

Developing and applying a constitutional framework for public participation in South Africa

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Abstract

Online public participation platforms have resuscitated the debate globally about whether the Internet can be used to improve the reach of public participation and the quality of comments received during these processes or not. This thesis highlights that this debate is a ruse. Our focus should not be on the mode of participation adopted to engage with interested and affected parties but rather on the manner in which that mode (whether online platforms or more traditional methods) is implemented.

Currently in South Africa there is not a standard set of guidelines to assist persons undertaking these modes of participation to ensure that they are adequate or acceptable. This thesis seeks to create such a framework. As all actions in South Africa must comply with the Constitution, it is the starting point for developing this baseline.

The Constitution drafters introduced participatory democracy into the South African legal framework. In doing so, they intended that certain principles associated with this notion filter into the legal system. This thesis identifies these principles, drawn from the works of democratic theorists, Constitutional-era South African case law, legislation, practice and administrative process, and proposes a participatory framework ('the Constitutional Framework for Public Participation' or 'CFPP') which, if followed, will ensure that policymaking and administrative participatory processes comply with the Constitutional conception of participatory democracy.

In addition, as online participation is most likely to become a prominent tool in engaging interested and affected parties, this thesis considers whether there are any principles relating specifically to online participation which should be included in the CFPP. Following an assessment of online public participation processes, additional principles have been identified but these principles apply equally to offline modes of participation as to online participation.

Having incorporated these additional principles into the CFPP, they are applied to the public participation process required in terms of Environmental Impact Assessment ('EIA') to assess whether these processes are being conducted in a Constitutional manner. The findings reveal that the regulations governing the EIA public participation processes fall short of the CFPP. Although the regulations are inadequate, examples of actual EIA public participation processes are examined to determine whether, notwithstanding the inadequate regulations, the implemented public participation process meet the requirements of the CFPP. This also yields

a negative outcome, highlighting that public participation processes are not being conducted in a manner required by the Constitution.

This thesis suggests that the CFPP can be consulted to assist lawyers, administrators, legislatures, persons responsible for public participation processes, government and others in designing and implementing constitutionally acceptable public participation processes. It is acknowledged that the CFPP will need to be the subject of empirical investigation by subsequent researchers to assess its effectiveness in achieving this objective.

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Glossary

AGM	Annual general meeting
AIR	Atmospheric impact report
ANC	African National Congress
Board	The National Roads Board
CC	Constitutional Court
CeRI	Cornell eRulemaking Initiative
Commission	The Competition Commission
CFPP	Constitutional Framework for Public Participation
CRR	Clarifying Regulatory Requirements published by OIRA
DA	Democratic Alliance
DEA	Department of Environmental Affairs
DOT	Department of Transport
DWAF Guidelines	The Generic Public Participation Guidelines published by the erstwhile Department of Water Affairs and Forestry (September 2001)
EAP	Environmental assessment practitioner
EIA	Environmental impact assessment
EIA Regulations	The 2006 EIA Regulations, 2010 EIA Regulations and the 2014 EIA Regulations, as relevant in the context
Final Motivation	Final Motivation for the Postponement of Compliance Timeframes in terms of Regulation 11 of Section 21 NEM:AQA Minimum Emissions Standards submitted by Sasol South Africa (Pty) Ltd
Framework	National Policy Framework for Public Participation
Guidelines	The National Environmental Management Act, 1998 (Act No 107 of 1998) Publication of Public Participation Guidelines
Guidelines for Participation	Guidelines for Participation in the Market Inquiry into the Private Healthcare Sector
IAP	Interested and affected party
IDP	Integrated Development Plan
LPG	Liquefied petroleum gas industry
Marloth	Marloth Park Municipality

MES	List of activities which result in atmospheric emissions which have or may have a significant detrimental impact on the environment, including health, social conditions, economic conditions, ecological conditions or cultural heritage GNR 893 GG 37504 22 November 2013
MSA	Local Government: Municipal Systems Act 32 of 2000
MTLC	Middleburg Transitional Local Council
NAAQS	National Ambient Air Quality Standards
NCOP	National Council of Provinces
NEMA	National Environmental Management Act 107 of 1998
NEC	National Executive Committee
NPRM	Notice of proposed rulemaking
NT Report	National Treasury Report into the Banking Industry
NWA	National Water Act 36 of 1998
OIRA	Office of Information and Regulatory Affairs
OUTA	Opposition to Urban Tolling Alliance
PAJA	Promotion of Administrative Justice Act 3 of 2000
PPS	Public Participation Strategy
Proponent	The party responsible for conducting the public participation process
Report	EY's Business Risks Facing Mining and Metals 2014 - 2015
SANRAL	The South African National Roads Agency Limited
Shongwe	Kwanale Asante Shongwe
SOI	Statement of issues
SSO	Second Synfuels Operation
Streak	Mr Streak (Discovery Health Medical Scheme representative)
Structures Act	Local Government: Municipal Structures Act 117 of 1998
Survey	E-Government Survey 2016
UN Department	United Nations Department of Economic and Social Affairs

Chapter 1

Introduction: the impact of online media in the context of public participation

1.1 Introduction

The introduction of the Internet in the early 1990's was expected to revolutionise political participation.¹ As information became more easily available online, it was anticipated that more people would engage in participatory processes.² Unfortunately, this did not come to fruition.³ Since then, the world has undergone a 'communication revolution'⁴ in that online media (such as Facebook,⁵ Twitter⁶ and Whatsapp) have fundamentally revised the way we communicate with one another.⁷ Online interactions are no longer a unidirectional flow of information from the government to the citizenry.⁸ Instead, interested and affected parties ('IAPs') use these platforms to receive, share and create information in real time making them appear to be suitable tools for participation.⁹ The introduction of this new form of online media has revitalized the debate globally and more specifically in South Africa around online participation as it provides 'enormous potential...for greater efficiency, cost reduction, quality of public services, convenience, innovation and learning.'¹⁰

These apparent benefits are being 'explored by governments around the world...to improve the quality and responsiveness of public services, expand the reach and accessibility of both services and public infrastructure, and allow citizens to experience faster and more

¹ Stephen M Johnson 'The Internet Changes Everything: Revolutionizing Public Participation in Access to Government Information Through the Internet' (1990) 50 *Administrative Law Review* 277 at 279.

² South African Parliament 'A People's Government. The People's Voice. A Review of Public Participation in the Law and Policy-Making Process in South Africa' available at http://www.parliament.gov.za/live/content.php?Item_ID=285 accessed on 4 September 2014.

³ SW Shulman 'The Internet Still Might (But Probably Won't) Change Everything' (2005) Vol 1 No 1 *I/S: A Journal of Law and Policy*.

⁴ Eric Qualman 'Socialnomics' available at <http://www.youtube.com/watch?v=1FZ0z5Fm-Ng> accessed on 18 February 2014.

⁵ Facebook available at <http://www.facebook.com> last accessed on 30 January 2017.

⁶ Twitter available at <http://www.twitter.com> last accessed on 30 January 2017.

⁷ Raj Agnihotri, Rebecca Dingus, Michael Y. Hu and Michael T Krush 'Social Media: Influencing Customer Satisfaction in B2B Sales' (2015) *Industrial Marketing Management* at 1.

⁸ Bruno Schinivinski and Dariusz Dabrowski 'The Effect of Social Media Communication on Consumer Perceptions of Brands' (2016) *Journal of Marketing Communications* at 3.

⁹ Agnihotri *et al op cit* note 7.

¹⁰ United Nations Department of Economic and Social Affairs 'Responsive and Accountable Public Governance 2015 World Public Sector Report' at 42 available at workspace.unpan.org/sites/Internet/Documents/UNPAN95253.pdf last accessed on 19 January 2017.

transparent forms of access to government services'.¹¹ There is a dearth of published research adding to this debate in South Africa.¹² This thesis contributes to the debate by proposing a set of principles aimed at enhancing the efficacy of public participation. These principles have been incorporated into a framework which, I propose, can be used to ensure that *any* policy-making or administrative participation process will meet the objectives of participatory Democracy contemplated by the South African Constitution.¹³ This framework is referred to as the Constitutional Framework for Public Participation ('CFPP') which is set out in detail in Chapter 6.

The principles making up the CFPP have been drawn from various sources. As a first step the works of democratic participatory theorists are evaluated in Chapter 2 to identify the principles that are common to democratic participatory theory and which the Constitution seeks to incorporate into the South African legal framework. These principles are referred to as a 'substantive principles'.

In Chapter 3 and 4 the existing participatory mechanisms (i.e. voting, the creation of legislation, local government involvement and administrative processes) are considered in light of the substantive principles to determine if these mechanisms meet the Constitutional standard. Through this process, a number of additional principles ('the procedural principles') are identified. These procedural principles provide guidance on how participatory processes must be structured to give effect to the substantive principles.

As online participation is likely to increase in the future, Chapter 5 considers the experience gained from RegulationRoom (an online public participation platform adopted in the United States to develop federal regulations) to determine if there are any additional procedural principles that are specific to online participation that must be included in the CFPP which is set out in Chapter 6. In Chapter 7, the CFPP is practically applied to the public participation processes conducted in terms of the Environmental Impact Assessment

¹¹ Ibid.

¹² Ifeoluwapo Fashoro and Lynette Barnard 'Social Computing as an E-Participation Tool in South Africa: An Exploratory Study' (2016) *CONF-IRM 2016 Proceedings* Paper 9 available at <http://aisel.aisnet.org/confirm2016/19> last accessed on 19 January 2017, Roxanne Piderit and Nqabomzi Jojozi 'Improving Citizen Participation Through Information Access in e-Government: Technology, Organization and Environmental Factors for South Africa' *Electronic Government and Electronic Participation* HJ Scholl, O Glassey and MFWHA Janssen (Eds) (2016), Laban Bagui and Andy Bytheway 'Exploring E-Participation in the City of Cape Town' (2013) Vol 9 No 4 *The Journal of Community Informatics*; Hamilton Mphindi 'Digital Divide and e-governance in South Africa' available at http://www.ais.up.ac.za/digi/docs/mp hindi_paper.pdf last accessed on 19 January 2017.

¹³ Constitution of the Republic of South Africa, 1996.

('EIA') to determine whether these public participation processes meet the normative goals in the CFPP. Before setting out the outcomes of this comparison, an overview is provided of the principles underpinning the CFPP.

1.2 Participatory Democratic Theory

In 1996, the South African Parliament adopted the final Constitution and, in doing so, ushered in a supreme law aimed at establishing *inter alia* 'a society based on democratic values'.¹⁴ This value system applies not only to the actions of government institutions but 'permeate[s] all social relations, and inform[s] all South Africans' dealings with each other whether as private citizens *inter se* or as civil servants appointed to serve the public interest'.¹⁵ It is the relationship with the citizens that is considered to be a 'defining characteristic'¹⁶ of democracy.

In spite of this common theme, there is not one theory or definition of democracy in the Constitution. This is evident when reviewing the text of the Constitution where the word 'democracy' is prefaced by the words 'representative',¹⁷ 'participatory',¹⁸ 'constitutional'¹⁹ and 'multi-party'.²⁰ Each of these forms of democracy governs the relationship between the government and its citizens in some manner: representative democracy concerns the appointment of government representatives through voting; constitutional democracy balances the relationship between the protection of fundamental human rights and majority will (which are not always aligned); multi-party democracy endorses having multiple political parties being able to compete in elections for votes and participatory democracy promotes increased citizen participation in governance between elections. 'Given that the various forms of democracy in political theory are either ideal types or deliberately partial accounts of what this terms means, it is not surprising that the final Constitution should have hedged its bets in this way – to have chosen as its blueprint just one of the existing 'models' of democracy would have been artificial and unnecessary.'²¹

¹⁴ Ibid at the Preamble.

¹⁵ Theunis Roux 'Democracy' in Chaskalson et al *Constitutional Law of South Africa* 2nd Ed, revised service (2014). at 10 - 23.

¹⁶ Iain Currie and Johan De Waal *The Bill of Rights Handbook* 6th Ed (2016) at 14.

¹⁷ Constitution *op cit* note 14 at S57(1)(b), s70(1)(b) and s116(1)(b).

¹⁸ Ibid.

¹⁹ Ibid at Ch9.

²⁰ Ibid at s1(d), s199(8) and s236.

²¹ Roux *op cit* note 15 at 10 - 2.

The South African Constitution does not select one democratic theory in favour of another. Instead it seeks to incorporate all of these theories and the principles underpinning them into the South African legal system. For present purposes, I have focused on participatory democracy and the principles underlying increased participation as substantiation.

The principles arising from participatory democratic theory are explained and discussed in Chapter 2. In summary, participatory democratic theory has three objectives: firstly, IAP's must be informed to enable them to perform reasonable and responsible action.²² This is achieved through collaboration in which IAP's express, defend and debate their views with other participants in order to develop a common solution.²³ Where necessary, problem-solving mechanisms will need to be implemented to resolve impasse between the parties.²⁴ In doing so, any discrepancy between the IAPs' private interests and the public interest will be diminished. I refer to this as *Principle 1: The Educative Effect*.

The next principle, *Principle 2: The Principle of Control* requires that IAP's must exercise a degree of control over their own destiny and so they must feel that they have a genuine opportunity to influence the outcome of any public participation process.²⁵ IAP's who exercise such control and believe that their voices are heard (and responded to) are more likely to accept the final decision, even if it does not accord with their own private interests as they believe the process followed to have been fair. This acceptance of the outcome or the participatory process is referred to as *Principle 3: The Social Licence to Operate*.

These principles (along with *Principle 4: The Principle of Dignity*) are referred to as the 'substantive principles'. The substantive principles focus on the IAP's subjective assessment of the public participation process. In particular they focus on whether IAP's concerns have been ventilated and debated; that their opportunity to participate is real rather than illusory and that the final decision is fair even if it does not accord with their private interest. These principles are supported by the 'procedural principles' which relate to the

²² Carol Pateman *Participation and Democratic Political Theory* (1970) at 24.

²³ J Muso, C Weare and T Bryer 'Toward "Strong Democracy" in Global Cities? Social Capital Building, Theory-Driven Reform, and the Los Angeles Neighborhood Council Experience' (2011) *Public Administration Review* at 107.

²⁴ R Fisher & J Ury *Getting to Yes – Negotiating Agreement Without Giving In* (1981) a 91; Gyu-Chan Lim, Seung-Bo Park, Won-Jin Lee and Jae-Dong Lee 'Content Requirements for Collaborative Learning Based on the Concept of Role-Playing' (2014) Vol 47 (Culture and Contents Technology) *Advanced Science and Technology Letters* at 159.

²⁵ Pateman *op cit* note 22 at 26.

structure, format and operation of the public participation process.²⁶ This distinction between substantive and procedural principles has been adopted for the sake of convenience to draw a distinction between those categories of principles that focus on the subjective state of mind of the IAP's compared with the more objective procedural principles. The importance and prominence of each of the substantive and procedural principles will swell and diminish in each public participation process and, depending on the facts of each case one principle is likely to trump another principle.

The procedural principles which I identify and develop below have been drawn from participatory processes conducted since the introduction of the Constitution in South Africa. I have referred to the substantive principles and procedural principles as 'the democratic participatory principles'.

1.3 Constitutional Public Participation

During apartheid the substantive principles were not enforced. In fact, extreme legislative²⁷ and administrative measures were implemented²⁸ (and in some instances endorsed by the judiciary)²⁹ to ensure that predominantly black³⁰ IAP's were excluded from participating in government and decisions which affected their day-to-day lives.³¹ It is unsurprising that citizen participation has not only been encouraged but enforced in the constitutional era.

Chapters 3 and 4 consider the legislative, administrative and judicial treatment of public participation since the inception of the Constitution by considering the primary forms of engagement: voting, public participation in the creation of legislation, public participation in local government and public participation in administrative decision-making. Aside from *Principle 4: The Principle of Dignity* (which essentially requires that IAP's feel that they are

²⁶ See Chapter 3 and 4 below.

²⁷ Two examples of legislative measures used to prevent persons from participating in government are the Separate Representation of Voters Act 12 of 1936 which removed black South African voters from the voters roll and the Senate Act 53 of 1955 which allowed the government to re-constitute the Senate so as to have a sufficient majority to pass the Separate Representation of Voters Act which removed coloured voters from the voters roll.

²⁸ For example, The Suppression of Communism Act 44 of 1950 (later the Internal Security Act 74 of 1982) along with the Unlawful Organisations Act 34 of 1960 and the Public Safety Act 3 of 1953 outlawed organisations that the administrator believed may overthrow the government, prevented individuals from participating in such organisations and even banning gatherings and publications so as to prevent the sharing of information and collaboration.

²⁹ *Ndlwana v Hofmeyr NO* 1937 AD 229; *Collins v Minister of the Interior and Another* 1957 (1) SA 552 (AD); *South African Defence and Aid Fund and Another v Minister of Justice* 1966 (3) SA 572 (AD).

³⁰ Black persons were defined as any person classified as 'non-European' including black Africans, Asians, Indians and any person considered to be 'black' by the administrators based on their characteristics.

³¹ These legislative and administrative measures are briefly discussed in Chapters 3 and 4.

part of their community and believe that, by participating, their views 'count'),³² the principles discussed in this chapter are procedural in nature.

While the substantive principles discussed above 'sketch the contours of a peculiarly South African form of democracy...the legislature and the judiciary...fill in the details'³³ of the form that participatory processes should take to give effect to these principles. The first of the procedural principles is *Principle 5: The Principle of Inclusivity*.³⁴ This principle requires that the person conducting the public participation process ('the proponent') must take all reasonable measures to remove obstacles which prevent IAP's from participating.³⁵ In certain instances IAP's may lawfully be excluded from participating but this should only be in exceptional circumstances and only where the exclusion is specified in the empowering legislation or linked to a legitimate government purpose or objective.³⁶

In order to remove obstacles to participation, the proponent must have a clear understanding of which IAP's may wish to participate in the process (*Principle 8: The Identity of the IAP's*).³⁷ This includes IAP's which would ordinarily participate in the process such as business, industry and those individuals that are well-resourced (these IAP's are referred to as 'insiders'),³⁸ as well as parties who traditionally would not participate in public participation processes because of a lack of resources, knowledge or skill ('outsiders').³⁹ In order to solicit information from these divergent types of IAP's, the proponent may need to adopt various modes of participation (*Principle 13: The Principle of Multiplicity*).⁴⁰ Failure to do so may result in the substantive principles not being achieved as certain IAP's may have not been accorded an opportunity to be heard or their views have not been taken into consideration. Context is critical in selecting a mode of participation as a poor understanding of the circumstances in which a decision is taken is unlikely to further the democratic participatory principles (*Principle 11: The Principle of Context*).⁴¹ This is particularly so with

³² *August and Another v Electoral Commission and Others* 1999 (3) SA 1 (CC) at [17].

³³ Roux *op cit* note 15 at 10 - 2.

³⁴ August *supra* note 32.

³⁵ *New National Party of South Africa v Government of the Republic of South Africa and Others* 1999 (3) SA 191 (CC).

³⁶ Ibid at [19] – [23].

³⁷ *Moutse Demarcation Forum and Others v President of the Republic of South Africa and Others* 2011 (11) BCLR 1158 (CC).

³⁸ Dmitry Epstein, Josiah Heidt and Cynthia R Farina 'The Value of Words: Narrative as Evidence in Policymaking' (2014) *Cornell Law Faculty Publication Paper* 1243 at 3.

³⁹ Ibid.

⁴⁰ Competition Commission 'Banking Inquiry Report Chapter 1' available at http://www.compcom.co.za/wp-content/uploads/2015/10/1-Enquiry-Process_non-confidential1.pdf accessed on 13 March 2016 at page 17.

⁴¹ See section 4.3 Administrative action affecting the public below.

respect to online media. Implementing a public participation process using online media in a rural area where the majority of the IAP's did not have access to technology defeats the democratic participatory principles.

The mode of participation selected is merely a means to an end in that the mode should allow IAP's to participate and, in doing so, to give effect to the democratic participatory principles. Therefore, the proponent needs to re-evaluate the mode of participation and change or supplement the existing mode to achieve the substantive principles.⁴² This is referred to as *Principle 9: The Principle of Flexibility*. The *raison d'être* of this principle is to dissuade proponents from selecting a mode of participation and doggedly persisting with that mode of participation while not achieving the substantive principles.

The identity of the IAP's and the mode(s) of participation selected for participation must be incorporated into a public participation strategy ('PPS')⁴³ (*Principle 10: Public Participation Strategy*) that is negotiated with the IAP's. The views of the IAP's must be taken into consideration when designing and implementing the PPS. However, the proponent does not need to defer to the views of the IAP's in all instances (*Principle 7: The Deference Principle*).⁴⁴ In fact, it will be impossible for the proponent to do so as the IAP's may have conflicting views on the PPS. However, the proponent needs to keep an open mind when considering the various views.

The PPS sets out the step-by-step process that will be followed from initial notification of the process until completion. This thesis suggests that, at each step, the proponent must indicate the nature and extent of the IAP's participation. That is, whether the IAP's are notified of an event ('inform'),⁴⁵ whether they will be entitled to submit comments or representations ('consult')⁴⁶ or whether they will be actively involved in the decision-making process ('involve').⁴⁷ After the strategy has been agreed with the IAP's, it cannot be amended without the IAP's input. Public inquiries conducted in terms of the Competition

⁴² See section 3.6.2 The National Policy Framework below.

⁴³ Department Provincial and Local Government 'National Policy Framework for Public Participation' (2007) available at <https://pmg.org.za/policy-document/35/> last accessed on 12 April 2016 at 6.

⁴⁴ *Poverty Alleviation Network and Others v President of the Republic of South Africa and Others* 2010 (6) BCLR 520 (CC).

⁴⁵ Framework *op cit* note 43 at 45 – 46.

⁴⁶ Ibid at 47.

⁴⁷ Ibid at 48.

Act⁴⁸ provide some useful insights into the structure and form that these public participation strategies can take, based on what is practical and feasible in the circumstances (*Principle 12: The Principle of Reasonableness*).

In implementing the mode(s) of participation, both technical and social issues (*Principle 14: The Principle of Integration*)⁴⁹ need to be raised, debated and (if necessary) resolved. This form of participation needs to continue for the life of the undertaking (*Principle 15: The Principle of Continuity*).⁵⁰ On-going participation, however, has the potential to be counter-productive and can be used by objectors to draw out the participatory process to prevent decisions being taken. This is contrary to *Principle 16: The Principle of Efficiency*⁵¹ which requires that good quality decisions must be made as quickly as possible. *Principle 6: The Finality in Decision-Making* ensures that this does not happen. Where the proponent is satisfied that the IAP's have participated in the process and is confident that there will be no further value or benefit in additional participation, he or she may permit a less engaging form of participation.⁵² For example, the proponent may merely notify IAP's of a decision, rather than engaging in further consultation. In this way, the various principles need to be weighed against one another within the structure of the CFPP.

In order to determine whether there has been adequate participation, the process needs to be monitored and evaluated on an on-going basis to ensure that the participatory democratic principles are being achieved (*Principle 17: The Principle of Monitoring and Evaluation*).⁵³ Where the substantive principles are not being achieved, the PPS may need to be adapted to bring the public participation process in line with the substantive principles.⁵⁴

Given the recent resurgence in online participation, it is worth considering whether there are any principles specific to online participation that should be identified before incorporating the principles expressed above into the CFPP.

⁴⁸ 89 of 1998.

⁴⁹ Department of Water Affairs and Forestry 'Generic Public Participation Guidelines - September 2001' accessible at <http://www.dwaf.gov.za/Documents/Other/GPPG/guide.pdf> accessed on 15 April 2016 at page 15.

⁵⁰ Ibid 16.

⁵¹ Ibid 20.

⁵² *Merafong Demarcation Forum and Others v President of Republic of South Africa and Others* 2008 (5) SA 171 (CC).

⁵³ Generic Public Participation Guidelines *op cit* note 49 at 21.

⁵⁴ Section 6.6 Auditing the Public Participation S.

1.4 Online Public Participation

Online media are increasingly being used as tools for participatory decision-making.⁵⁵ As expressed here, little has been written in South Africa regarding online participatory mechanisms and nothing appears to have been written in respect of online participation and democracy in South Africa. Although there are many international examples of online participation projects and initiatives,⁵⁶ they are based on different methodologies and circumstances,⁵⁷ making it difficult to make general observations about these projects. Furthermore, some of the platforms that are considered to be participatory do not meet the democratic participatory principles as they are merely a source of information and do not also provide opportunities for IAP's to collaborate in constructing knowledge or exercise control over decisions or laws that may affect them – which are critical components of *Principle 1: The Educative Effect* and *Principle 2: The Principle of Control*.

To determine whether there are principles which must be incorporated into the CFPP specific to online participation, requires consideration of online participatory processes which promote the conception of participatory democracy envisaged in the Constitution. RegulationRoom,⁵⁸ an online rulemaking platform created by the Cornell eRulemaking Initiative ('CeRI') in conjunction with the United States Department of Transport is one such example.

⁵⁵ United Nations, Department of Economic and Social Affairs 'United Nations E-Government Survey 2016' available at <https://publicadministration.un.org/egovkb/en-us/Reports/UN-E-Government-Survey-2016> last accessed on 15 February 2017.

⁵⁶ Oded Nov, Mor Naaman and Chen Ye 'Analysis of Participation in an Online Photo-Sharing Community: A Multidimensional Perspective' (2009) *Journal of the American Society for Information Science and Technology*; June Ahn, Brian S Butler, Alisha Alam and Sarah A Webster 'Learner Participation and Engagement in Open Online Courses: Insights from the Peer 2 Peer University' (2013) Vol 9, No 2 *MERLOT Journal of Online Learning and Teaching*; Joseph Kahne, Nam-Jin Lee, Jessica Timpany Feezell 'Digital Media Literacy Education and Online Civic and Political Participation' (2012) *International Journal of Communication*; Dareb C Brabham 'Crowdsourcing the Public Participation Process for Planning Projects' (2009) Vol8(3) *Planning Theory*; Jeff Biggar 'Crowdsourcing for the Environment: The Case of Bright Planet' (2010) *Journal of Media and Communication*; L Lei and B Hilton 'A Spatially Intelligent Public Participation System for the Environmental Impact Assessment Process' (2013) *ISPRS International Journal of Geo-Information*; Rodrigo Sandoval-Almazan and J Ramon Gil-Garcia 'Are Government Internet Portals Evolving Towards More Interaction, Participation, and Collaboration? Revisiting the Rhetoric of E-government among Municipalities' (2012) Vol 29, Supplement 1 *Government Information Quarterly*.

⁵⁷ The examples cited above are a few of many. Although engaging with participants in some manner or form the various platforms used make it difficult to compare one public participation process against another. For example, in some instances participants use online platforms to merely provide information while others use online media so as to create a two-way dialogue between the participants. Furthermore, some online tools are designed specifically for the public participation process, while others use more well-known social media technology which means that they may have different design features which may influence the outcome of the public participation process. These different forms of participation are also adopted in a variety of circumstances from education to healthcare to environmental impact assessments which may influence the kind of interaction. Furthermore, cultural impacts may also interfere in public participation processes in that students may not want to engage with other students but only with the teacher or men may not want to engage with women.

⁵⁸ RegulationRoom available at <http://regulationroom.org/> last accessed on 31 January 2017.

CeRI has administered a number of online rulemaking participatory processes using RegulationRoom to engage actively IAP's in a dialogue around proposed rules. The methodologies for each of these processes has been similar, with modifications made along the way based on the lessons they have learned in implementing RegulationRoom. These processes and the lessons learned have been extensively documented and are discussed in detail in Chapter 5. Interestingly, the procedural principles that can be drawn from these investigations are equally applicable to offline participatory processes, highlighting that it is the manner in which the public participation process is conducted ('the method') not the kind of participation process that is adopted ('the modes of participation') which is relevant when conducting a public participation process.⁵⁹

The first principle is *Principle 18: The Narrative Principle* which recognises that insiders and outsiders to a public participation process communicate their views differently.⁶⁰ While insiders tend to submit well-reasoned and supported written comments, outsiders tend to express themselves in the narrative through stories and personal experience.⁶¹ CeRI noted that, although this form of comment was unfamiliar to the administrators, it provided valuable 'situated knowledge' which influenced the decision-making process in that it raised issues of conflict between the proposed decision and the IAP's, associated negative consequences of the proposed decision or unintended impact.⁶² This form of public participation needs to be encouraged and administrators and regulators also need to develop the necessary skills to isolate valuable information from it.

To assist IAP's (and particularly outsiders) to contribute towards the public participation process, the IAP's need to receive and understand all relevant information. *Principle 19: The Issue Posts Principle* suggests that information should be broken down into important themes which can guide IAP's through this information (particularly where it is voluminous or technical). These important themes (or issue posts) must be simply written to ensure that participants can understand the critical issues and the associated impacts even if they are not familiar with the jargon or technical information.⁶³ This will allow IAP's to understand the key issues and participate without needing to read through hundreds of pages

⁵⁹ Kathryn S Quick and John M Bryson 'Public Participation' in *Handbook on theories of Governance* (2016) Christopher Ansell and Jacob Torfing (Eds) at 163 – 164.

⁶⁰ Epstein *et al op cit* note 38 at 10 – 11.

⁶¹ Ibid.

⁶² Section 5.5 Broader participation: recognising the value of situated knowledge expressed in the narrative below.

⁶³ Cynthia Farina, Mary Newhart and Cheryl Blake 'The Problem with Words: Plain Language and Public Participation in Rulemaking' *Cornell Law School Research Paper No 15-08* at 6 – 13.

of technical information.⁶⁴ The issues posts, however, should cross reference this more technical information so that more sophisticated users can refer to the primary sources.⁶⁵ Online tools can be used to cross-reference effectively or hyperlink these underlying documents with the issue posts but this is not a *sine qua non* for public participation.

Although issue posts assist IAP's in understanding the critical concerns of a public participation process, this does not guarantee broader or better participation. *Principle 20: The Principle of Moderation*, therefore, suggests that moderators can help to encourage debate, clarify misconceptions or misinterpretations and direct IAP's to relevant information that may address their concerns.⁶⁶ CeRI found that facilitated moderation solicited additional comments 60 – 70% of the time.⁶⁷ In online participation the role of moderator is more important as IAP anonymity tends to heighten antagonistic interactions as IAP's feel less inhibited to express themselves than in face-to-face interactions. This more honest and aggressive interaction may precipitate more lively debate but this may deteriorate into IAP's making personal attacks on other IAP's rather than discussing the issues at hand. This may dissuade IAP's from participating further in the process.⁶⁸ The moderator needs to strike a balance between encouraging lively debate and stepping in to censor IAP's. This is a particularly sensitive issue when the IAP's express views contrary to what the public participation process seeks to achieve. Although the role of the moderator may be more prominent in online interactions, the moderators' function is important to facilitate IAP involvement in both online and offline forms of participation.⁶⁹

1.5 The Constitutional Framework for Public Participation

The baseline for constitutionally acceptable public participation can be structured into a framework which can be used as a litmus test when conducting public participation processes, be it administrative action or creating legislation. The CFPP is set out in Chapter 6. It may not seem substantially different from some codified administrative law public

⁶⁴ Jackeline Solivan and Cynthia R Farina 'Regulation Room - How the Internet Improves Public Participation in Rulemaking' (2013) *Proceedings* at 59.

⁶⁵ Cynthia Farina, Hoi Kong, Cheryl Blake, Mary Newhart, Nik Luka 'Democratic Deliberation in the Wild: The McGill Online Design Studio and the RegulationRoom Project' (2014) *Fordham URBL.J. Vol XLI* at 1531 - 2.

⁶⁶ *Ibid* at 1556 – 1557.

⁶⁷ Cynthia R Farina, Mary J Newhardt, Claire Cardie, Dan Cosley and the Cornell eRulemaking Initiative (CERI) 'Rulemaking 2.0' 65 *U. Miami L. Review* 395 (2010 - 2011) at 434.

⁶⁸ *Ibid* at 451.

⁶⁹ Joonsuk Park, Claire Cardie, Cynthia R Farina, Sally Klingel and Mary J Newhart 'Facilitative Moderation for Online Participation in eRulemaking' (2012) *Cornell e-Rulemaking Initiative Publications* Paper 2 at 2.

participation processes⁷⁰ but there are two points which distinguish the CFPP from these processes. Firstly, the CFPP is founded on the democratic participatory principles which guide the interpretation and application of any administrative or policymaking public participation process which (over time) will develop a precedent of public participation that is constitutionally compliant and, secondly, the selected mode(s) of participation must be continually compared to the democratic participatory principles to ensure that the process meets these standards.

As set out above, the most important part of the CFPP is developing the PPS as this sets out the process that the proponent and IAP's must follow in implementing and participating in the public participation process. The PPS is informed by the identity of the IAP's, the time available to conduct the public participation process, the reasonable costs of implementing the process, the available resources to conduct the process, the nature of the decision or activity following the public participation process and any other requirements in the empowering legislation.

Having taken this information into account, the PPS must be designed and negotiated with IAP's (if the group is small) or published for comment in respect of larger groups. The PPS must set out the phases of the public participation process and the proposed mode(s) of participation, expressing the nature and extent of participation at each phase and the timeline of the entire public participation process.

Once the PPS has been finalized, it must be published and implemented. The proponent will need to implement the process in strict compliance with the PPS and act as a moderator to facilitate comments, moderate conflicts and maintain interest in the process, despite competing factors. To ensure that the implemented PPS meets the requirements of the democratic participatory principles, an independent assessor will need to review the PPS and engage with the IAP's to confirm whether the process meets the substantive principles. To the extent that the assessor feels that the principles are not being achieved, he or she will direct the proponent to amend the PPS to ensure that the process moves closer to fulfilling the substantive principles.

⁷⁰ For example, when applying for a mining right in terms of the Minerals and Petroleum Resources Development Act 28 of 2002 or an environmental authorisation in terms of the National Environmental Management Act 107 of 1998 (read with the Environmental Impact Assessment Regulations) or the notice and comment proceedings contained in the Promotion of Administrative Justice Act 3 of 2000.

As the CFPP is designed as a framework for all kinds of public participation processes, it is general in nature and may be modified for every circumstance. As a test case, this thesis compares the public participation processes adopted during the administrative law process of EIA's to consider whether traditionally these processes meet the democratic participatory principles.

1.6 Environmental Impact Assessment Public Participation Processes

EIA public participation processes are regulated by the EIA Regulations⁷¹ which include peremptory language on how IAP's must be notified about proposed public participation processes. The mode of participation and the manner in which the process is conducted is left to the proponent, the Environmental Assessment Practitioner ('EAP'), to decide. While EAP's must be able to exercise their discretion in selecting a process based on what is appropriate under the circumstances, the EIA Regulations are notably deficient when compared to the CFPP: There is no obligation to identify and approach 'outsiders' to the participatory process or to develop a PPS. While the EIA Regulations require that the critical information must be made available to IAP's, there is no obligation to ensure that this technical information can be understood by the IAP's. Finally, there is no obligation to monitor the public participation process to ensure that the substantive principles are being met.

These elements are not expressly stated in the EIA Regulations and investigations into the EIA public participation processes reveal that EAP's default to notice and comment proceedings and a public hearing in all instances.⁷² While notice and comment proceedings followed by public hearings may be appropriate in certain circumstances, in the two test cases discussed in Chapter 7, the deficiencies in the EIA Regulations impacted on the implementation of the regulations. The chapter concludes with steps the EAP will need to take to ensure that public participation processes meet the CFPP requirements.

1.7 Conclusion

This chapter provides a brief overview of the democratic participatory principles which must be met in order to achieve a constitutionally acceptable participatory process. The CFPP structures these principles into a step-by-step process which proponents can be guided by to focus on which principles are relevant at each phase of a participatory process. These principles have been drawn from the theories underlying participatory democracy and law. These theories will be examined in the next chapter.

⁷¹ Environmental Impact Assessment Regulations, 2014 GNR 982 GG 38282 of 4 December 2014.

⁷² Section 7.5 The Implemented Environmental Impact Assessment public participation processes below.

Chapter 2

Participatory Democratic Theory

2.1 Identifying the principles underlying participatory democratic theory

By including participatory democracy in the Constitution, its drafters intended that the principles underlying this democratic feature should infiltrate the South African legal system. Determining what these principles may be requires an understanding of what 'participatory democracy' entails. However, as Dahl stated, 'there is no democratic theory – there are only democratic theories.'⁷³ While there may be a number of democratic theories, they all exhibit principles which are common to the genus of participatory democratic theory.

As will be explored in more detail in this chapter, the genus-defining principles are *Principle 1: The Educative Effect*, *Principle 2: The Principle of Control* and *Principle 3: The Social Licence to Operate*. These principles have been drawn mainly from the work of Carole Pateman, the chief proponent⁷⁴ of participatory democratic theory.⁷⁵ Although her work was first published in the 1970's, these normative principles have not been disputed by subsequent participatory theorists.⁷⁶ As will be seen below, these theorists differ from Pateman only in the manner in which these normative principles can be incorporated into and applied to a modern democratic state and not in respect of the principles themselves.⁷⁷ The remainder of this chapter investigates each of these principles in more detail to determine what each of them seeks to introduce into the legal system. The next chapter explores how these principles were denied during apartheid and enhanced during the constitutional era.

2.2 The normative principles of participatory democratic theory

Participatory democracy is often associated with direct democracy (the classical democratic theory) and, as such, seems like a suitable starting point for an assessment of the principles underlying participatory democracy. 'Direct democracy may be defined as a system of government in which major decisions are taken by the members of the political community

⁷³ Robert A Dahl *Preface to Democratic Theory* (1956) at 1.

⁷⁴ Roux *op cit* note 15 at 10 - 14.

⁷⁵ Pateman *op cit* note 22.

⁷⁶ CB Macpherson *The Life and Times of Liberal Democracy* (1979) or Benjamin Barber *Strong Democracy Participatory Politics for a New Age* (1984).

⁷⁷ Michael E Morrell 'Citizens' Evaluations of Participatory Democratic Procedures: Normative Theory Meets Empirical Science' (1999) Vol 52, No 2 *Political Research Quarterly* at 293.

themselves, without mediation by elected representatives.⁷⁸ In Athenian times when this form of democracy was practised, women and slaves were not considered to be 'citizens' able to participate in this decision-making process and it would not be considered 'democratic' by today's standards. This theory, however, represents a system of governance where there must be maximum participation by all those persons that were eligible to participate in all decisions.

This Classical notion of democracy (and the central role that participation plays) was rejected by contemporary theorists such as Joseph Schumpeter on the basis that maximum participation of all citizens was based on 'empirically unrealistic foundations'.⁷⁹ Similarly, Berelson⁸⁰ stated that, in order to have maximum participation (and the successful implementation of the classical theory of democracy), all participants must be interested in political decisions and participate in such decisions.⁸¹ The primary (and limited) function of participation according to these theorists is to vote for representatives who are responsive to the needs of the electorate by virtue of the fact that they may be removed from office at the next election should they fail to act according to the general will.⁸² In this theory, maximum participation is not required in voting for such representatives. In fact, these theorists claimed that maximum participation could lead to instability of the political system.⁸³ According to them, all that is required is that sufficient people participate to ensure that the democratic methods (i.e. the appointment of leaders) can function⁸⁴ and that there is a healthy degree of authoritarianism in order for the democratic method to work efficiently.⁸⁵

In the 1960's and 1970's, following growing dissatisfaction that the 'existing institutions of representative democracy [were] inadequate as channels for effective political expression'⁸⁶ many 'student, women's, civil rights and peace movements'⁸⁷ called for alternate forms of engagement which could function alongside representative democracy. It is out of this conflict that democratic participatory theory was born. In her influential work *Participation and Democratic Political Theory*⁸⁸ Pateman rejects the criticisms of the

⁷⁸ Roux *op cit* note 15 at 10 - 4.

⁷⁹ Pateman *op cite* note 22 at 4.

⁸⁰ Bernard R Berelson, Paul F Lazarsfelv and William N McPhee *Voting* (1954) at 307.

⁸¹ Ibid.

⁸² Dahl *op cit* noted 13 at 133 - 4.

⁸³ Ibid Chapter 3.

⁸⁴ Pateman *op cit* note 22 at 14.

⁸⁵ Harry Eckstein *A Theory of Stable Democracy* (1961) at 20.

⁸⁶ Frank Cunningham *Theories of Democracy*(2002) at 141.

⁸⁷ Ibid.

⁸⁸ Pateman *op cit* note 22.

Classical theory of democracy discussed above, claiming that the contemporary theorists have misinterpreted them.⁸⁹

Drawing on the theories of Jacques Rousseau, John Stuart Mill and GHD Cole, Pateman proffers her participatory democratic theory (which includes the democratization of non-political spheres such as the workplace). In doing this she sets out the inherent benefits of participatory democratic theory:

- Firstly, by actively participating in participatory processes, IAP's are educated so that they come to understand the common good and to align their own private interests with that common interest;⁹⁰
- Secondly, it allows participants to exercise a degree of control over their destiny in that they believe that by participating they can influence the outcome of any decision that may affect them⁹¹ and
- Thirdly, it results in decisions which are either acceptable to the IAP's or that were reached in a manner that is suitable to IAP's.⁹²

I refer to these three principles below as *Principle 1: The Educative Effect*, *Principle 2: The Principle of Control* and *Principle 3: The Social Licence to Operate*, respectively.

The theories of other participatory democratic theorists such as Macpherson⁹³ and Barber⁹⁴ iterate these objectives. Macpherson states that, in order for a political system to achieve participatory democracy, there needs to be 'a change in people's consciousness...from seeing themselves and acting as...consumers to seeing themselves and acting as exerters and enjoyers of the exertion and development of their own capacities.'⁹⁵ In this way, in order to develop their consciousness of a common interest, the participants need to participate actively in participatory processes and, in so doing, they will enjoy the benefits (i.e. control over their destinies) associated. This is congruent with what has been stated in the first two principles above. Provided that the ultimate decisions accord with this common interest, the IAP's will find the decision to be acceptable. This is in line with *Principle 3: The Social Licence to Operate*.

⁸⁹ Ibid at 103.

⁹⁰ Section 2.3 *Principle 1: The Educative Effect* below.

⁹¹ Section 2.4 *Principle 2: The Principle of Control* below.

⁹² Section 2.5 *Principle 3: The Social Licence to Operate* below.

⁹³ Macpherson *op cit* note 76.

⁹⁴ Barber *op cit* note 76.

⁹⁵ Macpherson *op cit* note 76 at 99.

Similarly, Barber's theory of participatory democracy (or what he calls 'Strong Democracy') iterates the principles set out above. He describes Strong Democracy as 'politics in the participatory mode where conflict is resolved in the absence of an independent ground through a participatory process of ongoing [*Principle 1: The Educative Effect*], proximate self-legislation [*Principle 2: The Principle of Control*] and the creation of a political community capable of transforming dependent, private individuals into free citizens and partial and private interests into public goods [*Principle 3: The Social Licence to Operate*].'⁹⁶ These theories only differ from Pateman in the manner in which participatory democracy can be incorporated into the modern state.⁹⁷

'By the 1980's the attention of most political theorists turned in other directions, interest in democratic theory waned and, in particular, participatory democratic theory became unfashionable.'⁹⁸ By the 1990's it was argued that deliberative democracy had taken its place.⁹⁹ Whether this is true or not is immaterial to the present enquiry as the principles of deliberative democracy are, for all intents and purposes, the same as those discussed above. The main distinction between deliberative and participatory democracy is the distinction between the 'modes' and 'sectors' of political participation. Hilmer concisely sets out this distinction:

'The difference between 'modes' and 'sectors' of political participation is a useful distinction to make at this point. Democratic theorists often refer to a physical location at which participation occurs, what might be labelled the sector of participation. This is not to be confused with forms of political action, which might be labelled the mode of participation. For example, a sector includes social, civil, and economic realms: the household, classroom, neighbourhood, associations, or as in Pateman's study, the workplace; and also governmental realms: local and regional seats of political power and bureaucratic administration; whereas the mode might include deliberation, cooperative ownership and management, collective decision-making, administration, and so on. Thus while some participatory democratic theorists focus on traditionally non-political sectors as a potential site for participatory democracy, the deliberation, collective decision-making, and voting that takes place in that sector are distinguished as modes of participation. While participatory democratic theorists may not devote equal time to both sectors and modes of participation, it is important to note that each are assumed to be important facets of participatory democratic theory.'¹⁰⁰

Deliberative democrats focus on a particular mode of participation (i.e deliberation) in support of their theory. The principles that should be achieved through deliberation, however, are similar (if not the same) as those of participatory democracy. The seminal theorist in this

⁹⁶ Barber *op cit* note 76 at 132.

⁹⁷ Macpherson *op cit* note 76 at 94.

⁹⁸ Carole Pateman 'Participatory Democracy Revisited' (2012) Vol 10 No 1 *Perspectives of Politics* at 7.

⁹⁹ Jeffrey D. Hilmer 'The State of Participatory Democratic Theory' (2010) Vol 32, No 1 *New Political Science* at 51.

¹⁰⁰ *Ibid* at 46.

field, Jürgen Habermas, has been interpreted as stating that deliberative democracy 'revolves around the transformation rather than simply the aggregation of preferences'.¹⁰¹ As mentioned above (and explored in more detail below), *Principle 1: The Educative Effect* is predicated on the changing of individuals' interest through discussion and debate and not merely the sum of preferences. This form of debate, according to Gutmann and Thompson should continue until 'mutually acceptable decisions'¹⁰² are reached.¹⁰³ Although not specified as a requirement of deliberative democracy, by reaching outcomes that are acceptable to all parties, the IAP's are likely to achieve *Principle 2: The Principle of Control* in that they will have exercised control over their own destiny.

In addition to this form of deliberation, Gutmann and Thompson suggest that the other principles of deliberative democracy are 'publicity' and 'accountability'. Publicity requires that the reasons for any decisions are made public and accountability requires that decision-makers be held responsible for the decisions that they have made.¹⁰⁴ These components form part of *Principle 3: The Social Licence to Operate* in that holding decision-makers to account for incorrect decisions or decisions that do not reflect the common interest ensures that acceptable decisions are made or, at least, ensures that the process followed in reaching that decision is fair. The similarity between the key factors underlying participatory and deliberative democracy is most evident when considering an example.

Hartz-Karp published *A Case Study in Deliberative Democracy: Dialogue with the City*¹⁰⁵ which reported on the outcomes of a deliberative forum aimed at engaging the people of Perth, Australia, with planning and infrastructure development in the city. In developing this forum, the Minister of Planning and Infrastructure adopted the definition of deliberative democracy prescribed by the Deliberative Democracy Consortium that iterates the principle set out above:

'Deliberation is an approach to decision-making in which citizens consider relevant facts from multiple points of view, converse with one another to think critically about options before them and enlarge their perspectives, opinions and understandings.'

¹⁰¹ J Elster (ed) *Deliberative Democracy* (1998) at 1.

¹⁰² Amy Gutmann and Dennis Thompson *Democracy & Disagreement* (1996) at 1.

¹⁰³ Gutmann and Thompson indicate that this form of deliberation only occurs in respect of deliberative disagreements which are defined as disagreements between parties in respect of matters that are worthy of mutual respect. Where one argument is not worthy of respect (i.e. a view endorsing racism) there is no duty, they argue, to deliberate.

¹⁰⁴ Gutmann & Thompson *op cit* note 102 at 8.

¹⁰⁵ Janette Hartz-Karp 'A Case Study in Deliberative Democracy: Dialogue with the City' (2005) Vol 1, Issue 1 Article 6 *Journal of Public Deliberation*.

Deliberative democracy strengthens citizens' voices in government by including people of all races, classes, ages and geographies in deliberations that directly affect public decisions. As a result, citizens influence – and can see the result of their influence on – the policy and resource decisions that impact their daily lives and their future'.¹⁰⁶ [emphasis added]

With this understanding of democracy, the Minister went on to state:

'We need to reinforce that we are a democracy, the problems confronting government are the problems of the community and we have to work together to solve them. We need to make democracy richer, providing opportunities for everyone to participate creatively and critically in community affairs, connecting individuals, building trust, respect and confidence in our democratic processes and in the future'.¹⁰⁷ [emphasis added]

Having conducted a number of consultative and deliberative processes in the past, the Department of Planning and Infrastructure developed *Dialogue with the City*, a deliberative process aimed at engaging citizens on planning an infrastructure development in Perth to make it 'the world's most livable city by 2030'.¹⁰⁸ This process was judged against the criteria of inclusivity, deliberation and influence.¹⁰⁹ Inclusivity assessed whether a diversity of views contributed to the debate and whether the participants who held these diverse views were afforded an opportunity to participate. This reflects *Principle 1: The Educative Effect*. Also in line with this principle, deliberation requires 'open dialogue, access to information, space to understand and reframe issues, respect and movement towards consensus'.¹¹⁰ The movement towards consensus also hints at *Principle 3: The Social Licence to Operate* which requires that IAP's agree on the outcome of the process. Whether this was achieved through the deliberative process will be discussed briefly below. Finally, by influencing the decision-making process the IAP's exercise control over the planning and infrastructure of the city and, as a result, effect control over their own destinies (*Principle 2: The Principle of Control*).

In implementing the *Dialogue with the City* programme IAP's were initially sent surveys to

'determine the issues of prime concern to the community and to ascertain their values and views of future development of the city.

To help inform the public, comprehensive issues papers were published on the web, and an interactive web site enabled browsers to access information, input ideas and exchange views. To make this information more accessible to the broader community, the daily newspaper provided full-page feature articles, each feature story based on one of the issues papers. The aim was to interest people in the issues, help them understand the complexities and varying viewpoints and encourage debate as well as participation at the large, interactive forum'.¹¹¹

¹⁰⁶ Ibid at 1 quoting the Deliberative Democracy Consortium (2003), researcher and Practitioner Conference, Maryland USA.

¹⁰⁷ Ibid at 1 quoting the Minister of Planning and Infrastructure, Alannah MacTiernan.

¹⁰⁸ Ibid at 3.

¹⁰⁹ Ibid.

¹¹⁰ Ibid at 2.

¹¹¹ Ibid at 3.

The interactive forum was developed in a manner which ensured that the representatives included the citizens' diverse viewpoints. In doing so, it became apparent that certain members of the population were underrepresented.¹¹² Steps were taken to ensure that these participants were informed and heard and would be able to participate in the interactive forum.¹¹³

Having identified the participants that would be involved in the deliberative process, a 'variety of strategies were developed to encourage open dialogue, respect, access to information, and space to understand and reframe issues, and movement toward consensus. One of the most important of these was to encourage open and free discussion through small-group dialogue between diverse participants'.¹¹⁴ To ensure that this was achieved, IAP's were purposely grouped together with those who held differing views.¹¹⁵ The groups' collective desires for the future as well as their likes and dislikes regarding planning and infrastructure in Perth were recorded and common themes were shared with the larger group.¹¹⁶ Following this, each smaller group of IAP's was invited to participate in a 'hands-on planning game' aimed at compelling the IAP's to find trade-offs and negotiate solutions.¹¹⁷ 'The purpose of the planning game was to move participants from the theoretical realm of scenarios to practical allocation of the housing, industry, commerce, etc. that would be required in such a context. Trade-offs and a search for alternatives would be necessary'¹¹⁸ in developing an acceptable plan of the city. These plans were shared with the larger group to identify common themes and, ultimately, to reach consensus on the planning lay out.

Following the deliberative forum,

'[q]ualitative analysis of participant feedback forms pointed to their high satisfaction with the deliberative process...[F]orty two percent (42%) said they changed their views as a result of the dialogue, while many more admitted to broadening their views. Over ninety nine percent (99.5%) of participants thought that the deliberations went okay or great. Most importantly, ninety seven percent (97%) indicated they would like to participate in such an event again'.¹¹⁹

Participation, however, did not end there. During the implementation phase of the project, a team of representatives which participated in the *Dialogue with the City* was appointed to monitor the implementation of the project to ensure that it complied with the agreed map. It

¹¹² Ibid at 4.

¹¹³ Ibid.

¹¹⁴ Ibid.

¹¹⁵ Ibid at 5.

¹¹⁶ Ibid.

¹¹⁷ Ibid.

¹¹⁸ Ibid at 6.

¹¹⁹ Ibid at 7.

was their responsibility to ensure that the 'constituent groups could "'live with" the proposal'.¹²⁰

While deliberative democracy considers only one kind of mode of participation, the above example indicates that it has the potential to give effect to the democratic participatory principles espoused by Pateman. The nature and extent of these principles will now be considered as they will inform the baseline objectives of participation in the CFPP.

2.3 Principle 1: The Educative Effect

Rousseau's theory is based on the individual's role in the political decision-making process. That is, the function of participation is not only the process of voting for representatives (i.e. the institutional arrangement) but also the psychological development of the individual and the relationship between this development and the institutional arrangement.¹²¹ To achieve this psychological development, the institutional arrangement (or participatory process) must be educative so that the individual is able to perform 'responsible, individual social and political action.'¹²² Although Rousseau does not explain how this educative process should be conducted, he indicates that it is one where the 'individual is educated to distinguish between his own impulses and desires [and]...learns to be a public as well as a private citizen...[and] through this educative process the individual will eventually come to feel little or no conflict between the demands of the public and private spheres'.¹²³ The first participatory democratic principle considers whether the participatory process educates the individual in distinguishing between his personal interest and the common interest and (in so doing) eliminates polarized views.

To determine how best to implement this principle in practice, it is necessary to understand how individuals learn 'responsible individual social and political action.' A literature review on education in colleges reveals that students struggle to reach their academic potential in 'traditional classroom learning' where a teacher lectures or merely transfers a fixed amount of information to students¹²⁴ - a process similar to the EIA public participation process where the EAP presents the EIA report. The same results were identified in the business environment where an estimated \$210 billion spent on traditional

¹²⁰ Ibid.

¹²¹ Pateman *op cit* note 22 at 24.

¹²² Ibid.

¹²³ Ibid at 25.

¹²⁴ Kenneth A Bruffee 'Collaborative Learning and the "Conservation of Mankind"' (1984) Vol 46 No 7 *College English* at 637.

lecture-based staff development resulted in a behavioural change in less than 10% of employees.¹²⁵ The reason advanced for such a poor performance by students and employees alike is that the recipients of information are merely 'spectators'¹²⁶ in the process.¹²⁷ In fact, participants are likely to remember only 20% of the information they receive passively.¹²⁸ By participating actively, however, participants will remember 70% of what they say and 90% of what they do.¹²⁹ Remembering information is only part of the educative effect: in order to apply this information to other circumstances, information must not only be recalled but also comprehended.

Comprehension is more effectively achieved (according to the Taxonomy of Learning) through collaborative learning mechanisms.¹³⁰ Smit argues that collaborative learning applies in any situation where group interaction occurs or is advocated.¹³¹ This assessment, however, is not strictly correct as individuals learn not 'because they are two, but because they perform some activities [that...generate] extra activities (explanation, disagreement, mutual regulation,...) which trigger extra cognitive mechanisms (knowledge, elicitation, internalisation, reduced cognitive load,...)'.¹³² The 'extra activities' which trigger the cognitive development required for the educative effect are: (1) the participants must collectively construct knowledge; and (2) where impasse is reached, participants must enter

¹²⁵ Maryam Alavi 'Computer-mediated Collaborative Learning: An Empirical Evaluation' Vol 18 No 2 (Jun 1994) *MIS Quarterly* at 160.

¹²⁶ D W Johnson, R T Johnson and C A Smith 'Cooperative Learning: Increasing College Faculty Instructional Productivity' (1991) *ASHE-ERIC Higher Education Report No 4*.

¹²⁷ This passive form of learning can best be compared to 'when a toddler is watching a children's television program, the toddler may dance and sing with the music. The toddler is not interacting; he or she is *reacting* to what is playing. The responses toddlers exhibit during a children's television show are examples of information learned passively. While watching a television show, the viewer 'passively' watches the show develop. A viewer has no way of interacting with the program. One can obviously learn while being passive, but passive learning is not the best way of learning complex information.' (Bahaudin G Mujtaba 'Facilitating Through Collaborative Reflections to Accommodate Diverse Learning Styles for Long-Term Retention' (2005) Vol 32 *Developments in Business Simulations and Experiential Learning* at 229).

¹²⁸ A R Arunachalam 'Bringing out the Effective Learning Process by Analyzing of E-Learning Methodologies' (2014) Vol 7(s5), 41 - 43 *Indian Journal of Science and Technology* at 41.

¹²⁹ *Ibid* at 41.

¹³⁰ Robert G Boutilier and Ian Thomson 'Modelling and Measuring the Social Licence to Operate: Fruits of a Dialogue between Theory and Practice' (2011) *Social Licence*.

¹³¹ David W Smit 'Some Difficulties with Collaborative Learning' (1994) *Composition Theory for the Postmodern Classroom* at 69 - 70.

¹³² Pierre Dillenbourg 'What do you mean by collaborative learning' in P Dillenbourg (Ed) *Collaborative Learning: Cognitive and Conceptual Approaches* (1999) at 1 - 19. Also see Alavi *op cit* note 125 at 161 and R. Hamalainen and M Arvada 'Scripted Collaboration and Group-Based Variations in Higher Education CSCL Context' (2009) Vol 53 No 1 *Scandinavian Journal of Educational Research* at 1 - 16.

into group problem-solving mechanisms to create solutions.¹³³ These two components will be explored below.

2.3.1 Constructing Knowledge

According to the constructivist theory, knowledge is a function of 'individual perceptions and experiences'¹³⁴ which are 'situation-bound or context-dependent'.¹³⁵ The subjective nature of individual knowledge (that is, the private interest) means that, when collaboration occurs, the participants are exposed to different perspectives¹³⁶ which are often based on 'incompatible values, agendas and strategies.'¹³⁷ Differing views compel higher-order thinking by participants, moving them 'beyond their existing levels of understanding through a range of cognitive activities, such as elaborating, explaining ideas and concepts, questioning, argumentation, resolving conceptual discrepancies and metacognitive regulation of the learning process.'¹³⁸

This remains true even when the information under discussion is technical in nature. In circumstances where decisions are informed by technical information, authors have argued that technical experts (or 'elites') should work with administrators in reaching decisions to the exclusion of lay persons.¹³⁹ As there is seldom 'one scientific answer', the elites would (in debating a solution) trigger the extra cognitive development required by the educative effect.¹⁴⁰ There would be no such development for lay persons as they would be excluded from the process. This is contrary to *Principle 1: The Educative Effect*, in that:

- these persons would not learn how to perform responsible individual social action and

¹³³ Carl E Wieman, Georg W Rieger and Cynthia E Heiner 'Physics Exams that Promote Collaborative Learning' (2014) Vol 52 *The Physics Teacher* at 53; Georg W Reiger and Cynthia E Heiner 'Examinations That Support Collaborative Learning: The Students' Perspective' (2014) Vol 43 No 2 *Journal of College Science Teaching* at 46; C-P Lin, W Chen, S-J Yang, W Xiet and C-C Lin 'Exploring students' learning effectiveness and attitude in Group Scribbles-supported collaborative reading activities: a study in the primary classroom' (2014) 30 *Journal of Computer Assisted Learning*.

¹³⁴ Sarah L Frank 'Collaborative Learning and Web-based Instruction in Cognitive Apprenticeship Model' (2000) Volume 27 *Developments in Business Simulation & Experiential Learning* at 188.

¹³⁵ Ibid. Also see Yves Sinotmer, Carsten Herzberg and Anja Rocke 'Participatory Budgeting in Europe: Potentials and Challenges' (2008) Vol 32 1 *International Journal of Urban and Regional Research* at 166.

¹³⁶ Mizuho Iinuma, Takashi Matsushashi, Tagiru Nakamura and Hiroaki Chiyokura 'Collaborative Learning Using Integrated Groupware: A Case Study in Higher Education Setting' (2014) Vol 4 No 4 *International Journal of Information and Education Technology* at 351.

¹³⁷ S E Daniels and G B Walker 'Collaborative Learning: Improving Public Deliberation in Ecosystem-based Management' (1996) 16 *Environmental Impact Assessment* at 78.

¹³⁸ Jie Lu and Daniel Churchill 'Using social networking environments to support collaborative learning in Chinese university class: Interaction pattern and influencing factors' (2014) 30(4) *Australian Journal of Educational Technology* at 473.

¹³⁹ D Fiorino *Participation and Environmental Risk: A Survey of Institutional Mechanisms Science, Technology & Human Values* (1990) Vol 15 No 2 at 227.

¹⁴⁰ Daniels and Walker *op cit* note 137 at 73.

- it is based on the assumption that only technical skill and knowledge is important in decision-making.

