participation: Growth through participation, held in Durban 24 to 25 June 2003; Report of the Centre for Public Participation.

¹³ SST Khanyile ‘Evaluation of the effectiveness of public participation in the Gauteng electronic tolling programme’ PhD Thesis, University of Johannesburg, 2015 at 19.

are always inclined to act in a manner that would achieve the aspirations of the citizens.¹⁴ By contrast, in a participatory democracy, on an ongoing basis, the masses are always involved in the government decision-making processes.¹⁵ The concept of participatory democracy is characterised by the parties representing their constituencies and stakeholders in the form of interest groups.¹⁶

In the new constitutional dispensation, the paradigm of our constitutional democracy dictates public involvement in the government processes as a mandatory precondition. Thus, section 118(1) (a) introduces a constitutional duty upon legislative institutions across the provinces to facilitate public involvement when fulfilling their obligation of enacting laws. The KwaZulu-Natal Legislature, as all other provinces, derives authority to make laws from Section 104 of the Constitution. This section grants provinces competence to enact legislation to the exclusion of Parliament in certain areas (exclusive competence) and the competence to legislate with Parliament in other areas (concurrent competence). What determines the procedure to be followed is the type of Bill in question that needs to be enacted. Four types of Bills are distinguished, namely, first, ordinary Bills which have no effect on provinces once passed (section 75 Bills); second, ordinary Bills which have the effect of impacting provinces once passed, third, Bills which seek to amend the Constitution (section 74 Bills), and last but not least important, money Bills (section 77 Bills).

1.1 Rationale for the Study

1.1.1 Reason(s) for selecting the topic

Budget allocation to advance public participation within legislative institutions is a factor among the matrix of factors for selecting KZNL as the focus of this study. The KZNL has enjoyed a substantial budget that could possibly be double the allocations to other provinces for the period 2008 to 2017.¹⁷ Having said the above, it bears noting

¹⁴ Ibid.

¹⁵ MR Phooko 'What should be the form of public participation in the law-making process? An analysis of South African case' (2014) 3 (1) *Obiter* at 42. Available at <https://hdl.handle.net/10520/EJC155241> (accessed 15 October 2020).

¹⁶ Ibid.

¹⁷ Pragmatic Solutions Africa (Pty) Ltd *Situation Analysis of Public Participation in the South African Legislative Sector* 2018, African Climate Reality Project/Food & Trees for Africa Ekurhuleni Environmental Organisation, South African Institute of International Affairs and South Durban

legislatures are not immune from the failure to comply with the requirement to facilitate public involvement as stipulated in the Constitution. It becomes apparent from the recent judgments by the Constitutional Court that the legislature has fallen short when it comes to enforcing public participation as required.¹⁸

An overarching goal of the KZNLC is to firmly enhance democracy and entrench people involvement across the province with the primary objective of achieving effective public participation as a precondition of effective law making.¹⁹ As part of its concerted efforts towards strengthening public involvement, the KwaZulu-Natal Provincial Legislature (KZNPL) has designed and customised a robust participation framework together with buttressing modalities.²⁰ The main intention is to give guidance on public involvement processes so as to accomplish meaningful public involvement.²¹ Notwithstanding the establishment of such a framework within the institution to guide and promote public participation in the business of the institution, apparently there are challenges encountered by the institution specifically with how public involvement is being executed in the KZNLC and other institutions in the legislative sector.²²

There have been a number of interesting cases decided by the Constitutional Court that relate directly to the issue of public participation.²³ In some of the well-known cases the applicants were compelled to bring an application disputing the validity of the enacted statutes on the ground that the legislature had failed to facilitate public involvement. These cases include *Doctors for Life international; Matatiele Municipality*;

Community Environmental Alliance at 36 (hereinafter referred to as Action 24). This is a research project which was established to research the “situational analysis of public participation in the South African legislative environment.” The main objective was to “promote broader and effective participation of South African civil society in environmental governance”. It was compiled under the auspices of Pragmatic Solutions Africa (Pty) Ltd. Available at <http://www.climatereality.co.za/wp-content/uploads/2018/08/...> PDF file (accessed 13 April 2020).

¹⁸ *Land Access Movement of South Africa & others v Chairperson of the National Council of Provinces and others* [2016] ZACC 22 at para 32 (LAMOSA 1); *South African Veterinary Association v Speaker of the National Assembly and Others* [2018] ZACC 49 at para 13 (SAVA).

¹⁹ See KwaZulu-Natal legislatures’ archives, available at <http://www.kznlegislature.gov.za> (accessed 01 August 2019).

²⁰ Strategic plan of the KwaZulu-Natal legislature (2014-2019).

²¹ *Ibid.*

²² Action 24 (note 17 above) at 3.

²³ *Doctors for Life international v Speaker of the National Assembly and others* 2006 CCT 12/05; *Matatiele Municipality and Others v President of the Republic of South Africa and Others* CCT 73/05 [2006] ZACC 2; *Land Access Movement* (note 18 above); *Merafong Demarcation Forum v President of the RSA* (2008 5 SA 171 (CC)).

Land Access Movement and Merafong Demarcation Forum.²⁴ As is evident from these cases, public involvement plays an important role that is essential during the legislative processes. Notably, the court has the power to set aside the legislation passed without following the stipulated requirement to facilitate public participation.²⁵ Pertinent is the fact that the ruling by the court has highlighted shortcomings in the legislative process.

1.1.2 Motivation for the Study

The review of literature demonstrates that there are inadequate academic publications and materials contributing to a clear articulation of the nature and extent of public participation during the law-making process. While a review of published contributions reveals that much focus has been placed on decisions within the local sphere of government, the provinces are responsible for facilitating public participation at provincial level when certain laws are made.

The researcher was motivated by the expectation that this study could add significantly to the existing body of knowledge, especially focusing on strengthening public involvement when new laws are being made within the province. Upon completion of this study, the researcher also envisages publishing the findings and recommendations of the study aimed at expanding peoples' knowledge relating to public involvement and consultations. Recommendations might also be beneficial to other provincial legislatures and the entire legislative arm of government. Furthermore, this study might ultimately improve the approach of the legislature when it comes to matters requiring public involvement; influencing evaluations; and advancing the quality of participation activities. Possibly recommendations would eventually lead to the consolidation of meaningful participation and the strengthening of participatory democracy within and beyond the legislative environment.

²⁴ Ibid.

²⁵ The Constitution of the Republic of South Africa, 1996, section 167(4).

2. Problem Statement

Section 118 of the Constitution imposes a constitutional obligation on provincial legislatures to execute public involvement in the legislative process. This implies that legislative institutions that have not complied with this duty stand to enact invalid laws. There have been cases lodged in the Constitutional Court on the basis of inadequate public participation compliance in the KZN and other in the legislative sector, when certain laws were enacted.²⁶ Time and again whenever the problem of non-compliance arises, the reason is always, either that the consultation was short, or the notice given before the hearings was short; or the community was not afforded an adequate opportunity to participate in the legislative processes, or worse still, that the community's views were simply ignored or disregarded.²⁷

The interest groups would have to take the matter to court for resolution. However, this route seems to prove a futile exercise since the court only deals with the reasonableness of public participation and procedural issues.²⁸ The courts do not deal with the substantive issues including the question to whether it was reasonable and fair for the legislature to arrive at such a decision after considering all the submissions made during the public hearings in question.²⁹ Public participation provides an issue for considerable research in as far as the legislative process is concerned. It is a puzzling question that in spite of existing literature on studies on the subject of public participation, yet public participation still remains an issue in KZN³⁰ and the entire legislative sector.

This study purports to establish whether the KZN complies with the constitutional mandate of discharging its obligation to involve the public in the process of making new laws. The research further investigates the parameters within which the

²⁶ *Doctors for Life International* (note 23 above); *Matatiele* (note 23 above); *Land Access Movement* (note 18 above).

²⁷ *Land Access Movement* (note 18 above) at para 32; and *Merafong Demarcation Forum v President of the RSA* (2008 5 SA 171 (CC) as particular examples.

²⁸ MR Phooko 'Conflict between participatory and representative democracy: A call for model legislation on public participation in the law-making process in South Africa' 2017 (38) *Obiter* at 539.

²⁹ *Ibid.*

³⁰ *South African Veterinary Association* (note 18 above) at para 13, where the Court stressed that there was no indication that public hearings did take place in KZN legislature while other legislatures conducted unreasonable public hearings.

legislature should act in discharging its constitutional obligation of ensuring public involvement when laws are being made.

3. Aims and Objectives

3.1 Aim of the study

This study aims to investigate the compliance of the KZNL with its Constitutional obligation of facilitating public participation as envisaged in section 118 of the Constitution. The main rationale is to understand the reasons for the continuous disputes regarding whether public involvement processes have indeed been facilitated by the KwaZulu-Natal legislature and other institutions in the legislative sector.

3.1.1 Objectives of the Study

This study aims to fulfil the following objectives:

- To explore the mechanisms adopted by the legislature when passing proposed Bill/s.
- To investigate how the legislature contextualizes and implements the concept of public participation and the offering of “reasonable opportunity” to public members, stakeholders and interest groups.
- To determine the extent to which the legislature should act in facilitating public involvement when laws are being made.
- To review the existing legal framework guiding and regulating public involvement within the institution and to provide appropriate recommendations.

4. Key Research Questions

In pursuit of attaining the above mentioned research objectives, the following research questions will systematically be answered:

- What mechanisms are put in place by the KZNL to facilitate public participation when passing proposed Bill/s?

- How does the KZNL legislature contextualize the concept of public participation and “reasonable opportunity” within the KZNL?
- To what extent should the KZNL legislature act in discharging public involvement in law making?
- What is entailed in the legal framework that regulates public participation?
Are there any possible recommendations that can be made?

5. Methodology (Approach and Design)

A qualitative research approach was employed in this study. The study mainly adopted a library-based research and further drew on desktop research conducted on public participation in the SALS. The work involved analysing the existing literature on public participation. While the invoked sources were both primary and secondary, the research initially commenced with the review of the relevant literature based on the available information in the context of KZNL. Insightful information was accessed from the website of the institution. Further rich data was extracted from online articles and conference reports. Information disseminated via pamphlets was also utilised in order to consolidate data on the subject of public involvement. Strategic plans and annual reports of the KwaZulu-Natal Legislature provided useful data for the study. Essentially, the primary sources considered were cases where the application of public participation processes were disputed and then subsequently heard before the Constitutional Court. The Constitution, as the supreme law of the land was also an indispensable source.³¹

Kumar has stressed that research design is a pivotal aspect of research as it drives the study towards valid findings and or conclusions.³² He further mentioned that a poorly crafted design results in misconstrued findings and can thus prove to be a waste of time and a fruitless drain of financial resources.³³ In this regard, the study employed a descriptive design. Informed data was drawn from secondary sources available in scholarly contributions which involve an analysis of decided cases dealing with questionable participation processes. The rationale is that the existing sources and case law have thoroughly addressed the issue of non-compliance with the well-known

³¹ See section 2.

³² R Kumar *Research Methodology a step by step guide* 3rd edition (2011) at 24.

³³ Ibid.

public involvement procedures, and therefore constitutes an appropriate methodological basis in the execution of this research. The adopted design also has the added advantage to produce valid and reliable study findings.

5.1. Data Collection and Analysis

The method of data collection was mainly based on so-called documentation analysis. Nieuwenhuis asserts that “when one uses documents as a data gathering technique, one will focus on all types of written communications that may shed light on the phenomenon that one is investigating.”³⁴ Notably, written data normally emanates from both published and unpublished sources focusing on the subject in question. Similarly, documentary sources were textually-based³⁵ and largely available in electronic and physical formats. To a limited extent some data was only available in physical format. The sources consulted cover the period from 2006 to 2021. Additionally, in order to secure rich data, the researcher had to collect data on the available literature. This exercise was done by consulting textbooks, electronic journal articles and web searches, including case law. Moreover, the study explored the internal documents prepared by the KZNL, focusing on the subject of public involvement. The scanned documents were annual reports and strategic frameworks of the KZN legislature and the webpage of the KZN legislature.³⁶ Lastly, the researcher had to collect data from the framework of the legislative sector focusing on issues of public involvement.³⁷

The main data analysis method adopted for this study is content analysis of literature and data gathered. The setting of analysis in formulating this study was the KZN legislature.

³⁴ J Nieuwenhuis ‘Qualitative Research Designs and Data Gathering Techniques’ in K Maree (ed) *First Steps in Research* Pretoria: Van Schaik Publishers (1995).

³⁵ J Mouton *How to succeed in your Masters and Doctoral studies* Pretoria. Van Schaik Publishers (2001) at 99.

³⁶ All these sources are available on the KZN Legislature webpage at <http://www.kznlegislature.org.za>.

³⁷ PPF of 2013 (note 2 above).

5.1.1. Ethical Considerations

For the current study to be ethically sound, all the protocols relating to the procedure for data collection were observed. No prejudice or personal information was divulged to the detriment of any participants. The employed sources have been duly acknowledged through footnote referencing. A letter was drafted and presented to the unit manager of Public Participation and Petitions requesting authorisation to conduct this research. The researcher was given permission to undertake the research without let or hinder. No further risk to the integrity or dignity of persons was foreseen in the execution of the study.

6. Literature review

It has always been an aspiration of the KZNL to be a provincial legislature that enacts constitutionally compliant laws, and to achieve a high level of technical capacity in developing and drafting of bills.³⁸ Molepo, Maleka and Khalo, assert that legislators have a significant impact on any matter in the public space.³⁹ They further argue that the promulgations from these legislatures seek to give direction on various issues that everyone must abide by the law.⁴⁰ Numerous legal prescripts enforce public participation in legislatures.⁴¹ Yet the achievement of full and meaningful participation remains a future prospect as the KZNL has not yet achieved what it should have done.⁴²

³⁸ Strategic plan of the KwaZulu-Natal legislature (2014 - 2019) at 45.

³⁹ JN Molepo 'CM Maleka and T Khalo 'Public participation and service delivery: The case of the City of Tshwane' (2015) 50 (2) *Journal of Public Administration* at 350. Published Online: 1 Jun 2015. Available at <https://hdl.handle.net/10520/EJC183275> (accessed 15 August 2021).

⁴⁰ Ibid.

⁴¹ The Constitution of the Republic of South Africa, 1996; KwaZulu-Natal Petitions Act 4 of 2003; Standing Rules of the KZN legislature etc.

⁴² Scholars point out a number of issues which include public apathy and lack of knowledge; ailing feedback from the legislature to participants; limited resources on the legislative institutions; poor communication by the legislatures; Uncertainty on the public as to whether their contributions will yield any positive outcome in influencing the legislation being pursued.

In South Africa, most of the writers have critically analysed the court's decisions, judges' comments in *obiter dicta* and rationale for rulings on public participation.⁴³ Czapanskiy and Manjoo critically analysed the obligation placed upon the legislature to implement public involvement.⁴⁴ This was done in light of the court decision *in the Doctors for Life* case. A substantial focus was principally placed on the scope, together with the exact nature of the constitutional mandate placed upon the legislative sector to facilitate public involvement in their processes of making laws and that of their established committees.⁴⁵ They also examined the implications of the failure to comply with that obligation.⁴⁶ This particular article focused more on interpreting the crux of the *obiter dictum* raised in the *Doctors for Life* case but no attention was given to aligning the *obiter dicta*, nor the *ratio decidendi* with the mechanisms or framework of ensuring public involvement in the legislative sector. In light of the gaps indicated above, there is still room for legal scholars to contribute creatively to the legal framework for meaningful public participation in law-making institutions.

Mubangizi and Dassah researched public participation with the objective to understand the steady increase in cases, where the courts are often approached to intervene in enforcing correct simple procedures of public involvement.⁴⁷ The adopted methodology of analysis was based on the jurisprudence in the cases of *Matatiele*⁴⁸ and *Merafong Demarcation Forum*,⁴⁹ where the cases were upheld by the court. The study concluded that it is unfortunate for the courts to enforce public involvement, since they are of the view that such enforcement will have the effect of diminishing stakeholders with an opportunity of collaborative and communal initiatives in collective decision-making.⁵⁰ Briefly, Mubangizi and Dassah are of the view that public participation will automatically be stripped of its purpose and impact. when enforced

⁴³ RM Phooko (note 15 above) at 39-59; KS Czapanskiy and R Manjoo 'The right of public participation in the law-making process and the role of the legislature in the promotion of this right' (2008) 19 (1) *Duke Journal of comparative & international law*; BC Mubangizi and MO Dassah 'Public Participation in South Africa: Is Intervention by the Courts the Answer?' (2014) 39 (3) *Journal of Social sciences* at 275-284; TA Manthwa & LS Ntsoane 'Public participation, electoral dispute and conflict resolution mechanisms – the case of Moutse South Africa, ward 5&6; 2013-2016' (2018) 17 *Journal of African elections* at 105 -124.

⁴⁴ Czapanskiy and Manjoo (note 43 above).

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

⁴⁷ Mubangizi and Dassah (note 43 above) at 275-284.

⁴⁸ 2007 (1) BCLR 47 (CC).

⁴⁹ [2008] ZACC 10.

⁵⁰ Mubangizi and Dassah (note 43 above).

through the courts⁵¹ In this study, it was recommended that consultation processes with communities should be developed through the concerted efforts of promoting all the democratic processes, since all the processes are aligned with legislation and existing policies of democracy.⁵² Resorting to courts was therefore criticised.

There are a few studies on public participation where scholars have employed descriptive or exploratory approaches in considering the workings of the legislative sector using different methodologies. Some notable ideas on public participation have come from Scott,⁵³ Ben-Zev,⁵⁴ Parliamentary monitoring group,⁵⁵ and the Action 24 project.⁵⁶ These contributors have pointed out that a number of implementation activities have taken place across the legislative sector. However on the face of it, efficiency and effectiveness as overarching goals have not yet been achieved.⁵⁷

In his contribution Scott critically analysed the efficiency and effectiveness of the mechanisms employed by the SALS in dealing with public participation. Scott employed a desktop research approach to examine the existing literature as well as the qualitative approach employing semi-structured questionnaires to the nine provincial legislatures and Parliament. The findings of Scott point out that a number of implementation activities are taking place across the legislative sector. Yet these activities still remain below the expected benchmark.⁵⁸ A great deal of effort needs to be invested in identifying the areas where improvement still lacks.

In sum, a rich literature has focused on public involvement. The scholars have discussed the effectiveness of public participation with special emphasis on the *modus operandi* in discharging public involvement across the entire legislative sector. Some scholars have reviewed the jurisprudence set by the courts on cases dealing with public involvement. It is clear from the reviewed literature that in as much as the

⁵¹ Ibid.

⁵² Ibid.

⁵³ R Scott 'An analysis of public participation in the South African Legislative Sector' Master's thesis, Stellenbosch University, 2009.

⁵⁴ K Ben-Zeev 'Peoples Power Peoples Parliament' A Report of Proceedings and Issues at the People's Power Conference' (Cape Town) 13-15 August 2012.

⁵⁵ Parliamentary Monitoring Group. (2013). Getting information to the people: The role of the Parliamentary Monitoring Group. Retrieved from <https://www.climatereality.co.za>.

⁵⁶ Action 24 (note 17) above.

⁵⁷ Scott (note 53 above) at iii. See also Action 24 (note 17 above) at 11.

⁵⁸ Ibid (note 53 above) at iii.

Constitution imposes the duty to facilitate public involvement, there has been no universal understanding of public participation within the legislative arm of the state. It is argued that there are constitutional safeguards to this duty. As a result, for public participation to be meaningful, certain guidelines and limits need to be established for implementation across the legislative sector. As a result, public participation will remain a topical issue for a considerable time to come.

7. Delimitation of the study

This research project is limited to the study of public involvement processes in the law-making process in the KwaZulu-Natal Provincial legislature. It does not look at the processes of oversight. The KZN legislature was chosen among other institutions in the legislative sector because notable challenges in implementing meaningful public participation have been observed in the selected province. However, the researcher anticipates that findings and observations from the study will be helpful in answering questions raised around compliance with public participation.

The study critically analyses the existing legal framework of the concept of public participation. This includes the constitutional underpinning and the jurisprudence in different cases where actual public involvement in the legislative process was deemed inadequate and hence challenged. The case law provides the procedural and substantive aspects of public involvement processes; with the aim to establish the level of compliance with the constitutional mandate in section 118.

8. Limitation of the Study

The study does not involve empirical or dynamic fieldwork where the researcher has to engage with participants and or stakeholders, and where one can observe and gauge their experiences on the subject matter. The research is confined to document analysis and the synthesis of scholarly research on the subject of public participation.

9. Outlining the Study.

Chapter one is an introductory chapter which provides a background and overview of the study. This chapter presents the problem statement, aims and objectives, research questions, research methodology, ethical consideration, delimitations and limitations of the study.

This study is informed by the following background and problem: Section 118(1) (a)⁵⁹ introduced a constitutional duty on provincial legislatures, to facilitate public participation when executing all legislative processes. The provision does not prescribe how public participation ought to be organised and structured. However, the legislative bodies exercise a measure of discretion in determining what processes and procedures should be utilised to facilitate public involvement. The Constitutional Court has dealt with the issue of what will constitute reasonable public participation in the law-making process.⁶⁰ Meanwhile, the legal dissatisfactions and concerns do not go away but remain a problematic issue, more especially on how the public should be consulted.⁶¹

On numerous occasions the interest groups find it necessary to challenge the validity of enacted statutes on the ground that there was no credible compliance with the Constitution.⁶² In those instances, the Court ruled that there was non-compliance with the Constitution.⁶³ As per this study's perspective, the issue of non-compliance is attributed to the KZN legislature and other legislative institutions in the legislative arm of the State. This study sought to research the compliance level of the KZN legislature towards the constitutional imperative envisaged in section 118 of the Constitution.

The main research question remains to determine whether what is being done by the KZN legislature proves sufficient to constitute compliance with the Constitutional duty to facilitate public involvement.

⁵⁹ See section 118 (1) (a) of the South African Constitution, 1996.

⁶⁰ *Doctors for Life International* (note 23 above). The judgment of the Court in *Doctors for Life* explains the meaning of public involvement and gives guidance on what is expected of a legislature in fulfilling this obligation.

⁶¹ Action 24 (note 17 above) at 3. The KZN legislature was sampled in this study together with other three provincial legislatures and Parliament.

⁶² *Doctors for Life* (note 23 above); *Matatiele Municipality and Others* (note 23 above); *Land Access Movement of South Africa & others* (note 18 above).

⁶³ Ibid.

In answering the research objectives, in **Chapter two**: the study employed the reviewed literature, involving internet sources, journal articles, books, case laws, and legislatures' framework on public participation. The aim was to establish some permutations of effective and meaningful public participation. The literature focuses on international, foreign and local perspectives aimed at gaining some incentives for elucidating exactly what public involvement in the legislative process entails. The terminology of a ladder of public participation as used by Arnstein is discussed in the theoretical framework of the study.

The study reveals that there is an international trend towards centralisation of public participation. The ratified treaties oblige democratic states to ensure adherence to the will of the people in all government decision making processes. It is noted that states in foreign jurisdictions have also reformed their democracies and adopted the standard practice of implementing public participation. As will become clear, South Africa's legal framework and court judgements stress the importance of meaningful public participation in the law making process.

Chapter three explores the first and second objectives of the study. It further presents the findings of the study. This chapter provides analyses of various mechanisms employed by the KZN legislature to fulfil its constitutional obligation to facilitate public involvement when enacting proposed legislation. The assessment was done through analysing the legislature's internal documents and the webpage of the KZN legislature. An incredibly rich data is archived in the mentioned web page. The study reveals that there has been a remarkable progress after serious efforts to give effect to the constitutional obligation to facilitate public participation. The research further uncovers some few shortcomings that need to be addressed, *inter alia* bloated consultation processes, short notices for hearings and a lack of access to information. These make some inhibiting aspects and need to be prioritised towards the achievement of meaningful participation.

In this chapter, the study further discusses and analyses the contextualisation and understanding of public participation in the KZN legislature. It was interesting to learn that the legislature aligns its public participation activities with the court decisions. The institution understands that it derives its mandate to facilitate public involvement from the Constitution. In its documents, be it annual performance plans or strategic

frameworks, the legislature invests time, skill and planning in ensuring compliance with the constitutional prescripts.

In determining the scope of proper public participation and the sufficient extent thereof, **-Chapter four-** describes the extent to which the KZN legislature should act to facilitate public involvement in the law-making process. Subsequently, the chapter looks at the level of alignment with the established benchmarks and the existing framework. These ultimately establish whether there is compliance with the Constitution of the Republic of South Africa, 1996. In this chapter the International Human Rights Law Framework was employed to analyse public participation within the terrain of the KZN legislature. The study further reviewed the current public participation activities against the principles in the Constitution.

The research findings revealed that a wide range of plausible participation activities have been established and implemented within the KZN. Moreover, the study has revealed certain benchmarks which the legislature is required to adopt when following procedures for public involvement. The findings of this research have also identified that at times, short notices are sent to Provinces to convene public hearings. As a result, interests' groups end up with little time to study the Bill, prepare submissions, and prepare for public hearing. These represent serious discrepancies that tend to negate the good progress that has been made to realise meaningful participation.

Lastly, **chapter five** undertakes a review of the legal framework that regulates public participation in the law-making process within the legislature. The conclusion and recommendations close the chapter. Chapter five reveals that the legal framework that regulates public participation within the KZNPL is foregrounded in the democratic values entrenched in the Constitution.

Undeniably, the KZN has gone the extra mile by adopting and customising the framework to regulate public participation. These frameworks are; The KwaZulu-Natal Petitions Act and the Public Participation Framework of 2013. Also an analysis of judicial processes of constitutional review is given. Theories of constitutional interpretation are invoked to give a philosophical basis for the legal duty to facilitate public involvement.

The study concludes that there is an outstanding progress towards meaningful public participation and ultimately, compliance with the Constitution. However, there are a few inhibiting factors that need to be addressed by the legislature as such factors tend to spoil efforts towards meaningful public participation. Hence the recommendations in the study seek to address the identified weaknesses including the review of public hearings on community involvement.

CHAPTER TWO

ESTABLISHING THE PERMUTATIONS OF EFFECTIVE AND MEANINGFUL PUBLIC PARTICIPATION

2.1 Introduction

Chapter two is intended to explore the available literature on public participation. The first section explores the conceptualisation of public participation by different scholars and institutions. In addition, the chapter explores theories by different scholars concerning participation.

The second section of the chapter covers the international perspective in light of international treaties that apply uniformly to states that have ratified treaties. Foreign law was also considered. This aspect has involved employing comparative law to uncover some of the recent developments in few selected developing and developed countries. The aim was to understand the domestic practises and the status of public participation in other democratic countries.

The next section covers public participation in the South African context. It is followed by a reflection on the theory of democracy seen against the broad background of public participation. The two concepts, *democracy* and *public participation* are used interchangeably although both are nuanced and ought to be distinguished.⁶⁴ Here, two forms of democracy, *participatory democracy* and *representative democracy*, are discussed.

Notably, public involvement is aligned with both participatory and representative democracy.⁶⁵ Accordingly, there is a discussion on the relationship between the two institutions, parliament and the provincial legislature in the legislative process.

⁶⁴ SAM Nsingo & OJ Kuye 'Democratic Participation for Services delivery in Local Government in Zimbabwe: Humanising Structural Configuration and Local Provisions' (2005) 40 (4) *Journal of Public Administration* at 747.

⁶⁵ *Doctors for Life* (note 23 above) at para 116. The Court contemplates that the South African democracy is to a certain degree representative and also partly participatory in nature. It went onto evinces that representative and participatory elements are apparent from the founding provision of the South African Constitution.

The fifth section focuses on the different forms of public involvement mechanisms practised by the KZNL. This is extended to both strategies and channels for public involvement employed by the KZNL aimed at enhancing public participation. The sixth section of the chapter gives an analysis of the concept of public participation. The aim of the assessment is to understand how public involvement has been implemented in the KZNL. There is also a discussion on the framework that regulates public involvement within the KZNL. Lastly, the researcher gives relevant case laws of disputed public participation processes heard and decided by the Constitutional Court.

2.2 Conceptualisation and theorisation of public participation

This research is rooted in the broad theory of public involvement as discussed in the context of the law-making process. 'Public participation' as a theory and concept will drive the study towards the literature and further adduce the connection between public involvement as a theory and concept in relation to the status quo of public participation within the KZNL. The review of the literature on public involvement will somewhat drive the study towards valid findings. It is therefore pertinent to reflect on the concepts in general use in public participation.

Before getting to the center of the discussion, the question should be asked as to why public participation matters in the context of KZNL, in particular, and elsewhere outside South Africa, in general. What relevance does it have? Scott mentions that the concept of 'public participation' is often considered as a pertinent aspect of democracy.⁶⁶ Without public participation, there will not be democracy. Historically, the intrinsic defining characteristic of the myth of democracy was the right to vote for the government.⁶⁷ The situation of voting without continuous participation in government decision making is not entirely democratic.⁶⁸ In any democratic institution therefore, public participation in the law-making process is a necessary requirement.

⁶⁶ Scott (note 53 above) at 40.

⁶⁷ Ibid at 33.

⁶⁸ Scott (note 53 above); See also H Gildenhuys...et al *Public Macro Organisation*, Juta (1991) at 24.