Although lay persons do not have the knowledge to engage with the elites on a technical level, they have local knowledge and experience which may be relevant to the decision-making process as these persons 'are in the best position to make the final choice about....alternatives and trade-offs based on individuals' needs and preferences'.¹⁴¹ Therefore, the construction of knowledge requires that all parties engage with one another to express, defend and explain their respective views and, in doing so, trigger the extra cognitive development that democratic public participation seeks to achieve.¹⁴² Where these entities are unable to reach consensus on an outcome, collaborative learning requires that the parties enter into extra cognitive development through problem-solving mechanisms.

2.3.2 Problem-Solving Mechanisms

Collaborative problem-solving does not mean that participants must develop a completely new solution.

'Constructing improvements rather than solutions requires parties to understand situations in terms of their complexity. This understanding can be fostered by activities that require systems thinking, rather than linear, single-issue perspectives. [Collaborative learning] achieves systemic learning by encouraging participants to focus on their concerns and interests related to the situation, thus freeing them from the more rigid task of taking positions or making demands. Suggestions for improvements grounded in these concerns are ultimately debated to determine if they represent both "technically desirable and culturally feasible" change'.¹⁴³

Within the context of EIA, the EAP plays an essential role. It is his or her responsibility to moderate the public participation process to ensure that an appropriate solution is achieved. Various techniques can be used when solving problems, depending on the nature of the relationship between the parties, the nature of the disagreement and the ultimate goals that the parties wish to achieve. These techniques require that the EAP understands the human element in any form of 'negotiation'. That is, he or she needs to understand how the participants view the proposed activity (i.e. their pre-conceived ideas about the developer, the activity, the impact, the administrator) as well as the emotional impact that the proposed

¹⁴¹ C Charles and S DeMaio 'Lay Participation in Health Care Decision Making: A Conceptual Framework' (1993) *Journal of Health, Politics, Policy and Law* at 897 - 8.

¹⁴² Muso *et al op cit* note 23 at 107.

¹⁴³ Daniels and Walker *op cit* note 137 at 83.

project will have. In all instances the key to collaborative problem-solving is to communicate continuously with IAP's.¹⁴⁴

By understanding the participants in the process, the EAP can better understand each participant's interests in the negotiation and assist parties to avoid deadlocks over positions.¹⁴⁵ For example, parties may be at loggerheads regarding the position of a proposed substation. The developer may argue that the site is the only feasible site in the area for the construction of the substation while the community argue that they have concerns regarding their children's safety as the proposed substation will border the park where their children play and so do not want the substation built. It is the EAP's responsibility to assist the parties in recognizing that both options are possible - the substation can be built with appropriate security.

This example perhaps over-simplifies the complexity associated with the resolution of issues during the EIA process but it highlights that (on occasion) participants can get locked into the positions for and against a project or activity on principle without understanding the interests that the other party is trying to protect. In certain circumstances resolving interests cannot be easily achieved. For example, two parties may have competing and mutually exclusive interests in the use of a property. In this situation, neither party will be willing to compromise and undertake their activity on an alternate property. A traditional method of resolving competing interests is to 'split the difference', that is, to divide the property in half or refuse both applications. This suggestion is not acceptable in all instances. The EAP needs to assist the parties in realizing that splitting the difference is not the only option.

In these circumstances it may be necessary to create new options to break the stalemate. To ensure a fair process and outcome, the parties can agree on the rules or principles governing this interactive process. In addition, exercises such as role-playing may be a successful tool in assisting participants in considering different views, exploring alternatives and seeking creative solutions.¹⁴⁶ The independence of the mediator or EAP is critical in this process as only when all the parties believe that their views are being dealt with fairly and equitably will they accept the problem-solving techniques suggested by the EAP and allow themselves to be persuaded by the views expressed by other participants.

¹⁴⁴ Fisher and Ury *op cit* note 24 a 91.

¹⁴⁵ Ibid.

¹⁴⁶ Lim *et al op cit* note 24 at 159.

Collaborative problem-solving has been effectively implemented in the participatory budgeting process. Participatory budgeting originated in Port Alegre in Brazil and has since been rolled out in various other municipalities in Brazil, South America and the world. In this process, municipalities divest a portion of their decision-making powers in respect of the allocation and spending of municipal funds to the community.¹⁴⁷ As will be explored below, this divestiture of decision-making power is also a requirement for purposes of democratic participatory theory (*Principle 2: The Principle of Control*). Within the context of collaborative learning, however, public involvement in participatory budgeting is an example of where the educative effect is achieved:

‘Through taking part in public discourse, individual participants learned to transform their personal needs into public interests...Discussions in the public sphere also served to broaden appreciation of the needs of others, thus building solidarity, as Roselaine, one of the participants, describes:

Even I only thought of my own street when I first took part in participatory budgeting. But then I met other people and communities and learned of much greater problems. What I thought was a huge problem was nothing compared with the situations of some of the others. The question of having no place to live, sleeping under a piece of cloth, or open sewage close to where the children run and play. I forgot about my street, so that even today it still hasn’t been paved’.¹⁴⁸

This is not the sole example of where collaborative learning has shifted the focus of the participants. Cabannes’ findings on participatory budgeting in 25 countries throughout Latin America and Europe indicates that involving citizens in participatory budgeting has led to a change in the tax-paying habits of those citizens.¹⁴⁹ Through this process, the population is aware of the extent and limits of municipal budgets. In Puerto Asis, the participatory budgeting advisors indicated that the public’s knowledge of the ‘common good’ was not only developed but also

‘[t]he community, on learning what the municipality’s budgetary and financial situation is, becomes aware of its budgetary restrictions. Then, when there are not enough resources for the implementation of its projects, the community decides to collaborate with personnel, financial resources or materials, aiming not only at increasing the resources available to them, but enlarging the infrastructure initially approved’.¹⁵⁰

in the budget.

¹⁴⁷ Terrence Wood and Warwick E Murray ‘Participatory Democracy in Brazil and Local Geographies: Port Alegre and Belo Horizonte Compared’ (2007) 83 *European Review of Latin America and Caribbean Studies* at 19.

¹⁴⁸ Andres Novy and Bernhard Leubolt ‘Participatory Budgeting in Port Alegre: Social Innovation and Dialectical Relationship of State and Civil Society’ (2005) Vol 42 No 11 *Urban Studies* at 2030.

¹⁴⁹ Y Cabannes ‘Participatory budgeting: a significant contribution to participatory democracy’ (2004) Vol 16 No 1 *Environment and Urbanization* at 36.

¹⁵⁰ Ibid at 36. It is worth noting that the Municipal Finance Management Act 56 of 2003 contains provisions regarding the publication and consultation on the annual budget. In particular, the relevant information should be included on the municipality’s website (which must include the annual report) and must invite comments or the public and the Auditor General.

In summary, the educative effect enunciated by Rousseau can be refined as follows: does the public participation process result in collaborative learning? That is, does it facilitate interaction between participants, experts and authorities in the expression of differing views leading to debate and discussion and culminating in a change of behaviour, position or amicable solution? If this question can be answered affirmatively, then the process meets *Principle 1: The Educative Effect*.¹⁵¹ Research¹⁵² has shown that these objectives can be achieved equally in online collaborative learning and face-to-face interactions.¹⁵³

Closely related to the requirement to learn is that the participants must have sufficient control over the administrative process and the ultimate decision to ensure that an amicable solution is developed. This will be explored in the second democratic participatory principle: *Principle 2: The Principle of Control*.

2.4 Principle 2: The Principle of Control

A key component in the theory of participatory democracy is the notion of freedom within the constraints of society. According to Rousseau's theory, a person is free where he is obedient to laws that he has prescribed for himself. Based on this understanding, an 'individual's actual sense, as well as his sense of freedom is increased through participation in decision making because it gives him a very real degree of control over the course of his life and the structure of his environment'¹⁵⁴ in that, if he participates, he will shape laws in a way that are more acceptable to him.

¹⁵¹ Elvira Popescu 'Providing collaborative learning support with social media in an integrated environment' (2014) 17:199 - 212 *World Wide Web* at 200.

¹⁵² See Chapter 5.

¹⁵³ For more examples see Lu and Churchill *op cit* note 41; Sean P Goggins 'Designing Computer-support Collaborative Learning at Work for Rural IT Workers: Ensembles and Geographic Isolation' (2014) Vol 45 No 6 *British Journal of Educational Technology* at 1069 - 1081; Kewen Wu, Yuxiang Zhao, Julita Vassileva, Xiaoling Sun and Zhe Fan *How does awareness of task conflict motivate wiki-based collaborative learning? A design science approach* (2014) *PACIS 2014 Proceedings* Paper 261; Rebeca Soler Costa, Jose Luis Antonanzas Laborda and Icier Nadal Garcia 'Effective teaching methods in the master's degree: Learning strategies, teaching-learning processes, teacher training' (2014) Vol 1 *European Scientific Journal September* at 106 - 120 Catherine Westbrook 'Online Collaborative Learning in Health Care Education' (2014) *European Journal of Open, Distance and E-Learning* available at <<http://www.eurodl.org/?article=475>>; Frank *op cit* note 36 at 188; Popescu *op cit* note 53 at 200; David Curtis and Michael Lawson 'Exploring Collaborative Online Learning' (2001) Vol 5 Issue 1 *JALN* at 31; Deniz Palak and Melda Yildiz 'Teaching and Learning in the Global Classroom: Strategies for Designing Thinking Curriculum and Online Collaborative Learning Project' (2014) *Promoting Global Literacy Skills Through Technology-infused Teaching and Learning*; Chia-Cheng Hsu, Sin-Chin Chen, Kuo-sin Huang, Kuo-Kuang Huang and Yeah-Min Huang 'The Development of an Adoptive Group Composition System on Facebook for Collaborative Learning using an Artificial Bee Colony Algorithm' (2014) 8 No 1L *Applied Mathematics & Information Sciences* at 157 - 164.

¹⁵⁴ Pateman *op cit* note 22 at 26.

The second principle is *Principle 2: The Principle of Control* which requires that participation affords citizens a greater sense of control by granting them sufficient power to influence the final outcome of any decision or law (i.e. political efficacy). ‘Both the opportunity to participate, as well as the act of participation in policy decisions, can be expected to promote more positive views about the efficacy of individual political action’.¹⁵⁵ However, the opportunity to participate (on its own) is insufficient to ensure efficacious participation: ‘Much depends on how people take up and make use of what is on offer, as well as on supportive processes that can help build capacity, nurture voice and enable people to empower themselves’.¹⁵⁶ Any public participation process must also encourage and facilitate the development of political efficacy.

As Rousseau’s theory was developed in a non-industrialized city state,¹⁵⁷ Pateman looks at the participatory democratic theory of Mill and Cole which applied Rousseau’s participatory principles on a larger scale. Both Mill and Cole indicate that individuals will only develop political efficacy on a national scale if they have been educated on how to participate.¹⁵⁸ This ‘social training’ occurs in spheres other than the national political environment, such as the workplace, where individuals can effectively participate. Whether an individual’s sense of ‘freedom’ is achieved in this local non-political sphere depends on whether (and how) that sphere’s authority structure permits participation in the decision-making process. Where citizens are afforded such an opportunity, the empirical evidence reveals a positive correlation between participation and political efficacy.¹⁵⁹

Currently industry is structured in a hierarchical way (superiors-subordinates), meaning that workers have been ‘trained in subservience’¹⁶⁰ rather than in exercising control over the course of their lives. Similarly, in EIA and other public participation processes, EAP’s and IAP’s have been trained in positioning, opposition, distrust of the regulator and

¹⁵⁵ Shaun Bowler and Todd Donovan ‘Democracy, Institutions and Attitudes about Citizen Influence and Government’ (2002) Vol 32 No 2 *British Journal of Political Science* at 376.

¹⁵⁶ Andrea Cornwall ‘Unpacking “Participation”: models, meanings and practices’ (2008) Vol 43 No 3 *Community Development Journal* at 275.

¹⁵⁷ Pateman *op cit* note 22 at 22.

¹⁵⁸ Ibid at 37.

¹⁵⁹ Ibid at 45 - 6.

¹⁶⁰ Almond and Verba as quoted by Pateman *op cit* note 22 at 47: ‘if in most social situations the individual finds himself subservient to some authority figure, it is likely that he will expect such an authority relationship in the political sphere. On the other hand, if outside the political sphere he has opportunities to participate in a wide range of social decisions, he will probably expect to be able to participate in political decisions as well. Furthermore, participation in non-political decision making may give one the skills needed to engage in political participation’.

hostility and so lack the belief that they can change or modify the proposed activity or its impacts. Cole suggests that

‘[o]nly if the individual could become self-governing in the workplace, only if industry was organized on a participatory basis, could this training for servility be turned into training for democracy and the individual gain the familiarity with the democratic procedures, and develop the necessary "democratic character" for an effective system of large-scale democracy’.¹⁶¹

If self-governance is a requirement to develop political efficacy, it is necessary to consider what degree of control is required in order to optimize this sense of efficacy. According to Arnstein there is a distinction between ‘the empty ritual of participation and having the real power needed to affect the outcome of the processes.’¹⁶² To illustrate this, Arnstein developed eight types of participation ranging from non-participation to citizen power:

‘The bottom rungs of the ladder are (1) Manipulation and (2) Therapy. These two rungs describe levels of ‘non-participation’ that have been contrived by some to substitute for genuine participation. Their 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. Rungs 3 and 4 progress to levels of ‘tokenism’ that allows the have-nots to hear and to have a voice: (3) Informing and (4) Consultation. When they are preferred by power holders as the total extent of participation, citizens may indeed hear and be heard. But under these conditions they lack the power to ensure that their views will be heeded by the powerful. When participation is restricted to these levels, there is no follow-through, no ‘muscle’, hence no assurance of changing the status quo. Rung (5) Placation is simply a higher level of tokenism because the ground rules allow have-nots to advise, but retain for the power holder the continued rights to decide. Further up the ladder are levels of citizen power with increasing degrees of decision-making clout. Citizens can enter into a (6) Partnership that enables them to negotiate and engage in trade-offs with traditional power holders. At the topmost rungs (7) Delegated Power and (8) Citizen Control, have-nots citizens obtain the majority of decision-making seats, or full managerial power’.¹⁶³

Based on the understanding that the authority structure should facilitate the development of political efficacy and that participants should have a degree of control over the outcome of any decision, more attention should be given to partnership, delegated power and citizen control.

Citizen control (according to Arnstein) is the pinnacle of public participation. In terms of this, the public is ‘demanding the degree of power (or control) which guarantees that participants or residents can govern a program or institution, be in full charge of policy and managerial aspects, and be able to negotiate the conditions under which "outsiders" may change them’.¹⁶⁴ The traditional example that is volunteered for citizen control is the neighbourhood corporation which has direct access to the funds required to make decisions

¹⁶¹ Pateman *op cit* note 22 at 38 - 9.

¹⁶² Shelly Arnstein ‘A Ladder of Citizen Participation’ (1969) 35.4 *Journal of American Institute of Planners* at 218.

¹⁶³ Ibid at 220.

¹⁶⁴ Ibid at 223.

and execute these decisions. This form of participation is not practical for purposes of the modern democracy where the ultimate decision-maker is (directly or indirectly) elected as a representative and is not the public.¹⁶⁵ This form of public control, however, is not required for purposes of developing the desired efficacy. Having considered various examples of participatory processes within industry, Pateman concludes that full participation and consensus are not required to achieve political efficacy: partial participation (or even pseudo participation) will suffice.

In this context, 'full participation' is defined as that process in which the participants not only have the opportunity to influence decisions but also have the power to make decisions. 'Partial participation' refers to those situations in which individuals can influence decisions but do not have the power to make the final decision and 'pseudo participation' arises in situations where the final decision has been made and participants do not participate in making a decision but the manner in which the participation process is conducted creates a 'feeling' of participation.¹⁶⁶ An example of such participation is where the participants question the decision-maker on a decision that has already been taken.

What is evident from these categories is that parties must participate in decision-making and this does not include situations where a participant merely attends a meeting or is provided with information to undertake an activity. 'Participation requires the granting of actual influence over the content of the decisions to groups affected by those decisions. This definition implies that merely listening to public views at hearings is insufficient'.¹⁶⁷ This is (rightly) excluded from the definition of participation as this form of non-participation does not develop a citizen's democratic character. However, it is exactly this form of 'participation' that is largely relied upon by EAP's conducting public meetings during the EIA process.

While Pateman argues that the smallest amount of participation (pseudo participation) may result in political efficacy, she cautions that this may be short-lived as participants become disheartened in situations of pseudo participation as they eventually realize that they, in fact, do not have the ability (in these circumstances) to influence the decision. The lower levels of Arnstein's ladder and the topmost level seem inappropriate for developing suitable

¹⁶⁵ Ibid.

¹⁶⁶ Pateman *op cit* note 22 at 68 - 9.

¹⁶⁷ Lloyd C Irland and J Ross Vincent 'Citizen Participation in Decision Making - A Challenge for Public Land Managers' (1974) 27(3) *Journal of Range Management* at 182.

control that is congruent with democratic theory. The only forms of participation that may fit within the democratic model, it seems, are partnership and delegated authority.

Delegated power arises where the public exercise a dominant decision-making authority in respect of a particular decision and the success or failure of the decision can be attributed to the public. A variation of this model is where the citizens have a veto power over decisions which cannot be resolved through negotiation. Tritter argues this 'approach conceptualises user involvement activity as a contest between two parties wrestling for control over a finite amount of power. This adversarial model seems to exclude opportunities for collaboration and shared decision-making'.¹⁶⁸ Such an interpretation is contrary to the democratic theory in that collaboration (as discussed above) is an essential component of *Principle 1: The Educative Effect*. Where citizens know that they can exercise a veto power, there is no incentive to compromise, collaborate or problem-solve. As a result, delegated power encourages the party which holds the veto power to adopt a position and dig in his or her heels while the other party is compromised in order to avoid the veto. This is contrary to *Principle 1: The Educative Effect*.

Partnership, on the other hand, focuses on the redistribution of power through negotiation (collaboration) between the citizens and authorities. Partnerships generally arise (although this is not always the case) from prior hostile interactions between citizens and authorities in which citizens threaten to oppose any action by the authorities if they are not afforded a more active role in the decision-making process. In creating a partnership, the parties must collaborate to develop rules governing power-sharing, planning and decision-making.¹⁶⁹ Once these rules have been generally agreed, they cannot be changed unilaterally by either party. Although the ultimate decision-making power may still vest with the authorities, partnerships based on negotiation and collaboration can provide participants with enough power 'to negotiate any eleventh-hour objections.'¹⁷⁰

As a minimum, the rules governing power-sharing, planning and decision-making must include

'Such techniques as running meetings without agendas or presiding officers (or at worst, rating presiding officers); allowing officers minimal decision-making powers away from the general meetings; running meetings by consensus or sense-of-the meeting decision-making; refusing to limit

¹⁶⁸ J Tritter and A McCallum 'The snakes and ladders of user involvement: Moving beyond Arnstein' (2006) 76 *Health Policy* at 164 - 5.

¹⁶⁹ Cunningham *op cit* note 86 at 129.

¹⁷⁰ Arnstein *op cit* note 22 at 220.

discussion or debate; letting as many executive-administrative decisions flow from the whole body as possible, without delegation of responsibility to agents or committees; and encouraging the body to act immediately on decisions taken, that is, dropping the artificial division between meeting and non-meeting so that in the extreme the meeting is a community and the community is virtually a constant meeting'.¹⁷¹

Cornwall states that community-initiated engagement is more responsive than the legislated process, irrespective of how participatory that process may be.¹⁷² Groups which are created on the initiative of a number of people have a different character from those processes which are generated at the behest of the legislation. These characteristics include equality between the participants in that there is not an authority figure and associated power struggles. These platforms may also not be dominated by IAP's with particular viewpoints.

'Most commonly, they consist of people who come together because they have something in common, rather than because they represent different stakeholders or different points of view. These kinds of spaces can be essential for groups with little power or voice in society, as sites in which they can gain confidence and skills, develop their arguments and gain from the solidarity and support that being part of a group can offer'.¹⁷³

If the parties can develop the rules of the public participation process in line with these ideals, then, irrespective of any personal relationship or distrust between the parties, the participants will trust the process and should be satisfied that any decision generated from that process is fair - irrespective of outcome.¹⁷⁴ A fair procedure on its own, however, has been found wanting. The recent litigation between the Opposition for Urban Tolling Alliance ('OUTA') and The South African National Roads Agency Limited ('SANRAL') is an example of this.¹⁷⁵ Despite complying with the legislative requirements to implement toll fees, the

¹⁷¹ M Oppenheimer 'The Limitations of Socialism' in Benello and Roussopolous (Eds) *Case for Participatory Democracy: Some Prospects for a Radical Society* at pages 277 - 8; K Czapansky and R Manjoo 'The Right of Public Participation in the Law Making Process and the Role of Legislature in the Promotion of this Right' (2008) *University of Maryland School of Law Legal Studies Research Paper* No 2008-42 at 15 - 16.

¹⁷² Cornwall *op cit* note 156 at 275.

¹⁷³ Ibid.

¹⁷⁴ John R Parkins and Ross E Mitchell 'Public Participation and Public Debate Society and Natural Resource Management' (2005) 18 *Society and Natural Resources* at 536.

¹⁷⁵ *Opposition to Urban Tolling Alliance and Others v The South African National Roads Agency Limited and Others* No 90/2013. This series of cases highlighted the stark opposition between members of the public and government in respect of the decision by SANRAL and the Department of Transport to implement tolls for upgrading various highways between and surrounding Johannesburg and Pretoria. As far back as 1996, the White Paper on National Transport Policy highlighted the inadequacies of national transport system including the deficiencies in transport infrastructure following apartheid. In accordance with this policy, in October 2007 the then Minister of Transport announced the Gauteng Freeway Improvement Project (or GFIP) which provided for upgrades to various roads which would be funded by an electronic toll collection arrangement approved by Parliament. This announcement was followed by SANRAL publishing a notice of intention to toll and calling for comments in November 2007. On 15 January 2008 SANRAL applied for these roads to be declared toll roads. The application was approved by the Minister of Transport on 11 February 2008 and 28 March 2008 the relevant notices were published in the Government Gazette. Subsequent to the declaration, SANRAL conducted a number of presentations to the public. In May 2008 SANRAL announced the appointment of contractors who commenced with the upgrading and construction of the infrastructure. Barring a brief hiatus during the FIFA World Cup in 2010, the project was finally completed in that year. On 11 February 2011, the Director-General

decision by SANRAL and the Minister of Transport to toll was met with public opposition. This dispute is a prime example of where legislative compliance was insufficient to placate the community. While this example did not allow the participants to determine the rules of consultation, it does illustrate that process alone is insufficient where IAP's do not believe that their participation can influence the outcome of a public participation process. *Principle 2: The Principle of Control* can therefore be restated to say that IAP's must be afforded sufficient power to influence the outcome of any law or decision that affects them and shape their destiny. This does not mean that there must be a delegation of authority and responsibility to the IAP's as such an approach would be impractical in an industrialised society. IAP's must however have input into the manner in which the public participation process is conducted so that they feel (by participating in that process) that they have the opportunity to influence the outcome of the process. *Principle 2: The Principle of Control* (or the notion of control) when used in this thesis must therefore be understood to refer to the opportunity to influence a decision or outcome.

Moote *et al*, however, indicate that political efficacy requires not only that participants have a sense or belief that they could potentially influence the decision but, through the public participation process, must, in fact, *support* the final conclusion as this will expedite the implementation of the decision and reduce or eliminate the appeals against it.¹⁷⁶ This degree of support for a decision is discussed in more detail below with respect to *Principle 3: The Social Licence to Operate*.

published the proposed toll tariffs in accordance with The South African National Roads Agency Limited and National Road Traffic Act 7 of 1998 with the intention that these tolls would be implemented in June of that year. 'The publication gave rise to a massive public outcry. In response, the Department of Transport suspended the implementation of the tolling while the Minister announced that a steering committee would be formed to address the public's concerns. The mandate of the steering committee was to review the amount of the toll tariffs. It was not to revisit the mechanism of tolling itself. Yet the appellants point out that numerous parties including the appellants themselves, made representations to the steering committee that tolling itself should be discontinued, in the belief, so they said, that SANRAL and the Minister would reconsider and withdraw the implementation of tolling system as a whole. This belief, so they explained, was fueled by the widespread and unparalleled public opposition to tolling that even crossed political dividing lines' (at [14]). The meetings held by the steering committees clearly indicated that the purpose of the meetings was to discuss the amount of the toll and not to re-consider the user pays principle underlying tolling which Parliament supported. Following these meetings the toll tariffs were eventually published and implemented.

¹⁷⁶ Margaret Moote, Mitchel P McClaren and Donna K Chickering 'Theory in Practice: Applying Participatory Democracy Theory to Public Land Planning' 1997 Vol 21 No 6 *Environmental Management* at 878.

2.5 Principle 3: The Social Licence to Operate

It is generally accepted that decisions based on comments received during a public participation process are expected to be better informed, more effective and more robust.¹⁷⁷

While this statement seems logical and correct, it has not been scrutinized in light of the requirements of participatory democratic theory. As citizen control is not required to meet participatory democratic theory, administrators are still empowered to make decisions taking into account various competing interests not only based on the comments received during the public participation process but also on macro and micro economic, political and other factors. Although the educative effect is expected to align private and public interests, this is a normative goal and realistically it can be anticipated that the chasm between competing views may be lessened but it is doubtful that it will be completely eliminated. Despite this, it is still possible that participants may accept a decision even if consensus is not achieved. The tipping point of what is an acceptable decision and what is not will depend on how 'acceptance' is defined.

Those participants that subscribe to the 'process goals' of participation will deem decisions acceptable where the correct procedures are followed and requirements in terms of law have been complied with in reaching that decision. Acceptable decisions in terms of 'outcome objectives', on the other hand, mean that at the end of the participatory process the parties achieve outcomes which they sought leading into the public participation process. That is, the IAP's agree with the final decision made following a participation process. There are a number of examples of mass public objection to infrastructure development, such as the proposed pebble bed nuclear reactor;¹⁷⁸ the City of Cape Town against SANRAL and the proposed upgrades to the N1/N2 Toll Highways;¹⁷⁹ various companies and communities opposed to the N2 Wild Coast Toll Road;¹⁸⁰ and the Casa Maris Eco Estate at the foot of the Hottentots Holland Mountains outside the province's urban edge development policy.¹⁸¹ The fracking debate in the Karoo is likely to follow a similar trajectory as the Treasure Karoo

¹⁷⁷ Caron Chess and Kristen Purcell 'Public Participation and the Environment: De We Know What Works?' (1999) Vol 33 No 19 *Environmental Science and Technology* at 2684.

¹⁷⁸ *Earthlife Africa (Cape Town) v Director General Department of Environmental Affairs and Tourism and Another* 2005 (3) SA 156 (C).

¹⁷⁹ *City of Cape Town v South African National Roads Agency Limited and Others* 6165/2012.

¹⁸⁰ *Toyota South Africa Motors (Pty) Ltd and Others v Minister of Water and Environmental Affairs and Others* (case no: 3173/2012) and *Reinford Zukulu and Others v The Minister of Water and Environmental Affairs and Other* (case no: 18553/2012).

¹⁸¹ IOL Property 'Somerset West property development gets go-ahead despite many objections' available at http://www.iolproperty.co.za/roller/news/entry/somerset_west_property_development_gets last accessed on 12 February 2015.

Action Group has already been very active in opposition authorisation to undertake exploration activities for fracking the Karoo.¹⁸² This need to obtain not only the public's acceptance of a project or law or decision but, in fact, its approval is becoming increasingly prevalent.

The World Bank has referred to this approval as 'free, prior and informed consent of local communities and stakeholders',¹⁸³ but, in fact, it goes much further in that the participants' consent need not only be obtained but will also need to be maintained for the life of the activity.¹⁸⁴ Jim Cooney referred to this broader notion of consent as 'the social licence to operate',¹⁸⁵ with particular reference to the mining industry but it has since become a term used outside of mining.

In EY's *Business Risks Facing Mining and Metals 2014-2015*¹⁸⁶ ('the Report') the social licence to operate was identified as the third biggest business risk to the mining industry. The Report notes that '[a]n organization cannot rest on its laurels, nor assume that acceptance provided by the community and its stakeholders will always be maintained.'¹⁸⁷ This requires that participatory tools and engagement with the community is conducted on an on-going basis throughout the life of the project and a failure to obtain and maintain the social licence to operate can have numerous consequences:

'Protests, negative media coverage, violence, sabotage and other direct attacks on the business and its employees are all signs that a company is not an accepted part of the community. We have seen in the aftermath of the tragic Turkish mining accident, where 282 lives were lost, how questions over mine

¹⁸² IOL News 'Marchers protest against Fracking' (19 October 2013) available at <http://www.iol.co.za/news/south-africa/western-cape/marchers-protest-against-fracking-1.1594445> accessed on 30 November 2014; Engineering News 'Action Group want moratorium on Karoo Fracking applications' (5 April 2011) available at <http://www.engineeringnews.co.za/print-version/action-group-wants-moratorium-on-karoo-fracking-applications-2011-04-05> accessed on 30 November 2014; Moneyweb 'Treasure the Karoo pulls apart Shell's Environmental Plans' (5 April 2011) available at <http://www.moneyweb.co.za/moneyweb-special-investigations/treasure-the-karoo-pulls-apart-shells-environmenta?sn=2009+Detail> accessed on 30 November 2014; The Greentimes 'Calls to halt Karoo Fracking' (26 September 2011) available at <http://thegreentimes.co.za/calls-to-halt-karoo-fracking/> accessed on 30 November 2014.

¹⁸³ World Bank 'Striking a Better Balance: The World Bank and Extractive Industries' (2003) available at http://www.wds.worldbank.org/external/default/WDSP/IB/2004/09/21/000160016_20040921111523/Renfered/PDF/300010GLB.pdf accessed on 9 December 2014.

¹⁸⁴ Rory Pike 'The Relevance of Social Licence to Operate for Mining Companies' *Schroders Social Licence to Operate* July 2012.

¹⁸⁵ Miningfacts.org 'What is the Social Licence to Operate' available at <http://www.miningfacts.org/Communities/What-is-the-social-licence-to-operate/> accessed on 11 December 2014; Jason Prno and D Scott Slocombe 'Exploring the origins of "social license to operate" in the mining sector: Perspectives from governance and sustainability theories' (2012) 37 *Resources Policy* at 346.

¹⁸⁶ EY 'Business Risks Facing Mining and Metals 2014-2015' available at [http://www.ey.com/Publication/vwLUAssets/EY-Business-risks-facing-mining-and-metals-2014-2015/\\$FILE/EY-Business-risks-facing-mining-and-metals-2014-2015.pdf](http://www.ey.com/Publication/vwLUAssets/EY-Business-risks-facing-mining-and-metals-2014-2015/$FILE/EY-Business-risks-facing-mining-and-metals-2014-2015.pdf) accessed on 30 November 2014.

¹⁸⁷ Ibid at 16.

safety and consequent community outrage quickly damaged the reputation of the host governments, mine operators and more broadly the sector in Turkey. Recently too, the community and environmental activists blocked trains accessing the Maules Creek coal project in New South Wales, Australia, attempting to stop development because of alleged threats to the local bushland and allegations of corruption in the approval process'.¹⁸⁸

Examples of developers failing to obtain the social licence to operate before or during an activity are plentiful.¹⁸⁹

These examples highlight quite clearly where a person undertaking an activity has failed to obtain the social licence to operate. However, as this is not a physical licence, it is unclear how or when this person has been granted the licence. This is further complicated by the fact that the stakeholders may have differing expectations of what constitutes a 'successful' outcome.¹⁹⁰ What is clear is that the person seeking the licence cannot interpret silence as consent to undertake the activity. '[I]nterpreting tacit consensus as "social licence" can inadvertently lead companies to miscalculate the contingencies upon which points of agreement are made and underestimate their overall relative importance to particular groups'.¹⁹¹ The failure to dissent against a decision or project can be for various reasons, for example, where the community has disengaged from the process because they believe the decision to be a *fait accompli* or the community is mobilizing their attack on the process. Sometimes cultural beliefs of the community involved do not support the expression of disagreement.

One example¹⁹² of where cultural beliefs may inhibit participation is evident in an online collaborative learning investigation conducted by Lu and Churchill at a Chinese university where (owing to limited available face-to-face time) an online networking

¹⁸⁸ Ibid.

¹⁸⁹ Pike *op cit* note 184 at 6 - 7.

¹⁹⁰ Chess and Purcell *op cit* note 177 at 2685.

¹⁹¹ John R Owen and Denna Kemp 'Social Licence and mining: A critical perspective' (2012) *Resources Policy* available at <<http://dx.doi.org/10.1016/j.resourpol.2012.06.016>> accessed on 12 December 2014 at 4

¹⁹² There are numerous examples of where cultural beliefs may inhibit participation including: Ngo Vu Thu Hang, Marijn Roland Meijer, Astrid M W Bulte and Albert Pilot 'The implementation of a social constructivist approach in primary science education in Confucian heritage culture: the case of Vietnam' (2015) 10 *Cultural Studies of Science Education* 665 - 693; Thi Tuyet Tran 'Is the learning approach of students from the Confucian heritage culture problematic?' (2013) 12 *Education Resource Policy and Practice* 57 - 65; Thi Hong Thanh Pham and Peter Renshaw 'Formative assessment in Confucian heritage culture classrooms: activity theory analysis of tensions, contradictions and hybrid practices' (2015) Vol 40 No 1 *Assessment & Evaluation in Higher Education* 45 - 49; Ann-Sofie Isaksson, Andreas Kotsadam and Man Nerman 'The Gender Gap in African Political Participation: Testing Theories of Individual and Contextual Determinants' (2014) Vol 50(2) *The Journal of Development Studies* 302 - 318; M Kongolo and O.O. Bamgose 'Participation of Rural Women in Development: A Case Study of Tsheseng, Thintwa and Makhalaneng Villages, South Africa' (2002) Vol 4(1) *Journal of International Women's Studies* 79 - 92.

relationship was required.¹⁹³ The students were required to use the online network to complete various assignments. In particular, the students were encouraged to use blogs as a platform for recording ideas, processing information and ultimately learning as other students could critique their peers' work. As part of the group assignment, the students were required to collaborate by developing a wiki as this encouraged higher thinking.¹⁹⁴ Upon the completion of the assignments, the students were interviewed about the experience and the information contained on the online network (i.e. the blogs, wikis etc) was analysed. The exercise revealed that the students did not value the comments by their peers as they tended to be superficial (as a result of lack of knowledge and experience) when compared against their teacher.¹⁹⁵ Although the wikis were expected to aid collaboration in that students would be reviewing, contributing and editing each other's work, in practice this was not the case as the students tended to work individually, synthesise their comments and then merely publish them on the wiki page. There tended to be more collaboration when the teacher or authority figure was involved in the process. It was noted that cultural beliefs may have influenced the outcome of the study as some of the learners subscribe to the Confucian-Heritage Culture which promotes working alone, depending on teachers and avoiding conflicts – all beliefs that are not congruent with collaborative learning.¹⁹⁶

Cultural impacts on public participation processes are not specific to Asian communities. South Africa has a pluralistic legal system which recognizes customary law (and the social practices that comprise it) as an integral part of South African law which stands on an equal footing with other laws in South Africa.¹⁹⁷ Therefore, it is critical that, when engaging with traditional communities, cognisance is taken of customary laws and practices. Failing to do so may render the public participation process ineffective. For example, in some communities decisions can only be made at a community meeting where traditional leaders and community members are present to discuss and debate the relevant issues and decide what is best for that community. Only decisions made in this way will bind the community. Therefore, in these communities if members are engaged on an individual level, their personal preference or opinion would not be treated with the same level of

¹⁹³ Lu and Churchill *op cit* note 138 at 474.

¹⁹⁴ Ibid.

¹⁹⁵ Ibid at 480 - 1.

¹⁹⁶ Ibid at 483.

¹⁹⁷ Constitution *op cit* note 13 at s30, s31 and s211(3).

authority or support as the community decision. These practices and customs are specific to each community.¹⁹⁸

These examples highlights the importance of understanding the relevant community that is affected by a decision and the manner in which their custom or culture will grant the social licence to operate.¹⁹⁹ It is, therefore, imperative that some degree of confirmation is obtained from the community.

As the social licence to operate contemplates a situation where parties are able to negotiate, the person seeking the licence ('the proponent') should provide an opportunity for parties to express their expectations and ensure that these are incorporated into the social licence to operate.²⁰⁰ That is, the proponent is required to go beyond mere legal compliance and 'implies genuine and concerted efforts on the part of the [proponent] to engage in community building, operate in environmentally responsible manner and to generally integrate community concerns into its operations.'²⁰¹ Through this process, the proponent should be able to obtain confirmation of the licence. This does not mean that the proponent, in fact, needs to meet the expectation or obtain the community's approval of the proposed activity.

According to Boutilier and Thomson, the social licence to operate comprises four levels. These levels are inversely related to political risk. The lowest level of the social licence to operate is where the community has withdrawn or withheld the licence to operate. In this level, the proponent is likely to suffer significant opposition from the community in respect of any of its applications for licences or financing; it will bring claims for damages or compensation and report non-compliances to authorities. This is the situation in respect of the examples cited above where the social licence to operate has not been secured. However, if the activity²⁰² breaches what is referred to as the 'legitimacy boundary', the community will

¹⁹⁸ Milena Ivanovic 'The rose of tribal authorities in rural tourism development in South Africa: The case of the Kingdom of the Rain Queen' (2015) *African Journal for Physical, Health Education, Recreation and Dance* 37 – 54; Joanna Pickering and Thabiso Nyapisi 'A Community Left in the Dark: The Case of Mapela Struggles for Transparency and Accountability in South Africa's Platinum Belt' (2017) *In Good Company?: Conversations around transparency and accountability in South Africa's extractive sector* at 27 – 35; N Mathonsi and S Sithole 'The incompatibility of traditional leadership and democratic experimentation in South Africa' (2017) Vol 9(5) *African Journal of Public Affairs* at 35 – 46.

¹⁹⁹ Owen and Kemp *op cit* note 191 at 4.

²⁰⁰ Prno and Slocombe *op cit* note 185 at 348.

²⁰¹ Joseph Doleschal-Ridnell 'Social Licence to Operate How to Address the Three Eyed Fish' Unpublished paper October 2011 at 7.

²⁰² Activity in this context is used broadly to refer to a development, project, the creation of a law or taking a decision.

have accepted the activity. This does not mean that the community approves of the activity but they will accept it (which for the purposes of democratic theory and sustainable development seems to be sufficient). Crossing this threshold is not a bright line but rather a continuum.²⁰³

In terms of this, the minimum requirement is that the activity must have economic legitimacy - that is, the activity must (in the mind of the IAP's) offer a benefit. If this is not present, the social licence to operate will not be granted. Its presence alone, however, is not necessarily sufficient to grant the licence. The social licence to operate is more likely to be granted where the activity has socio-political legitimacy and / or interactional trust. Socio-political legitimacy is secured where there is a 'perception that the [proponent] has contributed to the well-being of the region, respects the local way of life, meets expectations about its role in society and acts according to stakeholders' views of fairness.'²⁰⁴ Interactional trust, on the other hand, is where the stakeholders perceive that the proponent listens and responds to their concerns, engages in communication with the communities and 'exhibits reciprocity in its interactions.'²⁰⁵

While socio-political legitimacy and interactional trust are based on the subjective perceptions of the community, what is evident is that the social licence to operate falls short of their consent or approval, making it almost (if not completely) impossible to determine whether the social licence to operate has been granted as there is no objective evidence to indicate that it has been obtained. This makes sense given that the social licence to operate is not a defined or static concept but rather one that transforms depending on the circumstances and (depending on its transformation) may be supported by the community - or not. As a result, the only manner in which to judge whether a community has granted the social licence is to review the manner in which the community interacts with the proponent, particularly in stressful situations (for example, where a company suffers a hazardous chemical spill).

The community's response to these activities is generally indicative of whether the social licence to operate has been granted based on whether they trust the proponent to remove the harm and make good on any damage caused. Cunningham *et al* iterate the importance of having reputation capital or trust:

²⁰³ Boutilier and Thomson *op cit* note 130 at 2.

²⁰⁴ Ibid.

²⁰⁵ Ibid.

‘One pulp mill environmental manager reflected the same idea - that building reputation capital is a good economic investment - when he told us, in the context of a discussion of local community environmental activities, "You have to develop the relationship in times of peace...[because]...when there are spills, tank failure, dioxin issues, it gets tough". It was in these circumstances, he argued, that the trust and social capital that had been built up earlier became crucially important. A manager at another mill talked about the pitfalls of failing to build reputation capital: "It works against you when things are behind the community's back. If you have a good relationship with the public, then the goodwill will be there, and when there is trouble you will get the benefit of the doubt. You will have a positive bank account."²⁰⁶

Once the proponent has proved that it is credible, the activity or undertaking will be approved by the community. If (over time) trust develops between the proponent and the community, then that approval can morph into 'psychological identification'.²⁰⁷ Ultimately, for purposes of democratic theory, a company should seek to obtain 'psychological identification' as this means that the educative effect has been achieved. The movement up the hierarchy of Boutilier and Thomson's model depends on the nature of the relationship and trust between the parties as it is through this relationship that the parties can engage in meaningful dialogue that is capable of resulting in mutually beneficial outcomes. 'Development of such relationships potentially creates a platform for balanced negotiations and co-creation of outcomes, where a [proponent's] actions and behaviours are aligned to community expectations and aspirations.'²⁰⁸ The requirements of earning this trust have been identified as 'maintaining a positive corporate reputation; understanding local culture, language and history; educating local stakeholders about the project [or activity]; and communication among stakeholders'.²⁰⁹ It is never merely a question of more participation but rather a question of the type of participation required that will develop this degree of trust.

A successful example of the social licence to operate (and one which relies in part on social media) is laying the fibre optic high-speed internet line in Parkhurst, Johannesburg by Vumatel. Following an open bid in which proposals were submitted and presentations conducted by Vumatel and eleven others,²¹⁰ the Parkhurst Village Residents and Business Owners Association passed a resolution at its Annual General Meeting on 13 May 2014 appointing Vumatel as the preferred bidder to provide the suburb of Parkhurst with high-

²⁰⁶ Neil Gunningham, Robert A Kagan and Dorothy Thornton 'Social Licence and Environmental Protection: Why Businesses Go Beyond Compliance' (2004) Vol 29 No 2 *Law and Social Inquiry* at 230.

²⁰⁷ Boutilier and Thomson *op cit* note 130 at 1.

²⁰⁸ Gas Industry Social & Environmental Research Alliance 'The Social Licence to operate and Coal Seam Gas Development' (2013) available at http://www.gisera.org.au/publications/tech_reports_papers/socioeco-proj-5-lit-review.pdf last accessed 7 December 2016 at 6.

²⁰⁹ Prno and Slocombe *op cit* note 185 at 347.

²¹⁰ MTN, Vodacom, Telkom, Dark Fibre Africa, SA Digital Villages, ATEC, Liquid Telecoms, ClearlineIS, Posix, Cool Ideas, Cortac and CCS.

speed internet capabilities.²¹¹ Vumatel was selected based on an ‘excellent technical proposal, a solid business plan that showed the project as financially viable and fully funded, a comprehensive community communications plan, and commercial terms that were very favourable to the residents.’²¹²

Prior to the commencement of construction, Vumatel ran a non-binding online survey in terms of which residents could pledge their support and commitment to the project. Once a minimum threshold of 30% of the residents had given their support to the project, the first fibre optic cables would be laid.²¹³ Construction commenced on 25 August 2014 according to a pre-determined and interactive schedule in terms of which residents could insert their address and the map would indicate in which phase of construction the residents’ house fell. Each phase included proposed dates of construction and the planned dates of delivery (i.e. each phase would go live upon its completion). The construction involved the laying of the fibre optic cables and attaching a small box on the outside wall of each house (irrespective of whether the owner or occupier intended to obtain a contract and make use of the internet service). The municipality did not permit Vumatel to dig a narrow trench in the street and, as a result, Vumatel was compelled to dig the trench along each property’s verge, exacerbating the potential for conflict between Vumatel and the residents. However, they undertook to replace each property’s verge in the same state as or better than they found it.

During the implementation phase, residents were generally informed of the on-going activities via the Parkhurst Village Residents and Business Owners Association’s website, social media and through direct interactions with the owners and occupiers who would be affected by the construction works. Laying the fibre optic cable was conducted in phases and prior to each phase the residents in that area were notified.

Once the cables were laid, residents were provided with information regarding where the router would be installed on an external wall to their property - not merely by describing where it would be placed but with a photo of each house and an indication of where it would be placed. This notification also provided details on how to apply to link into the network.

²¹¹Parkhurst Village Residents and Business Owners Association available at <<http://www.parkhurstvillage.com/category/ftth/>> accessed on 26 December 2014.

²¹² Ibid.

²¹³ Vumatel available at <<http://vumatel.co.za/fibrehoods/>> accessed on 26 December 2014.

The application could be submitted in hard copy or electronically. Applicants were then informed of additional conditions that they should be aware of to ensure that their premises were ready for the contractors to install the fibre optic cable into their household. Although a few complaints found their way onto the *I Love Parkhurst* Facebook page,²¹⁴ the complaints were notably few given the number of home owners and residents who were affected. In fact, there have also been a number of very positive responses about Vumatel's responses to queries, actions on complaints and ultimate service delivery (fast internet). There is no doubt that the legitimacy threshold has been crossed in that the community sees the economic benefit of the project as well as accepts the process that was followed in authorizing the work. In addition, with the on-going communication (including personal communication regarding each property), as well as the responses to complaints and queries, not only has the project crossed the legitimacy threshold but it has, in fact, developed so that the community identifies with the project and its outcomes - the ultimate form of acceptance.

2.6 Conclusion

Having considered the democratic theories espoused by the preeminent theorists in this field, three characteristics (or principles) have been identified:

- *Principle 1: The Educative Effect;*
- *Principle 2: The Principle of Control and*
- *Principle 3: The Social Licence to Operate.*

The next chapter considers how these principles were denied during apartheid and illustrates how they have been incorporated into and expanded upon in South African law during the constitutional era. In doing so, a number of additional principles will be introduced and these will be incorporated into the CFPP set out in Chapter 6.

²¹⁴ I Love Parkhurst available at <https://www.facebook.com/groups/138642919837/> last accessed on 6 March 2017.

Chapter 3

Participation in pre-democratic and democratic South Africa

3.1 Applying the substantive participatory principles to the South African context

Chapter 2 set out the substantive principles of democratic participatory theory which form the basis of constitutionally acceptable participatory processes. Further understanding of how these principles apply in the constitutional dispensation is drawn from 'historical and cultural experiences',²¹⁵ legislation and judicial decisions. The pre-democratic history is the epitome of what participation is not. This low-water mark of public participation in South Africa is briefly explored in the next section. From this point, it is unsurprising that in the constitutional era the right and opportunity to participate have been generously encouraged and developed by the legislatures, administration and the courts.

As will become apparent in the sections that follow, the substantive principles mentioned in Chapter 2 guide participants in participatory processes required when voting, creating legislation, engaging with local government and participating in administrative processes.²¹⁶ In the process, further (mostly procedural) principles have emerged. These procedural principles along with the substantive principles all form part of the CFPP that will be discussed in Chapter 6 as the baseline for all participatory processes.

Part A: Participation in pre-democratic South Africa

3.2 Historical and cultural 'participation' during apartheid in South Africa

During apartheid, the democratic participatory principles were renounced in an attempt to quell opposition to the white minority government. Any collaboration which promoted views contrary to the separateness agenda was banned or outlawed and many persons who attempted to exercise control over their own destiny were banished. The people affected by these laws turned to the courts hoping that justice would prevail. Unfortunately, the judiciary did not always come to

²¹⁵ *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (12) BCLR 1399 (CC).

²¹⁶ Public participation occurs in various fora. The ones discussed in this thesis are not the only fora where public participation takes place. For example, Chapter 9 institutions created in terms of the Constitution are required to undertake investigations and public hearings are part of their mandates.

their assistance. The inconsistent application of the law prevented many people from being allowed to participate in government and society where they clearly should have been permitted to do so. As a brief illustration of this, the 'participation' during apartheid will be reviewed using the substantive principles outlined in Chapter 2.

3.2.1 Principle 1: The Educative Effect during apartheid

Principle 1: The Educative Effect requires that participants construct knowledge and solve problems together in order to decrease the polarity of views and ultimately move towards a common goal. In order for the educative effect to function, there needs to be a variety of views and the opportunity for these views to be aired and debated.²¹⁷

Using the sovereign power of parliament to 'make or unmake any law whatever; and further, that no person or body...as having the right to override or set aside the legislation'²¹⁸ the apartheid government excluded any person (particularly black²¹⁹ South Africans) who expressed

²¹⁷ Section 2.3 *Principle 1: The Educative Effect* above.

²¹⁸ AV Dicey *Law of the Constitution* 8th Ed (1924) at xvii.

²¹⁹ This was defined differently in different legislation during apartheid to generally mean any person who was not of European descent. The Population Registration Act 30 of 1950 required that all persons must be designated to a racial category. Once classified, a person's lot in life as being coloured or 'Bantu' significantly impacted on his or her social, economic and political life. (*Mohamood v Secretary for the Interior* 1974 (2) SA 402 (C)). No personal liberty was more restricted by Parliamentary intervention than the freedom of movement within the country. The Native Land Act 27 of 1913 set aside tracts of land that were used to occupy African people. These areas were extended by the Development Trust and Land Act 18 of 1936 coupled with extensive powers to expropriate black owned land and forced relocation of black persons to these 'reserves'. These forced relocations inevitably deprived individuals of their possessions and property but also removed them from their places of employment, denying them the opportunity to participate in economic exploits (Muriel Horrell *Survey of Race Relations in South Africa* (1968) 121 at 124 - 137). The Native (Urban Areas) Consolidation Act 25 of 1945 required that Africans venturing into a 'white area' required permission to do so. This was extended to women in terms of the Bantu (Abolition of Passes and Co-ordination of Documents) Act 67 of 1952 and also empowered the Bantu Affairs Commissioner to banish a person to his or her 'homeland, to a rehabilitation centre, or to a farm colony for a period not exceeding two years, or with his consent, to an approved employer on contract'. (John Dugard *Human Rights and the South African Legal Order* (1978) at 77). This decision could not be reviewed by the courts, preventing the black population from exercising any control over their own destiny. Other restrictions on the involvement in society included not being able own land within 'controlled area' (Group Areas Act 36 of 1966; Elizabeth Landis 'South African Apartheid Legislation I: Fundamental Structure' *The Yale Law Review* (1961) Vol 71 No 1 at 22 - 23); not being able to frequent the same amenities (Separate Amenities Act 49 of 1953; *Williams and Ardendorf v Johannesburg Municipality* 1915 TPD 106; *Minister of Posts and Telegraphs v Rasool* 1934 SA 167 (AD); *R v Lusu* 1953 (2) SA 484 (AD); *R v Abdurahman* 1950 (3) SA 136 (AD); *R v Carelse* 1943 CPD 242) including schools (*Moller v Keimos School Committee* 1911 SA 635 (AD)); swimming pools (*R v Plaatjies* 1910 SA 63 (EDL)) and desks in court (*R v Pitje* 1960 (4) SA 709 (AD). Education was also not equal amongst white and black students (Frank Berman 'South Africa: A Study of Apartheid Law and Its Enforcement' *Touro Journal of Transitional Law* (1991) Vol 2 No 1 at 28 - 29; V Brittain and A Minty *Children of Resistance* (1987)); the exclusionary nature even pervaded the home as inter-racial marriage and sex were prohibited (Prohibition of Mixed Marriages Act 55 of 1949; Immorality Act 23 of 1957).

views which sought to bring about political change, by removing black²²⁰ and coloured²²¹ persons from the voting roll, prohibiting organizations²²² which furthered the objects of 'communism,'²²³ banishing individuals²²⁴ from collaborating in these organizations²²⁵ and stifling free speech.²²⁶ These are only a few examples of where *Principle 1: The Educative Effect* was denied during apartheid in an attempt to suffocate the expression of collaboration among persons who opposed the government and who sought democratic change. For as long as these laws existed, the majority of the population would never be free as they would never feel that they exercised any control over their destiny.

3.2.2 Principle 2: The Principle of Control during apartheid

Principle 2: The Principle of Control requires that IAP's must feel that they have an opportunity to influence their own destiny by being involved in developing laws which apply to them or participating in decisions that affect them.²²⁷ In this way *Principle 2: The Principle of Control* can be compared with the common law principle of *audi alteram partem* (which is also known as natural justice) which requires that an authority has the duty to hear both sides before making a decision which affects those parties.

²²⁰ The Representation of Natives Act 12 of 1936 and *Ndlwana v Hofmeyr* supra note 29.

²²¹ The Separate Representation of Voters Act *op cit* note 27 was successfully challenged in *Harris and Others v Minister of the Interior and Another* 1952 (2) SA 428 (A) on the basis that Parliament failed to obtain a sufficient majority to lawfully promulgate the legislation. (See DV Cowen 'Legislature and Judiciary: Reflections on the Constitutional Issues in South Africa: Part I' *The Modern Law Review* (1952) Vol 15 No 3 and Hamish R Gray 'The Sovereignty of Parliament' *The University of Toronto Law Journal* (1953) Vol 10 No 1.) This decision, however, did not dissuade Parliament from trying to exclude the coloured voters from the roll. Following three further failed attempts, it passed the Senate Act reconstituting the Senate so as to ensure that it would have a sufficient majority to amend the provisions of the South Africa Act which entrenched the coloured franchise. Despite this ulterior motive, the Appellate Division held that Senate Act was lawfully passed stating that Parliament had the power to make the legislation it did and the courts cannot look to the intention of Parliament to invalidate the legislation. (*Collins v Minister of the Interior and Another* supra note 29 at 565. Also see B Beinart 'The South African Appeal Court and Judicial Review' *The Modern Law Review* (1958) Vol 21 No 6 at 587 - 608).

²²² Unlawful Organisations Act *op cit* note 28.

²²³ Suppression of Communism Act *op cit* note 28 (later the Internal Security Act 74 of 1982). Communism in terms of this legislation was so broadly defined that any organisation which sought to bring about political change was an unlawful organisation. Unsurprisingly the African National Congress and the Pan-Africanist Congress were deemed unlawful organisations.

²²⁴ Riotous Assemblies Act 17 of 1956; Black Administration Act 38 of 1927.

²²⁵ Public Safety Act *op cit* note 28.

²²⁶ Publications Act 42 of 1974; Suppression of Communism Act *op cit* note 28 and the Riotous Assemblies Act *op cit* note 224.

²²⁷ Section 2.4 *Principle 2: The Principle of Control* above. Iain Currie and Johan de Waal *The New Constitutional & Administrative Law* (2011) at 87.

As has been seen above, parliamentary sovereignty was used to remove black voters from the roll, denying them the opportunity to influence laws that applied to them. This power was also used by parliament to expressly exclude IAPs' rights to be heard in administrative proceedings,²²⁸ denying them of any opportunity to influence decisions that affected their lives.

The courts (in some instances) also denied IAP's this opportunity to control²²⁹ their destiny. In situations where the right to be heard prior to a decision being taken was not obvious, (i.e legislation was silent as to *audi alteram partem*), the courts adopted conflicting stances. In some cases, the court adopted the approach set out in *R v Ngwevela*²³⁰ that *audi alteram partem* was presumed to apply unless expressly excluded, in this way endorsing *Principle 2: The Principle of Control*. In other cases, IAP's were denied the opportunity to be heard on the basis that there was no express inclusion of the *audi alteram partem* principle in the empowering statute.²³¹ While the matter was finally resolved in 1988 in *Attorney-General, Eastern Cape v Blom*²³² in favour of the *Ngwevela* approach there was nothing preventing parliament from expressly excluding IAP's rights to participate in legislation.²³³

Even where the legislation expressly or implicitly afforded IAP's a hearing, it only existed in respect of a certain category of decisions and not all administrative decisions. Unlike in the constitutional era where all decisions are subject to procedural fairness, prior to 1994, only those decisions which affected the property, liberty, existing rights or (after 1989) the legitimate

²²⁸ Unlawful Organisations Act *op cit* note 28 read with the Suppression of Communism Act *op cit* note 28 indicated that prior to banning an organisation, assembly or individual, the relevant Minister was required to appoint an officer to conduct an investigation into the activities of the organisation. This report needed to be reviewed by an advisory committee established by the Minister which would make recommendations to the Minister. In compiling this report and investigations, the committee was required to serve written notice on the organisation, affording it an opportunity to make representations prior to being banned. This requirement, however, was often by-passed on the basis that granting the organisation prior notice was contrary to public interest. The Riotous Assemblies Act *op cit* note 224 empowered administrators to ban persons from a particular area without the opportunity of being heard where the Minister was satisfied that such persons were 'promoting feelings of hostility between the European inhabitants of the Republic on the one hand and any other section of the inhabitants of the Republic on the other hand' (s3(5)) or 'in any area, advocating, advising, defending or encouraging the achievement of the objects of communism [as broadly defined] or any act or omission which is calculated to further the achievement of any such object, or is likely in any area to advocate, advise, defend or encourage the achievement of any such object or any such act or omission' (s10(1) of the Suppression of Communism Act).

²²⁹ The meaning of control in this context must be understood as an opportunity to influence the outcome and not that IAP's have ultimate decision-making control.

²³⁰ 1954 (1) SA 123 (A).

²³¹ *Winter v Administrator-in-Executive Committee* 1973 (1) SA 873 (A); *Omar v Minister of Law and Order* 1987 (3) SA 859 (A); *E Snell & Co (Transvaal) (Pty) Ltd v Minister of Agricultural Economics* 1986 (3) SA 532 (D).

²³² 1988 (4) SA 465 (A).

²³³ *Sachs v Minister of Justice* 1934 AD 11 at 38.

expectation of an individual attracted the principles of procedural fairness.²³⁴ Decisions of this nature were referred to as 'quasi-judicial' decisions as opposed to legislative or 'purely administrative' decisions which did not attract *audi alteram partem* notwithstanding that these decisions may significantly affect the rights of individuals.²³⁵ This categorization was referred to as the classification of functions doctrine.

Despite judicial warnings that the 'classification of functions doctrine...is [nothing] more than a convenient classification into a source of legal rules',²³⁶ the courts and administrators continued to apply natural justice only to 'quasi-judicial' decisions. In justification for this approach, the courts indicated that to rely on natural justice 'outside its proper limits'²³⁷ would lessen its value as administrators would be over-burdened and only pay lip service to the requirement. This narrow construction of the *audi alteram partem* principle was used to good effect during the apartheid era in denying parties an opportunity to participate in decisions that clearly affected them but were not quasi-judicial in nature, preventing them from exercising any control over their destiny.²³⁸

Denial of the right to participate went further. Even in respect of 'quasi-judicial' decisions, IAP's were only entitled to be heard where they held an antecedent right.²³⁹ Persons that only had a *spes* could not demand to be heard prior to an administrative decision being made.²⁴⁰ This arbitrary distinction between existing rights and privileges meant that natural justice was denied in numerous instances where the outcome of the administrator's decision would have had a significant impact on the affected persons. As Baxter points out, there is a distinction between a person succeeding in his or her application and the process followed leading up to that decision. He adds that 'to talk in terms of 'existing rights' in some contexts adds nothing to the question in issue: namely, should the body or official concerned act fairly or

²³⁴ *Administrator, Transvaal v Traub* 1989 (4) SA 731 (A).

²³⁵ The following cases held that *audi alteram partem* should apply in all instances and not only quasi-judicial decisions: *Naike Ltd v Boksburg Municipality* 1918 WLD 92; *Fernandez v South African Railways* 1926 AD 60; *Builders Limited v Union Government (Minister of Finance)* 1928 AD 46; *Petersburg Club Ltd v Petersburg Licensing Board* 1931 TPD 217; *Sullivan v Wheat Industry Control Board* 1953 (4) SA 169 (T); *Chief Pass Officer Johannesburg v Mashamba* 1917 TPD 397.

²³⁶ *Pretoria North Town Council v A1 Electric Ice-Cream Factory (Pty) Ltd* 1953 (3) SA 1 (A) at 11.

²³⁷ *Laubscher v Native Commissioner, Piet Retief* 1958 (1) SA 546 (A) at 549.

²³⁸ *E Snell & Co (Transvaal) (Pty) Ltd* supra note 231; *Pretoria City Council v Modimola* 1966 (3) SA 250 (A).

²³⁹ *Labuscher* supra note 237.