In the case of *King and Others v Attorneys Fidelity Board Control and another*,⁶⁹ the SCA had to elucidate the whole concept of public participation. This was done by way of focusing on the content and insight of the concept of public participation in question before court. The Supreme Court of Appeal defines it as a complicated concept on the basis that it is multifaceted in the sense that it displays many possible dimensions.⁷⁰ Similar sentiments are echoed with the SCA in this study as the researcher compares the concept of public participation with a prism that reflects many possible facets. It is therefore necessarily an imprecise concept, and suggest that the obligation to implement public involvement can be achieved in many different ways.⁷¹ The Court further explains that “public involvement might include public participation through the submission of commentary and representations: but that is neither definitive nor exhaustive of its content.”⁷²

Drawing inferences from the above contextualization, it can be deduced that public participation would mean any process initiated by the legislature to facilitate public involvement. However, such initiative should come before making a decision that will have an effect on the lives of people.⁷³ Such an initiative falls within the ambit scope of facilitating ‘public participation.’⁷⁴ This is because it would be an attempt by the legislature in endeavouring to give credence to the constitutional provisions of section 118. Notably, the initiatives can be public hearings, representations and submissions from the stakeholders, interest groups and the targeted population who will be affected by the bill in question.⁷⁵

According to Madlala, “public participation is the process where government creates opportunities and avenues for communities to express their views and opinions on

⁶⁹ 2006(4) BCLR 462 (SCA).

⁷⁰ Ibid.

⁷¹ Ibid.

⁷² Ibid.

⁷³ This aspect was emphasised in the case of *Moutse Demarcation Forum v President of the Republic of South Africa* 2008 (5) SA 171 (CC) at para 62.

⁷⁴ It should however be noted that such initiative must be a reasonable one. See *Doctors for Life* (note 23 above) at para 171, where the court assert that: “Legislatures must facilitate participation at a point in the legislative process where involvement by interested members of the public would be meaningful. It is not reasonable to offer participation at a time or place that is tangential to the moments when significant legislative decisions are in fact about to be made. Interested parties are entitled to a reasonable opportunity to participate in a manner which may influence legislative decisions.” See also paragraph 61 of *Moutse* case.

⁷⁵ *Doctors for Life* (note 23 above) decision gave an insight on what constitute public involvement.

matters of governance, either directly or indirectly.”⁷⁶ Other scholars, such as Mofolo, define public participation as a process where all citizens are given sufficient time to express their views on the government decision making processes.⁷⁷ He further clarifies that such involvement can be achieved through direct participation or via the established and registered institutions representing people’s interests and will.⁷⁸ On the other hand, Sebola defines public participation, in its broadest sense, as a means of convenient communication between community members and government institutions constitutionally established to represent the people and their needs.⁷⁹ The researcher can endorse both Mofolo and Sebola’s understanding of public participation as these two writers both embrace direct participation and the formation of community based structures to speak on behalf of the community members. In this context Madlala’s definition cannot be ignored as it suggests that public participation can take any form including indirect participation. Essentially, it must be emphasised that in the representative system the elected representatives must never lose contact with the people on the ground. On a regular basis representative must act with the mandate from their constituencies.

Similarly, SALS defines public participation as a process initiated by either Parliament or Provincial legislatures (concurrently)⁸⁰ with an aim of consulting and involving all the interest groups and entities in the government, purporting to consolidate views before making a decision.⁸¹ Furthermore, SALS elaborates that in discharging public involvement more focus needs to be put on the vulnerable, those who do not have adequate resources at their disposal. Some of these are people living with disabilities,

⁷⁶ S Madlala ‘Public participation in service delivery’. Paper presented at service delivery conference. 2005 Johannesburg at 45. See Also E Draai and D Taylor ‘Public Participation for Service Delivery: A Local Government Perspective’ (2009) 44 (1.1) *Journal of Public Administration* at 112-122. Published Online: 1 Apr 2009. Available at <https://hdl.handle.net/10520/EJC51702>. (Accessed 15 October).

⁷⁷ MA Mofolo ‘Intergovernmental relations system for public participation in the local sphere of government’ (2016) 51 *Journal of Public Administration* at 232.

⁷⁸ Ibid.

⁷⁹ MP Sebola ‘Communication in the South African public participation process: The effectiveness of communication tools’ (2017) 9 (1) *African Journal of Public Affairs* at 26; Mofolo (note 77 above) at 232.

⁸⁰ It is evident from a number of Bills considered by the legislative sector that Bills are being considered concurrently by Parliament and Provincial legislatures. Most of this Bills are found on the website of the Parliamentary Monitoring Group. Available at <https://www.bing.com/search?q=the+website+of+the+Parliamentary+Monitoring+Group.&cvid=6e7e50828afa4dff8ecad74b984f0585&aqs=edge..69i57.2240j0j1&pqlt=43&FORM=ANSAB1&PC=U531> (accessed 15 October 2021).

⁸¹ PPF of 2013 (note 2 above) at 7.

women and children as well as the youth.⁸² As an entity, SALS is made up of the speaker's forum.⁸³ Therefore, all the eleven institutions have a common understanding of public participation.⁸⁴

In addition, the KZNLC defines public participation as the involvement of the general public or a certain segment of the community during the legislative process, or oversight processes in matters affecting the people's lives, such as public hearings or bills and new laws being passed.⁸⁵ Public involvement is also extended to the daily activities of the committees set by the legislature.⁸⁶ The KZNLC characterises public participation as a voluntary but more political consultative process in which community members participate, either directly or indirectly, in the government processes.⁸⁷ Moreover, public involvement provides the legislature, altogether with MPLs, an opportunity to exchange views or interact with members of the public whom they represent in the legislature.⁸⁸ During public involvement sessions, community members have an adequate opportunity to express their concerns, views and to be informed on the recent government plans and development programmes.⁸⁹

According to Sebola, the primary purpose of public involvement is to ensure that interest groups that are likely to be affected by the decision have a constitutional right to be engaged and to influence such decision.⁹⁰ The National Policy Framework⁹¹ defines participation as a process facilitated through openness and accountability in which ordinary citizens and interest groups can have a chance to exchange views and contribute in influencing government decisions.⁹² Likewise, Marzuki explains that

⁸² Ibid.

⁸³ SALS comprises of different stakeholders including Parliament and all the Provincial Legislatures as lead by the Speakers forum. SALS main objective is to raise the profile of the legislatures' capacity to implement the constitutional imperatives <https://www.sals.gov.za/show.php?show=2> (accessed 23 August 2019).

⁸⁴ It is apparent from the Public Participation framework of 2013, that there is a universal approach towards executing the duty to facilitate meaningful public involvement within the legislative institutions.

⁸⁵ See KwaZulu-Natal legislatures' archives, available at <https://www.kznlegislature.gov.za> (accessed 1 August 2019).

⁸⁶ Ibid.

⁸⁷ Available at <https://www.kznlegislature.gov.za> (accessed 01 August 2019).

⁸⁸ Ibid.

⁸⁹ Ibid.

⁹⁰ Ibid at 28.

⁹¹ Draft National Policy Framework for Public Participation, (2007). Republic South Africa: Department of Provincial and Local Government.

⁹² Ibid.

public participation is essential for the government to educate the public about the government's programme of action.⁹³

Essentially, the Action 24 project⁹⁴ has confirmed that public participation suggests that government should consult with the people so as to capacitate them on the ways to influence decisions on issues directly affecting them. The main reason is that people have a right to scrutinize government decisions. Without the right to examine and challenge government, it is impossible to hold certain organs of state to account.⁹⁵ It is clear that scholars and government institutions all adopt more or less the same common understanding of public participation. They emphasise that public participation still remains a regular interactive communication between the citizens, and interest groups, on the one hand and government, on the other, for purposes of influencing government decisions.

The concept of public participation has been theorized in the traditional regimes of social contract theory.⁹⁶ Thomas Hobbes, supported by Jean Jacques Rousseau, acknowledges that people delegate their power to create a government to govern them but that the people remain sovereign.⁹⁷ According to Stewart, public participation is not a new phenomenon but has been practiced from ancient times.⁹⁸ In this system, decisions were taken directly by the collective wisdom of the overwhelming majority of citizens who gathered on a face to face assembly to discuss issues.⁹⁹ Even to this day it is accepted that public participation is a standard procedure as democratic rule is impossible without considering the contributions from the voting constituency.¹⁰⁰ Democratic practices were therefore practically communal. According to Scott, over

⁹³ A Marzuki 'Challenges in the public participation and the decision making process' (2015) 201 (1) *Sociological I proctor* at 21-39.

⁹⁴ Available at <https://www.climatereality.co.za> (accessed 19 August 2019).

⁹⁵ Action 24 (note 17 above) at 14.

⁹⁶ JJ Rousseau *The Social Contract: & Discourses*. NO: 660. JM Dent & Sons (1920); See also JJ Rousseau *The Social Contract*. Open Road Media 2016.

⁹⁷ Ibid.

⁹⁸ Stewart 'Citizen Participation and judgement policy analysis: A case study of urban air quality' (1984) 17 (1) *Policy Journal* at xi; See also VA Clapper 'Advantages and disadvantages of citizen participation' in K Bekker (ed) *Citizen participation in local Government*. Van Schaik (1996) at 52.

⁹⁹ J Ranny 'Governing: an introduction to political sciences' In Clapper (note 98 above) at 52.

¹⁰⁰ P Nel and J Van Wyk 'Foreign policy making in South Africa from public participation to democratic participation' (2003) 22 (3) *Politeia* at 55; See also Scott (note 53 above) at 29, where the author was differentiating between *realist theories* of democracy and *elite theories* of democracy.

time, the notion of participation was well established and subsequently adopted formally and informally in most democratic states across the world.¹⁰¹

Nel and Van Wyk insist that in modern society, democracy has gained influence. Hence governments thus adopt standard provisions to facilitate public involvement. In other words, people involvement is institutionalised on the mantra of ascribing power to the people across all democratic institutions.¹⁰² It is however, noted that not everybody advocates the notion of public involvement as a key determinant to democracy.¹⁰³ Various types of democracy have emerged. Parry and Moyser draw a fundamental difference between the realist theory of democracy and other theories which advocate for direct participation as an exclusive condition for the democratic culture.¹⁰⁴ They are of the view that realist theories of democracy regard responsible leadership and representation as key determinants of democracy.¹⁰⁵

Nel and Van Wyk argue further that the idea of democracy becomes hollow without a whole set of mechanisms to make participation possible.¹⁰⁶ They further mention that ordinary citizens need not to vote for the mere intention of appointing and monitoring elected representatives, but ordinary citizens, should themselves become potential political citizens in the real meaning of the word.¹⁰⁷ What can be deduced from the above is that citizens would have to enjoy the right envisaged in section 19.¹⁰⁸

The theory of participation together with the associated practices has significantly evolved from 1960s within the development context.¹⁰⁹ Consequently, in the era of the 1990s there was a shift in mind-set, which influenced the theoretical change in the framing and understanding of public participation.¹¹⁰ Prior to the 1990s, there was a

¹⁰¹ Scott (note 53 above) at 28.

¹⁰² P Nel & J Van Wyk (note 100 above) at 35.

¹⁰³ Ibid.

¹⁰⁴ G Parry and G Moyser 'More participation, more democracy?' in D Beetham (eds) *Defining and measuring democracy* SAGE (1994) at 44- 46.

¹⁰⁵ Ibid.

¹⁰⁶ P Nel and J Van Wyk (note 100 above) at 35.

¹⁰⁷ Ibid.

¹⁰⁸ Section 19 contemplates the right to political participation.

¹⁰⁹ S Hickey and G Mohan 'Relocating participation within a radical politics of development. Development and Change' 2005 36 (2), at 237-262. Accessed at https://oro.open.ac.uk/4103/1/Hickey_and_Mohan_revised_70704.Pdf on 17 August 2014 at 19 (page number refers to the open source version).

¹¹⁰ Ibid.

preconceived idea that public participation should be considered a development tool, to a new understanding that it should be considered a necessary aspect of citizenship rights.¹¹¹

Theorists have argued that the level of government unresponsiveness to the issues raised by the community and the lack of accountability thereof, has amongst representative systems suddenly resulted in a disparity within the communities.¹¹² In that way, the quality of democracy has been severely undermined.¹¹³ They further claim that the above aforementioned representative systems fail to balance the relationship between the state and the citizenry.¹¹⁴ According to Friedman and McKaiser 'participatory citizenship has been established and cultivated to react to the shortcomings and weaknesses of the elected representatives as well as to respond to the changing needs of the society.'¹¹⁵ The institutional response is clearly visible within the more direct democratic systems which aim to strengthen the relationship between representatives and their constituencies dealing with specific issues.¹¹⁶

Conversely, in participatory systems, public participation entails something that is far beyond the mere right to vote. In other words, exclusive opportunities are usually afforded to the citizens to make their inputs into government decisions.¹¹⁷ As a result, theories of deliberative democracy have been further developed.¹¹⁸ These theories entail that decisions by the government must be based on the will of the people,

¹¹¹ Ibid.

¹¹² SJ Waterhouse 'People's Parliament? An assessment of Public Participation in South Africa's legislatures' Dissertation published by the University of Cape Town at 20-25. Available at <https://open.uct.ac.za/http://hdl.handle.net/11427/15198> (accessed 29 June 2021).

¹¹³ Ibid.

¹¹⁴ I Buccus et al. 'Public participation and local governance' (Research report prepared by the Centre for Public Participation in association with the HSRC and University of KwaZulu-Natal) 2007, at 97. Available at <http://hdl.handle.net/20.500.11910/5981>; See also J Gaventa 'Exploring citizenship, participation and accountability' (2002) 33 (2) *Institute of Development Studies Bulletin* at 1. Available at <http://onlinelibrary.wiley.com.ezproxy.uct.ac.za/doi/10.1111/j.17595436.2002.tb00020.x/pdf> (accessed May 2014).

¹¹⁵ S Friedman and E McKaiser *Civil society and the post-Polokwane South African State: assessing civil society's prospects of improved policy engagement*, Centre for the Study of Democracy; Rhodes University/University of Johannesburg: Commissioned by the Heinrich Boell Foundation 2009 at 1, 3 and 45.

¹¹⁶ Ibid.

¹¹⁷ S Chambers 'Deliberative Democratic Theory' (2003) 6 *Annual Reviews Political Science* at 316-317. Available at <https://doi.org/10.1146/annual.rev.polisci.6.121901.085> (first published 5 February 2003).

¹¹⁸ Ibid.

through deliberations with the government.¹¹⁹ Habermas identifies three elements of a genuine deliberative democracy: first, it must always be inclusive by nature; second, it must afford citizens an equal opportunity to engage government; and third, the process must be transparent.¹²⁰ In this case, the researcher argues that even the fictitious participants must not feel that they have not been treated fairly or that their dignity was impaired in an open democratic society run along the values of freedom and openness.

Arnstein has analysed the descriptions of citizen participation. He coined the analogy of eight rungs of the ladder to describe citizen's participation. The eight rungs of the ladder represent the various levels of citizen's participation.¹²¹ According to Arnstein, "the eight rungs represent the extent of involvement and level of power citizens can leverage to influence the decisions that affect their wellbeing."¹²² These eight rungs start from- "manipulation at the base, through therapy, informing, consultation, placation, partnership, delegated power, to citizen control at the apex."¹²³ Ile and Mapuva¹²⁴ have categorised the aforesaid eight rungs into three main categorical levels which would enable effective citizen participation.

The bottom rungs of the ladder namely manipulation and therapy, describe levels of "non-participation."¹²⁵ The real objective is not to enable people to participate in planning or conducting programs, but to enable power holders to "educate" or "cure" the participants.¹²⁶ This objective should be equivalent to community educational and

¹¹⁹ G Baiocchi 'Participation, activism and politics: The Porto Alegre experiment and deliberative democratic theory' (1999) 29 (1) *Politics and Society* at 43-72. Available <https://doi.org/10.1177/0032329201029001003>.

¹²⁰ J Habermas 'Political Communication in Media Society: Does democracy still enjoy an epistemic dimension? The impact of normative theory on empirical research' *International Communication Association* (2006) 16 at 413.

¹²¹ SR Arnstein 'A Ladder of Citizen Participation' (1969) 35 (4) *Journal of the American Institution of Planners* at 216-224.

¹²² Arnstein (note 121 above) at 216. The ladder of citizens' participation presents the fundamental difference between participation and non-participation and clarifies as to what constitute participation between citizens and power holders.

¹²³ Arnstein (note 121 above) at 216 where Arnstein presents the diagram of a ladder with eight rungs labelled as described herein).

¹²⁴ I Ile & J Mapuva 'Citizen Participation and democracy: safeguarding citizen participation through Government of National Unity (GNU) or democracy violated?' (2010) 45 (1) *Journal of Public Participation* at 32.

¹²⁵ Arnstein (note 121 above) at 216.

¹²⁶ LE Lessia 'Public participation in local government in South Africa: A case study on decision making in street naming in Kwamashu Township of the Ethekewini Municipality' Masters dissertation,

outreach programs including excursions. Understanding that we are coming from colonial and apartheid eras, our level of illiteracy remains high.¹²⁷ It is therefore necessary for government to educate the people about development and transformation programs.

The 1969 Arnstein ladder presents the middle rungs as the degrees of tokenism.¹²⁸ A typology of the degrees of tokenism entails informing the citizens, the convening of consultations with them as well as placation.¹²⁹ These middle rungs of the ladder give citizens an opportunity to be heard.¹³⁰ However, to a certain degree, citizens lack power to ensure that their views will definitely be taken into consideration.¹³¹ Informing citizens is one of the crucial steps towards the commencement of citizen participation.¹³² Failure to provide information adequately and timeously regarding the participation programs leaves citizens with little opportunity to benefit from those platforms.

Rung 3 (informing), and 4 (consultation) of the ladder basically allow the community to voice their concerns on issues being discussed.¹³³ However, in terms of power relations, citizens lack the muscle to challenge those in power to take their views seriously. At this stage, the status quo remains unchanged. As a result, citizens still remain powerless.¹³⁴ The ultimate decision still remains with the power holders.

Moreover, placation was established as rung 5 of the ladder. Arnstein points out that placation is the maximum expression of tokenism since the society is only given room for comments while power holders exercise the final word.¹³⁵ It is however noticed that

University of KwaZulu-Natal, 2011 at 14. Available at <https://www.semanticscholar.org/paper/Public-participation-in-local-government-in-South-%3A-Lessia/8bc9aae8b56ed0c009306489aa16034237e8241a> (accessed 02 October 2021).

¹²⁷ J Aitchison and A Harley 'South African Illiteracy statistics and the case of magically growing number of literacy and ABET learners' (2006) 39 *Journal of education* at 95 - 96. Available at cae.ukzn.ac.za/Libraries/Publications/joe39JJWAAH.sflb.ashx · PDF file.

¹²⁸ Arnstein (note 121 above) at 219.

¹²⁹ Ibid, at 217.

¹³⁰ Arnstein labels citizens as the "have-nots" whilst representatives are labelled as the powerful. The crux of the matter is that power holders remains superior to ordinary citizens when views are being considered. Therefore, there are slim chances that the citizens' views might emerge.

¹³¹ SR Arnstein (note 121 above) at 217.

¹³² Ibid.

¹³³ Arnstein explicates that when participation is restricted to this levels, "there is no follow through, no muscle," hence no assurance of the emergence of power shift.

¹³⁴ Ibid.

¹³⁵ Arnstein (note 121 above) at 220. Arnstein assert that it is at this stage that citizens begin to have some increasing degree of influence even though tokenism is still traceable at this level.

at this stage a certain degree of influence becomes apparent at the disposal of citizens even though tokenism is still latently at play.¹³⁶

Furthermore, ascending up the ladder according to Arnstein requires “the degrees of citizen power.” Wherein rung 6 is labelled as partnership, rung 7 is named as delegated power and finally at the apex rung 8 is labelled as citizen control.¹³⁷ It is anticipated that at this level of partnership, the level of citizen participation gradually becomes convincing in the sense that citizens are accorded greater opportunities of reaching common grounds with the power holders.¹³⁸ The rationale is that at this level, power holders normally give citizens room to negotiate and engage with the possibility of trade-offs and compromises in favour of the citizens.¹³⁹

Arnstein explains further that partnership can be more effective if citizens were more organized and had structures in place to hold their leaders accountable.¹⁴⁰ Arguably, the assertion by Arnstein calls for the establishment of more civil society organizations, which can collaborate with the government and hold the executive accountable. At the apex of the ladder there is delegated power marked as rung 7 and citizen’s control marked as rung 8.¹⁴¹ Arnstein has observed that at this point the so called “have-not citizens” acquire managerial status and gain more power in the decision making processes.¹⁴² Accordingly, the nature of negotiations can bring about the dominance of citizens against public representatives in terms of discussions. Thus, at this stage, citizens are in a position to secure victory against power holders in relation to a particular program to be implemented.¹⁴³

According to Roberts, Arnstein has analysed the ladder and concluded that it can elucidate all the conceptual difficulties in as far as citizen participation is concerned.¹⁴⁴ Roberts further characterised participation as a variety of distinct actions executed by

¹³⁶ Ibid.

¹³⁷ Arnstein (note 121 above).

¹³⁸ Ibid.

¹³⁹ Ibid.

¹⁴⁰ Arnstein (note 121) above at 222- 223.

¹⁴¹ Ibid.

¹⁴² Ibid.

¹⁴³ Ibid.

¹⁴⁴ Mubangizi and Dassah (note 43 above) at 275-284. See also N ‘Roberts Direct Citizen Participation: Building a Theory’ Paper presented to 7th National Public Management Research Conference, 9-11 October 2003 Georgetown University, Washington DC at 6.

different groups of people and as such extend informing citizens, consultations and imbalanced power relations.¹⁴⁵ Mubangizi and Dassah have also argued that since Arnstein pioneered the ladder of participation, it has been increasingly employed as a guide by practitioners of public participation, academics and those who propagate for meaningful involvement in government processes.¹⁴⁶

The South African Legislative Sector (SALS) has therefore crafted a Public Participation Framework.¹⁴⁷ This decisive framework serves as a road map towards the concerted efforts of standardising all forms of participation.¹⁴⁸ This strategy is followed through the implementation of a “best-fit approach” for the entire legislative sector. To its credit, at all material times SALS seeks to inform the public, consult, involve, and ultimately collaborate in certain circumstances in order to afford the public a reasonable opportunity to participate during legislative processes.¹⁴⁹ The adoption of the above framework can mitigate the identified problems. The researcher argues that once the framework is entrenched throughout the legislative institutions, it can address the issues of lack of information, poor participation strategy, and insufficient consultation platforms.

Importantly, the theory of public participation is not merely asserted. The crux of its justification is the ladder of participation, which asserts that there must be a consultation phase before decisions are taken by the government.¹⁵⁰ The consultation is between the government, stakeholders, and the people who are mostly likely to be affected by the decision. In this study, it is argued that meaningful consultations can advance public participation and avoid instances of non-compliance with the Constitution in the law-making process.

¹⁴⁵ Ibid.

¹⁴⁶ Mubangizi and Dassah (note 43 above) at 276.

¹⁴⁷ PPF of 2013 (note 2 above).

¹⁴⁸ Ibid.

¹⁴⁹ The KwaZulu-Natal legislature has customised this approach. Available at <https://kznlegislature.gov.za/levels-of-participation/> (accessed 03 March 2020).

¹⁵⁰ Arnstein (note 121 above).

2.3 International perspective on public participation

The International Human Rights Law framework (IHRL) is the custodian for citizen's participation.¹⁵¹ It is therefore important for the researcher to reflect on the dynamic, robust and evolving instruments of the international framework. The framework is precisely because there are strategic perspectives on public participation established by binding treaties. This section also invoked foreign law from some developed and developing countries. This helps in determining whether the legislature is on the right track towards ensuring adherence and compliance with the purposive intention of the Constitution.¹⁵² The researcher also gains an in-depth understanding of the international context and domestic situation against which the South African situation can be analysed and measured, not for the sake of comparison; but in order to shed light towards the world common understanding of meaningful public participation.

2. 3.1 International treaties

The international framework (IHRL) extensively protects human rights within the context of political participation.¹⁵³ As a result, a number of international instruments (treaties) articulate the right to participation and emphasise the role played by participation in acting as a catalyst towards the enjoyment of civil freedoms and human rights.¹⁵⁴

The international treaties mount a strong pressure on sovereign democratic governments to implement a high level of participation, transparency and

¹⁵¹ Among others see the General Comment No. 25: (Art. 25): 12/07/96. CCPR/C/21/Rev.1/Add.7, General Comment No. 25. Para 5, "The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25) 12/07/96. CCPR/C/21/Rev.1/Add.7, General Comment No. 25. (General Comments)." Available at <https://www.equalrightstrust.org/ertdocumentbank>; ICCPR (1996) Article 25; The 1948 General Assembly Resolution 207A (III)/ UNGA 72; A/RES/263 (III) (11 December 1948) Universal Declaration of Human Rights. Article 21(1) and Article 21(3) which envisage that "The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures."

¹⁵² The Constitution of the Republic of South Africa, 1996. Section 118 requires the provincial legislatures to execute public participation in the law making process.

¹⁵³ Waterhouse (note 112 above) at 9-10.

¹⁵⁴ Ibid.

accountability in decision making.¹⁵⁵ The Rio Summit held in 1992, declared principle 10, which stresses the significance of access to information by members of the public in the law-making process.¹⁵⁶ Principle 10 obligates different states to facilitate and advance public awareness, thereby making information easily accessible and widely available.¹⁵⁷ Countries across the world have adopted principle 10, as it also emphasises the right to have access to fair judicial procedures and remedies.¹⁵⁸ There is also agenda 21, which envisaged the plan of action targeting the youth towards the pursuit of effective participation in broadening public participation in government processes, particularly the achievement of sustainable development.¹⁵⁹

There is a convention on “Access to Information, Public Participation in Decision-making, and Access to Justice in Environmental Matters”¹⁶⁰ (known as the Aarhus Convention), it was adopted by the United Nations in 1998. It provides immense opportunities for participation with reference to the environment.¹⁶¹ It also obliges different states to take progressive measures in making the information widely available and accessible.¹⁶² Consequently, the Bolivian Summit Declaration held in 1996 has taken enormous steps by establishing a framework for people’s participation. In addition, a national programme for community development has been created and adopted with the objective of realising sustainable development.¹⁶³ The Manila Declaration,¹⁶⁴ and “African Charter for Popular Participation in matters of

¹⁵⁵ MM Sefora ‘Public participation in Parliament: Perspective on Social Media Technology (SMT)’ Masters Dissertation, Stellenbosch University, 2017 at 30.

¹⁵⁶ Report of the United Nations conference on environment and development (1992). A/CONF.151/26 (Vol. I).

¹⁵⁷ United Nations (UN), (19 August 2016) UNEP implements principle 10 of Rio Declaration.

¹⁵⁸ Ibid.

¹⁵⁹ PPF of 2013 (note 2 above at 24); See also Principle 21 of the Report of the United Nations conference on environment and development (1992). A/CONF.151/26 (Vol. I)

¹⁶⁰ This is a Convention on “Access to information, Public Participation in Decision-Making and Access to Justice in Environmental Matters.” It entered into effect on 30 October 2001. Available at <https://unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf> (accessed 04 June 2021).

¹⁶¹ Aarhus Convention, Pillar II: Public participation in decision-making. Adopted on 25 June 1998 in the Danish city of Aarhus at the Ministerial Conference. Available at <https://unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf> (accessed 04 June 2021).

¹⁶² Ibid.

¹⁶³ S De Villiers ‘A people’s government. The people’s voice – a review of public participation in the law and policy-making process in South Africa:’ 2001 Cape Town Parliamentary support programme at 122.

¹⁶⁴ Manila Declaration (1989). The Manila Declaration on People’s Participation and Sustainable Development. Philippines: ANGOC.

transformation and people's development are some of the decisive declarations which signal progress towards public involvement.¹⁶⁵

In 1981, the African Charter on Human and People's Rights, (Banjul Charter) was adopted. It significantly imposes the positive obligation upon different states to promote and ascertain, through public education and continuous publications, respect for citizens' rights and freedoms envisaged in the charter.¹⁶⁶ Likewise, there is another essential international human rights framework adopted by the United Nations, known as the "International Covenant on Civil and Political Rights" (ICCPR). It imposes similar obligations on various signatory states.¹⁶⁷ South Africa is a signatory to this treaty.¹⁶⁸ It obliges the states to initiate necessary steps for citizen's participation in a manner that will give weight to the right to 'political participation.'¹⁶⁹ The South African court has however affirmed in the *Doctors for Life* case that article 25 of the African Charter is more straightforward than the ICCPR in imposing the obligation on the state to ensure that people get an opportunity to exercise the right to political participation.¹⁷⁰

In addition, the so-called "International Association for Public Participation",¹⁷¹ has established the seven cardinal pillars for the effective practise of public participation. These pillars were established with an objective of intervening and enabling public institutions to take decisions in the best interest of the potentially affected groups.¹⁷² According to these fundamental values, public involvement is premised on the following: "Is premised on the belief that the people who will be affected by a decision have a right to be involved in the decision-making process. Conversely the principle *** includes the notion that the public's input will be considered; promotes sustainable decisions by recognising and communicating the needs and interests of all participants

¹⁶⁵ The 1982 Manila declaration on the peaceful settlement of international disputes adopted in New York, USA on the 15th of November 1982.

¹⁶⁶ The 1981, African Charter on Human and Peoples' Rights. OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986). Article 25.

¹⁶⁷ International Covenant on Civil and Political Rights of 1966. (ICCPR) This is a multilaterally treaty that abides a number of democratic countries. It was adopted by the United Nations General Assembly resolution 2200A (XXI) on 16 December 1946 and it came into operation on the 23 of March 1976. Article 25.

¹⁶⁸ South Africa has ratified the ICCPR on 10 December 1998 and entered into force in March 1999. See the Annual International Report 2011. *South African Human Right Commission* at 11.