²⁴⁰ Eitenne Mureinik 'Reconsidering Review: Participation and Accountability' (1993) *Acta Juridica* at 35.

in according with the principles of natural justice?'²⁴¹ This was, in Baxter's view, particularly relevant given the fact that 'so many of our daily necessities derive from state handouts'.²⁴²

Notwithstanding this clearly more suitable approach, the judiciary clung to the 'existing rights' doctrine in refusing affected parties an opportunity to be heard where those individuals did not hold pre-existing rights.²⁴³ The court, however, refused to extend the application of the existing rights doctrine and prevented parties from exercising any control over their own destiny. It was only in 1989 that the classification of functions and existing rights doctrines were abandoned in favour of a general principle of fairness in respect of decisions that have an adverse effect. In the case of *Administrator, Transvaal v Traub*²⁴⁴ the Appellate Division held that the 'classification as quasi-judicial adds nothing to the process of reasoning: the Court could just as well eliminate this step and proceed straight to the question as to whether the decision does prejudicially affect the individual concerned.'²⁴⁵

Therefore, even before the constitutional era, the court in *South African Roads Board v Johannesburg City Council*²⁴⁶ recognised that notwithstanding the fact that a toll road declaration would have affected the public at large (and was therefore 'legislative' in nature), it would also impact on particular individuals or groups of individuals and so the rules of natural justice would apply.²⁴⁷ It is noteworthy that as the Johannesburg City Council in this instance was going to suffer particular prejudice, it was entitled to a hearing. Despite dispensing with the classification of functions doctrine, the rules of natural justice still only applied to parties that suffered a 'particular prejudice' and was not available to the public at large.

This existing rights doctrine was also extended to include situations where an affected person held a legitimate expectation. Therefore a person suffered a particular prejudice where, although he or she did not hold an existing prior right, he or she had an expectation that a right, permit, licence or other form of authorization would be granted. A person was deemed to hold such an expectation where there was an express promise or the existence of a longstanding

²⁴¹ L G Baxter 'Fairness and Natural Justice in English and South Africa Law' (1979) *SALJ* at 621.

²⁴² *Ibid* at 578.

²⁴³ *Laubscher* supra note 237; *Castel NO v Metal & Allied Workers Union* 1987 (4) SA 795 (A).

²⁴⁴ 1989 (4) SA 731 (A).

²⁴⁵ *Ibid* at 763.

²⁴⁶ 1991 (4) SA 1 (A).

²⁴⁷ *Ibid* at 12.

practice of a particular process being followed. This reasoning had been applied in a number of high courts²⁴⁸ in the late 1980's but it was only in the Appellate Division case of *Administrator, Transvaal v Traub*²⁴⁹ that the principle was formally adopted. This extension of the law, however, had come too late in that up until this time the existing rights doctrine had prevailed, leaving parties without recourse to participation in decisions that affect them and so they had no control over these decisions. As parties felt that they had little influence over the outcome of these decisions, it is unlikely that they would accept the outcome of these processes (*Principle 3: The Social Licence*).

3.2.3 Principle 3: The Social Licence to Operate during apartheid

Principle 3: The Social Licence is based on the premise that (at the very least) the IAP's are satisfied with the public participation process being followed. If they are satisfied with the process (i.e. they believe it to be fair) they may be satisfied with the outcome, even if it is contrary to their own personal beliefs or objectives. If the social licence is not secured (i.e. the IAP's do not trust the process) they are unlikely to accept the outcome and evidence suggests that they will take action to show their dissatisfaction, such as demonstrating or sabotage.

There is no doubt, based at least on the above accounts, that the apartheid government failed to obtain the social licence from the majority of the population who saw and experienced government developing and using laws to exclude them from participating in government and society. There are numerous examples that can be cited to illustrate this fact, including the marches against the pass laws,²⁵⁰ economic boycott campaigns against companies sympathising with the apartheid Government,²⁵¹ marches against the housing shortages and the education crisis in Sebokeng in 1990²⁵² and even the taking up of arms in the anti-apartheid movement.²⁵³ In

²⁴⁸ *Everett v Minister of the Interior* 1981 (2) SA 453 (C); *Boesak v Minister of Home Affairs* 1987 (3) SA 665 (C); *Lunt v University of Cape Town* 1989 (2) SA 438 (C); *Langeni v Minister of Health and Welfare* 1988 (4) SA 93 (W).

²⁴⁹ *Traub* supra note 234.

²⁵⁰ Robert Ross *A Concise History of South Africa* 2nd Ed (2008) at 139.

²⁵¹ Christabel Gurney "'A Great Cause': The Origins of the Anti-Apartheid Movement, June 1959 - March 1960" (2010) 26:1 *Journal of Southern African Studies* at 124 - 127.

²⁵² J Rauch and D Storey 'The Policing of Public Gatherings and Demonstrations in South Africa 1960 - 1994' available at <http://www.csvr.org.za/index.php/publications/1483-the-policing-of-public-gatherings-and-demonstrations-in-south-africa-1960-1994.html> last accessed on 8 December 2016.

these situations there was such a degree of distrust between the people and the government that neither the process nor the outcome was acceptable to or accepted by most of the population.

It is unsurprising based on the injustices of apartheid that the Constitution emphasises the need for public participation.²⁵⁴ The question that needs to be considered is how the substantive principles identified in Chapter 2 can be incorporated into an industrialised constitutional society like South Africa. The remainder of this chapter investigates public participation in the constitutional era. As will become apparent, the substantive principles have been included in the practice of public participation and, through this process, a number of additional (mostly procedural) principles have emerged. These principles have been drawn from the participatory processes conducted during this era, namely the right to vote, the creation of legislation, participation in local government and administrative processes.

Part B: Participation in democratic South Africa

3.3 Participating through Voting: Political Parties

The Constitution entrenches the right to vote through free, fair²⁵⁵ ‘regular elections and a multiparty system of democratic government’.²⁵⁶ By its very nature, voting is done secretly and does not allow for the sharing of ideas and collaboration required by *Principle 1: The Educative Effect*. It does, however, fulfil a very important function in that it ‘has historically been important both for the acquisition of rights of full effective citizenship by all South Africans regardless of race, and for the accomplishment of an all-embracing nationhood. The universality of the franchise is important not only for nationhood and democracy. The vote of each and every citizen is a badge of dignity and personhood. Quite literally it says that everybody counts.’²⁵⁷

Voting (and by association participating) endorses a participant’s sense of value and dignity (*Principle 4: The Principle of Dignity*) but merely casting a ballot is unlikely (on its own) to achieve the democratic participatory principles expressed above as it does not result in an assimilation of government objectives and individual requirements. To determine whether voting

²⁵³ Gay Seidman ‘Guerrillas in their Midst: Armed Struggle in the South African Anti-Apartheid Movement’ in Hank Johnston (ed) *Mobilization The International Journal of Research and Theory about Social Movements, Protest, and Contentious Politics* (2001) Vol 6 No 2.

²⁵⁴ Constitution *op cit* note 13 at s1(d), 19, 59(1)(a), 72(1)(a) and 118(1)(a).

²⁵⁵ Ibid at s19(3)(a).

²⁵⁶ Ibid at s1(d).

²⁵⁷ August *supra* note 32 at [17].

can give effect to the democratic participatory principles, it must be seen within its broader context as a final expression of a voter's will following his or her active involvement in political processes (i.e. political parties) leading up to the election.²⁵⁸

'Although there is considerable disagreement in the various strands of democratic theory on the precise role political parties should perform in order to make democracy work, as a general proposition, political parties are important for the proper functioning of democracy. Ideally parties will act as vehicles to articulate group aims, nurture political leadership, develop and promote policy alternatives, and present voters with coherent electoral alternatives.'²⁵⁹

In fulfilling these obligations, political parties are afforded ultimate discretion regarding how participation should be conducted to ensure that it is appropriate for their members, subject to the proviso that 'political parties may not adopt constitutions that are inconsistent with s19 of the Constitution'²⁶⁰ and, therefore, the democratic participatory principles.²⁶¹ A brief review of the constitutions of the two largest political parties in South Africa currently active, the African National Congress ('ANC') and the Democratic Alliance ('DA'), does not introduce new democratic participatory principles but demonstrates how that the substantive principles espoused in Chapter 2 have been incorporated in practice by political parties in South Africa.

3.3.1 African National Congress

The ANC's Constitution²⁶² lists the empowering of all people to take part in the administration of the country among its aims and objectives.²⁶³ It also establishes the management structures of the party: this is controlled by the National Conference which is hosted once every five years and is responsible for determining policies and programmes of the ANC. In between these intervals the National Executive Committee ('NEC') acts as the implementing agency of the ANC. Similar structures exist at a provincial and regional level.²⁶⁴ At a local level there is a Branch Biennial General Meeting which elects a Branch Executive Committee. 'Branches may be grouped

²⁵⁸ As will become evident, voting alone (and possibly even in conjunction with participatory processes preceding the act of voting) will not fall within the scope of the Constitutional Framework for Public Participation contemplated in Chapter 6. This notwithstanding, lessons about participation can be learnt from the participatory act of voting (and the preceding processes) as is evidenced by this Chapter.

²⁵⁹ Pierre de Vos 'It's my party (and I'll do what I want to)': Internal Party Democracy and Section 19 of the Constitution' 2015 *SAJHR* 30 at 39.

²⁶⁰ *Ramakatsa v Magashule* 2013 (2) BCLR 202 (CC) at [74].

²⁶¹ De Vos *op cit* note 259 at 35.

²⁶² African National Congress 'African National Congress Constitution' available at <http://www.anc.org.za/show.php?id=10177> accessed on 2 January 2016.

²⁶³ *Ibid* at s2.2.

²⁶⁴ *Ibid* at Rule 7.

together in zones and may be subdivided, for the purpose of co-ordination, into smaller units such as street communities, voting districts and zones which may be grouped into sub-regions. Any sub-branch so established will have the same voting powers as a branch.²⁶⁵

Prior to the National Conference, the NEC (via a Conference Preparatory Committee) must circulate information relating to the conference, 'determine the precise procedure for the selection of delegates and indicate how the membership can then ensure that their concerns are on the agenda.'²⁶⁶ Once on the agenda, the 'Conference shall determine its own procedures in accordance with the democratic [participatory] principles'²⁶⁷ so as to create and amend policy²⁶⁸ and elect representatives of the NEC. It must be noted, however, that not all members are able to attend and vote at the National Conference. The National Conference is made up of elected delegates from the various branches (in proportion to their paid-up membership),²⁶⁹ proportional representation of delegates from the provinces,²⁷⁰ the members of the NEC²⁷¹ and members from the Provincial Executive Committees, and the ANC Veterans, Women and Youth Leagues (as determined by the NEC).²⁷² The voting procedure for the selection of these members to the NEC at the National Conference is set out in some detail in the Constitution but there is no direction on how other participatory procedures should be implemented within the party except in accordance with 'democratic participatory principles'.²⁷³ Similar wording is contained in the Constitution in respect of the Provincial Conference,²⁷⁴ Provincial Executive Committee,²⁷⁵ Regional Conference,²⁷⁶ the Regional Executive Committee²⁷⁷ and the Branches.²⁷⁸

Based on the above, the ANC's Constitution requires (as a bare minimum) that the participatory procedures at each of these levels of the party must be conducted in accordance

²⁶⁵ Ibid at Rule 7.2.

²⁶⁶ Ibid at s10.2.

²⁶⁷ Ibid at s10.3.

²⁶⁸ Ibid at s11.1.

²⁶⁹ Ibid at s10.1.1.1.

²⁷⁰ Ibid at s10.1.1.2.

²⁷¹ Ibid at s10.1.1.3.

²⁷² Ibid at s10.1.1.4.

²⁷³ In addition, the NEC can invite certain non-voting members to attend the National Conference if such persons have specific skills or experience or who made a significant contribution to the struggle (Ibid at s10.1.2).

²⁷⁴ Ibid Rule 17.

²⁷⁵ Ibid Rule 19.

²⁷⁶ Ibid Rule 21.

²⁷⁷ Ibid Rule 21.9 - 21.12.

²⁷⁸ Ibid Rule 23.

with the democratic participatory principles. In relation to *Principle 1: The Educative Effect*, it contains some encouraging wording. As with most participatory processes, the political party must make information available. A brief review of the ANC's website illustrates that the party does this. Declarations, leaflets, policy documents, press statements, reports, rules are all readily available.²⁷⁹ Supplying information, on its own, is not a particularly noteworthy undertaking. (As will be seen in the section below dealing with public inquiries, merely supplying information may not be sufficient to meet the participatory requirements). However, if read in conjunction with Rule 5 (Rights and Duties of Members), supplying information is a gateway to achieving *Principle 1: The Educative Effect*.

Rule 5.1 lists the rights of members. This rule grants every member the right to participate actively in the formulation of policies, to share information and to submit proposals or statements to the Branch, Region, Province and NEC through the appropriate structures.²⁸⁰ While members are entitled to these participatory processes, they are also 'obliged' to participate in their respective branches and take the requisite steps to comprehend and explain ANC policies, aims and programmes to other members so they can better understand not only the policy, programmes and activities better but also the socio-economic, political and cultural issues in the country. This places a significant burden on all members of the ANC who may not have the knowledge or experience themselves (or worse, they may express the incorrect view). As no specific person(s) are responsible for this obligation, it may be aspirational.

There is no evidence to suggest that this form of education and training occurs in practice.²⁸¹ However, to the extent that it does not occur, members are able to enforce this codified version of *Principle 1: The Educative Effect* through the ANC Constitution. A better understanding of the policy, programmes, activities and the socio-economic, political and cultural issues of the country, however, does not guarantee that the members will develop a stronger sense of control²⁸² over the policy making processes of the ANC or be satisfied with the outcome of these processes.²⁸³ To the extent that the member's views are not congruent with

²⁷⁹ African National Congress available at www.anc.org.za accessed on 11 April 2016.

²⁸⁰ ANC Constitution *op cit* note 262 at s5.1.

²⁸¹ Ibid at Rule 5.2.

²⁸² *Principle 2: The Principle of Control*.

²⁸³ *Principle 3: The Social Licence to Operate*.

those of the party, he or she should consider looking to another political party in which to express those views.

Constitutions of other parties do not contain similar codified versions of the democratic participatory principles but do afford their members democratic political participation.

3.3.2. Democratic Alliance

Like the ANC Constitution, the DA Constitution sets out in detail the structure and composition of the party which is similar (in general terms) to the ANC. In addition, it lists a number of freedoms and principles which underlie the DA Constitution. These principles and freedoms accord generally with the notion of participatory democracy, such as the accountability of government, 'government must reflect the will of the people'²⁸⁴ or that government must ensure the 'devolution of power to locate government as close as possible to the people.'²⁸⁵ However, aside from these generic expressions, the DA Constitution does not contain any clauses that seek to give effect to the democratic participatory principles. In fact, they seem to promote a lesser form of control more closely aligned with the bottom rungs on Arnstein's ladder of participation.

For example, section 3.8 of the DA Constitution states:

3.8.1 The basic organisational units of the Party are the branches. The Party will strive to establish and maintain a branch or branches for every local government ward in South Africa.

3.8.2 Branches are established to manage and direct the affairs of the Party, to communicate the principles and policy of the Party to the public, to mobilize the public in support of the program of action of the Party, to participate in the process of democratic selection of candidates for the Party and to serve as the vehicle for the articulation of interests of members of the Party and voters in their area of jurisdiction.' [Emphasis added]

The branches seem to be merely mouth-pieces for the upper echelons of the Party. The fact that branches merely 'communicate' policy to their members implies a one-way form of communication. Although it states that the branches are also the 'vehicle for the articulation of the members' interests,' it does not appear to provide for any form of collaboration between the members and the representatives of the party. This one-way engagement would explain why the branch is responsible for 'mobilizing' support for a programme or policy as the members would

²⁸⁴ Democratic Alliance 'Democratic Alliance Constitution' available at <http://www.da.org.za/wp-content/uploads/2013/DA-Federal-Constitution-approved-by-Congress-9-May-2015.pdf> accessed on 2 January 2016 at s2.2.

²⁸⁵ Ibid at s1.3.10.

not have been involved in creating or developing such programme or policy. Mobilisation may not be required if they had been involved from the outset.

Without empirical evidence of the manner in which the various DA branches operate, these criticisms may be unfounded and the selection of words used in this section may be unfortunate. Wording more closely aligned to the participatory democratic principles could be incorporated into the DA Constitution. Notwithstanding criticism of the fact that the ANC Constitution places responsibility on the members to communicate and explain policies, programmes. to other members, that approach appears to be more closely aligned to the democratic participatory principles than the approach contained in the DA Constitution.

Although the DA Constitution does not expressly cater for the democratic participatory principles, the DA's Policy on Governance (dated December 2013) requires active participation by the citizens and recognises that this can be achieved in a number of ways, including the adoption of social media and online platforms. It states that to

'promote accountability and cooperation between the government and the people of South Africa the DA would...[*inter alia*] aim to make as many government services as possible available online to facilitate interaction with government through online platforms; [and]...Use both traditional and social media to foster participation by the public and civil society in the decisions and processes of government - e.g. through comment on policy green papers and bills, input at portfolio committee meetings and input into the Integrated Development Plan on local government levels.'²⁸⁶

In this way the DA recognises that participation should not and cannot be limited to the more traditional forms of participation.

The role of political parties within the participatory process are often overlooked in that they are overshadowed (in some ways) by the election process. Political parties, however, provide a vital function in the participatory electoral process.

3.4 Participating by Voting

Following their participation in political parties, participants vote for their respective representatives in government. Voting gives effect to the democratic participatory principles in that participants are educated on how to vote and select government. Provided that this process is viewed as fair and legitimate, the citizens are likely to accept the chosen government (*Principle 3: The Social Licence*).

²⁸⁶ Democratic Alliance 'DA Policy on Governance (December 2013)' available at <http://www.da.org.za/wp-content/uploads/2014/01/Governance1.pdf> accessed on 11 April 2016 at 24 - 25.

Rules or laws that inhibit the democratic participatory principles are unconstitutional unless such restriction is reasonable.²⁸⁷ There does not, for example, appear to be much objection to denying children the right to vote until they are 18 years old. While it may be argued that this age is random, given that some persons have the mental capability to vote well before this age (and arguably, there are persons over this age who may lack the ability): for the sake of practicality, the age threshold is considered reasonable.²⁸⁸ Section 36²⁸⁹ of the Constitution permits the limitation of rights (including the right to vote and arguably the democratic participatory principles) contained in the Bill of Rights.²⁹⁰ Notwithstanding this power, the cases have favoured an approach which enhances participation rather than exclusion.

In *August and Another v Electoral Commission and Others*²⁹¹ the Constitutional Court ('CC') had to consider whether prisoners had forfeited their right to vote. The applicants in this case included convicted prisoners and prisoners awaiting trial, incarcerated and unable to register in the voting district in which each was 'ordinarily resident'.²⁹² In considering the Electoral Commission's duties and responsibilities in terms of the Electoral Act, the court held that there is an 'affirmative obligation on the Commission to take reasonable steps to ensure that eligible voters are registered'.²⁹³ Short of any direction from Parliament to the contrary, the Commission's mandate was to provide all *eligible* voters with a reasonable opportunity to register and not to determine which members of the population were or should be eligible. The CC held that in failing to provide all prisoners with an opportunity to register, the Commission failed to meet its legislative and constitutional mandate.

²⁸⁷ Constitution op cit note 13 at s36.

²⁸⁸ Ibid.

²⁸⁹ 'The rights in the Bill of Rights may be limited only in terms of a law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including -

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.'

²⁹⁰ Notably the test adopted when assessing whether rights have been limited by laws of general application is similar to the reasonableness test the court has adopted in assessing whether the legislature has met its obligations to facilitate public involvement in the legislative process.

²⁹¹ August supra note 32.

²⁹² Electoral Act 73 of 1998.

²⁹³ August supra note 32 at [16].

This case highlights that participation must be broadly interpreted to be inclusive rather than exclusive (*Principle 5: The Principle of Inclusivity*). This does not mean that full participation is required. The person responsible for conducting the process needs only to take reasonable steps to facilitate participation. The reasonableness of the selected mode of participation is considered in more detail in the next section.²⁹⁴ Suffice to state that the selected mode of participation should not impose unreasonable obstacles which prevent those that wish to participate from doing so. That is, an unreasonable obstacle is one when, having taken all reasonable steps to participate, a participant is denied from doing so.

The reasonableness of obstacles to the participation process was considered in an application brought at the same time as the August case by the New National Party of South Africa against the government in respect of the documentary requirements that eligible voters were required to produce in order to register to vote.²⁹⁵ The New National Party indicated that these requirements denied individuals the right to vote.

The majority judgment dismissed the application holding that Parliament must provide requirements aimed at giving effect to the right to vote. Provided that these requirements give effect to a legitimate government purpose (i.e. the mechanism is not capricious and arbitrary) and they do not deprive persons from being able to exercise their constitutional right, the mechanism is reasonable. In this case, the introduction of bar-coded identity documents as a means of identification was (in the CC's view) connected to a legitimate government purpose in that it enabled the right to vote. Permitting voters to use a variety of identity documents in order to vote would have made the voting process difficult, inefficient and increased the risk of fraud. The obligation to obtain a bar coded identity document did not create an unreasonable obstacle to voting in that it was linked to a legitimate government purpose.²⁹⁶

The reasonableness of restrictions on the right to vote was also considered in the cases of *Richter v Minister of Home Affairs and Other*²⁹⁷ and *Minister of Home Affairs v National*

²⁹⁴ Section 3.5 Participating in creating legislation below.

²⁹⁵ *New National Party of South Africa v Government of the Republic of South Africa and Others* 1999 (3) SA 191 (CC).

²⁹⁶ Ibid at [19] - [23].

²⁹⁷ 2009 (5) BCLR 448 (CC).

Institute for Crime Prevention and the Re-integration of Offenders (NICRO).²⁹⁸ In the first case, Richter challenged section 33 of the Electoral Act regarding the special votes for South African citizens who were registered as voters but who would be outside the country on the date of the election. As set out above, voters must vote (subject to certain exceptions) within the voting district within which they are registered. One exception is where a voter is eligible for a special vote. Persons that would temporarily be absent from the Republic on the polling date were entitled to apply for a special vote which (if approved) allows that person to vote before proceeding overseas.

The Electoral Act did not provide for citizens (like Richter) who were registered to vote but resident overseas. In order to give effect to their right to vote, they would need to return to South Africa to vote or, following the proclamation of the voting date by the President, apply for a special vote and (upon its approval) exercise their vote before returning to their country of residence. This, the court held, placed an unreasonable burden on Richter (and other similar applicants) and the limitation on their right to vote could not be linked to a legitimate government purpose, particularly since government officials traveling abroad were not required to return to South Africa to vote but could do so at Consulates and Embassies abroad.

Similarly, in the NICRO case the CC considered an amendment to the Electoral Act which had the effect of depriving persons serving sentences for crimes for which a fine could not be paid from voting during the period of their incarceration. In support of this contention, the Director General of Home Affairs expressed concern that to do so would be an administrative and financial burden on the Department.²⁹⁹ Given the limited available resources, the Department indicated that these resources would be allocated to persons who could not attend voting stations due to illness, disability, pregnancy etc. When it came to prisoners, not all prisoners were denied the opportunity to vote. Detainees serving sentences for crimes in which an alternate fine could have been paid were considered to be different category of detainee from those who had been convicted of an offense for which an alternate fine was not available. This latter group were denied the opportunity to vote³⁰⁰ because they were the authors of their own misfortune and so, the limited resources available to the state should be funneled to individuals who have complied

²⁹⁸ 2005 (3) SA 280 (CC).

²⁹⁹ Richter *supra* note 297 at [39 - 40].

³⁰⁰ NICRO *supra* note 298 at [43].

with the law but who cannot attend polling stations and allowing prisoners to vote would send the wrong message to the community that the ‘government is soft on crime.’³⁰¹

The CC dismissed these reasons for denying the prisoners the opportunity to vote. Resources had been allocated for setting up mobile polling stations for those prisoners who were serving sentences instead of paying a fine. No evidence was provided to indicate that the extension of these stations to the prisoners guilty of crimes for which there was no alternate fine was untenable.³⁰²

With respect to the second reason, the court concluded that a ‘fear that the public may misunderstand the government’s true attitude to crime and criminals provides no basis for depriving prisoners of fundamental rights that they retain despite their incarceration.’³⁰³ There was no legitimate reason for singling out this category of persons and denying them the right to vote.

These cases illustrate the courts’ reluctance to exclude parties from participatory processes. ‘In light of our history where denial of the right to vote was used to entrench white supremacy and to marginalise the great majority of people in our country, it is for us a precious right which must be vigilantly respected and protected.’³⁰⁴ Similarly persons conducting participatory processes should adopt an inclusive rather than exclusive approach to participation and must not exclude a specific group or category of participants from participating unless the empowering legislation specifically permits such exclusion or where it is linked to a legitimate government purpose (*Principle 5: The Principle of Inclusivity*).

3.5 Participating in creating legislation

The legislative authority of government is granted to Parliament, the provincial legislatures and municipal councils. These bodies must create legislation within the scope of their respective competencies.³⁰⁵ Parliament is comprised of the National Assembly and the National Council of Provinces (‘NCOP’)³⁰⁶ and is responsible for creating laws within its national competence. The

³⁰¹ Ibid [46].

³⁰² Ibid [49].

³⁰³ Ibid [56].

³⁰⁴ Ibid [47].

³⁰⁵ Constitution *op cit* note 13 at Schedules 4 and 5.

³⁰⁶ Ibid s42(1).

National Assembly is elected as representatives of the electorate (representative democracy) and must ensure ‘government by the people’ by choosing the President, providing a national forum for the public consideration of issues, passing legislation and by scrutinizing and overseeing executive action’.³⁰⁷

The NCOP’s function is to ensure that provincial issues are aired at the national level by ‘participating in the national legislature and by providing a national forum for the public consideration of issues affecting the provinces.’³⁰⁸ In giving effect to their respective obligations, the National Assembly and the NCOP must ‘conduct its business in an open manner, and hold its sittings and those of its committees, in public, but reasonable measures may be taken’ to regulate access to the National Assembly or the NCOP and to search for or prevent access to or removal from the National Assembly or NCOP.³⁰⁹ In doing so, the National Assembly and NCOP must ‘facilitate public involvement in the legislative and other processes.’³¹⁰ [Emphasis added].

Based on the principles above, it would be expected that parties affected by proposed legislation and provided with an opportunity to collaborate in developing the proposed legislation would have a sense of control over and develop trust in the process in that, even if their views are not those of the majority, they will accept the final legislative product as they trust the procedure followed in reaching that conclusion.

3.5.1 Doctors for Life International v Speaker of the National Assembly and Others

The nature and extent of this duty to facilitate public involvement was first considered in the case of *Doctors for Life International v Speaker of the National Assembly and Others*.³¹¹ In considering this point, the CC held that the ‘duty to facilitate public involvement in the legislative process is an aspect of the right to political participation’³¹² which means that the State must not only provide citizens with an opportunity to vote and participate in political parties³¹³ but must also act accountably, responsively and openly in all of its actions.³¹⁴ In doing

³⁰⁷ Ibid s42(3).

³⁰⁸ Ibid at s42(4).

³⁰⁹ Ibid s59 and s72.

³¹⁰ Ibid s59(1)(a) and s72(1)(a).

³¹¹ *Doctors for Life* supra note 215.

³¹² Ibid at 1433.

³¹³ Section 3.4 Participating by Voting above.

so the State needs to be in on-going consultation with the electorate,³¹⁵ including during the development of legislation. The CC cannot prescribe how Parliament should give effect to this obligation as to do so would be contrary to the separation of powers³¹⁶ but it can review the process to determine if it complies with the constitutional duty to ‘facilitate public involvement.’³¹⁷

Before considering whether the process followed met this standard, it is necessary to understand the process that was actually followed. What is evident from the judgment is that:

‘Parliament has enacted four health statutes, namely, the Choice on Termination of Pregnancy Amendment Act 38 of 2004...the Sterilization Amendment Act 3 of 2005; the Traditional Health Practitioners Act 35 of 2004...and the Dental Technicians Amendment Act 24 of 2004. The constitutional challenges relate to these statutes, which I shall collectively call the health legislation. The applicant’s complaint is that during the legislative process leading to the enactment of these statutes, the NCOP and the provincial legislatures did not comply with their constitutional obligations to facilitate public involvement in their legislative processes as required by the provisions of sections 72(1)(a) and 118(1)(a) of the Constitution, respectively. In terms of section 72(1)(a), the NCOP ‘must...facilitate public involvement in [its] legislative and other processes...and [those of] its committees.’ Section 118(1)(a) contains a similar provision relating to a provincial legislature. The applicant accepts that the National Assembly has fulfilled its constitutional obligation to facilitate public involvement in connection with the health legislation. This, the applicant says, was done by the National Assembly by inviting members of the public to make written submissions to the National Portfolio Committee on Health and also by holding public hearings on the legislation. That process, the applicant maintains, complied with section 59(1)(a) of the Constitution. The applicant alleges that the NCOP and the various provincial legislatures were likewise required to invite written submissions and hold public hearings on the health legislation. This is what the duty to facilitate public involvement requires of them, the applicant maintains...The respondents deny the charge by the applicant. They maintain that both the NCOP and the various provincial legislatures complied with the duty to facilitate public involvement in their legislative processes. They also take issue with the scope of the duty to facilitate public involvement as asserted by the applicant. While conceding that the duty to facilitate public involvement requires public participation in the law-making process, they contend that what is required is the opportunity to make either written or oral submissions at some point in the national legislative process.’³¹⁸ [emphasis added].

³¹⁴ Sachs J in his supporting judgment states in respect of the principles of accountability, responsiveness and openness: ‘True to the manner in which it itself was sired, the Constitution predicates and incorporates within its vision the existence of a permanently engaged citizenry alerted to and involved with all legislative programmes. The people have more than a right to vote in periodical elections, fundamental though that is. And more is guaranteed to them than the opportunity to object to legislation before and after it is passed, and to criticise it from the side-lines while it is being adopted. They are accorded the right on an ongoing basis and in a very direct manner, to be (and to feel themselves to be) involved in the actual process of law-making. Elections are by necessity periodical. Accountability, responsiveness and openness, on the other hand, are by their very nature ubiquitous and timeless. They are constants of our democracy, to be ceaselessly asserted in relation to on-going and other activities of government’. *Doctors for Life* supra note 215 at 1470 - 1471.

³¹⁵ Ibid at 1470 - 1470.

³¹⁶ It is submitted that the Court could never specify the form that public participatory processes should take as these should be determined based on the circumstances of each case.

³¹⁷ *Doctors for Life* supra note 215 at 1444.

³¹⁸ Ibid at 1408 – 1409.

The CC noted that '[w]hatever procedures the provinces follow, to the extent that they are engaged in a legislative process in considering and conferring mandates on their delegations, they are required to comply with section 118(1)(a), which requires provincial legislatures to facilitate public involvement in their legislative processes and those of their committees.'³¹⁹ The respondents made unsubstantiated claims that the NCOP had extensively advertised the bills and invited members of the public to participate. Some of the provincial legislatures held public hearings in respect of some of the bills. 'This raises the question as to whether the duty of the NCOP to facilitate public involvement in its legislative process may be met through public hearings that are conducted by the provincial legislatures.'³²⁰

There are both practical and functional considerations which must be considered in answering this question, including the fact that some members of the NCOP also represent their respective provincial legislatures and, therefore, provincial interests at the provincial legislatures should be carried into the NCOP; to hold public meetings at the NCOP and in provincial legislatures would be a duplication of costs which (given scarce resources) seems unnecessary and holding public hearings in each province, as opposed to the NCOP seat in Cape Town, would make the hearings accessible to those affected by the proposed legislation.³²¹ The Court recognised that in some instances the NCOP may also be required to host public hearings in respect of bills.

'Whether public hearings conducted by a provincial legislature are sufficient to satisfy the obligation of the NCOP under section 72(1)(a) ultimately depends on the facts and the nature of the process of facilitating public involvement that has occurred in the provinces, including the extent to which the NCOP delegations were involved in and have access to the information gathered during that process. Where the process involves consideration of a bill affecting the provinces, the ultimate question is whether the provincial interests on the legislation under consideration were taken into account in the national legislative process.'³²²

To assess whether the duty to facilitate public involvement has been met, the CC developed a two-stage test congruent with *Principle 2: The Principle of Control*:

- (1) were the participants afforded a reasonable opportunity to participate and
- (2) were the participants able to take advantage of that opportunity?³²³

³¹⁹ Ibid at 1452.

³²⁰ Ibid at 1453.

³²¹ Ibid at 1454.

³²² Ibid.

³²³ Ibid at 1445.

In assessing whether these standards are achieved depends on the democratic participatory principles. Whether the opportunity is reasonable depends on whether the mechanism adopted can give effect to the principles and the second phase questions whether the participants could benefit from these principles (i.e. have the principles been implemented). If both of these questions can be answered in the affirmative, then the legislature will have complied with its obligation under the Constitution.

3.5.1.1 A reasonable opportunity to participate

The first leg of the investigation considers whether, under the circumstances, members of the public were afforded an acceptable chance to participate in the legislative process. The reasonableness of this process depends on the

‘nature and importance of the legislation and the intensity of its impact on the public...Reasonableness also requires that appropriate account be paid to practicalities such as time and expense...Yet saving money and time in itself does not justify an inadequate opportunity for public involvement...The Court will have regard to what Parliament itself considered to be appropriate...in light of the legislation’s content, importance and urgency.’³²⁴

The first leg of the investigation reviews the mode of participation adopted by the legislature as part of the consultative process taking into account the grounds specified above.

The parties in this case did not dispute whether the opportunity to participate (i.e. the notice and comment proceedings and public hearing) was inadequate or unconstitutional. The only issue in dispute was whether the reasonable opportunity to participate must occur at the provincial level or merely ‘at some point in the national legislative process.’ The CC recognised, however, that ‘[m]erely to allow public participation in the law-making process is...not enough. More is required.’³²⁵

3.5.1.2 Participants taking advantage of the opportunity to participate

The ‘more’ refers to the second leg of the reasonableness test and can find support from the International Covenant on Civil and Political Rights which obliges signatory States to implement measures aimed at not only providing its citizens with a right to participate in public affairs but also at providing an effective opportunity to give effect to the right. The African Charter³²⁶ goes further. It requires that signatory States ‘have the duty to promote and ensure through teaching,

³²⁴ Ibid.

³²⁵ Ibid at 1446 - 1447.

³²⁶ South African became a signatory to the African Charter in 1996.

education and publication, the respect of the rights and freedoms contained in the present Charter and to see to it that these freedoms and rights as well as corresponding obligations are understood.³²⁷ [Emphasis added]. This is the first time that the CC suggests that the democratic participatory principles should be implemented in the participatory process (albeit only *Principle 1: The Educative Effect* is referenced).

In order to ensure that the mode of participation adopted by the legislatures is effective, the CC states that

‘Parliament and the provincial legislatures must provide notice of and information about the legislation under consideration and the opportunities for participation that are available. To achieve this, it may be desirable to provide public education that builds capacity for such participation. Public involvement in the legislative process requiring access to information and the facilitation of learning and understanding in order to achieve meaningful involvement by ordinary citizens.’³²⁸

Although the CC was reluctant to specify the modes of participation which should be adopted in each instance, it highlighted that Parliament has in the past adopted methods which facilitate effective engagement. Referring to the Inter-Parliamentary Union on Parliamentary Involvement in International Affairs, the CC noted that effective participation can be achieved in ‘various ways, including through road shows, regional workshops, radio programs and publications aimed at educating and informing the public about ways to influence Parliament’.³²⁹ The CC found that participation must allow participants the opportunity to ‘influence legislative decisions. The requirements that participation must be facilitated where it is most meaningful has both symbolic and practical objectives: the persons concerned must be manifestly shown the respect due to them as concerned citizens, and the legislators must have the benefits of all inputs that will enable them to produce the best possible laws’³³⁰ and, with that, exercise a degree of control over the laws which govern their lives.³³¹

Based on the above, it appears that a reasonable opportunity to participate requires that the democratic participatory principles are not only notional but actually achieved.³³² The CC

³²⁷ *Doctors for Life Case supra* note 215 at 1433. Also see Article 25(a) of the International Convention on Civil and Political Rights.

³²⁸ *Ibid* at 1446.

³²⁹ *Ibid*.

³³⁰ *Ibid* at 1456.

³³¹ *Principle 2: The Principle of Control*.

³³² As will become apparent later, the principles must be weighed up against one another based on what is reasonable in the context.

evaluated the process followed by the provincial legislatures in respect of the health legislation to determine whether the processes met the reasonableness standard. Unfortunately, the circumstances surrounding this case did not turn on whether or not the participatory democratic principles were achieved but rather on the fact that the time periods afforded to IAP's to participate in public hearings were inadequate³³³ given the public interest in the legislation and the NCOP's express instruction to the provincial legislatures to conduct public hearings in respect of the legislation.³³⁴ Where the legislation did not elicit any public interest when first published,³³⁵ the fact that the NCOP did not insist upon the provinces holding public hearings in respect of the Bill was not deemed unreasonable and not in breach of its duty to facilitate public participation.

Since the *Doctors for Life* case, the CC has considered a number of cases concerning proposed constitutional amendments altering municipal boundaries. These cases have concerned challenges to the Constitution Twelfth Amendment Act³³⁶ and the Cross-Boundary Municipalities Laws Repeal and Related Matters Act³³⁷ which abolished municipalities straddling two provinces and provided for the re-drawing of provincial boundaries so that certain municipalities that were originally in one province were transferred into the jurisdiction of another province. Dissatisfied with this outcome, the applicants in these areas challenged the provincial legislatures' failures to facilitate public involvement as in the Constitution. Raboshakga argues that the principles approach to public involvement reached by the CC in the *Doctors for Life* case has more recently been abandoned in favour of procedural compliance in these judgments.³³⁸

3.5.2 Matatiele Municipality and Others v President of RSA and Others (No 2)

In *Matatiele Municipality and Others v President of RSA and Others (No 2)*,³³⁹ the respondents argued that the provincial legislature's duty to facilitate public involvement in section 118(1)(a) of the Constitution only applied to provincial legislation and not to national legislation. As such,

³³³ *Doctors for Life* supra note 215 at 1456.

³³⁴ Ibid at 1455 - 1462.

³³⁵ Such as the Dental Technicians Amendment Act 24 of 2004.

³³⁶ Constitution Twelfth Amendment Act, 2005.

³³⁷ 8 of 2009.

³³⁸ Ngwako Raboshakga 'Towards participatory democracy, or not: The reasonableness approach in public involvement cases' 2015 *SAJHR* 4 at 5.

³³⁹ 2007 (6) SA 477 (CC).

the respondents argued, the provincial legislature was not under a duty to facilitate public involvement in respect of a constitutional amendment as this was national legislation. In rejecting this argument, the CC found that there is both a textual and a structural approach to interpreting the Constitution. Section 118(1)(a), therefore, cannot be interpreted in isolation without reference to the ‘basic principles which underlie our democracy and the other provisions of the Constitution’³⁴⁰ which require that the views of the provinces must be ventilated at a national level where the proposed legislation impacts directly on the provinces. On this basis, provincial legislatures must participate in national law-making and must do so in accordance with the Constitutional requirements which include the duty to involve the public in the legislative process.³⁴¹

This duty is not limited to the election of representatives in legislatures and empowering them to make all decisions on the public’s behalf. The duty requires continuous engagement between the legislature and the public which, in turn,

‘provides vitality to the functioning of representative democracy. It encourages citizens of the country to be actively involved in public affairs, identify themselves with the institutions of government and to become familiar with the laws as they are made. It enhances civic dignity of those who participate by enabling their voices to be heard and taken account of. It promotes a spirit of democratic and pluralistic accommodation calculated to produce laws that are likely to be widely accepted and effective in practice. It strengthens the legitimacy of legislation in the eyes of the people.’³⁴²

The Court in this way invoked *Principle 3: The Social Licence* and *Principle 4: The Principle of Dignity*.³⁴³

De Vos argues that civic

‘dignity permeates the South African Constitution...Underlying the constitutional focus on the value of dignity is the assumption that each human being has incalculable human worth, regardless of circumstances, and should be treated accordingly. This idea that dignity is inherent to every person regardless of circumstance, which leads to the conclusion that everyone has the same moral worth, suggests that individuals must be accorded an equal opportunity to take part in democratic decisions and should arguably be interpreted and applied in such a way that increases an individual's control over self-determination and self-development.’³⁴⁴

³⁴⁰ Ibid at 488 - 489.

³⁴¹ Ibid at 490.

³⁴² Ibid at 494, quoting the *Doctors for Life* case at [115].

³⁴³ Ibid at 497.

³⁴⁴ De Vos *op cit* note 259 at 33 - 34.

Creating a real participatory process in which individuals believe that their opinion is heard and valued enhances their sense of worth and the belief that they can control their own destiny.³⁴⁵

As in *Doctors for Life*, the CC did not prescribe what this 'real participatory process' looks like as it depends on the facts of each case. However, it provided some guidance on the manner and form that such participation could take by stating that these mechanisms 'may include providing transportation to and from hearings or hosting radio programmes in multiple languages on an important bill, and may go well beyond any formulaic requirement of notice or hearing.'³⁴⁶ The CC also cautioned the legislatures. Although the legislatures are the appropriate bodies for determining the manner in which the public should be engaged and are empowered to develop their own rules in this regard, the ultimate test should always be whether the legislature 'acted reasonably in the manner that it facilitated public involvement in the particular circumstances of a given case.'³⁴⁷ This implies that provincial legislatures will not necessarily have met their constitutional mandate by applying their standard rules of engagement. What it requires in all instances is that the legislatures acted reasonably, that is, in the manner contemplated in the *Doctors for Life* case.

In this case (like *Doctors for Life*), the CC was not required to consider whether the participatory process complied with the democratic participatory principles and rather dispensed with the matter on the basis that the KwaZulu-Natal provincial legislature had failed to facilitate any public engagement in respect of the proposed constitutional amendments.³⁴⁸

3.5.3 Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others

In the case of *Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others*,³⁴⁹ the CC was once again faced with considering whether a provincial legislature complied with its duty to facilitate public involvement regarding proposed

³⁴⁵ *Principle 2: The Principle of Control.*

³⁴⁶ Matatiele (2) supra note 339 at 497.

³⁴⁷ Ibid.

³⁴⁸ Ibid at 500 - 501.

³⁴⁹ 2008 (5) SA 171 (CC).

constitutional amendments altering municipal boundaries of the Merafong Municipality which straddled the Gauteng and North West provinces but would, following the amendment, fall solely within the jurisdiction of the North West Province.

Relying on *Doctors for Life*, the CC applied the reasonableness test in finding that the Gauteng Legislature complied with its constitutional mandate by conducting a public hearing and affording the public an opportunity to submit written submissions to the legislature. On the facts of this case, the majority's conclusion is significantly narrower than the decision in *Doctors for Life* and (in the writer's opinion) is incorrect in that the fulfillment of the constitutional obligation to 'facilitate public involvement' in the CC's eyes falls well short of the participatory democratic principles discussed in Chapter 2.

In order to demonstrate this supposition, it is necessary to touch on the facts of the Merafong case. The provincial legislatures from Gauteng and the North West provinces held a joint public hearing regarding the proposed change to the demarcation of the provincial boundary which would impact the Merafong Municipality which extended across the two provinces but would (if the constitutional amendment was successful) include the entire Merafong Municipality within the North West Province. Thereafter, each provincial legislature would consider the outcome of the public hearing and adopt a written mandate regarding the proposed amendment that was to be presented to the NCOP.³⁵⁰ At the public hearing, the communities expressed strong opposition to the inclusion of the Gauteng portion of Merafong in the North West province.³⁵¹ Based on this opposition, the Portfolio Committee of the Gauteng Legislature agreed to support the constitutional amendment on condition that the Merafong Municipality be incorporated into Gauteng and not the North West. This mandate was presented to the Select Committee at the NCOP. It was also highlighted that the provinces are only permitted in terms of the Constitution, either to accept or reject the proposed constitutional amendment relating to the changing of provincial boundaries and not to propose changes. In light of this, the mandate was defective in that it did not indicate whether it was in support or opposed to the proposed amendment relating to the Merafong Municipality. After this meeting the matter reverted to the

³⁵⁰ Ibid [31] - [32].

³⁵¹ Ibid [33].

Gauteng Portfolio Committee which elected to support the amendment without condition. The Gauteng Legislature did not consult with the Merafong community prior to taking this decision. The constitutional amendment was subsequently approved by the NCOP.

The majority of the Court concluded that, notwithstanding the fact that the Gauteng Legislature did not consult with the community after the mandate was referred, it had complied with its constitutional responsibilities in terms of section 118(1)(a). The Court found that providing the opportunity to participate does not mean that the legislature is obliged to follow the views of the public where those are contrary to government policy. ‘The public participation in the legislative process, which the Constitution envisages, is supposed to supplement and enhance the democratic nature of general elections and majority rule, not to conflict or even overrule or veto them.’³⁵² Following government policy does not mean that the legislature did not keep an open mind when considering the opinions of the public. The facts of this case show that the Gauteng Legislature did listen to the views of the public. The defect was (according to the CC) not with the public participation process conducted but rather with the mandate taken by the Portfolio Committee to the NCOP: ‘Consultation requires the free expression of views and the willingness to take those views into account. This did happen,’³⁵³ at least, originally in developing the Portfolio Committee’s mandate.

In reaching this conclusion, the CC made various comments that seem directly opposed to the democratic participatory principles and the *Doctors for Life* case. The CC found that:

‘From the perspective of respectful dialogue and the accountability of political representatives, it might well have been desirable to report to the people of Merafong that it was impossible to adhere to the position taken by the Portfolio Committee in the negotiating mandate. To the extent that the community has given the impression that the Committee agreed with them and that an understandable exception was created that their views would prevail, it was possibly disrespectful not to return to inform them of subsequent events. The question, though, is whether the omission to consult again after the alteration of the Portfolio Committee’s negotiating mandate amounts to a failure to facilitate public involvement in the process of the Gauteng Provincial Legislature.

...In my view the failure to report back to the Merafong community does not rise to the level of unreasonableness which would result in the invalidity of the Twelfth Amendment which was otherwise properly passed by Parliament...’³⁵⁴ [emphasis added].

The court went on to state that:

³⁵² Ibid [189].

³⁵³ Ibid [190].

³⁵⁴ Ibid [55] - [56].

‘If they [the Gauteng Legislature] had gone back to Merafong to explain the situation to the people, a better understanding might have been fostered, but it is unlikely that the majority would have been sufficiently impressed by the explanation to change their strongly held views. If they agreed to the incorporation in the North West, the Bill would in any event have been passed. If they persisted in their original position, the Gauteng Provincial Legislature still would not have been bound by their view and would in all likelihood have proceeded to vote in favour of the passing of the Bill. The possibility of the Portfolio Committee being persuaded anew by views of which it was already fully aware is indeed small. In all probability little would have been achieved by another round of exchanging ideas, other than to inform and perhaps educate the community. Whereas speculation about the likely outcome of further consultation is not ultimately decisive, the fact is that the community had a proper opportunity to air their views. The previous decisions of this court, on which the applicants rely, do not require an ongoing dialogue. In fact, continuing discussion which does not result in a changed outcome could strengthen possible percepts that consultation was not meaningful.’³⁵⁵ [emphasis added].

Despite the strong statements made by the CC in *Doctors for Life* that participation is vital to giving effect to a citizen’s constitutional right to dignity, in this case the Legislature’s failure to conduct further participation was watered down to merely being ‘disrespectful’. In addition, the CC unilaterally decided that ‘little would be achieved’ if the legislature had conducted additional consultation and that any participation which did occur would amount to ‘non-participation’ (based on the Arnstein ladder of participation) as the affected citizens would merely be informed of the fact that the legislature had changed its position in respect of the Bill. In addition, the CC mentioned that the *Doctors for Life* and *Matatiele* cases should not be interpreted as requiring on-going consultation between legislatures and the public. This appears to be a significant step backwards from the position in the *Doctors for Life* case regarding the purposive interpretation of the Constitution to give effect to participatory democracy in the law-making process.

This criticism finds support in the minority judgment of Sachs J who distances himself from the rest of the bench on the question of whether the Gauteng Legislature was obliged (in terms of section 118(1)(a)) to conduct further consultation with the Merafong community, following the rejection of the negotiating mandate by the NCOP. He critically says that in

‘some ways an interrupted dialogue, when expectations of candour and open-dealing have been established and certain unambiguous commitments have been made, can be more disruptive of a relationship than silence from the start might have been...[P]articipation by the public on a continuous basis provides vitality to the functioning of representative democracy. It encourages citizens of the country to be actively involved in public affairs, to identify themselves with the institutions of government and to become familiar with the laws as they are made...In the present matter the failure of the legislature to go back to the community and explain its abrupt about-turn violated...the civic dignity of the majority. It denied any spirit of accommodation and produced a total lack of legitimacy for the process and its outcomes in the eyes of the people. [(*Principle 3: The Social Licence to Operate*)] And finally, it gave rise to a strong perception - reflected in the papers - that the legislative process has been a sham because an irreversible deal had already been struck at a political level outside the confines of the legislative process in terms of

³⁵⁵ Ibid [59].

which, come what may, Merafong was going to the North West. [*Principle 2: The Principle of Control*].³⁵⁶

In Sachs J's view, *Principle 2: The Principle of Control* and *Principle 3: The Social Licence to Operate*, as well as *Principle 4: The Principle of Dignity* were violated by the legislature in failing to conduct further consultation, and that allowing parties to present their side of the story 'is necessary to preserve human-dignity and self-respect' even if the outcome seems to be a foregone conclusion. The 'respect for the relationship between the legislature and the community required that there be more rather than less communication.'³⁵⁷ If Sachs J's judgment is correct (which, on the face of it, it appears to be), then the majority's finding that the provincial legislature dispensed with its constitutional mandate in section 118(1)(a) must be wrong. There may, however, be a more subtle interpretation of the majority's decision which would be more constitutionally acceptable and which further refines the reasonableness test discussed in these cases and the application of the democratic participatory principles.

This suggested interpretation of the majority's judgment adds an additional principle: that of finality in the decision-making process (*Principle 6: Finality in Decision-Making*). As mentioned in Chapter 2, one of the principal criticisms lodged against participatory democracy (at least in its traditional conception) is that it has the potential to hamstring decision-making processes in that parties cannot reach consensus on a matter. Although it has been determined that participatory democracy does not require full participation (or 100 per cent consensus), there is a point at which the value of further participation is no longer beneficial and when 'talking' must be converted into 'doing'. At this point in the participatory process, the participants should have expressed their respective views, developed solutions through collaborative learning efforts, feel that they have an opportunity to influence the decision-making process and be satisfied that the outcome of the process benefits the common good even if that does not align with their personal objectives (what I refer to as 'constitutional participation').

Where additional participation does not further these principles, the optimal point has been exceeded and participation is downgraded from partnership or delegated power to forms of

³⁵⁶ Ibid [263] - [264].

³⁵⁷ Ibid [298] - [299].

'non-participation' such as therapy or manipulation,³⁵⁸ then perhaps constitutional participation can be abandoned to avoid endless consultation which prevents the implementation of decisions. This does not mean that engagement is abandoned in its entirety: it means that a lesser form of participation (i.e. less than constitutional participation) would be acceptable (what I refer to as 'lesser participation'). This, however, does not mean that this lesser participation is any less important. In fact, as will be expressed below, lesser participation is critical to achieving the outcomes gained during constitutional participation where the optimal point has been breached (*Principle 3: The Social Licence to Operate*).

The Merafong case provides an example of the finality in the decision-making process principle and situations where lesser participation would not only be acceptable but necessary. In this case, it was not disputed that the provincial legislature had conducted public hearings and listened to the views of the community. Up until the negotiating mandate was rejected by the NCOP, the parties seem to have been in unison that constitutional participation had been achieved. Once the mandate had been rejected, the optimal point of participation was exceeded and any additional participation would not further the democratic participatory principles as, in spite of the outcome of any participatory process, the provincial legislature intended to follow government policy.³⁵⁹

Participation should not have ended there. The majority recognised that the community should have been informed of or educated about the legislature's decision and that the failure to do so was 'disrespectful'. Had the provincial legislature taken the last step of informing the community of the outcome of the meeting with the NCOP, the community may not have felt that the participation process was a sham³⁶⁰ and would have had a better understanding of the outcome even though it was contrary to their desires as they would have had an understanding³⁶¹

³⁵⁸ Arnstein *op cit* note 162 at 217.

³⁵⁹ Merafong *supra* note 349 at [24] where van der Westhuizen J says: 'When provincial boundaries are at stake, national and regional needs and perceptions must often be balanced against each other. Government must be open and responsive to the wishes of the communities, which may not necessarily be adequately represented in national elections and could, therefore, find expression in localised resistance. But it also must act in the national interest, be loyal to those who voted it into office and strive to realise the constitutional ideal of achieving the equitable distribution of resources across the country and between the provinces.'

³⁶⁰ *Principle 4: The Principle of Dignity*.

³⁶¹ *Principle 1: The Educative Effect*.

of why a contrary decision was reached by the legislature and, consequently, may have been more accepting of the outcome.³⁶²

The failure to take that last step may have been the reason why the Merafong community launched court proceedings. The CC, however, was not convinced that the failure to execute this form of 'non-participation' diminished the community's dignity or justified overturning the entire legislative process as (it is surmised) constitutional participation had been achieved prior to the provincial legislature's decision and based on *Principle 6: The Principle of Finality in Decision-making*.

3.5.4 Subsequent case law implementing the principle of participation

In the subsequent cases of *Moutse Demarcation Forum and Others v President of the Republic of South Africa and Others*³⁶³ and *Poverty Alleviation Network and Others v President of the Republic of South Africa and Others*,³⁶⁴ the CC was once again faced with the 'duty to facilitate public involvement' conundrum. The issue in dispute was the same as that in the Matatiele and Merafong cases in that constitutional amendments³⁶⁵ varied municipal and provincial boundaries with the effect that certain citizens who were previously resident in one province were now resident in another. It was common cause between the parties in both cases that the provincial legislature had conducted public participation processes but the adequacy of that participation was questioned by the applicants.

In *Poverty Alleviation Network*, the applicants contend that the duty to facilitate public participation was invalid in that the Matatiele community had not been exclusively consulted as a 'discrete and identifiable group',³⁶⁶ the legislature did not receive oral submissions from the community and had failed to consider the written summation that it had received. The applicants further argued that the participatory process must have a 'direct outcome' on the resultant

³⁶² *Principle 3: The Social Licence to Operate*.

³⁶³ 2011 (11) BCLR 1158 (CC).

³⁶⁴ 2010 (6) BCLR 520 (CC).

³⁶⁵ Constitutional Thirteenth Amendment Act 23 of 2007 and the Cross-boundary Municipalities Laws Repeal and Related Matters Amendment Act 24 of 2007.

³⁶⁶ *Poverty Alleviation Network supra* note 364 at 536.

legislation.³⁶⁷ The Court rejected the applicants' submission that the legislature had not taken its submissions into consideration. Based on the facts before the Court, it was evident that the concerns raised by the applicants were considered. The legislature was not obliged to follow those decisions. All that is required is that it maintains an open mind when considering the submissions. That is, the legislature (or authority) does not need to defer to the IAP's.³⁶⁸

The CC also held that the applicants had misconstrued the reference to 'a discrete and identifiable group' mentioned in the *Matatiele* case. In that case, the CC held that the 'more discrete and identifiable the potentially affected section of the population, and the more intense the possible effect on their interests, the more reasonable it would be to expect the Legislature to be astute to ensure that the potentially affected section of the population is given a reasonable opportunity to have a say.'³⁶⁹ [emphasis added]

This statement, the CC concluded, does not mean that the Matatiele community must be afforded a right to be heard at the exclusion of all other parties.³⁷⁰ All that this means is that the community must be afforded a meaningful opportunity to participate in the process.

Arguably the reference to a 'discrete and identifiable group' requires the person conducting the participatory process to identify group(s) of people which may be affected by the proposed legislation (including the missing groups) and - in so doing - select the mode(s) of participation that are suitable to allow all these groups an opportunity to participate meaningfully in the legislative process. If the affected community is largely uneducated or cannot read and write, it is inappropriate for the legislature to receive only written submissions. This was not argued by the Poverty Alleviation Network. Nor could it be, as the Matatiele community was represented by the Poverty Alleviation Network and the legal counsel who submitted written comments on its behalf. The applicants argued that had they been afforded an opportunity to express their concerns orally, they would have been able to dispel the apparent perception that their only complaint was limited to service delivery concerns. This was rejected by the Court. As in the case of Common Law, parties are not entitled to an oral hearing unless fairness requires it.

³⁶⁷ Ibid at 529.

³⁶⁸ *Principle 7: The Deference Principle*.

³⁶⁹ Poverty Alleviation Network *supra* note 364 at 537, quoting the Matatiele case at [68].

³⁷⁰ Ibid.

The 'discrete and identifiable group' argument was also raised in the Moutse case but did not provide a different interpretation to what is mentioned above, other than to state that the classification of a group as 'discrete and identifiable' does not entitle the group to any special treatment in airing their concerns.³⁷¹ All that is required is that the public participation process which was conducted was reasonable. What is reasonable depends on the facts of each case and, in this case, the CC was of the view that the notice and comment proceedings and public inquiries were reasonable under the circumstances.³⁷² What is reasonable, however, will depend on the identity and circumstances of the persons affected.³⁷³

Since these judgments, there has been another case, *Land Access Movement of South Africa and Others v Chairperson of the National Council of Provinces and Others*.³⁷⁴ This case also considered whether the NCOP had adequately dispensed with its constitutional duty to facilitate public participation when considering and passing the Restitution of Land Rights Amendment Act.³⁷⁵ It is not necessary to consider this case in detail as it merely reiterates the principles discussed above. However, one principle that is highlighted in this instance is *Principle 4: The Principle of Dignity*. The CC reinforces *Doctors for Life* by quoting

'[p]ublic involvement...[is] of particular significance for members of groups that have been the victims of processes of historical silencing...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. 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. Public involvement accordingly strengthens rather than undermines formal democracy, by responding to and negating some of its functional deficits.'³⁷⁶

In summary, the case law concerning the duty to facilitate public involvement at the national legislative level has introduced a number of additional principles that guide a facilitator in constructing a public participation process. Firstly, processes should focus on including participants, rather than on excluding them. That is, a reasonable person, acting reasonably must be able to participate in the process. Where parties are excluded from a process, the exclusion

³⁷¹ Moutse *supra* note 363 at 1173.

³⁷² Ibid [1174] - [1175].

³⁷³ *Principle 8: The Identity of the IAP's*.

³⁷⁴ [2016] ZACC 22.

³⁷⁵ 15 of 2014.

³⁷⁶ Land Access Movement of South Africa *supra* note 374 at 26, quoting *Doctors for Life* at [234].

must be linked to a legitimate purpose.³⁷⁷ Secondly, participation is an on-going activity. In order for such participation to be constitutionally compliant, it must comply with the constitutional democratic principles (i.e. the process must be educative, the parties must have a sense of control over the process). However, at some point in the process, further detailed consultation may not lead to additional benefits. In these instances, it may be acceptable to down-grade to a lower form of participation.³⁷⁸ Thirdly, consultation does not mean that the authority must always defer to or reach agreement with the public in a public participation process. All that is required is that the parties keep an open mind when considering submissions by the other party.³⁷⁹ Finally, this section highlights that the identity and circumstances of the parties to the participatory process is relevant to determining the appropriate mode of participation.³⁸⁰

3.6 Participating in local government

Local government is the most accessible sphere of government. Section 152 of the Constitution obliges local government to ‘encourage the involvement of communities and community organizations in the matters of local government’³⁸¹ and policy-making to ensure that the needs of the people are addressed.³⁸²

3.6.1 Legislation governing local government

These broad obligations are fleshed out in the Local Government: Municipal Systems Act³⁸³ ('MSA') and Local Government: Municipal Structures Act³⁸⁴ ('Structures Act'). The Structures Act allows for participation in local government by creating municipalities with sub-council or ward participatory systems and a leadership which is obliged to report on the manner in which the public have been involved in issues of local governance. The circumstances in which the public can participate is developed in the MSA. It states that

‘there is a need to set out the core principles, mechanisms and processes that give meaning to developmental local government and to empower municipalities to move progressively towards social and economic upliftment of communities and the provision of basic services to all our people, and specifically the poor and the disadvantaged.’³⁸⁵

³⁷⁷ *Principle 5: The Principle of Inclusivity.*

³⁷⁸ *Principle 6: Finality in Decision-making.*

³⁷⁹ *Principle 7: The Dereference Principle.*

³⁸⁰ *Principle 8: The Identity of the IAP's.*

³⁸¹ Constitution *op cit* note 13 at 152(1)(e).