¹⁶⁹ International Covenant on Civil and Political Rights, Dec 16, 1996, 1999 U.N.T.S. 171. See also KS Czapanskiy and R Manjoo (note 43 above) at 7.

¹⁷⁰ *Doctors for Life* (note 23 above) at para 100.

¹⁷¹ International Association for Public Participation (IAP2). Available at <https://www.iap2.org> (accessed 15 July 2019).

¹⁷² Ibid.

and decision makers; seeks to facilitate the involvement of those potentially affected by or interested in a decision; seeks input from participants in designing how they participate; provides participants with the information they need to participate in a meaningful way; and communicates to participants how their input fashioned the decision.”¹⁷³ These are clear benchmarks of public participation processes. These core values articulate on the sentiments and aspirations of the vulnerable groups who would have an interest in the government decisions. In short, these values seek to embrace the powerless groups in the government decision making.

In analysing the state of public involvement in the South African setting, it will be more convenient to explore the position in foreign countries against which the South African polity can be analysed. In so doing, democratic processes of developed and developing countries will be brought into discussion because of the patterns and trends, which will be examined in this section. This section presents few selected examples of recent developments regarding the notion of public participation in foreign countries.

2.3.2 Review of developing and developed foreign countries

Munene¹⁷⁴ has stressed the importance of the principle of public participation, more especially in giving effect to the IHRL instruments and that it has over the years been a trending theme in the United Nations and at the African region. This section sought to succinctly reflect upon the modern political and legal landscape amongst few foreign countries.

The Constitution of Uganda obliges the state to take all the possible steps to involve the people in the establishment and implementation of developmental plans and programmes of action that affect the people.¹⁷⁵ Article 38(2)¹⁷⁶ which addresses civil rights and other activities, provides for the establishment of civil organisations to

¹⁷³ Ibid.

¹⁷⁴ AW Munene ‘Public Participation and the right to development in Kenya’ (2019) 7 (1) *Africa Nazarene University Law Journal*. Published Online: 1 Jul 2019. Available at <https://hdl.handle.net/10520/EJC-17f1e66883> (accessed 01 July 2021).

¹⁷⁵ PPF of 2013 (note 2 above) at 22. See also the National Objectives and Directive Principles of State Policy in Uganda. (Hereinafter referred to as the Constitution of Uganda, 1995).

¹⁷⁶ The Constitution of Uganda, 1995, as amended in 2017.

enable effective and peaceful participation activities that would influence the government decisions.¹⁷⁷ In addition, the Constitution set out the democratic principles, which embrace active participation in all levels of government processes.¹⁷⁸ Hyden and Venter commends the pivotal role played by the media in promoting transparency during the Ugandan Constitution making process. *Inter alia* the media has expressed the views of the people intensely.¹⁷⁹ It also articulated the sentiments of those who were confronting certain provisions and agitated for implementation of people's views.¹⁸⁰ The mass media went an extra-mile in safeguarding the Constitution making process; it was vigilant to expose any possible deviant and manipulations. It ensures that outcomes reflect the people's views.

De Villiers opines that in the new democratic countries such as Uganda and South Africa, democratic processes demands the facilitation of public participation.¹⁸¹ Wherefore, the aforesaid countries have the obligation to facilitate public involvement whereas countries which are governed by older framework are still enjoying an immense sovereignty.¹⁸² Despite the unjustified discretion to exclude the public still practised in other countries, public involvement has gained hegemony and it frequently practised in a number of developing countries and modern democracies.¹⁸³

In Kenya, there is a proposed Bill seeking to regulate public participation.¹⁸⁴ The primary objective of the Bill is to structure a framework that would enable effective facilitation of public involvement.¹⁸⁵ Since the advent of the new Constitution in Kenya, ordinary citizens are often being consulted on every government program. De Villiers points out that the government of Kenya has started to take decisions openly and overtly including the enactment of new laws, policy making and decision making, all starts with a forum for public consultations.¹⁸⁶ The Bill sought to establish the

¹⁷⁷ PPF (note 2) above.

¹⁷⁸ See The Constitution of Uganda, 1995, under political objectives.

¹⁷⁹ G Hyden and D Venter (eds) *Constitution-Making and democratisation in Africa* (2001) Pretoria: Africa institute of South Africa at 63.

¹⁸⁰ Ibid.

¹⁸¹ De Villiers (note 163 above) at 117.

¹⁸² Ibid.

¹⁸³ Ibid.

¹⁸⁴ The Public Participation Bill, 2018.

¹⁸⁵ Ibid.

¹⁸⁶ De Villiers (note 163 above) at 117.

benchmarks in order to coordinate all public participation processes. Moreover, the Bill promotes the constitutionally entrenched principles of public participation.¹⁸⁷ It does so by bringing into practise the principles of participatory democracy and Articles articulated in the Constitution of Kenya.¹⁸⁸ Munene¹⁸⁹ asserts that Kenya has ratified the international conventions and incorporated them to form part of the law of Kenya under the Constitution of Kenya, 2010. Moreover, the Constitution of Kenya espouses public participation as part of National principles and values of good governance in Kenya.¹⁹⁰

Moreover, Germany and Denmark are some of the countries with older established democracies. According to De Villiers, these two countries have a discretion to exclude the public.¹⁹¹ Contrary to the international trend, Germany and Denmark are both silent about the promotion of public participation. The public representatives and legislatures are not expected to canvass the views of the interested parties neither obliged to convene any public forum of engagement. They therefore have that prerogative to involve or not to involve the public in decision making.

Furthermore, the Parliament of Scotland has openly declared that “this Parliament was elected on a promise: that policy making would be more open, participative and consultative. That is what the people of Scotland expect of us.”¹⁹² The Scottish people was further taken into confidence that the legislature will commit itself and dedicate its time in enhancing openness and accountability.¹⁹³ This proclamation by Scottish Parliament comports with the international standards on the question of public participation.¹⁹⁴ The articulated statement espouses a dedication to review public participation and as such, public participation will be embraced as the most crucial aspect of democracy. Meanwhile, public involvement in practice conceived as a method of building people’s empowerment, strengthen public education and restore stability and legitimacy in democratic decisions.¹⁹⁵

¹⁸⁷ The Constitution of Kenya, 2010. Article 1, 10, 35, 69, 118, 174, 184, 196, 201, and 232 respectively.

¹⁸⁸ The Constitution of Kenya, 2010.

¹⁸⁹ Munene (note 174 above).

¹⁹⁰ The Constitution of Kenya, 2010.

¹⁹¹ De Villiers (note 163 above) at 116.

¹⁹² Ibid at 115.

¹⁹³ Ibid.

¹⁹⁴ Scott (note 53 above) at 40.

¹⁹⁵ Ibid.

The polity of Canadian democracy demonstrate that public participation is frequently regarded as an added ingredient of their political life.¹⁹⁶ This becomes practical when the government is about to take decisions in the process of making laws.¹⁹⁷ In the early 1960s, the notion of public participation was accepted as part of the public policy.¹⁹⁸ Consequently, today's decisions reflect what has been adduced during the implementation of public participation processes. Accordingly, the Canadian modern democracy promotes transparency in the sense that exclusion of the public can emerge as an exception rather than being a practise and a general rule.

According to Hyden and Venter, "the new Ethiopian Constitution makes a break with past principles of governance in the country".¹⁹⁹ It significantly marks transformation and a new social order when it openly declares that sovereignty derives from the existing distinct ethnic groups.²⁰⁰ The adoption of the new Constitution in Ethiopia towards a Federal Democratic Republic of Ethiopia was a true reflection of the will of the people.²⁰¹ It took almost four years to produce that document. It is therefore not merely the product of legal minds, but one that also enjoys the understanding and support of the people.

2.4. South African perspective on public participation

2.4.1. Democracy and public participation

The South African Constitution, 1996 clearly indicates that South Africa is a democratic society in which the government is based on the will of the people and it places a duty on various institutions to facilitate public participation in the law-making process.²⁰²

¹⁹⁶ De Villiers (note 163 above) at 117-188.

¹⁹⁷ Ibid.

¹⁹⁸ Ibid.

¹⁹⁹ G Hyden and D Venter (note 179 above) at 141.

²⁰⁰ Ibid.

²⁰¹ Ibid.

²⁰² Preamble to the Constitution; section 59(1), section 72(1) and section 118(1) and of the Constitution. Section 59(1) requires the National Assembly to "(a) facilitate public involvement in the legislative and other processes of the Assembly and its committees". S 72(1) requires the NCOP to "(a) facilitate public involvement in the legislative and other processes of the Council and its committees". Section 118(1) (a) requires a provincial legislature to "(a) facilitate public involvement in the legislative and other processes of the legislature and its committees".

The South African democracy can be characterized as both representative and participatory in its nature.²⁰³ The case law depicts an overall picture that South African democracy espouses the elements of both participatory and representative democracy. It is also determined that these elements support and buttress each other, thus they are interdependent and not mutually exclusive.²⁰⁴

The aforesaid forms of democracy are not supposed to be in conflict with one another but has to work hand in glove with each other to complement the sentiments of the South African constitutional democracy.²⁰⁵ The court has held that our constitutional paradigm advocates for the realisation of a core functioning and balanced relationship between participatory and representative democracy in the South African terrain.²⁰⁶ Likewise, the pattern of section 72(1) (a), section 59(1) (a) and section 118(1)(a),²⁰⁷ all bind the legislative institutions to execute public involvement. Moreover, the provisions ostensibly stress the significance of the corresponding relationship between participatory and representative democracy.²⁰⁸ Pimbert and Wakeford assert that democracy without citizen deliberation and participation is ultimately an empty and meaningless concept.²⁰⁹

Currie and De Waal also opine that participatory democracy means that the individuals or institutions must be given an opportunity to play a meaningful role in matters that affect them,²¹⁰ whereas representative democracy lies in the political rights entrenched in the Bill of rights.²¹¹ This is the idea that people should participate in politics through their duly elected representatives. It is argued that the latter is justified by the provisions for an electoral system and the provisions dealing with the mandate of representatives necessary to understating the concept and contextualisation of

²⁰³ Currie and De Waal are of the view that South Africa's democracy is representative, participatory and direct in its nature. See Currie and J De Waal (note 8 above) at 3; See also Nyathi (note 12) above.

²⁰⁴ *Doctors for Life* (note 23 above) at para 115; *Matatiele* (note 23 above) at paras 59-60.

²⁰⁵ MR Phooko (note 28 above) at 517- 527.

²⁰⁶ *Doctors for Life* (note 23 above).

²⁰⁷ The Constitution of the Republic of South Africa, 1996.

²⁰⁸ *Doctors for Life* (note 23 above) at paras' 122 & 244 Yacoob J concurring with Van Der Westhuizen J; *Matatiele* (note 23 above) at paras 59-60.

²⁰⁹ M Pimbert and T Wakeford *Deliberative democracy and citizen empowerment* (2001) PLA Notes 40, IIED, co-published by common wealth Foundation at 23.

²¹⁰ Currie and De Waal (note 8 above) at 15.

²¹¹ *Ibid.*

participatory democracy.²¹² Accordingly, the Constitution provides that the PLs must administer their own internal affairs and procedures.²¹³ However, this must be achieved through the adoption of rules and orders, which shall give credence to representative and participatory democracy.²¹⁴ More importantly, such rules must heed to the call of promoting transparency, accountability and public participation.²¹⁵

There is an incisive contribution by Phooko in this subject of public participation in the law making process. His study sought to establish the form of public participation which ought to ensue during the legislative process. Phooko's research topic was as follows "what should be the form of public participation in the law-making process."²¹⁶ His extensive contention was that if the people's will and aspirations were taken into consideration by the legislature, definitely the outcome would reflect what has been presented by the people during hearings.²¹⁷ In Phooko's findings, he claimed the presence of a tension between participatory and representative democracy especially when public views have been considered but not reflecting in the outcome.²¹⁸

It is therefore apparent that the South African democracy is much more aligned with representative democracy. In *Merafong*,²¹⁹ *Moutse*²²⁰ and *Poverty cases*,²²¹ the decisions reflected that public participation is more of a procedural obligation meant to secure compliance with the constitutional standards.²²² In these cases, the court decisions weighed less the substantive aspect of participatory democracy as it upheld representative democracy.²²³ This suggest that people can take a particular stance through submissions and representations during the public hearings, only to find out post the scrutiny of different views by the portfolio committee, the legislature unilaterally takes a different stand and make a final decision. The researcher shares

²¹² Nyathi (note 12 above) at 102.

²¹³ The Constitution of the Republic of South Africa, 1996. Section 116.

²¹⁴ Ibid.

²¹⁵ Ibid.

²¹⁶ Phooko (note 15 above).

²¹⁷ Ibid.

²¹⁸ Ibid at 538.

²¹⁹ *Merafong Demarcation Forum* (note 23 above).

²²⁰ 2008 (5) SA 171 (CC).

²²¹ *Poverty Alleviation Network v President of the Republic of South Africa* 2010 (6) BCLR 520 (CC).

²²² Phooko (note 15 above).

²²³ Ibid at 15, where the author has presented that the recent judgements from the above-mentioned case laws advances a shift in favour of representative democracy. See the abstract of the article.

the same sentiments with Phooko's conclusion that public involvement is just a matter of procedure trying to secure constitutional compliant whereas it has no substantive value.²²⁴ Arguably, the notion that the people should be consulted before the government makes a decision has no substantive value. There supposed to be a strong interconnection and mutual supportive relationship between representative and participatory aspects of democracy.

Action 24 project asserts that when the elements of meaningful participation did not come into play, then the validity of decisions, which flows from such processes may be challenged.²²⁵ Meanwhile, it remains the researcher's view that there should be a platform where the legislature is formally challenged about denting the views of the majority, rather than resorting to courts, revolts and violent protests. In that avenue, the legislature must be forced to correct what is against the will of the overwhelming majority. Alternatively, the legislature must again give feedback that will make the public to be conscientious about the effects of the legislation in question. Citizens would need to be taken into confidence that indeed there was a broader consideration of their inputs. This can be done through post- enactment processes where the legislature goes back to the public and give them an ideological orientation, which forms the base in which the Bill was passed.

It is befitting and quite important to interlink the working relationship between the two legislative institutions in the law making process, namely Parliament and the MPL's. The reasoning behind this aspect is that some Bills are considered in a concurrent competence to be passed as a National legislation.²²⁶ Therefore the PLs and NCOP are mutually reinforcing their legislative mandate. For the purposes of this section, functions of the NCOP in the law making will be discussed as it represents the interest of Provinces within Parliament.

²²⁴ Phooko (note 15 above) at 39.

²²⁵ Action 24 (note 17 above).

²²⁶ The Constitution of the Republic of South Africa, 1996. Section 75 and 76 (respectively).

2.4.2 The Relationship between the Provincial Legislature and Parliament

Section 72 and 118 are distinctive but also interrelated constitutional mandates, as they both obligate the legislative institutions, being the NCOP and PLs respectively to facilitate public involvement.²²⁷ These two institutions are therefore, given interdependent but also parallel and interwoven duties in executing public involvement. In executing their mandate, both of these institutions remain autonomous. Provincial legislatures are considered to be working closer to the people, and therefore are in a better position to reach out to all sectors of the communities including at a grass root level.²²⁸ In addition, the court has reiterated that PLs are interdependent and are not satellites or appendages to the National Council of Provinces.²²⁹ When considering section 76 bills, the PLs will canvass the peoples' views and consolidate mandates, whereupon the NCOP will cast votes as per the received mandates from the people on the ground.²³⁰ In doing so provinces seeks to uphold their respective provincial interests. In that way, PLs take part in the process of enacting National legislation.²³¹

Consistent with this relationship, chapter three of the Constitution promotes the good working relationship among legislative bodies.²³² This is because of the universal nature of their work as they work hand in glove and they seem to be interdependent, hence there is a need for integration. The Constitution calls for the need to heed to the cardinal pillars of good governance as contemplated in section 41.²³³ It is further provided that such integration of actions must be motivated by mutual trust as well as good faith.²³⁴ The principles of unity and cooperation are also espoused in the Intergovernmental Relation Framework Act.²³⁵ Essentially, there is a sub obligation upon Parliament and PLs namely to cooperate in the process of honouring their duty execute meaningful public involvement.

²²⁷ Ibid. Section 1 which is the founding provision of a democratic South Africa aspired by the Constitution.

²²⁸ *Land Access Movement* (note 18 above) at para 74.

²²⁹ Ibid at para 81.

²³⁰ *Doctors for Life* (note 23 above) at para 86.

²³¹ Ibid.

²³² The Constitution of the Republic of South Africa. Section 40.

²³³ Ibid.

²³⁴ Ibid. Section 41.

²³⁵ Act 13 of 2005. The Act sought to promote the vital working relationship among the government structures.

In the efforts of raising the profile of the legislative sector, there has been an element of compromising the independence of these institutions.²³⁶ The objective is to consolidate the good work and incentives implemented across the board.²³⁷ The legislature is also determined to consolidate benchmarks and certain minimum standards for improvements and ultimately better participation activities.²³⁸

2.4.3 Mechanisms and Channels for Public Participation

It is common cause that for democracy to work, the public must be able to deliberate and be heard in the law making process. The KwaZulu-Natal Legislature which is the institution that is directly responsible for passing new laws in the province encourages its citizens across the nooks and crannies of the province to participate in the law making processes; hence, there are various mechanisms strategised by the legislature for the purposes of involving ordinary citizens in any event when considering the enactment of new laws. It should be noted that the legislature is obliged to fashion this mechanisms in line with the dictates of our Constitution.²³⁹

It is even more critical that I [the researcher] explore the various mechanisms that exist within the legislature, so to reflect on the current situation within the legislatures' commitment to public involvement. The Public Participation Framework advances a "best fit approach" and put in place a number of mechanisms to execute public involvement.²⁴⁰ These initiatives include programmes which are regular mass based campaigns in nature, ranging from Taking Legislature to the People (TLTP), public hearings, sectoral parliaments, outreach and information dissemination.²⁴¹ Other programmes are public education, petitions avenues and liaising with representatives through the facilitation of the established Parliamentary Constituency Offices (PCOs).²⁴²

²³⁶ Scott (note 53 above) at 49.

²³⁷ PPF of 2013 (note 2 above).

²³⁸ Ibid.

²³⁹ The Constitutional provisions of section 116 and 118 obliges the Provincial legislatures to conduct public involvement in their legislative businesses. (The Constitution of the Republic of South Africa, 1996).

²⁴⁰ PPF of 2013 (note 2 above); See also kznlegislature.gov.za/a-best-fit-approach-for-ppp-in-the-south-african-legislative-sector/ (accessed 12 June 2021).

²⁴¹ Ibid.

²⁴² Ibid.

There is Taking Legislature to the People's programme:²⁴³ Here, the legislature is aimed at addressing matters of concern affecting communities. This is also intended to ease access to the legislature specifically for the vulnerable and people from grass roots. TLTP further propagates unity in action between the three spheres of government as they work together in attending and addressing issues raised by communities.²⁴⁴ The Legislature joins Parliament and embark on a plenary called Sectoral parliaments: Here, the legislature is usually committed in engaging exclusively with pre-dominantly marginalised and vulnerable sectors of the community amongst others women, youth, disabled citizens and the working class.²⁴⁵ During this programme this legislature looks get an opportunity to look at the challenges it faces towards transformation, work on strengthening the recognition of diversity of opinions in the government decisions and also redress the backlog of power imbalances in South Africa.²⁴⁶

There is another platform for Petitions: This is a mechanism that promotes direct access to the legislature in raising complaints or other matters for the attention of the legislature.²⁴⁷ It is always emphasised that submissions or representations must be forwarded to the legislature after an individual or affected group has exhausted all the available avenues at their disposal. There is also a prescribed format for petitioning. This makes it difficult to the illiterate and only favours the elites as it always becomes difficult and challenging to those who have most at stake.²⁴⁸ In institutions such as KZNL, there is a standard format for petitioning. Then the full petition will be submitted to the relevant committee for consideration.²⁴⁹ For instance, Waterhouse contends that although a Petitions Framework was developed and adopted in 2013,²⁵⁰ there is a big problem on how to forward a petition.²⁵¹

²⁴³ PPF of 2013 (note 2 above) at 26.

²⁴⁴ Ben-Zeev (note 54 above) at 24.

²⁴⁵ Waterhouse (note 112 above) at 48.

²⁴⁶ Action 24 (note 17 above) at 16.

²⁴⁷ PPF of 2013 (note 2 above) at 52-54.

²⁴⁸ Ibid at 5.

²⁴⁹ Scott (note 53 above) at 87.

²⁵⁰ Petitions Framework, annexure to the PPF of 2013.

²⁵¹ Waterhouse (note 112 above), quoted from the Report of the Independent Panel Assessment of Parliament. 2009. (RIPAP) Parliament of the Republic of South Africa at 63. Available at <https://open.uct.ac.za> (accessed 08 August 2020).

Pre-hearings, hearings and post-hearings are most popular and common platforms accross the legislative sector.²⁵² These are usually conducted when the legislature seeks to consider public inputs, perspectives and ideas that may shape the government decision.²⁵³ In most cases public hearings are conducted to consider public views on any Bill/s under consideration by the government. This helps the government takes the informed decisions in either amending, passing or rejecting the Bill. The peoples views seeks to motivate the decision to be taken. It is anticipated that the decision must always be in the best interest of the citizens. Public hearings also seeks to strengthen participatory democracy since those who are likely to be affected by the decisison gets the priority of being heard before the decision can be taken.

The public hearing process was outlined by Scott as the one characterised by preliminary notices, setting the dates for hearings, hosting of public workshops and public mpbization prior to the hearing. During the day of the hearing the deligation will allow an opportunity for presentations and submissions. Finallly the matter is brought forward before the house for voting.²⁵⁴ The target population is determined based on the Bill at hand.²⁵⁵

Educational,outreach and information dissemination:²⁵⁶ This strategy focuses on community outrage programs and often targets disadvanged communities. Education is provided through the convening of educational workshops, school visits and excursions. Whereas information is disserminated via media strategies, public mobilisation by local municipalities, community radios, websites, government gazette and other platforms such as GCIS. Moreover, there is recently a platform called Information disseminated via various channels: In 2013/14, the KZNL conduted weekly media briefings on the business of the house and that of its committees. Members of the public were updated through media alerts; statements addressing the burning issues of national importance. Media interviews with office beares, event and visibility

²⁵² PPF of 2013 (note 2 above) at 27.

²⁵³ Action 24 (note 17 above).

²⁵⁴ Scott (note 53 above) at 84-85.

²⁵⁵ Ibid.

²⁵⁶ PPF of 2013 (note 2 above).

advertisements, media inserts and advertorials in print and electronic media platforms as well as radio adverts were also conducted.²⁵⁷

Lastly, there is Parliamentary constituency offices (PCOs)²⁵⁸: These are the satellite offices of the legislature. MPLs can be approached by any ordinary citizens in these offices and address matters that affect the community. MPLs make time to attend to matters raised in the constituency offices.²⁵⁹ The next section provides an analysis of public participation within the KZN legislature.

2.4.5 An analysis of the concept of public participation

Action 24 has recently researched on the subject of public involvement within the five selected institutions of the legislative sector.²⁶⁰ The study sought to explore amongst others meaningfulness of the mechanisms established to execute the constitutional mandate of facilitating public involvement.²⁶¹ The study also sought to determine the level of public understanding and ability to engage in these participation processes.²⁶² As a result, the study embarked on analysing the existing public involvement strategies and other activities dedicated to promoting public involvement. To ease the execution of the research project, the study was narrowed down to focus on the four Provincial legislatures and Parliament.²⁶³ The motivation behind the sampling of these institutions was based on the salient features portrayed by the institutions.²⁶⁴ The study further analysed the current framework regulating public involvement in each of the above-mentioned legislative institutions. More emphasis was placed on assessing the effectiveness of the identified mechanisms. The study findings demonstrate good practices and significantly addressed areas where efforts should thrive in order to achieve meaningful participation.

²⁵⁷ Sources: Annual Reports 2013/14, 2014/15, 2015/16 and 2016/17 of the KZN Provincial Legislature; EPRE 2014/15, 2015/16 and 2016/17.

²⁵⁸ PPF of 2013 (note 2 above) at 35.

²⁵⁹ Ibid.

²⁶⁰ This research project started in 2018 intended to explore the legislative environment in South Africa. Available on <https://www.climatereality.co.za>. The study was only demarcated to the KZN legislature, Limpopo, Gauteng, Western Cape and Parliament.

²⁶¹ Action 24, (note 17 above) at 3

²⁶² Ibid.

²⁶³ The study has targeted the KwaZulu-Natal legislature, Gauteng, Limpopo and Western Cape and Parliament.

²⁶⁴ Action 24 (note 17 above) at 11.

The methodology employed during the execution of the Action 24 project has mainly adopted desktop approach.²⁶⁵ The study derived credible information from scholarly research conducted on the subject of public participation within the sector (SALS). Interviews were also conducted with the staff members from the legislative institutions as well as with other stakeholders, which includes experts, academics and civil society organisations. During the interview sessions, the appreciative inquiry (AI) approach was adopted.²⁶⁶ Three themes were adopted and were executed using the strategy of appreciative inquiry approach, the themes unfolded as follows, as they sought to determine: “What is working well, appreciating the best of what is, what could be better; envisioning what could work better in future and solutions; how can the ideal/ dream be achieved? Planning for the future.”²⁶⁷

According to the findings of Action 24, the KZNL claimed to have vigorous and dynamic public involvement apparatus established to complement the duty to execute public participation. Since the year 2013, an extra benchmark was achieved by the KZNL by simply customising the SALS’ framework on public participation.²⁶⁸ Localising the framework has the benefit of addressing the issues encountered during the execution of public participation within the provincial jurisdiction of KZN. The challenges of communication barriers in terms of languages has been attended to by appointing a language services unit.²⁶⁹ Customising the framework has intensified community outreach activities. This innovation has enabled the legislature to visit communities and to hear directly from the community what issues concern them.²⁷⁰

The KZNL is one of the three PL’s that adopted their own strategies and drew insights and incentives from the framework. For example, the KZNL and the Limpopo PL

²⁶⁵ Ibid at 12.

²⁶⁶ The Appreciative Inquiry approach is a method of gaining more information by way of simple appreciating the efforts that has been made and hard works. It signals compassion and therefore reduces defensiveness as a result set the respondent free to reveal more rich data.

²⁶⁷ Action 24 (note 17 above) at 13.

²⁶⁸ Action 24 (note 17 above). It is recorded that three of the Provincial legislatures KZN, Gauteng, and Western Cape have gone an extra-mile thereby drawing incentives from the public participation framework of 2013 in implementing their participation activities. In addition, to their credit the aforementioned provincial legislatures have customised the aforesaid 2013 Public Participation Framework for local use within their respective provinces.

²⁶⁹ Ibid.

²⁷⁰ Ibid at 49.

publish their weekly programmes on Facebook to inform the public about upcoming programmes. This well thought initiative advances public participation as the world moves towards the fourth industrial revolution which nowadays takes advantage of electronic communication in our modern society. Prioritisation of public participation has always been a mandate of the KZNL, in that the legislature often invests large amounts in order to enhance public participation.²⁷¹ However, there are still concerns about how the public is consulted.²⁷²

The study also raised concerns on the lack of feedback and mentioned that a great deal of effort needs to be given to establishing a feedback mechanism by which the legislature can report to the communities. Respondent F, a participant from the KZNL, acknowledged that a huge challenge still existed regarding reporting back to the public. As a result, great efforts still need to be invested in cultivating a culture of giving feedback within the legislature. Among other respondents, a need to prioritise feedback was also indicated as lack of it delays the achievement of meaningful participation. In order to achieve fast and efficient feedback, there is a mutual responsibility on both the legislature and stakeholders to play a role in pursuing meaningful participation.

During the interviews with the participants, it was suggested by a respondent from KZN, that there should be a strong collaboration between the legislature and the traditional leaders. Similarly, traditional leaders are considered the most relevant channel to facilitate public involvement, especially at the local government level.²⁷³ The Traditional Leadership Act also supports this active involvement ²⁷⁴ Innes and Booher voice identical views when they say that participation must be collaborative and include *inter alia* Non-Governmental Organisations, civil society organisations,

²⁷¹ See National Treasury, (2018). National Treasury. Available at <http://www.treasury.gov.za/> (accessed 19 March 2018).

²⁷² Action 24 (note 17 above).

²⁷³ Lessia (note 126 above) at 26; Nyalunga (note 4 above).

²⁷⁴ Traditional Leadership and Governance Framework Act of 2003 provides a framework for the recognition of tribal authorities as traditional councils wherein certain duties are closely linked to local government functions. According to Lessia "The function of traditional councils is to facilitate involvement of the traditional community in the development of a local government's integrated development plan."

planners and public administrators.²⁷⁵ All these stakeholders should engage in one common vision and influence one another.²⁷⁶

Among the study participants, 'Respondent G' stressed the need for public education and capacity development on the programmes of the legislature.²⁷⁷ The respondent stressed that government must convene the people to talk about the issues provided those people have a proper understanding of processes in the legislature.²⁷⁸ Full understanding forms the fundamental principle underlying public participation. The respondent further declared: "They [public] also need to understand they not every idea will go forward, they may start as combatants but end up as collaborators."²⁷⁹ It can be deduced from this statement that decisions will emerge after robust engagements with all the interested parties. Furthermore, citizens must be informed that it is not every input that will be accorded favourable consideration. Innes and Booher²⁸⁰ add that to be effective, participatory mechanisms must be characterised by interactions, dialogues and collaboration amongst potential stakeholders.

The study concluded by advancing a number of recommendations meant to improvise best practises in the work of the legislature. However, it was suggested that there is a need for further research to analyse the reasons why some mechanisms are not bearing the intended outcomes and to assess the adequacy of budgets allocated for public participation activities.