³⁸² Ibid at s195(e).

³⁸³ 32 of 2000.

³⁸⁴ 117 of 1998.

³⁸⁵ MSA *op cit* note 383 preamble.

Active engagement with the community is fundamental in achieving this objective.³⁸⁶ The MSA, as a result, grants members of the community the right:

- (a) 'Through mechanisms and in accordance with processes and procedures provided for in terms of this Act or other applicable legislation to-
 - (i) contribute to the decision-making processes of the municipality; and
 - (ii) submit written and oral recommendations, representations and complaints to the municipal council or to another political structure or a political office bearer of the administration of the municipality;
- (b) To prompt responses to their written or oral communications, including complaints, to the municipal council or to another political structure or a political office bearer or the administration of the municipality, affecting their rights, property and reasonable expectations;
- (c) To regular disclosure of the state of affairs of the municipality, including finances.'³⁸⁷

It also imposes a reciprocal duty on the municipal councils 'to encourage the involvement of the local community'³⁸⁸ and more specifically to consult the local community about service delivery³⁸⁹ by facilitating co-operation and communication between the municipal administration and the community and providing full and accurate information to the community regarding these services. Chapter 4 of the MSA sets out the processes in which communities must be involved and consulted, including the preparation, implementation and review of its integrated development plan ('IDP')³⁹⁰ and performance management systems,³⁹¹ as well as monitoring its performance³⁹² and preparing its budget.³⁹³ Participation in these processes

'provides for-

- (a) the receipt, processing and consideration of petitions and complaints lodged by members of the local community;
- (b) notification and public comment procedures, when appropriate;
- (c) public meetings and hearings by the municipal councillor and other political structures and political office bearers of the municipality, when appropriate;
- (d) consultative sessions with locally recognised community organizations and, where appropriate, traditional authorities; and
- (e) report-back to the local community.'³⁹⁴

The notification contemplated above must include the matters in which community preparation is encouraged,³⁹⁵ the rights and duties of the community³⁹⁶ and 'municipal governance, management and development.'³⁹⁷

³⁸⁶ Ibid.

³⁸⁷ Ibid at s5(1)(a) - (c).

³⁸⁸ Ibid at s4(2)(c).

³⁸⁹ Ibid at s4(2)(e).

³⁹⁰ Ibid at s16(1)(a)(i).

³⁹¹ Ibid at s16(1)(a)(ii).

³⁹² Ibid at s16(1)(a)(iii).

³⁹³ Ibid at s16(1)(a)(iv).

³⁹⁴ Ibid at s17(2).

³⁹⁵ Ibid at s18(1)(b).

³⁹⁶ Ibid at s18(1)(c).

The MSA prescribes the manner and form in which the local community must be notified of public participation processes. This notification requirement is notable in that when ‘the municipality invites the local community to submit written comments or representations on any matter before the council, it must be stated in the invitation that any person who cannot write may come during office hours to a place where staff members of the municipality named in the invitation will assist that person to transcribe their comments or representations.’³⁹⁸ In addition, where

‘a municipality requires a form to be completed by a member of the local community, a staff member of the municipality must give reasonable assistance to persons who cannot read or write, to enable such person to understand and complete the form...If the form relates to the payment of money to the municipality or to the provision of any service, the assistance must include an explanation of its terms and conditions.’³⁹⁹

This supports the construction of knowledge in terms of *Principle 1: The Educative Effect*. In this way, the legislation requires not only the opportunity to participate but also assists participants in being able to take advantage of that opportunity.⁴⁰⁰

In addition, the MSA requires that taking advantage of this opportunity must contribute to ‘building the capacity of - (i) the local community to enable it to participate in the affairs of the municipality; and (ii) councillors and staff to foster community participation.’⁴⁰¹ This section represents a legislative recognition of *Principle 1: The Educative Effect*.

Save for the functional requirements aimed at assisting persons who cannot read or write and the general obligation to give effect to the educative effect, the MSA is not prescriptive on how local government must implement ‘public hearings’, ‘notice and comment’ proceedings or ‘consultative sessions’. The Local Government: Municipal Planning and Performance Management Regulations⁴⁰² require a municipality to develop a forum that will ‘enhance’ public participation by including people in ‘(i) the drafting and implementation of the municipality’s

³⁹⁷ Ibid at s18(1)(d).

³⁹⁸ Ibid at s21(4).

³⁹⁹ Ibid at s21(5).

⁴⁰⁰ This gives effect to the reasonableness test discussed above but does not guarantee that the democratic principles are achieved.

⁴⁰¹ MSA *op cit* note 383 at s16(1)(b).

⁴⁰² GN R796 GG22605 of 24 August 2001.

development plan; and (ii) monitoring, measurement and review of the municipality's performance in relation to the key performance indicators and performance targets set by the municipality.⁴⁰³ The local community must be invited to serve on the forum which will:

- (i) 'discuss the process to be followed in drafting the [IDP];
- (ii) consult on the content of the [IDP];
- (iii) monitor the implementation of the [IDP];
- (iv) discuss the development, implementation and review of the municipality's performance management system; and
- (v) monitor the municipality's performance in relation to the key performance indicators and performance targets set by the municipality.'⁴⁰⁴

While this creates the forum for participation, it does nothing to ensure that the democratic participatory principles are met and does not provide much guidance to municipalities or the forum on how to achieve these objectives. Guidance eventually came in the form of the National Policy Framework for Public Participation that was published by the Department: Provincial and Local Government in 2007 ('the Framework').

3.6.2 The National Policy Framework for Public Participation

The Framework seeks to assist municipalities in developing the participatory procedures contemplated in the MSA in such a way that is 'genuinely empowering and not token consultation or manipulation.'⁴⁰⁵ Genuinely empowering public participation can be defined (with reference to various government policies)⁴⁰⁶ as 'an open, accountable process through which individuals and groups within selected communities can exchange views and influence decision-making. It is further defined as a democratic process of engaging people, deciding, planning and playing an active part in the development and operation of services that affect their lives.'⁴⁰⁷ While this definition does not expressly set out all of the democratic participatory principles contemplated above, it is broad enough to encompass these principles.

⁴⁰³ Ibid at reg15(1)(a).

⁴⁰⁴ Ibid at reg15(2).

⁴⁰⁵ Framework *op cit* note 43 at 6.

⁴⁰⁶ White Paper on Local Government 1998, Batho Pele Principles, Community Based Planning Initiative 2003 and Community Development Workers (2003).

⁴⁰⁷ Framework *op cit* note 43 at 15.

In designing the participatory procedures contemplated, the Framework suggests that five factors must exist in order for participatory procedures to 'work':⁴⁰⁸

- citizens must be able to participate;
- citizens must want to participate;
- participation by citizens must be facilitated;
- citizens must be asked to participate and
- citizens must be responded to.⁴⁰⁹

These measures are not uncommon objectives of participation. The ability for citizens to participate is congruent with the 'reasonable opportunity' to participate dealt with above. Similarly, the facilitation of participation matches the requirement that the relevant authority must not only provide this opportunity but must also assist parties to take advantage of the opportunity to participate. The requirement that citizens want to participate depends on whether the participants feel part of the community. That is, they must feel that the local government is 'their' government. This means that they must feel that they exercise a degree of control over the government and the process. This approach is similar to *Principle 2: The Principle of Control*. This sense of control and trust over the process is also likely to be enhanced where local authorities consider and respond to issues that are raised by participants. This is similar to *Principle 3: The Social Licence to Operate*. Finally, in order for any form of participatory process to commence, the relevant parties need to be notified of the process. This is the standard notification requirement that is critical to initiating the participatory process.

With these minimum criteria for participation in mind, the Framework includes a list of community participation principles which guide the selection and running of the participatory process to make sure that participation 'works'. These principles mirror the participatory democratic principles mentioned in Chapter 2 and this chapter and include inclusivity,⁴¹⁰

⁴⁰⁸ It is assumed that 'work' used in this context means the requirements that must exist in order to achieve the 'genuinely empowering participation' that the Framework seeks to achieve.

⁴⁰⁹ Framework *op cit* note 43 at 19.

⁴¹⁰ *Principle 5: The Principle of Inclusivity*.

diversity,⁴¹¹ building community participation,⁴¹² transparency,⁴¹³ flexibility,⁴¹⁴ accessibility,⁴¹⁵ accountability,⁴¹⁶ trust, comment and respect⁴¹⁷ and integration.⁴¹⁸

The principle of inclusivity has been raised in the previous section.⁴¹⁹ *Principle 4: The Principle of Dignity* recognises that the person conducting the participatory process must identify which participants may be affected by the proposed decision and provide them with an opportunity to participate in the process.⁴²⁰ Meanwhile, the obligation to build community participation and accessibility to the participatory process both reflect *Principle 1: The Educative Effect*. Transparency, accountability, trust and commitment are all characteristics that form part of *Principle 3: The Social Licence to Operate*.

As mentioned throughout this Chapter, the appropriate mode of participation is determined by the surrounding circumstances. There is a tendency, once having selected a mode of participation, to apply it rigidly at the expense of the democratic participatory principles. The principle of flexibility remains an important one. Persons conducting participatory processes need to review and assess the process being implemented continually to confirm that it is promoting the democratic participatory principles. To the extent that it is failing to do so, the

⁴¹¹ This principle requires that there is a diversity of factors such as race ethnicity and language etc in the decision-making process. This is incorporated into *Principle 8: The Identity of the IAP's*. This is also a vital component of *Principle 1: The Educative Effect*.

⁴¹² 'Capacity building is the active empowerment of role players so that they clearly and fully understand the objective of community participation and may in turn take such actions or conduct themselves in ways that are calculated to achieve or lead to the delivery of the objectives.' Framework *op cit* note 43 at 21.

⁴¹³ The principle seeks to ensure that there is openness and honesty in the public participation process.

⁴¹⁴ 'The ability to make room for change for the benefit of the participatory process. Flexibility is often required in respect of timing and methodology. If built into the participatory process upfront, this principle allows for adequate public involvement, realistic management of costs and better ability to manage the quality of the output.' Framework *op cit* note 43 at 21.

⁴¹⁵ 'At both mental and physical levels - collectively aimed at ensuring that participants in a community participation process fully and clearly understand the aim, objectives, issues and methodologies of process, and are empowered to participate effectively. Accessibility ensure not only that the role players can relate to the process and the issue at hand, but also that they are at the practical level, able to make their input into the process.' Framework *op cit* note 43 at 22.

⁴¹⁶ Participants are responsible for their actions and for fulfilling their obligations.

⁴¹⁷ This is tantamount to *Principle 3: The Social Licence to Operate* and *Principle 4: The Principle of Dignity* which require that the participants believe that their voices are heard and, whatever the outcome, they support the conclusion because they deem the process to be fair.

⁴¹⁸ 'The community participation processes are integrated into mainstream politics and services, such as the IDP process, service planning.' Framework *op cit* note 43 at 22.

⁴¹⁹ *Principle 5: The Principle of Inclusivity*.

⁴²⁰ *Principle 8: The Identity of IAP's*.

person conducting the participatory process needs to adapt it accordingly. This cannot be undertaken unilaterally as the participants would have been involved in designing the process. Through consultation to adapt the process, the participants may waive the proposed adaptation in favour of a less onerous process. In such cases, they would also waive their right to challenge this lesser process at a later stage. This requirement of flexibility is critical to the participatory process and must be included as an additional principle: *Principle 9: The Principle of Flexibility*.

Variety in participation (and possibly even less participation) is contemplated in the Framework and the MSA which include three categories of participation: informing, consulting and involving. For example, citizens must be informed of council decisions or the available mechanisms, processes and procedures through which community members can participate;⁴²¹ they must be consulted regarding municipal service delivery and they must be involved in ward committees in integrated development planning.

The MSA does not define these terms. Parliament's specific use of them, however, indicates that it intended there to be degrees of participation in local government. The Framework attempts to define these categories of participation in a manner that is useful to understand and implement. These definitions must be used with caution in that the rigid application of the definition may compromise ultimate fairness and since these terms are not consistently used across legislation these definitions may be transferable from one context to the next. As set out below, context and not terminology is definitive in determining the form of participation that is adopted. However, terminology can be a useful tool in developing a baseline level of participation.

3.6.2.1 Informing

According to the Framework

‘[i]nform means the passing of information between councillors, officials and the community. It constitutes the most passive form of engagement between the public and the municipality. It is usually a one way communication from a municipality to the public, merely to keep the public informed about something in order to assist them in understanding a problem, alternatives or solutions. No real input is expected from the public. Examples of the way 'informing' can help from a municipal point of view would be advertising an imbizo in a newspaper or a radio, the use of loud-hailers, publication of notices and so

⁴²¹ MSA *op cit* note 383 at s5(1)(c) and 18(1)(c).

on. From the perspective of the community, one mechanism central to 'informing' is the ward committee, but others would include direct petition or a letter to a councillor or official.⁴²²

This form of communication, although important for the achievement of participatory democracy, does not fulfill the requirements of the substantive principles as it does not allow for the exchange of viewpoints, problem-solving or exercising control over the process or its outcome as information is merely communicated to the participants. This form of communication should only be relied upon where the local government does not expect a response⁴²³ and so it is tantamount to notification and not public participation as required by the democratic participatory principles.

3.6.2.2 Consulting and Involving

The democratic participatory principles are more evident in the Framework's definitions of 'consult' and 'involve'. The reference to 'consult' in the MSA is

'one step closer to full participation and requires more of the public than merely receiving communicated information from the municipality. It is therefore also less passive since the objective is to obtain feedback from the public on analysis, alternatives and / or decisions communicated to them by the municipality. Consultation will be mainly with stakeholder groups or ward committees but will not exclude the general public. Self-selected stakeholder groups will emerge during this kind of process. Consultation represents the start of a two way communication between the municipality and the public.'⁴²⁴

This form of engagement would be expected at meetings to discuss the budget / IDP process or through surveys to assess service delivery. While this definition is generally aligned with the participatory principles in the sense that it recognises that two-way engagement is necessary to achieve *Principle 1: The Educative Effect*, there are some elements of concern:

- Firstly, the reference to 'full participation' is incorrect. As highlighted above, the focus of a successful participatory process is not based on the number of people consulted as a percentage but rather on whether the process adopted in consulting those who participate or wish to participate gives effect to the democratic participatory principles.
- Secondly, consultation in this context places form over substance. It is based on two-way communication between the municipality and the community where the municipality informs the community (in the manner considered above) and the community provides feedback. The mode of participation suggested to meet the requirement to consult is

⁴²² Framework *op cit* note 43 at 45 - 46.

⁴²³ Ibid at 46.

⁴²⁴ Ibid at 47.

through conducting surveys. This, the Framework suggests, is appropriate when assessing the level of service delivery provided by the municipality in respect of water, sanitation etc. This kind of approach may be appropriate where the municipality wants the community to rank identified projects in order of preference for purposes of implementation. In this way there is a closed list of options from which the community can elect their individual preference. The feedback received from the community, however, is finite. Members of the community cannot suggest new projects or give comments in respect of the project.

The term 'involve', on the other hand, has been described as a

'high level of two way interaction between the municipality and the public. It constitutes an active working relationship between the public (represented by ward committees and stakeholder groups) and the municipality in order to ensure that concerns and issues raised by the community are directly reflected in the way the municipality deals with it. Providing continued feedback to ward committees and stakeholder groups is part of the process.'⁴²⁵

This can be undertaken in a variety of ways: ward committees, stakeholder forums, training or referenda. This form of engagement is most closely aligned with the concept of participation proposed in this Chapter as being 'constitutionally compliant'.

However, what these three terms indicate is that not all forms of engagement need to achieve the same degree of participation which is attached to the term 'involve' in order to meet the democratic participatory principles. The concern that arises by using and defining these terms is that there is the potential for the descriptions provided in the Framework to be applied formalistically.

As was the case with the classifications of functions doctrine mentioned earlier, caution must be exercised in such situations as municipalities may lose sight of the concept of fairness and the democratic participatory principles by sticking rigidly to what the terminology requires. Furthermore, the legislature has not used terms like 'inform', 'consult' and 'involve' consistently in other legislation and so the definitions provided here may not be directly applicable in other contexts. This, however, creates a conundrum as in terms of the general rules of interpretation, it

⁴²⁵ Ibid at 48.

is assumed that the legislature's decision to use different words is intentional and, therefore, requires different meanings.

The Framework and the definition provided are useful and should be used as a guide to municipalities when they are faced with one of these terms, provided that when they are faced with such a term, they evaluate the definition of the term within the context to ensure that the form of engagement that the definition contemplates is appropriate under the circumstances in light of the democratic participatory principles and the general rules of fairness. These terms can form the basis of a lexicon for the legislature to use in future to develop consistency in the terminology and intention of Parliament in using particular terms. Over time, consistent terminology in the context of participation will be a useful tool, not only to the legislature but also to administrators, lawyers, EAP's and other stakeholders.

3.6.3 Developing a public participation strategy

Once the form of engagement has been selected and tested against the definition to determine its appropriateness, the Framework suggests that a strategy must be developed to give effect to it. The Framework identifies three strategies (1) communication; (2) ward committees and ward forums and (3) stakeholder forums.

The communication strategy highlights the suggestion that modes of participation (and the sharing of information between municipalities and the community) can be enhanced through the development and publishing of public participation principles and a Citizen's Participation Charter, as well as by implementing a complaints management system and citizen satisfaction surveys. According to the Framework, publishing the principles of participation and educating citizens in respect of these principles is likely to assist the municipality in understanding that governance at a local level is done in partnership with the community meaning that the municipality is constrained in making decisions for the public good. These principles can be published in the Public Participation Charter - a document which outlines 'the rights and duties of citizens as regards participating in their municipality's governance.'⁴²⁶

⁴²⁶ Ibid at 51.

This Charter must provide an understanding of what community participation is, how it will be implemented, the ways in which complaints can be lodged and the contact details of relevant persons. The complaints mechanism should include time periods to ensure that there is an efficient response. In addition, the Framework suggests that the communication strategy include citizen satisfaction surveys that assess the performance of service provision and responsiveness of government employees. These can be used to check that the municipality is on track to fulfill the expectations of the community. This strategy, however, does not encourage 'consultation' or 'involvement' in the manner contemplated in the Framework.

To achieve this goal, the second strategy deals with structures in which persons can participate: namely, ward committees and ward forums. Ward Committees are comprised of the Ward Councillor and 10 other people representing the diversity in the ward. The function of the Ward Committee is to act as an independent advisory body. This function was refined in a ministerial note which described the primary function of the ward committees as being one of communication and mobilization including 'attending to all matters that affect and benefit the community, acting in the best interest of the community service payment campaigns, the IDP process, the budgetary process, decisions about service provision, bylaws, and by delimiting and chairing zonal meetings.'⁴²⁷ As the ward committee is a representative body acting in the interests and for the benefit of the community, the municipality must not only provide structures within which the community can participate but must 'explore ways of (i) empowering ward committees in respect of council processes, (ii) ensuring ward committees function effectively, and (iii) that the relationship with communities is inclusive, transparent and participatory.'⁴²⁸ That is, representative forums such as ward committees need to be actively involved in 'central municipal processes' in order for them to be effective and for the views of the community to be heard. The participation of the ward committees within municipal structures, however, must be real and not illusionary otherwise 'participation' of these committees within the council will be nothing more than examples of 'non-participation' described by Arnstein.⁴²⁹

⁴²⁷ Ibid at 54.

⁴²⁸ Ibid.

⁴²⁹ Arnstein *op cit* note 162 at 36.

In fulfilling this role, the Ward Committee members must be provided with administrative support and training, as well as a budget, to perform its functions.⁴³⁰ However, in addition to an empowered ward committee, what is ultimately required in order to reach the partnership rung on the Arnstein ladder is the ‘deepening of the interaction between ward committees and the community to ensure that it is really the community that can take advantage of an empowered ward committee.’⁴³¹ This, the Framework suggests, can be achieved through internal restructuring within the ward committee by making certain committee members responsible for a portfolio or particular geographic area. This must be coupled with ward committees holding public meetings in which they report back on matters raised by community members and consult with the community in development planning. Development planning assists ward committees in prioritising community needs which can be reviewed on an on-going basis. In considering what these community needs may be, the third leg of the participation strategy requires recognition of the different groups within the community.

The Framework acknowledges two kinds of community groups:

‘The first group is formed with the specific goal of ensuring performance by a municipality in key performance areas. Such organisations include community based organisations and ratepayers associations and are referred to as service or municipal directed groups. The second set of interest groups comprise organisations that focus on a particular area of interest which may not be associated directly with municipal activities. Examples of such interest groups are Chambers of Commerce and informal trade associations.’⁴³²

Within the municipal process, the Framework provides that these stakeholders must register with the municipality so that they can be notified of and interact with the municipality on issues that interest them. This is an important distinction as the first group is one that is concerned more with process, rules and procedures (i.e. they are less concerned with the outcome of the process and more interested in ensuring that the municipality is acting within its powers). The latter group is more interested in pursuing a particular outcome which is in accordance with their mandate. For example, environmental groups may be more vigorously opposed to a greenfields development than in organisations representing business or labour.

⁴³⁰ Framework *op cit* note 43 at 55.

⁴³¹ Ibid at 56.

⁴³² Ibid at 61.

Engaging these stakeholders can take various forms. The Framework suggests that this should be done through stakeholder forums which are public engagement mechanisms (other than ward committees) developed for a particular purpose. The MSA obliges municipalities to develop IDP and local project implementation fora. While these fora have been developed with a specific purpose in mind, their mandate could be extended beyond this function to deal with issues of budget or performance management and thus deal with development in a more integrated way. As in the case of ward committees, these fora must be supported with the requisite resources - such as the developing and circulating of agenda, documents, records, providing training as well as logistical support - and must ensure that participation within these fora is effected in the manner contemplated.

Effectiveness within the Framework recognises that, in order for citizens to exercise a real form of participation, there not only needs to be a platform for participation but also that these citizens can take advantage of these processes. This requires the supply of resources such as administrative support, training and budget. These are components which form part of *Principle 1: The Educative Effect* and which will feed into the development of a public participation strategy.⁴³³ This strategy will need to be designed, taking into account the kind of participatory groups that will form part of the participatory process and the resources that they will require in order to participate effectively. In developing this strategy, the facilitator should rely on consistent terminology such as 'inform', 'consult' and 'involve' so that a consistent approach to participation can be developed and understood by the participants. This strategy must also include ongoing monitoring and be adjusted, if necessary, to meet the democratic participatory principles. Such strategies may be particularly useful within the scope of administrative proceedings.

3.7 Conclusion

This chapter sought to highlight how the substantive principles were undermined during apartheid and to consider how these very same principles have been implemented and supplemented in the constitutional era. Viewed through this lens, the substantive principles were not merely inadequately applied during apartheid, they were non-existent.

⁴³³ *Principle 10: Public Participation Strategy.*

Since then, citizen participation has flourished in accordance with the substantive participatory principles identified in Chapter 2 in a variety of situations: voting, in the creation of legislation and in local government processes.

In addition, this form of participation endorses a citizen's sense of 'dignity and personhood' (*Principle 4: The Principle of Dignity*) and therefore IAP's must be included rather than excluded unless there is a legitimate government purpose for their exclusion (*Principle 5: The Principle of Inclusivity*). In fact, IAP's must be sought out and identified so that the person conducting a public participation process can develop a strategy on how to engage with all IAP's (*Principle 10: Public Participation Strategy*) and, where necessary, adapt the selected modes of participation (*Principle 9: The Principle of Flexibility*) to ensure that all these IAP's are consulted.

While this may seem onerous on the person conducting the public participation process, it is tempered by *Principle 6: Finality in Decision-making* which allows the person conducting the public participation process to terminate the process or decrease the degree of participation where he or she is of the view that no value will be gained from further participation and *Principle 7: The Deference Principle* which provides that the person conducting the public participation process is not required to defer to the views of the IAP's in all instances; all that he or she is required to do is keep an open mind when considering those views.

The manner in which these principles have been applied and developed in the administrative law context is discussed in the next chapter.

Chapter 4

Participation in terms of the Promotion of Administrative Justice Act

4.1 Applying the democratic participatory principles in the administrative law context

The opportunity to participate in administrative decisions has dramatically increased since the introduction of the Constitution. As mentioned in the previous chapter, natural justice (i.e. the opportunity to be heard) only applied to administrative decisions affecting a person's liberty, property or legitimate expectation.⁴³⁴ The consequence of this was that they were prevented from participating (and influencing) decisions which clearly affected them. This was contrary to *Principle 2: The Principle of Control*. Since then section 33 of the final Constitution was enacted requiring that all administrative action must be lawful, reasonable and procedurally fair.⁴³⁵ 'Procedural fairness in the form of *audi alteram partem* is concerned with giving people an opportunity to participate in the decisions that will affect them, and – crucially – a chance of influencing the outcome of those decisions. Such participation is a safeguard that not only signals respect of the dignity and worth of the participants but is also likely to improve⁴³⁶ decisions.⁴³⁷

In giving effect to this right, Parliament passed the Promotion of Administrative Justice Act ('PAJA')⁴³⁸ which requires procedural fairness in respect of administrative action affecting an individual⁴³⁹ and the public.⁴⁴⁰ A detailed investigation into these opportunities to participate yields further principles that have been incorporated into the CFPP in Chapter 6.

⁴³⁴ *S v Moroka op cit* note 183 at 398.

⁴³⁵ Constitution *op cit* note 13 at s33(1).

⁴³⁶ Cora Hoexter *Administrative Law in South Africa* 2nd ed (2012) at 363.

⁴³⁷ *Principle 2: The Principle of Control* and *Principle 4: The Principle of Dignity*.

⁴³⁸ 3 of 2000.

⁴³⁹ *Ibid* at s3.

⁴⁴⁰ *Ibid* at s4.

4.2 Administrative actions affecting an individual in terms of the Promotion of Administrative Justice Act

Where an administrative act ‘materially and adversely affects the rights or legitimate expectations of any person,’⁴⁴¹ the administrator must ensure that the process is procedurally fair. A fair process is not prescribed as it is dependent on the circumstances of each case⁴⁴² but, as a minimum, the process must include:

- (i) ‘adequate notice of the nature and purpose of the proposed administrative action;
- (ii) a reasonable opportunity to make representations;
- (iii) a clear statement of the administrative action;
- (iv) adequate notice of any right of review or internal appeal, where applicable; and
- (v) adequate notice of the right to request reasons.’⁴⁴³

Items (i) and (ii) are critical to the public participation process, while elements (iii) - (v) follow when the administrative action has been completed. Adequate notice includes sufficient information to ensure that participation is real rather than illusory,⁴⁴⁴ details of when and where the IAP's can make representations⁴⁴⁵ and sufficient time in which to prepare and submit these representations.⁴⁴⁶ Identifying who may be affected by a proposed administrative action is an important consideration when issuing a notice and determining the mode of participation to ensure that IAP's are afforded a reasonable opportunity to participate.⁴⁴⁷

4.2.1 Identifying and engaging with an interested and affected party

When considering the reasonableness of a notice informing IAP's, the Courts have looked at the type of person receiving the notice in determining whether it was fair under the circumstances. This requires that the administrator ‘takes some steps to ascertain the identity of the individual to be affected by the decisions for purposes of the notice and the opportunity to be heard.’⁴⁴⁸ Once this assessment has been done the administrator will better understand how to notify and engage

⁴⁴¹ Ibid at s3(1).

⁴⁴² Ibid at s3(2).

⁴⁴³ Ibid at s3(2)(b).

⁴⁴⁴ *Heatherdale Farms (Pty) Ltd v Deputy Minister of Agriculture* 1980 (3) SA 476 (T) at 486.

⁴⁴⁵ *Joseph v City of Johannesburg* 2010 (4) SA 55 (CC) at 59.

⁴⁴⁶ *Nkomo v Administrator, Natal* (1991) SA ILJ 521 (N); *Police and Prisons Civil Rights Union v Minister of Correctional Services (No 1)* 2008 (3) SA 91 (E); *Marais v Democratic Alliance* 2002 (2) BCLR 171 (C); *Diko v Ngobongoza* 2006 (3) SA 126 (C); *MEC, Department of Agriculture, Conservation and Environment v HTF Developers (Pty) Ltd* 2008 (2) SA 319 (CC).

⁴⁴⁷ Principle 8: *The Identity of the IAP's*.

⁴⁴⁸ *Zondi v MEC for Traditional and Local Governance Affairs and Others* 2005 (3) SA 589 (CC). Also see *Joseph v City of Johannesburg* supra note 445.

with those parties. The following cases illustrate how fairness varies, based on the identity of the parties:

- In *Bushula v Permanent Secretary, Department of Welfare, Eastern Cape*⁴⁴⁹ the Court reviewed the notification process followed by the Department to inform the recipients of disability grants that it was undertaking a process to review the paying of grants. The Court held that the printed pamphlets, radio broadcasts and media publications were inadequate and that individuals should have received notification with their pay slips and
- In *Cape Killarney Property Investments (Pty) Ltd v Mahamba*⁴⁵⁰ the Court found that since many of the people that would be affected by an eviction notice were illiterate, notification should have been by way of loud hailer announcements.

Having identified these persons within the notification process, the administrator should be better placed to adopt modes of participation that afford IAP's a reasonable opportunity to participate.

4.2.2 Providing a reasonable opportunity to participate

The reasonableness test developed in the *Doctors for Life* case in respect of legislative participation applies equally in this context. That is, administrators are not only obliged to create the platform for parties to participate but also need to take reasonable measures to ensure that those parties are able to take advantage of that opportunity. Since administrators make various decisions under multiple pieces of legislation, it is unlikely that any two situations will be factually identical. Even where situations may be similar, different administrators may implement different mechanisms which they believe to be reasonable under the circumstances. Factual variance and administrator subjectivity mean that it is impossible to develop a procedure that will meet the democratic participatory principles in every circumstance. This notwithstanding, '[c]ompliance by...government with its procedural fairness obligations is crucial, not only for the protection of citizen's rights, but also to facilitate trust in the public administration and in our participatory democracy.'⁴⁵¹

Without a set procedure that administrators can rely on and the fact that administrators and IAP's may view 'fairness' differently, it may be difficult for an administrator to develop this

⁴⁴⁹ 2000 (2) SA 849 (E).

⁴⁵⁰ 2000 (2) SA 67 (C).

⁴⁵¹ *Joseph v City of Johannesburg* supra note 445 at 72 - 73.

degree of trust with the participants in the process. One possible remedy is to develop terminology such as 'inform', 'consult' and 'involve' in governing legislation and / or the public participation strategy.

As highlighted earlier, developing precedent around terminology has the potential to create more certainty around appropriate modes of participation but there is a risk that, like the classification of functions doctrine,⁴⁵² terminology is applied formalistically to the detriment of fairness. This concern can be avoided if terminology is used as a starting point in developing a mode of participation which is adapted in consultation with the IAP's. To use an overworked metaphor, the terminology is the clay that is moulded and shaped (the engagement process) to develop a unique sculpture (the mode of participation). The terminology in this process sets a baseline level of participation which means that each participatory process does not need to be agreed or negotiated from scratch but can be adapted in the interests of fairness. What may become apparent through this process is that the baseline level is not appropriate within the context and is either not considered fair or will be unacceptable to the IAP's. If this is the case, the participatory process can be adjusted or altered at the beginning rather than being criticised at the end of the process for not being up to standard.

Prima facie, such a suggestion would seem to run contrary to the requirement that administrators must act expeditiously.⁴⁵³ While this might be the case in the short-term, in the long-term discussion and agreement surrounding the process that needs to be followed will foster a sense of ownership by the IAP's over the process and the outcome.⁴⁵⁴ Ownership over the process also means that parties are more likely to trust the process and be satisfied with an outcome, even if it is contrary to their personal view⁴⁵⁵ as, through this process, there will be a transfer of thoughts, ideas, concerns and information.⁴⁵⁶ Therefore, although there may be delays in the implementation of administrative decisions, it may help avoid appeal and review applications down the line.

⁴⁵² Section 3.2.2 *Principle 2: The Principle of Control* above.

⁴⁵³ *Premier, Mpumalanga and Another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC) at [41].

⁴⁵⁴ *Principle 2: The Principle of Control*.

⁴⁵⁵ *Principle 3: The Social Licence to Operate*.

⁴⁵⁶ *Principle 1: The Educative Effect*.

The above represents the Utopian ideal where parties expeditiously agree on the process of consultation and (through this agreed process) all the parties are able to express their views, exercise a degree of control over the process and generate a decision that is acceptable to everyone. Parties may not be able to agree on the nature and extent of the participatory process that should be implemented. While this does not bode well for compliance with the democratic participatory principles, at least, from the perspective of the IAP's, *Principle 6: The Finality in Decision-making* requires that administrative processes move forward and that the administrator in complying with his or her obligation to consult, only needs to have provided a reasonable opportunity to participate and to create an environment in which parties can take advantage of that opportunity. Therefore, where the parties cannot agree on a suitable process, the administrator can select the procedure that will reasonably meet the constitutional principles, which is based on the input from the IAP's and which is guided by the base terminology.

Developing content for the terminology (and the terms 'inform', 'consult' and 'involve') can be drawn from the case law (both pre- and post- 1994). The principles developed from these cases have not been developed with this terminology in mind but are relevant to creating such content as these are approaches that the Courts have held to be fair in certain instances. In these instances, a reasonable opportunity to participate:

- is where the IAP's understand that the purpose of the public engagement is for them to make representations.⁴⁵⁷ While this may seem like an obvious statement, too often participants are unaware of the administrative process and the stage(s) in that process. They may, for example, believe that a public meeting is being held to inform them of an upcoming project, provide them with information and advise them about when they will be allowed to submit comments or when a further meeting will be held. The administrator, on the other hand, may believe that in consulting with the participants at a public meeting, he or she will have complied with his or her legislative mandate. The notice informing the IAP's of the public engagement should, therefore, provide some guidance as to the purpose of the public engagement (i.e. the stage of the process) and whether the participants will be consulted or involved in the process. Neither the PAJA

⁴⁵⁷ *Sokhela v MEC for Agriculture and Environmental Affairs (KwaZulu-Natal)* 2010 (5) SA 574 (KZP) at [55].

nor the Regulations on Fair Administrative Procedures⁴⁵⁸ compel administrators to make this disclosure. Based on what has been mentioned already, it would seem prudent that the first meeting with the identified participants would be to develop the public participation strategy.

- is where the decision-maker or public participation coordinator discloses information that will have an impact on the affected parties and which would result in an adverse decision being taken against those parties.⁴⁵⁹ This obligation is not an absolute duty but depends on how the administrator came to know of the adverse information, the materiality of the information to the IAP's and the practical implications that such a disclosure requires or triggers.⁴⁶⁰ Without commenting on whether the notice and comment proceedings adopted in *Earthlife Africa (Cape Town) v Director-General Department of Environmental Affairs and Tourism*⁴⁶¹ met the democratic participatory principles, the Court recognised that in a multi-phased process the participants must be afforded an opportunity to view all draft reports as well as the final report submitted to the competent authority, particularly where there are significant changes to the initial draft.⁴⁶² A reasonable opportunity must include access to all relevant information throughout the process. The public participation strategy can set out the manner in which information will be disclosed to the participants.
- does not imply that such representation must be an oral hearing as section 3(3)(c) of the PAJA specifically refers to 'an opportunity to...appear in person' and so a reasonable opportunity must mean something broader than oral hearings and may include written representations.⁴⁶³ However, in recognizing what is appropriate under the circumstances,

⁴⁵⁸ GNR 1022 GG 23674 of 31 July 2002.

⁴⁵⁹ Sokhela supra note 457 at [55]; *Chairman, State Tender Board v Supersonic Tours (Pty) Ltd* 2008 (6) SA 220 (SCA); *Chairman of the State Tender Board v Digital Voice Processing (Pty) Ltd* [2012] 2 All SA 111 (SCA); *Yuen v Minister of Home Affairs* 1998 (1) SA 958 (C); *Du Bois v Stompdrift-Komanassie Besproeiingsraad* 2002 (5) SA 186 (C); *Nisec (Pty) Ltd v Western Cape Provincial Tender Board* 1998 (3) SA 228 (C); *National & Overseas Modular Construction (Pty) Ltd v Tender Board, Free State Provincial Government* 1999 (1) SA 701 (C); *Mafongosi v United Democratic Movement* 2002 (5) SA 567 (Tk).

⁴⁶⁰ *Simunye Developers CC v Lovedale Public FET College* [2010] ZAECGHC 121 (9 December 2010); *Thabo Mogudi Security Services CC v Randfontein Local Municipality* [2010] 4 All SA 314 (GSJ).

⁴⁶¹ *Earthlife* supra note 178.

⁴⁶² *Ibid* [11] and [12].

⁴⁶³ Hoexter *op cit* note 436 at 371. Also see *Bam-Mugwanyana v Minister of Finance and Provincial Expenditure, Eastern Cape, and Others* 2001 (4) SA 120 (C) in which the court held that the requirement to a hearing does not necessarily mean an oral hearing unless the empowering legislation requires an oral hearing.

the Courts have held that it may be inappropriate to require uneducated or illiterate people to submit written representations.⁴⁶⁴ In designing an appropriate public participation process, the administrator must look at the categories of participants who may wish to be involved in the process and design a mode of consultation which caters for their needs so as to ensure that the democratic participatory principles are achieved. This must be contained in the public participation strategy.

- is where procedural fairness is balanced against the efficiency of the process and the capacity of the administrator when designing a suitable mode of participation.⁴⁶⁵

‘In determining what constitutes procedural fairness in a given case, a Court should be slow to impose obligations upon government which will inhibit its ability to make and implement policy effectively (a principle well recognised in our common-law and that of other countries). As a young democracy facing immense challenges of transformation, we cannot deny the importance of the need to ensure the ability of the Executive to act efficiently and promptly.’⁴⁶⁶

This, however, does not mean that participation can be dispensed with or its value diminished under the guise of policy implementation or to develop policies which are not linked to a legitimate government purpose. If the administrator too readily dismisses suggestions from participants regarding the manner and form of the participatory process, those participants are not likely to feel involved in the process, trust the process or accept the outcome arising from the process.

- must take into consideration the objects and purpose of the administrative action in light of the empowering legislation.⁴⁶⁷

The above principles are not only relevant when engaging with individuals but are equally applicable when negotiating and agreeing on the modes of participation in respect of projects with the general public. However, designing a strategy in consultation may be more difficult to achieve when the number of people being consulted is large and / or unidentified. Section 4 of the PAJA sets out the appropriate modes of participation where the public at large is concerned.

⁴⁶⁴ *Catholic Bishops Publishing Co v State President* 1990 (1) 849 (A); *Bam-Mugwanyana* supra note 463; *De Beer v Health Professions Council of South Africa* 2005 (1) SA 332 (T).

⁴⁶⁵ *Joseph* supra note 445 at 77.

⁴⁶⁶ *Premier, Mpumalanga and Another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* supra note 453 at [41].

⁴⁶⁷ *HTF Developers (Pty) Limited* supra note 446.

4.3 Administrative action affecting the public in terms of the Promotion of Administrative Justice Act

Section 4 of the PAJA requires that the responsible administrator must, in cases where an 'administrative action materially and adversely affects the rights of the public,'⁴⁶⁸ ensure procedural fairness is achieved by engaging with the public. According to the section, this can be achieved by implementing notice and comment proceedings or public inquiries: a 'fair but different procedure' provided for in other legislation and another appropriate procedure which gives effect to section 3 of the PAJA.

This section is a novel introduction to South African law as there is no equivalent in the common law.⁴⁶⁹ *Audi alteram partem* only applied to quasi-judicial decisions which affect an individual's property or liberty. The reason for limiting *audi alteram partem* was (at least in part) because of a fear that public participation would overburden the administration and yield one of two results: either, administrators would do nothing more than pay lip service to the consultation requirements, rendering the process pointless or slowdown the administrative machine rendering it ineffective and inefficient.⁴⁷⁰ The inclusion of section 4 makes these risks a reality in the constitutional era.

Parliament must have been conscious of these risks when drafting the PAJA as the obligations of the administrator when engaging the public appear to be significantly less than when engaging an individual whose rights are affected by an administrative decision. Unlike section 3 of the PAJA which expressly recognises that 'fair administrative procedures depends on the circumstances of each case,'⁴⁷¹ section 4 does not contain a similar requirement. Instead it states that in 'cases where an administrative action materially and adversely affects the rights of the public,'⁴⁷² the responsible administrator

'must decide whether -

- (a) to hold a public inquiry in terms of subsection (2);
- (b) to follow a notice and comment procedure in terms of subsection (3);
- (c) to follow the procedures in both subsections (2) and (3);

⁴⁶⁸ PAJA *op cit* note 438 at s4(1).

⁴⁶⁹ Save for the very later inclusion of this principle in the South African Roads Board case discussed *supra* note 246.

⁴⁷⁰ Joseph *supra* note 445 at 67.

⁴⁷¹ PAJA *op cit* note 438 at 3(2)(a).

⁴⁷² Ibid at s4(1).

- (d) where the administrator is empowered by any empowering provision to follow a procedure which is fair but different, to follow that procedure; or
- (e) to follow another appropriate procedure which gives effect to section 3.⁴⁷³

An interpretation of section 4 which allays fears of an overburdened administration is that the administrator, in selecting one of the modes of participation cited in paragraphs (a) - (e), will (notwithstanding the context) ‘give effect to the right to procedural fairness.’⁴⁷⁴ This interpretation is supported by the fact that the decision to select one of these modes of participation cannot be reviewed in terms of the PAJA.⁴⁷⁵ This means that an administrator, could, for example, conduct a notice and comment procedure in circumstances where the IAP's cannot read or write. The inappropriateness of the decision to select this mode of participation cannot be reviewed and, provided the notice and comment proceedings are conducted in accordance with section 4, the ultimate decision can also not be reviewed on the basis that the process was procedurally unfair.

Arguably such an interpretation is untenable as it is diametrically opposed to the democratic participatory principles and would amount to an unjustified limitation of the right to just administrative action.⁴⁷⁶ Although section 4 does not specifically require the administrator to take into consideration the circumstances surrounding the administrative action, it is implied in order to give effect to the democratic participatory principles. In order for both the administrator and IAP's to learn and understand how the proposed decision will impact them, the administrator needs to select a mode of participation which facilitates the sharing of information and collaboration.

4.3.1 Identifying and engaging with interested and affected parties

As is evident from Chapter 2, this can be achieved in a variety of ways but in order to know how best this can be achieved the administrator needs to understand the community⁴⁷⁷ or communities that may be affected. If the administrator adopts an unsuitable procedure, *Principle 1: The Educative Effect* is unlikely to be achieved as some or all of the parties would be unable to

⁴⁷³ Ibid.

⁴⁷⁴ Ibid.

⁴⁷⁵ Section 1(b)(ii) excludes the decision or failure to take a decision in terms of section 4(1) of the PAJA from the definition of administrative action thus making the decision unreviewable.

⁴⁷⁶ Constitution *supra* note 13 at s36.

⁴⁷⁷ *Principle 8: The Identity of the IAP's.*

communicate their opinions and concerns adequately or at all. As a result, the administrator may not consider all the concerns (or may be influenced by those parties which could participate) in reaching a decision. In these instances, affected parties may feel:

- that the administrator favours the wealthy and the organized and parties which do not fall within this category are unable to influence the outcome of the decision;
- that their concerns are not worthy of attention or are unimportant or
- resentment or distrust of the administrator, the decision or the project and oppose or frustrate the process, decision or project on principle or out of a lack of understanding.

In respect of section 3, this could be overcome by engaging with the IAP's in developing the public participation strategy ('PPS'). Given the large number of people who may be affected in these circumstances, it would be impractical to engage with the public to agree about these rules of engagement. In such circumstances the administrator would need to take the lead in developing and publishing the PPS and allowing the public to comment on this proposal.

Context is critical in selecting a mode of participation as a poor understanding of the circumstances in which a decision is taken is unlikely to further the democratic participatory principles (*Principle 11: The Principle of Context*). In this way, adopting a participatory process using a social media platform may not be an appropriate substitute for more traditional forms of participation (such as public hearings) in certain circumstances but rather should be used in conjunction with these traditional forms where appropriate. Consultation via social media alone in respect of a decision which affects a largely rural and uneducated population would contravene *Principle 11: The Principle of Context*. Adopting such a mode of participation in respect of decisions affecting persons located in an urban area might still prevent IAP's from participating (for example, those persons who do not have easy access to technology or are not technologically proficient) but it may allow persons who cannot attend public hearings an opportunity to participate and express their views. A combined mode of participation may be (in these circumstances) the most appropriate.

If context is relevant to determining the mode of participation which will best give effect to the democratic participatory principles, it begs the question about whether section 4 affords the administrator sufficient flexibility to adopt appropriate procedures. To date, there have not been any judicial decisions in respect of public inquiries or notice and comment proceedings, considered in section 4(2). As such, constitutional compliance needs to be assessed, taking into consideration the wording of section 4 and the Regulations on Fair Administrative Procedures.⁴⁷⁸

4.3.2 Public inquiries in terms of the Promotion of Administrative Justice Act

Section 4(2) states that

- ‘[i]f an administrator decides to hold a public inquiry -
- (a) the administrator must conduct a public inquiry or appoint a suitably qualified person or panel of persons to do so; and
 - (b) the administrator or the person or panel referred to in paragraph (a) must -
 - (i) determine the procedure for the public inquiry which must-
 - (aa) include a public hearing;
 - (bb) comply with the procedures to be followed in connection with public inquiries, as prescribed;
 - (ii) conduct the inquiry in accordance with that procedure;
 - (iii) compile a written report on the inquiry and give reasons for any administrative action taken or recommended; and
 - (iv) as soon as possible thereafter-
 - (aa) publish in English and in at least one of the other official languages in the Gazette or relevant provincial Gazette a notice containing a concise summary of any report and the particulars of the places and times at which the report may be inspected and copied; and
 - (bb) convey by such other means of communication which the administrator considers effective, the information referred to in item (a) to the public concerned.’⁴⁷⁹

The Regulations on Fair Administrative Procedures provide some detail to this section. Unfortunately, these regulations do not provide any guidance in respect of public inquiry, other than the notice advertising it.⁴⁸⁰ Administrators and lawyers are, therefore, bound by the wording of section 4 in developing and implementing the public inquiry. Notably, the task of determining the procedure for the public inquiry falls to the administrator. His discretion in determining the procedure is only fettered by two restrictions: (1) that the public inquiry must include a public hearing and (2) the procedure must comply with any prescribed requirements. To date the legislature has not published any such requirements. Once this procedure has been determined, the public inquiry must be conducted accordingly.

⁴⁷⁸ GNR 1022 GG 23674 of 31 July 2002.

⁴⁷⁹ PAJA *op cit* note 438 at s4(2).

⁴⁸⁰ Regulations on Fair Administrative Procedures *op cit* note 458 at reg 3.

There are two potential concerns regarding this section. Firstly, there is no requirement for the administrator to engage with the public in developing the procedure. While it is acknowledged that the PPS cannot reasonably be negotiated and agreed, given the number of potential IAP's, there should still be a degree of interaction between the administrator and the public regarding the public engagement procedure, such as by publishing the rules of engagement for comment or by inviting key parties or groups to be consulted. As illustrated above, this is an important requirement as it enhances trust in the process and the outcome.⁴⁸¹ The section does not restrict the administrator from engaging with the public in determining the procedure and, since all laws must be interpreted in accordance with the Constitution, it must be assumed that the administrator would engage with the IAP's and (in doing so) comply with the democratic participatory principles. This requirement could also be included within the prescribed procedures contemplated in section 4(2)(b)(i)(bb), as well as the fact that the rules of engagement will be published finally.

Notwithstanding this engagement, the procedure agreed upon by the parties is fettered by the fact that it must include a public hearing. The administrator does not appear to be limited to only implementing a public hearing.⁴⁸² The procedure adopted must 'include' a public hearing which, at least, allows the administrator some flexibility to include other forms of engagement that may be more appropriate within the circumstances but, as a bare minimum, there must be a public hearing.

Insisting on a particular mode of participation has the potential to prevent procedural fairness as the public hearing required by PAJA may not be an appropriate mode of participation once the administrator has identified the IAP's and determined their specific preferences. In these circumstances it seems that the administrator must, if he realises that a public hearing is not the most appropriate mode of participation, abandon this process and commence a new process.

⁴⁸¹ *Principle 3: The Social Licence to Operate.*

⁴⁸² S4(3) of the PAJA permits the administrator to adopt a public inquiry and notice and comment proceedings.

Participation in this way is governed by form and not substance in that fairness is considered by the mode of participation. The administrator is restricted in moulding the process (in consultation with IAP's) that is suitable under the circumstances. This may also be an inefficient use of limited resources to insist on a public hearing where it may not be the most appropriate mode of participation. Furthermore, it seems nonsensical to provide the administrator broad discretionary powers to determine supplementary procedures only to bind him or her to a public hearing in circumstances where it may not be appropriate. Rather than binding an administrator to a particular mode of participation, it may be better to develop a PPS using the terminology 'inform'; 'consult' and 'involve'.

Once this procedure has been determined, it must be followed and implemented by the administrator. Although certainty is important as it engenders trust in the process and the outcome, strict adherence to a procedure which turns out to be unfair can be as destructive as administrators developing a participatory process on a whim. Administrators need to review the process constantly against the democratic participatory principles and satisfaction of the participants to determine whether it is necessary to fine-tune the process in favour of ultimate fairness. In this way, although the PAJA seeks to facilitate fairness by publishing the public inquiry procedure in section 4, it has the potential to generate the opposite effect.

The deficiencies in the requirements of section 4 become evident when considering public inquiries conducted in terms of the Competition Act⁴⁸³ which accords more closely to the democratic participatory principles in that it provides for the rules of engagement in market inquiries.

4.3.2.1 Lesson to be learnt from public inquiries in terms of the Competition Act

The Competition Act empowers the Competition Commission ('Commission') to conduct inquiries into the market for the provision of goods and services without identifying the conduct of one firm within the market.⁴⁸⁴ There is little guidance in the Competition Act concerning how the Commission must execute the public inquiry. In fact, it states that the Commission can

⁴⁸³ 89 of 1998.

⁴⁸⁴ Ibid at s43A.

implement an inquiry in 'any manner' depending on the context. All that is required is that the Commission publishes a notice advertising the inquiry, setting out the scope, terms of reference and timeline⁴⁸⁵ and inviting IAP's to comment.

At any time during the inquiry, the scope or time period may be amended by publishing a further notice in the *Gazette*.⁴⁸⁶ It is assumed that before finalizing this amendment, there will be some consultation. The section does not specifically require it but since it refers to 'a further notice', it is assumed that the process contemplated in relation to the original notice must apply. Once the market inquiry is complete, a report must be prepared, then published in the *Gazette* and then forwarded to the Minister with or without recommendations.⁴⁸⁷ Based on the outcome of the report the Commission may:

- (a) 'initiate a complaint and enter into a consent order with any respondent...with or without conducting further investigation;
- (b) initiate a complaint against any firm for further investigation...;
- (c) initiate and refer a complaint directly to the Competition Tribunal without further investigation;
- (d) take any other action within its powers in terms of this Act recommended in the report of the market inquiry; or
- (e) take no further action.'⁴⁸⁸

Since the inception of the Competition Act, only four market inquiries have been initiated by the Commission.⁴⁸⁹ The process followed in respect of three of these processes is set out below as they provide some insight into the form and structure a PPS can take.

4.3.2.1.1 The banking inquiry

Following an initial investigation into the banking sector by the National Treasury, the Commission launched an investigation into the competition laws' impacts arising from the findings in the National Treasury's report ('the NT Report'). The Commission published a notice of intention to launch the inquiry and invited all IAP's to respond to the findings in the NT Report, submit information voluntarily and to answer questions regarding the industry. The

⁴⁸⁵ Ibid at s43B(1) - (4).

⁴⁸⁶ Ibid at s43B(1)(5).

⁴⁸⁷ The recommendations may include (but are not limited to) '(a) recommendations for new or amended policy legislation or regulations; and (b) recommendations to the other regulatory authorities in respect of competition matters.'

⁴⁸⁸ Competition Act *op cit* note 423 at s43C(3).

⁴⁸⁹ The Banking Inquiry, the Liquefied Petroleum Gas Inquiry, the Retail Inquiry and the Healthcare inquiry. The reports in respect of these inquiries are available on the Competition Commission website at <http://www.compcom.co.za/#> last accessed on 15 February 2017.

outcome of the investigation and recommendations would be compiled in a report and submitted to the Commissioner.⁴⁹⁰

In executing the inquiry, a plan was developed setting out the personnel, logistics, timelines and financial resources required. ‘Financial constraints dictated that the [I]nquiry had to be housed in the current Commission offices, but dedicated office space and separate infrastructure were provided for the [i]nquiry personnel.’⁴⁹¹ With this infrastructure in place, the inquiry was announced in a document titled *Composition of the [I]nquiry and Terms of Reference*.⁴⁹² The terms of reference and object of the inquiry, as well as the identity of the personnel, were included and published in the notice. In terms of the proposed timelines, the inquiry published a Programme of Action and Guidelines on submissions in the media and on the inquiry’s website.

‘The Programme of Action informed stakeholders and the South African public in general how the [i]nquiry process would unfold. The Programme set out the main activities that the [i]nquiry was likely to be engaged in during the various stages.’⁴⁹³ These stages (as amended) were:

- (a) ‘stage one: August to October 2006
Submissions, analysis and research
- (b) stage two: November 2006
First public hearings
- (c) stage three: December 2006 to March 2007
Further analysis, engagement and research
- (d) stage four: April 2007 to July 2007
Second public hearings
- (e) stage five: August 2007
Analysis and writing report.’⁴⁹⁴

During stage one, the Commission identified and contacted stakeholders. Those that might be affected by the banking system included banks, card associations, regulatory bodies (either legislative or voluntary), organizations representing consumers, retailers and other stakeholders

⁴⁹⁰ Competition Commission ‘Banking Inquiry Report Chapter 1’ available at http://www.compcom.co.za/wp-content/uploads/2015/10/1-Enquiry-Process_non-confidential1.pdf accessed on 13 March 2016 at page 7.

⁴⁹¹ Ibid at 9.

⁴⁹² Ibid.

⁴⁹³ Ibid at 11.

⁴⁹⁴ Ibid.

that did not fall within the other categories. Having identified these entities, introductory letters were sent to these parties. In these letters

‘the Panel welcomed the opportunity of an initial meeting with them and encouraged organisations to contact the [i]nquiry Manager if they were desirous of such a meeting...The introductory letters also explained that the main purpose of such meetings was to afford the Panel members the opportunity to introduce themselves and to explain the ambit of the [i]nquiry and the relevant information that the [i]nquiry sought from the stakeholders.’⁴⁹⁵

Meetings were held with those stakeholders that requested them and with those that the Panel believed would provide critical information to the inquiry. These meetings were attended by the Panel, the Technical Team and representatives of the stakeholders. ‘As success of the [i]nquiry was largely dependent on the voluntary participation of the banks, the main aim of these initial introductory meetings was to gain the co-operation and confidence of the banks and to address any concerns or perceptions that may have existed after the announcement of the [i]nquiry.’⁴⁹⁶ This is congruent with *Principle 3: The Social Licence to Operate*.

During these meetings, the background of the inquiry was explained, the terms of reference and the Programme of Action discussed.⁴⁹⁷ ‘To facilitate the interaction and exchange of views, the [i]nquiry invited consumer and civil society organisations to a briefing workshop which dealt with how the work of the [i]nquiry impacted on such organisations and their members.’⁴⁹⁸ This facilitated *Principle 1: The Educative Effect*. It also provided for more than merely a public hearing (as required by PAJA) as the Commission adopted *Principle 13: The Principle of Multiplicity* by employing modes of participation such as workshops to ensure that the participatory democratic principles were achieved.

In addition to the letters and the meetings, the Panel released guidelines detailing the manner and form of parties’ submissions. That is, it ‘provided directives on length, language, claims of confidentiality, number of copies and deadlines.’⁴⁹⁹ Much of the information received by the inquiry was made under a claim of confidentiality and, therefore, could not be made available to the general public. Some of these entities provided non-confidential versions of their

⁴⁹⁵ Ibid at 15.

⁴⁹⁶ Ibid at 16.

⁴⁹⁷ *Principle 10: Public Participation Strategy*.

⁴⁹⁸ Banking Inquiry Report *op cit* note 490 at 17.

⁴⁹⁹ Ibid at 15.

submissions which could easily be made available to other participants. Having considered all of the submissions, the Technical Team asked participants to clarify and amplify their submissions before certain entities were invited to take part in the first round of public hearings.⁵⁰⁰ Only those parties invited to attend the public hearings were able to make oral submissions.

The Report notes that

‘[i]n an attempt to increase public awareness and greater participation by stakeholders in the process, the [i]nquiry held these first set of public meetings in several cities and as far as was reasonably possible, the [i]nquiry attempted to arrange venues that were most convenient to stakeholders wishing to make presentations. The [i]nquiry also reserved the right to expand the hearings to other cities if the number of submissions received justified such a decision.’⁵⁰¹

This approach recognised the nature of the participants who may wish to be involved and recognised that the approach needs to be flexible to ensure that all persons who reasonably wished to participate could do so.

The public hearings were conducted in accordance with a further set of guidelines published by the Panel. Those parties called upon to make oral submissions needed to do so in accordance with the guidelines which required that the party making the submissions ‘provide the panel with an introduction to the organization itself and then enlighten the Panel on how they had dealt with or were dealing with the issues that are the subject matter of the [i]nquiry. These presentations were to be one hour of duration with parties being expected to summarize and highlight the main thrust of their submissions.’⁵⁰² The public hearings would be conducted in an inquisitorial manner by the Panel. However, the Panel acknowledged that it had not (by the time of the hearings) read all of the submissions in detail and so the hearings were merely ‘intended to clarify and test at a general level the significance and reliability of the presentations made.’⁵⁰³

Based on this information and the outcomes of the public hearings, the Panel analysed the submissions in detail which involved technical meetings with the banks, card associations and other identified stakeholders. The Technical Team also issued a questionnaire in which they requested additional information or clarification. Upon receipt of this information, a second

⁵⁰⁰ Ibid at 19.

⁵⁰¹ Ibid at 20.

⁵⁰² Ibid at 20 - 21.

⁵⁰³ Ibid at 21.

round of public hearings was held to consider specific issues identified by the Panel. Unlike the first round of hearings, the second round was initiated by the Technical Team providing an overview of the areas of concern coming out of the process to date, making reference to the legislative provisions, submissions and academic opinion.⁵⁰⁴ The Panel invited specific parties to make representations in respect of these questions and (where necessary) these were permitted to make supplementary written submissions.

Following the second set of public hearings, the Panel and the Technical Team developed recommendations aimed at addressing the competition concerns identified during the public inquiry. The Panel required the Technical Team to arrange further meetings with various stakeholders to

‘explore the feasibility and practical implications of certain possible recommendations and / or changes which were mooted in public hearings and which could come to form part of the eventual recommendation of the Panel...Participation in the process did not commit any participant to support or endorse any particular change or measure which was mooted for exploration, nor was the process or its topics taken to imply definite findings or recommendations by the [i]nquiry Panel. It was emphasized that nothing said at those meetings would be considered as being on the record of the [i]nquiry, unless specifically advanced and recorded as an on-the-record statement at the instance of, or by the agreement with, the participant concerned.’⁵⁰⁵

These engagements with stakeholders constituted the final stages of the participatory process. Based on these outcomes, the Panel (in conjunction with the Technical Team) prepared the final report that was published and submitted to the Minister.

The banking inquiry highlights the importance of understanding the IAP's that may be affected by a process and to engage with those parties directly. However, this engagement should be done in terms of a pre-determined process so that the participants are aware from the start of their opportunities to participate. They should know that their submissions may be limited to written submissions and that they may not be afforded an oral hearing. Where there is face-to-face interaction with parties, this should be an inquisitive interaction that works both ways. This can only happen if the parties are informed about the substance of the inquiry which is largely assisted by the Commission publishing direct questions or themes on which they require input from the IAP's. This does not mean that the IAP's are prohibited from raising issues outside of

⁵⁰⁴ Ibid at 23.

⁵⁰⁵ Ibid at 24 - 25.

what the Commission believes to be important but it does indicate to the IAP's what the commission believe to be an issue. This approach was carried into the Liquefied Petroleum Gas Inquiry.

4.3.2.1.2 The liquefied petroleum gas inquiry ('LPG')

In September 2014 the Commission initiated a market inquiry into the LPG market. The reason for the inquiry is that the Commission believed that activities within the sector may prevent or distort competition and that the inquiry may result in measures that would promote competition. In accordance with the Competition Act, the Commission published the Terms of Reference subject to the proviso that it could be amended in due course should circumstances require it. As in the case of the other market inquiries, the Terms of Reference described the market inquiry process as an information gathering exercise which would be achieved by sending questionnaires or undertaking surveys with identified parties or the public, information requests, calls for submissions on specific issues and meetings with identified parties.⁵⁰⁶ The outcome of the investigation would be reported.

To facilitate participation, the Commission developed guidelines which would become effective at the start of the inquiry. Therefore, rather than having a generic set of guidelines applicable to all market inquiries, the Commission elected to develop guidelines for each inquiry. This is noteworthy as it creates the impression that the Commission is thinking about developing a participatory process that is appropriate for the context, based on the market and the participants. That being said, the market inquiry process adopted in general terms in the Terms of Reference does not (at face value) appear to be any different from the process that has been adopted in any of the other inquiries. This may be based on the fact that the Commission does not have an over-arching public participation guideline document to use as a reference when designing guidelines for the individual market inquiries.

Failing to have such guidelines means that the Commission is not testing the participatory standard it is adopting against an independent constitutionally acceptable standard but is rather

⁵⁰⁶ Competition Commission 'Liquefied Petroleum Gas (LPG) Market Inquiry Terms of Reference' accessible at <http://www.comcom.co.za/wp-content/uploads/2014/09/LPG-Terms-of-Reference-August-2014.pdf> accessed on 31 March 2016.

drawing on past practices. While precedent is a useful tool, it should not be blindly replicated as the important question of whether the democratic participatory principles are being achieved is not being asked at the outset. The *LPG Market Inquiry Guideline for Stakeholder Participation* goes on to state that '[t]he guidelines may, however, be reviewed from time to time to reflect any best practice that may develop. Any amendments to the guidelines will be notified to the public, and the latest version will always be appearing on the Commission's website.'⁵⁰⁷ This means that the participatory process must be scrutinised to confirm that participation is being effective⁵⁰⁸ and will be amended if needs be. By not having an over-arching participatory approach which is adopted and implemented to determine its effectiveness or fairness, it is unclear how it can be determined that the public participation process is effective.

The procedure adopted in the LPG inquiry during the information-gathering phase is to allow parties to submit written comments or avail themselves for a meeting. The Guideline document did not impose many formalities regarding the written submissions. Submissions could be handwritten or typed and could be in any of the official languages. In this way, parties were not required to make representations in a language in which they were not comfortable.⁵⁰⁹ Similarly, although the meetings would be conducted in English, interpreters would be present to assist with translation. Interestingly, however, the Guidelines state that the

'Commission may hold meetings with key stakeholders...[and] may exercise its discretion to determine which participants these meetings will be held with...[However, p]articipants seeking to have meetings with the Commission must provide written submissions first in order to provide information to the Commission on the issues to be addressed during the meeting.'⁵¹⁰

This process immediately excludes participants which cannot read or write from participating. Based on the nature of the investigation, the Commission believed it to be unlikely that participants who cannot read and write would be interested in the investigation and, therefore, they were not specifically catered for. While this may be a true statement, provision should be available for such persons to participate should they wish to.

⁵⁰⁷ Competition Commission 'LPG Market Inquiry Guidelines for Stakeholder Participation' accessible at <http://www.compcom.co.za/wp-content/uploads/2014/09/LPG-Terms-of-Reference-August-2014.pdf> accessed on 26 March 2016 at 2.

⁵⁰⁸ Effectiveness within this context is considered to mean achievement of the democratic participatory principles.

⁵⁰⁹ LPG Market Inquiry Guidelines for Stakeholder Participation *op cit* note 507 at 4 - 5.

⁵¹⁰ Ibid at 5.

On 16 September 2014, the Commission issued a call for submissions.⁵¹¹ This notification called upon IAP's to submit comments on the issues set out in the Terms of Reference, as well as any other issues that may be relevant to the investigation into the state of competition in the LPG market. In respect of these issues

‘the Commission is providing a list of questions that may guide the submissions by stakeholders...These questions are not intended to limit the extent of the submissions by stakeholders but rather to guide stakeholders in thinking about issues to be covered by the market inquiry.’⁵¹²

Providing questions such as this as a guideline is an example of the manner in which to narrow the divide between regulators and participants and achieve *Principle 1: The Educative Effect*:

- It highlights matters which the regulator believes to be important and directs participants to where they should focus their limited resources.
- It helps IAP's to identify key issues which are not currently on the regulator's radar and bring them to their attention.
- It assists IAP's in developing submissions which are useful and informative to the regulator in making recommendations appropriate to the market and the participants which, in turn, may lead to more acceptable outcomes for the participants in the market.

After considering the submissions received, the Commission published a *Request for Further Submissions* on a focused set of issues. In respect of each of these issues, the Commission provided context in support of the issues, highlighted the potential competition concerns and called upon the participants not only to provide evidence but also to suggest potential solutions.

Although this market inquiry is still underway and no final conclusions have yet been published, this approach seems to be more closely aligned with the democratic participatory principles in that it promotes *Principle 1: The Educative Effect* and *Principle 5: The Principle of Inclusivity* in developing an outcome that is acceptable to the participants (or, at least, if it is not acceptable to the participants, it is accepted as being legitimate).

⁵¹¹ Competition Commission ‘Call for Submissions’ available at <http://www.compcom.co.za/wp-content/uploads/2014/09/Call-for-Submissions.pdf> accessed on 31 March 2016 at 2.

⁵¹² Ibid.

4.3.2.1.3 The healthcare inquiry

In November 2013 the Commission published a notice expressing its intention to conduct a market inquiry into the private healthcare market. The Terms of Reference were published along with the notice setting out the regulatory and factual aspects of the healthcare market and the scope of the inquiry into that 'portion of healthcare services that are funded by private patients themselves, either through medical scheme, insurance or through out-of-pocket payments.'⁵¹³

4.3.2.1.3.1 The public participation strategy

The Terms of Reference were supplemented by the *Draft Statement of Issues and Guidelines for Participation in the Market Inquiry into the Private Healthcare Sector* ('the Guidelines for Participation'). The Statement of Issues ('SOI') set out the framework for conducting the market inquiry which included the general themes that the Panel intended to investigate and a number of potential 'theories of harm' to competition. After comments were received from various stakeholders, the final SOI was published on 1 August 2014. This statement included a call for submissions by stakeholders in which the Competition Commission cautioned that:

'Participants are requested to make their full submissions at the outset. It should not be assumed that those who withhold information and argument at the outset will be afforded an opportunity to provide it later, as and when they choose.

Submissions should be as detailed as possible and any views or opinions expressed should be substantiated as far as possible. It would be most helpful to the Panel to receive submissions that provide verifiable facts to support specific arguments.'⁵¹⁴

The call for submissions goes on to state that the submissions:

- must be accompanied by the prescribed form;
- must be compiled in accordance with the Commission's Guidelines for Participation;
- must include the applicant's details (i.e. their role in the sector, their geographic location, the areas where the product is sold, a narrative of their observations of the market etc);
- should be supported by international comparisons and

⁵¹³ Competition Commission 'Terms of reference for Market Inquiry into the Private Healthcare Sector' GN 1166 GG 37602 of 29 November 2013 at 75 - 76.

⁵¹⁴ Competition Commission 'Call for Submissions 1 August 2014' accessible at <http://www.compcom.co.za/wp-content/uploads/2014/09/4-Final-Call-for-submissions-31072014.pdf> accessed on 14 April 2016.

- to the extent that they include information of a technical nature, must comply with the *Guideline for Submissions of Technical Data and Analysis*.

The Guidelines for Participation have been created specifically for this public inquiry and cannot be relied upon for other inquiries. This is a noteworthy comment in that it means that the Commission is implementing *Principle 11: The Principle of Context* in that it has designed a participatory process that it believes to be the most appropriate for this inquiry. In this way, the Guidelines for Participation go on to state that information will be gathered through research studies, direct consultations (including focus groups, interviews and meetings), public consultations in the form of workshops and seminars, data reviews, questionnaires and surveys to specific stakeholders, site visits and a formal public hearing.⁵¹⁵ Using these mechanisms, the Guidelines for Participation go on to set out the various phases of the public engagement (information gathering, analysis of information received, further submissions and public hearing and the writing of the final report) and the proposed timeline when each of these phases will occur and be completed.⁵¹⁶

The Guidelines for Participation prescribe who may participate in the inquiry and the methods of participation (i.e. written submissions and public inquiries). In respect of written submissions, the Guidelines for Participation set out the requirements mentioned above in the call for submissions. It also indicates where the written submissions must be sent and / or hand delivered, as well as the form that the submissions must take.⁵¹⁷ The Commission also undertakes to acknowledge receipt of all submissions that are received. In this way, parties should follow up with the Commission if they have not received this confirmation.⁵¹⁸

These are all important elements in developing a PPS⁵¹⁹ in that the stakeholders all have a clear understanding of what is expected of them in respect of their written submissions. The Guidelines for Participation were also published in draft form and the participants were afforded

⁵¹⁵ Ibid at 4.

⁵¹⁶ Ibid at 5 - 6.

⁵¹⁷ Ibid 7 - 9.

⁵¹⁸ Ibid at 9.

⁵¹⁹ *Principle 10: Public Participation Strategy*.

an opportunity to submit comments to the Commission. The final Guidelines for Participation were published based on the comments received.

4.3.2.1.3.2 Implementing a public participation strategy and the principle of reasonableness

The democratic participatory principles are evident in the description of the section dealing with public hearings. This section acknowledges that the ‘chairperson may allow some flexibility in the [public hearings] process in order to achieve the desired purpose and to avoid infringements of the right of any participant in the hearing, and to ensure that the hearings are conducted expeditiously and in accordance with the rules of natural justice.’⁵²⁰

Although it is anticipated that the hearings will be conducted in Pretoria, the Guidelines for Participation recognise that where the Panel thinks it ‘appropriate in order to ensure access to the hearings, such as where the participants and witnesses are in remote areas, or where it would be conducive to saving costs, the Panel may decide to hold hearings at other venues across the country.’⁵²¹ The Panel recognises that the identity and circumstances of stakeholders is relevant to the inquiry⁵²² and that participation should be inclusive rather than exclusive.⁵²³ Hearings were held in Pretoria and Cape Town to cater for IAP’s. It is noted that the cost of conducting public hearings was highlighted as a relevant factor in the Guidelines for Participation. However, cost was not a limiting factor in this instance but was used rather as a means to ensure that resources were used efficiently. Facts such as cost and practicality are relevant to the public participation process (*Principle 12: The Principle of Reasonableness*). Although this is a principle that is relevant to the public participation process, it is one that must be exercised with caution as factors such as cost cannot justify an unfair public participation process.

Principle 12: The Principle of Reasonableness recognises that not all parties will be afforded an opportunity of an oral hearing. The Guidelines for Participation indicate that the Panel will exercise its discretion in awarding persons an opportunity to be heard orally. ‘One of the factors that will be taken into consideration in the exercise of this discretion is the extent to

⁵²⁰ Call for Submissions *op cit* note 514 at 9 - 10.

⁵²¹ *Ibid* at 10.

⁵²² *Principle 8: The Identity of the IAP's*.

⁵²³ *Principle 5: The Principle of Inclusivity*.

which an oral presentation will help to clarify or resolve any issues raised in the written submissions.⁵²⁴ Prior to the public hearing, the Panel may elect to conduct a pre-hearing with participants. The purpose of this pre-hearing is to:

- (a) 'establish procedures for protecting confidential information, including the terms under which participants may have access to that information;
- (b) establish who will represent the participants at the hearing and the language in which each witness will testify;
- (c) determine the procedure to be followed at the hearing, and its expected duration;
- (d) establish a date, time and schedule for the hearing;
- (e) give directions in respect of technical or formal amendments to correct errors in any documents filed by participants;
- (f) identify issues in dispute and those that are common cause as between particular participants;
- (g) clarify and simplify the issues;
- (h) obtain admissions or confirmation of particular facts, document or issues by particular participants;
- (i) determine when documents will be produced or delivered, where formally or informally, if applicable; and
- (j) otherwise assist in expediting the inquiry proceedings.⁵²⁵

Pre-hearings allow for the parties to isolate the issues in dispute which is important for *Principle 1: The Educative Effect* in the sense that the parties will each understand the issue of concern held by the other party. It also enhances the stakeholders' feeling that they are being heard and that they will be able to influence the outcome of the process.⁵²⁶ Being heard allows parties to make their submissions in their own language and meeting with stakeholders enhances the participants' dignity in that they feel that they are being heard.⁵²⁷

4.3.2.1.3.3 Implementing a public participation strategy and the principle of flexibility

As the process progressed and submissions were received from the IAP's, a further revised SOI and participation guidelines was published. This highlights that *Principle 9: The Principle of Flexibility* has been implemented by the Commission.

Oral submissions and presentations could be made in Pretoria and Cape Town in four public hearings. These hearings ran from February to March 2016. Nothing has been written regarding the success or failure of any aspect of the public inquiry: this is probably a result of the fact that the inquiry has not yet been completed.

⁵²⁴ Call for Submissions *op cit* note 514 at 10.

⁵²⁵ Ibid at 15.

⁵²⁶ *Principle 2: The Principle of Control* and *Principle 3: The Social Licence to Operate*.

⁵²⁷ *Principle 4: The Principle of Dignity*.

What can be ascertained from the record of proceedings, however, is that the Panel adopted an inquisitorial approach in the proceedings. Those parties which made presentations were quizzed on matters arising from their presentations, as well as on their role and conduct in the sector. The hearings do not appear to have been supported by other modes of participation. That is, other than information requests, the Panel does not appear to have hosted workshops or distributed surveys in order to solicit information from the participants on particular issues. This notwithstanding, there does not appear to be (at least, at this preliminary stage of the inquiry) action which pays homage to *Principle 1: The Educative Effect*. Issues were identified in the Terms of Reference and these were refined during the public inquiry to the extent that they dealt with the aspects of the inquiry that were specific to those participants.

In this way, the participants may feel that they exercise a degree of control in the outcome of the inquiry. Whether or not this is a true statement is too early to tell as the inquiry is not yet complete and will require an investigation into the views of the participants upon completion.

4.3.2.1.3.4 Defects in the existing modes of participation in the healthcare sector and future obligations to improve participation

It is not possible from the record to determine whether all of the democratic participatory principles have been fulfilled as it does not contain any empirical evidence in this regard. The conclusions suggested above are advanced by reading between the lines of the record of the public hearings. The oral submissions made at the inquiry were not limited to the elements of competition regulation but was also a fact finding mission in which the Panel sought to understand the healthcare market. In doing this, submissions were made by the various stakeholders in the sector including government, the private sector and individuals.

Two particular submissions need to be mentioned: that of Kwanale Asante Shongwe ('Shongwe'), a lawyer and healthcare activist, and Mr Streak ('Streak') representing Discovery Health Medical Scheme. The reason for identifying these two submissions is that they highlight the public participation difficulties existing in the healthcare sector in South Africa. The problems expressed by these parties (particularly Shongwe) are a result of the failure to give effect to the democratic participatory principles expressed in this Chapter.

It is apparent from Shongwe's submissions that (in her view) patients are the subject of medical treatment and not a party to medical treatment. This distinction lies in *Principle 1: The Educative Effect*. Patients subject to medical treatment have a limited role in deciding on their treatment. With reference to Arnstein's ladder of participation, the patient's participation is one of manipulation or therapy in which the power holders (in this case the medical practitioners) 'educate' or 'cure' the patients. Their involvement in the process is merely by virtue of the fact that their health is compromised to the point where medical intervention is required. A more active participation by the patient in treatment options is not only more educative for the patient in that they can understand the consequences of the various options that they may receive but it will also inform the medical practitioner in developing a treatment plan.

Similarly when engaging with medical aid schemes, Shongwe mentioned the difficulties that she experienced when interacting with Discovery. In particular, she was unaware of any platform where she could express concerns which were unrelated to claims.⁵²⁸ The only forum that she was aware of was the annual general meeting ('AGM') but she assumed that these meetings dealt with the financial aspects of the medical aid scheme and (as she does not fully understand the financial aspects of the fund) she did not attend. This perception was created by the fact that the agenda that was circulated to the members prior to the AGM did not specifically provide for an opportunity for members to raise concerns. Streak indicates that this opportunity was permitted under the item described as 'General' on the agenda. Justice Ngcobo, the presiding officer on the Panel, requested that Discovery amend this prior to the next annual general meeting.

This amendment is noteworthy in that the current notice informing parties was deficient in that it failed to indicate the purpose of the meeting. Shongwe indicated that had she known that she could raise concerns at this meeting, she would have attended.⁵²⁹ The amendment to the notice is also noteworthy as it obliges private entities to comply with the democratic participatory principles when engaging with their stakeholders. In fulfilling this obligation,

⁵²⁸ Call for Submissions *op cit* note 514 at 33.

⁵²⁹ *Ibid* at 38.

Discovery is not only required to provide a reasonable opportunity to participate (i.e. advertise the AGM) but must also take steps to ensure that members are able to take advantage of that opportunity. By providing an opportunity for members to raise concerns at the AGM Discovery may satisfy this obligation.

Discovery will need to investigate whether providing this platform is sufficient to engage with members. Members may not be able to attend meetings due to family commitments or travel arrangements or may feel uncomfortable standing up at a meeting to raise their concerns. In this way, other modes of participation may be required such as online mechanisms by which complaints could be submitted. What became clear from Shongwe's presentation was that Discovery did not provide a platform for general feedback in which members could voice their concerns around patient satisfaction and patient services⁵³⁰ and where Discovery did request feedback, they did so by sending 'a survey that says we are interested to hear what our members feel about ourselves, please take 15 minutes to complete this survey. Surveys are cold. Surveys are designed by somebody else there who is anticipating what the needs would be.'⁵³¹ Surveys have a pre-determined list of options or outcomes and do not generally allow for the free submission of information. Based on the submissions made by Shongwe, the form of participation that she expects is more closely aligned with 'involvement' and not 'consultation' as described in the Framework discussed in the Local Government section above.⁵³² Shongwe, however, admitted that a balancing act must be struck between competing stakeholder interests but she was unable to provide an answer to 'what kind of process should we collectively be thinking about to make those kinds of decisions.'⁵³³

When it comes to the participation of members within the medical aid scheme, Discovery acknowledged that member participation is limited. Although the members of the scheme are considered to be the owners of the scheme, given the number of stakeholders and the regulatory environment, it would not be possible for the members to exercise 'citizen control' as

⁵³⁰ Ibid at 35.

⁵³¹ Ibid at 38.

⁵³² Section 3.6 Participating in local government above.

⁵³³ Competition Commission 'Market Inquiry into the Private Healthcare Sector Hearing 3 / Day 3' available at <http://www.compcom.co.za/wp-content/uploads/2016/03/Health-Inquirt-3-March-Final-Transcript.pdf> at 29 last accessed on 8 December 2016.

contemplated by Arnstein. For the sake of practicality (and given the number of complex issues which need to be considered), Discovery indicated that the Board of the medical aid scheme was operationally responsible for administering the scheme in the best interests of its membership.⁵³⁴ The board's responsibilities include developing the rules of the medical aid scheme. The members (despite being 'owners' of the scheme) do not have an opportunity to approve these rules. The rules are merely communicated to them in benefit brochures and via brokers that contract with Discovery. So, despite being owners of the scheme, the members have little control over the development of the rules that govern them. This does not accord with *Principle 2: The Principle of Control*. Aside from the AGM and the selection of board members, there is no other mechanism by which the members can express their dissatisfaction. Furthermore, the one-way communication of policies and rules does not allow for the education of both the board members and the members. It would be advisable that the board members, by virtue of their fiduciary duty, engage more actively with the members to ensure that the members' interests are, in fact, preserved.

In response to this, Discovery indicated that the purpose of the AGM is to provide a forum in which members can raise these issues. The Panel, however, indicated that merely providing for an AGM is not enough. What the Panel wanted to know was 'where is the ordinary member's voice?'⁵³⁵ Merely providing the platform for discussion is not enough for compliance with the democratic participatory principles. Similarly, supplying parties with information may also not be good enough.

The Panel indicates that there must be a way in which the participants are able to engage with this information. Given the number of members of the medical aid scheme, it would not be practical to have a pre-AGM meeting similar to those held by the Commission in this public inquiry. In these circumstances it may be more appropriate to publish a statement of issues prior to the AGM highlighting issues which Discovery believes to be of concern.

⁵³⁴ Ibid at 97.

⁵³⁵ Ibid at 139.

This SOI could be informed by complaints or concerns received by Discovery via a complaints mechanism available to members during the course of the year. The SOI could also include proposed solutions to these complaints or concerns which could be debated or discussed at the AGM. This approach caters for the participatory democratic principles by (1) allowing participants to feel that they have some control over the medical scheme of which they apparently are the 'owners'⁵³⁶ and that they may feel as if their concerns are being addressed and may be more trusting of the process,⁵³⁷ (2) engaging with the members and respecting their dignity,⁵³⁸ (3) being more inclusive than exclusive.⁵³⁹

Discussion of the issues at the AGM does not mean that the Board of Discovery is obliged to follow the recommendations given by the members but they must keep an open mind and by publishing the SOI, Discovery would have developed a strategy on how to deal with public participation.⁵⁴⁰ Adopting this approach may be most practical under the circumstances⁵⁴¹ but Discovery would need to remain open to altering this process (or having additional processes)⁵⁴² where the context requires or based on the identity and circumstances of the IAP's.⁵⁴³

The above examples illustrate that the democratic participatory principles may arise as a result of the public inquiries but this is also not guaranteed. Merely implementing notice and comment proceedings does not guarantee compliance with the democratic participatory principles.

4.3.3 Notice and Comment Proceedings in terms of the Promotion of Administrative Justice Act

Section 4(3) of the PAJA states that

- ‘[i]f an administrator decides to follow a notice and comment procedure, the administrator must-
- (a) take appropriate steps to communicate the administrative action to those likely to be materially and adversely affected by it and call for comments from them;

⁵³⁶ *Principle 2: The Principle of Control.*

⁵³⁷ *Principle 3: The Social Licence to Operate.*

⁵³⁸ *Principle 4: The Principle of Dignity.*

⁵³⁹ *Principle 5: The Principle of Inclusivity.*

⁵⁴⁰ *Principle 10: Public Participation Strategy.*

⁵⁴¹ *Principle 12: The Principle of Reasonableness.*

⁵⁴² *Principle 9: The Principle of Flexibility.*

⁵⁴³ *Principle 8: The Identity of the IAP's.*

- (b) consider any comments received;
- (c) decide whether or not to take the administrative action, with or without changes; and
- (d) comply with the procedures to be followed in connection with notice and comment procedures as prescribed'.⁵⁴⁴

As in the case of public inquiries, the Regulations are silent on the manner and form that a notice and comment procedure must take. As for the notice advertising the proceedings, the notice must include information concerning the proposed administrative action or specify where additional information is available or can be reviewed.⁵⁴⁵ It must also indicate by when and where persons can submit comments. It is evident from the wording of the Regulations that these comments must be in writing and cannot be made orally. However, section 4(3) of the PAJA permits the administrator to adopt notice and comment proceedings in conjunction with public inquiries mentioned above. In this way, comments could be submitted orally (or in another manner) where the interests of justice so require, subject to the concerns raised above. In addition, if the 'proposed administrative action may materially and adversely affect the rights of members of a specific community consisting of a significant proportion of people who cannot read or write or who otherwise need special assistance...the administrator must take special steps to solicit the views of the members of the community.'⁵⁴⁶ These measures include:

- (a) 'the holding of public or group meetings where the proposed action is explained, questions are answered and views from the audience minuted;
- (b) a survey of public opinion in the community on the proposed action; or
- (c) provision of secretarial facility in the community where members of the community can state their views on the proposed action.'⁵⁴⁷

In this way, it is suggested that the notice advertising the notice and comment proceedings follows the structure similar to the Terms of Reference, SOI and Guidelines regarding public inquiries expressed above. The following example, however, highlights the fact that there is an inconsistent approach to participation.

⁵⁴⁴ PAJA *op cit* note 438 at s4(1) - 4(3).

⁵⁴⁵ Regulations on Fair Administrative Process *op cit* note 458 at reg18(3).

⁵⁴⁶ Ibid at reg20(1).

⁵⁴⁷ Ibid at reg20(2).

4.3.3.1 Judicial pronouncement on notice and comment proceedings: *S v Smit*⁵⁴⁸

In this case, Smit refused on several occasions when passing through the Nkomazi Toll Plaza to pay the prescribed toll fee. His refusal to pay the toll centred on *inter alia* the validity of the N4 toll road (on which the Nkomazi Toll Plaza was situated) declaration. In his defence, he argued that he was not liable as Trans African Concessions Limited (the concessionaire appointed by SANRAL to administer tolling on the N4) was charging tolls unlawfully as tolls could only be charged on roads declared toll roads.

The State alleged that the N4 Toll Road was not declared a toll road under the South African National Roads Agency Limited and National Roads Act⁵⁴⁹ but, in terms of section 9 of its predecessor, the National Roads Act.⁵⁵⁰ In terms of this section, the National Roads Board ('the Board') (not SANRAL) can only declare a toll road once:

- (a) '...'
- (b) The Board has consulted with the Premier in question and with any local authority affected by the declaration of the proposed toll road; and
- (c) The Board has invited, in the manner prescribed by regulation, interested parties to make written representations to it, which may include representations on the position of the toll gate, and has considered such representations, if any;
- (d) The Board has in consultation with any local authority and its invitations contemplated in paragraph (c) given an indication of the approximate position of the proposed toll gate.⁵⁵¹

The consultation process with the Premier and the local authority had not been prescribed by regulation.

'In contrast thereto the process of invitations to [IAP's] to make representations to the Board as prescribed by Regulation 2263 published in Government Gazette No 15190 of 30 December 1994. It is an important difference: The invitation to [IAP's] must be published in the government gazette as well as two newspapers; the representations of the [IAP's] must be submitted within 30 days from the date of the notice as published. On the other hand no time limit is placed on the consultation process nor is the manner and form of consultation prescribed.'⁵⁵²

Smit disputed that the Board complied with its obligations to consult with the local authorities in declaring the N4 a toll road. The dispute turned on the meaning of the word 'consult' as used in section 9(b). Mojaelo J considered the various dictionary definitions of

⁵⁴⁸ 2008 (1) SA 135 (T).

⁵⁴⁹ 7 of 1998.

⁵⁵⁰ 54 of 1971.

⁵⁵¹ Ibid at s9(3).

⁵⁵² Smit *supra* note 548 at 147.

'consult' and 'consultation', as well as the manner in which it has been interpreted in both English and South African case law.

Drawing on these cases, the Court adopted an approach congruent with *Principle 1: The Educative Effect* by holding that consultation is not a unidirectional process in which one party merely informs or educates another on the outcome of a process or a pending decision. Consultation requires 'a communication of ideas on a reciprocal basis...The procedure must...allow reasonable opportunity to both sides...to communicate effectively and achieve a purpose.'⁵⁵³ That is, there must be 'a genuine and effective engagement of minds between the consulting and consulted parties. A mere formalistic attempt to consult does not constitute consultation.'⁵⁵⁴

4.3.3.1.1 Building on the *Doctors for Life* case's reasonable opportunity to participate

In the cases discussed in *Chapter 3.5 Participation in creating legislation* the Court was tasked with considering whether the legislature had fulfilled its obligation to facilitate public involvement. In doing so, it adopted a reasonableness test which considered whether the legislature provided a reasonable opportunity to persons to participate and whether the participants could meaningfully take advantage of that opportunity. None of the cases reviewed⁵⁵⁵ obliged the Court to consider whether the participants were able to take advantage of the opportunity to participate by considering whether the process actually complied with the democratic participatory principles. The Court in this case, however, was required to look at the *actual* level of engagement between the Board and the local authorities.

An assessment of whether the parties actually consulted with one another and whether the democratic participatory principles were achieved is a factual enquiry. That is, in identifying the process to be conducted or which has been conducted, the administrator or the Court (as the case may be) must consider whether the process allows for consultation in the manner required by the democratic participatory principles. As mentioned in Chapter 2, this is best achieved through collaborative learning mechanisms. The second question is whether the consulted parties were afforded an opportunity to influence the outcome of the decisions or be involved in the decision-making process which developed a sense of control over the outcome of the process. And, even

⁵⁵³ Ibid at 157.

⁵⁵⁴ Ibid at 159.

⁵⁵⁵ None of the cases referred to in section 3.5 Participating in creating legislation.

where the consulted parties' position was not adopted, did they trust the legitimacy of the process enough to grant the proposed decision (in this case to declare a toll road) the social licence to operate. That is, do the participants express dissatisfaction with the decision through litigious proceedings, protest action, vandalism or other conduct?

4.3.3.1.1.1 The meaning of 'consult' versus the meaning of 'invite'

Having considered the evidence before it, the Court held that the Middleburg Transitional Local Council ('MTLC') and the Marloth Park Municipality ('Marloth') had not been consulted. In respect of Marloth, although the Board had sent notice of the proposed declaration of the N4, it had sent it to the wrong address. As a result, Marloth was not aware of the proposed declaration and did not submit comments or engage with the Board on this point. As the empowering legislation specifically required that SANRAL 'consult' with local municipalities, the Court found that notification of the proposed declaration only without further conduct did not amount to consultation. More was required. That is, even if the notification had been sent to the correct address and Marloth had not responded, the Board could not merely rely on Marloth's silence as consent.

The same did not apply in respect of IAP's as the Act only obliged SANRAL to 'invite' these parties to participate. If parties are notified of a decision and elect not to participate, they cannot be forced to do so. This is reasonably practical and reflects Pateman's interpretation of participatory democracy. However, in the writer's view, if IAP's elect to participate in the process, the duty to consult (i.e. the participatory democratic principles) apply to these persons albeit in terms of the common law, Constitution and democratic participatory principles and not the empowering legislation.

4.3.3.1.1.2 Where the legislation does not specify whether the IAP's must be invited or consulted

This raises the question of what happens in situations where the empowering legislation does not draw a distinction between categories of IAP's affected by a decision. For example, if we assume that empowering legislation requires an authority to conduct a public participation process in order to build a substation in an urban area but does not differentiate between the various parties that may be affected by such a decision, by the nature of the activity, it is evident that some

parties may be more affected than others. The adjacent property owners would suffer a greater visual impact than those parties that live one block away. In such instances, it is unclear whether the authority (in this example) would be obliged in terms of the common law to identify those parties that are 'more affected' and would be obliged to 'consult' with them in the manner contemplated above in order to overcome his or her legal responsibility. The immediate response to this would be to say that in instances where a participatory process is inadequately expressed in the empowering legislation, guidance must be sought from the provisions of PAJA.

As is evident above, the PAJA contemplates two very clear situations: one where an individual is affected by a decision and another where the public may be affected. These sections, therefore, do not immediately address the above examples. Mass⁵⁵⁶ argues that these two sections must be linked, based *inter alia* on the fact that section 4(1)(e) of the PAJA permits the administrator to 'follow another appropriate procedure which gives effect to section 3' of the PAJA and that there is no compelling reason why the minimum requirements contained in section 3(2) of PAJA (i.e. the need to notify IAP's of an administrative action, a reasonable opportunity to make representations etc.) cannot apply to participatory processes contemplated in section 4.⁵⁵⁷

Hoexter is unconvinced by Mass's argument because although section 4 does not specifically contain the requirements contained in section 3(2), they are implicit in the processes. She states that as

'far as s4(3) is concerned, the absence of the matching requirement arguably makes perfect sense in the context of notice and comment procedures; and as for s4(2), it does, in fact, contain requirements that match two of the three compulsory requirements of s3(2). An administrator who decides to hold a public inquiry [or notice and comment proceedings] is required to compile a written report on the public inquiry and indicate where it may be inspected or copied. Notice of rights to review or appeal would not make sense in this context, as there would not be any specific ones to communicate. In addition Mass tends to gloss over some rather compelling indications of a gulf between ss3 and 4 of the sections, the fact that s4 is evidently intended to be used only in cases where rights, and not mere legitimate expectations, are in issue, and the specific exclusion of decisions made in terms of s4(1) (and not those of s3(2)) form the realm of administrative action.'⁵⁵⁸

⁵⁵⁶ Caroline Mass 'Section 4 of the AJA and Procedural Fairness in Administrative Action Affecting the Public: A Comparative Perspective' in Claudia Lange & Jakkie Wessels (Eds) *The Right to Know: South Africa's Promotion of Administrative Justice and Access to Information Acts* (2004) 63.

⁵⁵⁷ Ibid at 67.

⁵⁵⁸ Hoexter *op cit* note 436 at 417.

Hoexter's submissions in this regard maintained that sections 3 and 4 cater for different categories of persons affected by an administrative action and so the differentiation between consulting and inviting persons to participate mentioned above is relevant. There does not, however, appear to be any reason why the responsible party cannot adopt both sections 3 and 4 simultaneously in that there are likely to be different categories of person affected by a decision. Seen in this context, section 4(1)(e) does not appear to be a mistake but rather a factor that the administrator must consider in deciding on a mode or modes of participation which are relevant in the circumstances. That is, the administrator may elect to hold a public inquiry (or notice and comment proceedings) and an appropriate procedure in respect of those individuals who are 'more' affected. In order for this interpretation to be accepted, the options listed in section 4(1) must not be considered to be alternatives and the word 'or' must be read as 'and (if relevant and appropriate)'. Such an interpretation would also render section 4(1)(c) redundant as it already permits the administrator to hold both notice and comment and public inquiry procedures.

On this understanding, even where the legislation does not draw a clear distinction between the parties which may be affected by a decision (as was the case in the National Roads Act), the person conducting the public participation process needs to analyse which party or parties may be affected by a decision in selecting the appropriate mode of participation. *Principle 9: The Principle of Flexibility* was noted above. As highlighted here, it is possible that one process may not be adequate within the same set of circumstances based on the nature of the participants. *Principle 9: The Principle of Flexibility* therefore must be supplemented by *Principle 13: The Principle of Multiplicity* - that is, there may be multiple modes of participation within one set of circumstances in order to ensure that fairness is achieved.

These principles can be referred to as the structural (or procedural) democratic participatory principles as they inform the decision the responsible person will take in selecting a participatory process. Other principles, while also being structural, are evaluative in that the responsible party will consistently need to evaluate the participatory process against the principles to ensure that constitutional compliance is achieved and (to the extent that it falls short) the responsible party will need to adjust or vary the process to achieve the substantive principles.

4.3.3.1.2 Assessing compliance with the substantive principles in *S v Smit*

In assessing compliance with the substantive principles, guidance can be obtained from the *S v Smit* case in which the Court evaluated the consultation process between the Board and MTLC. The evidence regarding the consultation revealed that letters expressing the intention to declare the N4 a toll road were sent to the local authorities attaching the published notice ('the initial notice') and requesting the local authorities submit their comments to the Board. Having reviewed the comments, the Board decided to declare the N4 a toll road.⁵⁵⁹

The notice was later amended by repealing the initial notice and simultaneously publishing a new notice ('the final notice').⁵⁶⁰ The final notice indicated that the position of the toll plazas had been moved, that an additional portion of road would fall within the declaration and it notified all IAP's of the Board's intention to amend the original notice.⁵⁶¹ After publishing the final notice, the Board sent similar letters to the relevant local authorities, the Premier and all IAP's.⁵⁶²

A meeting was held with the MTLC following the publication of the initial notice in which concerns were expressed regarding the position of the toll plazas within its jurisdiction. After this meeting the MTLC was informed that the location of the toll plazas had not yet been finalised. The MTLC requested an update a number of months later. The response to this request is unknown. However, local community representatives were informed after this request that the position of the toll plazas had not been finalised and the consultation was pending.

Soon thereafter and notwithstanding the Department of Transport's ('DOT') undertaking to inform MTLC of the final position of the plazas,⁵⁶³ at a public participation meeting conducted during the EIA process, MTLC were informed that the position of the plazas had been finalised.⁵⁶⁴ MTLC walked out of the meeting in protest as they believed this meeting was the first opportunity to be consulted on the revised position of the plazas. 'In their view the

⁵⁵⁹ Smit *supra* note 548 at 162.

⁵⁶⁰ Ibid at 163.

⁵⁶¹ Ibid.

⁵⁶² Ibid at 167.

⁵⁶³ Ibid at 173.

⁵⁶⁴ Ibid at 172.

purported consultation was not genuine as the [DOT] had already made up its mind.⁵⁶⁵ After this public display of opposition to the process, the MTLC sent a letter to the DOT, specifically requesting to be consulted. There was no further engagement between the parties until after the final declaration of the toll road.

As in the case of the initial declaration, once again the comments received were compiled in a report and submitted to the Board who elected to proceed with the final notice and published the final declaration. According to Mr Nothnagel (a representative from the Board) this included comments received by the MTLC.

Following the declaration, the MTLC approach Mr Nothnagel requesting further discussion on the matter. Mr Nothnagel

‘referred them to section 9(3A) of the Act 54 of 1971...and advised them to make use of that section to put their case before the Board. It is noted that the section in question is not one that provides for obligatory or compulsory consultation as section 9(3) does, but one which simply gives the Board the option, if it so chooses, to give [IAP's] the opportunity to submit further written representations regarding the position of the toll gates.’⁵⁶⁶

In considering the evidence, the Court made the following findings: Firstly, providing information to all IAP's regarding the proposed administrative decision does not constitute consultation. It is, however, a key component to ensure that the substantive democratic participatory principles are achieved but the act of providing information alone is inadequate as there is not ‘a genuine and effective engagement of the minds.’⁵⁶⁷

Aside from collaborative learning efforts that need to be created in order to achieve *Principle 1: The Educative Effect*, relevant and material information needs to be shared between the parties. The relevance and materiality of information that must be disclosed depends on the facts of each case but, at the very least, sufficient information must be provided so that the parties know ‘the substance of the complaints, and the circumstances on which they are founded.’⁵⁶⁸ As highlighted in the previous section, the educative effect can be further enhanced

⁵⁶⁵ Ibid. *Principle 7: The Principle of Non-deference*.

⁵⁶⁶ Smit supra note 548 at 169.

⁵⁶⁷ Ibid at 159.

⁵⁶⁸ *Turner v Jockey Club of South Africa* 1874 (3) SA 633 (A); *Imbali Taxi Association v KwaZulu-Natal Provincial Taxi Registrar* [2005] 2 All SA 268 (N); *Yuen* supra note 459.

if the administrator identifies the issues that he or she believes to be relevant or controversial and allows the parties to comment on these (and other) issues as part of the PPS.

Secondly, the Court draws a distinction between 'invitation' and 'consultation'. To meet its consultation obligation, the Court held that the mere publishing of a notice in a Government Gazette or newspaper does not amount to consultation. It cannot, based on the understanding that consultation requires an exchanging of ideas. According to the Court '[p]ublication serves to notify the general public and interested parties. It is no substitute for consultation.'⁵⁶⁹ Furthermore, where consultation does occur, it 'cannot take place by ambush.'⁵⁷⁰ The parties being consulted must be aware that they are being called upon to express their opinions on the proposed decision. In an *obiter* statement, however, the Court implies that if the Board expressly stated in the final notice that it would only entertain comments submitted by parties in response to the notice and that there would be no further engagement, that the MTLC would have been 'consulted'. As strange as this submission might appear, it would meet the participatory principles in that:

- only those parties which wish to participate need submit comments to the Board. If a local authority received an invitation and elected not to submit comments, the Board would not be required to do more to confirm that the local authority did not have comments. From a practical perspective, this may be a desirable interpretation (*Principle 6: Finality in Decision-making*) and
- where a local authority submits comments, there is an engagement of the minds sufficient to trigger the educative effect, provided that the comments are properly considered by the Board.

There is, however, one qualification. In the writer's view, the final notice can and should never state that there will be no further engagement. *Principle 1: The Educative Effect* requires the resolution of problems. If, after the consideration of comments, the Board and the local authority's minds have been aligned, further consultation may be required through collaborative efforts in order to resolve the polar opposite views. Further engagement with IAP's would need

⁵⁶⁹ Smit *supra* note 548 at 158 - 159.

⁵⁷⁰ Ibid.

to take place unless *Principle 5: The Finality in Decision-making* applies. Further engagement would also have strengthened the MTLC's trust in the participatory process. Its dissatisfaction with the process is clear in the judgment.⁵⁷¹ It must be stated that notwithstanding further engagement, parties may still feel that they have not been heard in that their views have not been adopted. However, they may be more accepting of the outcome, provided that their comments were properly considered, their concerns eliminated or mitigated or, where this cannot occur, adequate reasons provided.

Many of the principles expressed above have been included in *The Generic Public Participation Guidelines* published by the erstwhile Department of Water Affairs and Forestry ('DWAFF Guidelines') in September 2001. These guidelines are comprehensive and informative and while they have been developed to assist the DWAFF⁵⁷² in fulfilling its administrative responsibilities in terms of the National Water Act ('NWA'),⁵⁷³ it is general enough to provide some useful insights into guidelines which apply more generally.

4.3.3.2 Department of Water Affairs and Forestry Guidelines developed in terms of the National Water Act

The NWA was promulgated with the intention of reforming water resource regulation. During apartheid access to and use of water resources was unequally distributed. Ownership in water resources was transferred to the people of South Africa and the South African government was tasked with managing and distributing this scarce resource.⁵⁷⁴ This is fulfilled through various mechanisms, including the development of water management strategies,⁵⁷⁵ classifying water resources and water quality standards,⁵⁷⁶ determining the water reserve,⁵⁷⁷ the requirement to obtain a water use licence prior to undertaking certain water uses⁵⁷⁸ and determining water consumption charges.⁵⁷⁹ In implementing these mechanisms, the NWA requires that there is a degree of public engagement which is served by inviting written comments from IAP's. The

⁵⁷¹ Ibid at 170, 172 and 175.

⁵⁷² Now the Department of Water and Sanitation.

⁵⁷³ 36 of 1998.

⁵⁷⁴ Ibid at preamble.

⁵⁷⁵ Ibid at s8 read with Chapter 7.

⁵⁷⁶ Ibid at s12 - 15.

⁵⁷⁷ Ibid at s16 - 18.

⁵⁷⁸ Ibid at chapter 4.

⁵⁷⁹ Ibid at chapter 5.

NWA provides little guidance on the manner in which these parties should be consulted but guidance can be sought from the DWAF Guidelines.

The DWAF Guidelines are more closely aligned with the objectives of the democratic participatory principles in that they ‘are not intended to dictate or prescribe the public participation process, but to provide ideas on how to undertake public participation.’⁵⁸⁰ In this way, the DWAF Guidelines recognise that the public participation process adopted must be flexible, based on the circumstances, in order to achieve ‘the objectives of public participation [which] are to improve decision-making, to bring about sustainable development and to normalise the attitudes of stakeholders. These three objectives result in the improvement of people’s quality of life.’⁵⁸¹ If these objectives are achieved the DWAF Guidelines state that the benefits of public participation should be achieved equally. ‘These benefits are, among others, facilitated co-operation between previously segregated sectors, improved decision-making, sustainable development, and positive growth and attitudes among stakeholders.’⁵⁸² Although the terminology may be slightly different, these objectives and benefits are similar to some of principles discussed in this chapter.

The DWAF Guidelines also set out a series of principles that underpin public participation. These principles have been described using different terminology but generally overlap with the principles expressed in this Chapter and Chapter 2.⁵⁸³ Over and above these principles, the following principles are worthy of consideration:

⁵⁸⁰ Department of Water Affairs and Forestry ‘Generic Public Participation Guidelines - September 2001’ accessible at <http://www.dwaf.gov.za/Documents/Other/GPPG/guide.pdf> accessed on 15 April 2016 at page ix.

⁵⁸¹ Ibid.

⁵⁸² Ibid.

⁵⁸³ The Principle of Inclusivity reflects *Principle 5: The Principle of Inclusivity*; The principle of Mutual Respect is tantamount to *Principle 4: The Principle of Dignity*; The Principle of Multiple Options is the same as *Principle 13: The Principle of Multiplicity*; The Principle of Flexibility is the same as *Principle 9: The Principle of Flexibility*; The Principle of Rights and Roles is very similar to *Principle 10: The Public Participation Strategy* and *Principle 2: The Principle of Control* in that by knowing their respective rights and roles allows parties to exercise control over the public participation process. The Principle of Accessibility of Information is an element of *Principle 1: The Educative Effect*. The Principle of Awareness Creation and the Principle of Transparency require that the public participation is open and honest and parties act truthfully. These are all critical elements to *Principle 3: The Social Licence to Operate*. The Principle of Capacity Building and Empowerment reflects the requirements of *Principle 1: The Educative Effect* and *Principle 2: The Principle of Control*. Finally, the Principle of Suitability of Scale of Involvement reflects *Principle 12: The Principle of Reasonableness* and *Principle 13: The Principle of Multiplicity*.

- The Principle of Integration: this principle requires that both social and technical issues should be raised and discussed in the same decision-making process (*Principle 14: The Principle of Integration*);⁵⁸⁴
- The Principle of Continuity: Participation is not a once-off process but rather an ongoing activity. Public participation process developed must be sustainable for the life of the initiative. In order for this to occur, the participants must also be comfortable with the form of process that is adopted (*Principle 15: The Principle of Continuity*);
- The Principle of Efficiency: an efficient process is one which is completed quickly without compromising the quality of the process. The Guidelines suggest that this is best achieved by developing a public participation plan (i.e the PPS) which is implemented throughout the process. If IAP's are aware of the direction in which the participation is moving, they will be motivated to continue participating (*Principle 16: The Principle of Efficiency*);
- The Principle of Monitoring and Evaluation: according to the DWAF Guidelines, '[m]onitoring involves continuous assessment of progress and adjusting where necessary. Evaluation measures the success or failure of a process in terms of objectives that were specified in advance...Evaluation usually takes place after completion.'⁵⁸⁵ This does not seem a logical statement. In order to ensure that the participatory principles are being achieved, the person conducting the participatory process needs to monitor the participatory process continually, test it against the democratic participatory principles and specific objectives required for the process and adjust the process in line (or in the direction of) the participatory principles. In this way monitoring and evaluation must occur simultaneously and not consecutively (*Principle 17: The Principle of Monitoring and Evaluation*).

These principles must be applied when developing a public participation process in respect of water related issues. The DWAF Guidelines indicate that there are three stages in the

⁵⁸⁴ DWAF Guidelines *op cit* note 580 at 15.

⁵⁸⁵ Ibid at 21.

participatory process: the planning phase, the participation phase and the exit phase. Each phase is comprised of further steps.

Within the planning phase, the DWAF is required to conduct a decision analysis which assesses the nature of the initiative it intends to undertake. The DWAF must define the goal and purpose of the public participation process that must be conducted. ‘The goal and purpose is prescribed by the nature of the initiative, and could include information dissemination, public inputs or shared decision-making.’⁵⁸⁶ Although the language may be different, this goal is the same as the ‘inform’; ‘consult’ and ‘involve’ distinction contained in the Framework. Once the goal and purpose have been defined, the DWAF must determine ‘the appropriate level of participation.’⁵⁸⁷ The degree of participation is directly proportional to the significance and controversial nature of the initiative.⁵⁸⁸ High levels of participation are required where:

- ‘The initiative involves finding a compromise between economic growth, social equity and ecological integrity;
- Controversy already exists around the issues of the initiative;
- There is a public perception that people stand to lose or gain significantly from the initiative;
- The initiative will result in certain groups benefitting more than others economically, politically, environmentally or culturally;
- Public support is necessary to implement the initiative;
- Environmental or social impact is expected;
- DWAF has low credibility in the specific area of the initiative;
- Previous initiatives were imposed upon the relevant stakeholders;
- Finding out in the middle of the public participation process that different divisions within an organisation had different understandings of the decision being made.’⁵⁸⁹

As part of the decision analysis, the DWAF is required to compile a preliminary list of stakeholders that would be interested in the initiative. The DWAF Guidelines provide a series of questions that will assist the Department in identifying which person should be included on the stakeholder list.⁵⁹⁰ One question states: ‘Whose behaviour and attitudes have to change for the initiative to succeed?’⁵⁹¹ This is the only acknowledgment in any of the guidelines governing

⁵⁸⁶ Ibid at 29.

⁵⁸⁷ Ibid at 27.

⁵⁸⁸ Ibid.

⁵⁸⁹ Ibid.

⁵⁹⁰ *Principle 8: The Identity of the LAP's.*

⁵⁹¹ DWAF Guidelines *op cit* note 580 at 28.

participation that participatory processes should require that parties re-evaluate their behaviours and outlooks with the intention that parties can align their objectives. This, of course, is a key component of the democratic participatory principles set out in Chapter 2. These parties, along with others (for example, those that would be directly affected by the initiative) must be included as stakeholders.

The identified stakeholders must undertake the participation planning together.⁵⁹² This includes:

- identifying the degree of controversy that the proposed initiative is expected to achieve;
- identifying the various steps that are likely to occur during the life-cycle of the initiative and where stakeholders could or should be engaged throughout this process. Traditionally, any process includes a planning, design, construction, operational and evaluation process;⁵⁹³ and
- selecting (in consultation with stakeholders) the mode of participation⁵⁹⁴ that should be used to facilitate public participation. In selecting these methods the DWAF Guidelines require that:
 - stakeholders be advised of the manner in which the selected mode of participation will impact on their involvement within the process;
 - methods promoting team-building opportunities between DWAF and the public should be selected within the scope of the budget made available for the process;
 - the adopted process allows all stakeholders an opportunity to participate and is not dominated by one particular party;
 - different modes of participation can be selected for different participants. For example, public meetings may not be suitable for the elderly or engagement via online platforms may not be suitable in poorer communities which do not have access to electronic resources.⁵⁹⁵

⁵⁹² Ibid at 29.

⁵⁹³ *Principle 10: Public Participation Strategy.*

⁵⁹⁴ *Principle 13: The Principle of Multiplicity.*

⁵⁹⁵ DWAF Guidelines *op cit* note 580 at 31.

- The development of an implementation plan. This plan provides substances to the public participation process by including dates by when parties should have performed particular functions. The implementation plan must be developed with the available budget in mind. This plan must be developed in accordance with the stakeholders.⁵⁹⁶

Once the planning phase is complete, the participation phase can commence by finalising the stakeholder list, grouping the stakeholders according to the manner in which they will be notified of the public participation process and disseminating all relevant information to stakeholders.⁵⁹⁷

The DWAF Guidelines most closely reflect the democratic participatory principles required in terms of Chapter 2 and this Chapter. Using these principles to develop an appropriate public participation process requires a delicate balance. Thompson cautions that if

‘the custodians, developers and regulators develop and implement instruments without the will of the stakeholders by engineering centralised, paternalistic and 'top-down' approaches, policies and strategies, it could result in the instruments not being acceptable. On the other hand, a 'bottom-up' approach should also not be followed because the custodians, developers and regulators should stay responsible, accountable and liable for developing the instruments. They have to ensure that the processes to develop the instruments are structured, focused and correctly driven so as to involve the relevant stakeholders to contribute to an interactive dialogue manner.’⁵⁹⁸

Striking this balance can best be achieved through careful consideration and application of these principles in designing and implementing a public participation process.

4.4 Conclusion

Chapter 3 considered how the substantive principles that underpin normative democratic theory were achieved in public participation processes conducted in post-apartheid South Africa. The focus in that chapter was on the public participation processes conducted by political parties and voting procedures, the creation of legislation and local government. This chapter continued with that theme by considering how the substantive principles have been achieved within the administrative law sphere.

⁵⁹⁶ Ibid at 32. *Principle 10: Public Participation Strategy*.

⁵⁹⁷ Ibid at 34.

⁵⁹⁸ Hubert Thompson *Water Law A practical approach to resource management and the provision of services* (2006) at 242 - 243.

This chapter highlights principles, in addition to those raised in chapters 2 and 3, which are relevant when implementing a public participation process in order to give effect to participatory democracy. The first of these principles is *Principle 11: The Principle of Context* which requires that the person conducting the public participation process consider the context within which the public participation process will be conducted (i.e. rural versus urban, educated versus low-levels of education and different languages). Based on this the person responsible for the public participation process must select one or a number of ways in which to interact with IAPs (*Principle 13: The Principle of Multiplicity*) taking into consideration what would be a reasonable process under the circumstances by assessing factors such as time available, the costs of the process etc (*Principle 12: The Principle of Reasonableness*) and ensuring that aspects such as technical and situated knowledge are incorporated into the process where necessary (*Principle 14: The Principle of Integration*).

These processes must be conducted quickly without compromising the quality of the process (*Principle 16: The Principle of Efficiency*) while ensuring that there is some form of participation or engagement happening throughout the life of the project or activity (*Principle 15: The Principle of Continuity*). Finally, this chapter suggests that any public participation process must be continually monitored to ensure that the democratic participatory principles are being achieved (*Principle 17: The Principle of Evaluation and Moderation*).

These principles have been generated by the traditional modes of public participation and will be incorporated into the CFPP set out in Chapter 6. However, in the next chapter it will be considered whether there are specific principles that arise from online participation to assess whether there are any principles which need to be included in the CFPP. All of these principles will be tested against the existing EIA public participation process to confirm whether the EIA process will pass constitutional muster and whether online participation will aid public participation in the EIA's.

Chapter 5

RegulationRoom - Online participation

5.1 Lessons to be learnt regarding online public participation in foreign jurisdictions

'E-participation is expanding all over the world. With growing access to social media, an increasing number of countries now proactively use networking opportunities to engage with people and evolve towards participatory decision-making'.⁵⁹⁹ The principles considered in Chapters 2, 3 and 4 apply to all forms of participation, irrespective of which mode of participation is adopted and would apply equally to participation via online methods. What must be considered is whether there are additional principles which apply specifically in situations where online mechanisms are adopted and need to be incorporated into the CFPP. In South Africa there is no significant body of work detailing the long-term implementation of online public participation processes: studies conducted in other jurisdictions where online participatory processes are being practised, investigated and assessed may provide guidance in this regard.

Studies into online participation are numerous and the results of new investigations are being published at a rapid rate⁶⁰⁰ across numerous countries, sectors and industries.⁶⁰¹ These investigations are based on variable methodologies and outcome goals and, in order to identify an authoritative study, only jurisdictions ranked as the world e-government leaders, according to the United Nations Department of Economic and Social Affairs ('the UN Department') published the E-Government Survey 2016 ('the Survey')⁶⁰² were considered.

These rankings were based on 'a weighted average of normalised scores on the three most important dimensions of e-government, namely: scope and quality of online services,...status of

⁵⁹⁹ United Nations E-Government Survey 2016 *op cit* note 55.

⁶⁰⁰ An online search for articles published in 2017 concerning 'eParticipation' yielded 125 articles within the first 6 weeks of the calendar year. 'Egovernance' generated a further 290 hits for the same time period and triggered 270 responses.

⁶⁰¹ Nov *et al op cit* note 56; Kahne,*et al op cit* note 56; Dareb *op cit* note 56; Biggar *op cit* note 56; Lei and Hilton *op cit* note 56; Sandoval-Almazan and Gil-Garcia *op cit* note 56.

⁶⁰² United Nations E-Government Survey 2016 *op cit* note 55.

the development of telecommunications infrastructure...and inherent human capital.⁶⁰³ In addition, the UN Department considered a supplementary index referred to as the E-Participation Index which focuses on 'the use of online services to facilitate provision of information by governments to citizens,...interaction with stakeholders...and engagement in decision-making processes.'⁶⁰⁴ The results of this Index reflect a country's

'e-participation mechanisms that are deployed by the government as compared to all other countries. The purpose of this measure is not to prescribe any particular practice, but rather to offer insights into how different countries are using online tools to promote interaction between citizens and government, as well as among citizens, for the benefits of all...[The Index] is not intended as an absolute measurements of e-participation, but rather, it attempts to capture the e-participation performance of countries relative to one another at a particular point in time.'⁶⁰⁵

Based on this assessment, three English-speaking jurisdictions which were highly ranked were the United Kingdom (ranked 1), Australia (ranked 2) and the United States of America (ranked 12).^{606 607}

The United Kingdom's ranking was based on the fact that it has 'been leading the global trend in developing new web technologies such as HTML5, as part of the aim to make its national portal GOV.UK 'accessible to the widest possible audience'.⁶⁰⁸ The GOV.UK portal is described as the 'best place to find government services and information'.⁶⁰⁹ It is an interactive platform which provides persons with information on *inter alia* benefits, citizenship, housing and local services, passports, travel and living abroad.⁶¹⁰ Under each of these headings is a number of sub-topics or themes which users can click to find more information or step-by-step guides to undertake activities with these general themes such as filing taxes and apply for a visa.⁶¹¹ By doing this, the United Kingdom government reported that £1.7 billion had been saved in the

⁶⁰³ Ibid at 134.

⁶⁰⁴ Ibid at 141.

⁶⁰⁵ Ibid.

⁶⁰⁶ Ibid at 114.

⁶⁰⁷ Web portals from these jurisdictions were considered because they ranked highly in the Survey and therefore represent good practice in respect of online participation. It may be that South African governmental websites offer similar services or degrees of interaction. Further analysis into the nature and extent of online participation via South African governmental websites is an area for further analysis.

⁶⁰⁸ Ibid at 110 quoting Frances Berriman 'Using HTML5 for Gov.UK' (2012) *Blog, Government Digital Service, United Kingdom* available at <https://gds.blog.gov.uk/2012/02/10/using-html5-for-gov-uk/> last accessed on 15 February 2017.

⁶⁰⁹ GOV.UK available at <https://www.gov.uk/> last accessed on 15 February 2017.

⁶¹⁰ Ibid.

⁶¹¹ Ibid.

period 2013/2014 through 'digital and technology transformation',⁶¹² almost £100 million of which had come as a result of GOV.UK.⁶¹³ This significant saving and the United Kingdom's number one ranking in the survey indicates the success of the platform in providing members of the public with important governmental information. The website, however, provides limited opportunities for IAP's to engage with government. That is, the site only provides users with useful information and does not provide citizens with an opportunity to, for example, comment on new laws or comment on service delivery. The website does not provide for the two-way flow of information between government and the public which this thesis submits is critical to *Principle 1: The Educative Effect* and to participatory democracy.

The Australian government has implemented a very similar portal.⁶¹⁴ The Australian government has been one of the early adopters of an extensive one-stop national portal, offering citizens a secured sign-on for access to various interactive services, both at the federal and local levels, ranging from birth certificates to medicare, taxation, job search, aged care, child support among others.⁶¹⁵ Like GOV.UK, however, the website (while helpful) does not allow IAP's to contribute to the construction of knowledge or collaborate thus falling short of the democratic participatory principles.⁶¹⁶

Despite ranking significantly lower than the United Kingdom and Australia, the United States of America was selected for investigation as it adopted (in some instances) a more interactive approach to participation than the UK and Australian approaches.⁶¹⁷ (That being said, the US government has implemented online platforms such as the US Public Participation Playbook⁶¹⁸ which only sets factors that should be taken into consideration when participating

⁶¹² Stephen Foresheaw-Cain 'How digital and technology transformation saved £1.7bn last year' (2015) available at <https://gds.blog.gov.uk/2015/10/23/how-digital-and-technology-transformation-saved-1-7bn-last-year/> last accessed on 2 February 2017.

⁶¹³ Ibid.

⁶¹⁴ Australia.gov.au available at <http://www.australia.gov.au/> last accessed on 16 February 2017.

⁶¹⁵ United Nations E-Government Survey 2016 *op cit* note 55.

⁶¹⁶ This does not mean to suggest that GOV.UK and Australia.gov.uk do not allow public participation. It is possible that the website is supplemented with the more traditional modes of public participation. There appears to be limited opportunities for participants to engage with and respond to the information contained in these websites.

⁶¹⁷ For example, the US Government has developed 'We the People', an online website in which the public can petition to change government policy. Provided there is adequate support, the matter will receive a response from the US Government.

⁶¹⁸ US Public Participation Playbook available at <https://participation.usa.gov/> last accessed on 16 February 2017.

and does not provide for interaction between the parties).⁶¹⁹ The approach of the Cornell eRulemaking Initiative ('CeRI') in the United States, however, is different from these approaches in that it is not used only as a tool to 'educate' IAP's using online portals but also to encourage them to participate actively in the process by engaging with the information, understanding it and submitting comments. That is, CeRI seeks to give effect to the democratic participatory principles discussed above using an online platform. The lessons learned from CeRI's investigations may prove useful in determining whether there are principles specific to online participation which need to be incorporated into the CFPP.