2.4.6 Case law on public involvement

It was common cause that the normal procedure for altering the provincial boundaries is prescribed in section 74.²⁸¹ The applicants contended that it was within the efficacy

²⁷⁵ JE Innes & DE Booher 'Reframing Public Participation: Strategies for the 21st Century' (2004) 5 (4) *Planning Theory & Practice* at 422.

²⁷⁶ Ibid.

²⁷⁷ Action 24 (note 17 above). The respondent was from one of the civil society organisations operating in the province.

²⁷⁸ Ibid.

²⁷⁹ Ibid at 51.

²⁸⁰ Lessia (note 126 above) at 23; See also Innes & Booher (note 275 above).

²⁸¹ The Constitution of the Republic of South Africa, 1996. Section 74(3) (b) (ii) provides that any other provision of the Constitution may be amended by a Bill passed by the National Council of provinces,

of the KZNL and Eastern Cape PLs to be concerned with their territorial integrity.²⁸² The applicants submitted that it was incumbent on both provinces to host public consultations as per the provisions of section 74 (8).²⁸³ Deciding the court said: “The KwaZulu-Natal legislature was required to approve that part of the Twelfth Amendment that transfers the area that previously formed Matatiele Local Municipality from the province of KwaZulu-Natal to the Eastern Cape”. Furthermore, based on the evidence and records before court, there were serious doubts that militate against the findings that the KZNL had complied with its constitutional duty. The court was therefore inclined to conclude that the KwaZulu-Natal Legislature had failed to heed the call to facilitate public involvement. It was apparent from the records that no hearings were conducted by the KZNL. It is clear from the wording of section 78(4) that the drafters of the Constitution envisaged that the approval would be subject to the constitutional compliance with the obligation envisaged in section 118.²⁸⁴

In the case of *Doctors for Life International v The Speaker of the National Assembly*,²⁸⁵ three contentious issues were before court. Firstly, the court needed to clarify the ‘nature of the duty to facilitate public involvement.’ Secondly, it had to deal with the question of determining whether the legislature had complied with the above duty in as far as the enactment of health legislations was concerned. Third, the court had to determine what could be the possible implications of the validity of the said health statutes in case where it can be concluded that the participation process was flawed. The reasonableness test was adopted as a standard of judicial review in enquiring into the conduct of the legislature.²⁸⁶ The aim of the enquiry was to establish whether the legislature had acted reasonably in executing public participation.

Subsequently, a few factors were considered in establishing the reasonableness of the conduct of the legislature. Amongst others, the court considered “The nature of the legislation concerned; the importance of the legislation; intensity of the impact on the

with a supporting vote of at least six, provinces if the amendment alters provincial boundaries. This triggers the obligation on the part of PLs to facilitate public involvement.

²⁸² Ibid. Section 74(8).

²⁸³ *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) para 233.

²⁸⁴ *Matatiele* (note 23 above) at para 85.

²⁸⁵ 2006 (12) BCLR 1399 (CC).

²⁸⁶ Procedure for public involvement was suggested in *King and others* (note 69 above).

public,²⁸⁷ and other relevant factors which will depend on the circumstances of each case.” In addition, the court has construed a two legged approach in determining compliance with the constitutional duty to execute public involvement. First, the legislature is obliged to facilitate meaningful participation opportunities to enable citizens to actively influence the nature of Bill/s. Secondly, the legislature is obliged to create convenient participation processes, which can promote participation of a nature that can be of advantage to the people.²⁸⁸

It was on the basis of the preceding cases that the court in the case of *Moutse Demarcation Forum v President of the Republic of South Africa*,²⁸⁹ remarked that the duty contained in section 118(1) of the Constitution is two dimensional. The first aspect requires invitations to be given to the public by the legislature within a reasonable and sufficient time for the people and stakeholders to prepare themselves for the intended hearing.²⁹⁰ The second aspect concerns the point in time the hearings were convened.²⁹¹ It was held that public hearings must be convened at a point in time that is just before the final decision. The rationale is that people must be given time to have a say in a manner that signals that the legislature has respect for them so that they, in turn, can have confidence in the government processes.

In *re Land Access Movement v Chairperson of the NCOP and others*,²⁹² the applicants sought a declaration of invalidity for the alleged failure to conduct adequate public hearings. As a result, the court decided in favour of the applicants and ruled that the legislature had failed to comply with the constitutional mandate of facilitating public involvement. It was stressed that short notices for public hearings has the effect of depriving Non-Governmental Organisations (NGOs) and other community structures of the opportunity to be heard before the decision to enact the Land Restitution Act,²⁹³ (the Amendment Act) was taken.²⁹⁴ In the end the ‘Restitution of Land Amendment Act’²⁹⁵ was declared to be invalid. The declaration of invalidity was suspended for a 24

²⁸⁷ *Doctors for Life* (note 23 above) at para 128.

²⁸⁸ *Doctors for Life* (note 23 above) at para 129.

²⁸⁹ [2011] ZACC 27.

²⁹⁰ *Moutse* (note 73 above) at para 61.

²⁹¹ *Ibid* at para 63.

²⁹² [2016] ZACC 22.

²⁹³ Act 15 of 2014.

²⁹⁴ *Land Access Movement of South Africa* (note 18 above) para 32.

²⁹⁵ Act 15 of 2014.

months' period in order to allow Parliament to correct the defects in the law making process.

In the case of *South African Veterinary Association (SAVA) v Speaker of the National Assembly and Others*,²⁹⁶ the applicants (SAVA) challenged the reasonableness of the conduct of the legislature in passing the Medicines and Related Substances Amendment Act²⁹⁷ particularly section 16 of the Act. The applicant contended that Parliament fell short of its obligation to discharge its duty to facilitate public participation, and thus failed to execute its constitutional mandate. The Court noted that based on the records, there was no indication that hearings were hosted in KwaZulu-Natal. While other PLs managed to conduct public hearings, these were found to be unreasonable.²⁹⁸

There is also a valuable contribution by Phooko²⁹⁹ who answers the question of public involvement in the process of decision making. The aim of his paper was to determine whether the views can be considered for the sake of procedural compliance or that public views can be considered sufficient to cover the substantive component of the constitutional requirement of the intended legislation. Phooko's article answered that question by critically analysing the jurisprudence from different cases that were decided by courts, *inter alia*, *Matatiele*,³⁰⁰ *Merafong*,³⁰¹ *Moutse*,³⁰² *Poverty alleviation*³⁰³ and other cases.

The conclusion was that the early decisions (*Matatiele* and *Doctors for Life* cases) favoured participatory democracy. This component required the people affected to be consulted (which is a sign of respect) to have their inputs considered and presumably updated in case of sudden changes to the legislative policy. The paper further stressed that the recent decisions are in no doubt in favour of a representative democracy approach. Ostensibly, this means that citizens can vote on a particular stance.

²⁹⁶ [2018] ZACC 49.

²⁹⁷ Act 14 of 2015

²⁹⁸ *South African Veterinary Association* (note 18 above) at para 13.

²⁹⁹ Phooko (note 15 above).

³⁰⁰ *Matatiele* (note 23 above).

³⁰¹ *Merafong Demarcation Forum* (note 23 above).

³⁰² *Moutse* (note 73 above).

³⁰³ *Poverty Alleviation Network* (note 221 above).

However, their representatives can unilaterally take a different position when finalising the matter.³⁰⁴ This situation arises as a result of the nature of the so called representative democracy in our political system which gives powers to the elected representatives to represent the citizens in Parliament. To summarise, there is a binding five-year contract between the citizens and the representatives.

It is submitted that the approach applied in the recent court decisions cannot be countenanced or endorsed in a democratic country that entrenches participatory democracy. This approach is subversive to the constitutional principles of openness and transparency. Moreover, it tends to strip public participation of its strength and frustrates the influence of public views on the decisions that are taken.

Raboshakga's article³⁰⁵ has considered the judicial precedent established by the Courts in the first five case laws regarding the issue of public involvement in the legislative processes. Those case laws were *Doctors for Life, Matatiele*,³⁰⁶ *Merafong*,³⁰⁷ *Poverty Alleviation Network*³⁰⁸ and *Moutse*.³⁰⁹ Raboshakga's main contention was that, an element of substantive engagement within the reasonableness test is lacking. At the same time, it is concluded that the process of facilitating public involvement, envisaged in the Constitution,³¹⁰ is not just an obligatory procedural requirement. It is however one which has the objective of achieving the substantive constitutional goal of participatory democracy, and constitutes part of the South African principle of democracy.³¹¹

2.4.7.1 The reasonableness test

Reasonableness is a mechanism or standard of judicial review.³¹² In public involvement cases, the concern is with judicial review in a constitutional sense, that is,

³⁰⁴ Phooko (note 10 above).

³⁰⁵ N Raboshakga 'Towards participatory democracy or not: The reasonableness approach in public involvement cases' (2015) 31(1) *South African journal on Human Rights* at 4 – 29.

³⁰⁶ *Matatiele* (note 23 above).

³⁰⁷ *Merafong Demarcation Forum* (note 23 above).

³⁰⁸ *Poverty Alleviation Network* (note 221 above).

³⁰⁹ *Moutse Demarcation Forum* (note 73 above).

³¹⁰ Ss 59(1)(a), 72(1)(a) and 118(1) (a)

³¹¹ Raboshakga (note 305 above) at 28.

³¹² *Ibid* at 12.

the power of the courts to scrutinise and strike down conduct of legislative bodies, which offends against the constitutional mandate to foster the implementation of public involvement. This derives from the constitutional prerogative of the court (herein after referred to as Constitutional Court) to declare any piece of legislation or conduct of the legislature to be invalid to the extent of its inconsistency with the Constitution.³¹³

Nyathi³¹⁴ critically analysed the judgement of *Merafong Demarcation Forum*,³¹⁵ where he concludes that the reasonableness test has no procedural protections. He further claims that the reasonableness test give the legislative institutions a wide range of discretion just to comply with the minimum standards established for the reasonableness altogether with the rationality.³¹⁶ In addition, Nyathi expounds that the minimalist approach has created a gap, which calls for the imminent enactment of a piece of legislation to regulate public participation.

2.5 Conclusion

This chapter started off with the conceptualisation and theorisation of Public Participation. It is discernible that there is a common conceptualisation of the term “public participation” by different scholars and institutions. The only difference is that some scholars align public participation with participatory democracy while others define it as a combination of both direct and indirect participation. It is submitted that in representative democracy, the elected representatives must come with more strategies of getting in touch with the ground before government can take decisions. Again, a balance should be maintained between representative and participatory democracy to achieve the deep principle of South Africa’s constitutional democracy. In this chapter a synthesis of theories in relation to public participation were discussed. *Inter alia* deliberative democracy, social contract theory, real theorist of democracy, theories of direct participation and the ladder of participation. Arnstein’s ladder of participation was adopted as a theoretical framework for this study. This theory was

³¹³ Section 172(1) (a).

³¹⁴ Nyathi (note 12 above).

³¹⁵ *Merafong Demarcation Forum* (note 23 above).

³¹⁶ See *King and Others* (note 69 above); See also Nyathi (note 12 above) at 109.

adopted to achieve the objectives of the study. It provides with levels of citizen's participation.

This chapter further discussed international legal instruments on public participation and explored foreign experiences or practices on public participation. It is therefore clear that there has been a shift in the understanding of the law making process. The treaties are the only binding legal instruments across the globe that promote public participation in the law making process. The international standards on public participation have influenced most of the countries to cooperate with the citizens in decision making. Democratic countries are obliged to promote public participation in the conduct of public affairs. The IAP2 has established the core values of public participation. The said values guide the whole public participation processes, as they establish the benchmarks and objectives of public participation.

Essentially, this chapter has also explored various mechanisms that exist to foster the implementation of the legal duty to facilitate public involvement. A wide range of mechanisms were identified *inter alia* TLTP, public hearings, Petitions, educational outreach and information dissemination programmes, sectorial Parliaments together with the use of constituency offices. This set of mechanisms proves to be effective except public hearings and information dissemination. A great deal of effort needs to be invested in giving timeous information to the public about public participation events, and so that public hearings become effective and meaningful.

In this chapter the concept of public participation was analysed. The aim was to establish how public participation has been implemented in the KZNL. In a study conducted by Action 24, a number of criticisms were levelled against the legislature particularly on the lack of meaningful participation opportunities. The criticisms also relate to the lack of feedback mechanisms, lack of public education and capacity development in the communities, as well as on how the public is being consulted. Strenuous efforts need to be invested in addressing the aforesaid areas of concern and perhaps work towards the achievement of meaningful public involvement.

Lastly, the case law is testimony to the averments that public participation has not been implemented in a manner that would achieve the aspirations of the South African Constitution. A series of case laws reveals that the legislature has fallen short in

implementing the required level of public involvement. Hence the Court ruled non-compliance with the Constitution.

CHAPTER THREE

UNPACKING PUBLIC PARTICIPATION IN PRACTICE WITHIN THE KZN LEGISLATURE

3.1. Introduction

Chapter three seeks to present the collected data. The study has extracted rich data from desktop research by scholars on the question of public involvement processes in the context of KZN. The data presentation and analysis was done through documentation analysis, as is evident in the study. The first section of chapter three presents study mechanisms, which took the form of public hearings, submissions public education, outreach and information dissemination. The above mentioned mechanisms were identified as essential tools employed by the KZN in accomplishing its duty of executing public consultations and involvement in the legislative process. The first section is structured according to the mechanisms identified in the study. The ensuing discussion is in relation to the mechanisms identified. The points of discussion centre on how the mechanisms are rolled out to the public by the KZN.

Since the study is embedded in the constitution, the creation of the mechanisms to facilitate public involvement is based on the Constitution.³¹⁷ It obligates legislative institutions to facilitate public involvement. The second section of the chapter examines themes that emerged in the study. They were identified as reasonable opportunity, the legislative process from Parliament to provincial legislatures and the case law emerging from the courts dealing with disputed public involvement. These particular themes investigate whether adequate opportunities are afforded to

³¹⁷ Section 118.

communities and interested groups to register their concerns when the legislature considers certain bills.

Lastly, the third section of the chapter investigates the conceptualization and understanding of public participation within the KZN. In giving context to the ideal of public participation, considerable focus is placed on how the KZN understands the meaning and scope of section 118 of the Constitution.

3.2. An analysis of the mechanisms employed by the KZN legislature for public involvement

The analysis of the mechanisms employed by the KZN to facilitate public involvement encompasses two legs. The two legs comprise first jurisprudence, and second, the public participation framework.³¹⁸ The jurisprudence was set by the court³¹⁹ when it was obliged to give meaning to the constitutional provisions of section 118. The court's interpretation of the mandate to fulfil public involvement was instructive to the legislative organ of the state.³²⁰ The jurisprudence has eloquently laid the foundation on what constitutes public participation, and the sufficient extent thereof. The public participation framework³²¹ was adopted by the legislature as a guideline and baseline document which the institution can utilise to navigate the benchmarks and mainstream certain standards towards the implementation of public participation. Scholarly research, KZN legislatures' annual performance plans,³²² and strategic frameworks³²³ were employed to analyse the implementation of the framework.

Doctors for Life International v Speaker of the National Assembly and Others is the leading case on the question of public involvement. The court has therefore stated that legislative institutions need to be given a wide discretion to determine the best modalities for fulfilling the duty to accomplish public involvement³²⁴. The court has

³¹⁸ PPF (note 2 above).

³¹⁹ *Doctors for Life* (note 23 above).

³²⁰ Ibid.

³²¹ PPF of 2013 (note 2 above).

³²² Annual performance plans post the adoption of the framework, starting from the term 2014/15 up to the term 2019/20.

³²³ Strategic framework of the KwaZulu-Natal Legislature (2014-19 and recently 2020-2025).

³²⁴ *Doctors for Life* (note 23 above) at para 124.

elaborated that such discretion applies both in relation to establishing the modalities that would be suitable for certain legislative programmes and internal rules to enforce public participation.³²⁵ Conversely, in as much as the legislature exercises a wide measure of discretion, the Constitutional Court is the final arbiter³²⁶ in the sense that it has powers to intervene whenever a dispute arises on the nature of public participation, and make a ruling on whether what has been done constitutes adequate public involvement as envisaged in the Constitution.

Various mechanisms were established and regularly invoked by the legislature whenever it seeks to receive and consider public inputs.³²⁷ In this section, the researcher looks at the identified mechanisms and assesses whether the KZN succeeds to foster them in practice in a manner that gives support to the existing legal framework and the available jurisprudence.

3.2.1. Public hearings

According to the framework,³²⁸ public hearings are normally convened by the Provincial legislatures and Parliament in certain circumstances to allow for public inputs. These inputs are meant to influence decisions on matters of public interest or a section of the community which is likely to be impacted by the proposed piece of legislation. It is said that this is the most common and popular avenue of strengthening public involvement.³²⁹ It is clear from the framework that public hearings usually take three stages namely, pre-hearings, hearings and thereafter post hearings.³³⁰ These hearings are facilitated for the purpose of drawing out public views on a specific Bill. Stakeholders and voting citizens are invited to submit perspectives on the government programmes on the table. The level of public interest usually demonstrates the degree to which the legislative institution has succeeded to involve the public to make formal submissions during the enactment of new laws.

³²⁵ Ibid.

³²⁶ Section 167 (4) and (5).

³²⁷ Annual Reports 2013/14, 2014/15, 2015/16 and 2016/17 of the KZN Provincial Legislature; EPRE 2014/15, 2015/16 and 2016/17.

³²⁸ PPF of 2013 (note 2 above).

³²⁹ Ibid at 36.

³³⁰ See also the KwaZulu-Natal Legislature website <https://kznlegislature.gov.za/public-hearings-hearings-and-post-hearings/> (accessed 03 September 2020).

The framework recommends that a minimum timeframe of six weeks ahead should be reasonable for any Bill under consideration.³³¹ It is also suggested in the framework that pre-hearings must be conducted.³³² This is for the purpose of apprising citizens and interest groups of a specific upcoming hearing. Furthermore, the framework emphasises the establishment of a strong relationship between the legislature, interest groups and stakeholders. Again, a strong relationship enables effective communication between the legislature and the communities it serves. In this wise, the legislature is best able to strengthen civic awareness programmes. This also makes it easier for the legislature to reach out to a greater number of people during public mobilisation, and to convene successful consultation meetings.³³³ Upon conducting a hearing, a full report is submitted to the House for the responsible committee to consider and make further comments.³³⁴ On the post hearing phase, the legislature is expected to go back to the community and stakeholders and provide them with feedback.

In the KZN Legislature, the main driver behind compliance is the Public Participation and Petitions Unit (PPP). This administrative structure serves as a standby committee. It provides a routine of administrative duties to the various committees of the KZNL.³³⁵ This Public Participation and Petitions unit participates in the execution of public hearings.³³⁶ The KZN Legislature and its committees hold public hearings on various matters including new draft legislation or the Bill being considered.³³⁷ Essentially, public hearings give the public an opportunity to study the Bill and to understand what it entails. Thereafter the public have a say in the process. During these hearings, the relevant committee and the department, through its officials, will outline the content and effects of the Bill.³³⁸ Accordingly, the deployed officials may also invite individuals or organisations to make a presentation on the issue. Representatives from relevant

³³¹ PPF of 2013 (note 2 above) at 51.

³³² Ibid.

³³³ PPF of 2013 (note 2 above) at 51- 52.

³³⁴ Ibid.

³³⁵ The information is available on the website of the institution. Available at <https://www.kznlegislature.gov.za> (accessed 1 July 2020)

³³⁶ Ibid.

³³⁷ It was outlined in a pamphlet, which was distributed by the KZN legislature in the stakeholder's engagement summit which was held at Olive Convention centre. Durban. 19 - 20 September 2018.

³³⁸ Ibid.

departments will usually allow those attending, an opportunity to raise questions or make comments.³³⁹

The public hearing process was similarly outlined by Scott.³⁴⁰ In his analysis he outlined it as a standard procedure that the hearing process normally entails apprising the people, by way of public notices, of upcoming hearings. Public notices are usually followed by pre- hearing workshops. This is accompanied by massive public mobilisation of interest groups and potentially affected citizens. During the day of the public hearing, stakeholders make submissions to the committee.³⁴¹ Thereafter the Bill is tabled in the House for adoption.³⁴² Again a post hearing process to give feedback to the community follows.

It is worth pointing out that the KZNL advertises public hearings on the local newspaper, community radio as well as in its website.³⁴³ The target audience for the intended hearings is thereby figured, based on the type of Bill under consideration. It is common cause that public hearings are the most frequently preferred by most provinces in the legislative sector when considering a Bill.³⁴⁴ The researcher contends that public hearings are the most appropriate and meaningful mechanisms in the legislative process. This view is justified because the legislative process involves inviting interest groups and stakeholders to come and give perspectives.³⁴⁵ However, the concern remains whether the institutions take into consideration the inputs provided on the above processes.³⁴⁶

In a research conducted by Action 24, interviews were made with some of the participants from the Democratic Development Program (DDP). This is one of the active and dynamic CBOs advocating for sustainable democracy and good

³³⁹ Ibid.

³⁴⁰ Scott (note 53 above).

³⁴¹ This is research that was conducted by R. Scott in 2009. It was conducted in all the legislative institutions in the legislative sector. The framework of 2013 corresponds with the practices that were identified in this study.

³⁴² Scott (note 53 above) at 85.

³⁴³ See the KZN legislature website <https://www.kznlegislature.gov.za> (accessed 01 July 2020)

³⁴⁴ PPF of 2013 (note 2 above) at 36 where it asserts that "Public hearings represent the most common form of public participation."

³⁴⁵ Scott (note 53 above).

³⁴⁶ Action 24 (note 17 above).

governance in the KZN province. When questioned on the meaningfulness of public involvement within KZN, the respondent raised concerns that “public participation is seen by the public merely as a means of getting compliance. People tend to resent being used to merely endorse decisions that were finalised long before their involvement.” The respondent further gave a typical example of the facts in the case of *Matatiele*.³⁴⁷

In analysing the nature of public hearings in KZNL, it is important to see public hearings in light of the disputed legislation on the Twelfth Amendment of 2006, now known as the *Matatiele* case³⁴⁸ and the Restitution of Land Rights Amendment Act,³⁴⁹ known as the *LAMOSA 1* case. The rationale is to note progress or regression in terms of the processes of public hearings bearing in mind the jurisprudence set by the court in 2006 and the adoption of the Public Participation Framework (PPF).³⁵⁰ The above mentioned pieces of legislation were disputed based on alleged procedural and substantive irregularities contrary to public involvement processes.

In the case of *Matatiele Municipality v President of South Africa*, during the consultative processes of the Twelfth Amendment Bill, an emphasis was made regarding the importance of hosting public hearings on the Bill. It is clear that Parliament and various provincial legislatures, including the KZNL, all initially intended to host public hearings as they were considered to be the most suitable platform of facilitating public involvement. Consequently, it became evident from the minutes of the KZNL that there was a deviation from the initial plan to host public hearings.³⁵¹ The court quoted the Deputy Speaker of the KZNL, who said, “it is common cause that no specific hearing was held in relation to the issue [of Matatiele]”. This might be due to technical problems along the schedule,³⁵² but for the record, the institution failed to

³⁴⁷ In the year 2006, the Apex court (hereinafter referred to as Constitutional Court) had issued a ruling that the incorporation of Matatiele Local Municipality to the Eastern Cape from KZN had been done capriciously and without paying due regard to the constitutional duty to execute public involvement. Thus there were flaws in approving the aforesaid Amendment of the Constitution.

³⁴⁸ [2006] ZACC 2.

³⁴⁹ Act 15 of 2014.

³⁵⁰ PPF of 2013 (note 2 above).

³⁵¹ *Matatiele* (note 23 above) at para 74.

³⁵² The Court remarked that there was a subsequently revised program which was issued on 14 November 2005 which made no provision for hearings, and no explanation was given. “From what one gathers from the record, these bills suddenly became urgent and that was probably the reason for dispensing with public hearings. Counsel for Parliament was unable to offer any explanation for this change in attitude.”

hold public hearings. What is surprising is that the court further recognised that it was only KZN that could not conduct public hearings whereas the rest of the affected provinces managed to conduct hearings.³⁵³

Nyathi warns that any legislation promulgated without paying due regard to the views of an overwhelming majority of the public during the hearings, is liable to be challenged on the basis of lack of legitimacy of that statute.³⁵⁴

In *LAMOSHA 1*, during the legislative processes of the intended Restitution Amendment Act,³⁵⁵ the legislature had taken the initiative to conduct public hearings. There was, however, dissatisfaction around the issue of short notices and paucity of information to other Community Based Organisations (CBOs) on the proposed legislation. It is common cause that the local media, both print adverts and local radio were media platforms employed to advertise the hearings. The Adverts were in both English and Zulu format. An opportunity was also made available for submission of written comments from various organisations advocating for public interest in the agricultural sector. However, the court eventually ruled that the period for notifications was inadequate.

It is assuring to note that there has been significant progress by the KZNL to conduct public hearings in order to draw public inputs. Even though there were some shortcomings, there is a belief that the institution is progressively perfecting its processes towards the achievement of meaningful public involvement. This reminds one that in 2006, the court stressed that public involvement processes were not being conducted as envisaged in the Constitution and were not consistently applied.³⁵⁶ Frequently after the adoption of the PPF, there were some major developments. Some good initiatives should be counted that benchmark progress towards achieving meaningful participation. Parliament and Provinces have taken the initiative to

³⁵³ *Matatiele* (note 23 above) at para 74.

³⁵⁴ L Nyathi (note 12 above) at 109.

³⁵⁵ Restitution of Land Rights Amendment Act 15 of 2014.

³⁵⁶ Scott (note 53) above as quoted from *Doctors for Life* (note 23 above) and *Matatiele* rulings.

transport people from their areas to reach hearing venues.³⁵⁷ The database for stakeholders is maintained for updates and consistence participation.³⁵⁸

During the public hearings of the Restitution Amendment Act, only two public hearings were conducted on the Bill. It is reported that people were dissatisfied with the format of the Bill in the Pietermaritzburg hearing. The reason was that people raised concerns that the Bill was not properly translated into the IsiZulu language. Following the expression of dissatisfaction, the KZNL conceded the need to establish a 'Language Services Unit.' This component was established to address the issue of communication barriers in the process of public involvement. The established unit provides translation interventions from English to Isizulu including sign language. In addition, braille practitioners are also available to assist the deaf and dumb.

This innovation is in accordance with the framework, which requires the legislature to ensure that, at all material times, the information is conveyed in a language most spoken within the reach of the Province.³⁵⁹ In the research conducted by Scott, the KZNL acknowledged that the inputs during public hearings were of poor quality.³⁶⁰ This general impression might be due to people's lack of understanding the content of the Bill. Two suggestions to improve the quality of input were given. The first was that documents must be available in a language that is in general use in the targeted audience. The second was that the notice period for the public hearing must be increased.³⁶¹

The researcher now turns to focus on the developments made by the legislature in innovating public hearings and thus aligning it with the framework. In terms of section 118 of the Constitution, the legislature must consistently hold public consultations/hearings when processing both Provincial and National Council of Provinces (NCOP) Bills. Between 2014/15 and 2018/19, the Legislature passed and/

³⁵⁷ Action 24 (note 17 above) at 53. The author has indicated that frequently the KZN legislature provides participants with transport and meals during hearings in strengthening public participation.

³⁵⁸ Action 24 (note 17 above) at 54. The writer has noted that the KZN legislature have cultivated innovating modes of communicating and liaising with the participants. It is said that "After each public participation event, names and cell phone numbers are documented, fed into a database, which is then used to send mass SMS's messages informing the public of future engagements."

³⁵⁹ PPF of 2013 (note 2 above) at 45.

³⁶⁰ Scott (note 53 above) at 85.

³⁶¹ Ibid.

or gave NCOP mandates of approximately fifty (50) Bills as reported in the Legislature's audited annual reports.³⁶² There was however, a constant challenge, especially on NCOP Bills pertaining to stringent turnaround timeframes for providing mandates. For instance, requests for mandates were often sent rather late to allow adequate consultations. The institution asserts that efforts to address this should continue even into the sixth Legislature. This will require constant communication and cooperation between the Legislature, Provincial Executive, and NCOP.³⁶³

Ultimately, there is a concerted effort in the legislature to advance public participation. The convening of public hearings in the KZNLC commences six weeks before the hearing date.³⁶⁴ In addition, the legislature targets relevant stakeholders to prepare to participate in the upcoming hearing.³⁶⁵ This is referred to as stakeholder's analysis and engagement. Depending on the nature of the bill, should the legislature identify the need for pre-education, they would be facilitated five weeks before the hearing or submission. The invitations are usually issued five weeks before the hearing.³⁶⁶ The institution then prepares the required logistics within three weeks before the hearing. Subsequently, the institution undertakes pre-workshops for the upcoming hearing.³⁶⁷ After the hearing, the relevant executive officer and committee prepare feedback to the stakeholders. Lastly, the committee reports back on the hearing within a period of two weeks after the hearing.³⁶⁸

In as far as the strategic plan is developed, the institution pledges to embark on a self-introspection to assess the success of public hearings.³⁶⁹ Some of the strategic questions asked, as part of improving public participation programmes, amongst others, related to: whether relevant and adequate numbers of people or stakeholders are invited to public hearings when processing Bills; whether venues and places chosen for the public hearings are appropriate to facilitate effective

³⁶² Strategic framework for the KwaZulu-Natal (KZN) Legislature (2020-2025) at 14.

³⁶³ Ibid.