As will become apparent, CeRI has implemented a number of online public participation processes using similar methodologies and building on the lessons learnt from their previous attempts. In this way, CeRI have refined their online participatory process and reported on their findings. The results of these investigations are set out below. Interestingly, the online participation process primarily tracks the democratic principles already analysed in this thesis. In addition, further principles can be drawn from CeRI's experiences not specific to online participation. These are incorporated into the CFPP in the next chapter.

5.2 The history of online participation in the United States of America

In the United States (as in South Africa), legislation provides agencies with extensive power to develop rules and regulations governing the implementation and administration of legislation for which each is responsible. 'The originating agency is required to give public notice of what it is proposing, to reveal the scientific studies or other data it is using to support its decisions and to explain its legal and policy rationales. It must provide a period of time (usually 60 - 90 days) during which any person has the right to comment on any part of the proposal.'⁶²⁰ All the comments must be considered before the agency makes a final decision. As proof that the comments have been considered, the responsible agency must also publish a report responding to the questions, comments and suggestions made.⁶²¹

⁶¹⁹ This website proposes a number of 'plays' where parties can participate. The website contains principles similar to the democratic participatory principles discussed in this thesis but the website does not allow for the same degree of interaction as RegulationRoom.

⁶²⁰ Cynthia R Farina, Dmitry Epstein, Josiah B Heidt and Mary J Newhart 'Regulation Room: Getting "More Better" Civic Participation in Complex Government Policymaking' (2013) Vol 7 Issue 4 *Transforming Government People, Process and Policy* at 2.

⁶²¹ Ibid.

Traditionally this form of participation was conducted using notice and comment proceedings. Harter observed that these processes tended to be adversarial such that participants took extreme positions on the understanding that by the end of the process they would agree to some middle-of-the-road outcome. In order to maintain their extreme position for as long as possible (or to make these seem more legitimate), participants would not disclose or share information with other stakeholders.⁶²² Parties all make submissions directly to the decision-maker with no interaction among them. This means that the issues of concern are not ever properly identified.⁶²³ These (and other) deficiencies ‘inhibit...dialogue over and exploitation of creative solutions necessary to resolve vexing problems addressed by agency regulation.’⁶²⁴ For this reason, Harter proposed another form of engagement in the rulemaking space: negotiated rulemaking.

Negotiated rulemaking sought to create an environment which is ‘more conducive to peer-production of knowledge.’⁶²⁵ It sought to replace the collection of isolated monologues that traditional written comments often represent with genuine responsive dialogue among stakeholders including the agency.⁶²⁶ In doing this, the agency is required to take a more active role⁶²⁷ in identifying parties affected by the proposed rule and developing a committee to represent the views of all the IAP's. These representatives are tasked with negotiating the rule on behalf of the stakeholders. The agency needs (during this process) to ensure that all voices are heard. This can be achieved if online platforms

‘encourage commenters to engage more dialogically with other commenters. Some of these design elements are relatively simple: threaded commenting allows users to comment not only on the agency proposal but also on what others are saying in visible discussion ‘threads’, so long as users are required to register and provide a valid email address, an email can be automatically generated that alerts a commenter when someone replies to her comment and provides a direct link to that reply. Other elements that

⁶²² Philip J. Harter ‘Negotiating Regulations: A cure for Malaise’ 71 *Geo. L.J.* 1 (1982-1983) at 19.

⁶²³ *Ibid* at 20.

⁶²⁴ *Ibid* at 22-23. As an aside, it is interesting to note that the criticisms lodged against notice and comment proceedings are all ones that would render the process in contravention of the constitutional participatory principles and, notwithstanding this, it is the process suggested in PAJA as being an appropriate mode of participation.

⁶²⁵ *Principle 1: The Educative Effect.*

⁶²⁶ Cynthia R Farina, Paul Miller, Mary J Newhart, Claire Cardie, Rebecca Vernon and Dan Cosley ‘Rulemaking in 140 Characters or Less: Social Networking and Public Participation in Rulemaking’ (2011) *Cornell Law Faculty Publication Paper 174* Doc 13 at 419.

⁶²⁷ Harter *op cit* note 622 at 66.

encourage responsible commenting are more ambitious: human moderation or automated suggestion systems that prompt users to consider and reply to particular contributions by other users.⁶²⁸

Since the introduction of the Internet, there have been calls for the United States government to implement a system of e-government aimed at increasing public participation. These calls were officially recognised in the E-Government Act which directs agencies to make essential rule-making documents available online and to permit persons to submit comments electronically.⁶²⁹ Following this Act, regulations.gov was created. This online platform converted the traditional notice and comment procedure into an online format. This first generation e-rulemaking made it easier for participants to submit comments but ‘it has not significantly broadened public awareness of, or effective engagement in, the process.’⁶³⁰ In fact, there has been

‘sharp criticism...from political scientists, legal academics, expert commissions and advocacy groups of all stripes. Their complaints include: regulations.gov interface is difficult to use, even for the relatively small portion of the public who understand the rule making process; the completeness and timeliness of posting rule making materials varies widely from agency to agency; the underlying data in [the Federal Docket Management System] is incomplete, inconsistent in quality, and difficult to extract; and most fundamentally, the system has not enticed new stakeholder voices into the rule making process and supported them in informed and meaningful participation.’⁶³¹

These criticisms reveal that merely providing participation processes online has not resulted in 'broader and better' participation. ‘[T]reating the value of participation as self-evident has left us without any guidance on how to value the new participation that technology brings, and on how to deploy technology to get the participation that we want.’⁶³² Furthermore, as will be set out below, the ‘effective designing and deploying of technology, although essential, is only one dimension of realising broader, better civic engagement. Effective e-participation systems must be prepared to address a set of barriers that are social, psychological and / or procedural rather than technological in nature.’⁶³³

Much research in this regard has been done by the CeRI in conjunction with various Federal agencies via a rulemaking platform called 'RegulationRoom' to ‘discover how a digitally

⁶²⁸ Farina *et al op cit* note 626 at 421.

⁶²⁹ E-Government Act of 2002 U.S.C 101.

⁶³⁰ Farina *op cit* note 620 at 2.

⁶³¹ Farina *et al op cit* note 67 at 403.

⁶³² Cynthia R Farina, Mary J Newhart and Josiah Heid ‘Rulemaking vs. Democracy: Judging and Nudging Public Participation That Counts’ (2014) *Environmental Law Report* at 10670.

⁶³³ Farina *et al op cit* note 620 at 1.

empowered citizen-participant can be meaningfully engaged through processes designed to prime deliberative discussion and knowledge production.⁶³⁴ The results of this research provide useful insight into the manner in which online participatory practices can be implemented in South Africa to ensure that online participatory processes yield broader and better public participation and (in so doing) yield additional participatory principles.

5.3 RegulationRoom

Since the first attempts at online participation using regulations.gov, the world has undergone a 'communication revolution' in which social media has re-fashioned the manner in which people interact with one another.⁶³⁵

‘Now, the Web has evolved from an environment in which users passively view pre-formulated content on their desktop computers to an environment ('Web 2.0') in which users routinely create, transform, and share content - not only sitting at relatively fixed computer stations but also on the fly with mobile computers ranging in size from laptops to smartphones. The new technologies and use patterns of Web 2.0 have inspired yet another group of e-rulemaking proposals: blogging about proposed rules; posting videos about the rule making information through social networking services like Facebook and Twitter; offering group comment drafting via wikis and other collaborative-work software; and using visualization tools to present rule making information results.’⁶³⁶

This means that the Internet has evolved from a one-way flow of information from government into a conversation that can occur ‘in (or near) real-time.’⁶³⁷

Recognising this, Barack Obama effectively used social media when campaigning for the United States' Presidency and, when he came into office, ‘mandated that agencies use Web 2.0 [Information and Communication Technologies] to increase transparency, participation and collaboration in federal policymaking.’⁶³⁸ The government directive also called on agencies to use ‘innovative methods...to obtain ideas from and to increase collaboration with those in the private sector, non-profit, and academic communities.’⁶³⁹

⁶³⁴ Farina *et al op cit* note 65 at 1531 - 2.

⁶³⁵ Eric Qualman *op cit* note 4.

⁶³⁶ Farina *et al op cit* note 63 at 406.

⁶³⁷ Farina *et al op cit* note 626 at 393.

⁶³⁸ Farina *et al op cit* note 620 at 1.

⁶³⁹ Executive Office of the President 'Memorandum for the Heads of Executive Departments and Agencies' at page 10 available at https://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_2010/m10-06.pdf last accessed on 9 December 2016.

In response to this call, the Department of Transport ('DOT') selected RegulationRoom 'as its open-government flagship initiative'.⁶⁴⁰ The RegulationRoom platform is 'an experimental online public learning and participation platform which supports research in using social media outreach, web design, and facilitative moderation techniques to achieve broader, better public participation in 'live' (i.e. ongoing) federal rule makings.'⁶⁴¹ 'The site is conceived and operated by CeRI researchers from computing and information science, communications, conflict resolution, law and psychology.'⁶⁴² It 'uses selected live rulemakings to experiment with human and computer support for public engagement and discussion. The ultimate goal of RegulationRoom is to provide guidance on design, technological, and human intervention strategies - grounded in theory and tested in practice - for effective Rulemaking 2.0 systems.'⁶⁴³

In developing such participation strategies, CeRI has published numerous papers setting out the strategies required to develop broader and better participation online. These papers have drawn on the experience gained from the participatory processes conducted in respect of the following rulemaking processes:

- The 'Texting Rule' - a rule prohibiting texting while driving by commercial motor vehicle drivers.⁶⁴⁴
- The 'APR Rule' - a rule aimed at addressing air passengers' rights. The rule governed issues such as tarmac delays and bumping passengers from flights.⁶⁴⁵
- The 'EOBR Rule' - a rule in which commercial motor vehicle operators would be obliged to install equipment which monitors their drivers' driving and resting times.⁶⁴⁶
- The 'Accessibility Rule' - a rule that sought to make self-service ticketing kiosks available at the airport for disabled passengers.⁶⁴⁷

⁶⁴⁰ Farina *et al op cit* note 63 at 396 - 397.

⁶⁴¹ Ibid.

⁶⁴² Farina *et al op cit* note 620 at 8.

⁶⁴³ RegulationRoom 'Overview' available at <http://regulationroom.org/about/overview> accessed on 1 August 2016.

⁶⁴⁴ RegulationRoom 'Texting' available at <http://regulationroom.org/texting/> accessed on 1 August 2016.

⁶⁴⁵ RegulationRoom 'Airline Passenger Rights' available at <http://regulationroom.org/airline-passenger-rights/> accessed on 1 August 2016.

⁶⁴⁶ RegulationRoom 'Texting' available at <http://regulationroom.org/eobr/> accessed on 1 August 2016.

⁶⁴⁷ RegulationRoom 'Texting' available at <http://regulationroom.org/air-travel-accessibility/> accessed on 1 August 2016.

- The 'Home Mortgage Servicers Rule' - a rule that sought to increase consumer protection in the home loan industry.⁶⁴⁸

Based on the participatory process conducted in respect of these rules, CeRI confirmed that making more opportunities to participate does not foster more useful comment. They conclude that in order to secure more meaningful comments, the agencies need to obtain input from 'missing' participants - that is, those participants that would ordinarily not participate in rule-making but who can contribute valuable information which informs the development of the rule. CeRI highlight that there are certain barriers to identifying these participants and securing their useful participation. The barriers (and possible solutions or mitigation measures) discussed below arise within the context of online participation in RegulationRoom. Although these barriers and the methods of overcoming them germinate from online participation, the findings equally apply to offline modes of participation.

5.4 Broader participation: insiders and outsiders

In conducting these participatory processes CeRI, in conjunction with the relevant agency, identifies the participants who may be affected by the proposed rule and in particular the 'missing' participants. CeRI indicates that there are two groups of participants: insiders and outsiders.

Insiders are 'sophisticated and resourceful commenters from either the regulated community'⁶⁴⁹ or organisations representing affected communities. They have significant knowledge regarding the proposed regulations and the industry to which the rule relates. They have the resources to conduct investigations, appoint experts, develop reports and prepare empirically supported and well-reasoned submissions regarding the suitability or lack thereof of the proposed regulations. Information presented in this manner is regarded as valuable to the decision-makers who share the knowledge and understanding of the industry, policymaking procedures, technical know-how. Because of this, insiders have, in the past, dominated

⁶⁴⁸ RegulationRoom 'Texting' available at <http://regulationroom.org/mortgage-protection> accessed on 1 August 2016.

⁶⁴⁹ Such as industry, lobbies, trade associations etc. Dmitry Epstein, Josiah Heidt and Cynthia R Farina 'The Value of Words: Narrative as Evidence in Policymaking' (2014) *Cornell Law Faculty Publication Paper* 1243 at 3.

participatory processes and are likely to participate in rulemaking processes which affect them, irrespective of whether the process is conducted online or using more traditional methods.

Having participated in these processes, insiders develop a 'community of practice'. That is, 'a process of collective learning within a specific domain, developing shared rhetoric, competencies, experiences and expertise over sustained interactions.'⁶⁵⁰ Comments submitted by insiders tend to exhibit certain characteristics considered valuable to rulemakers in drafting rules, namely:

- The comments draw a distinction between the rule or regulation and the statutory requirements;
- The comments include at least one paragraph of text providing an interpretation of the proposed rule and illustrate that the commenter understands the statutory requirements;
- the comments propose a change to the wording of the proposed rule contained in the Notice of Proposed Rulemaking ('NPRM');
- The comments provide examples of arguments warranting the comments being worthy of consideration; and
- The comments are supported by legal, policy and empirical information.⁶⁵¹

As insiders are likely to participate in the rulemaking, irrespective of whether the process is conducted online or using more traditional means and these commenters are likely to submit comments with these characteristics, they are not the target of RegulationRoom. In order for RegulationRoom to broaden participation successfully, it must identify and target those parties which have not previously participated in rulemaking. These parties are referred to as 'outsiders' to the participatory process.

Outsiders to the community of practise generally include 'small businesses, local government and civil society groups'⁶⁵² or IAP's. Outsiders may not participate because of a lack of resources, time or motivation or may be barred from or intimidated from participating by the

⁶⁵⁰ Cynthia R Farina, Dmitry Epstein, Josiah Heidt, Mary J Newhart and CeRI 'Knowledge in the people: Rethinking "value" in public rulemaking participation' (2012) Vol 47 *Wake Forest Law Review* at 103.

⁶⁵¹ Ibid at 107 - 108.

⁶⁵² Epstein *et al op cit* note 649 at 3.

rhetoric of the community of practice or the manner in which to structure comments that are considered valuable to decision-makers. Furthermore, when compared with insiders, outsiders 'view and experience policy from a very subjective and highly contextualised point of view - they may have in-depth knowledge about facts, causes, inter-relationships and likely consequences'⁶⁵³ of a proposed rule that the agency has not considered but which are valuable to the development of the rule. This is referred to as 'situated knowledge'.⁶⁵⁴ Caution must be exercised when engaging with organisations or unions representing individuals as these groups may not accurately reflect the individual views of their members or may block direct consultation with them in which case situated knowledge may go unheard.

Identifying outsiders is only the first hurdle to broader, better participation. Owing to their lack of experience in these proceedings and the manner in which they perceive rulemaking processes, the way in which they present situated knowledge does not exhibit the characteristics set out above. Rulemakers need to evaluate the submissions they receive to isolate the issues being raised.

5.5 Broader participation: recognising the value of situated knowledge expressed in the narrative

As outsiders to the community of practice, these participants lack the skills or knowledge to participate in rulemaking in a manner which compares with insiders' participation and which is considered acceptable to decision-makers.⁶⁵⁵ Rather than comments being submitted in a well-argued submission supported by empirical data, outsiders rely on personal experience which is relayed in the form of stories and examples.

'The personal narrative does not fall within the repertoire of acceptable forms of communication shared by the policymaking community of practice...Indeed stories about individual experience appear dramatically opposed to arguably objective verifiability of empirical data and abstract logic of principled argumentation. Thus, the personalised, narrative form of lay citizen participation may interfere with the policymaker's ability to 'hear' the knowledge being conveyed.'⁶⁵⁶

Important issues relevant to the rulemaking process may go undiagnosed because the information is not presented in accordance with the traditional insider paradigm.

⁶⁵³ Ibid at 7.

⁶⁵⁴ Farina *et al op cit* note 650.

⁶⁵⁵ Ibid at 112.

⁶⁵⁶ Epstein *et al op cit* note 649 at 10 - 11.

During the rulemaking process conducted using RegulationRoom, CeRI assumed that by adopting an outreach programme targeting outsiders and presenting information in a concise and clear way and using moderators, it ‘could engage rulemaking newcomers in the process successfully, inculcating them with the norms of effective participation to a sufficient degree that they could provide information perceived as useful by agency decision makers.’⁶⁵⁷ However, notwithstanding these efforts, the participants continued to express themselves in the narrative. Farina *et al* report that when CeRI ‘asked for reasons and for factual support, [they] persist in telling stories. Instead of hypothetical examples, they offer first person narratives. Instead of logic-based reasoning from abstract principles, they support their positions with highly contextualised argument from their own experience.’⁶⁵⁸

While this form of information differs from the 'acceptable' insider approach, Epstein *et al* ‘believe that the information that can be gained by attending to these non-standard types of evidence and discourse justifies the effort to develop guidance for their appropriate use in policymaking.’⁶⁵⁹

Based on the APR Rule, EOBR Rule and Accessibility Rule processes, CeRI developed four categories of narrative submissions which are useful to rulemakers when interpreting narrative comments.

5.5.1 Narrative of complexity

The narrative of complexity concerns ‘stories containing situated knowledge that reveal and explore contradictions, tensions and disagreements within what may appear to be the agency to be a unitary set of interests or practices.’⁶⁶⁰ The example cited is the Accessibility Rule in the proposal to make check-in kiosks available to travellers with disabilities. The aim of the regulation was to save time and to remove the stigma associated with disabled people by treating them in the same manner as able travellers. This motion was supported by organisations which purportedly represented disabled groups. However, the disabled travellers commenting in RegulationRoom indicated that:

⁶⁵⁷ Farina *et al op cit* note 650 at 113.

⁶⁵⁸ Ibid at 116.

⁶⁵⁹ Epstein *et al op cit* note 649 at 13 - 14.

⁶⁶⁰ Ibid at 14.

‘As a visually impaired person I DO NOT believe kiosks access would be beneficial. In fact, I suspect that the plan may ‘backfire’, making airport access more difficult. Not being able to read airport signage, and therefore requiring ‘meet and assist’ assistance to my designated gate, I find it most convenient to find (*sic*) a ticket agent who will also call for assistance to take me through security and to my gate. If kiosks become more widely used (or possibly required) in the future, it is likely to mean fewer ticket agents, thus longer wait times in line, and more difficulty and delays acquiring the assistance I need. Making kiosks available to those disabled individuals who wish to use them may be a good idea in theory, but, as proven by the growth of ATMs and self-service checkouts, the more automation - the less human assistance.’⁶⁶¹

Situated knowledge may therefore identify additional concerns or effects that were not contemplated when the rule was developed and which may defeat the ends the rule sought to achieve.

5.5.2 Narrative of contributory context

The narrative of contributory context concerns ‘stories containing situated knowledge that identifies contributory causes that may not necessarily be within the agency’s regulatory authority but could affect the efficacy of the new regulatory measures.’⁶⁶² The example used in support of this narrative is the EOBR Rule and the impact that inefficient or irresponsible third party shippers have on the day-to-day operation of long-haul logistics drivers. A commenter stated:

‘The use of the EOBRs will tell you how long the truck has been in operation. Road conditions and other delays are not addressed. Shippers/receivers have no respect for deadlines they have placed on drivers to move their products. Once they get the truck loaded their job is done. I’ve sat in a loading dock for 13hrs before and then I had to be at my delivery site in 10hrs. I couldn’t sleep while in the dock because the truck would shake every time the forklift loaded another pallet. It also sounds to me that FMCSA is mandating the use of EOBRs REGARDLESS whether those of us in the industry think that they will be effective or not. The shippers and receivers are an integral part of the problem that can’t seem to be addressed by FMCSA.’⁶⁶³

Situated knowledge therefore may reveal additional concerns which diminish the efficacy of the proposed rule.

5.5.3 Narrative of unintended consequences

The narrative of unintended consequences concerns ‘stories containing situated knowledge that identifies possible outcomes and effect of the proposal other than those the agency is seeking to achieve.’⁶⁶⁴ For example, in respect of the EOBR Rule, one commenter was recorded as stating:

‘Ok, I just took a trip to red deere alberta canada...I am sampling AN e-log, as I said I am sitting on an exit ramp in Reed Point Montana, 16 miles from my home and I have to sit here for 10 hours before I can’t legally drive the 16 miles home...I could legally unhook from my trailer and drive home, Personnel

⁶⁶¹ Ibid.

⁶⁶² Ibid at 16.

⁶⁶³ Ibid at 16 - 17.

⁶⁶⁴ Ibid at 17.

conveyance...but not with an electronic recorder...so I'll sit here on this exit ramp for 10 hours and then drive the 16 miles to my home...makes a lot of sense.'⁶⁶⁵

Situated knowledge reveals practical outcomes that the regulator did not identify when developing the proposed rule.

5.5.4 Reframing narratives

Reframing narratives refers to 'stories containing situated knowledge that reframe regulator issues.'⁶⁶⁶ Many of the comments received in the EOBR Rule indicated that the drivers felt that they were being treated as criminals as previously only reprobate drivers were required to have EOBRs. This had the effect of pushing drivers into alternate careers.

The problem with situated knowledge is that, by its very nature, it is 'often complex, contingent and, at any given moment, inchoate.'⁶⁶⁷ This knowledge 'is not a static body of identifiable material that could even, in theory, be mastered by an expert planner. Rather, it is dispersed in individual actors, is created by and continually changing in response to changed circumstances, and is often neither quantifiable nor readily expressible.'⁶⁶⁸

As situated knowledge may be difficult to assess, it is important to develop criteria to assess the veracity of the comments. In the RegulationRoom examples, CeRI found that the veracity of situated knowledge was determined on the basis that 'experiential claims were repeated, or affirmed, by multiple commenters. Moreover, many of the accounts had both internal coherence (i.e. completeness and consistency) and external coherence (i.e. plausibility given what we know about what typically happens in the world).'⁶⁶⁹ Therefore, while the typology proposed by Epstein illustrates the way in which situated knowledge can be useful to decision-making, there is reason to be wary of the narrative because it can be highly politicised or dramatic which can 'impede rather than advance, public deliberation on contested policy questions.'⁶⁷⁰ That being said, information provided by insiders in the community of practice is also not incontestable. Experts often disagree on the methodology and interpretation of technical

⁶⁶⁵ Ibid.

⁶⁶⁶ Ibid at 18.

⁶⁶⁷ Farina *et al op cit* note 650 at 136.

⁶⁶⁸ Ibid.

⁶⁶⁹ Ibid at 137.

⁶⁷⁰ Ibid at 145.

information: the mere fact that the comments submitted by sophisticated parties are presented in a manner that is more acceptable to the decision-makers does not mean that it is correct or should be accepted at face value. Like narrative submissions, this information needs to be evaluated and tested before it can be accepted. The difficulty with the narrative is that sometimes it requires rulemakers to read between the lines or sift through stories to identify the point that is being made and then determine if the point has value within the context.

Having understood whom online participation processes seek to reach and that comments are not likely to be submitted in the traditional format by these participants, CeRI identified certain barriers to participation which need to be addressed when designing the online public participation process which will encourage these participants to participate and assist them in understanding the issues at hand so that they can provide their situated knowledge. (*Principle 16: The Principle of Integration*).

5.6 Barriers to broader and better participation

The first generation e-participation movement merely digitised the conventional rulemaking process by making information available online and allowing participants to submit comments electronically.⁶⁷¹ Despite expectations (at the time), online participation did not generate the number and kind of comments that rulemakers expected. The reason for this is that first generation e-participation did not ‘directly address public *ignorance* about the process, *unawareness* of particular rulemakings of interest, or *information overload* from rulemaking materials.’⁶⁷² These factors became the focus of Regulation 2.0.⁶⁷³ Having determined which participants had not pervasively participated in rulemaking procedures, CeRI identified the following barriers to participation.

5.6.1 Lack of awareness

Before Regulation 2.0, in order for any person to be aware that a proposed rule was available for public comment, he or she had to review the Federal Register. Given the large number of rules generated by various government agencies the number of pages of proposed and final rules could amount to 70 000 to 90 000 pages per rule. Sometimes, when the agency deemed a rule to be

⁶⁷¹ Farina *et al op cit* note 67 at 399 – 401.

⁶⁷² Farina *et al op cit* note 63 at 418.

⁶⁷³ Regulation 2.0 refers to the second phase of online participation which includes ways in which participants can not only engage with the information but interact with the regulator and other participants.

important, conventional media were adopted to advertise the commenting period. This process was made marginally easier when the documents were made available online - however, potential participants were still obliged to trawl through the Register in order to enlighten themselves. Insiders to the community of practice would have been aware of the proposed rules from participating in industry, allocating resources to monitor the process, as well as through interactions with other insiders. Outsiders, on the other hand, do not know of the process, the nature and extent of the impacts on them and whether or not they are entitled to participate.⁶⁷⁴

To overcome this barrier, CeRI notes that each public participation process must develop an outreach programme identifying parties and engaging them in the process. The nature and extent of the outreach programme will be driven by the identity of the outsiders as these are the target parties whose input is required in order to achieve broader, better participation.

As "social networking" - through Web-based services...allows users to share ideas, activities, events and interests within a designated group or with the world at large⁶⁷⁵ so it is the perfect tool for alerting and engaging participants. That being said, CeRI found that 'using Web-based social networking to lower unawareness barriers turns out not as simple as it sounds.'⁶⁷⁶ In fact, in order for social networks to alert and engage outsiders effectively requires a great deal of human effort and does not happen spontaneously merely by posting notifications on Facebook or Twitter. People are only alerted to a particular post once

'a critical mass of people have been 'exposed' to it. Blogs inform those who come to the site to read them, or take the steps to set up automatic delivery of new content to their email account or browser homepage. Microblogs spread info through communities declared 'friends' and 'followers', who use Facebook and subscribe to Twitter tweets...Successful social networking happens only when people (ideally, those with large networks of readers, friends or followers) both learn about and feel motivated to share new information.'⁶⁷⁷

CeRI found that in order to generate this kind of traction, the following human actions were required:

- '(i) working with the agency to identify the range of stakeholders for rule making;

⁶⁷⁴ Farina *et al op cit* note 65 at 1550.

⁶⁷⁵ Farina *et al op cit* note 63 at 420.

⁶⁷⁶ Ibid.

⁶⁷⁷ Ibid at 421.

- (ii) locating gatekeeper groups and influential individuals who represent or speak to members of these stakeholder communities, as well as groups interested more generally in open government or the rulemaking process;
- (iii) segmenting these groups and individuals into categories for development of audience-targeted messaging; and then
- (iv) using a variety of methods, initially throughout the comment period, to capture the attention of the gate keepers long enough to motivate them to spread the word to their readers, members, friends, and followers.⁶⁷⁸

Item (i) has been dealt with above in identifying outsiders. Once these persons have been identified, CeRI needs to determine where they receive their information - such as 'membership associations, recreational and trade publications and influential individuals (such as bloggers), and reach out to them through email, telephone and online communications'⁶⁷⁹ (items (ii) and (iii)).

In explaining this outreach programme, CeRI reported that

'[t]echnology certainly assists this process - we find individuals and groups through search engines...but considerable human time and energy is required. In addition to daily Facebook posting and Twitter tweeting, we monitor blog traffic about rulemaking and attempt to alert the blogger about the availability of RegulationRoom if the blog has not included the site. And, we use email and telephone follow-up with the bellwethers to advocate that our message be among the content they feature online or through newsletters and other print sources.'⁶⁸⁰

In addition,

'a list of keywords and phrases to use proactively on Twitter was developed, and we posted ads on Facebook and Google by setting continuous automated searches and responding with comments or 'tweets' when the rule or its subject appears in news sites, blogs, or Twitter. RegulationRoom has a presence on Facebook, which is designed to encourage users to share issue posts and individual comments. [CeRI] coordinate media outreach with agency partners to persuade conventional and online media to publicise the rulemaking and availability of RegulationRoom.'⁶⁸¹

Although there has been skepticism regarding whether traditional media would drive participants onto an online platform, CeRI's experience has been that traditional media resulted in a spike in the number of visitors to RegulationRoom. The outreach programme, therefore, needs to develop a strategy that provides for a mix of media based on where outsiders obtain their information. That being said,

'organisations...must adapt, from the model of a single voice broadcasting a message via multiple media, to a model in which information spreads 'virally' from user to user. The downside, from a 'marketing' point of view, is that the organisation quickly loses control of the message as users redistribute it. The promise of free access to a potential audience of millions thus comes with the threat of countless users who share

⁶⁷⁸ Ibid at 421 - 422.

⁶⁷⁹ Solivan and Farina *op cit* 64 at 59; Farina *et al op cit* note 65 at 1552.

⁶⁸⁰ Farina *et al op cit* note 63 at 422.

⁶⁸¹ Solivan and Farina *op cit* note 64 at 59.

and recommend it. As a result, organisations are forced to become not just proactive communicators, but reactive ones as well, as the fortuity of circumstances and the capriciousness of word-of-mouth are magnified by the immediacy and reach of the web.’⁶⁸²

Developing the outreach programme in respect of the Texting Rule and the ARP Rule, CeRI learnt a number of lessons regarding factors which impact on the effectiveness of the outreach and participation programme.

In respect of the Texting Rule, CeRI and DOT identified over 100 groups of IAP's. These groups were categorised into six categories, based on their respective interests in the rule:

- safety interest;
- driver interest;
- business interest;
- public servant interest;
- open government interest and
- academic interest.

Having identified these groups, the outreach strategy involved a mix of media, including traditional media and social media posts, as well as reactive messaging where 'followers' or 'friends' shared or posted comments regarding the rule.

CeRI also sent press releases to 73 media contacts in the transport and technology industries, business, government and law. The DOT press releases and the NPRM directed participants to RegulationRoom. Not all the articles arising from the 73 press releases mentioned that IAP's could participate via RegulationRoom. In respect of the 100 constituent groups, each group ‘received an email twenty-four hours after the rule opened, and a follow-up phone call ten days later. Some groups were not interested in the rulemaking or did not wish to help promote it to their members. Others reported promoting it via e-mail, newsletter or social networking.’⁶⁸³ This resulted in a spike in the number of visitors to the site.

⁶⁸² Farina *et al op cit* note 626 at 395.

⁶⁸³ Ibid at 398.

The outreach programme also included accessing social networks affiliated with the identified target groups such as Facebook and Twitter.

‘When the rule opened, we asked the owners of the group to post the message about rulemaking and RegulationRoom. Where permitted by the group’s privacy setting, we also posted directly to their wall. Unfortunately, this was considered spamming by Facebook and the posting persona we had used was shut down...To organisations on Twitter, we delivered an invitation to participate via direct messaging their Twitter account. Some ignored the message while others reposted or retweeted it. We estimate the total number of followers exposed to the initial tweet at nearly 35 000. We also encouraged people to ‘friend’ RegulationRoom Facebook page or follow us on Twitter to receive updated information as the rulemaking process progressed.’⁶⁸⁴

In addition to proactive messaging, CeRI adopted a reactive outreach programme. Using online tools which monitor social networks, CeRI ‘continually monitored social networks, for phrases such as ‘distracted driving’ or ‘texting and driving’ and uncovered nearly one hundred blogs about the rulemaking. We visited the blogs and, where possible to post a comment, we left an invitation to participate in RegulationRoom.’⁶⁸⁵

Despite the extensive outreach programme, the Texting Rule did not generate the volume of participants that CeRI or DOT expected. CeRI put this down to the fact that in the months leading up to the Texting Rule being released, there had been significant media coverage regarding texting and driving, including the Secretary of Transportation issuing a statement immediately outlawing texting while driving commercial motor vehicles and launching a campaign on the Oprah show against texting and driving.⁶⁸⁶ As a result, by the time the NPRM was released (notwithstanding that the NPRM raised issues that had not been discussed in the lead up to the release of the rule) banning texting while driving was ‘old and uncontroversial news.’⁶⁸⁷ As a result, CeRI reported that the ‘most important lesson we took away from the texting rule is the importance of an outreach plan that is attained and, to the extent possible, responsive, to external circumstances, including the level of traditional media coverage of the rule.’⁶⁸⁸

⁶⁸⁴ Ibid.

⁶⁸⁵ Ibid at 399.

⁶⁸⁶ Ibid at 400 - 401.

⁶⁸⁷ Ibid at 403.

⁶⁸⁸ Ibid.

This participation fatigue is caused in part by the fact that there is so much information available which makes it difficult to keep the participants' attention.⁶⁸⁹ If the subject matter and the means of engaging the participants do not motivate and maintain engagement, the participants will easily be distracted and focus their time and attention on something else. The lack of attention may arise from the subject matter becoming stale but also from external factors like where a 'natural disaster occurs across the world; a famous actor dies in suspicious circumstances; a funny video is posted to YouTube.'⁶⁹⁰

In the APR Rule, CeRI noted how social media could be used to maintain the attention of the participants and to continue the debate. As set out above, the APR Rule concerned regulations relating to travel delays. The approach adopted in advertising the rule in traditional media was similar to that in the Texting Rule.⁶⁹¹ During the comment period, it became evident that most of the participants were air travel customers, few had identified themselves as working in the air travel industry. CeRI were of the view that participants from the sector would offer a different perspective on the rule and, as a result, industry groups were targeted in order to obtain their views. Emails were sent to groups which 'have a social media viewership.'⁶⁹² Despite these efforts CeRI

'did not receive any response from the site owners nor did we see any sign of our announcement being promoted via social media. Based on this poor response, and in light of the substantial response generated by traditional media, we cut back our proactive social networking to concentrate resources on personal outreach to these groups and traditional media outlets. However, we did continue to post regular messages on RegulationRoom's Facebook page and Twitter account, weekly at first, and then daily in the early weeks of the targeted outreach to air travel industry workers...In the last weeks of the comment period, we increased proactive tweeting, focusing on each major issue in the rulemaking in turn and trying to add a sense of urgency to the tweets as the discussion period closed. In general, proactive tweeting was only mildly successful.'⁶⁹³

Despite the fact that social media efforts were less effective than traditional media in engaging the public, social media were used effectively to engage users' attention around a particular sub-topic which formed part of the NPRM; namely, whether a rule should be developed in respect of peanut allergy sufferers.

⁶⁸⁹ Farina *et al op cit* note 63 at 423.

⁶⁹⁰ Ibid at 424 - 425.

⁶⁹¹ Farina *et al op cit* note 626 at 405.

⁶⁹² Ibid at 407.

⁶⁹³ Ibid.

'In the first week the rule was open, the Peanut Allergy post got more than 300% more traffic coming from Facebook. By the end of the rule, visits to the Peanut Allergy post were more than 3.5 times as high as the next most popular issue (tarmac delay). More than four times as many different users commented on that post as on the next highest issue post; these 185 users made almost as many comments on the peanut allergy regulations as users made on all other issues combined (454 of 931 total comments). These comments were overwhelming in favor of regulation. A CNN article about the peanut issue three weeks into the rule making certainly helped spread the word of DOT's possible intervention to help allergy sufferers. More than one-third of total traffic came from Facebook - a considerably larger percentage than Facebook's 4.5% contribution to overall site visits.'⁶⁹⁴

The interesting part of the peanut allergy situation is that CeRI did not see it as a primary issue and did not develop an issue post on this topic and did not implement targeted promotion. 'Through Facebook, several blogs, and perhaps e-mail and print newsletters, members of this group managed from the outset of the rule making to mobilise each other to come to site and comment in large numbers than any other stakeholder group.'⁶⁹⁵ The peanut allergy example illustrates that 'person-to-person' engagement is more effective than 'entity to audience' promotion in soliciting participation. Members of groups such as trade unions were not informed of the opportunity to participate because it was against conveying the message to its members and so barred participation. However, person-to-person networking resulted in 'an intense, sometimes heated, debate about the existence and validity of evidence on the incidence, severity and exposure methods of peanut allergies.'⁶⁹⁶ This maintained participants' interest in the subject matter. CeRI recognised that, in order for interest to be maintained, it is necessary to engage directly with members rather than doing so through associations. This needs to form part of the outreach programme.⁶⁹⁷ One suggested method would be Facebook advertising. If the membership association follows RegulationRoom and RegulationRoom posts a 'paid-for' advertisement, it will be visible to the 'friends' of the membership association by virtue of the fact that it follows RegulationRoom. This may encourage more individuals to follow RegulationRoom themselves. However, if the member receives information regarding the rulemaking from both RegulationRoom and the membership association, he or she may be faced with the same problems of information overload and maintaining that participants' attention for a sufficient period of time to engage the information.⁶⁹⁸

⁶⁹⁴ Ibid at 411 - 412.

⁶⁹⁵ Ibid at 412 - 413.

⁶⁹⁶ Ibid.

⁶⁹⁷ Ibid at 415.

⁶⁹⁸ Farina *et al op cit* note 620 at 6.

Holding participants' attention requires a significant amount of human effort as more 'creative audience targeted, proactive and reactive communication'⁶⁹⁹ methods will be needed, including the manner in which large amounts of information can easily be communicated to and understood by outsiders.

5.6.2 Information Overload

During rulemaking, there is generally not a lack of information. In fact, the NPRM can run into hundreds of pages. Not only are these documents lengthy but they often require readers to have a graduate school reading age in order for the documents to be understood. The difficulty level in comprehending this information may chill participants from participating. Rulemakers often include simplified summaries aimed at assisting various users in understanding enough about the rule to participate effectively.

'Unfortunately, even when the material is available to citizens, it is rarely comprehensible to them without help. Often voluminous and filled with technical, legal, or other jargon, such material is virtually always written from the 'insider' perspective of the professional consultant, regulator, or planner - with little effort to present context, problems, constraints, and options in terms that make sense to ordinary people.'⁷⁰⁰

The difficulty associated with rulemaking (and a similar problem is experienced in EIA public participation processes) is packaging this information in such a way that it can easily be consumed and digested by participants. In order to make the information more comprehensible, CeRI adopted three techniques in designing the online platform:

- information triage and sign-posting;
- translation; and
- information layering.

5.6.2.1 Information Triage and Sign-posting

The first technique involves CeRI conducting 'information triage' by selecting information in the relevant document that participants need to know in order for them to participate effectively.⁷⁰¹

These information needs will vary on a case-by-case basis.

'For example, in a DOT rulemaking used for a limited beta test of RegulationRoom, a central question was how to design a label for automobile tires that would effectively inform consumers about how choice of tire model could affect fuel economy. Here, the information requirements for effective participation were low: Participants needed to know the objective of new labelling requirement and the designs DOT was

⁶⁹⁹ Farina *et al op cit* noted 626 at 416.

⁷⁰⁰ Epstein *et al op cit* note 65 at 1553; Farina *et al op cit* note 63 at 434.

⁷⁰¹ Cynthia R Farina, Mary J Newhart, Josiah Heidt and Jackeline Solivan 'Balancing Inclusion and "Enlightened Understanding" in Designing Online Civic Participation Systems: Experiences from RegulationRoom' (2013) *Cornell e-Rulemaking Initiative Publications* Paper 14 at 184.

considering. By contrast, in a DOT rulemaking requiring air travel websites and airport check-in kiosks to be accessible to travelers with physical and other disabilities, the information requirements were fairly high. Participants needed to know what standards of accessibility DOT was considering, when and how to propose phasing in implementation, and what methods would be used to verify compliance. An example in the middle comes from a DOT rule making proposing to require that commercial motor vehicles be retrofitted with electronic devices (EOBRs) to monitor operators' driving and rest time. Initially this sounds information intensive, but knowledge about EOBRs was widespread in the trucking community, even among the small businesses that made up 99% of affected companies (the unsophisticated stakeholders being targeted). What participants needed to know was who would be affected, when compliance would be required and how violations would be punished.⁷⁰²

CeRI initially implemented 'targeted commenting' in which participants were able to submit comments online in respect of specific wording of the NPRM. CeRI believed that rulemaking would benefit where participants could comment on the text of the rule as this would allow for the clustering of comments that the agency or CeRI could use to isolate issues. Technology was implemented so that participants could write comments alongside the actual text of the NPRM. This approach was found to be too cumbersome as the NPRM⁷⁰³ was too long for people to read and comment on. CeRI found that '[f]orty-five percent of comments were made on the first paragraph - regardless of the paragraph to which they were related.'⁷⁰⁴

As targeted commenting was too cumbersome, CeRI decided to use issue posts which broke down the NPRM into manageable units.⁷⁰⁵ Issue posts were grouped together under a general theme. Under the issue posts there may be a number of subtitles to further assist the user in navigating the information to find matters of interest to him or her ('signposting'). This more focused commenting approach prevented 'global, unfocused and conclusory comments'⁷⁰⁶ as the comments were clustered to a particular issue under discussion in the issue post and it allowed participants to see the comments submitted on that same subject matter by other participants.⁷⁰⁷ This allowed for further debate between parties in respect of that issue as was seen in the peanut allergy discussion. The issue posts need to be written in such a way that the information being relayed to the participants could be easily understood. It has been suggested that this should be

⁷⁰² Ibid at 184 - 185.

⁷⁰³ In the Texting Rule the NPRM comprised 227 paragraphs and in the APR Rule the NRPM comprised 274 paragraphs.

⁷⁰⁴ Farina *et al op cit* note 63 at 437.

⁷⁰⁵ Solivan and Farina *op cit* note 64 at 59.

⁷⁰⁶ Farina *et al op cit* note 701 at 185.

⁷⁰⁷ Ibid.

conducted by someone outside of the process as he or she will not be bound by jargon and technical terminology.

5.6.2.2 Translation

Translation involves taking the technical and jargonist language contained in the information provided to the participants and restating it in a simpler form so that it can be better understood by the 'ordinary' person (i.e. outsiders).

This notion has been discussed and implemented in the US since before the Nixon administration. Various executive orders, guidelines and legislation have been promulgated since then which have both contributed to and inhibited the comprehensible information movement.⁷⁰⁸ Most recently, the Office of Information and Regulatory Affairs ('OIRA') published the *Clarifying Regulatory Requirements* ('CRR') in January 2012 calling for public participation in rulemaking which, it submitted, can only occur if the public are able 'to obtain a clear sense of content' of the proposed rules.⁷⁰⁹ To achieve this, the CRR required that rulemakers include 'straightforward executive summaries' in preambles for 'lengthy and complex rules (both proposed and final)'.⁷¹⁰

In the two years following the publication of the CRR, CeRI investigated whether these executive summaries provided the public with a 'clear sense of content'⁷¹¹ by evaluating the incidence,⁷¹² length,⁷¹³ format⁷¹⁴ and readability⁷¹⁵ of the proposed and final rules. Contrary to what was expected the investigation concluded that:

⁷⁰⁸ Farina *et al op cit* note 63 at 6 - 13.

⁷⁰⁹ Ibid at 13, quoting the CRR.

⁷¹⁰ Ibid.

⁷¹¹ Ibid at 14.

⁷¹² 'How many proposed and final rulemaking documents actually include an executive summary? How are agencies interpreting the instruction that executive summaries should be provided for 'long and complex rules'?' (Ibid).

⁷¹³ 'How long are executive summaries? The Guidance provides a 'suggested template' that contemplated 'generally 3-4 pages of double spaced Word document maximum, although usually complex or lengthy regulatory actions may require longer executive summaries.'" (Ibid).

⁷¹⁴ 'Has the Guidance standardised the structure of executive summaries? The Guidance template is formatted with three titled sections ('Proposed of the Regulatory Action', 'Summary of Major Provisions of the Regulation Action in Question,' and 'Costs and Benefits'). Are agencies following the template? (Ibid).

⁷¹⁵ 'How 'readable' are executive summaries? Paraphrasing Executive Order 13563, the Guideline instructs that 'regulations...be written clearly and simply' and directs that the executive summaries should be 'straightforward.' We use common readability scoring methods to provide a quantitative measure of readability. Admittedly, such methods give only a preliminary indicator of comprehensibility, but testing methods that involve human readers are not

‘plain-language efforts still have not produced rulemaking documents that most of the public could use in writing meaningful comment.

The preambles are very long and written at a level most college graduates would find challenging. More sobering is the unexpected discovery that, when agencies try to summarise these documents, what readers gain in shorter length is offset by *substantially* less readable text. Apparently, when rule writers try to compress content, they use more complex sentences and more jargon - and the greater the compression the greater the loss in clear and simple expression.

In particular, OIRA’s efforts to use executive summaries as a way to ‘promote public understanding’ and give ‘members of the public...a clear sense of the content’ of proposed and final rules is a regulatory misfire. Most agencies are indeed providing executive summaries more often, and the practice is more common in long rules and in proposed rules. But the executive summaries in proposed rules are less likely to follow a standard format, and are written at a higher grade level, than those in final rules. In general, experience doesn’t seem to help agencies in writing more readable executive summaries. Executive summaries are significantly less readable than the preambles they are supposedly explaining...⁷¹⁶

Based on the above, Farina *et al* conclude by saying that merely providing additional directions to agencies to write in plain language and more clearly is not going to result in the members of the public having a better understanding of the content. What is required is a better understanding of why the authors of these executive summaries are unable to write clearer and simpler documents.⁷¹⁷ They speculate that it may be because the rules are drafted by insiders (lawyers, engineers, experts, government officials etc.) or by parties who do not value participation.⁷¹⁸

Ultimately, they conclude that further investigation should be conducted to determine whether the reasons above are empirically correct. Based on the outcome of such investigations it would be possible to design methodology that would be more appropriate to assist lay persons to understand. For example, appointing trained drafters or editors to draft the rules may be an appropriate solution.⁷¹⁹ However, since executive summaries written by experts tend to be more complicated than the reports themselves, they cannot merely be inserted under the issue posts dealing with a particular subject - more is required. This information must be broken down into issue posts that lay persons can understand.

practicable for a large number of documents. Is there any evidence that Guidance has improved readability of executive summaries among those agencies that had an executive summary practice in place before the Guidance? How readable are the executive summaries produced by agencies for which the practice is new? Are executive summaries more readable than other parts of the rulemaking documents in which they appear?’ (Ibid).

⁷¹⁶ Ibid at 33 - 34.

⁷¹⁷ Ibid at 35.

⁷¹⁸ Ibid at 35 - 36.

⁷¹⁹ Ibid at 36.

There are some concerns that the ‘practices of triage and translation might be considered objectionable because of the power over participant knowledge that they place in the hands of the designer. ‘Information layering’ somewhat ameliorates this concern’.⁷²⁰

5.6.2.3 Information layering

The final technique is information layering which takes into consideration the features that can be applied in an online format. That is, hyperlinks and glossaries allow participants to click through to more detailed information on a subject if they wish to do so. This may link them to the NRPM, statutes or research studies which provide more technical or detailed information.⁷²¹ ‘For users needing additional help, a mouse-over glossary defines acronyms and terms that might be unfamiliar. Also, links may give users access to other pages on the site and offer brief explanations of regulatory background of other relevant topics.’⁷²² This method reduces the likelihood of participants being overwhelmed by the volume of information provided. It can also be a tool to assist online moderators in guiding users to review more information or answer users’ questions.⁷²³

Layering allows the users to engage with as much information about the proposed rule as they feel is comfortable. This means that the first layer of information is relatively superficial but because of the ability to layer the information participants should not be driven away on the basis that it is too simplistic. Similarly, if the information is too complicated, it may have a chilling effect on further participation. ‘For this reason, a guiding principle of the information architecture in RegulationRoom is that information should, to the extent possible, be stratified: more basic information should be available for users who need it, without getting in the way of sophisticated users.’⁷²⁴

Once parties have a better understanding of the information underlying the proposed rule, they should be more equipped to engage in the kind of participation that RegulationRoom

⁷²⁰ Farina *et al op cit* note 701 at 185.

⁷²¹ Farina *et al op cit* note 65 at 1556 - 1557.

⁷²² Farina *et al op cit* note 701 at 185.

⁷²³ Farina *et al op cit* note 65 at 1558

⁷²⁴ Farina *et al op cit* note 63 at 439.

requires. However, as set out below, merely being informed does not mean that the participants are equipped with the skills necessary to participate meaningfully. Part of the reason for this is that participants approach participatory processes with the wrong mindset. That is, they expect their participation to involve voting for a preferred option and the option with the most support 'wins'. Instead, they are faced with a process in which participants are required to engage with one another on issues of preference and evidence, to debate these issues and to broker solutions. Participatory process designers, therefore, need to build a process which moves participants away from a voting mindset.

5.6.3 Low participation literacy

Despite the importance of rulemaking and the fact that it can have a serious impact on the day-to-day lives of many people, few people (including those who are educated or politically savvy) outside the rulemaking process really appreciate how the process works.⁷²⁵ 'For most US citizens...participating in government decision-making means casting a vote - formally in elections and referenda, or informally in opinion polls.'⁷²⁶ As rulemaking requires the development of laws based on reasons, fairness and the rule of law and not merely on majority preference, treating it as a plebiscite renders the process useless as all it does is generate hundreds of expressions in support of or opposition to a particular viewpoint.⁷²⁷ This is not to say that voting has no place in society. (As will be illustrated below, voting can be an effective tool in certain instances). The question, rather, is when is a mere expression of preference adequate?

Before this question can be answered, it is necessary to distinguish between forms of preference. Farina, Newhart and Heidt proffer the following classification:

- Spontaneous preference: this is where the participant selects a preference off-the-top-of-his-head which is informed by his own biased world view or knowledge;
- Group preference: this is where a group or agency dictates the views of its members or a group of people;
- Informed preference: this is where the participants make an educated preference and

⁷²⁵ Solivan and Farina *op cit* note 64 at 3.

⁷²⁶ Ibid.

⁷²⁷ Ibid.

- Adaptive preference: this is where the participants' informed preference is modified following an assessment of the larger sociopolitical environment.⁷²⁸

In electoral democracy it does not matter which of these preferences the participants choose as the decision is one of majority (although it may still result in unsatisfactory results). In rulemaking, however, the participants should be expressing an informed or adaptive preference. The task at hand is to design a participatory process which encourages IAP's to express a preference which is appropriate for the kind of decision which will be made. The example cited by CeRI concerns the labelling requirements of the sale of car tyres. Various examples of labelling were proposed and participants were asked to select the one that they believed to be most suitable. In this instance, an off-the-cuff expression of preference without much background information may be adequate. On the other hand, the recent election by the British citizenry to exit the European Union is an example of where citizens expressed a spontaneous preference, rather than an informed or adaptive one 'resulting in the worst calamity to befall Britain in the last half century and has inflicted severe damage not only on the EU but also on all countries of the North Atlantic Rim.'⁷²⁹ According to the *Daily Mail*, following the decision to exit the EU, an 'analysis of Internet searches made...revealed many people may not have known exactly what they were voting for in the EU referendum. Google Trends recorded a huge spike in the number of people asking 'What happens if we leave the EU?', after the polls had closed.'⁷³⁰

The problem is that many US citizens approach rulemaking in the same manner in which they would select the tyre label: as an expression of preference as this is their default understanding of what participation entails. Participants view participation as only being able to vote for a predetermined option and not an 'informational investment' in which citizens engage with information, learn, debate and solve problems. This voting culture is strongly reiterated online. This is evident on Facebook by 'liking' a post; voting for books or movies using a star rating or rating driving services on Uber. One of the biggest challenges to online participation in

⁷²⁸ Farina, Newhart and Heidt *op cit* note 632 at 10671.

⁷²⁹ Wendy C Grenade 'Paradoxes of Regionalism and Democracy: Brexit's Lessons for the Commonwealth' (2016) *The Commonwealth Journal of International Affairs* at 2.

⁷³⁰ Daily Mail 'Google search spike suggests many people don't know why they voted for Brexit' available at <http://www.dailymail.co.uk/sciencetech/article-3657997/Britain-s-Google-searches-hint-people-didn-t-know-voting-for.html> last accessed on 19 February 2017.

rulemaking is moving participants away from a 'vote or vent' mentality to one which is more engaged, reasoned and solution driven.

The mechanisms mentioned in the previous section aimed at assisting participants to find their way through the large volumes of information provided in the Federal Register: most people visiting RegulationRoom will not come prepared to participate in the manner needed for 'better' participation. This is emphasised in online participation where, rather than engaging with information in detail, most people tend to spend an incredibly short period of time on a webpage. In fact, statistics illustrate that almost two-thirds of webpages are not even scrolled. Users merely scan the text and click on the items that catch their attention so the 'basic habits of web use do not prepare people for the attentional investment required by a rulemaking participation site.'⁷³¹ Online participation platforms need to be designed in such a way as to force participants to engage with the information and make informed comments rather than mere expressions of preference.

5.6.3.1 Moving from 'voting and venting' to effective participation

Voting mechanisms are attractive options for public participation as they solicit an immediate response and allow parties to interact quickly with the content and (depending on the context within which they are used) can be a valuable tool.⁷³² The tyre labelling voting mechanism is an example of this.

'Ironically, however, the more successful Rulemaking 2.0 outreach is, the more problematic it becomes for the site to offer these [voting] features. Rating comments is not like rating movies or restaurants. Users who have never participated in the conventional process are highly unlikely to be knowledgeable about what makes a 'good' rulemaking comment. And voting devices are useless if they reinforce users' starting assumptions that the agency will respond to the position that has the most supporters'.⁷³³

That being said, since participants will approach online participation with a preconceived understanding of how to participate (i.e. voting), they will not expect to be required to 'consider facts, seriously reflect on opposing policies and arguments and give reasons for their preference that 'make sense' within the factual and policy landscape.'⁷³⁴ The fact that their preconceived

⁷³¹ Farina *et al op cit* note 626 at 440.

⁷³² Ibid at 443.

⁷³³ Ibid at 443 - 444.

⁷³⁴ Farina *et al op cit* note 620 at 2.

participation requirements will not be met immediately may prevent participants from involving themselves in the process.

Based on the understanding that user engagement with some form of voting interaction facilitates further participation, CeRI developed a question which users were faced with as soon as they entered the page relating to the APR Rule: 'What matters to you?' Having selected an answer from a pre-determined list, the user would be informed of the results and was encouraged to click through to the issue posts relating to this topic. The results showed positively that people responded to the poll and made the effort to register and participate thereafter. In order to encourage the desired participation, the facilitators may need to play on the expectations of the participants. However, caution must be exercised that voting mechanisms are not used more regularly as a convenient way of engendering support. These mechanisms should be the exception rather than the rule, for the reasons stated above.

Once the participants have been encouraged into the process, they may 'require support and encouragement to offer facts or data, give reasons, consider competing argument and claims, make suggestions and discuss alternatives.'⁷³⁵ CeRI found that this was most effectively achieved using moderators.

5.6.3.2 Moderation

As participants approach rule-making with the intention of expressing a spontaneous preference as opposed to an informed or adaptive preference and since participants seem disinclined to want to learn⁷³⁶ how to participate effectively (i.e. engaging with the relevant information, debate competing interests, problem-solve solutions etc.), public participation processes need to be designed in a manner which will encourage participants to move away from unthinking spontaneous reactions to informed or adaptive decision-making. One way of achieving this is by employing moderators to facilitate public participation processes.

⁷³⁵ Farina *et al op cit* note 65 at 1559.

⁷³⁶ Farina *et al op cit* note 63 at 433.

Facilitative moderation was missing from the first generation of e-rulemaking. Merely making information available does not guarantee better participation as ‘many participants need additional help to contribute most effectively.’⁷³⁷ CeRI appointed

‘[s]tudent moderators training in active listening, neutral and open-ended questioning, and other techniques of group facilitation [to] periodically review and respond to comments. Their role goes beyond the traditional online moderator function of policing civility; rather, they fulfil many of the functions that a facilitator would play in an offline deliberative exercise. They point participants to information, prompt them to give reasons for positions, urge them to consider other perspectives, and encourage them to offer alternative solutions.’⁷³⁸

The Texting Rule and the APR Rule showed that ‘moderator comments designed to elicit further information or discussion generated responsive comments from either the targeted user or another user between sixty percent and seventy percent of the time.’⁷³⁹ Facilitative moderation has, therefore, yielded positive outcomes in offline participatory processes.⁷⁴⁰

However, as CeRI discovered, the line between debate that is knowledge-generating and that which is destructive is difficult to define. This is even more so in online forms of participation where participants feel less inhibited to comply with social etiquette and more willing to express themselves.⁷⁴¹ The role of the moderators in these circumstances is critical. While more online fora have a guide to civil conduct which requires that participants comment on the content and not the commenter or that they do not write in capital letters as this represents shouting, moderators need to be circumspect in the manner in which they apply it.

As illustrated above, moderators have an important role in directing participants to participate but if they involve the user guidelines too readily, they may dissuade participation by parties or be seen to be censoring the participants’ viewpoints - particularly those which may be contrary to the proposed rule. Similarly, if participants are attacked by other participants and the moderator does not intervene, they may be dissuaded from returning to the site. Moderators should not be too hasty to intervene as controversial comments (i.e. those that may border on

⁷³⁷ Farina *et al op cit* note 65 at 1562.

⁷³⁸ Ibid.

⁷³⁹ Farina *et al op cit* note 63 at 434.

⁷⁴⁰ Park *et al op cit* note 69 at 2.

⁷⁴¹ Farina *et al op cite* note 63 at 448.

being offensive) will, in fact, spur further participation.⁷⁴² This was in fact CeRI's experience in respect of the peanut allergy debate in the APR Rule.⁷⁴³

The moderators can also play a training role. In addition to guiding participants to particular information or answer direct questions, the moderator can also rate comments that the rule maker would consider valuable. This could be done in a manner similar to the TripAdvisor website which ranks commenters based on the veracity with which they comment on their experiences at hotels, restaurants etc. By doing this, participants (both insiders and outsiders) would learn about the community of practice and the manner in which comments are submitted. This argument, however, presupposes that the participants have access to the relevant technology to participate online.

5.6.4 The Digital Divide

There are always concerns that participants do not have access to the necessary technology to enable them to participate. Furthermore, providing access to technology does not necessarily mean that the stakeholders have the skills⁷⁴⁴ to use that technology. The lack of access and skills may be a barrier to participation.⁷⁴⁵ However, these factors should be considered by the facilitator when identifying the affected stakeholders and designing the mode(s) of participation (*Principle 8: The Identity of the IAP's*). Where the facilitator believes that participation can take place using online platforms, the following factors should be considered:

- participants may be dissuaded from participating if their identity is made public. For example, participants may not participate because their employers may see their comment and this may impact on how they are treated in the workplace. Anonymity may be an important element to encourage further engagement.⁷⁴⁶ There is the potential that an anonymous persona could be adopted by an individual or organisation to try and disrupt the participation process or push a particular agenda. However, as conclusions are not based on majority support - the identity of the participants becomes less important.

⁷⁴² Ibid at 451.

⁷⁴³ Ibid at 449 - 452.

⁷⁴⁴ Dmitry Epstein, Mary J Newhart and Rebecca Vernon 'Not by technology Alone: The "Analog" Aspects of Online Public Engagement in Policymaking' (2012) *Cornell e-Rulemaking Initiative Publications Paper 18* at 17.

⁷⁴⁵ Ibid at 15.

⁷⁴⁶ Ibid at 16.

- participants are likely to use online platforms more readily if they are familiar with the platform.⁷⁴⁷ For example, participants may feel more comfortable using Facebook (or features similar to that) than an online page designed specifically for the public participation process.
- participants have found it difficult communicating online with people they did not know well as they were not able to obtain additional information about the participant which may contextualise their comments.⁷⁴⁸

5.7 Conclusion

There is an increasing amount of literature on the subject of online participation, stemming from a variety of experiments into the effectiveness of online participatory efforts. These experiments are founded on different methodologies. For example, some online portals (such as GOV.UK and Australia.gov.au) merely serve as a platform in which governments can inform their citizens of important and relevant information around specific issues. It is not disputed that these forms of online participation can be (and are) effective. However, this unidirectional flow of information by itself does not subscribe to the form of participatory democracy contemplated in the Constitution discussed and explained in this thesis. Therefore, to determine if there are additional principles that must be included in the CFPP which are specific to online participation, it is necessary to consider online platforms which seek to give effect to participatory democracy as conceptualised in the Constitution.

One platform which apparently provides this kind of engagement and on which there is a substantial amount of published literature is RegulationRoom. What this chapter reveals is that online participation is currently not an easy way to engage with the public but requires a great deal of effort and resources to monitor and implement. Many parties will not have the benefit of time and the resources to implement online participation to such a degree that it will generate a genuine benefit. However, if online mechanisms are used, once they gain traction they may be a useful and effective way for IAP's to participate. In particular, it may encourage 'outsiders' to participate and contribute situated knowledge to the decision-making process.

⁷⁴⁷ Curtis and Lawson *op cit* note 153 at 27.

⁷⁴⁸ Ibid at 30.

One lesson learned from RegulationRoom is that when outsiders participate, they do not submit comments in a well-reasoned manner, supported by evidence. Instead, they tend to express themselves through stories and personal experience. While this may be an unfamiliar way in which to submit comments it may reveal valuable information which may influence the ultimate decision. *Principle 18: The Narrative Principle* requires that the party running the participation process allows participants to express themselves in a manner in which they are comfortable, even if this does not comply with the 'acceptable' method of submitting comments. The comments must be taken seriously as they may provide situated knowledge which is relevant to the decision or project and may introduce aspects that were not considered or contemplated. The fact that outsiders do not express themselves in a manner which is acceptable to those parties within the community of practice may be a barrier to participation.

Another lesson is that IAP's may not know that a participatory process is being conducted, or even if they do know, they cannot digest the voluminous technical information in order to submit intelligible comments. *Principle 19: The Issue Posts Principle* requires that information is presented in such a way that it can easily be understood and commented on. These posts must highlight the key issues of importance, the concerns and the mitigation measures. The information can be presented using layering techniques if online mechanisms are adopted, otherwise cross-referencing with other relevant documents is necessary in order for more sophisticated users to review the more detailed and technical information. It is important to note that executive summaries of expert reports are not considered to be 'issue posts' and so should be avoided.

Even where information is available and can be understood by the IAP's, public participation processes may require a moderator to intervene to ensure that the public participation process moves along and direct IAP's to relevant information. The moderator needs to understand when to intervene and when to let discussion continue as sometimes aggressive and provocative participation clarifies the issue in dispute. This is referred to as *Principle 20: The Principle of Moderation*.

What is evident from the above principles is that they not only apply to online participation but also to traditional offline participation. In the next chapter these principles are consolidated into a constitutional framework for public participation which can be used as a framework for constructing participatory processes so as to ensure that the democratic participatory principles are achieved.

Chapter 6

Constitutional Framework for Public Participation

6.1 Consolidating the democratic participatory principles into a framework for public participation

The democratic participatory principles described in the previous chapters were drawn from democratic theory, South African history, culture, the Constitution, law, and foreign jurisdictions. Relying on these principles, this chapter sets out a CFPP which can be used as a template for any participatory process.

At first glance, the CFPP may not appear to be substantially different from most other public participation processes described in legislation or exercised in practice. There are, however, two points distinguishing it from existing codified participatory procedures: Firstly, it is underpinned by a defined set of principles which guide its interpretation and application and, secondly, it includes an on-going independent assessment of the public participation process to ensure that the democratic participatory principles are achieved.⁷⁴⁹

In elaborating on the CFPP, it is necessary to touch on various research paradigms, theories and interpretative tools associated with social science research. These paradigms, theories and tools have been described in broad overview to explain how and why the CFPP could be implemented. It is important, however, not to lose sight of the fact that the purpose of the CFPP is to provide a *legally and constitutionally compliant* framework for participation and not to define a methodology that persons conducting public participation processes must adopt when engaging with IAP's. In explaining the CFPP, it is necessary to categorize the principles into two groups: the substantive principles (principles 1 - 4) and the procedural principles (the balance of the principles).

⁷⁴⁹ Principle 1: The Educative Effect; Principle 2: The Principle of Control; Principle 3: The Social Licence to Operate; Principle 4: The Principle of Dignity; Principle 5: The Principle of Inclusivity; Principle 6: Finality in Decision-making; Principle 7: The Deference Principle; Principle 8: The Identity of the IAP's; Principles 9: The Principle of Flexibility; Principle 10: The Public Participation Strategy; Principle 11: The Principle of Context; Principle 12: The Principle of Reasonableness; Principle 13: The Principle of Multiplicity; Principle 14: The Principle of Integration; Principle 15: The Principle of Continuity; Principle 16: The Principle of Efficiency; Principle 17: The Principle of Evaluation and Monitoring; Principle 18: The Narrative Principle; Principle 19: The Issue Posts Principle; and Principle 20: The Principle of Moderation.

The procedural principles are those which relate to the structure, format and operation of the public participation process being implemented while the substantive principles look at the IAP's, their opportunity to participate and their subjective assessment of the process. In evaluating the public participation process holistically within the CFPP, the person assessing the public participation process would rely on both the substantive and procedural principles. In monitoring the implementation of the modes of participation, the assessor evaluates the fulfillment of the substantive principles.

Based on the outcome of this investigation, the person conducting the public participation process may be required to apply some or all of the procedural principles. This will be dealt with in more detail below: assessing compliance with the substantive principles means developing and implementing a qualitative data collection methodology. This means that the assessor needs to determine the IAP's subjective views of the public participation process to assess whether the substantive principles have been achieved. If they have not been achieved, the public participation process needs to be revised so as to ensure that the substantive principles will be achieved. While this may appear to be an additional administrative burden on the person conducting the public participation process, it is suggested that it will lessen the likelihood of IAP's challenging decisions arising from the public participation process. In addition, this chapter proposes ways in which this burden can be lessened using Principle 7: The Principle of Deference and Principle 13: The Reasonableness Principle.

In the next Chapter, the EIA public participation process (with particular reference to online participation) will be tested against the CFPP to determine whether it stands up to these requirements or should be amended. Before doing so, it is necessary to differentiate between two persons involved in the CFPP: the proponent and the assessor.

6.2 The proponent and assessor

The 'proponent' refers to the party who is conducting and is responsible for a public participation process. In the case of the EIA public participation process, this refers to the EAP. However, the term 'proponent' (as used in this Chapter) goes further than this and would, for example, also

include the applicant seeking the environmental authorisation on whose behalf the EAP is conducting the public participation process. Proponent is, therefore, used broadly.

The 'assessor' refers to an independent person monitoring the public participation process to confirm whether it complies with the public participation strategy ('the PPS') and gives effect to the substantive principles. To the extent that the substantive principles are not achieved, the assessor will make changes to the PPS which will need to be implemented by the proponent. It is important that the assessor is independent of the proponent and the IAP's and that both parties trust the changes (if any) required by the assessor.

The appointment and function of assessors will need to be regulated in order to ensure that this independence is maintained. Probably the fairest and most efficient way to appoint the assessor is for a body of assessors to be created from which an assessor is randomly assigned to a public participation process. Although the proponent would be responsible for the cost of the assessor, this money would be paid to the body of assessors and not to the assessor directly. In this way, the assessor will not feel obliged or pressured to find an approach that favours the proponent.

6.3 The Constitutional Framework for Public Participation

The CFPP was developed with the democratic participatory principles in mind. Theoretically, by implementing this CFPP, the public participation process will accord with the Constitution and the requirements of participatory democracy. The most important aspect of the CFPP is developing and publishing the PPS as this sets out the participation process which informs IAP's of the process that will be followed, when they are expected to participate and what forms the baseline against which the public participation process will be audited to confirm that it is complying with the democratic participatory principles. Although the PPS must be designed for each public participation process, it is not intended that each process would be initiated without any previous knowledge or experience informing it. Therefore, while the CFPP contemplates that each public participation process must be tailored to meet the requirements of the IAP's, it does not do so in a vacuum. Guidance must be taken from previous public participation processes so as to ensure that similar matters are treated in a similar way and to learn from practices which failed to give effect to the democratic participatory principles.

The first stage of the PPS is to look at the factors informing the PPS: the identity of the IAP's, the time available to the proponent to conduct the public participation process; the reasonable costs and resources available to implement the public participation process; the nature of the decision or activity which will result following the public participation process and any empowering legislation or document. Using this information, the proponent will be able to develop a draft PPS which can be made available to the IAP's for comment.

6.3.1 Identifying the Interested And affected Parties to the public participation process

The first factor to be addressed is the identity of the IAP's. Identifying IAP's will depend on the facts of each case and will be left largely to the proponent to determine in each instance. For example, determining the IAP's in respect of a proposed project to build a substation would require that the proponent look at the relevant parties that reside in close proximity to the proposed substation. It may also require that resident associations are notified and contacted. Certain local authorities (such as municipalities) should be notified as well as non-governmental bodies such as nature groups if there is a potential environmental impact. In these instances, the proponent may also be guided by governing legislation and regulations which provide some input as to who may be interested and affected. The process followed in identifying the IAP's that may wish to comment on health legislation, however, would require the proponent to review the themes that the legislation deals with and identify those persons that may be affected, such as patients, doctors, hospital groups, medical aid groups, public health care groups, traditional medicine, healthcare members associations etc. There is, therefore, not a 'one-size-fits-all' approach to identifying IAP's. Both the insiders and outsiders need to be identified.⁷⁵⁰ That is, those parties which will participate in the process, irrespective of the kind of process adopted by virtue of the fact that they have a vested interest in the outcome of the process and they have the resources and skills to participate in the process and those parties that would traditionally be 'missing' from the participatory processes for whatever reason (i.e. intimidation, lack of resources, lack of knowledge or time etc.)⁷⁵¹ or are a 'discrete and identifiable group'⁷⁵² but

⁷⁵⁰ Section 5.4 Broader participation: insiders and outsiders above.

⁷⁵¹ 'Missing' persons may include the elderly, disabled persons, disadvantaged persons, the poor or people with no or limited education.

⁷⁵² Section 3.5 Participating in creating legislation above.

which could provide situated knowledge which may highlight issues that the proponent did not identify or consider.

Having identified all the IAP's, the proponent must consider whether any IAP's have been intentionally excluded and whether there is a legitimate government purpose⁷⁵³ for doing so. The examples cited above indicate that persons under the age of 18 or persons without a bar-coded identity document are legitimate reasons for excluding persons from voting. Where there is any uncertainty as to whether persons should be excluded, the presumption should favour inclusion rather than exclusion.⁷⁵⁴

6.3.2 Time and costs of implementing the public participation process

The amount of time available to the proponent to conduct the public participation process is a relevant consideration as it influences the mode or modes of participation which will be adopted to engage with the IAP's. However, the democratic participatory principles require that participants are, at least, afforded a reasonable opportunity to participate.⁷⁵⁵ The proponent cannot reduce the time period in order to meet a commercial deadline and (in so doing) compromise the IAP's right to participate in the process.⁷⁵⁶ Similarly, a compromised public participation process cannot be implemented merely because a constitutionally acceptable process is too costly.⁷⁵⁷ However, costs are a relevant factor to consider when assessing the reasonableness of a public participation process as whatever process is selected must be supported by adequate resources, such as administrative and logistical support.⁷⁵⁸

6.3.3 The reason for the public participation process

The reason for conducting the public participation process is an important factor as it dictates the nature and extent of the process. As is evident from the tyre labelling example cited above,⁷⁵⁹ where there is a predetermined number of options and a limited amount of information, it may be suitable to conduct a public participation process which reflects a spontaneous preference, rather

⁷⁵³ Section 3.4 Participating by Voting above.

⁷⁵⁴ *Principle 5: The Principle of Inclusivity*; section 3.4 Participating by Voting above.

⁷⁵⁵ *Doctors for Life supra* note 215 at 1445.

⁷⁵⁶ Section 3.5 Participating in creating legislation above.

⁷⁵⁷ *Ibid.*

⁷⁵⁸ Section 3.6.3 Developing a public participation strategy above.

⁷⁵⁹ Section 5.6.2.1 Information Triage and Sign-posting above.

than an informed or adaptive preference.⁷⁶⁰ Given the simplicity in the feedback required, there is not a significant amount of information and instruction that needs to be conveyed to the IAP's and no reasons or justification need be provided in support of the decision. Ultimately, the choice comes down to the personal preference of each IAP.⁷⁶¹ This form of participation mimics voting and is, therefore, generally known and understood by the participants. The option with the most votes 'wins' by way of majority rule.

Where the nature of the decision is more complex and without clearly defined conclusions or options - such as in an EIA or the creation of legislation governing healthcare – IAP's need to move away from 'voting and venting'⁷⁶² to something which compels them to engage with the information and develop solutions which promote the public good.⁷⁶³

Understanding the reason for engaging the IAP's will also highlight whether the matter is controversial or not. In matters which are more likely to generate polarised views concerning what is being proposed (for example, authorisation to construct a nuclear power plant or undertake fracking activities in the Karoo), the proponent will need to develop highly interactive participatory processes which support the construction of knowledge contemplated in *Principle 1: The Educative Effect* so that the concerns of each of the parties are clarified. The proponent will need to exercise strong moderation⁷⁶⁴ skills so as to encourage lively debate while not allowing mud-slinging.⁷⁶⁵ Where there is an impasse, the proponent will need to develop and implement effective problem-solving techniques. It is also critical that the proponent has an understanding of the IAP's and their pre-conceived ideas about and emotions towards the process, project or decision as this will inform the manner in which he or she approaches breaking the impasse.⁷⁶⁶

⁷⁶⁰ Section 5.6.3 Low participation literacy above.

⁷⁶¹ *Principle 11: The Principle of Context.*

⁷⁶² Section 5.6.3 Low participation literacy above.

⁷⁶³ *Principle 1: The Educative Effect.*

⁷⁶⁴ *Principle 20: The Principle of Moderation.*

⁷⁶⁵ Section 5.6.3.2 Moderation above.

⁷⁶⁶ *Principle 20: The Principle of Moderation.*

6.3.4 Empowering legislation relating to the public participation process

The final factor (although circumstances may require that additional factors be considered) which must be taken into consideration when designing the PPS is whether there is any empowering legislation governing the public participation process being implemented as this may impose restrictions or qualifications which will determine the structure of the public participation process.⁷⁶⁷ For example, as will be set out in detail in the next chapter, the NEMA and EIA Regulations impose certain restrictions governing the public participation process in EIA's. As has been expressed above, however, the legislation (barring the PAJA which is fairly prescriptive) tends to be vague regarding the manner in which participation must be implemented. To the extent that the legislated public participation process deviates from the democratic participatory principles, there would be an opportunity to challenge the constitutionality of the empowering legislation and the process.

6.4 Designing the Public Participation Strategy

Based on the information generated above, the proponent will be able to prepare a first draft of the PPS which can be negotiated with IAP's (if it is a small group) or made available for comment where the group is larger.⁷⁶⁸ The draft PPS must set out *inter alia* the various phases of the proposed public participation process, the nature and extent of the public participation process being conducted, the modes of public participation that will be implemented and the contact details of the relevant persons. A unique PPS must be designed for each public participation process⁷⁶⁹ and must include the following characteristics.

6.4.1 Implementing the lexicon: inform, consult and involve

When setting out the PPS, the proponent must use the language associated with the participatory framework. That is using the words 'inform',⁷⁷⁰ 'consult'⁷⁷¹ and 'involve'⁷⁷² at the various stages of the PPS so that the IAP's have a clear understanding of the extent of their involvement throughout the process.⁷⁷³ This approach will not only solidify a participatory lexicon but will

⁷⁶⁷ Section 4.3.3.1 Judicial pronouncement on notice and comment proceedings: *S v Smit* above.

⁷⁶⁸ Section 4.3 Administrative action affecting the public above.

⁷⁶⁹ Section 4.3.2.1.3 The healthcare inquiry above.

⁷⁷⁰ Section 3.6.2.1 Informing above.

⁷⁷¹ Section 3.6.2.2 Consulting and Involving above.

⁷⁷² *Ibid.*

⁷⁷³ Section 4.2 Administrative actions affecting an individual and Section 4.3.2.1.1 The banking inquiry and Section 4.3.2.1.3 The healthcare inquiry above.

also give the IAP's an understanding of the degree of participation that will be allowed at each particular phase. For example, in selecting the site for a proposed hospital, the PPS may state that the IAP's will be *consulted* by obtaining feedback using surveys in which they can rank the identified sites in order of preference. In reviewing the draft PPS, the IAP's may wish to object to the fact that they will only be consulted regarding the proposed sites and would prefer to be involved as none of the identified sites may be desirable and so ranking the suggested sites may be pointless if none of the sites is viewed as feasible.

The lexicon should serve as a guide to assist IAP's and the proponent in understanding the base level of participation expected at each stage of the public participation process. However, strict adherence to wording to the detriment of fairness must be avoided.⁷⁷⁴

6.4.2 Develop a timeline for implementing the public participation process

Having developed the rhetoric of participation, this terminology must be consistently used to set out the various phases of the participatory process. The PPS must clearly set out the timetable to be followed. It should set out the date on which information will be published, when comments must be received and when any pre-meeting or meetings will be held. This timeline should be adhered to as closely as possible and to the extent that it varies, the IAP's must be informed of such changes subject to the caveat that the timeline can never be shortened to the detriment of the IAP's.

6.4.3 Notifying Interested And Affected Parties

Having identified the insiders and outsiders to the process and the empowering legislation, the proponent will have an idea of how to notify certain of the IAP's. The more traditional way (and the manner normally set out in legislation) is for notices to be published in the media and for written notification to be submitted to people directly affected. This is an appropriate approach for insiders and may catch the attention of certain outsiders but it falls short of actively seeking to engage outsiders who may contribute situated knowledge during the implementation phase of the PPS.

⁷⁷⁴ Section 3.2.2 Principle 2: *The Principle of Control* above.

Part of the process of notifying IAP's is identifying outsiders and understanding where these people obtain their information regarding a particular subject matter. For example, members of a gun association may receive notice of gun ownership laws via the local gun owners' association newsletter or Facebook page. In order to target these IAP's, the proponent should include posting information regarding proposed changes to these laws in the newsletter or on the Facebook page. Where the IAP's are unknown, online tools which monitor social networks for articles, updates or posts including key phrases such as 'private gun ownership' can be adopted. Where these searches yield results, the proponent can target the author of the article, update or post regarding the proposed changes to the law and the public participation process.⁷⁷⁵

As highlighted in the examples from RegulationRoom,⁷⁷⁶ it is best for the proponent to engage directly with individuals rather than associations or groupings which purport to represent the interests of a group of people as (on occasion) the individual members may be able to contribute an 'on the ground' perspective to the decision or rule. Therefore, although efforts should be made using associations or groups to identify and notify IAP's, directly engaging with individuals should be the objective during the implementation phase of the PPS. Although requiring a significant amount of effort and number of human hours, online platforms have made it possible to find, target and engage with outsiders who make use of these online fora. Where online tools are not appropriate to notify IAP's (for example, in rural areas) alternate solutions may need to be adopted such as loudhailers, notifications in pay packets etc.⁷⁷⁷ Whichever method is adopted, it is important that the critical information is conveyed to the IAP's.

6.4.4 Identifying and sharing critical issues

Depending on the nature of the participatory process and the empowering legislation, information critical to the public participation process can either be disclosed initially or at a later stage, provided that this information is communicated to the IAP's and included in the PPS.⁷⁷⁸ For example, in the EIA process, IAP's must be notified at the start of an application for an environmental authorisation. At this early stage of the process the proponent may not know what impacts the proposed project will have on the environment as none of the investigations has

⁷⁷⁵ Section 5.6.1 Lack of awareness above.

⁷⁷⁶ Section 5.4 Broader participation: insiders and outsiders above.

⁷⁷⁷ Section 4.2 Administrative actions affecting an individual above.

⁷⁷⁸ Ibid.

yet commenced. As such, IAP's may be notified initially with some of the more critical issues following in the implementation phase. Whichever approach is adopted is not important, provided it is set out clearly in the PPS.

Whenever information is disclosed to IAP's, it must be in a format that encourages participants to engage with and understand the information. This means that the information must be easily understood so that IAP's can express an informed or adaptive preference⁷⁷⁹ during the participation phase (irrespective of the mode of participation adopted). This may be difficult to achieve in situations where there is a significant volume of information relevant to the activity or decision and / or where the information is technical in nature. In these instances the proponent should not rely on executive summaries of the relevant reports to identify the topics in these reports as these have been found to be overly complicated and require a graduate school reading age in order to comprehend.⁷⁸⁰

The proponent must collate the information into a readable format that can be understood by laypersons. This has been effectively achieved using issue posts⁷⁸¹ where a general theme is discussed drawing issues from a variety of sources and cross-referencing the more technical reports for insiders or more sophisticated IAP's who may wish to read the underlying documents. Where online platforms are used, this can easily be achieved using hyperlinks.⁷⁸² There are arguments to suggest that qualified writers (as opposed to the proponent, lawyers, engineers) should write the issue posts as they will be more likely to draft understandable wording which is divested of technical jargon but detailed enough to engage insiders.⁷⁸³

The issue posts highlight the pressure points that the proponent foresees with the project or decision. For example, in the EIA process for the construction of a mine, the proponent may indicate that there are concerns around water availability as water is a scarce resource in the area. The subcategories of the issue post may include the possible solutions to this problem. A further subcategory would set out the advantages and disadvantages of these various options. By

⁷⁷⁹ Section 5.6.3 Low participation literacy above.

⁷⁸⁰ Section 5.6.2.2 Translation above.

⁷⁸¹ Section 5.6.2.1 Information Triage and Sign-posting above; *Principle 19: The Issue Posts Principle*.

⁷⁸² Section 5.6.2.3 Information layering above.

⁷⁸³ Section 5.6.2.2 Translation above.

presenting the information in this way, the proponent will highlight the key issues that he or she believes to be relevant to the inquiry, in this way, assisting IAP's in using their limited resources efficiently.⁷⁸⁴ It also indicates which issues the proponent is not focusing on, such as the peanut allergy in respect of the APR Rule⁷⁸⁵ and should be brought to his or her attention.

Technology can be useful in these situations as layering allows the issue posts to be simply worded rather than filled with technical jargon. Hyperlinks will allow the more sophisticated users to click through to more detailed information or to the source documents underlying the issue posts. Where technology is not a feasible option, adequate cross references must accompany the issue posts. This may be more cumbersome than technology but should still achieve the desired result.

6.4.5 Selecting the modes of participation

The appropriate mode(s) of participation will depend on the facts of each case.⁷⁸⁶ Where the process requires more than the expression of a spontaneous preference and the IAP's have had an opportunity to engage with the information, there may be an opportunity to submit written comments and participate in a hearing or some other form of meeting at which the IAP's can express and debate issues of concern and collaboratively (using moderators) develop acceptable solutions. As indicated above, insiders to the process will have the resources to participate in any mode(s) of participation - written submissions or oral hearings. In both instances, their comments are likely to be well reasoned and supported by evidence.

Outsiders, on the other hand, will need to be handled with more consideration. The proponent must ensure that IAP's are able to express themselves in a manner in which they are comfortable. For example, outsiders will submit their comments in the narrative supported by firsthand experience, rather than facts and figures.⁷⁸⁷ The mode(s) of participation need to allow IAP's to contribute knowledge in a manner that is not traditionally acceptable in the community of practice.⁷⁸⁸ The modes of participation used to collect this narrative must also be analysed to

⁷⁸⁴ Section 4.3.2.1.2 The liquefied petroleum gas inquiry ('LPG') above.

⁷⁸⁵ Section 5.6.1 Lack of awareness above.

⁷⁸⁶ *Principle 11: The Principle of Context.*

⁷⁸⁷ *Principle 18: The Narrative Principle.*

⁷⁸⁸ Section 5.5 Broader participation: recognising the value of situated knowledge expressed in the narrative above.

identify the situated knowledge and whether it is corroborated or disputed by other IAP's.⁷⁸⁹ This information must be interpreted as being as valuable as the information submitted by insiders.

Whichever method is selected, it must be clearly communicated in the PPS using the terminology 'inform', 'consult' and 'involve' so that the IAP's know exactly what is expected of them at each stage of the process. The PPS must be published for comment⁷⁹⁰ so that IAP's have an opportunity to indicate whether they agree⁷⁹¹ with the methodology being employed to engage with them. For example, they can express concerns that at a particular stage they should be 'involved' rather than 'consulted'. To the extent that these comments are acceptable to the proponent, the PPS could be adapted accordingly.⁷⁹² Where the comments are not acceptable, the proponent should engage the relevant IAP's in problem-solving processes until a solution is developed. Where the mode of participation is altered or amended following the audit by the assessor, this will also need to be clearly indicated in the revised PPS.

Neither the proponent in developing the PPS nor the assessor in auditing the PPS is bound to one process. Multiple processes can be adopted based on the identity of the IAP's. More sophisticated IAP's may be satisfied with notice and comment proceedings while outsiders may need workshops and public meetings to assist them with understanding the critical information and assessing the impacts of the proposed project / decision on them. It should also be reiterated that participation is an ongoing activity, rather than a once-off event (*Principle 15: The Principle of Continuity*). The modes of participation should not only include the formal modes of participation but also the ongoing ways in which IAP's can engage with the proponent outside of

⁷⁸⁹ Section 5.5.4 Reframing narratives above.

⁷⁹⁰ Section 3.6.2 The National Policy Framework above.

⁷⁹¹ The use of the terms 'consent', 'agree' and 'consensus' when used within the context of the CFPP must not be interpreted to mean unanimity. It would not be practical to insist that there is this level of agreement between participants. Where there is disagreement between the parties, the proponent must adopt problem-solving mechanisms as required in terms of *Principle 1: The Educative Effect*. However, even having implemented these procedures does not guarantee that the parties will reach some form of 'consensus'. In these circumstances the proponent implementing the public participation process must adopt *Principle 6: Finality in Decision-making*; *Principle 7: The Principle of Deference*; and *Principle 12: The Principle of Reasonableness*.

Principle 6: Finality in decision-making allows the proponent to conclude a public participation process even though the substantive principles may not have been achieved and informs the IAP's of the process that will be followed. *Principle 7: The Principle of Deference* permits the proponent does not need to defer to any of the IAP's views (provided he has at least considered those views); and *Principle 12: The Principle of Reasonableness* which requires that the proponent take into consider time, cost etc when implementing a process.

⁷⁹² *Principle 9: The Principle of Flexibility*.

these formal modes of participation. For example, the development of a grievance mechanism where IAP's can express concerns about the PPS and its implementation.⁷⁹³ Whichever approach is adopted, the proponent should seek to remove or minimise any obstacles to participation.

6.4.6 Obstacles to participation

Implementing the mode(s) of participation may have unexpected consequences which prevent IAP's from actively participating. That is, any person acting reasonably must be able to participate in the process. If there are any factors preventing IAP's from participating, these should be identified and the mode of participation adapted or changed. As indicated above, reasonable obstacles include only being allowed to vote with a bar-coded identity book.⁷⁹⁴ Unreasonable obstacles may include situations where registered voters were required to return to South Africa to vote if they were abroad at the time of the election.⁷⁹⁵

One of the most significant obstacles to meaningful participation processes with multiple parties is the imbalance of power between IAP's. Insiders tend to wield more power than outsiders as they are backed by a greater amount of resources and technical knowledge than outsiders and therefore tend to dominate public participation processes. It is important that the proponent managing the public participation process ensures that all IAP's are afforded an equal opportunity to participate and that their submissions are treated equally. *Principle 5: The Principle of Inclusivity*, *Principle 8: The Identity of the IAP's*, *Principle 14: The Principle of Integration* and *Principle 20: The Principle of Moderation* are relevant in this regard as the proponent will be responsible for identifying all IAP's and ensuring that they are included in the process.⁷⁹⁶ By engaging with all IAP's the proponent must ensure that all technical and situated knowledge is taken into consideration.

Where the proponent believes that IAP's have not considered a particular view or have not understood or considered certain information, he or she should direct the IAP's to that information or assist them in understanding it. In doing this, the proponent will be facilitating implementation of the substantive principles and will assist the IAP's to recognize a common

⁷⁹³ Section 3.6.3 Developing a public participation strategy above.

⁷⁹⁴ Section 3.4 Participating by Voting above.

⁷⁹⁵ Ibid.

⁷⁹⁶ *Principle 5: The Principle of Inclusivity*.

goal. If they are able to do this it enhances their sense of control over the outcome of the participatory process and they are likely to support the outcome (even if it does not directly align with their personal views). The assessor should ensure that this occurs and that the views of the more powerful participants have not dominated the process. If this has occurred, the assessor may adapt the PPS to cater for this discrepancy.

The obstacles to online participation are that notifying IAP's of the modes of participation around a particular subject matter requires a significant investment of man-hours. Merely posting a Facebook or Twitter post regarding the proposed public participation process does not guarantee that the matter will go viral and encourage IAP's to get involved. This is more likely to happen where the subject matter is controversial or where there is a strong divergence of views (such as the Peanut Allergy discussed above).⁷⁹⁷ Proponents may not have the resources available to allocate to extensive online participation methods in order to target missing IAP's. This obstacle to engaging with IAP's should not be treated too harshly as these efforts attempt to solicit situated knowledge from outsiders which may not be obtained by merely publishing a notice in a newspaper.

6.4.7 Publishing the Public Participation Strategy

There are multiple reasons for publishing the draft PPS: firstly, based on the information feeding into the PPS, the proponent will select mode(s) of participation which in his or her view are likely to facilitate collaborative learning. Publishing this information in the PPS and allowing IAP's to consider the appropriateness of the modes of participation gives them an opportunity to exercise a degree of control over the process which may ultimately engender a sense of trust in the process (and acceptance of the decision) even where the IAP's personal views are not reflected in the decision.⁷⁹⁸

Once the draft PPS is published for comment, it may require (depending on the nature and extent of the comments and the revision) that a revised draft of the PPS is published for comment. In order to avoid an endless cycle of drafts and comments, the proponent will need to

⁷⁹⁷ Section 5.6.1 Lack of awareness above.

⁷⁹⁸ Section 2.3 *Principle 1: The Educative Effect*, Section 2.4 *Principle 2: The Principle of Control* and 2.5 *Principle 3: The Social Licence to Operate* above.

exercise discretion in respect of the comments received. That is, the proponent is not required in all instances to defer to the view-points of the IAP's but must keep an open mind when considering their comments.⁷⁹⁹ Failing to include the IAP's comments adequately places the process at risk of being challenged as the IAP's may feel that they do not exercise any control over the process or do not trust the process or the outcomes.⁸⁰⁰ However, complete deference can never be an acceptable solution as the public participation processes suggested by IAP's may be too extensive or costly which is contrary to *Principle 12: The Principle of Reasonableness* and such an approach could be adopted by IAP's to hamstring projects or render them unfeasible.

In exercising discretion in accordance with these principles, the proponent may (once satisfied that the principles have been adequately addressed) publish the PPS in its final form.⁸⁰¹ Doing this does not mean that the PPS cannot be altered in the future. In fact, the PPS will need to be monitored continually by the assessor to ensure that it gives effect to the substantive principles and (to the effect that this is found to be inadequate) it may need to be amended. In monitoring the process, the assessor acts as a counterbalance to the decisions made by the proponent in designing the PPS and incorporating (or not incorporating) the comments from the IAP's. The proponent should also assess whether, in implementing the PPS, the participatory democratic principles are being achieved and (if not) take appropriate action.

6.5 Implementing the Public Participation Strategy

The proponent must implement the published PPS to ensure that both technical and situated knowledge is shared (*Principle 14: The Principle of Integration*). Any material deviation to the PPS without the consent of the IAP's or on the instruction of the assessor may render the process defunct. In implementing the PPS, the IAP's may disagree on a particular issue. In such instances, the proponent will need to implement problem-solving techniques to resolve this dispute.⁸⁰² It is not possible during the development of the PPS to specify which problem-solving techniques will be adopted as it will depend on the nature of the dispute and the parties to the dispute. All that need be said in the PPS is that the proponent will implement such processes where required and adopt problem-solving techniques that are proportional and appropriate to the

⁷⁹⁹ *Principle 7: The Principle of Deference.*

⁸⁰⁰ *Principle 2: The Principle of Control* and *Principle 3: The Social Licence to Operate.*

⁸⁰¹ *Principle 6: The Principle of Finality.*

⁸⁰² Section 4.3.3.1 *Judicial pronouncement on notice and comment proceedings: S v Smit* above.

nature of the dispute. That is, where there are two parties who cannot reach agreement, all that may be required is a moderated meeting between these parties. If there is more widespread disagreement, it may be necessary to hold a workshop in which the issues and proposed solutions are re-framed. These problem-solving methods, however, should not cause the public participation process to be delayed indefinitely and the proponent will need to exercise his or her discretion as to when to impose *Principle 6: Finality in Decision-making*.

Principle 6: Finality in Decision-making is also important in moving the PPS along. One of the key issues that inhibits public participation online (but the same can be said of offline participation) is that the subject of the public participation process becomes 'old news' and the IAP's lose interest in the process and the outcome. This can happen for a multitude of reasons: the matter has been widely debated in the media prior to the launching of the public participation process or there is an event unrelated to the public participation process (such as 9-11 or the Public Protector issuing her report on state capture) which directs IAP's attention away from participating. If the process runs for too long with significant intervals IAP's may be discouraged and lose interest in the process. Where IAP's do lose interest, the proponent may be required to implement new measures to resuscitate participation (if necessary). The assessor, in auditing the process may also make recommendations on how to encourage participation where the PPS is failing to sustain effective participation.

6.6 Auditing the Public Participation Strategy

Monitoring the PPS is comprised of two stages: firstly, the assessor must confirm that the process that has been implemented matches the process set out in the PPS. This is an objective inquiry. To the extent that the proponent has deviated from the process without following due process, the public participation process may (if the deviation is material) be defective. The second phase of the investigation considers whether the implemented process gives effect to the substantive principles (*Principle 17: The Principle of Monitoring and Evaluation*).

This second phase is difficult to prove scientifically as achieving these principles is completely within the IAP's subjective assessment of the public participation process. The assessor must, therefore, design a monitoring programme to understand whether the IAP's

mindsets align with the requirements of the substantive principles.⁸⁰³ The assessment may appear to be an additional administrative burden to conducting a public participation process. However, while the assessment may be an additional step during the public participation process, it will improve the efficacy of the public participation in the long run as it will assist the proponent in developing a public participation process that meets the democratic participatory principles and thus it is less likely to be challenged.

The following four factors inform the monitoring programme: '(1) the purpose of the research, (2) the theoretical paradigm informing the research, (3) the context or situation within which the research is carried out, and (4) the research techniques employed to collect and analyse the data.'⁸⁰⁴

6.6.1 The purpose of the monitoring programme

Defining the purpose of the monitoring programme requires that the assessor define who and about what he or she seeks to draw conclusions. The 'who' can easily be answered as the proponent will have identified the IAP's prior to developing the PPS. The assessor, however, will need to consider whether there are any IAP's missing or have been excluded without a legitimate government purpose. If there are any IAP's that have been excluded or are missing, the PPS will need to be amended to cater for these IAP's.

The purpose of the monitoring programme is to determine whether the IAP's feel that, through the implementation of the PPS, they:

- understand the various competing interests of all the IAP's as compared to their own personal interest and appreciate the viewpoint which reflects the public interest;
- feel that they exercise a degree of control over the process and can influence the outcome of the decision;

⁸⁰³ The monitoring programme needs to assess whether: (1) the participatory process set out in the PPS educates the individual in distinguishing between his personal interest and the common interest and (in so doing) eliminates polarised views (Section 2.3 *Principle 1: The Educative Effect*) by sharing of information (section 2.3.1 Constructing Knowledge) and collectively problem-solving solutions (Section 2.3.2 Problem-Solving Mechanisms); (2) the process develops the IAP's' sense of control over the process and the outcome (section 2.4 *Principle 2: The Principle of Control*); (3) the IAP's favour the decision(s) made or at least trust that the process is fair and transparent; (4) the IAP's believe that their views count, that they are heard and that they feel valued.

⁸⁰⁴ Martin Terre Blanche, Kevin Durrheim & Desmond Painter (Eds) *Research In Practice* 2nd Ed (2007) at 37.

- support the outcome of the participatory process because they believe the process to be fair and
- believe their views have been taken into consideration and addressed.

The monitoring programme seeks to determine the subjective state of mind of the IAP's. The research paradigm, on the other hand, provides the theoretical framework which defines the scope of the investigation into whether the substantive participatory principles have been achieved.

6.6.2 The research paradigm

Terre Blanche *et al* describe research paradigms as

‘all-encompassing systems of interrelated practice and thinking that define for researchers the nature of their enquiry along three dimensions: ontology, epistemology, and methodology. Ontology specifies the nature of the reality that is being studied, and what can be known about it. Epistemology specifies the nature of the relationship between the researcher (knower) and what can be known. Methodology specifies how researchers may go about practically studying whatever they believe can be known.’⁸⁰⁵

The interpretive research paradigm applies in situations such as this where the reality under investigation (ontology) is related to the subjective experiences of people.⁸⁰⁶ In these instances the assessor will adopt qualitative research techniques to collect and make sense of these participants’ views about the public participation process and the fulfillment of the democratic participatory principles. ‘Thus the interpretive approach does not focus on isolating and controlling variables, but on harnessing and extending the power of ordinary language and expression to help us understand the social world we live in.’⁸⁰⁷ The results of qualitative research such as this tend to be less scientific than the quantitative information gathered in a strictly positivist investigation. To ensure that the results of these investigations are useful, the assessor must be conscious of two principles when conducting interpretive research: firstly, the researcher must understand the context within which the information is gathered and secondly, the role of the researcher in collecting and interpreting the information must be determined.⁸⁰⁸

⁸⁰⁵ Ibid at 6.

⁸⁰⁶ Sharan B Merriam and Elizabeth J Tisdell *Qualitative Research: A Guide to Design and Implementation* (2016) at 243.

⁸⁰⁷ Terre Blanche *op cit* note 804 at 274.

⁸⁰⁸ Ibid.

6.6.3 Epistemology and Context

It is important to understand the context in which the monitoring programme will be conducted: it is an assessment of the IAP's mindset to determine whether the PPS is effectively implementing the democratic participatory principles.⁸⁰⁹ This investigation cannot be drawn out by endless interviews and inputs. It is important, therefore, that this assessment is conducted as quickly as possible to allow for the PPS to be amended (where necessary) so that the public participation process can proceed without significant delays. To the extent that principles are not being achieved, further (more detailed) investigation may be required. To ensure a speedy assessment of the efficacy of the PPS, the monitoring programme must adopt a methodology that is able to 'check the pulse' of the participants, evaluate the mindset of the IAP's and take the appropriate action, be it amending the PPS, engaging further with certain IAP's or deciding that no further action is required.

In assessing the suitability of the PPS and its implementation, the assessor must also determine whether the proponent exercises any subjective bias towards the proposed development or decision which impacts on the proponent's actions in implementing the PPS. For example, a situation in which a proponent with a capitalist bent adopts a robust attitude to exclude outsider participants as he is of the view that they are unlikely to add value to the process but may delay the proposed project. In these instances, the assessor may require the proponent to take specific action to ensure the process is fair and IAP's are not discriminated against based on the proponent's inherent bias.

6.6.4 Methodology: The research techniques and data analysis

The assessor needs to adopt a monitoring programme that is appropriate for the context and the purpose. That is, the assessor needs to implement a programme which quickly and efficiently determines the subjective mindset of the IAP's to confirm whether the democratic participatory principles have been achieved.

The method used to assess the PPS can be described as both descriptive and exploratory. It is descriptive in the sense that the assessor must compare the implemented process against the

⁸⁰⁹ Rachal Ormston, Liz Spencer, Matt Barnard and Dawn Snape 'The Foundations of Qualitative Research' in *Qualitative Research Practice A Guide for Social Science Students and Researchers* (2013) Jane Ritchie, Jane Lewis, Carol McNaughton Nicholls and Rachel Ormston (Eds) at 6.

PPS. Any discrepancies which may exist between it and the PPS may compromise the public participation process unless (notwithstanding the discrepancy) the democratic participatory principles are achieved. The exploratory element of the investigation requires that the assessor 'employ an open, flexible, and inductive approach to research'⁸¹⁰ in answering the research question (i.e. does the implementation of the PPS give effect to the democratic participatory principles?)

6.6.4.1 Qualitative Research

Answering the research question requires that the assessor adopt a qualitative research methodology (as opposed to a quantitative methodology) as it is naturalistic, holistic and inductive⁸¹¹ and involves

'[s]tudying real-work situations as they unfold naturally; non-manipulative; unobtrusive, and non-controlling; openness to whatever emerges - lack of predetermined constraints on outcomes...The whole phenomenon under study is understood as a complex system that is more than the sum of its parts; focus on a more complex interdependencies, not meaningfully reduced to a few discreet variables and linear, cause-effect relationships...Immersion in the details and specifics of the data to discover important categories, dimensions, and interrelationships; begin by exploring genuinely open questions rather than testing theoretically derived (deductive) hypotheses.'⁸¹²

Given the context within which the monitoring process takes place, it is not possible to adopt genuinely open questions which allow the IAP's to provide open-ended answers in the same manner as they would during the public participation process. The purpose of monitoring the public participation process is to 'check the pulse' of the process to ensure that it gives effect to the democratic participatory principles. Conducting a survey (either in writing or orally, depending on the identity of the IAP's) may be a quick and easy way to determine whether there are any problems with the public participation process which may require further investigation with specific IAP's or on a particular subject matter (*Principle 16: The Principle of Efficiency*).

The *Monitoring Survey of Public Participation Process* could be structured in the following manner:

- (a) The mode of participation employed in the public participation allowed IAP's an opportunity to express their views, concerns or ideas.
 - (i) disagree

⁸¹⁰ Ibid at 44.

⁸¹¹ Ormston *et al op cit* note 809 at 6.

⁸¹² Terre Blanche *op cit* note 804 at 48.

- (ii) agree
- (b) Where parties expressed opposing views, the mode of participation employed required those parties to explain, justify and debate their views.
 - (i) disagree
 - (ii) agree
- (c) Once parties explained, justified and debated their views, the number of contested issues decreased as parties understood the various viewpoints and found them not to be in dispute.
 - (i) disagree
 - (ii) agree
- (d) Where matters could not be resolved, the conflicting parties participated in problem-solving mechanisms which successfully resolved in the dispute.
 - (i) disagree
 - (ii) agree
 - (iii) not relevant.

If the results of the survey generate a positive result (i.e. the IAP's agree with the research questions), it would not be necessary to undertake further investigation. Where only certain questions have been answered negatively or only certain IAP's have answered negatively, the assessor can adopt a qualitative research methodology to determine the cause of the IAP's dissatisfaction and create solutions which could be adopted to rectify the non-compliance with the democratic participatory principles. For this reason it is important that the surveys are not anonymous.

In considering the outcome of the survey and implementing the qualitative assessment (if necessary), the assessor will rely on the procedural principles, including:

- *Principle 7: The Principle of Deference*
 - Although the qualitative assessment investigates the subjective views of the relevant IAP, the assessor does not need to defer to the IAP's demand to amend the PPS. The assessor, as an independent party, can consider the reasonableness of the IAP's subjective views in light of the context (*Principle 11: The Principle of Context*).

- As part of the qualitative assessment, the assessor must consider whether the proponent is inhibiting the IAP's from participating (*Principle 5: The Principle of Inclusivity*) or if the IAP's are trying to frustrate the public participation process. In the former cases, the assessor can amend the PPS to ensure that the substantive principles in respect of the IAP's are achieved. In the latter case, the assessor can refuse to amend the strategy. (The assessor's decisions would need to be included in the list of administrative decisions contained in PAJA which cannot be reviewed otherwise disgruntled IAP's could use this as an opportunity to frustrate the public participation process prior to its completion).
- *Principle 9: The Principle of Flexibility*
 - Where the assessor concludes that the PPS is deficient, the assessor can make various changes including (but not limited to):
 - The adoption of a new mode of participation in respect of certain IAP's (*Principle 13: The Principle of Multiplicity*);
 - an adaption to the existing mode of participation described in the strategy;
 - the development of problem-solving mechanisms where IAP's are at loggerheads with one another or the proponent.⁸¹³

Having identified the research question which needs to be answered, the purpose of the monitoring programme, the theoretical constructs defining the nature of the monitoring investigation, as well as the type of study which will be implemented in order to answer the research question in the monitoring programme design, the assessor will also need to determine whether there are any practical constraints which would inhibit the monitoring programme such as timing, cost and number of IAP's. As set out in the previous chapters, although cost may be a limiting factor, it cannot justify a sub-standard or unconstitutional participatory process. Where the group of IAP's is large, it may prevent the assessor from quickly assessing the constitutionality of the participatory process. In this case, the assessor may only assess a sample of the IAP's.

⁸¹³ *Principle 1: The Educative Effect.*

6.6.4.2 Sampling of Interested and Affected Parties

Sampling involves the selection of parties from the list of IAP's who will be monitored to determine whether they believe the substantive principles have been achieved in implementing the PPS. As expressed in Chapter 2, although full participation is not a requirement of participatory democracy, where parties elect to participate, the democratic participatory principles must be achieved. Since the achievement of these principles is based on a subjective evaluation of the IAP's, the assessor cannot assume that the proponent has complied with the democratic participatory principles by including a certain number of participants in the process. This means that the assessor needs to monitor and interact with each and every IAP who elected to participate in the public participation process to determine whether the substantive principles were achieved in respect of that person.

In some instances this may be possible as the IAP's may be a small defined group. For example, in an EIA public participation process, the IAP's are required to register with the EAP. The EAP is required to maintain a database of all IAP's for that project. In other situations, the group of IAP's may be less definite and may refer to general groups of people. For example, the 'health legislation' that the National Assembly and NCOP sought to pass and which was the subject of the *Doctors for Life* case (discussed in Chapter 3), may have affected an amorphous group of people and organisations.

In the former example it may (depending on the number of IAP's) be satisfactory to monitor all of the IAP's listed on the database. In these instances, it would be possible for the EAP to forward the *Monitoring Survey of the Public Participation Process* mentioned below to the IAP's to seek out their responses.⁸¹⁴ Where the database is very large, it may not be practical or feasible to monitor each participant. In these instances the assessor would need to select IAP's to monitor. The assessor will need to ensure that the sample is representative of all IAP's participating in the process and that the size of the sampled group is large enough for the assessor to draw accurate conclusions about the group. The same requirement applies in respect of the IAP's who wish to participate in the development of the health legislation. However, the

⁸¹⁴ Merely forwarding the survey to registered IAP's may not be appropriate where the IAP's are part of a rural community and do not have a reliable postal service, access to electronic resources or cannot read or write. In these cases it may be necessary for the assessor to meet directly with the IAP's.

manner in which the sample of participants is monitored may differ, based on the circumstances. For example, probability sampling, systematic sampling, stratified sampling, cluster sampling or non-probability sampling.⁸¹⁵

Based on the outcome of the *Monitoring Survey of the Public Participation Process*, the assessor may be able to identify if there are any particular individuals or groups which require further assessment in order to identify changes to the PPS. Once the assessor is aware of the individual(s) or group(s) which feel that the substantive principles have not been achieved, he or she can develop a strategy (in conjunction with the IAP's) on how to engage with these groups or individuals. Based on this investigation, the assessor can propose changes to the PPS.

The assessor's function is ongoing to ensure that the democratic participatory principles are being achieved. Through this function, it is hoped that there will be 'broader and better' participation which gives effect to the democratic participatory principles and results in fewer challenges to the project or decision to which the public participation process relates (*Principle 15: The Principle of Continuity*).

6.7 Conclusion

The CFPP consolidates the democratic participatory principles into a framework which can be used to develop a public participation process in any circumstances (be it online or by more traditional forms of participation). Given its broad application, the CFPP is general in nature and will need to be moulded to every particular circumstance and application. In the next chapter, the South African EIA public participation process is measured against the CFPP to determine whether the current legislated requirements and day-to-day implementation of these sections comply with the CFPP and, as a result, pass constitutional muster.

⁸¹⁵ Merriam and Tisdell *op cit* note 806 at 96; Terre Blanche *et al op cit* note 710 at 131 - 140.

Chapter 7

The Environmental Impact Assessment Public Participation Process in South Africa

7.1 Reviewing Environmental Impact Assessment public participation processes in terms of the Constitutional Framework for Public Participation

The CFPP embodies the democratic participatory principles identified in this thesis. It is suggested that it can be applied by lawyers, administrators, government representatives and others responsible for implementing and facilitating public participation processes to ensure that these processes are more closely aligned with the Constitution. The CFPP will assist in developing a consistent approach to participatory processes and the terminology used in those processes. As has been discussed in detail in other chapters, the purpose of the CFPP and of the development of participatory practice and terminology is not to remove or limit the discretion afforded to the proponent but is aimed at facilitating the expression of that discretion so that both the proponent and the IAP's have a clear understanding of their rights and obligations in a public participation process.

In this chapter, the participatory process required during an EIA in South Africa will be analysed in light of the CFPP to determine whether it passes constitutional scrutiny. Since the introduction of the Constitution and the environmental right, there have been four iterations of EIA regulations.⁸¹⁶ The public participation process set out in each of these has not changed substantially. Therefore, although only the EIA public participation processes developed in terms of the National Environmental Management Act⁸¹⁷ ('NEMA') will be considered in light of the CFPP, the outcome of this assessment is likely to apply to the previous versions under the Environment Conservation Act.⁸¹⁸ Before considering the public

⁸¹⁶ A number of academics have published works regarding the effectiveness (or not) of the various iterations of the EIA public participation process including: A du Plessis 'Public participation, good environmental governance and fulfilment of environmental rights' (2008) 11(2) *PERJ* 252; Luke A Sandham and Hester M Pretorius 'A review of EIA report quality in the North West province of South Africa' (2008) 28 *Environmental Impact Assessment Review* 229 – 240; John O Kakonge 'Problems with Public Participation in EIA Process: Examples from sub-Saharan Africa' (1996) 14:3 *Impact Assessment* 308 – 317; Ian Sampson 'So near and yet so far with environmental impact assessments' (2007) 15:2 *Juta Business Law* 77 – 82.

⁸¹⁷ 107 of 1998.

⁸¹⁸ 73 of 1989.

participation process, it is necessary to consider briefly the empowering legislation which impacts upon the public participation process in the NEMA.

7.2 The empowering legislation: the Constitution and National Environmental Management Act

As highlighted in the previous Chapters and the CFPP, the procedural principles are required to give effect to the substantive principles. Therefore, unless there is any valid limitation on the democratic participatory principles in the NEMA, the public participation processes implemented in terms of this legislation must also give effect to them.

Over and above the environmental principles set out in section 2⁸¹⁹ of the NEMA which requires public participation⁸²⁰ in environmental processes and decisions, Chapter 5 of the NEMA establishes environmental management tools aimed at ensuring integrated environmental management of activities. Section 23(2) of the NEMA sets out the general objectives of integrated environmental management which include the promotion of the environmental principles, as well as ensuring an ‘adequate and appropriate opportunity for public participation in decisions that may affect the environment.’ There are a number of options which could be used to achieve these objectives, the most common of which is the EIA process.⁸²¹

Section 24 of the NEMA states that ‘the potential consequences for or impacts on the environment of listed activities or specified activities must be considered, investigated, assessed and reported on to the competent authority...except in respect of those activities

⁸¹⁹ The relevant section 2 principles include:

- 'The participation of all interested and affected parties in environmental governance must be promoted, and all people must have the opportunity to develop the understanding, skills and capacity necessary for achieving equitable and effective participation, and participation by vulnerable and disadvantaged persons must be ensured' (s2(4)(f));
- 'Decisions must take into account the interests, needs and values of all interested and affected parties, and this includes recognizing all forms of knowledge, including traditional and ordinary knowledge' (s2(4)(g));
- 'Community well-being and empowerment must be promoted through environmental education, the raising of environmental awareness, the sharing of knowledge and experience and other appropriate means.' (s2(4)(h));
- 'The vital role of women and youth in environmental management and development must be recognized and their full participation therein must be promoted.' (s2(4)(q)).

⁸²⁰ Public participation is defined in the NEMA as 'in relation to the assessment of the environmental impact of any application for an environmental authorisation, means a process by which potential interested and affected parties are given opportunity to comment on, or raise issues relevant to, the application.'

⁸²¹ Michael Kidd and Francois Retief 'Environmental Assessment' in HA Strydom and ND King Eds *Fuggle and Rabie's Environmental Management in South Africa* 2ndEd (2009) at 981.

which may commence without having to obtain an environmental authorisation.⁸²² In considering, investigating, assessing and reporting the environmental impacts of an activity, the applicant must comply with any procedure relating to public participation.⁸²³ These procedures must ensure that IAP's are provided with a reasonable opportunity to participate in participation procedures and 'public information'.⁸²⁴ The notion of a 'reasonable opportunity to participate' has been considered above within the context of the *Doctors for Life* case⁸²⁵ and thus incorporated into the CFPP. Therefore, to the extent that these regulations fail to meet the obligations of the CFPP either in the text or in the way in which the regulations are implemented, the IAP's will not have been afforded a reasonable opportunity to participate. The content of these procedures can be prescribed in regulation.⁸²⁶ It must be noted, however, that in 'South Africa the parameters and level of public participation are shared not only by the legal and institutional framework, but also by other variables like the social and economic status of the citizens or [IAP's]... While public participation should aim to strike consensus or shared understandings, this may be difficult to achieve in a society with very wide gaps between the rich and the poor. The needs and concerns of these population groups are by no means homogenous.'⁸²⁷

The EIA public participation process contemplated in the EIA Regulations is set out below.

7.3 The Environmental Impact Assessment Regulations

In 2006 the Minister of Environmental Affairs published listed activities which were later replaced by the 2010 EIA Regulations and these were again replaced in 2014 (collectively 'the EIA Regulations'). There are no substantial differences between these versions and so they will be dealt with together, and any guidelines created in terms of one version of EIA Regulations are likely to apply to the other versions (to the extent that they are still relevant).

7.3.1 The 2006 and 2010 Environmental Impact Assessment Regulations

In terms of these regulations, the EAP is required to notify all potential IAP's of an application for an environmental authorisation. Except for notifying certain landowners and authorities, the EIA Regulations do not require that the EAP investigate all possible IAP's and (in particular) the stakeholders or outsiders who may have situated knowledge. This should

⁸²² NEMA supra note 817 at s24(1).

⁸²³ Ibid at s24(1A).

⁸²⁴ Ibid at s24(2A)(4)(v).

⁸²⁵ See section 3.5 Participating in creating legislation.

⁸²⁶ Ibid at s24(5)(b)(vii).

⁸²⁷ T Murombo 'Beyond Public Participation: The Disjuncture between South Africa's Environmental Impact Assessment (EIA) Law and Sustainable Development' (2008) Vol 3 *Potchefstroom Electronic Law Journal* at 4.

form part of the PPS which focuses on the way in which IAP's receive information and can be notified of the proposed activities.

The notification requirements set out in the EIA Regulations are prescriptive in that the notice must

- (a) 'give details of the application which is subjected to public participation; and
- (b) state-
 - (i) that the application has been submitted to the competent authority in terms of these Regulations, as the case may be;
 - (ii) whether the basic assessment or scoping procedures are being applied to the applications, in the case of an application for environmental authorisation;
 - (iii) the nature and location of the activity to which the application relates;
 - (iv) whether further information on the application or activity can be obtained; and
 - (v) the manner in which and the person to whom representations in respect of the application may be made.⁸²⁸

In respect of the public participation process itself, the EIA Regulations provide limited direction to the EAP regarding the manner in which it should be conducted. All that the EIA Regulations require is that the EAP

'must ensure that-

- (a) information containing all relevant facts in respect of the application is made available to potential interested and affected parties; and
- (b) participation by potential interested and affected parties is facilitated in such a manner that all potential interested and affected parties are provided with a reasonable opportunity to comment on the application.⁸²⁹

In giving effect to this obligation, the EAP must open and maintain a register of all IAP's including their names, contact details and addresses. The register must include parties which have submitted comments in terms of the public participation process, parties which have requested to be included in the register and all organs of state which have jurisdiction over activities related to the application.⁸³⁰ All of these registered IAP's are

'entitled to comment in writing, on all written submissions, including draft reports made to the competent authority by the applicant or the EAP managing an application, and to bring to the attention of the competent authority any issues which the party believes may be of significance to the consideration of the application, provided that-

- (a) comments are submitted within-
 - (i) the timeframes that have been approved or set by the competent authority; or
 - (ii) any extension of a timeframe agreed to by the applicant or the EAP;
- (b) a copy of comments submitted directly to the competent authority is served on the EAP; and
- (c) the interested and affected party discloses any direct business, financial, personal or other interest which that party may have in the approval or refusal of the application.⁸³¹

⁸²⁸ Environmental Impact Assessment Regulations *op cit* note 71 at reg56(3).

⁸²⁹ Ibid at reg54(7).

⁸³⁰ Ibid at reg55(1).

⁸³¹ Ibid at reg56(1).

All draft reports must be submitted to the competent authority prior to awarding IAP's an opportunity to comment. The IAP's must submit their comments to the EAP 'who should record it in accordance' with the regulations.⁸³² The final reports compiled and submitted to the competent authority must be made available to the IAP's for comment. The IAP's comments in respect of the final reports must be submitted directly to the competent authority.⁸³³ The prescribed process does not require the EAP to conduct any form of process which facilitates debate and discussion of issues.⁸³⁴ Parties are only afforded a reasonable opportunity to comment - a process similar to notice and comment proceedings, which Harter suggested led to adversarial positioning rather than collaboration.⁸³⁵ Without facilitated moderation, participants are unlikely to accept decisions arising from these processes as they will feel that they have not exercised any degree of control over the process.⁸³⁶

In 2012 the Minister of Environmental Affairs published guidelines in respect of EIA public participation processes titled the *National Environmental Management Act, 1998 (Act No 107 of 1998) Publication of Public Participation Guidelines* ('the Guidelines'). The purpose of the Guidelines is to assist applicants, EAP's and IAP's in identifying their respective roles in the EIA process.⁸³⁷ The importance of public participation in EIA's is highlighted in the Guidelines.

'It is considered so important that it is the only requirement for which exemption [in terms of NEMA] cannot be given. This is because people have a right to be informed about potential decisions that may affect them and to be afforded an opportunity to influence those decisions. Effective public participation also facilitates informed decision-making by the competent authority and may result in better decisions as the view of all parties are considered.'⁸³⁸

The Guidelines go on to list the benefits of public participation:

- 'it provides an opportunity for IAP's, EAP's and the Competent Authority (CA) to obtain clear, accurate and understandable information about the environmental impacts of the proposed activity or implications of a decision;
- it provides IAP's with an opportunity to voice their support, concerns and questions regarding the project, application or decision;
- it provides IAP's with the opportunity of suggesting ways for reducing or mitigating any negative impacts of the project and for enhancing its positive impacts;
- it enables an applicant to incorporate the needs, preferences and values of affected parties into its application;

⁸³² Ibid at reg56(5).

⁸³³ Ibid reg56(6).

⁸³⁴ *Principle 1: The Educative Effect.*

⁸³⁵ Harter *op cit* note 622.

⁸³⁶ *Principle 2: The Principle of Control and Principle 3: The Social Licence to Operate.*

⁸³⁷ Integrated Environmental Management Guidelines Series (Guideline 7): Public Participation in the Environmental Impact Assessment Process GNR 807 of 10 October 2012 in Government Gazette 35769.

⁸³⁸ Ibid at 240.

- it provides opportunities for clearing up misunderstandings about technical issues, resolving disputes and reconciling conflicting interests;
- it is an important aspect of securing transparency and accountability in decision-making; and
- it contributes towards maintaining a healthy, vibrant democracy.⁸³⁹

The Guidelines are more closely aligned with the democratic participatory principles than the EIA Regulations are. They recognise that the requirement to conduct public participation can arise in a variety of circumstances: the assessment of the environmental impacts associated with the undertaking of proposed activities; an application for an exemption or an amendment to an authorisation. The nature and extent of the public participation process will vary depending on the circumstances.⁸⁴⁰ Irrespective of which process is adopted, the EAP must invite all stakeholders to participate in the process. Certain stakeholders must require (in terms of the EIA Regulations) written notification of the proposed activities. Others will be informed through the public advertisements. The EAP should identify key stakeholders with situated knowledge which should be approached to engage in the process.⁸⁴¹ This hints at the notion of 'outsiders' to the participatory process.⁸⁴²

Under the heading 'Commenting periods and consultation with State departments and other IAP's, the Guidelines indicate that IAP's must be provided with an opportunity to comment on all written submissions which the proponent submits to the competent authority. The time period within which these written comments or submissions must be lodged must be set out in the invitation or notice calling for comments.⁸⁴³ This opportunity to comment is recognised as the bare minimum form of consultation. The Guidelines acknowledge that the

‘minimum requirements for public participation outlined in the EIA Regulations will not necessarily be sufficient for all applications. This is because the circumstances of each application are different, and it may be necessary in some situations to incorporate extra steps in the public participation process.’⁸⁴⁴

This concession that the minimum requirements specified in the EIA Regulations may not be sufficient in all instances is a matter for concern. While it is acknowledged that variability is an essential component when implementing a public participation process, neither the NEMA, the EIA Regulations nor the Guidelines provide sufficient guidance on how the proponent can meet the participatory obligations in the democratic participatory

⁸³⁹ Ibid.