³⁶⁴ The website of the legislature provides a detailed schedule of how the institution goes about conducting public hearings. Available on <https://www.kznlegislature.gov.za/pre-hearings-hearings-and-post-hearings/> (accessed 03 July 2020).

³⁶⁵ Ibid.

³⁶⁶ Ibid.

³⁶⁷ Ibid.

³⁶⁸ Ibid.

³⁶⁹ Strategic framework for the KwaZulu-Natal (KZN) Legislature (2020-2025) at 15.

engagements/consultations; whether the invited stakeholders and citizens are properly and adequately briefed to understand the exact implication/s of Bills which they are often asked to comment on; and lastly, whether there is a clear qualitative benefit as opposed to a quantitative benefit.³⁷⁰

3.2.2. Request for written submissions on burning issues

The Constitution authorises Provincial legislatures to receive petitions, representations or submissions from interested groups or any other institutions.³⁷¹ These submissions can be directed to and or received by a committee assigned by the legislature to receive such correspondence.³⁷² A submission is ordinarily less formal than a petition. Therefore, ordinary citizens and interest groups can address their written submission/s to the Speaker, the Legislature, and a Member of the Provincial Legislature or one of the committees at any time about any matter.³⁷³ Submissions can also be made about any draft legislation or policy published for public comment by sending comments and suggestions to the relevant department or responsible portfolio committee, dealing with the intended legislation under consideration.³⁷⁴

In *re King and Others v Attorneys Fidelity Fund Board of Control and another*,³⁷⁵ the SCA has stated that “public involvement might include public participation through the submission of commentary and representations: but that is neither definitive nor exhaustive of its content”. Notably, insufficient timeframes for notifications are normally given to citizens for their respective written or oral submissions. This has been recently determined as one of the reasons that negatively contribute to apathy amongst some of the potential participants.³⁷⁶ Nonetheless, Hicks and Buccus state that short notices

³⁷⁰ Ibid.

³⁷¹ The Constitution of the Republic of South Africa, 1996. Section 115 (d).

³⁷² Available at <https://www.kznlegislature.gov.za/public-submissions/> (accessed 25 July 2020).

³⁷³ It was defined in a pamphlet which was distributed by the KZN legislature in the stakeholder’s engagement summit which was held at Olive Convention centre Durban 19 - 20 September 2018.

³⁷⁴ Ibid.

³⁷⁵ 2006 (1) SA 474 (SCA); 2006 (4) BCLR 462 (SCA) at para 22.

³⁷⁶ Scott (note 53 above); J Hicks & I Buccus ‘Crafting new democratic spaces: participatory policy-making in KwaZulu-Natal, South Africa’ (2008) 65 (1) *Transformation Critical Perspectives on South Africa* at 105; Report of the Independent Panel Assessment of Parliament, 2009. Ibid at 54; J February ‘More than a law-making production line? Parliament and its oversight role’, 2006 at 136.

contribute to exclusion of CBO's and other stakeholders working in the interest of communities.³⁷⁷

During the legislative processes of Restitution of Land Rights Amendment Act (LAMOSA 1), there were invitations for submission of written comments. The written comments were expected only for one day, which was 13th of March 2014. As a result, a dynamic non-governmental organisation,³⁷⁸ which was actively involved in matters of land distribution and restitution in KZN was reported to be unable to attend hearings. Neither managed to forward any submission due to the short notice provided. It also transpired that members of this NGO could not manage to attend the hearings, so as to record their respective inputs. As noted already, the timeframe for notifications is an area where the legislature has to make some major improvements.

In the particular *Land Access Movement* case,³⁷⁹ the Court ruled that a notice for a hearing must be served at least seven days before the hearing, otherwise it may be considered unreasonable. The rationale was that a short notice has the effect of depriving potential participants of the opportunity to have a say on a Bill that has far reaching impacts on people's lives.³⁸⁰ The short notice also deprives community structures the requisite time to ready themselves by studying the contents and implications of the Bill and also to properly formulate their response.³⁸¹ The Constitutional Court has emphatically stressed the need for the legislature to give adequate time to public members and interest groups to prepare for their respective submissions.³⁸²

Despite the issue of short notices and the manner in which the information is relayed to the people, Hicks and Buccus give another perspective. They contend that the method employed to notify the public gives rise to problems and favours only well-resourced groups.³⁸³ In this regard, it is submitted that a database for all CBOs and NGOs can assist in disseminating information for their concerns about the Bill/s under

³⁷⁷ Hicks and Buccus (note 376 above).

³⁷⁸ Land Access Movement of South Africa and other active community-based organisations.

³⁷⁹ *Land Access Movement* (note 18 above) at para 60.

³⁸⁰ Ibid at para 77.

³⁸¹ Ibid at para 7.

³⁸² *Doctors for Life* (note 23 above) at paras 129 and 13.

³⁸³ Hicks and Buccus (note 376 above) at 10 and 104.

consideration.³⁸⁴ The KZNL is of the view that frequently electronic gadgets, technology and internet are often the most convenient means of communication.³⁸⁵ Access to information has been recently modernised by the rapid transformation of communication which the legislature needs to take advantage of.³⁸⁶ In light of the above, the KwaZulu-Natal legislature has often started to explore the use of social media as a means of communication. Amongst others, the legislature has fully resorted to the use of Facebook, Instagram and Twitter.³⁸⁷ However the effectiveness of these platforms depends on a massive social cooperation.

3.2.3. Public education, outreach, and information dissemination

The Legislature has a constitutional imperative to facilitate public involvement. This obligation is contemplated in Section 118 of the Constitution. In this regard, there has been concerted efforts to enhance public knowledge regarding legislative processes as well as citizens' right to access information.³⁸⁸ Moreover, the framework that the essential platforms of participation such as community outreach programmes meant to educate the public and information dissemination are key to the legislative Sectors. These are the strategies by the legislature of pursuing effective public involvement. It is noted that access to information is an effective means of realising participation.³⁸⁹ It is also expressly noted that materials to enable education are catered for during these educational activities.³⁹⁰ The materials include, but are not limited to, the distribution of exhibiting pamphlets or booklets, banners, and the digital video disks emphasising the role of the legislature. All these are crafted in the languages of the targeted communities.

Similarly, the strategies at the provincial legislature include community outreach programmes such as tours of Parliament, educational workshops and school education. Furthermore, additional strategies include the use of websites, focused

³⁸⁴ Ibid.

³⁸⁵ KwaZulu-Natal Legislature *Strategic framework*. (2014 - 2019) at 9.

³⁸⁶ Ibid.

³⁸⁷ Action 24 (note 17 above) at 4.

³⁸⁸ KwaZulu-Natal Legislature *Annual Report* 2017/18 at 9.

³⁸⁹ PPF of 2013 (note 2 above) at 37.

³⁹⁰ Scott (note 53 above) at 89.

media strategies including the use of local radio stations,³⁹¹ the Government Communication and Information System (GCIS) such as the Government gazette. Municipalities³⁹² are also utilised for the information to reach out to all sections of the community.³⁹³ These workshops are conducted at local municipality level, first, to escalate awareness on the Constitution, second, to provide civic education and to maximise awareness on human rights, the business of the legislature and other material information.

The annual report 2016/17 clearly stated that public education has, over the years and frequently continues, to be one of the essential functions of the legislature³⁹⁴ It is further stated that significant advances have been made in the period 2016/17, in that 30 workshops were hosted by the KZNL under the broad topic of public education.³⁹⁵ The workshops normally target schools and the youth. The rationale is the belief that when people participate from early stages, they will naturally grow up with the cultivated culture of eagerness to follow the legislative businesses.³⁹⁶ It is through these workshops that a generation of patriotic and active citizens will increase in the province.

Within the period of 2014/15, major public education workshops were conducted. For instance, in the period 28 workshops were hosted by the KZNL. Those who participated were given educational materials to acquaint them with legislative processes. The material covered training manuals, human rights pamphlets and booklets on public involvement. The material was printed in both English and IsiZulu

³⁹¹ The community radio slots campaign aims to educate the public about the role of the Legislature in law-making, public participation, and oversight over the Executive. Community radio slots are featured on Maputaland FM; Radio Newcastle; Ikhwezi FM; Icora FM; Umgungundlovu FM; Radio Sunny South; Inanda FM and Izwi Lomzansi FM.

³⁹² During the 2015/16 financial year, the KZN Legislature took a progressive step to strengthen public education in the Province. It hosted public education sessions utilizing its partnership with the Hibiscus Coast and Mnambithi local Municipalities. "The PPP Unit utilized the slots given to the Legislature in the public participation programmes of the said municipalities to educate members of the public on the roles and functions of the legislature. This exercise has proven to be fruitful in promoting an integrated approach in advancing public participation." See the KwaZulu-Natal Legislature annual report 2015/16.

³⁹³ Action 24 (note 17 above) at 17. The author was conducting research which sought to review the mechanisms which serve as apparatus in the implementation of public involvement in the South African Legislative environment.

³⁹⁴ Action 24 (note 17 above) at 22. See the KwaZulu-Natal legislature *Annual Report* 2016/17.

³⁹⁵ Ibid.

³⁹⁶ Ibid.

languages. In 2015/16, twenty public education workshops were run.³⁹⁷ Further, in the period 2016/17, there were 30 public education workshops; 1 annual stakeholder engagement summit on the “role of civil society organisations in the legislative sector”; another successful workshop was conducted with the youth of Sweetwaters.³⁹⁸ The workshop solely reflected on the various legislative processes. It is also on record that more than 20 public awareness campaigns, including civic education platforms, were conducted in the period 2017/18.

It has been seen that public involvement essentially requires access to information.³⁹⁹ It also extends to the facilitation of continuous learning programmes meant to equip people to better understand their role and thus the progressive realisation of meaningful public involvement.⁴⁰⁰ This is in accordance with certain international incentives that promote access to information. Amongst others, Article 25 of the African Charter calls for the establishment of strategies to enhance access to information.⁴⁰¹ It is therefore of utmost importance that the PL harmonises the level of communication with the people for better enjoyment of the right to political participation. The court’s *dictum* provides an insight on various ways through which public participation can be realised, such as platforms like workshops, road shows, radio programs and regular publications. These objectively aim to change the *status quo* by capacitating and informing the people about various participation avenues available to bring pressure on the legislature.⁴⁰²

Furthermore, the PL has an obligation to apprise the public of any current information relevant to the Bill under consideration so as to timeously notify the public of

³⁹⁷ KwaZulu-Natal legislature *Annual Performance Plan* 2015/16.

³⁹⁸ *Ibid.*

³⁹⁹ See Freedom of Information and Protection of Privacy Act 1993 (Nova Scotia, Canada), section 2; *O'Connor v Nova Scotia* 2001 NSCA 132 (Nova Scotia Court of Appeal 2001) at paras 35 - 41. As the Canadian PL of Nova Scotia has recognised, access to government information may be necessary “to facilitate informed public participation in policy formulation.” See *Doctors for Life* (note 23 above) at para 131.

⁴⁰⁰ As US Supreme Court Justice Stephen Breyer has suggested, regardless of whether participation is direct or vicarious, “the people, and their representatives, must have the capacity to exercise their democratic responsibilities. They should possess the tools, such as information and education, necessary to participate and to govern effectively.” See *Doctors for Life* (note 23 above) at para 131.

⁴⁰¹ Article 25 of the African Charter obliges its signatories to utilise teaching, education, publication methods to give effect to the right to political participation.

⁴⁰² *Doctors for Life* (note 23 above).

participation opportunities available to state their views.⁴⁰³ In this era of rapid growth of social networks and internet, the legislative arm of the government has to devise means to be more visible and keep in touch with the citizens. The available means of communication must be regularly assessed and modernised.

Accordingly, the right to access information is one of the critical aspects of public participation.⁴⁰⁴ In practice, there are significant attempts in place to pursue this overarching goal of being an activist and people-centred legislature. It is assuring to note that the KZNL has opened various channels to disseminate information to the public. Amongst others, there are media releases and alerts on the daily activities of the legislature and its committees. In addition, focused media statements on matters of public concern in both the provincial and national spheres are periodically released, as well as media interviews with Office Bearers; events and visibility advertisements, media inserts and advertorials in print, and electronic media platforms as well as a quarterly newsletter.⁴⁰⁵

Masango⁴⁰⁶ gives similar sentiments as the court in *Doctors for Life* when he points out that the appropriate methods of accomplishing effective public involvement would include *inter alia* public education, regular capacity development for effective participation and the application of necessary methods of participation.⁴⁰⁷ This contention is also supported by De Villiers' observation that effective public involvement will be determined largely by strategies put in place. Those strategies will serve as determinant factors *inter alia* activities aimed at outreach education and information dissemination, to enable access to this incomprehensible institutions.⁴⁰⁸ Accordingly, in *Doctors for Life*, the court suggested that, it might be desirable for the legislature to provide public education that builds capacity for such participation.⁴⁰⁹

⁴⁰³ Ibid at para 131.

⁴⁰⁴ Abid Hussain. UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression. Abid Hussain. Ibid. Paragraph 42. Quoted from Waterhouse (note 112) above. Available at <https://open.uct.ac.za/handle/11427/15198> (accessed 13 August 2021).

⁴⁰⁵ Action 24 (note 17 above) at 22.

⁴⁰⁶ R Masango 'Public Participation: A critical ingredient of good governance' (2002) 21 (2) *Politeia* at 60. Published Online: 1 Jan 2002. Available at <https://hdl.handle.net/10520/EJC88060> (accessed 15 Oct 2021).

⁴⁰⁷ *Doctors for Life* (note 23 above) at para 132.

⁴⁰⁸ De Villiers (note 163 above) at 98.

⁴⁰⁹ *Doctors for Life* (note 23 above).

Essentially, public education is critical in empowering citizens and enabling them to become good citizens by providing robust engagement, which can result in positive public inputs. The legislature needs to work hard to deepen public education as all the legislatures' annual performance plans adequately recognise the need for civic education.

In addition, scholarly research has shown that legislative institutions across the sector have experienced much difficulty in relation to access to far-flung communities.⁴¹⁰ It also becomes evident that those who do not have access to technology experience difficulty in accessing the information disseminated through websites.⁴¹¹ Likewise, there is also a language barrier as publications sometimes get released in languages that are unfamiliar in the target communities.⁴¹² Public education booklets are also not written in simple language, and often appear to have been written for a literate audience.⁴¹³ As indicated clearly already, inadequate and short notification of upcoming events, has been the most frequently cited information-related barrier to public participation.⁴¹⁴

The Legislature has acknowledged that over the past years it has been reluctant to adapt to the use of social media⁴¹⁵ with the KZN completely failing to take advantage of the use of the webpage as an aid for consistent communication between the legislature and citizens. Frequently in this modern society of electronic communication, it is often beneficial if the legislature establishes means of communication via social media and other internet platforms. Furthermore, the availability of and access to

⁴¹⁰ PPF of 2013 (note 2 above); See L Muntingh 'The state of civil society participation in Parliament' *Law, Development and Democracy* (2012) 29 (48) at 39, where the researcher stressed that "It remains a relatively small number of public representatives that engage with Parliament on a consistent or even sporadic basis"; See also C Van Der Westhuizen 'Parliament @20: Shrinking the Accountability deficit' (19 February 2014). Available at <http://www.thoughtleader.co.za/christivanderwesthuizen/2014/02/19/parliament-20-shrinking-the-accountabilitydeficit/> [accessed 10 July 2021]. Page 98; Similar sentiments were also presented by Hicks and Buccus (note 376 above) at 97 -105.

⁴¹¹ PPF of 2013 (note 2 above).

⁴¹² Ibid.

⁴¹³ Ibid.

⁴¹⁴ Waterhouse (note 112 above) at 51; Hicks and Buccus (note 376 above) at 105; and J February (note 403 above) at 136.

⁴¹⁵ Strategic framework of the KZN legislature (2014-2019) at 8.

smartphones and other electronic gadgets have significantly transformed access to public information.⁴¹⁶

It is common cause that the majority of the representatives and institutions have embraced the use of social media and internet. In spite of this progressive initiative, the KZNLC has been tardy in taking a policy position on implementing the use of these platforms. The legislature however, has pledged that in the next five year term, ⁴¹⁷ it will make extra efforts to establish an official platform as a medium of communication between the MPLs and their constituencies, especially in order to receive comments on matters of public interest.⁴¹⁸

Consequently, the strategic plan⁴¹⁹ reports that in enhancing communication between the legislature, especially the Members and their constituencies; social media platforms were created (Facebook, Twitter, and YouTube accounts). These were utilising to disseminate information on the activities of the Legislature such as a weekly schedule of committee meetings and sittings, media statements, oversight visits, events, and general information about the institution. The report further indicates that even though the legislature took bold strides in establishing these platforms, their utilization by both individual Members and employees of the Legislature remained at a minimum. In the Secretary's opening remarks, the legislature pledges that the year 2020/21 will see innovative public participation and involvement initiatives being pursued. The administration has therefore committed to relook at the type of support strategies and human resource capacity required to support public participation processes. This will entail looking at greater partnership between communications and the information communications technology units in taking fuller advantage of digital platforms. This approach is meant to ensure that platforms such as social media are utilised to reach out to more people as well as to make the Legislature more accessible to the public.

⁴¹⁶ Ibid.

⁴¹⁷ 2020-2025.

⁴¹⁸ Available at www.KZNlegislature.gov.za.

⁴¹⁹ KwaZulu-Natal legislature *Strategic Plan* (2020-2025) at 14.

As per the study objectives, in the next section the researcher examines the question whether the institution affords a “reasonable opportunity” to members of the public so that they can adequately provide inputs. This is just one amongst a matrix of factors that the court examines to determine whether there has been compliance with the provisions of section 118.⁴²⁰ The notion of reasonable opportunity was made by Sachs J in the case of *New Clicks* that “what matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say.”⁴²¹

3.2.4. The Offering of “Reasonable Opportunity” to the public

3.2.4.1. Does the Institution Afford the Public with Adequate Participation Opportunities?

In *re Doctors for Life*, the court had to address the question of what constitutes public participation as contemplated in the Constitution.⁴²² The court succinctly enunciated two salient features of the duty to facilitate public involvement, namely “the duty to provide meaningful opportunities for participation in the law-making process, and the duty to take measures to ensure that people’s abilities take advantage of the opportunities provided to them by the legislature.”⁴²³ Action 24 believe that in order to realise the so called “meaningful public participation process”, there has to be a strong correlation between participation and the results being directly motivating and or influencing the decision.⁴²⁴ They further added that the situation where the outcomes are so convincing that the public voice has been heard, constitute the real empowerment of citizens.⁴²⁵

The court has indicated that the legislature will always have a wide discretion to explore and opt for suitable mechanisms that would enable it to accomplish the duty

⁴²⁰ The Constitution of the Republic of South Africa, 1996.

⁴²¹ *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* [2005] ZACC 14; 2006 (2) SA 311 (CC); 2006 (8) BCLR 872 (CC) (*New Clicks*) at para 630. This extract was quoted with approval by Ngcobo J in *Doctors for Life* (note 23 above) at para 125.

⁴²² The Constitution of the Republic of South Africa, 1996. Section 118 obliges provincial legislatures to facilitate public involvement in the law-making process and other processes of the legislature.

⁴²³ *Doctors for Life* (note 23 above); *King and Others* (note 69 above) at para 26-24.

⁴²⁴ Action 24 (note 17 above).

⁴²⁵ Ibid.

to execute public involvement.⁴²⁶ Consequently, there are various mechanisms employed by the institution in rolling out public involvement, yet efficiency and effectiveness remain fundamental issues.

In undertaking to assess how the legislature offers a reasonable opportunity to the public, it is important to be guided by the court's determination *in re Doctors for Life*. This caution is solely because the Constitutional Court has the inherent jurisdictional authority to undertake a constitutional enquiry and should need be, issue a decree of invalidity, on the basis that the conduct of the legislature was inconsistent with the constitution. The order of invalidity will be granted to the extent of its inconsistency.⁴²⁷ The test by the court only takes into account the factual basis of what has transpired during the legislative process.⁴²⁸ The test is known as the reasonableness test.⁴²⁹

When the Court examines compliance with the Constitution, a number of factors play a role as been enunciated by the Court. The assessment takes into account questions such as "what action has the Parliament taken? Is it reasonable in all the circumstances? Are the rules of Parliament relating to public participation reasonable? How controversial is the Bill, and is there a reasonable degree of public interest in it? Did the legislation need to be passed urgently?"⁴³⁰ The court further evinces a strong argument that says for the legislature to successfully accomplish its obligation they will need to employ appropriate methods of facilitating public participation. The methods must be apposite and flexible in each case, based on the subsistence of the Bill and public interest on it. In establishing whether what has been done by the legislature is reasonable, the Court will place considerable focus on what the legislature has done to ensure that on the face of it, is reasonable and appropriate in all the circumstances. It should be noted that the court does not refer to the legislature but to Parliament. This is precisely because parliament is the embodiment of the legislative process while the provincial interest is represented by NCOP within Parliament.

⁴²⁶ *Doctors for Life* (note 23 above) at para 123.

⁴²⁷ The Constitution of the Republic of South Africa, 1996. Section 172(1) (a).

⁴²⁸ Raboshakga (note 305 above) at 4-29.

⁴²⁹ *Ibid* at 12. Described Reasonableness as "a mechanism or standard of judicial review. The requirement of reasonableness in constitutional matters can be seen as a standard which courts must apply in order to enforce certain obligations that the government is required to perform in a manner that is consistent with constitutional goals."

⁴³⁰ *Doctors for Life* (note 23 above) at 146-47.

Apparently, the public hearings and invited written comments or submissions are the major platforms the legislature depends upon to receive the public views on a particular Bill. The assessment of the reasonableness of the methods employed by the legislative bodies on their duty to facilitate public involvement, the court is obliged to maintain the separation of powers. The court is obliged to respect the legislatures' institutional autonomy, on the one hand, and to uphold the rights of the citizens to participate in public affairs on the other. As such, a balance must be maintained. Ngcobo J has concurred with the view that, such a balance is well maintained when the Court considers the question of whether what has been done by the Legislature is reasonable in all the circumstances.⁴³¹

There were instances where the court ruled that there were insufficient time frames for notice periods of the intended hearings. For instance, the Restitution of Land Rights Amendment Act⁴³² was declared invalid on the basis that Parliament had failed to facilitate adequate public involvement.⁴³³ It is progressive to note that the KZNL has noted, with great concern, the implications of this judgement, as it understands that such judgement is alarming. The KZNL has noted that it must always ensure that adequate public consultations are properly facilitated for the Bills flowing from NCOP.⁴³⁴

The KZNL is of the view that in order to ensure compliance with the Constitution, the NCOP must provide the provincial legislature with sufficient time to convene public hearings.⁴³⁵

In research conducted by Action 24 project, the study revealed the dismaying concerns around consultation processes.⁴³⁶ During interviews for this study, some participants pointed out that people are frequently called to attend meetings just to endorse decisions that were taken long before the public involvement.⁴³⁷ This

⁴³¹ *Doctors for Life* (note 23 above) at para 146.

⁴³² Act 15 of 2014.

⁴³³ *Land Access Movement of South Africa and Others v Chairperson of the National Council of Provinces and Others* [2016] ZACC 22

⁴³⁴ KwaZulu-Natal Legislature *Annual Report* 2016.

⁴³⁵ *Ibid.*

⁴³⁶ Action 24 (note 17 above).

⁴³⁷ *Ibid.*

suggests that their participation has no real influence but merely a façade that compliance with the constitutional obligation was met.

Accordingly, the court has to make a determination whether, in each case, adequate participation opportunity was offered to the interest groups during before the bill was open up for public inputs. The court assessment takes into account all the relevant circumstances by inquiring into the factual basis as already indicated. In as much as the institutions have a discretion to select an appropriate method of facilitating public involvement, the court will thereafter make a final determination whether the Act is valid or invalid. It is also important that the researcher outlines the procedure for legislative process from NCOP to the Provincial Legislatures. This requirement of procedure is to mitigate the irregularities and shortcomings that might arise on the way before the institution initiates the same task for public inputs.

3.2.4.2 The legislative process from NCOP to provincial legislatures

Normally the Bills flow from the National Assembly to the NCOP. They are received through the chair of the council. The relevant department then convenes the select committee to brief them on the content and effects of the Bill.⁴³⁸ The select committee exercises the prerogative powers of deciding on the route to be followed in transferring the Bill to the provincial legislature. The Bill is sent to the legislature for the purpose of obtaining the necessary public comments and ultimately formalising that the public involvement mandate has been met.

Upon determining the course to be followed in referring the Bill to the provinces, the Bill will then be sent to the speaker of each provincial legislature. Once received, the Speakers of the various provinces will forward the Bills to their respective provincial committees of the NCOP, generally known as NCOP Standing Matters Committee. This stage marks the point where the Provincial legislatures are expected to hold public hearings in compliance with section 118. This is done by inviting stakeholders, interest groups and general citizens to come forward to comment on the Bill. This is normally done by way of public discussions in the hearings, through oral and written

⁴³⁸ *Doctors for Life* (note 23 above) at para 148.

submissions. The public is invited through extensive advertisements that a particular committee will be meeting for consideration of the Bill. The intention is to secure the informed mandates to be submitted by the province as a formalised point of view on the Bill concerned. This mandate is known as a negotiated mandate.⁴³⁹

Finally, upon receipt of the negotiated mandate, the provinces will be obliged to submit the final mandates.⁴⁴⁰ The final mandates seek to give an indication to the delegates in the NCOP how they should vote on the Bill. The delegates may vote either in favour or against the Bill.

In addition to the procedure, there is a provision for legislative cycles in the Rules of the NCOP. For instance, Rule 240 entails a procedure for the Bills seeking to amend the Constitution and, second, those Bills affecting the provinces.⁴⁴¹ The Rules provide that the aforementioned Bills should be handled in a manner that will give provinces sufficient time to secure and confer the necessary mandates. Subsection 2 makes a provision that depending on the public interest on the Bill, such period may not exceed six weeks. Conversely, subsection 3 further states that should the circumstances dictate, that should a period be beyond the six weeks' period, then a request for an extension should be lodged with the Chair of the NCOP. This means that the affected legislature should request for a further extension, depending on the public interest on the Bill. Should circumstances warrant an extension, accordingly the Chair of the NCOP is obliged to grant such an extension so that the affected legislature can finalize its work and thus obtain an informed mandate from the public. The final mandates have to be a true reflection of the people's views. In turn, the completed public process would be a reflection of real democracy.

⁴³⁹ In terms of the Mandating Procedures of Provinces Act 52 of 2008 (Mandates Act), a negotiating mandate is "the conferral of authority by a committee designated by a provincial legislature on its provincial delegation to the NCOP of parameters for negotiation when the relevant NCOP select committee considers a Bill after tabling and before consideration of final mandates, and may include proposed amendments to the Bill."

⁴⁴⁰ In terms of the Mandates Act, a final mandate is "the conferral of authority by a provincial legislature on its provincial delegation to the NCOP to cast a vote when the relevant NCOP select committee considers a Bill or prior to voting thereon in [an ordinary sitting of the NCOP]."

⁴⁴¹ The Constitution of the Republic of South Africa, 1996. Section 74 (1), (2) and (3). See also section 76.

Rule 240 of the NCOP's Rules on the legislative cycle provides that the NCOP is more autonomous to the extent that it has more powers over provincial legislatures. The provinces are just there to receive negotiating mandates and to give back the final mandates. However, at this point, the independence of the provincial legislature may be compromised. In most cases, the institution does its best to facilitate public participation. However, there are some technical problems that emanate from the NCOP, usually from the Select Committee. Meanwhile, the powers of the NCOP prevail over the independence of the provinces. This explains why the provinces end up yielding to the NCOP. Those logistical and technical shortcomings by NCOP end up obstructing the provincial legislature in its course of inviting public inputs. Mostly, difficulties arise regarding the convening of public hearings. More particularly, the KZNL is engulfed with the issues of poorly planned timeframes and limited schedules to host the hearings. It is submitted that the insufficient timelines impact negatively on the good work of the legislature and ultimately proves the root cause of all the identified flaws in the legislative process.

The researcher finds it necessary to look at a few instances where the public participation activities were disputed and challenged in the KZNL. This item is to assist the researcher to get a handle on the root causes of non-compliance in the legislature's steps towards facilitating public participation.

3.2.5. Case Law on public involvement where the KZN legislature fell short in executing the required procedure

In *LAMOSAS 1*, during the 'flawed' legislative processes of enacting the Land Restitution Amendment Act, the KZNL and Western Cape legislature have both raised concerns about the limited timelines set by NCOP for public comments.⁴⁴² In this case of *LAMOSAS 1* the KZNL had only less than 4 weeks to process such a substantial Bill which would have far reaching impact on the lives of the people. The province (KZN) had only three days to advertise public hearings.⁴⁴³ The provinces were briefed 3 days prior to the commencement of the public hearings.⁴⁴⁴ Objectively, it is quite telling that

⁴⁴² Ibid at para 80.

⁴⁴³ 5-7 March 2014.

⁴⁴⁴ 10 March 2014.

it was extremely impossible for the Provincial legislatures to give adequate participation opportunities to the interest groups. Resultantly, the court has set the precedent that a notice of less than 7 days would be inappropriate and thus unreasonable to expect the people to pop up for public hearings.

The court contends that the deficiencies by the provincial legislatures cannot be seen in isolation to the limited turn-around timeframes given by the NCOP to the provinces. The KZNL's negotiating mandate was dismayed by the truncated time for public comments. The timeline was not suited for the purpose, hence the court declared non-compliance with the Constitution in that the institution has failed to comply with its duty to facilitate public involvement.

In *Doctors for Life v Speaker of the National Assembly*, during the legislative processes of enacting the Traditional Health Practitioners Bill, It transpires that the KZNL and Eastern Cape has intended to host the hearings, however they could not do so as they were twisted by truncated timeframes. The permanent delegates of the aforementioned legislatures have conveyed much concerns and dissatisfactions to the NCOP about limited time to convene hearings. Moreover, the Eastern Cape has feeble attempted to lodge an application for extension to get enough time for adequate public hearings. The NCOP could not grant such extension. It was an initial plan of the NCOP to hold proper hearings on the Bill, but despite that consensus, the NCOP has perplexed the provinces on their imminent course of holding public hearings. In the sense that the NCOP did not permit a situation where provinces would be able to conductively hold public hearings.

Consequently, out of the four provinces namely KZN, Limpopo, Gauteng, and Northern Cape intended to hold hearings, it is only Limpopo that has successfully managed to convene public hearings on the Bill. It also transpired that the KZNL has attempted liaising with the NCOP concerning the time constraints in which it had to consider the Termination of Pregnancy Bill (CTOP). There was no extension given, as a result the KZNL was unable to conduct public hearings on the other health Bills. Finally, in its verdict the court ruled that the KZNL has acted unreasonably in failing to accomplish

its duty to facilitate public hearings in relation to CTOP.⁴⁴⁵ Therefore, in the circumstances the KZNL did not comply with its constitutional duty to facilitate public involvement.

In *Matatiele*, during the legislative process of the Twelfth Amendment Act⁴⁴⁶ as well as the Cross-boundary Municipalities Laws Repeal and Related Matters Act,⁴⁴⁷ it was common consensus in KwaZulu-Natal that it was apposite to hold public hearings regarding the aforementioned Bills. According to the court, it can be deduced from the minutes of the KZNL portfolio Committee on Local Government and Traditional Affairs that upon briefing by NCOP certain committee members have stressed the importance of holding either hearings or the referendum on the Bill.⁴⁴⁸ It is salient to mention that both the KZNL and the Council of provinces has considered public hearings to be of paramount importance on the Bill (the Twelfth Amendment). The court has concluded that it is inclined to conclude that the KZNL did not act reasonably in failing to conduct public hearings. The court has remarked that in the circumstances failure to comply with the constitutional mandate is a “clear, plain and unmistakable violation of the Constitution.” In this case, there is no clear and valid reason why the institution (KZNL) ended up failing to invite public inputs.

In the next section, the researcher examines the conceptualisation of public participation by the institution. Subsequently, a look at how the institution understand its obligation to execute public involvement as imposed by the Constitution is also discussed.

3.2.6. Conceptualization and Understanding of Public Participation

The concept of Public involvement is used interchangeable with public participation. In the KZN Legislature, it is understood that the obligation to effect public involvement derives from the Constitution.⁴⁴⁹ The Constitution serves as the base for the universal understanding of ‘public involvement’ across the board of the legislative sector; hence

⁴⁴⁵ Choice on Termination of Pregnancy Amendment Act 38 of 2004.

⁴⁴⁶ Twelfth Amendment Act of 2005.

⁴⁴⁷ Cross-boundary Municipalities Laws Repeal and Related Matters Act 23 of 2005.

⁴⁴⁸ *Matatiele* (note 23 above) at para 77.

⁴⁴⁹ The Constitution of the Republic of South Africa, 1996. Section 118.

there was an establishment of the Public Participation framework⁴⁵⁰ by the South African legislative sector (SALS).⁴⁵¹

The year 2013 benchmarked an extra proverbial mile by the legislature when it adopted such a tailor made framework to guide public participation.⁴⁵² The legislature is determined to significantly uplift the standard of public involvement in the entire legislative sector.⁴⁵³ Frequently, the framework serves as an apparatus of consolidating all the incentives done across legitimate institutions and thus operate with similar modalities of participation activities that would finally enable the achievement of meaningful participation.⁴⁵⁴ It is also the prescripts set by the Constitution that in fulfilling various obligations prescribed in the Constitution, organs of state must subscribe to the set principles of co-operate governance. The said principles of good governance are *bona fide* and they are also based on mutual trust.⁴⁵⁵ It is therefore encouraged that all the legislative institutions across the board must co-operate with each other in fulfilling the constitutional obligation of public involvement.

It is however acknowledged that institutions remain independence from each other,⁴⁵⁶ and there is a discretion given to all the institutions in executing their mandate of facilitating public involvement.⁴⁵⁷ The understanding of this task before the legislature should be understood in conjunction with other promulgated legislations dealing with public involvement. Accordingly, the Draft National Policy framework on public participation⁴⁵⁸ has conceptualised public involvement or participation as an open process, which allows for accountability in which citizens and interest groups interact

⁴⁵⁰ PPF of 2013 (note 2) above. Available at <http://www.sals.gov.za/show.php?show=2> (accessed 02 November 2019).

⁴⁵¹ Ibid.

⁴⁵² Scott (note 53 above) at 49.

⁴⁵³ The adoption of the PPF of 2013 (note 2 above).

⁴⁵⁴ Scott (note 53 above) at 49; See also the PPF of 2013 (note 2 above).

⁴⁵⁵ The Constitution of the Republic of South Africa, 1996. Section 41.

⁴⁵⁶ *Doctors for Life* (note 23 above) at paras 1, 24 and 125.

⁴⁵⁷ *Land Access Movement* (note 18 above) at para 81. Where the Court emphasised that PLs are not merely the appendages of the NCOP as they have their own distinct constitutional mandate to discharge public involvement, and thus they are separate from the NCOP.

⁴⁵⁸ Draft National Policy Framework (note 91 above).

with government for the purposes of influencing the decisions to be made by the government.⁴⁵⁹

In its annual performance plan,⁴⁶⁰ the KZN Legislature indicates that as per the Constitution, the primary objective of public involvement and petitions include amongst others; improving civic education programmes and the active participation of citizens in government processes within the province.⁴⁶¹ Furthermore, public participation improves public and civil education programmes to empower the citizens of KZN.

In its strategic plan, the KZN Legislature postulates that public participation is characterised by regular, robust interactions and consultations between the citizens and the government as represented by the legislature.⁴⁶² The KZN legislature further expounds that it should be noticed that public participation is a continuous programme by the legislature to the people. It must not therefore be seen as an event.⁴⁶³ This is drawn from the Bill of rights,⁴⁶⁴ which envisions that the interaction between the voters and representatives (MPLs) is a *bona fide* relationship that is based on trust.⁴⁶⁵ Similarly, the KZN Legislature is of the view that there should be always a good and transparent relationship between the people [constituency] and the elected representatives.⁴⁶⁶ It is submitted that the nature of the aforesaid relationship needs to be appraised on a regular basis, restructured and or modernised according to the evolving needs of the people. In that way, public involvement becomes meaningful and ultimately the most important tool of realising the needs of the community.

The manner in which KZN Legislature contextualizes this concept of public involvement can be traced back to the Arnstein ladder of participation.⁴⁶⁷ As previously mentioned in the theoretical framework, this ladder of participation has also been

⁴⁵⁹ Ibid. This is the definition by National policy framework of 2007 addressing the question of Public participation.

⁴⁶⁰ KwaZulu-Natal Legislature *Annual Performance Plan* 2018/19.

⁴⁶¹ Ibid at 8; See also the Strategic plan of the KwaZulu-Natal Legislature (2014-2019) at 33.

⁴⁶² The strategic framework for the KwaZulu-Natal (KZN) Legislature (2014–2019) at 6. It represents the institution's five-year term statement of intent.

⁴⁶³ Ibid.

⁴⁶⁴ The Constitution of the Republic of South Africa, 1996.

⁴⁶⁵ The strategic framework (2014 – 2019).

⁴⁶⁶ Ibid.

⁴⁶⁷ The ladder of participation, which was developed by Arnstein (note 121) above at 216.

adopted by the SALS.⁴⁶⁸ The ladder has significantly strengthened public participation to such an extent that communities easily get an opportunity to comment and have an influence on matters affecting their social welfare. People participate in various platforms provided by the institution [KZNLC]. As established by the institution, there are four levels of participation. Firstly, the legislature seeks to inform the public where it essentially provides an opportunity for access to information.⁴⁶⁹ Second to that, it seeks to consult with the public by mainly providing an opportunity to community members to forward their inputs. Thirdly, the legislature seeks to involve the public. This is done by providing a platform for dialogues and interactions. Lastly, it seeks to collaborate with ordinary citizens and stakeholders by giving them an opportunity for collaboration.

The institution asserts that public involvement should be cultivated in a manner that would curb the possible culture of prevalent retaliations for service delivery.⁴⁷⁰ It is trite that when people are actively involved in the developmental agenda of their communities, there is a high possibility that they will militate against the vandalism of their property.⁴⁷¹ In this regard, effective involvement would mean that they [community members] somewhat get satisfied that their inputs were received and considered in the decision making.

In 2006, in *Doctors for Life*, the Court extensively dealt with the constitutional mandate of the legislatures in as far as public involvement is concerned. The Court had to meticulously apprise the meanings of the two words 'involvement' and 'participation.' The court just rose to the occasion and held that "in its plain meaning, facilitation of public involvement in the legislative process means taking steps to ensure that the public participate in the legislative process."⁴⁷² It was further stressed that the direction and nature that this participation will take would vary in different instances based on the case merits as it lies on the prerogative discretion of the legislature.⁴⁷³

⁴⁶⁸ PPF of 2013 (note 2 above) at 28.

⁴⁶⁹ See the website <https://www.kznlegislature.go.za> (accessed 01 July 2019)

⁴⁷⁰ KwaZulu-Natal Legislature *Strategic Plan* (2014-2019) at 8.

⁴⁷¹ Ibid.

⁴⁷² *Doctors for Life* (note 23 above) at para 120.

⁴⁷³ Ibid at paras 124 and 125.

Notably, the KZN Legislature (KZNL) understands that for democracy to work, ordinary citizens and stakeholders must be given an opportunity to have a say in law making and other decisions of government.⁴⁷⁴ The KZNL, which is responsible for passing new laws and changing the existing laws, encourages ordinary citizens and interest groups to actively participate in law-making and other government processes in various ways. The institution has noted the advantages of public participation, among others; it recognises that participation gives a platform to the ordinary citizens and the potentially affected citizens an opportunity to be heard in matters affecting their welfare.⁴⁷⁵ Furthermore, it essentially serve as a consultative process that promotes a relationship between the citizenry and their representatives [MPLs].⁴⁷⁶ In that way, public participation end up promoting open democracy and accountable government. In *Doctors for Life*,⁴⁷⁷ the Court has determined the constitutional meaning of the obligation to facilitate public involvement when the Court held that “It is implicit, if not explicit, from the duty to facilitate public in the law-making process that the Constitution values public participation in the law-making process. The duty to facilitate public participation in the law-making process would be meaningless unless it sought to ensure that the public participates in that process. The core purpose in facilitating public participation in legislative and other processes is to ensure that the public participates in the law-making process consistent with our democracy. Indeed, it is apparent from the powers and duties of the legislative organs of State that the Constitution contemplates that the public will participate in the law-making process”⁴⁷⁸

The Court’s jurisprudence extensively dealt with the question as to why the Constitution obligates the legislative institutions to provide a forum of public involvement in the processes of the legislature.⁴⁷⁹ The Court has noted a serious infringement of the concerned citizen’s right to dignity when they are deprived of their entitlement to participate in the processes of making laws.⁴⁸⁰ Concurring with the

⁴⁷⁴ Available at <https://www.kznlegislature.gov.za>.

⁴⁷⁵ Ibid.

⁴⁷⁶ Ibid.

⁴⁷⁷ 2006 6 SA 416 (CC).

⁴⁷⁸ *Doctors for Life* (note 23 above) at para 135.

⁴⁷⁹ The duty to facilitate public participation is contemplated in the Constitution of the Republic of South Africa, 1996. Section 118.

⁴⁸⁰ *Doctors for Life* (note 23 above) at para 234, where the court declared as follows “It is beneath the dignity of those entitled to be allowed to participate in the legislative process to be denied this constitutional right.”

majority Sachs J in the *Doctors for Life* judgement, expounds that “public involvement . . . [is] of particular significance for members of groups that have been the victims of processes of historical silencing”.⁴⁸¹ This demonstrate that the Constitutional Court is serious about addressing the “injustices of the past” and more importantly that the legislature should be held accountable to the electorate.⁴⁸² Taking into cognisance the ugly history of South African as characterised by segregation, it would be trite to expect constitutional protection to be guaranteed against capricious enactment of laws.⁴⁸³

Sachs J, has made the following remarks where he stresses the importance of public participation. “It is constitutive of their dignity as citizens today that they not only have a chance to speak, but also enjoy the assurance they will be listened to.”⁴⁸⁴ This would be of special relevance for those who may feel politically disadvantaged at present because they lack higher education, access to resources, and strong political connections.⁴⁸⁵ Public involvement accordingly strengthens rather than undermines formal democracy by responding to and negating some of its functional deficits.”⁴⁸⁶

The strategic plan of the KZNL gives perspective on the concept of public involvement. It objectively asserts that this concept should be viewed as a fundamental philosophy where the legislature would on an ongoing daily basis conduct its legislative and other oversight functions.⁴⁸⁷ It is however, expressly acknowledges that the standard of public participation is still underrated, hence a great deal of effort need to be invested in realising this overarching goal.⁴⁸⁸ The strategic plan further enunciates that the primary conditions for meaningful participation entails a strong relationship between MPL’s, staff and the officials to continuously honour their relationship with citizens. In addition, it emphasis the need to stick to the mandate of ensuring service delivery. This is one of the primary conditions for sufficient and meaningful public participation in the province by the Legislature.⁴⁸⁹ The institution has proactively recognised the

⁴⁸¹ *Doctors for Life* (note 23 above) at para 24.

⁴⁸² Nyathi (note 12 above) at 104.

⁴⁸³ Ibid.

⁴⁸⁴ *Doctors for Life* (note 23 above).

⁴⁸⁵ Ibid.

⁴⁸⁶ Ibid.

⁴⁸⁷ Strategic plan of the KZN legislature (2014 – 2019) at 6; Strategic plan of the KwaZulu-Natal Provincial legislature (2020 – 2025) at 25.

⁴⁸⁸ Ibid.

⁴⁸⁹ Ibid.

need to examine the efficiency, effectiveness and meaningfulness of the existing public involvement mechanisms.⁴⁹⁰

According to *Doctors for Life*, “Legislatures must facilitate participation at a point in the legislative process where involvement by interested members of the public would be meaningful.”⁴⁹¹ It is not reasonable to offer participation at a time or place that is tangential to the moments when significant legislative decisions are in fact about to be made. Interested parties are entitled to a reasonable opportunity to participate in a manner which may influence legislative decisions.”⁴⁹²

In addition, the requirement, which espouses that public participation must be convened where it will be credible and meaningful attributes the symbolic and practical objectives.⁴⁹³ In the sense that those who have a direct interest or in the possibility of being affected by the legislation must be manifestly shown the recognition they deserve as citizens in their free democratic country. Equally so, the lawmakers must benefit from the inputs provided and utilise those inputs to their advantage to produce acceptable laws. This view is supported by Raboshakga who opines that public participation must have a substantive significance in bringing a balance between representative and participatory democracy.⁴⁹⁴ Accordingly, the deep principle of democracy signifies an understanding of democracy not as a mere right of citizens to elect representatives of their choice periodically, but one which involves participation by the public in representatives’ decision-making processes and the holding of representatives accountable to the values of the Constitution.⁴⁹⁵

⁴⁹⁰ Ibid.

⁴⁹¹ Ibid at para171.

⁴⁹² Ibid at Para 171.

⁴⁹³ Ibid.

⁴⁹⁴ Raboshakga (note 305 above).

⁴⁹⁵ T Roux ‘Democracy’ in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (2006) at 15. Upon scrutinising the text and aspirational aspects of the Constitution and some earlier jurisprudence of the Constitutional Court, Roux eloquently articulates the participatory and representative elements of the South African conception of democracy – ‘the deep principle of democracy’. In his view, these elements cannot be considered separately but as concepts complementing one another or in a ‘constructive tension’ which becomes resolved ‘on a case-by case basis in accordance with the democratic values of “human dignity, equality and freedom”.

3.3 Conclusion

It is discernible from this chapter that insufficient time frames for notifications is one of the challenges faced by the KZNL. Notifications for public hearings are sent rather late, leaving potential participants with little or no time to prepare their written and /or oral submissions. It was on those bases that the court in LAMOSA¹ remarks that a notice period for public hearing must count down at least from seven days, so that it can be considered a reasonable notice. The manner in which the information is relayed to the interest groups was also identified as a stumbling block towards meaningful participation. In addressing this issue, the legislature declares that it will embark on leveraging the use of modern technology to ease communication with stakeholders. In rectifying the issue of insufficient timelines, in KZNL the public hearing is frequently set to commence 6 weeks before the hearing date.

The case law reveals that there was an absolute potential from the KZNL to host public hearings in a number of Bills. However, the efforts were tackled by the truncated turn-around timeframes from the NCOP. Moreover, it is noticeable that the conceptualisation and understanding of public participation in KZNL emanates from the Constitution. The Constitution remains a guiding document for all public participation activities. Additionally, the KZNL drew profound lessons from court decisions and endeavour to cure the areas of concerns.

In summary, the KZNL is on the right track towards achieving participatory democracy as it transpires in its annual performance plans and strategic objectives that it works very hard in trying to strike a balance between representative and participatory democracy. The KZNL also endeavours to provide civic education to the public, provide outreach programmes and information in enabling the citizens to have the ability to provide inputs. There is a strong co-relation between what the institution seeks to achieve and what the courts emphasis namely meaningful participation. In as far as the standard of review [reasonableness test] is concerned, the institution aligns its work with the criteria of reasonableness. This is shown by the institution's effort of maintaining contact with stakeholders and mobilising for public participation events. With this pace, the institution is working tirelessly to enact laws that can pass constitutional muster and comply with other values of constitutional democracy.

CHAPTER FOUR

ASSESSING THE LEGISLATURE'S DUTY TO FACILITATE PUBLIC PARTICIPATION IN THE LEGISLATIVE PROCESS

4.1 Introduction

This chapter continues to present the research findings on documentation analysis of public participation. The researcher seeks to establish the degree of participation which the legislature should reach in facilitating public involvement in a certain Bill as envisaged in section 118 of the Constitution. Likewise, chapter 5 examines the philosophical aspects and gives more focus on the practical aspects of the duty to facilitate public involvement. The researcher has employed the International Human Rights Law Framework to establish and understand the scope of the duty placed upon the legislative institutions to facilitate public involvement. The literature has revealed that public participation is not only a right in domestic right but it is also recognised in international law. This chapter subsequently engages the existing jurisprudence set by the Court regarding the extent to which legislative institutions should act in discharging their obligation of facilitating people's involvement in the government and law making processes.

The rationale is to determine the extent to which legislative institutions should act in ensuring compliance with the constitutional mandate of facilitating public involvement in the process of creating certain bills. It should be understood that the processes may vary from case to case. There are however benchmarks that should be reached by a legislature in fulfilling its constitutional duty to facilitate public involvement. This section seeks to understand the parameters that the legislature should cover in facilitating public involvement.

This chapter seeks to assess the level of alignment with the international framework the KZN legislature has achieved. This assessment is done against the benchmarks

set out in the constitution as well as the existing jurisprudence set by the courts on public involvement.

4.2 The International human rights law framework

In 1994, the South African government took a progressive decision by signing the International Covenant on Civil and Political Rights (ICCPR). The Covenant propagates the right to vote and more importantly, the right to participate in public affairs.⁴⁹⁶ Significantly, the state bears the burden of taking positive action towards the progressive realisation of this political right.⁴⁹⁷ Consistent with the above mentioned obligation, the provisions of article 19⁴⁹⁸ and 25⁴⁹⁹ simultaneously demand the facilitation of public involvement when the government conducts public affairs.⁵⁰⁰ The essence of this article centres on the establishment of mechanisms to ensure the realisation of these rights so that the public can utilise the avenues provided by the state. Furthermore, the crux of section 19 and 25 calls for the localisation of public participation through the development of concrete participation strategies.⁵⁰¹

The International Human Rights Law framework (IHRL) obliges different states to exercise a significant level of public involvement, more particularly, the inclusion of the impoverished groups.⁵⁰² Such participation can contribute to the realisation of people's

⁴⁹⁶ International Covenant on Civil and Political Rights adopted 16 December 1966 (entered into force 23 March 1976) 999 U.N.T.S. 171. South Africa signed this instrument on 3 October 1994 and ratified it on 10 December 1998. Article 25 of the ICCPR was based in part on article 21 of the Universal Declaration of Human Rights, adopted 10 December 1948, which provides: "(1) everyone has the right to take part in the government of his country, directly or through freely chosen representatives."

⁴⁹⁷ See M Nowak *UN Covenant on Civil and Political Rights: CCPR Commentary* (NP Engel, Kehl, Strasbourg and Arlington 1993) at 439.

⁴⁹⁸ Article 19 of the ICCPR, which provides: "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."

⁴⁹⁹ International Covenant on Civil and Political Rights art. 25, Dec. 16, 1966, ("Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: 1. To take part in the conduct of public affairs, directly or through freely chosen representatives; 2. To vote and to be elected . . .; 3. To have access, on general terms of equality, to public service in his [sic] country.").

⁵⁰⁰ *Doctors for Life* (note 23 above) at para 92. See also arts 9, 13(1) & 25 of the African Charter on Human and Peoples' Rights (1981); art 23 of the American Convention on Human Rights (1969); art 2 of the Inter-American Democratic Charter (2001); and art 4 of the Harare Commonwealth Declaration (1991).

⁵⁰¹ Article 19 and 25 of the International Covenant on Civil and Political Rights of December 1966.

⁵⁰² See the United Nations Population Fund (UNFPA). "Participation and Inclusion", which embraces people's participation, access to information affecting people's lives and well-being. This Human

development and enjoyment of political rights. Additionally, the IHRL framework characterises the right to vote as an indirect form of participation, whereas regular participation in the public affairs was labelled as a form of direct participation.⁵⁰³ In addition, the framework has established that the right to participation is contingent on the right to information and therefore recognises the right to information as instrumental to participation rights.⁵⁰⁴

The Inter-Parliamentary Union presents three avenues in which people can exercise their right to participation.⁵⁰⁵ First, it presents the principle that people can directly participate in popular assemblies established to address issues such as local issues touching the welfare of the community. Second, people can participate by way of influencing government through engagements and hosting of public debates with their elected representatives. Lastly, people can participate through their own arrangements entrenched in the Constitution, such as forming Civil Society Organisations.⁵⁰⁶ The last method of participation provided is supported by the right to freedom of expression, the right to assemble, and to associate.⁵⁰⁷

Furthermore, the right to political participation is also anticipated by the other fundamental human rights, such as the freedom of expression, which espouses the right to information.⁵⁰⁸ Notably, the international framework has grouped the fundamental human rights to strengthen the political participation. As a result, the citizens will utilise those rights as a shield against any possible dictatorship by the state.

Right principle promotes participation of minority groups. Published in 2005 by UNFPA. Available at <https://www.unfpa.org/resources/human-rights-principles>. Dated 2005. See also Waterhouse (note 112 above) at 13.

⁵⁰³ Ibid.

⁵⁰⁴ Ibid.

⁵⁰⁵ UN Office of the High Commissioner for Human Rights (OHCHR), Human Rights - A Handbook for Parliamentarians, 2005, No. 8-2005, available at: <https://www.refworld.org/docid/46cea90d2.html> [accessed 13 August 2021].

⁵⁰⁶ *Doctors for Life* (note 23 above) at para 99. Referring to Human Rights Committee. UN Human Rights Committee (HRC), CCPR General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote), The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service, 12 July 1996, CCPR/C/21/Rev.1/Add.7, available at: <https://www.refworld.org/docid/453883fc22.html> [accessed 13 August 2021] at para 5.

⁵⁰⁷ Human Rights Committee General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25): Available at <https://www.refworld.org/docid/453883fc22.html> (accessed 13 August 2021) at para 1.

⁵⁰⁸ *Doctors for Life* (note 23 above) at para 106.

Mendel has addressed the subject of freedom of information as an internationally protected right, where he expounds that the significance of the right to information is beyond question.⁵⁰⁹ Hence, it must be considered as one of the fundamental rights.⁵¹⁰ Mendel supported his assertion by referring to the United Nations General Assembly of 1946, specifically, Resolution 59 (1) which declared the right to information as the touchstone and fundamental human right of all the freedoms consecrated by the UN.⁵¹¹ Several freedoms are subordinated to the right to information. The implication of this is that people cannot enjoy their freedoms without prior knowledge.

Mendel explains that in the olden days, when some of the treaties were adopted, the interpretation given to the right to information excluded the information held by the state.⁵¹² He, however, acknowledges that over time, the interpretation has shifted as the understanding of the rights evolved.

The presentation made by the UN delegate reporting to the UN Economic and Social Council under the subject “Promotion and Protection of the Right to Freedom of Opinion and Expression,” firmly establishes that access to information is indeed one of the fundamental rights.⁵¹³ The rapporteur reflected on the right to access information as follows: “The right to seek, receive and impart information is not merely a corollary of freedom of opinion and expression; it is a right in and of itself.”⁵¹⁴ It was further stressed that access to information as a right is a determinative factor to the whole concept of the right to participation.⁵¹⁵ In his analysis, the Rapporteur asserts that in

⁵⁰⁹ See T Mendel “Article 19: Freedom of Information as an Internationally Protected Human Right”. The second paragraph of this Article stresses the importance of public participation. Mendel has noted that frequently, the right to access information has been recently adopted in a significant number of countries across the globe. Amongst others South Africa, United Kingdom and Tobago have gone an extra-mile by enacting National legislation in giving credence to this fundamental right. Accessed at <https://www.article19.org/data/files/pdfs/publications/foi-as-an-international-right.pdf> Undated.

⁵¹⁰ Ibid.

⁵¹¹ United Nations Resolution 59(I) “Calling of an International Conference on Freedom of Information.” Reports of the 3rd committee. 14 December 1946. A/RES/59. Available at <https://www.refworld.org/docid/3b00f0975f.html> (Accessed 1 July 2021).

⁵¹² Mendel (note 542 above) at 8.

⁵¹³ A Hussain United Nations Special Rapporteur on the subject “Promotion and Protection of the Right to Freedom of Opinion and Expression.” Reporting to the Economic and Social Council on the year 2000. (Accessed 18 January 2000). Available at https://digitalliberty.un.org/E_CN-4_2000_63_Add-1-EN-PDF

⁵¹⁴ Hussain (note 513 above) at 42.

⁵¹⁵ Ibid.

most of the democratic states, democracy depends primarily on the right to information. He firmly articulated that the right is a typical bridge towards the enjoyment of the right to political participation.

In South Africa, there is a routine of constitutional imperatives, which entrench the right to political participation.⁵¹⁶ The obligation to facilitate public involvement in the South African environment is a locally sounding assignment, on the basis that there are profound underlying constitutional provisions which enable the effective facilitation of this obligation. Amongst others, the right to access information, goes with freedom of expression, the right to present petitions and the political rights envisaged in section 19. Ngcobo J affirms that “the duty to facilitate public involvement in the legislative process under the South African Constitution must therefore be understood as a manifestation of the international law right to political participation.”⁵¹⁷ The international law right to political participation reflects a shared notion that a nation’s sovereign authority is one that belongs to its citizens, who themselves should participate in government – though their participation may vary in degree.”⁵¹⁸ Apparently, the South African courts have already agitated for the implementation of the international law framework in as far as the right to political participation is concerned.

Legal scholars have explored the functions performed by the legislative institutions within the democratic countries.⁵¹⁹ One of their findings was that legislatures serve as an embodiment of public representatives, which caters platforms and mechanisms that enables people to partake in the government processes.⁵²⁰ Second, the scholars all agree that legislatures are the forums in which government officials are held

⁵¹⁶ See the Constitution of the Republic of South Africa, 1996 *inter alia* s16, s17, s19, s59, 72 and s118.

⁵¹⁷ *Doctors for Life* (note 23 above) at para 107.

⁵¹⁸ “Active Liberty”; Interpreting our Democratic Constitution. The Tanner Lectures on Human Values Delivered by S Breyer at November 17-19, 2004. Page 10 under the theme Active Liberty. Justice Breyer expounds that the Nation Sovereign should be shared among the people. He further explained that Active Liberty refers to constant and active community participation in a collective manner.

⁵¹⁹ C Evans & S Evans ‘Evaluating the Human Rights Performance of Legislatures’ 6 HUM. RTS. L. REV. 545, 548 (2006) at 3.

⁵²⁰ *Ibid.*

accountable.⁵²¹ Lastly, scholars found that legislatures serve as “deliberative law-making bodies.”⁵²²

The Court has also recognised that in terms of international law, periodic elections coupled with permissibility interactions are characterised by incisive engagements between the people on the ground and their representatives.⁵²³ It was mentioned that such platform constitutes minimum requirement for public participation. The court recognised that the South African Constitution demands an extraordinary high level of public involvement when the government makes laws.⁵²⁴ It ensures that there is also a responsibility on the public to cooperate with the government in complementing the constitutional right envisaged in section 118.⁵²⁵

Domestically, (i.e. in the South African setting), the Court in *Doctors for Life* has reflected on the internationally sounding assignment of anticipating public participation. The court has localised the obligation to partake in the handling and execution of public affairs as well as the positive obligation to initiate steps towards people’s realisation of their right to political participation. These two obligations were framed according to the South African polity as follows: First, “legislatures have the duty to provide meaningful opportunities for participation in the law-making process.”⁵²⁶ Second, there is a duty to take measures to ensure that people’s abilities take advantage of the opportunities provided.”⁵²⁷ It is clear that the South African courts re-affirm allegiance to the international framework by instructing the legislative institutions to implement the binding declarations.