⁸⁴⁰ *Principle 9: The Principle of Flexibility.*

⁸⁴¹ Public Participation Guidelines *op cit* note 837 at 243.

⁸⁴² *Principle 8: The Identity of the IAP's.*

⁸⁴³ Public Participation Guidelines *op cit* note 837 at 243 - 244.

⁸⁴⁴ Ibid.

principles. As such, the EAP conducting the participation process is required to implement a process which he or she believes to be suitable in the circumstances. In doing so, the Guidelines state that he or she should consider (1) the degree of the impact arising from the proposed project; (2) the sensitivity of the affected environment and the degree of controversy surrounding the project and (3) the characteristics of the IAP's which will be impacted upon by the proposed project.⁸⁴⁵

In providing content to these considerations, the Guidelines include some questions:

'Scale of anticipated impacts:

Are the impacts of the project likely to extend beyond the boundaries of the local municipality?

Are the impacts of the project likely to extend beyond the boundary of the province?

Is the project a greenfield development (a new development in a previously undisturbed area)?

Does the area already suffer from socio-economic problems (e.g. job losses) or environmental problems (e.g. pollution), and is the project likely to exacerbate these?

Is the project expected to have a wide variety of impacts (e.g. socio-economic and ecological)?

Public and environmental sensitivity of the project:

Are there widespread public concerns about the potential negative impacts of the project?

Is there a high degree of conflict among interested and affected persons?

Will the project impact on private land other than that of the applicant?

Does the project have the potential to create unrealistic expectations (e.g. that a new factory would create a large number of jobs)?

Potentially affected parties:

Has very little previous participation taken place in the area?

Did previous public participation processes in the area result in conflict?

Are there existing organisational structures (e.g. local forums) that can represent interested and affected persons?

What is the literacy level of the community in terms of their ability to participate meaningfully within the public participation process?

Is the area characterised by high social diversity (i.e. socio-economic status, language or culture)?

Were people in the area victims of unfair expropriations or relocations in the past?

Is there a high level of unemployment in the area?

Do the interested and affected persons have special needs (e.g. a lack of skills to read or write, disability, etc)?⁸⁴⁶

These questions are useful in directing the EAP's attention to the objectives of *Principle 3: The Social Licence to Operate*, *Principle 8: The Identity of the IAP's* and *Principle 10: The Public Participation Strategy* in selecting a public participation process in that they raise issues regarding the social licence to operate, diversity in the community and the literacy level. Unfortunately, although forcing the EAP to identify these issues, he or she is not assisted in what to do with the information generated by these questions (i.e. to build the PPS). Furthermore, the Guidelines do not provide for a benchmark against which the 'success' of the process can be assessed to determine whether it is effective. All that the Guidelines state is that the EAP would (having answered these questions) be better placed to determine

⁸⁴⁵ Ibid.

⁸⁴⁶ Ibid at 245.

which mode of participation could best be implemented: 'public meetings, or open days; conferences; press releases; questionnaires or opinion surveys; information desks and / or info lines (helpline) or meetings / workshops with constituencies'.⁸⁴⁷

The Guidelines do not provide any guidance on how these modes of participation should be implemented so as to best give effect to the CFPP or on how to resolve some of the difficulties known to arise from public participation processes which the CFPP seeks to rectify, for example:

- EAP's (although independent) can be pressured to select a mode of participation that meets the formal legislative requirements but which limits the IAP's role as participation can frustrate rather than support development. Modes of participation which amount to nothing more than tokenism do not necessarily speed up the process in the long run as alienated citizens do not trust the process and are more likely to appeal and review administrative decisions;
- the public engagement process generally excludes the public's views in favour of polarised views of interest groups.⁸⁴⁸ This is particularly evident in situations involving environmental NGO's in 'controversial' projects⁸⁴⁹ or where participants are more organised or have financial backing;⁸⁵⁰
- low levels of participation due to apathy, insufficient information or negative past experiences;⁸⁵¹
- participating in public participation meetings is costly and time intensive. Parties which are self-employed cannot afford to spend time attending meetings rather than generating income;⁸⁵²
- participation is often undertaken too late in the process, preventing IAP's from properly influencing the alternatives for the proposed activity or other important variables like the size or location of the activity;⁸⁵³

⁸⁴⁷ Ibid at 245 - 246.

⁸⁴⁸ Judith Innes and David Booher 'Reframing Public Participation: Strategies for the 21st Century' (2004) Vol 5, No 4 *Planning Theory & Practice* 419 - 436 at 419.

⁸⁴⁹ Moote, McClaren & Chickering *op cit* note 176 at 877.

⁸⁵⁰ Hoexter *op cit* note 436 at 80.

⁸⁵¹ Roger Few, Katrina Brown & Emma L Tompkins 'Public participation and climate change adaptation: avoiding the illusion of inclusion' 7 (2007) *Climate Policy* 46 - 59 at 49.

⁸⁵² Moote, McClaren & Chickering *op cit* note 176 at 883.

- people stop participating because they feel frustrated by the process as there are no definite conclusions or outcomes. This can be coupled with the fact that the participants do not understand the consultative process, their right or the objectives and generally feel frustrated and exasperated;⁸⁵⁴
- certain objections during the EIA public participation process are purely strategic. These⁸⁵⁵ IAP's participate in EIA processes with the hope of preventing the development from proceeding at all or in a manner that will affect them or their members, directly or indirectly. Participating in an EIA process can in many ways be compared with a negotiation in that each party takes a position, provides evidence in support of the view he or she has put forward and makes certain concessions in order to reach an amicable solution. Fisher and Ury refer to this form of negotiation as 'positional bargaining.'⁸⁵⁶ Although positional bargaining is useful in identifying what each party wants in an agreement, they indicate that it 'fails to meet the basic criteria of producing wise agreement, efficiently and amicably.'⁸⁵⁷ They go on to state that when:

'negotiators bargain over positions, they tend to lock themselves into those positions. The more you clarify your position and defend it against attack, the more committed you become to it. The more you try to convince the other side of the impossibility of changing your opening position, the more difficult it becomes for you to do so. Your ego becomes identified with your position. You now have a new interest in 'saving face' - reconciling future action with past position - making it less and less likely that any agreement will wisely reconcile the parties' original interest.'⁸⁵⁸

Increased communication and understanding of the participants' views does not necessarily result in compromise or consensus.⁸⁵⁹ When conflicts occur, the proponent is required to implement problem-solving mechanisms to try and resolve any conflict.

What is evident is that the modes of public participation implemented during an EIA require re-evaluation. It is insufficient for the EAP merely to identify a traditional mode of public participation, implement this and expect that the form of participation will meet the constitutional and legal requirements of participatory democracy or solve the difficulties

⁸⁵³ Anne Shepherd and Christi Bowler 'Beyond Requirements: Improving Public Participation in EIA' (1997) 40(6) *Journal of Environmental Planning and Management* at 727.

⁸⁵⁴ Moote, McClaren & Chickering *op cit* note 176 at 883; Innes and Booher *op cit* note 848 at 419.

⁸⁵⁵ Tim Holmes and Ian Scoones 'Participatory Environmental Policy Processes: Experiences from North and South' (2000) *IDS Working Paper 113 Institute of Development Studies*; Few, Brown and Tompkins *op cit* note 759 at 50.

⁸⁵⁶ Fisher & Ury *op cit* note 24 at 4; Moote, McClaren & Chickering *op cit* note 176 at 883.

⁸⁵⁷ *Ibid*.

⁸⁵⁸ *Ibid* at 5.

⁸⁵⁹ Moote, McClaren and Chickering *op cit* note 176 at 883.

associated with public participation set out above. The recently promulgated 2014 EIA Regulations unfortunately do not create a public participation system that is more closely aligned with the CFPP for the reasons set out below.

7.3.2 The 2014 Environmental Impact Assessment Regulations

The most recent version of the EIA Regulations was promulgated on 4 December 2014.⁸⁶⁰ Chapter 6 of the EIA Regulations, entitled 'Public Participation', is comprised of six sections, setting out the consultation requirements which must be implemented during an EIA. For the most part, these sections are not different from the 2006 and 2010 EIA Regulations. As in the case of the previous EIA Regulations, IAP's must be afforded access

‘to all information that reasonably has or may have the potential to influence any decision with regard to an application including an opportunity to comment on reports...prior to submission of an application but [also] must be provided an opportunity to comment on such reports once an application has been submitted to the competent authority.’⁸⁶¹

The 2014 EIA Regulations are prescriptive about the manner and form in which IAP's must be notified about a proposed application. A new section states that the notification requirements do not need to be repeated in respect of subsequent additional public participation processes which may be required, provided that the initial public participation complied with the regulations and the IAP's receive written notification of where they can obtain a copy of relevant information and to whom they can make submissions.

In complying with these responsibilities, the EAP

‘must ensure that-

- (a) Information containing all relevant facts in respect of the application or proposed application is made available to potential interested and affected parties; and
- (b) Participation by potential or registered interested and affected parties is facilitated in such a manner that all potential or registered interested and affected parties are provided with a reasonable opportunity to comment on the application or proposed application.’⁸⁶²

In doing this, the EAP may use 'reasonable alternative methods...in those instances where a person is desirous of but unable to participate in the process due to – (i) illiteracy; (ii) disability; or (iii) other disadvantage' to assist these IAP's in participating. The EIA Regulations do not indicate what these 'reasonable alternative methods' may be but this section allows (at least in principle) the adoption of the CFPP and in the inclusion of 'outsiders'.

⁸⁶⁰ Environmental Impact Assessment Regulations *op cit* note 71.

⁸⁶¹ Ibid at reg 40.

⁸⁶² Ibid at reg 41(6).

A register of all IAP's must be created, and maintained and submitted to the competent authority with the application: this must include the names, contact details and addresses of-

- (a) 'all persons who, as a consequence of the public participation process conducted in respect of that application, have submitted written comments or attended meetings with the proponent, applicant or EAP;
- (b) all persons who have requested the proponent or applicant, in writing, for their names to be placed on the register; and
- (c) all organs of state which have jurisdiction in respect of the activity to which the application relates.⁸⁶³

The registered IAP's are 'entitled to comment, in writing, on all reports or plans submitted to such party during the public participation process...and to bring to the attention of the proponent or applicant any issues which the that party believes may be of significance to the consideration of the application.'⁸⁶⁴ These comments must be included in the reports along with the responses provided by the EAP and the minutes of any meetings held with these IAP's.

Based on the above, it is evident that in all iterations of the EIA Regulations, the public participation process does not differ significantly. One consistent factor is that the EAP is afforded significant discretion in the manner in which he or she designs the public participation process, while the notification requirements are more prescriptive. Unfortunately, as is evident from the example set out below, the EAP tends to adopt a process that is remarkably similar to the notice and comment proceedings and fails to implement the other vital components of the CFPP, failing to align with the democratic participatory principles.

7.4 The Environmental Impact Assessment public participation process analysed against the Constitutional Framework for Public Participation

As is evident from the above, the EIA public participation process tends to focus more on notifying IAP's of the proposed activity rather than on the mode(s) of participation which would be implemented. That being said, the following aspects of the process, when compared to the CFPP are notable.

First, the EIA Regulations oblige the proponent to give notice to all IAP's. However, the general obligation is limited by the fact that the notice must be placed on a notice board in a conspicuous place on the affected property, written notice must be given to specified parties

⁸⁶³ Ibid at reg42.

⁸⁶⁴ Ibid at reg 43(1).

and an advertisement must be placed in a newspaper.⁸⁶⁵ The proponent, therefore, is not obliged to consider whether there are outsiders or missing parties who may not read a notice board or an advertisement but who may be able to contribute situated knowledge and should be targeted or notified specifically. In this way, the existing EIA public participation process disregards *Principle 5: The Principle of Inclusivity* and *Principle 8: The Identity of the IAP's* as there is no requirement for the proponent to consider whether such persons exist and take reasonable steps to include these parties in the process.

Secondly, there is no obligation for the proponent to develop and publish a PPS setting out when and how the IAP's will be engaged; whether they will be allowed to submit comments on only one occasion or whether there will be numerous opportunities or whether the proposed modes of participation that will be implemented are appropriate. All that the proponent must ensure is that IAP's must be provided with a reasonable opportunity to submit comments. This is broad and does not provide the proponent with any guidance as to how this should be implemented. The vagueness in the legislation may not be problematic provided it is implemented in accordance with the democratic participatory principles. As will be set out in detail below, the proponents (EAP's) have failed to achieve this objective.

Thirdly, the EIA Regulations state that all relevant facts must be made available to IAP's. To meet this condition, all the proponent is required to do is provide the relevant technical documents. There is no obligation on the proponent to ensure that the information can be understood by IAP's, particularly outsiders.⁸⁶⁶ To combat this, the DEA and provincial environmental departments require proponents to prepare a 'basic information document' that must be circulated to the IAP's. The purpose of this document is to explain the project and the EIA process in simple terms. In the author's experience, this document is often superficial. It sets out the legislative public participation requirements and briefly sets out the project. It does not provide any detail on the key impacts that are expected to arise, how they will impact the IAP's or how they will be suitably mitigated. The reason for this is often because the basic information document is circulated at the initiation of the project – before any of the impact assessments have been considered. If this document was provided at the outset and another iteration was prepared later in the process with details of the impacts, it may be more

⁸⁶⁵ Ibid at reg41(2).

⁸⁶⁶ Although not in the EIA arena, there is case law to suggest that persons should receive information (or legal process) in their home language. See *Cape Killarney* supra note 450.

useful to IAP's. The current process therefore isolates outsiders and is a barrier to participation to those participants who do not speak the language of the community of practice.⁸⁶⁷ It is also contrary to *Principle 14: The Principle of Integration*.

Fourthly, by not providing a PPS setting out the details of the public participation process, IAP's will not have sense of their rights and obligations in terms of the entire public participation process. Instead they will be notified on an ad hoc basis, indicating that they are required to comment on a detailed EIA report within 30 days which is contrary to *Principle 15: The Principle of Continuity*.

Fifthly, there is no requirement to audit the public participation process to confirm whether it is effective in engaging with the IAP's and achieving the democratic participatory principles and the Constitution. To counteract this, proponents tend to conduct public participation processes aimed at a high number of consultations. As indicated in Chapter 2, the democratic participatory processes are less concerned with the number of IAP's and more concerned with the quality of the participatory process.

In spite of the defects set out above, it is conceivable that given the broad discretionary powers afforded to proponents (EAP's) in the EIA Regulations to select the mode(s) of participation and to implement the public participation process, they may implement processes which reflect the democratic participatory principles. A brief assessment of two EIA reports prepared by different EAP's indicates that the EIA public participation processes tend to fall short of the CFPP.

7.5 The Implemented Environmental Impact Assessment public participation processes

Although EIA Reports need to be made available to the public in terms of the EIA public participation process and these reports must be submitted to the competent authority, the authorities do not currently have a public repository where all EIA Reports are made available. The only place where these reports may be found (although this is not a legislated requirement) is on the EAPs' websites.

⁸⁶⁷ Section 6.4.6 Obstacles to participation.

Having scoured the websites of the five most well-known EAP firms in South Africa⁸⁶⁸ and having briefly reviewed some of the available reports⁸⁶⁹ it became apparent that the public participation process implemented in all cases was the same – namely, a notice and comment process and public hearing.

As a result, I randomly selected two EIA Reports from two different EAP's to determine whether the democratic participatory principles were (in these cases) achieved, notwithstanding the fact that the EIA Regulations do not include significant guidance on how public participation processes should be implemented. The details of these EIA's are set out below.

7.5.1 Amendments to licensed activities associated with the Platreef Underground Mine

The EIA report relating to the amendments to the licensed activities associated with the Platreef Underground Mine was prepared by Digby Wells in January 2016. The report contains an executive summary which sets out the purpose of the EIA, namely, to conduct an addendum EIA in order to update the Environmental Management Plan regarding the Platreef Underground Mine. No new listed activities were triggered by the proposed amendments but, in terms of the EIA Regulations, any amendments to the mitigation measures contained in the Environmental Management Plan require that a public participation process is conducted prior to the application for amendment is considered by the competent authority.

7.5.1.1 Purpose of the Public Participation Process

The EIA report includes a description of the public participation process. It must be noted that a separate public participation report was not compiled and attached to the EIA report. This means that the only information relating to the public participation process is the brief description contained in the EIA report. According to this description, the purpose of the public participation process is so ‘that stakeholders who are affected by the Project are given an opportunity to identify concerns and ensure that local knowledge, needs and values are

⁸⁶⁸ SRK Consulting, Digby Wells Environmental, Savannah Environmental (Pty) Ltd, Environmental Resource Management and Jones and Wagner Engineering and Environmental Consultants.

⁸⁶⁹ SRK Consulting available at <http://www.srk.co.za/en/public-documents> last accessed on 8 February 2017; Digby Wells available at <http://www.digbywellsdocs.com/PublicDocuments/> last accessed on 8 February 2017; Savannah Environmental available at <http://www.savannahsa.com/projects/index.php> last accessed on 8 February 2017; Environmental Resource Management did not have any available EIA public participation reports and Jones and Wagner available at <http://www.jaws.co.za/public-review-documents/> last accessed on 8 February 2017.

understood and taken into consideration.⁸⁷⁰ This, however, must be understood in the context of the authorisation to mine has already been granted and that this EIA is merely to amend the existing environmental management plan. This is a relevant consideration in that a public participation process would have been conducted in first obtaining this approval but, although this objective is congruent with the democratic participatory principles and the CFPP, the execution of this objective fails to meet the standards of the CFPP. The key areas of concern are addressed below.

7.5.1.2 Identifying Interested and Affected Parties

The report lists the following IAP's:

- 'Directly affected and surrounding landowners;
- National, Provincial and Local Government;
- Ward Councillors;
- Local villages;
- Traditional authorities;
- Agricultural entities;
- Local businesses and
- Non-governmental organisations.'⁸⁷¹

There is no indication that any particular measures have been taken to identify outsiders or persons missing from the public participation process. The above list is a generic list based on the kinds of participants who would be expected to be interested and may be able to contribute situated knowledge. Within each of these groups are various sub-groups who may require that the proponent exercise more or less effort to notify and engage with them.⁸⁷² As is evident from the next section, little effort appears to have been made to engage with these outsiders to the participatory process.

⁸⁷⁰ Digby Wells 'Amendments to Licensed Activities Associated with the Platreef Underground Mine' available at <http://www.digbywells.com/PublicDocuments/?downloads=iva3396-ivanplats-pty-ltd-eia-and-emp-addendum-report> at 29.

⁸⁷¹ Ibid.

⁸⁷² See 6.3.1 Identifying the Interested And affected Parties to the public participation process above.

7.5.1.3 Notification to Interested and Affected Parties and identifying and sharing critical issues

The failure to investigate the IAP's in more detail in the section above is carried through into the manner in which they are notified of the proposed project.⁸⁷³ The EAP has merely complied with the black letter of the EIA Regulations by sending letters to specific parties and publishing notices in the newspaper.⁸⁷⁴ While it is admirable that this notice was in English, Tsonga and Sepedi, such notice may be inappropriate if the community members are not literate.

Furthermore, the EAP did not appear to ascertain where the IAP's identified above obtain their information.⁸⁷⁵ That is, are local villagers obtaining their information from the newspaper? This is not evident from the facts contained in the EIA report. Given the rural nature of most villages, it seems unlikely that the newspaper will be the best source to notify and inform all the IAP's. This appears to undermine *Principle 5: The Principle of Inclusivity* and *Principle 8: The Identity of the IAP's*.

If written notification was not the appropriate way in which to inform certain IAP's of the proposed project, providing them with a Background Information Document, Posters and Pamphlets and access to the EIA Report is equally inappropriate.⁸⁷⁶ If outsiders were engaged and were sufficiently literate to understand the EIA Report, the question then needs to be considered whether the information contained in the report was presented in a manner that made it easy to understand to allow these IAP's the opportunity to participate.⁸⁷⁷

Contrary to *Principle 19: The Issue Posts Principle*, the EIA Report contains an executive summary. As argued in Chapter 5, executive summaries have a tendency to be more difficult to understand and, therefore, issue posts setting out the issues, risks and mitigations has been found to be a far more effective way to bring the important issues to the attention of the IAP's.⁸⁷⁸ While the executive summary does not include issue posts, it does include a summary of the 'Project Amendment Impacts' which highlight the potential impact

⁸⁷³ See 6.4.3 Notifying Interested And Affected Parties above.

⁸⁷⁴ See 6.3.4 Empowering legislation relating to the public participation process.

⁸⁷⁵ See 6.4.3 Notifying Interested And Affected Parties above.

⁸⁷⁶ Ibid at 35 - 36.

⁸⁷⁷ See 6.4.4 Identifying and sharing critical issues.

⁸⁷⁸ 5.6.2.2 Translation.

and the significance before and after mitigation.⁸⁷⁹ As an overview this highlights the areas of concern to IAP's. However, the table does not set out the mitigation measures that will be implemented and does not cross refer to the pages of the EIA Report where this is dealt with in more detail, and so it does not easily allow IAP's the opportunity to review the underlying more detailed information without reading the entire report.⁸⁸⁰

Even if the outsiders managed to link the table set out in the executive summary with the detailed impacts and mitigations, the impacts are generally stated and there is not a clear indication as to how these impacts will affect individuals. Furthermore, the wording of the impacts is very technically phrased in the EIA Report.⁸⁸¹ For example, in respect of Air Quality:

'The results of the pollutant dispersion model...indicate that the predicted 24-hour (daily) PM₁₀ concentrations show that the standard is exceeded at the four compass points with the worst cases at the western and southern boundary. In both cases the limit value (75ug/m³) is exceeded several kilometers from the mine boundary. The major contributions are emissions from hauling and crushing of ore and waste. In terms of spatial impact, the western and southern portions are affected most. The predicted concentrations are the likely additions that can be anticipated from the Project on ambient air quality and not cumulative impact from all the existing sources in the area. The predicted 99th percentile 24-hr (daily) ground level concentration of PM_{2.5} indicates exceedances at the mine boundary hence violating the current standard of 40 ug/m³.⁸⁸²

The failure to illustrate how outsiders will be affected makes it difficult for these IAP's to understand the information and its impacts and so inhibits them from contributing during the public participation process either in writing or orally at the public meetings.

7.5.1.4 Modes of Public Participation

Consultation with IA'Ps took place during the 30-day period within which the EIA report was available for public comment. A variety of stakeholder meetings were conducted with 'traditional authorities, key stakeholders, communities and the general public.'⁸⁸³ The comments raised by these stakeholders (including the written comments) were incorporated into a notice and comment report which was included in the EIA report. It is evident from the EIA report, however, that the consultation meetings failed to meet the standards of the CFPP.⁸⁸⁴

⁸⁷⁹ Ibid at ix.

⁸⁸⁰ 6.4.4 Identifying and sharing critical issues.

⁸⁸¹ Ibid.

⁸⁸² Ibid at 59.

⁸⁸³ Ibid at 31.

⁸⁸⁴ See 6.4.5 Selecting the modes of participation.

The modes of participation selected are the notice and comment proceedings in which the EIA Report was made available for comment in English, Tsonga and Sepedi. As expressed above, this option may be satisfactory for insiders to the process but this level of sophistication does not meet the requirement for all IAP's. To cater for less sophisticated IAP's, the EIA Report indicates that public meetings were held where a presentation regarding the amendments to the EIA was discussed and the attendees were 'educated' as to the amendments.⁸⁸⁵ Whether these meetings were successful in giving effect to the participatory democratic principles is unclear.

In certain instances, the EIA Report reveals that a number of the public meetings were disrupted by disgruntled community members and, in some instances, the meetings were cancelled.⁸⁸⁶ It is evident that *Principle 3: The Social Licence to Operate* regarding the existing mining operations is not held by the mine. There does not appear to have been any further effort to re-initiate these meetings or engage with these communities in any other format. In this way, IAP's acting reasonably have been unable to participate in the process and have been unable to voice their concerns. This is contrary to *Principle 1: The Educative Effect* and *Principle 4: The Principle of Dignity*. The disruption to the public meetings is an obstacle to participation which needs to be overcome in order for the CFPP to be successfully implemented.

Given the existing hostility to the mine, action should have been taken by the proponent to develop a PPS aimed at discussing ways in which the IAP's would be consulted, including those IAP's opposed to the mine.⁸⁸⁷ If the proponent had done this, the IAP's may have been more willing to participate in the public meetings, rather than to disrupt them (*Principle 1: The Educative Effect*) and may be satisfied with outcomes in which they were involved (*Principle 2: The Principle of Control*) and would, ultimately, grant the social licence to the mine (*Principle 3: The Social Licence to Operate*).⁸⁸⁸

Furthermore, if the existing public participation process was audited in accordance with the CFPP, the inadequacy of the previous public participation process may have been

⁸⁸⁵ Ibid and 6.4.4 Identifying and sharing critical issues.

⁸⁸⁶ Ibid at 32 - 33.

⁸⁸⁷ 6.4 Designing the Public Participation Strategy.

⁸⁸⁸ See 6.5 Implementing the Public Participation Strategy.

identified and resolved.⁸⁸⁹ To the extent that this still resulted in the IAP's not wanting to participate, the EAP could have relied on *Principle 6: The Finality in Decision-making* by continuing with the process notwithstanding the failed attempts. This case highlights the importance of and value in auditing the public participation process against an independent standard. (*Principle 17: The Principle of Monitoring and Evaluation*).

7.5.2 Sasol South Africa (Pty) Ltd's Postponement Application Public Participation Process

In June 2016 Sasol South Africa (Pty) Ltd, operating through its Second Synfuels Operations ('SSO') submitted its *Final Motivation for the Postponement of Compliance Timeframes in terms of Regulation 11 of Section 21 NEM:AQA Minimum Emissions Standards* ('the Final Motivation') to the National Air Quality Officer. The Final Motivation requested a further postponement from the Minimum Emission Standards⁸⁹⁰ ('MES') 'for three pitch tanks within the Tar Value Chain for Sasol's Second Synfuels Operations.'⁸⁹¹

7.5.2.1 Purpose of the Public Participation Process

In November 2013 the Department of Environmental Affairs ('DEA') published the MES for a variety of activities which caused air emissions. The MES included standards for new plants which were developed after the regulations were promulgated, as well as standards that existing operations need to meet. These existing operations were initially afforded until 1 April 2015 to bring themselves in line with the MES. As SSO was not going to meet the 1 April 2015 deadline in respect of the pitch tanks (and other infrastructure), a postponement was sought and granted. The postponement was granted until 31 March 2017.

'The initial postponement period of two years granted for the above mentioned tanks was shorter than the five year postponement period which was requested in line with an estimated 5 - 6 year project timeframe to ensure safe completion of the associated compliance project. Since SSO was granted a postponement shorter than required for its compliance project execution schedule for these tanks, SSO is applying for a further postponement.'⁸⁹²

Regulation 11 of the MES entitles a person to apply for a postponement from compliance with the MES. Regulation 12 indicates that an application must include an air

⁸⁸⁹ See 6.6 Auditing the Public Participation Strategy.

⁸⁹⁰ 'List of activities which result in Atmospheric Emissions which have or may have a significant detrimental impact on the environment, including health, social conditions, economic conditions, ecological conditions or cultural heritage' GNR 893 GG 37504 22 November 2013.

⁸⁹¹ Sasol South Africa 'Final Motivation for Postponement of Compliance Timeframes in Terms of Regulation 11 of Section 21 NEM:AQA Minimum Emissions Standards' at ii available at http://www.srk.co.za/sites/default/files/File/South-Africa/publicDocuments/Tar/SYNFUELS_FINAL_MOTIVATION_POSTPONEMENT_Tar_Value_Chain.pdf accessed on 8 August 2016.

⁸⁹² Ibid.

pollution impact assessment, reasons for the application and a public participation process in terms of the EIA Regulations.⁸⁹³

7.5.2.2 Identifying Interested and Affected Parties

The Stakeholder Engagement Report states that the IAP's were identified based on the previous environmental authorisation process that the EAP conducted on behalf of SSO, those stakeholders who had registered for the previous postponement application, the parties registered for bi-annual SSO environmental consultation sessions dealing with air quality issues and those who registered as IAP's during Sasol's Offset Implementation Plan public participation process.⁸⁹⁴ The report sets out an extensive list of IAP's registered.^{895 896}

While this list may be comprehensive, Chapter 5 indicates that the proponent needs to determine whether there are any stakeholders who may contribute situated knowledge to the public participation process.⁸⁹⁷ Where such stakeholders exist, the proponent should seek to interact directly with these individuals and not via a representative, agency group, union. as these bodies may not necessarily express the views of the individuals and may not be able to contribute such knowledge which the members of these groups have.⁸⁹⁸

There is nothing in the Stakeholder Engagement Report which indicates that the proponent has undertaken this exercise. Aside from Sasol employees and adjacent surrounding landowners, there is no indication that members of the surrounding communities had been contacted or consulted.⁸⁹⁹ These individuals may have situated knowledge which would have impacted on the authorities' decision on whether or not to grant a further postponement. For example, poor ambient air quality in the region may have impacts on health or agriculture which the decision makers have not contemplated.

⁸⁹³ 6.3.4 Empowering legislation relating to the public participation process.

⁸⁹⁴ 'Annexure F: Stakeholder Engagement Report' at 3 available at http://www.srk.co.za/sites/default/files/File/South-Africa/publicDocuments/Tar/ANNEXURE_F_Stakeholder_Engagement_Report_0.pdf accessed on 8 August 2016.

⁸⁹⁵ Ibid.

⁸⁹⁶ 6.3.1 Identifying the Interested And affected Parties to the public participation process.

⁸⁹⁷ Ibid.

⁸⁹⁸ 6.4.3 Notifying Interested And Affected Parties.

⁸⁹⁹ Ibid.

The EAP should have identified these missing stakeholders and taken measures to engage with these parties.⁹⁰⁰ Alternately, the EAP should have indicated that such outsiders to the process were not pursued because none was identified or that it was unreasonable or unnecessary to pursue these IAP's as they were unlikely to provide additional situated knowledge which would justify the significant costs (bearing in mind that cost cannot be an inhibiting factor to participation). If this exercise was conducted by the EAP, it has not been set out in the Final Motivation or the Stakeholder Engagement Report.

7.5.2.3 Notification to Interested and Affected Parties and identifying and sharing critical issues

The reasons and justification for the application are set out in a manner that is generally understandable. However, to the lay person, there are certain aspects which are phrased and described in a manner that outsiders may find difficult to understand particularly in respect of those aspects which impact outsiders such as health effects and the ecology. These impacts were set out in the atmospheric impact report ('AIR').⁹⁰¹

The purpose of the AIR is 'to provide an assessment of the implication for ambient air quality and associated potential impacts.'⁹⁰² ⁹⁰³ Baseline emissions were modelled on the existing operations and on the predicted emissions following implementation of the technology. These results were then compared against the National Ambient Air Quality Standards ('NAAQS') which contained acceptable emissions levels from a health risk perspective. The predicted emissions were compared against the NAAQS at 15 sensitive receptor sites within a 50km radius of the operations. The sensitive sites included residential areas.⁹⁰⁴ As set out in more detail below, despite the fact that residential areas are in close proximity to the project, there did not appear to be any representatives from these communities attending the public participation meetings. This may be, in part, because a portion of the AIR and the summary in the Final Motivation were too technical to be understood by many.⁹⁰⁵ For example, on page 17 of the Final Motivation in respect of which sources of emissions were included within the dispersion modelling, the report states:

'The dispersion modelling only considered these tanks, which does not include all VOC [Volatile Organic Compounds] sources on the site. Of the VOC sources that were not modelled, the majority are

⁹⁰⁰ See 6.3.1 Identifying the Interested And affected Parties to the public participation process.

⁹⁰¹ 6.4.4 Identifying and sharing critical issues.

⁹⁰² Ibid at 14.

⁹⁰³ 6.3.3 The reason for the public participation process.

⁹⁰⁴ Ibid at 15.

⁹⁰⁵ 6.4.4 Identifying and sharing critical issues.

considered fugitive emissions...While concentrations of these emissions can be measured, in the majority of cases it is not possible to conduct flow measurements that comply with the prescribed Method (EPA Method 1/2). In most instances, flow measurements could not be conducted due to limited access to vent outlet, and where sampling ports / vents are available, they often do not meet the requirements (location or measuring ports, pipe configurations, size of port being smaller than 4" diameter to insert pilot tube, etc.) to measure stack gas velocity and volumetric flow rate. Therefore, insufficient information exists to quantify the mass emission rates from many sources for dispersion modelling purposes. It is estimated that approximately 5% of the total VOC emissions from the second site can be attributed to tank emissions. Of the total of 36 tanks containing products emitting VOCs, 3 of these are included in this postponement application (although, as described above, VOC emissions from 7 tanks are modelled). The VOCs modelled is therefore a relatively small percentage of the total VOCs from the site. In terms of the remaining sources, the majority of which are fugitive emissions, projects such as the Tar Value Chain Phase 1 project are currently underway to reduce emissions. On completion of this project, the VOC emissions from the newly installed RTOs will be measurable to confirm compliance with the MES.⁹⁰⁶

SSO indicate that measuring VOC's is difficult and unreliable. As a result, they suggest that 'the most reliable measures of VOC ambient concentrations...remains the measured benzene values obtained from the monitoring stations in close proximity to the residential areas.'⁹⁰⁷ This notwithstanding, the AIR concludes that the purpose of the MES is to ensure that the ambient air quality does not impact on the health and well-being of people. This means that the air quality must comply with the NAAQS. According to the report, the Benzene measures fell below the NAAQS requirements.

The impacts on health and ecological effects are afforded a page and a half of the Final Motivation and are also phrased technically. In respect of health effects it states

'The AIR Regulations prescribe an assessment of the health effects of the emissions for which relief is sought from the MES based on the degree to which there is compliance with the NAAQS. The NAAQS governs air quality improvement, however, based on a permissible or tolerable level of risk to mitigate potential negative health impacts. The overall findings of the AIR are that the baseline emissions, as would apply during the period of postponement, will result [in] ambient concentrations within the tolerable or permissible risk levels...The results indicate that both the modelled and measured benzene concentrations are below the benzene NAAQS.'⁹⁰⁸

The ecological impacts are explained even more technically:

'Benzene (together with other VOCs) is a precursor pollutant involved in the formation of secondary atmospheric pollutants, such as smog (generally) and ozone (specifically). As a secondary pollutant, Ozone (O₃) is formed in the lower part of the atmosphere, from complex photochemical reactions following emissions of precursor gases such as NO_x and VOCs. O₃ is produced during the oxidation of carbon monoxide (CO) and hydrocarbons by hydroxyls (OH) in the presence of NO_x and sunlight. The rate of ozone production can therefore be limited by CO, VOCs or NO_x. Due to atmospheric transport, contributions or precursors from the surrounding region can also be important. The transport of O₃ is determined by meteorological and chemical processes which typically extend over spatial scales of several hundred kilometres. Thus, for the purposes of studying O₃ concentrations in a local area, it would be required to include regional emissions and transport. This would imply a significantly larger

⁹⁰⁶ Ibid at 17.

⁹⁰⁷ Ibid.

⁹⁰⁸ Ibid at 21.

study area with the inclusion of a slightly more comprehensive emissions inventory of NO_x and VOCs sources (eg vehicle emissions in gauging). Such a study was outside the scope of this report. Benzene is also a primary pollutant (slightly soluble in water (1.79g/L at 15°C)) that is toxic to aquatic systems, primarily altering redox potentials which in turn limits the biological communities which can function under the altered redox potentials. The toxicity for aquatic organisms is considered to be low to moderate, but this is only likely to be apparent when high concentrations arise from significant spills. Benzene quickly reacts with other chemicals in the air and is thus removed within a few days of release. In soils and water bodies it breaks down more slowly and can pass into groundwater where it can persist for weeks. Benzene does not accumulate in animals or plants and is unlikely to have any environmental effects at a global level...⁹⁰⁹

Based purely on a notice-and-comment type public participation process, outsiders to the process would be unable to review the above (without some assistance) to understand what these paragraphs mean but also to assess what the impact would be on them.⁹¹⁰ For example, what would the impact of benzene / VOCs be on a subsistence farmer within the 50km radius of the operations or a community that relies on the water for washing, cooking and drinking. The information could have been presented in a manner that would have been easier to grasp with the more technical descriptions being made available for more sophisticated participants. In this way, the Final Motivation fails to present information in a manner that is important for the IAP's to understand in order to participate effectively (*Principle 18: The Issue Posts Principle*).

The Final Motivation could have been structured differently so as to create issue posts setting out the key issue headings which would have directed the IAP's to issues which directly impact on them. For example:

- Impacts of the postponement on community health;
- Impacts of the postponement on water resources;
- Impacts of the postponement on farmers in the community;
- SSO's reasons for making the application.

An online mechanism would not have been needed for such an approach. All that is required is for the document which is made available to the public to be structured in a manner that is more focused on communicating information to the IAP's and not only the decision-maker. The Final Motivation may (in its current format) be a suitable submission to the decision-maker but it is not a suitable document for outsiders to comprehend the

⁹⁰⁹ Ibid at 21 - 22.

⁹¹⁰ 6.4.4 Identifying and sharing critical issues and 6.4.5 Selecting the modes of participation.

information and so that they can participate effectively.⁹¹¹ This discrepancy may be mitigated depending on the method in which the public participation process is conducted.

7.5.2.4 Modes of participation and Public Participation Strategy

A public participation process was not presented or agreed upon with the various stakeholders.⁹¹² This is another aspect that is contrary to the CFPP. The public participation process was selected by the EAP. The process included making relevant information available for comment and holding public meetings at which this information was presented to IAP's. 'Thereafter time was allowed for comment and queries'.⁹¹³ The Stakeholder Engagement Report notes that the

'primary objective of the public meetings was to:

- Foster robust engagement and build relationships with Sasol's host communities;
- Share information on Sasol, their activities and Air Quality impacts relating to the pitch tanks, management and commitments.
- Provide an opportunity for the community to raise issues regarding the postponement application process.
- Facilitate comments on the Second Tar Value Chain Phase 2 Tanks Motivation Report and AIR.⁹¹⁴

The comments from the meeting were captured in a Comments and Response Table which was submitted to the authorities for consideration as part of the application.

The problems with the above approach are twofold: firstly, the procedure followed is reminiscent of the notice and comment proceedings that Harter objected to during rulemaking processes in the United States as it enticed parties to take extreme positions, rather than to collaborate to find amicable solutions.⁹¹⁵ Secondly, as the information was technically stated, it would be impossible for less sophisticated participants to participate without assistance (such as moderation). It could be suggested that the public meeting is the EAP's attempt to facilitate discussions, deliberation and problem-solving to find these solutions.⁹¹⁶ This would seem evident from the objectives of the public meetings. However, the structure of the meeting indicates otherwise.

⁹¹¹ 6.4.4 Identifying and sharing critical issues.

⁹¹² 6.4 Designing the Public Participation Strategy.

⁹¹³ Ibid at 5.

⁹¹⁴ Ibid.

⁹¹⁵ 6.4.5 Selecting the modes of participation.

⁹¹⁶ 6.5 Implementing the Public Participation Strategy.

According to the Stakeholder Engagement Report, the public meeting involved the EAP presenting to the attendees. This was followed by an opportunity for the parties to ask questions or make comments. As set out in Chapter 2, when considering *Principle 1: The Educative Effect*, the conclusion reached was that active involvement of participants was far more effective in 'educating' participants than passive learning would be.⁹¹⁷ The Powerpoint presentation attached to the Stakeholder Engagement Report was largely drawn from the Final Motivation and was technically worded and focused.⁹¹⁸ There does not appear to have been any attempt (despite the objectives of the public participation process) to facilitate public participation and for the EAP to assume a role of moderator and encourage more active participation by those present at the meeting. In addition, there did not appear to be any attempts to simplify the information for outsiders.

Following this public meeting, no further attempts were made by the EAP to confirm that all IAP's were satisfied that their own views have been heard.⁹¹⁹ Given that certain IAP's were not present at the meetings and there does not appear to have been any attempt to elicit situated knowledge, it is unlikely that these missing participants would feel that they exercise any control⁹²⁰ over the process or be satisfied if a further postponement were granted. The views of the participants would need to be determined as the above statements are merely speculative, based on their absence from the process. If an assessor had been appointed to monitor the implementation of the public participation process, this information would have been made available and compliance with the CFPP would be evident.

7.6 Conclusion

The CFPP was established as a baseline framework for public participation. This thesis suggests that a public participation process implemented in terms of the CFPP (regardless of the mode of participation) is likely to satisfy the standard of participatory democracy contemplated in the Constitution. It has been emphasised throughout this thesis that it does not matter which mode of participation is implemented (be it online participation or more traditional formats). What matters is that the CFPP must be used to guide the development and implementation of the entire public participation process which includes (but is not limited to) the selection of the mode(s) of participation.

⁹¹⁷ Ibid.

⁹¹⁸ 6.4.4 Identifying and sharing critical issues.

⁹¹⁹ 6.6 Auditing the Public Participation Strategy.

⁹²⁰ *Principle 2: The Principle of Control*.

In this chapter, the public participation process required in terms of the EIA Regulations was analysed against the CFPP to determine whether it meets the standard. In doing this, the EIA Regulations were found to be deficient in a number of respects:

- Firstly, the EIA Regulations do not expressly require that the EAP consider if there are outsiders or missing persons who may contribute situated knowledge and who should be specifically engaged. This contravenes *Principle 5: The Principle of Inclusivity* and *Principle 8: The Identity of the IAP's*;
- Secondly, there is no obligation for the EAP to develop a PPS, setting out the entire public participation process and agree with the IAP's in breach of *Principle 10: The Public Participation Strategy* and does not allow for on-going participation throughout the process (*Principle 15: The Principle of Continuity*);
- Thirdly, the EAP is only obliged to ensure that all relevant information is made available to the IAP's. There is no obligation that this information is provided to IAP's in such a way that they can easily understand the information or, at least, the material issues arising from the information (*Principle 19: The Issue Posts Principle*). This is a barrier to effective participation and prevents the sharing of all forms of knowledge (*Principle 14: The Principle of Integration*); and
- Finally, there is no requirement that the public participation process is audited to ensure that it is effectively achieving the democratic participatory principles.

While the EIA Regulations may not expressly make provision for the above, the language of the EIA Regulations is sufficiently vague that, in spite of, the lack of specific regulation, the EAP may (in practice) implement a public participation process that meets the democratic participatory principles of the CFPP. The two examples reviewed above (which reflect the approach generally adopted in EIA public participation processes) revealed that EAP's complied with the letter of the law when notifying IAP's about the public participation process but did not take specific measures to seek out outsiders or missing persons that could provide situated knowledge (*Principle 5: The Principle of Inclusivity* and *Principle 8: The Identity of the IAP's*).

These notices informed the IAP's about the public participation process, the fact that they could submit comments and that there would be a public meeting. This public

participation process was determined by the EAP and was not negotiated with the IAP's to assess what they believe to be the best method of consultation (*Principle 10: The Public Participation Strategy*).

Notice and comment proceedings followed by a public meeting are common practice in EIA. The EAP's in these instances, however, do not appear to have considered whether there are alternate or better mode(s) of participation that could have been adopted to engage with members of the community (such as online mechanisms) but have, in fact, defaulted to this process. This is in breach of *Principle 13: The Principle of Multiplicity*.

What is more serious is that there appears to have been no attempt to present the information (particularly the technical information) so that it could be easily understood by the IAP's (*Principle 19: The Issue Posts Principle*). In this way, it is extremely likely that less sophisticated IAP's would be able to meaningfully engage in the public participation process. If IAP's cannot meaningfully engage and submit comments, they will not have collaborated in the creation of information (*Principle 1: The Educative Effect*), they will not have been able to influence the ultimate decision (*Principle 2: The Principle of Control*) and are unlikely to be satisfied with the ultimate result of the process (*Principle 3: The Social Licence to Operate*).

Whether these substantive principles were achieved or not can only be surmised as the public participation process was not audited to determine whether they were achieved (*Principle 17: The Principle of Monitoring and Evaluation*). It is thought that had this assessment been done, the public participation process would have been found to be inadequate and would have required amendment to ensure that the substantive principles were achieved. However, further investigation would need to have been conducted to determine this with any certainty as these presumptions are founded on the EAP's failure to give effect to the democratic participatory principles.

These examples highlight that the current manner in which EIA public participation processes are conducted in South Africa fails to meet the requirements of participatory democracy contemplated in the Constitution. However, achieving constitutionally acceptable public participation process does not (in respect of EIA public participation processes, at least) require legislative amendment. All that is required is for EAP's to rely on the CFPP

when exercising their discretion to implement a public participation process in terms of the EIA Regulations.

Chapter 8

Summary, Findings, Conclusions and Recommendations on the Constitutional Framework of Public Participation in South Africa

8.1 Broader and better participation

Social media and online portals ('Web 2.0') which allow for conversational interaction between government and citizens and among citizens has resuscitated the debate about whether the Internet can foster broader and better public participation or not.⁹²¹ Initial attempts at online participation (which merely involved making information available online)⁹²² failed to entice more IAP's to participate or to create better comments. Web 2.0 differs from these initial attempts in that it creates a platform in which participants can not only receive information but also share it, create their own information and interact with other IAP's and authorities.⁹²³ In addition, it has the benefit of allowing persons to participate remotely and in their own time. Therefore, theoretically, Web 2.0 has the potential to facilitate broader and better participation.⁹²⁴

This thesis, however, suggests that the debate around Web 2.0 is a red herring. The real question needing to be considered is not which mode of participation must be implemented but rather, when implementing a public participation process, to ask whether the process gives effect to the requirements of participatory democracy contemplated by the Constitution.

The starting point for such an investigation was to identify the defining factors of participatory democracy as contemplated by the Constitution. This required an analysis of the theories of participatory democracy.⁹²⁵ From these theories, this thesis identifies three principles: *Principle 1: The Educative Effect*, *Principle 2: The Principle of Control* and *Principle 3: The Social Licence to Operate*. These principles are discussed in detail in Chapter 2 and are summarised in the next section. Suffice to state that these principles are referred to (along with *Principle 4: The Principle of Dignity*) as the substantive principles in

⁹²¹ Responsive and Accountable Public Governance 2015 World Public Sector Report *op cit* note 10.

⁹²² Schulman *op cit* note 3 at 137.

⁹²³ Agnihotri *et al op cit* note 7.

⁹²⁴ Responsive and Accountable Public Governance 2015 World Public Sector Report *op cit* note 10.

⁹²⁵ Pateman *op cit* note 22, MacPherson *op cit* note 76 and Barber *op cit* note 76.

that they focus on the IAP's subjective views of the public participation process in which they are involved.

8.2 Substantive Principles

When the South Africa Constitution was enacted, it introduced a unique conception of democracy which included participatory democracy.⁹²⁶ Its express inclusion meant that the drafters of the Constitution intended certain objectives of participatory democracy to be incorporated into the legal system. These objectives are that IAP's actively participate in decisions and processes which affect them by collaborating with other IAP's to develop solutions. In doing this, the gap between the IAPs' personal interests and the common interest will be diminished. This is referred to as *Principle 1: The Educative Effect*.

By actively participating and collaboratively reaching an acceptable outcome, IAP's will exercise a degree of control⁹²⁷ over the public participation process and develop a sense of control over their lives. Determining their own destiny will enhance their sense of freedom (*Principle 2: The Principle of Control*). Furthermore by expressing their opinion in the decision-making processes, the IAP's sense of worth is enhanced as they believe that they are making a difference to the outcome (*Principle 4: The Principle of Dignity*). Where these characteristics exist, IAP's are more likely to accept the final outcome of the process even if it does not accord with their own personal views because they believe that the process was conducted in a fair manner (*Principle 3: The Social Licence to Operate*). These four principles are referred to as the substantive principles.

Whether a public participation process achieves these substantive principles is subjective which means that the IAP's need to be interviewed to confirm whether they feel that the substantive principles were achieved during the public participation process. However, it is suggested that there are certain procedural principles which (if implemented during the public participation process) may improve the likelihood of the substantive principles being achieved. These procedural principles are explored below.

8.3 Procedural principles

The substantive principles were considered in light of public participation processes conducted in South Africa since the introduction of the Constitution. Although it was not

⁹²⁶ Roux *op cit* note 15 at 10-4.

⁹²⁷ As highlighted in this thesis, 'control' cannot be interpreted to mean that the participants have complete decision-making control but rather that they must feel that if they participate, they will have the chance to influence the ultimate decision.

possible to consider all public participatory processes, the law, policy and practice of participation in political parties and voting,⁹²⁸ the creation of legislation,⁹²⁹ local government,⁹³⁰ administrative processes and online public participation processes⁹³¹ has been considered in detail. This evaluation generated a number of additional principles ('the procedural principles') which are relevant to the implementation of constitutionally compliant participatory processes. Unlike the substantive principles which focus on the IAP's subjective mindset, the procedural principles focus on the manner in which the participatory process should be implemented so as to reasonably achieve the substantive principles. These principles include:

- *Principle 5: The Principle of Inclusivity*: this principle requires that proponents should remove all barriers to the public participation process and only exclude IAP's where there is a legitimate government purpose or reason for doing so;
- *Principle 6: Finality in Decision-making*: this principle requires that at some point in the participatory process the proponent may conclude that additional participation may not further promote the substantive principles. In such cases, the proponent may 'downgrade' the level of participation from partnership or delegated power to lesser forms of participation in order to move the public participation process along;
- *Principle 7: The Principle of Deference*: this principle requires that, although the proponent needs to take into consideration the views of the IAP's, he or she does not need to defer to the views of the IAP's in all instances;
- *Principle 8: The Identity of the IAP's*: this principle requires that the proponent identify all IAP's that may be interested in the public participation process, including outsiders to the process (i.e. those parties that are missing from the process or may not ordinarily participate but which may contribute valuable situated knowledge to the decision making process);

⁹²⁸ Section Part B: Participation in democratic South Africa

3.3 Participating through Voting: Political Parties and 3.4 Participating by Voting.

⁹²⁹ Section 3.5 Participating in creating legislation.

⁹³⁰ Section 3.6 Participating in local government.

⁹³¹ Chapter 5

- *Principle 9: The Principle of Flexibility*: this principle requires that the proponent amend the mode(s) of participation in situations where the substantive principles are not being achieved;
- *Principle 10: The Public Participation Strategy*: this principle requires that the proponent develop a strategy for the public participation process from its inception until completion. This strategy must be negotiated and agreed with the IAP's (or in respect of large groups of IAP's, they must be permitted to comment on the draft PPS before it is finalised);
- *Principle 11: The Principle of Context*: this principle requires that the proponent take into consideration the circumstances in which the public participation process will be conducted. For example, implementing an online public participation process would be inappropriate in an area where most the IAP's do not have access to technology;
- *Principle 12: The Principle of Reasonableness*: this principle requires that the proponent implement a process taking into consideration factors such the cost of the process, the time available, the importance of the matter etc.;
- *Principle 13: The Principle of Multiplicity*: this principle encourages the proponent to select more than one mode of participation in order to ensure the substantive principles are achieved in respect of all the IAP's;
- *Principle 14: The Principle of Integration*: this principle recognises that both technical and situated knowledge must be incorporated into the public participation and decision-making processes;
- *Principle 15: The Principle of Continuity*: this principle recognises that public participation is an on-going activity that must continue throughout the lifecycle of the process;
- *Principle 16: The Principle of Efficiency*: this principle requires that the public participation process must be conducted quickly without compromising on the quality of that process;
- *Principle 17: The Principle of Evaluation and Monitoring*: this principle requires that the public participation process must be continually monitored to ensure that the democratic participatory principles are being achieved;
- *Principle 18: The Narrative Principle*: this principle recognises that outsiders do not express themselves in a way that is familiar to the administrators of the community of practice but rather by way of stories and personal experience. Although this may be

untraditional, this form of information includes valuable situated knowledge that impacts on the outcome of the process;

- *Principle 19: The Issue Posts Principle:* this principle requires that the information disclosed to the IAP's is presented in a manner that can be easily understood by the IAP's (particularly outsiders) so that they can meaningfully participate in the public participation process; and
- *Principle 20: The Principle of Moderation:* this principle requires that the proponent moderate the public participation process to direct IAP's to relevant information, initiate debate on critical issues and where necessary intervene where participants move off-point or become aggressive towards one another.

To guide administrators, lawyers, legislatures, government and other parties in developing public participation processes which give effect to the substantive principles, these principles, along with the substantive principles, have been incorporated into the CFPP which, if followed, will ensure that any administrative or policymaking public participation process complies with the conception of participatory democracy required by the Constitution.

8.4 The Constitutional Framework for Public Participation

Based on these principles, this thesis proposes the Constitutional Framework for Public Participation ('CFPP'). It is suggested (although this will need to be the subject of further empirical investigation) that if a proponent implements a public participation process in accordance with the CFPP, the process will give effect to the substantive and participatory principles and thus the conception of participatory democracy contemplated in the Constitution. . The CFPP requires (as a starting point) that the person responsible for implementing the public participation process develop a PPS which includes identifying IAP's, selecting appropriate modes of participation, implementing these modes and monitoring the effects of this participation to ensure that the substantive principles are achieved.

There are various factors which inform the PPS. Before the mode(s) of participation can be selected, the proponent will need to consider the provisions of the empowering legislation, the time available, the costs of implementing the process and the identity of the IAP's taking into consideration the insiders, outsiders, 'missing' persons, excluded persons and the discrete and identifiable groups (*Principle 5: The Principle of Inclusivity* and *Principle 8: The Identity of the IAP's*). Based on these factors the proponent must develop a

PPS setting out the structure of the public participation process. (*Principle 10: The Public Participation Strategy*).

The PPS must use the terminology of 'inform', 'consult' and 'involve' so that the IAP's know and expect the degree of participation expected from them at each phase of the process (*Principle 16: The Principle of Efficiency*). There can be various modes of participation, based on the context (*Principle 11: Principle of Context*). If appropriate online tools can be used (either alone or in conjunction with traditional modes of participation) to engage with IAP's (*Principle 5: Principle of Inclusivity* and *Principle 13: The Principle of Multiplicity*). Electronic consultation is not, however, a quick solution which solves all of the problems that are currently experienced in public participation principles. In fact, using social media and online tools may require additional resources and time. However, in the correct circumstances it can be a useful tool to encourage debate and comments associated with particular issue topics. Before implementing the PPS, it must be agreed with IAP's or (in respect of bigger groups) made available for public comment and input to ensure that the IAP's are satisfied that it will be an effective method of engagement.

The proponent needs to consider these comments and take some of them into consideration. However, the proponent does not need to defer to these comments in all instances (*Principle 7: The Principle of Deference*) and needs to strike a balance between what is practical and feasible (*Principle 12: Principle of Reasonableness*), bearing in mind that if the proponent does not take the IAP's comments into consideration, he or she may be opposed to the process and may not grant the social licence to operate (*Principle 3: The Social Licence to Operate*). The proponent will need to publish the final PPS prior to implementation (*Principle 6: Finality in Decision-making*).

In implementing the PPS, the proponent must present the information in a manner which can easily be understood by the IAP's (such as issue posts⁹³²) and provide them with a way in which they can express their concerns, bearing in mind that outsiders may comment on the information in ways that do not subscribe to the community to practice.⁹³³ Online forms of presenting information and allowing participants to comment can be useful in this context. Information can be simplistically set out with layering operations allowing more

⁹³² *Principle 19: The Issue Posts Principle*.

⁹³³ *Principle 18: The Narrative Principle* and *Principle 14: The Principle of Integration*.

sophisticated users the opportunity to read the underlying, more technical information while not denying the superficial user an understanding of the issues at hand (*Principle 19: The Issue Posts Principles*). Where conflicts arise, the proponent will need to implement problem-solving mechanisms to resolve these conflicts and reach some form of consensus or compromise. In doing so, the proponent will need to act as a moderator to ensure that the views of both parties are properly conveyed and adequate solutions are found (*Principle 20: The Principle of Moderation*).

Whichever modes of participation are adopted must be audited by an independent third party ('the assessor') to confirm that the substantive principles⁹³⁴ are achieved (*Principle 17: The Principle of Evaluation and Monitoring*). To the extent that the assessor is of the view that the principles are not being achieved, the PPS can be modified accordingly (*Principle 9: The Principle of Flexibility*). The assessment needs to be an ongoing activity throughout the life of the public participation process (*Principle 15: The Principle of Continuity*). It needs to determine quickly and easily whether the democratic participatory principles are being achieved and to modify or supplement the PPS if they are not (*Principle 16: The Principle of Efficiency*).

If the PPS is suitably implemented in accordance with the CFPP, the IAP's subjective assessment of the substantive principles should be confirmed and the objectives of the Constitution achieved. The EIA public participation process was examined in accordance with the CFPP (as an example) to determine whether processes conducted in terms of the EIA Regulations give effect to the democratic participatory principles and the conception of participatory democracy required by the Constitution.

8.5 The Constitutional Framework for Public Participation and the Environmental Impact Assessment Public Participation Process

The EIA public participation process set out in the EIA Regulations failed to comply with the CFPP in the following respects:

- There is no specific obligation to seek out missing IAP's who may offer valuable situated knowledge to the decision-making process as required by *Principle 8: The Identity of the IAP's*;

⁹³⁴ *Principle 1: The Educative Effect, Principle 2: The Principle of Control, Principle 3: The Social Licence to Operate and Principle 4: The Dignity Principle.*

- There is no obligation on the proponent to develop and negotiate a PPS with the IAP's that sets out the entire public participation process and informs IAP's as to when they can be involved and the nature and extent of that involvement;⁹³⁵
- While all relevant information must be made available to IAP's, there is no obligation on the proponent to present this information in a way that IAP's (particularly outsiders) can easily understand.⁹³⁶ This is a barrier to participation as it prevents IAP's from being able to raise informed matters during the process⁹³⁷ and
- There is no requirement that the public participation process be audited to ensure that the IAP's are actively engaged in the process and the substantive principles achieved.⁹³⁸

While the EIA Regulations may not expressly make provision for the above, the wording of the EIA Regulations was sufficiently vague that the proponent (EAP) may have given effect to these democratic participatory principles when implementing the public participation process.

Unfortunately, in the two EIA public participation processes examined (which were generally representative of EIA public participation processes), it was found that the above weaknesses in the public participation process were not rectified in practice. Given that these problems with the public participation process are significant, it is unlikely that the substantive participation principles would be achieved, highlighting that public participation processes are not being conducted in a manner required by the Constitution. That being said, the evaluation of the EIA process was conducted strictly on a desktop basis after the public participation process was complete. It is hoped that future empirical investigations will be conducted in which the CFPP is applied to both online and offline public participation processes, and to processes in which cultural practices may suggest the need for a nuanced approach, to assess its effectiveness in achieving public participation processes that are more acceptable to the IAPs.

⁹³⁵ *Principle 10: The Public Participation Strategy.*

⁹³⁶ *Section 19: The Issue Posts Principle.*

⁹³⁷ *Principle 14: The Principle of Integration.*

⁹³⁸ *Principle 17: The Principle of Monitoring and Evaluation.*

8.6 Conclusion

This thesis proposes a universal framework which administrative and policy-making public participation processes should follow to ensure that it meets constitutional standards. As is evident from the two examples cited in the last chapter, the legislation requiring public participation is generally not prescriptive regarding the manner in which it must be conducted. While this may be unfortunate, it is also necessary as the circumstances and the identity of the IAP's will dictate which mode or modes of participation may be appropriate under differing circumstances. This is not something that can be pre-determined by the legislature. However, if laws cannot specify what kind of participation is acceptable, what must legislatures, administrators, lawyers, EAP's do to ensure that the public participation process is constitutional? The CFPP is designed to assist in this process by guiding all parties through a participatory process. It is hoped that by following the CFPP, a more consistent approach to public participation processes will result and, with it, create a series of precedents.

What this thesis also shows is that lawyers, administrators and legislatures must focus on the effects of the implementation of the modes of participation and not the modes themselves. Online participation is not the panacea for the current inadequacies in public participation. It is only a tool used to engage IAP's. Whether it is an effective tool depends on whether it is used in accordance with the CFPP and gives effect to the democratic participatory principles. This, however, will need to be the subject of future research.

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