In addition, the Court goes further to emphasise the importance of the right to information, and obliges the Council of Provinces (NCOP) and PLs to initiate and

⁵²¹ Ibid.

⁵²² Ibid.

⁵²³ *Doctors for Life* (note 23 above) at para 106.

⁵²⁴ Ibid at para 107–8. The *Doctors for Life* court’s views on the relevance of international law are referred to with approval in *Matatiele* at para 54.

⁵²⁵ The Constitution of the Republic of South Africa, 1996.

⁵²⁶ *Doctors for Life* (note 23 above) at para 129.

⁵²⁷ Ibid.

promote participation of citizens in the processes of law-making.⁵²⁸ The Court has given the legislative institutions an insight as to how they can complement their obligation. Amongst others, the conducting of routine road shows, regular publications meant to develop the capacity to participate among ordinary citizens and to inform them of the available avenues of influencing the legislature through regular workshops as well as through radio platforms.⁵²⁹

Accordingly, the SCA declared that public involvement extends beyond informing people about public participation and hinges on providing them with participation avenues.⁵³⁰ It was on this spirit that the Court drew inspiration from the United States administrative policy, which views public participation as a “*continuum* that ranges from providing information and building awareness, to partnering in decision making.”⁵³¹

It is common cause that most of the international instruments impose a twin task upon democratic states namely “to provide an opportunity for its citizens, to take part in the conduct of public affairs, and also to take positive steps to ensure that their citizens have an opportunity to exercise their right to political participation in the conduct of public affairs.”⁵³² There is a subordinate and ancillary obligation on the states, which is to ensure that participation can be realised. Concurrently, the international framework guarantees the right to information as a key to public participation.⁵³³

⁵²⁸ Ibid, at para 119. This obligation was appraised as requiring ‘the legislature to take positive measures to facilitate public involvement in government action relating to any particular legislation under consideration’

⁵²⁹ *Doctors for Life* (note 23 above) at para 135.

⁵³⁰ *King and Others* (note 69 above).

⁵³¹ *Doctors for Life* (note 23 above) at para 129. See also the State National Park Service, Directors order #75A; “Civic Engagement and Public Involvement”, approved by Director A. Boman. 30 August 2007. Available at <https://www.nps.gov/policy/DOrders/thingstoknow.htm>. See section V (definitions).

⁵³² See the “International Covenant on Civil and Political Rights” of 1966 which came into effect after a decade (23rd March 1976). 23 March 1976). South Africa became a signatory of this instrument around October 1994 and subsequently ratified it in 1998. The binding effects of Article 25 of this instrument is partly based on the precepts of the 1948 ‘Universal Declaration of Human Right’, particularly article 21 which read as follows: “(1) everyone has the right to take part in the government of his country, directly or through freely chosen representatives.”

⁵³³ ICCPR. Ibid. Article 19 and 25.

In the next section, the researcher looks at participation activities within the KZN Legislature. The aim is to establish whether the legislature complies with the above international framework and the Constitution.

4.3 Key findings from documentation analysis: public participation activities within the KwaZulu-Natal Provincial Legislature

The research findings revealed that a wide range of laudable participation activities has been established and implemented within the KZN⁵³⁴. Principally, the establishment of a PPP unit has deepened participation through insightful and routine road shows, which seek to capacitate people on a variety of participation programs.⁵³⁵ All these participation measures enable ordinary citizens to better understand public participation. As a result, people participate effectively when they have the necessary information at their disposal. An assessment that has been conducted by Action 24 determines that the mechanisms for public participation are not yet sufficient to complement the obligation to facilitate public consultations. Action 24 further notes that whilst public participation programmes might still fall short in many respects, legislative institutions have gone to great lengths in implementing public involvement.⁵³⁶

A moderate level of interactive communication has been achieved through the utilisation of an active website of the KZN⁵³⁷. Frequently, members of the public can electronically submit their respective submissions on any Bill under consideration.⁵³⁸

⁵³⁴ Amongst others, civic education activities, public hearings, outreach and information dissemination over various channels, Taking legislature to the people, sectorial parliaments and petitions. See www.kznlegislature.gov.za (accessed 03 July 2020).

⁵³⁵ Annual Reports 2013/14, 2014/15, 2015/16 and 2016/17 of the KZN Provincial Legislature; EPRE 2014/15, 2015/16 and 2016/17 indicate a number of Education and Outreach activities, Institutional Tours, and Community Education that has been conducted by the legislature. In the period of 2013/14: 18 public education workshops were conducted. In the period of 2014/15, 28 public education workshops; public education material (workshop training manuals, public participation booklets, human rights booklets, public participation pamphlets, petitions pamphlets) were made available in English and IsiZulu. In 2015/16 20 public education workshops; 1 annual stakeholder engagement summit on the role of Constituency Offices in advancing public participation were conducted. In 2016/17: 30 public education workshops; 1 annual stakeholder engagement summit on the role of civil society organisations in the legislative sector; workshop for 100 youths from Sweet waters and surrounding communities on legislative processes were conducted.

⁵³⁶ Action 24 (note 17) above at 63.

⁵³⁷ The active website of the KZN legislature is on <https://www.kznlegislature.gov.za> (accessed on 05 August 2020).

⁵³⁸ Ibid.

These recent developments are in line with the constitutional prescripts and global frameworks on public participation. All these initiatives give considerable support to the precepts of the South African Constitution.

The second aspect seeks to determine if the opportunities provided to inform the public are helpful to serve the purpose. The Constitutional Court has remarked that there is a preliminary obligation on legislative institutions to publicise the information and notify the public on the intended consideration of the Bill.⁵³⁹ Furthermore, the institutions must advise on the participation opportunities available on the public disposal.⁵⁴⁰ The statement implies that the legislatures must provide information and notices to the public. It was emphasised that this must be done in the most effective fashion to cascade information to the masses.

In the case of *Matatiele*, the Court stressed the need to identify the so called 'discrete group'. This is a section of the community that is most likely to be affected by the possible effects of the intended legislation.⁵⁴¹ This assertion by the court implies that the legislature must advertise and conduct public hearings in areas most likely to be affected by the Bill. It was further stressed that the legislature is expected to act reasonably and shrewdly in making sure that the potentially affected group is given adequate and reasonable opportunity to participate. Legislatures must act astutely in identifying the discrete group and facilitate the access of those most likely to be adversely affected by the location of an inconvenient hearing venue.

Similarly, adequate hearings become more instrumental especially when the potentially affected communities have been predominantly the victims of discrimination.⁵⁴² The above consideration applies even more so if those victims were previously marginalised and silenced by the oppressive apartheid system of government. Their aspirations have to be given priority. Likewise, in light of the Land Restitution Amendment Act,⁵⁴³ when it was still a bill, the legislature was expected to

⁵³⁹ *Doctors for Life* (note 23 above) at para 131.

⁵⁴⁰ *Ibid.*

⁵⁴¹ *Matatiele Municipality and Others v President of the Republic of South Africa and Others* (No2) [2006] ZACC 12; 2007 (6) SA 477 (CC); 2007 (1) BCLR 47 (CC) (*Matatiele II*) at para 68.

⁵⁴² *Doctors for Life* (note 23 above) at para 130.

⁵⁴³ The Restitution of Land Rights Amendment Act 15 of 2014.

be cautious towards the marginalised indigenous people during the legislative processes. The legislature could have mobilised a staggered number of citizens through various NGOs and CBOs that seek to represent them. In its judgement, the court acknowledged that the matter is inherently sensitive as it concerns the historical injustices *inter alia* ejections, evacuations and land dispossessions.⁵⁴⁴ The land question continues to be a national concern with major political and socio-economic implications.⁵⁴⁵ Meanwhile, failure to execute necessary public consultations by the legislative institutions constituted a gross violation of the Constitution.

Moreover, the study has revealed certain benchmarks which the legislature is required to reach when enforcing the correct procedure for public involvement. When there is a likelihood or possibility of a great proportion of ordinary citizens having an interest in the legislation, the Constitution demands no less.⁵⁴⁶ It demands that all interest groups, ordinary citizens and stakeholders with a direct interest in the legislation under consideration should be accorded adequate and reasonable participation opportunities.⁵⁴⁷ Similarly, the parties would want to be taken into confidence by the government thereby gaining hope that indeed they are recognised and that their contribution will definitely receive due consideration and perhaps, possibly influence the legislation.⁵⁴⁸ It is the researchers' view that all these can be achieved through proper planning for public involvement. The legislature therefore needs to strategically utilize the six weeks' period by informing and mobilising the relevant stakeholders and civil society organisations to submit their inputs during the public hearing. Lastly, the outcome must reflect what was agreed upon by the majority of the participants.

Notably, the PPF⁵⁴⁹ recommends that notifications must reach the public at least five weeks prior to the date of the public hearing.⁵⁵⁰ Arguably, this is a reasonable period for potentially affected and interested sectors of the community to prepare themselves for the hearing. In this way they will get a chance to study the Bill and determine their position. The 2013 framework clearly sets out that notices must be directed to,

⁵⁴⁴ *Land Access Movement* (note 18 above) at para 1.

⁵⁴⁵ *Ibid.*

⁵⁴⁶ *Doctors for Life* (note 23 above) at para 185.

⁵⁴⁷ *Ibid* at para 235.

⁵⁴⁸ *Ibid.*

⁵⁴⁹ PPF of 2013 (note 2 above).

⁵⁵⁰ *Ibid* at 52.

amongst others, stakeholders, experts, civil society structures (CBOs and NGOs), academics, and more especially the potentially affected groups.⁵⁵¹ It further provides for the need to alert the stakeholders and the public via social media.⁵⁵² In a situation where the institution can fully adhere and enforce the guidelines provided in the PPF it will definitely facilitate meaningful public involvement.

The case law reveals that the Constitutional Court has established a mechanism for judicial review to assess the reasonableness of public participation whenever there is a dispute.⁵⁵³ The test is referred to as the reasonableness test. It determines the nature and extent of participation processes. The reasonableness test provides an enquiry of the conduct of the legislature and establishes the level of reasonableness in the circumstances.⁵⁵⁴ It is anticipated that the nature and depth of public interest on the Bill, its impact on the community welfare are the essential elements of the reasonableness test.⁵⁵⁵

The research further identified an anomaly, as it was clearly evident from the findings of the study that even though the provincial legislatures might have the potential of enforcing the required public involvement processes, the NCOP remains the custodian of provinces.⁵⁵⁶ It is the authority responsible for issuing out the schedule for provinces to seek and receive the required mandates from local communities within the provincial jurisdictions.⁵⁵⁷ The findings of this research have identified that at times, short notices are sent to provinces to convene public hearings.⁵⁵⁸ As a result, interest groups end up having limited time to study the Bill, prepare submissions, get ready for the public hearing.⁵⁵⁹ This manner works contrary to Rule 166, which mandates the Chair of the NCOP to immediately refer the 'Bill' to the provincial legislatures for public

⁵⁵¹ Ibid at 59; see also Waterhouse (note 112 above) at 21.

⁵⁵² Ibid at 43 - 57.

⁵⁵³ *Doctors for Life* (note 23 above) at para 127.

⁵⁵⁴ Ibid at para 128.

⁵⁵⁵ Ibid at para 128.

⁵⁵⁶ The Constitution of the Republic of South Africa, 1996. Section 42(4).

⁵⁵⁷ Mandating Procedures of Provinces Act 52 of 2008, read with the standing rules of the NCOP.

⁵⁵⁸ Strategic framework of the KwaZulu-Natal (KZN) Legislature (2020 – 2025) at 14; See also *Land Access Movement* (note 18 above).

⁵⁵⁹ *Land Access Movement* (note 18 above) at para 32. See also *Moutse Demarcation Forum* (note 73 above) at para 61.

comment and hearings, within the prescribed period.⁵⁶⁰ The Rules demand a six weeks cycle for the processing of a Bill moving towards public hearings.⁵⁶¹

Waterhouse has observed that public consultations are conducted by Provincial Legislatures in most of the towns within their provincial boundaries.⁵⁶² Waterhouse further mentions that the issue of facilitating public hearings is at the discretion of PLs, while the Provinces determine the extent of such organised hearings. It can however be argued that the discretion must be reasonable and must be aligned with the court's jurisprudence in so far as the reasonableness test is concerned. Waterhouse concludes by noting that, based on the available records, it is correct to ascertain what motivates the legislature to host public hearings.⁵⁶³ He therefore submits that the decision to undergo public hearings is motivated by political contestations on the issue. One of his criticisms is the discretion bestowed on the legislatures to determine whether or not it will be convenient for them to go for hearings. Waterhouse argues that as a result, public involvement ends up being inconsistently implemented.⁵⁶⁴ The researcher argues that proper implementation of the PPF incentives will lead to

⁵⁶⁰ Rule 166 of the Rules of the NCOP.

⁵⁶¹ Rule 240 of the Rules of the NCOP requires that all section 74 or 74(1), (2) and (3) Bills should be considered in a befitting manner that will ensure that provincial legislatures are given enough time to consider the Bill and confer the required mandates to the NCOP. Subsection 2 go further to provide that "depending on the subsistence of the Bill, the period may not exceed six weeks".

⁵⁶² Waterhouse (note 112 above) at 40. Reading the provincial mandates prepared by Provincial Legislatures on the Housing Development Agency bill [B1 of 2008]; the Restitution and Land Rights Amendment bill [B35 of 2013]; the National Credit Amendment Bill [B47 of 2013]; the Children's Act Amendment Bill [B19F of 2006]; and the Traditional Courts Bill [B1 of 2012]; most provinces indicate that they hosted public hearings and provide an indication of in which towns these were held. These documents can be found on numerous websites including the Parliamentary Monitoring Group website, the Children's Institute and the Centre for Law and Society.

⁵⁶³ Waterhouse (note 112 above). Provides with an example where the consideration of the "Housing Bill" [Housing Development Agency Bill 1 of 2008]. Published by the Parliamentary Monitoring Group (PMG) on 10 June 2008. It was reported some Provinces would hold one public hearing such as Limpopo and Gauteng. Whereas the Eastern Cape PL has hosted more than 30 public hearings on this Bill. Moreover, the KZN, reading from its negotiating mandate presents no record of public hearing being hosted in any event under the Housing Bill. This information is available at <https://pmg.org.za/committee-meeting/9263/> [accessed on 14 February 2015].

⁵⁶⁴ Waterhouse (note 112 above). Provides with an example where the processing of the Housing Development Agency Bill [B1 of 2008] during 2008, while the Eastern Cape Legislature reported hosting 32 public hearings, the Gauteng and Limpopo Legislatures only hosted one each, and the Western Cape and Kwazulu-Natal Legislatures' negotiating mandates make no mention of public hearings. A record of the negotiating mandates from all provinces can be accessed on the Parliamentary Monitoring Group website at <https://pmg.org.za/committee-meeting/9263/> accessed on 14 February 2015. The record for the North West Legislature's negotiating mandate is accessible at http://www.parliament.gov.za/live/commonrepository/Processed/20110729/83954_1.pdf (accessed on 14 February 2015).

innovation and ultimately the consistent execution and implementation of public participation activities.

4.4 Conclusion

The International Human Rights Law framework emphasises the right to information as the most significant aspect of the right to political participation. This right suggests that people need to be provided with information to enable them to enjoy the right to political participation. Accordingly, the Inter Parliamentary Union recognises the need for regular active engagement between citizens and their elected representatives. The right also recognises the need for the formation of civil society structures to harness public participation. All these avenues are entrenched in the Constitution of South Africa, for example, the right to assemble and freely associate as well as freedom of expression.

The *Doctors for Life* jurisprudence has set the scene on the state obligation to implement public involvement. The court gives an insight into the scope and application of the international law which must be understood and applied in the context of the South African democracy.⁵⁶⁵ Indeed, the study reveals that the legislature is hard at work towards realising the enjoyment of the right to political participation. It is assuring to note that the PPP unit has put in place a variety of routine road shows aimed at capacitating and mobilising the public towards meaningful public participation. The initiatives to promote public involvement have been of a high standard.

Through the separation of powers, the legislative institutions are given a wide constitutional discretion to opt for a suitable and convenient approach when implementing public involvement.⁵⁶⁶ It however, becomes clear that in doing so they must maintain a standard of reasonableness. It is anticipated that the duty may be implemented in various ways open for innovations and improvements.⁵⁶⁷ The results

⁵⁶⁵ *Doctors for Life* (note 23 above) at para 145.

⁵⁶⁶ Ibid.

⁵⁶⁷ Ibid.

that the public and interested parties must be given enough time for reasonable opportunities.⁵⁶⁸ The right also enjoins the legislature to identify the sectors of the community which are likely to be affected by the decision.

Taking account of the 'separation of powers' the court maintained that legislatures are at liberty to exercise their discretion to determine how to implement public involvement processes.⁵⁶⁹ The researcher submits that the decision to hold public hearings is not only one of political expedience but is also enshrined in the Constitution.

⁵⁶⁸ Ibid.

⁵⁶⁹ The Constitution of the Republic of South Africa, 1996, section 116 provides an insight that a provincial legislature is a master of its internal processes. See also *Doctors for Life* (note 23 above) at para 124.

CHAPTER FIVE

REVIEW OF PUBLIC PARTICIPATION LEGAL FRAMEWORK, CONCLUSION AND RECOMMENDATION

5.1 Introduction

The first part of chapter five begins with the review of the legal framework regulating the execution of public participation. The second part brings in the conclusion and recommendations. In the first part, the researcher provides a comprehensive review of the Rules and Regulations of the legislature. The latter are supposed to uphold the democratic principles of public involvement, access and openness. The study revealed that public participation in KZNPL is driven by a standby committee dealing with incidental matters. The standby committee was established as a “Public Participation and Petitions unit.” It was brought about in response to the call to facilitate public involvement. It operates as a strategic structure that works on implementing the progressive realisation of the constitutional imperative to maximise public involvement.⁵⁷⁰ It is the established framework that regulates public participation within the unit, and derives its mandate from the Constitution,⁵⁷¹ the petitions Act⁵⁷² and the Standing Rules of the KZNPL.⁵⁷³ This concluding chapter thus seeks to review the underpinning legal prescripts in order to determine whether the adopted framework is consistent with participatory democracy.

In the last sections of the chapter, the researcher concludes on the findings and provides recommendations on innovative ways in efforts to achieve meaningful participation, so that, ultimately the KZNPL can enact constitutionally compliant laws.

5.2 The Constitution

⁵⁷⁰ The webpage of the KZN legislature outlines the purpose of public participation within the institution. Available on <https://www.kznlegislature.gov.za> (accessed 01 July 2020).

⁵⁷¹ The Constitution of the Republic of South Africa, 1996

⁵⁷² Act 4 of 2003.

⁵⁷³ Ibid.

In response to the call to discharge its duty to facilitate public participation as envisaged in the Constitution, the KZNPL has, to its credit, established the unit, which serves as a catalyst for the proper implementation of the required public participation processes.⁵⁷⁴ The 'Public Participation and Petitions unit.', the PPP unit, derives its operational mandate specifically from the Constitution, the KwaZulu-Natal Petitions Act,⁵⁷⁵ and the Standing Rules of the KwaZulu-Natal Legislature.⁵⁷⁶

Chapter six of the South African Constitution deals with provincial legislatures. As was seen, section 118 obligates PL's to facilitate public involvement in the law-making process, as well as in other businesses of the legislature.⁵⁷⁷ The Constitution places a positive obligation upon the PLs to implement public involvement so that in the end people can actively participate in the totality of opportunities provided.⁵⁷⁸ In consequence, the Constitution advocates for the inclusion of citizens in all legitimate law making decisions. The legitimacy of the enacted legislation thus depends on public participation, that is, as a procedural condition for the validity of laws passed.

As was demonstrated, the nature of the South African Constitution can be said to be based on both representative and participatory democracy.⁵⁷⁹ The preamble to the Constitution envisages a democratic society founded on the democratic values of openness and transparency, where government acts in accordance with the tenets espoused in the Constitution, as well as the will of the people.⁵⁸⁰ The Constitution embodies the founding provisions which clearly include a national common voters' roll, regular elections, and a multi-party system of democratic government to ensure accountability, responsiveness and openness."⁵⁸¹ This is where the principles of representative and participatory democracy can be said to be embedded.

⁵⁷⁴ Available at [https://www.Kznlegislature.gov.za/public participation/](https://www.Kznlegislature.gov.za/public%20participation/) (accessed 17 July 2020).

⁵⁷⁵ Act 4 of 2003.

⁵⁷⁶ Final Standing Rules, Adopted on 20 October 2016.

⁵⁷⁷ The Constitution of the Republic of South Africa, 1996. Section 118 (1) (a).

⁵⁷⁸ Ibid.

⁵⁷⁹ *Doctors for Life* (note 23 above) at para 121.

⁵⁸⁰ The preamble to the Constitution of the Republic of South Africa, 1996. See also section 118, s17, and s115 (d) of the Constitution of the Republic of South Africa, 1996.

⁵⁸¹ Ibid.

Notably, regular elections take place after every five-years for all spheres of government.⁵⁸² People enjoy the right to choose who they desire to represent them. Since South Africa follows a party system, the representatives from the political parties once elected, then bear the responsibility to ensure accountability, responsiveness and openness.⁵⁸³ It was argued that these values are achieved through the advancement of participatory democracy. Consistent with this constitutional order, the Constitution obliges PLs to discharge the constitutional mandate of facilitating public involvement in the activities of the legislature and its other businesses.⁵⁸⁴

The provisions in section 118 require the provincial legislative institutions to enable the public to participate in the government processes, including those processes that relate to law making and oversight issues.⁵⁸⁵ Moreover, the provisions demand that citizens be engaged and involved in the work of the committees of the legislature. Furthermore the provisions address the issue of the setting up of the proceedings that must be held in public and be dealt with in an open manner, in line with the democratic values of openness.⁵⁸⁶

The provisions of section 118 can, however be problematic, as they confer discretionary powers on the legislature to act reasonably when excluding the media and public audience.⁵⁸⁷ A decision to exclude the media and the public must be justifiable in an open democratic society, such as one in South Africa. Once made, the decision must be exercised in a manner that gives serious attention to the values of constitutional democracy.⁵⁸⁸ In cases where the legislature deems it necessary to exclude the media, such exclusion must not be ordered capriciously and wantonly but must rather be reasonable and be mindful of the values of a democratic society.⁵⁸⁹

⁵⁸² This is the electoral procedure provided by the Independent Electoral Commission.

⁵⁸³ The elected representatives are mandated by the founding provision of the Constitution of the Republic of South Africa, 1996, to ensure a government by the people and for the people.

⁵⁸⁴ The Constitution of the Republic of South Africa, 1996. Section 118.

⁵⁸⁵ Ibid.

⁵⁸⁶ Ibid. Section 118 (1) (b).

⁵⁸⁷ Ibid. Section 118(1) (b) (i) and (ii).

⁵⁸⁸ L Muntingh 'The state of civil society participation in Parliament' (2012) 29 (48) *Law, Development and Democracy* at 29. Available at <http://www.saflii.org/za/journals/LDD/2012/2.pdf> (accessed 15 August 2020).

⁵⁸⁹ The Constitution of the Republic of South Africa, 1996. Section 118(2).

The Constitution then confers a discretionary burden on the legislature to develop suitable rules which will enhance the facilitation of public involvement.⁵⁹⁰

As was seen already, in *Doctors for Life*, the court was obliged to give meaning to the constitutional obligation of facilitating public involvement. Czapanskiy and Manjoo⁵⁹¹ confirm that the interpretation given by the above court, in relation to the duty to facilitate public involvement, was premised on a number of factors which cannot be ignored. These factors include amongst others, trends from the international instruments, a contextual interpretation that is based on the historical and social context of our democratic society, and lastly, the democratic values of human dignity.⁵⁹² Furthermore, the interpretation drew inspiration from the objectives of the Constitution, which are still to build a non –racial and democratic South Africa that is based on fundamental human rights, social justice and a system of government which leads according to the will of the majority of the people.⁵⁹³

At this stage it remains to assess the impact of the interpretation of section 118 of the Constitution, the standing rules of the provincial legislature and the Petitions Act.

5.2.1 Theoretical Interpretation of Section 118⁵⁹⁴

When the court interprets the meaning of the obligation to facilitate public participation, it invokes three theories. When the so-called “value-based approach” engages on a search for a constitutional meaning,⁵⁹⁵ it does not look at the primacy of the drafter’s intent nor solely at the notion of the political process. Instead, as it was upheld in the case of *Makwanyane*, the process of constitutional interpretation obliges the courts to stay in line with the underpinnings which the Constitution seeks to uphold.⁵⁹⁶

In summa, it was from a similar starting point of constitutional principle that the court, in *Doctors for Life*, had to explore the exact meaning of the phrase “facilitation of public

⁵⁹⁰ Ibid. Section 116.

⁵⁹¹ KS Czapanskiy and R Manjoo (note 43 above) at 11.

⁵⁹² Ibid.

⁵⁹³ Ibid.

⁵⁹⁴ Ibid.

⁵⁹⁵ Kentridge and Spitz (note 600 above) at 11-17.

⁵⁹⁶ *S v Makwanyane and another* 1995 (3) SA 391 at para 303.

involvement". The court consequently held that the phrase, in its plain meaning, means that the legislature must take steps to enable the public to participate in the legislative and other government processes.⁵⁹⁷ The judgement enjoins that effective mechanisms must be devised to facilitate the participation of communities in the legislative process. In other words, the legislature must proactively ensure that citizens participate in the law making process, in line with the values of democracy.⁵⁹⁸

The above mentioned approach is supported by the contextual interpretation approach.⁵⁹⁹ Contextual interpretation looks at the overall purpose of the Constitution while interpreting specific or certain provisions. The contextual interpretation of what is espoused by the constitutional imperatives of section 118,⁶⁰⁰ resulted in the court holding the view that in our contemporary society, meaningful and effective participation is ultimately an element of the South African conception of democracy.⁶⁰¹ In the case of *Matatiele*, Ngcobo J noted that the South African Constitution underpins the overarching fundamental aspirations of our constitutional democracy.⁶⁰²

Last but not least important, the researcher's view remains that the provisions of section 118 should be interpreted against the background of the political process theory. Thus the starting point in the programme of any public representative would be to give priority to the rights of the minority groups who are the least powerful and therefore the least likely to be heard by government. This explains the origin of the procedural condition that the constitution drafters envisaged for the legislative process, that is inclusive of the marginalised groups, and whose processes must be seen to be procedurally fair.⁶⁰³

⁵⁹⁷ *Doctors for Life* (note 23 above) at para 120.

⁵⁹⁸ *Ibid* at paras 110–11 & 115.

⁵⁹⁹ The term 'contextual interpretation' was used by the court in *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) (*Grootboom*) at para 22: 'Interpreting a right in its context requires the consideration of two types of context. On the one hand, rights must be understood in their textual setting. This will require a consideration of Chapter 2 and the Constitution as a whole. On the other hand, rights must also be understood in their social and historical context.'

⁶⁰⁰ The Constitution of the Republic of South Africa, 1996. Section 118 (1) (a).

⁶⁰¹ *Doctors for Life* (note 23 above) at para 129; *Matatiele* (note 23 above) at paras 78 & 97.

⁶⁰² See *Matatiele* (note 23 above) at para 36. See also Raboshakga (note 307 above) at 10.

⁶⁰³ *Doctors for Life* (note 23 above) at para 234. Where Sachs J opines that "[p]ublic involvement . . . [is] of particular significance for members of groups that have been the victims of processes of historical silencing"

The next provision, which opens an avenue for public involvement is section 115.⁶⁰⁴ It provides that a PL and or alternatively, its committees may allow for the public members, institutions and interest groups to serve either on the above structures with a petition, make presentations or make a submission on any matter that concerns them.⁶⁰⁵ However, there is a condition that petitions must be utilised after all the necessary avenues have been exhausted and failed. There is also section 17, which espouses the right to submit a petition.⁶⁰⁶

Meanwhile, the Constitution empowers the provincial legislatures to develop their own rules regarding the regulation of internal affairs.⁶⁰⁷ Most importantly, such rules must be made with due regard to representative and participatory democracy, accountability, transparency, and public involvement”⁶⁰⁸

5.2.2. The Standing Rules of the Legislature⁶⁰⁹

The Constitution empowers the PLs to make Rules and Orders that regulate their internal affairs.⁶¹⁰ Chapter four of the Rules provide for public access and involvement.⁶¹¹ The Rules do not go further than repeating what is envisaged in the Constitution.⁶¹² For instance, Rule 30 provides that: “The legislature must facilitate public involvement in the legislative and other processes of the legislature and its committees, as contemplated under section 118(1) (a) of the Constitution.”⁶¹³ Waterhouse contends, again, that the Rules of the legislature which should give direction and benchmarks as to how public involvement must be implemented do not provide insights as to how to foster participation, access and the promotion of openness.⁶¹⁴ In a nutshell, the Rules fail to provide any significant direction to enable the legislature to execute its obligation in a standardised fashion, as prescribed or

⁶⁰⁴ The Constitution of the Republic of South Africa, 1996.

⁶⁰⁵ Ibid. Section 115(d).

⁶⁰⁶ Ibid. Section 17.

⁶⁰⁷ Ibid. Sections 116(1) (b) and 116(2).

⁶⁰⁸ Ibid. Section 116 (1) (b).

⁶⁰⁹ The Standing Rules of the KwaZulu-Natal Legislature.

⁶¹⁰ The Constitution of the Republic of South Africa, 1996. Section 116.

⁶¹¹ Ibid.

⁶¹² The Constitution of the Republic of South Africa, 1996. Section 118.

⁶¹³ Rule 30 of the Standing Rules of the KwaZulu-Natal legislature.

⁶¹⁴ Waterhouse (note 112 above) at 22.

prescribed by the rules. The researcher concurs with Waterhouse that only the jurisprudence of the courts gives clear direction as to how to implement public participation in practise.

Furthermore, the standing Rules deal exclusively with the internal arrangement processes, particularly as regards regulating public involvement. Yet the Rules are silent on how to educate the public about how the public should exercise its right to participate. It is argued that this silence easily results in a slip shod implementation or distortion of activities which are meant to facilitate public involvement to the extent envisaged by the constitution giver. Rule 30 of the standing Rules looks weak in relation to the element of paying due regard to participatory democracy.⁶¹⁵ In recognising the discretion given to the legislatures by the Constitution regarding how the legislatures should facilitate public participation, it would be prudent for the legislature to pass a provincial legislation that addresses the issues of facilitating public involvement.

5. 2.3. The Petitions Act

The framework of the Petitions Act⁶¹⁶ was enacted to establish a convenient avenue to lodge a petition before the legislature. It clearly details the protocols and procedures that should be followed by the petitioner in lodging the petition before the legislature.⁶¹⁷ In addition, the Petitions Act illustrates the core functions of certain legislative committees, such as the 'Private Members Legislative Proposals' and the 'Pensions and Petitions Standing Committee of the legislature. It further lays down core principles and procedures relating to public involvement in all the government processes, including incidental matters.⁶¹⁸

⁶¹⁵ One would expect at least, that the Rules provide some guideline of facilitating such processes of public involvement.

⁶¹⁶ KwaZulu-Natal Petitions Act 4 of 2003.

⁶¹⁷ Available at <https://www.kznlegislature.gov.za/petitions-process/> (accessed 17 July 2020).

⁶¹⁸ Ibid.

In terms of Rule 40, the right to petition is open to every interested or concerned party.⁶¹⁹ The Petitions Act extensively deals with every aspect of petitioning, including the format and the consideration of a petition.⁶²⁰ This framework has remained a strategic initiative by the institution to enact a petitions Act that deals with a framework for petitioning. The Petitions Act has been useful in providing the guidelines and format for petitioning. It has also made it easier for petitioners to follow the prescribed format so that petitions can be accorded the necessary attention.⁶²¹ Furthermore, the petitions Act creates certainty that, after all the processes have been followed, the petitioner will receive feedback.

5.2.3.1. Public Participation Framework

In addition to the legal framework, the KZN legislature has customised the Public Participation Framework. The intention was to give guidance on the best practices of fostering public involvement. This was done by establishing benchmarks for implementation.⁶²² It was also intended to give more direction on the minimum standards on the nature of public participation in the legislatures.⁶²³ This framework plays a key role towards meaningful participation. Moreover, the PPF envisages that part of its objectives is *inter alia* to canvass peoples' perceptions on the proposed policies, intended legislation and oversight issues. It also aims to allow the public access to gauge the quantity and quality of service delivery.⁶²⁴ Waterhouse has given positive acknowledgement of the spin offs of the principles and values of the participation framework.

⁶¹⁹ The Standing Rules of the KwaZulu-Natal legislature.

⁶²⁰ KwaZulu-Natal Petitions Act 4 of 2003. Section 6 read with first schedule of the Act provides with a format for petitioning.

⁶²¹ Schedule 1 of the Petitions Act provides with a format of petitioning.

⁶²² See section 7 of the 'PPF' which provides that "the goal of this Public Participation Framework is to provide a written guideline that contains integration opportunities and minimum norms and standards for Public Participation within the Legislative Sector in order to improve alignment and the practice of Public Participation".

⁶²³ Ibid.

⁶²⁴ PPF of 2013 (note 2 above) at 30.

5.3 Conclusion

The primary aim of this dissertation was to investigate the compliance level of the KZNLC in relation to the Constitutional mandate imposed on it, to see to the execution of facilitating public involvement, as envisaged in the Constitution.⁶²⁵ The rationale was to understand the reasons for the continued disputes in public involvement processes facilitated by the KwaZulu-Natal Legislature and other institutions in the legislative sector. The objectives of the study were: (i) to explore various mechanisms employed by the legislature to effect public involvement on proposed Bill/s; (ii) to investigate how the legislature contextualizes the concept of public participation and the offering of “reasonable opportunity” to the concerned citizens and other potentially affected groups; (iii) to determine the extent to which the legislature should act in discharging their duty of executing public involvement, when enacting certain laws; and (iv) to review the legal framework regulating public participation within the KZNLC.

The study objectives were articulated in three chapters (chapter three, four and chapter five). During the execution of the study, certain themes were identified and discussed as they unfolded on the subject matter. In chapter two, the study provided a literature review, a conceptual and theoretical framework on public participation. These rubrics form the basis of the study. In addition, the literature provided a comprehensive review of the international perspectives on the best practices in public involvement. Comparative law was also employed to understand the practices in foreign jurisdictions. The review was further reconciled with the South African perspectives, practices and experiences established in case law.

Based on the evidence revealed by the study, the researcher is inclined to concur with the Action 24 Project. Based on the literature they have reviewed, Action 24 Project posits that public participation is normally implemented in a “non- prescriptive approach.”⁶²⁶ Therefore, it becomes utterly difficult to guarantee that public involvement processes are conducted in a manner that underscores the objectives of public participation. Otherwise, the Action 24 Project concedes that in spite of the

⁶²⁵ The Constitution of the Republic of South Africa, 1996. Section 118 (1) (a).

⁶²⁶ Action 24 (note 17 above) at 15.

continuing challenges on the effective implementation of public participation, there has been significant progress on public participation activities since the advent of the 1994 constitutional reform in South Africa. The progress is noticeable in the improvements of the mechanisms developed to implement meaningful participation as well as in the adopted Public Participation Framework.⁶²⁷ *Inter alia*, there is public education, public hearings platforms, petitions, written submission avenues and information dissemination via various channels etc.

The findings of the study also revealed that there has been good progress by the legislature and the entire legislative sector in enhancing participatory democracy as entrenched in the Constitution. This progress flows from the outcomes of the Birchwood conference. Birchwood was a major conference of different stakeholders in South Africa, operating within the legislative environment. Amongst the delegates were the MPs, MPLs, and different experts including leading academics, SALS officials and civil society organisations. The intention of the conference was to deliberate on the constitutional interpretation of the duty to facilitate public involvement in question.

The conference was fruitful in that it produced some helpful ideas which could be used to improve the facilitation of public involvement. As a result, some common standards were adopted, developed and implemented across the legislative sector. These include, but were not limited to, the hosting of workshops, stakeholders' engagement summits and the convening of public hearings. In response to the Birchwood conference resolutions, a Public Participation Framework was adopted.⁶²⁸ The intention was to standardise public participation activities across the legislative institutions in South Africa.

Moreover, the KZNL has customised the Public Participation Framework. The framework provides a comprehensive theoretical outlook of what public participation should be and how it should be conducted so as to make it meaningful and effective. This makes participation one of the most successful projects towards meaningful participation in KwaZulu-Natal.

⁶²⁷ Ibid.

⁶²⁸ PPF of 2013 (note 2 above).

The study however revealed that at some point in time, short notices were sent to provinces to convene public hearings. This slip shod action resulted in some interest groups ending up with limited time to study a bill, prepare submissions, and to travel to the venues announced for the public hearings. When the NCOP sent short notices to the Provincial legislatures in pursuit of the required mandates, the Provincial Legislatures had limited time to inform the public and to receive the required mandates. In light of the above observation, the study concludes that great strides still remain to be made towards meeting public participation strategies. One of the causes of the current stale mate is that information was not brought to the attention of the concerned people in good time and in an efficient manner. As was shown, when the information is published, it is advertised in non-conventional channels of communication such as websites and gazettes. The platforms just mentioned are the least likely to reach the majority of citizens outside urban areas. There is also a challenge in identifying the potentially affected sectors of the community and to inform them about the proposed programmes and the participation avenues at their disposal.

Lastly, the study revealed that the question of whether there was compliance with the Constitution rests solely with the court, as it is constitutionally entrusted to make a determination of whether steps taken towards the facilitation of participation, constitute compliance with the Constitution.

5.4 Recommendations

Based on the findings of the study, the researcher proposes to provide proactive and innovative recommendations to enhance public participation in the province. It is recommended that a review of the public hearing processes should be conducted. The assessment should evaluate the effectiveness of the mobilisation strategies that the legislature normally engages when convening public hearings. More traditional strategies, such as liaising with traditional leaders, and using loud hailers within and around the potentially affected population groups need to be employed. This approach can assist in ensuring consistency and legal protection. It enjoins that media analysis should also be conducted. In this case, a comprehensive survey aimed at determining which media channel received a higher number of users should be conducted. That

can be done within the available database of stakeholders. This can assist in ensuring that information reaches the largest target audiences rather than merely resorting to notice boards and websites.

Secondly, a standby committee of experts should be established. Such a committee would have the necessary expertise to identify the sectors of the community expected to be largely negatively affected by the bill. Advertisements and notices should then target relevant interest groups. From the foregoing, it follows that such a committee of experts should establish whether the venues and places arranged to accommodate hearings, are convenient for the target interest groups and relevant stakeholders, to achieve the anticipated turn-up. To ensure meaningful participation, the established committee of experts should also ensure that the stakeholders are capacitated to understand the exact implications of the intended bill. This would demand a high level of pre-hearing workshops and public awareness.

It is further recommended that provincial legislatures should cooperate and guard against tight turn-around time-frames, as happened in the situation where the NCOP imposed an inadequate time for provincial legislatures to secure the required mandates through public participation. In cases of inadequate timeframes, the Provincial legislature should request for an extension of time as contained in Rule 240 (3) of the Rules of the NCOP. If it should happen that such an extension is denied or not granted, then the Provincial legislature should seek for a declaratory relief by which to interdict the entire process until it is given enough time to conduct public hearings. In this way, the researcher thinks that the loss of valuable time and waste of scarce resources, would be avoided.

In addition, ordinary citizens together with civil society organisations at the forefront, should take public participation as a serious activity ahead of their inputs, before the government can decide.

It is solely the primary responsibility of the public and the organised groups to ensure that the inputs they forward, should be of the right and proper standard, and contain useful information. When the negotiating mandates are considered, elements capable of influencing a decision must also be weighed on a balance of convenience and

included. Accordingly, the legislature should be sensitive to concede the presence of inequalities in the provision of resources. It is recorded that this factor alone lies at the root of complaints by civil society groups.

Moreover, feedback mechanisms should be strengthened. The people need to be convinced about the outcome of the process they have participated in. Lack of feedback can result in a public feeling that the law making process was not democratic, if large sections of the community are left unsure of the process.

BIBLIOGRAPHY

Primary sources

KwaZulu-Natal Legislature, *Annual Reports and Performance plans* 2013/14; 2014/15; 2015/16; 2016/17; 2017/18 and 2018/19.

Strategic framework for the KwaZulu-Natal (KZN) Legislature (2014 – 2019) and (2020 – 2025).

Case law

Doctors for life international v Speaker of the National Assembly and others 2006 CCT 12/05. (17 August 2006). Available at <http://www.saflii.org/za/cases/ZACC/2006/11.html>.

Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC).

Government of the Republic of South Africa v Grootboom 2001 (1) SA 46 (CC).

King and Others v Attorneys Fidelity Fund Board of Control and Another 2006 (4) BCLR 462 (SCA).

Land Access Movement of South Africa & others v Chairperson of the National Council of Provinces and others (CCT40/15) [2016] ZACC 22; 2016 (5) SA 635 (CC); 2016(10) BCLR 1277 (CC). (28 July 2016). Available at <http://www.saflii.org/za/cases/ZACC/2016/22.html>

Matatiele Municipality and Others v President of the Republic of South Africa and Others (No2) [2006] ZACC 12; 2007 (6) SA 477 (CC); 2007 (1) BCLR 47 (CC).

Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others [2005] ZACC 14; 2006 (2) SA 311 (CC); 2006 (8) BCLR 872 (CC) (*New Clicks*).

Moutse Demarcation Forum and others v President of the Republic of South Africa and Others (CCT 40/08) [2011] ZACC 27; 2011 (11) BCLR 1158 (CC). (23 August 2011). Available at <http://www.saflii.org/za/cases/ZACC/2011/27.html>

Poverty Alleviation Network and others v President of the Republic of SA (2010) ZACC 5 CCT 88/08.

S v Makwanyane 1995 (3) SA 391 (CC), 1995, (6) BCLR 665 (CC).

Southern African Legal Information Institute (SAFLII). (2008, June 13). *Merafong Demarcation Forum and Others v 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). Retrieved March 30, 2018, from <http://www1.saflii.org/za/cases/ZACC/2008/10.pdf>

Southern African Legal Information Institute (SAFLII). (2006, February 27). *Matatiele Municipality and Others v President of the Republic of South Africa and Others* (1) (CCT73/05) [2006] ZACC 2; 2006 (5) BCLR 622 (CC); 2006 (5) SA 47 (CC). Retrieved March 30, 2018, from <http://www1.saflii.org/za/cases/ZACC/2006/2.pdf>.

South African Veterinary Association v Speaker of the National Assembly and Others (CCT27/18) [2018] ZACC 49; 2019 (2) BCLR 273 (CC); 2019 (3) SA 62 (CC). (5 December 2018). Available at <http://www.saflii.org/za/cases/ZACC/2018/49.html>

International Treaties

African (BANJUL) Charter on Human and Peoples' Rights. (Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986).

General Assembly Resolution 207A (III)/ UNGA 72; A/RES/263 (III) (11 December 1948) Universal Declaration of Human Rights.

General Comment No. 25: (Art. 25): 12/07/96. CCPR/C/21/Rev.1/Add.7.

International Covenant on Civil and Political Rights, Dec 16, 1996, 1999 U.N.T.S. 171

Manila Declaration (1989). The Manila Declaration on People's Participation and Sustainable Development. Philippines: ANGOC.

The 1982 Manila declaration on the peaceful settlement of international disputes adopted in New York, USA on 15 November 1982.

The UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) was adopted on 25 June 1998 in the Danish city of Aarhus. Available at <https://unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf> (accessed 04 June 2021).

United Nations (UN) UNEP implements principle 10 of Rio Declaration (2016).

Constitutions

The Constitution of the Republic of South Africa, 1996.

The Constitution of Uganda, 1995.

The Constitution of Kenya, 2010.

Statutes

Choice on Termination of Pregnancy Amendment Act 38 of 2004.

Cross-boundary Municipalities Laws and Repeal Related Matters Act 23 of 2005.

Intergovernmental Relation Framework Act 13 of 2005.

KwaZulu-Natal Petitions Act 4 of 2004.

Mandating Procedures of Provinces Act 52 of 2008.

Traditional Leadership and Governance Framework Act of 2003.

Twelfth Amendment Act of 2005.

Rules

Rules of the National Council of Provinces 9th Edition: March 2008. Parliament of the Republic of South Africa.

Standing Rules of KwaZulu-Natal legislature. Adopted 20 October 2016.

Secondary sources

Books

Barratt A...et al *Introduction to South African Law* Fresh Perspective 3rd edition (2019).

Bloor, M and Wood, F *Keywords in Qualitative Methods: A Vocabulary of Research Concepts* London: SAGE Publications (1st edition) (2006).

Clapper, VA 'Advantages and disadvantages of citizen participation' In K Bekker (ed) *Citizen participation in local Government*. Pretoria: Van Schaik (1996).

Creighton, JL *The public participation Handbook* San Francisco, USA: Jossey-Bass (2005).

Currie, I and De Waal, J *The Bill of Rights Handbook* 6ed. Kenwyn Juta. (2013).

Currie, I and De Waal, J *The New Constitutional & Administrative Law, Volume one Constitutional Law* (2002).

Davis, D, Chaskalson, M and De Waal, J 'Democracy and constitutionalism: the role of constitutional interpretation' in Van Wyk D... et al (eds) *Rights and constitutionalism: the new South African legal order*. Kenwyn Juta (1994).

Gildenhuys, H; Fox, W and Wissink, H *Public Macro Organisation*. Kenwyn: Juta (1991).

Hyden, G and Venter, D (eds) *Constitution-Making and democratisation in Africa* (2001) Pretoria: Africa institute of South Africa.

John Hart Ely *Democracy and Distrust: A Theory of judicial review* (1980).

Kentridge, J and Spitz, D 'Interpretation' at 11-22 in Chaskalson, Kentridge, Klaaren, Marcus, Spitz and Woolman (eds) *Constitutional Law of South Africa*. (1996) ("CONLSA") Juta. Cape Town.

Kumar, R *Research Methodology a step by step guide* 3rd edition (2011).

Maree, K (ed) *First Steps in Research* Pretoria: Van Schaik Publishers (1995).

Marlow, C *Research Methods for Generalist Social Work* 2nd Ed. Pacific Grove, California: Brooks/ Cole (1998).

Mouton, J *How to succeed in your Masters and Doctoral Studies A South African guide and research book*. Pretoria: Van Schaick (2001).

Nieuwenhuis, J 'Qualitative Research Designs and Data Gathering Techniques'. In Maree, K (ed) *First Steps in Research* Pretoria: Van Schaik Publishers (1995).

Parry, G and Moyser, G 'More participation, more democracy?' In D Beetham (eds) *Defining and measuring democracy* London: SAGE (1994).

Woolman, S and Bishop, M (eds) *Constitutional Law of South Africa* 2 ed (2006).

Journal articles

Aitchison, J and Harley, A 'South African Illiteracy statistics and the case of magically growing number of literacy and ABET learners' (2006) 39 *Journal of education* at 95 - 96. Available at cae.ukzn.ac.za/Libraries/Publications/joe39JJWAAH.sflb.ashx · PDF file.

Arnstein, SR 'A Ladder of Citizen Participation' (1969) 35 (4) *Journal of the American Institution of Planners* at 216- 224.

Baiocchi, G 'Participation, activism and politics: The Porto Alegre experiment and deliberative democratic theory' (1999) 29 (1) *Politics and Society* at 43 – 72. Available <https://doi.org/10.1177/0032329201029001003>.

Czapanskiy, KS and Manjoo, R 'The right of public participation in the law-making process and the role of the legislature in the promotion of this right' (2008) 19 (1) *Duke Journal of comparative & international law*.

Draai, E and Taylor, D 'Public Participation for Service Delivery: A Local Government Perspective' (2009) 44 (1.1) *Journal of Public Administration* at 112-122. Available at <https://journals.co.za/doi/abs/10.10520/EJC51702>.

Evans, C and Evans, S 'Evaluating the Human Rights Performance of Legislatures' (2006) 6 (3) *Human Rights Law Review* at 545 – 569.

Gaventa, J 'Exploring citizenship, participation and accountability' (2002) 33 (2) *Institute of Development Studies Bulletin* at 1- 14. Available at <https://www.ids.ac.uk/download.php?file=files/dmfile/gaventa332.pdf>.

Habermas, J 'Three Normative Models of Democracy' (1994) 1 (1) *CONSTELLATIONS* at 1-10. Available at: <https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1467-8675.1994.tb00001.x>

Habermas, J 'Political Communication in Media Society: Does democracy still enjoy an epistemic dimension? The impact of normative theory on empirical research' (2006) 16 *International Communication Association* at 411- 426.

Hicks, J & Buccus, I 'Crafting new democratic spaces: participatory policy-making in KwaZulu-Natal, South Africa' (2008) 65 (1) *Transformation Critical Perspectives on South Africa* at 94 -119.

Ile, I & Mapuva, J 'Citizen Participation and democracy: safeguarding citizen participation through government of National Unity (GNU) or democracy violated?' (2010) 45 (1) *Journal of Public Participation*.

Innes, JE & Booher, DE 'Reframing Public Participation: Strategies for the 21st Century' (2004) 5 (4) *Planning Theory & Practice* at 419- 436.

Manthwa, TA & Ntsoane, LS 'Public participation, electoral dispute and conflict resolution mechanisms- the case of Moutse South Africa, ward 5&6; 2013-2016' (2018) 17 *Journal of African elections* at 105 – 124.

Masango, R 'Public Participation: a Critical ingredient of good governance' (2002) 21 (2) *Politeia* at 52 – 65.

Mofolo, MA 'Intergovernmental relations system for public participation in the local sphere of government' (2016) 51 *Journal of Public Administration* at 230 – 245.

Molepo, JN; Maleka, CM and Khalo, T 'Public participation and service delivery: The case of the City of Tshwane' (2015) 50 (2) *Journal of Public Administration* at 345 – 369. Published Online: 1 Jun 2015. Available at <https://hdl.handle.net/10520/EJC183275> (accessed 15 August 2021).

Mubangizi, BC and Dassah, MO 'Public Participation in South Africa: Is Intervention by the Courts the Answer?' (2014) 39 (3) *Journal of Social sciences* at 275- 284.

Muntingh, L 'The state of civil society participation in Parliament' *Law, Development and Democracy* (2012) 29 (48) at 29. Available at www.saflii.org/za/journals/LDD/2012/2.pdf (accessed 15 August 2020).

Marzuki, A 'Challenges in the public participation and the decision making process' (2015) 201 (1) *Sociological I proctor* at 21-39.

Nel, P and Van Wyk, J 'Foreign policy making in South Africa from public participation to democratic participation' (2003) 22 (3) *Politeia* at 49 -71.

Nsingo, SAM & Kuye, OJ 'Democratic Participation for Services delivery in Local Government in Zimbabwe: Humanising Structural Configuration and Local Provisions' (2005) 40(4) *Journal of Public Administration* at 744-760.

Nyalunga, D 'An Enabling Environment for Public Participation in Local Government' (2006) 1 (1) *International NGO Journal*.

Nyathi, L 'Public Participation: What has the Constitutional Court Given the Public?' 2008 (12) *Law Democracy & Development* at 102 – 110.

Oliver, E and Oliver, WH 'The Colonisation of South Africa: A unique case' (2017) 73 (3) *Pretoria*.

Phooko, MR 'Conflict between participatory and representative democracy: A call for model legislation on public participation in the law-making process in South Africa' 2017 (38) *Obiter* at 517- 527.

Phooko, MR 'What should be the form of public participation in the law making process? An analysis of South African case laws' (2014) 3 (1) *Obiter* at 39-59. Published Online: 1 Jan 2014. Available at <https://hdl.handle.net/10520/EJC155241> (Accessed 15 October 2020).

Raboshakga, N 'Towards participatory democracy or not: The reasonableness approach in public involvement cases' (2015) 31(1) *South African journal on Human Rights* at 4 – 29.

Sebola, MP 'Communication in the South African public participation process- the effectiveness of communication tools' (2014) 49 *Journal of Public Administration* at 392 – 405.

Shannon, MA 'Participation as Social Inquiry and Social Learning' (2006) 157 (10) *Schweizerische Zeitschrift fur Forstwesen* at 430- 437. Available at <https://doi.org/10.3188/szf.2006.0430> (First published 01 October 2006).

Stewart 'Citizen Participation and judgement policy analysis: A case study of urban air quality' (1984) 17 (1) *Policy Journal*.

Other miscellaneous sources

Action 24, Situation analysis of public participation in the South African legislative sector (2018). Available at <http://www.climatereality.co.za/wp-content/uploads/2018/08/...> . PDF file

Ben-Zeev, K 'Peoples Power Peoples Parliament' A Report of Proceedings and Issues at the People's Power Conference' (Cape Town) 13-15 August 2012.

Breyer, S *Active Liberty: Interpreting our Democratic Constitution*. The Tanner Lectures on Human Values Delivered by S. Breyer at November 17-19, 2004.

Buccus, I; Hemson, D; Hicks, J & Piper, L 'Public participation and local governance' (Research report prepared by the Centre for Public Participation in association with the HSRC and University of KwaZulu-Natal). (2007). Available at <http://hdl.handle.net/20.500.11910/5981>.

De Villiers, S 'A people's government. The people's voice – a review of public participation in the law and policy- making process in South Africa.' 2001 Cape Town Parliamentary support programme.

Draft National Policy Framework for Public Participation, (2007). Republic South Africa: Department of Provincial and Local Government.

Friedman, S and McKaiser, E *Civil society and the post-Polokwane South African State: assessing civil society's prospects of improved policy engagement*, Centre for the Study of Democracy; Rhodes University/University of Johannesburg: Commissioned by the Heinrich Boell Foundation. (2009).

Hicks, J. 'Government mechanisms for public participation. How effective are they?' (2003). Retrieve 6 July 2007 from www.ccp.org.za: Centre for Public Participation.

Hickey, S and Mohan, G 'Relocating participation within a radical politics of development. Development and Change' 2005 36 (2), at 237–262. Accessed at https://oro.open.ac.uk/4103/1/Hickey_and_Mohan_revised_70704. Pdf. on 17 August 2014. (Page numbers in footnotes refer to the open source version).

International Association for Public Participation (IAP2). www.iap2.org.

Inter-Parliamentary Union and U.N. High Commissioner for Human Rights Human Rights: A Handbook for Parliamentarians (SADAG, Bellegarde-sur-Valserine 2005).

Khanyile, STT 'Evaluation of the effectiveness of public participation in the Gauteng electronic tolling programme' PhD Thesis, University of Johannesburg, 2015. Available at <https://core.ac.uk/display/43610435> (accessed 22 May 2019).

KwaZulu-Natal legislatures' Archives, Available at <https://kznlegislature.gov.za/public-participation/>

Lessia, LE 'Public participation in local government in South Africa: A case study on decision making in street naming in Kwamashu Township of the Ethekwini Municipality' Masters dissertation, University of KwaZulu-Natal, 2011 at 14. Available at <https://www.semanticscholar.org/paper/Public-participation-in-local-government-in-South-%3A-Lesia/8bc9aae8b56ed0c009306489aa16034237e8241a> (accessed 02 October 2021).

Madlala S 'Public participation in service delivery'. Paper presented at service delivery conference (2005) Johannesburg.

Mayring, P *Qualitative Content Analysis. Forum: Qualitative Social Research*, 2000; 1: Article 20 [Cited 13 February 2013]. Available from URL: <http://www.qualitative-research.net/index.php/>.

Mendel, T Undated. Freedom of information as an internationally protected right. ARTICLE 19. Accessed at <http://www.article19.org/data/files/pdfs/publications/foi-as-an-international-right.pdf> on 15 01 2015.

National Park Service, Directors order #75A; "Civic Engagement and Public Involvement", approved by Director A. Boman. 30 August 2007. Available at <https://www.nps.gov/policy/DOrders/thingstoknow.htm>

Nowak, M United Nations Covenant on Civil and Political Rights: CCPR Commentary. Published by Engel, NP Kehl, Strasbourg and Arlington, VA. (2005).

Nzimande, B Public Participation, Socio-economic rights and NEPAD, Keynote Address at The Conference on Public Participation: Growth through participation, held in Durban 24 to 25 June 2003, Report of the Centre for Public Participation.

Parliamentary Monitoring Group. Getting information to the people: The role of the Parliamentary Monitoring Group. (2013). Available at <https://pmg.org.za/committee-meeting/9263/>.

Parliamentary Monitoring Group 'Getting information to the people: The role of the Parliamentary Monitoring Group.' (2013). Available at <https://pmg.org.za/provincial-legislatures/kwazulu-natal>

Pimbert, M and Wakeford, T *Deliberative democracy and citizen empowerment*. (2001) PLA Notes 40, IIED, co-published by common wealth Foundation at 23. Available at <https://pubs.iied.org/sites/default/files/pdfs/migrate/G01305.pdf>

Public Participation in Parliament a Survey of Participants, by Parliamentary monitoring group, 2017: Cape Town. www.pmg.org.za.

Report of the Independent Panel Assessment of Parliament. 2009. Parliament of the Republic of South Africa.

Roberts, N *Direct Citizen Participation: Building a Theory* Paper presented to 7th National Public Management Research Conference, 9-11 October 2003 Georgetown University, Washington D.C at 6.

Rousseau, Jean-Jacques *The Social Contract: & Discourses*. NO: 660. JM Dent & Sons. (1920). Available at <https://wadsworthatheneum.org/v/document/A7S0U7/> (accessed 17 October 2021).

Scott, R 'An analysis of public participation in the South African Legislative Sector' Master's thesis, Stellenbosch University, 2009.

Sefora, MM 'Public participation in Parliament: Perspective on Social Media Technology (SMT)' Masters Dissertation, Stellenbosch University, 2017.

South African Legislative Sector 'Public Participation Framework for the South African Legislative Sector' (2013). (PPF). Available at www.sals.gov.za.

The Public Participation Bill, 2018. Kenya.

UN Office of the High Commissioner for Human Rights (OHCHR), Human Rights - A Handbook for Parliamentarians, 2005, No. 8-2005, available at: <https://www.refworld.org/docid/46cea90d2.html> [accessed 13 August 2021].

UN Resolution 59(I) Calling of an international conference on freedom of information accessed at <http://daccessddsny.un.org/doc/RESOLUTION/GEN/NR0/033/10/IMG/NR003310.pdf?OpenElement> on 15 01 2015.

UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression. Abid Hussain. Report to the UN Economic and Social Council. E/CN.4/2000/63 18 January 2000.

United Nations Population Fund (UNFPA). "Participation and Inclusion", which embraces people's participation, access to information affecting people's lives and well-being. This Human Right principle promotes participation of minority groups. Published in 2005 by UNFPA. Available at <https://www.unfpa.org/resources/human-rights-principles>. Dated 2005.

Waterhouse, SJ 'People's Parliament? An assessment of Public Participation in South Africa's legislatures' Dissertation published by the University of Cape Town. Available at <https://open.uct.ac.za / http://hdl.handle.net/11427/15198> (accessed 29 June 2021).