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# Revitalizing the “liberty of the ancients” through citizen participation in the legislative process

## Thoughts on *Doctors for Life International v. the Speaker of the National Assembly & Others*

[Constitutional Court of South Africa - 2006]

ATHANASIOS EFSTRATIOS PSYGKAS

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## I. Introduction.

IN A FAMOUS 1819 lecture entitled “*De la liberté des anciens comparée à celle des modernes*”<sup>1</sup> Benjamin Constant distinguished between two kinds of liberty: the “liberty of the moderns” and the “liberty of the ancients”. He identified the former with individual autonomy comprising an array of individual rights, such as the right to property, freedom of expression, right to choose one’s profession, religious freedom, etc. The “liberty of the ancients,” on the other hand, consisted, according to Constant, in “exercising collectively, but directly, several parts of the complete sovereignty; in deliberating, in the public square, over war and peace; in forming alliances with foreign governments; in voting laws, in pronouncing judgments”<sup>2</sup>. This liberty made the individual an integral member of the political community, but as Constant noted, “if this was what the ancients called liberty, they admitted as compatible with this collective freedom the complete subjection of the individual to the authority of the community.... No importance was given to individual independence”<sup>3</sup>.

A number of constitutional developments occurred in the years succeeding that lecture at the Athénée royal de Paris. New generations of rights were added to the traditional list of political and individual liberties including, most notably, socio-economic rights<sup>4</sup>. The South African Constitution adopted in 1996<sup>5</sup> was perceived as an archetypical “third-generation” Constitution. Commentators described that Constitution as a societal transformative document that “seeks the transformation of the society through the construction of a multi-cultural social democracy in South Africa”<sup>6</sup>. The Constitutional Court itself underscored early on

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1. CONSTANT: *Political Writings* 309, Biancamaria Fontana ed., 1988.

2. *Id.* at 311.

3. *Id.*

4. See CASS R. SUNSTEIN, *Designing Democracy: What Constitutions Do*, 221, 2001.

5. An interim Constitution had been ratified in 1993.

6. DENNIS M. DAVIS, *Transformation and the Democratic Case for Judicial Review: The*

that this foundational document marked a decisive break from the disgraceful aspects of the past and aspired to commit the nation to a brighter future<sup>7</sup>.

While these developments more clearly suggest an enrichment of the “liberty of the moderns,” this Comment seeks to read the case of *Doctors for Life International v. the Speaker of the National Assembly & Others* (“*Doctors for Life*”) as rediscovering and reinvigorating the “liberty of the ancients”. While Constant pointed out the inadequacy of the “liberty of the ancients” due to the danger of individuals being fully subjected to the unbridled collective authority, today’s safeguards of individual autonomy rein in or, at least, aspire to keep in check potential excesses of collective power. The additional challenge with which we are faced today is that, in focusing on the “liberty of the moderns,” we do not lose sight of the “liberty of the ancients” in the sense of “active and constant participation in collective power”. In his book *Active Liberty*, U.S. Supreme Court Justice Stephen Breyer – while “conscious of the importance of modern liberty” – called increased attention to “the combination’s other half”<sup>8</sup>. *Doctors for Life* – I will argue – similarly invites us to reconsider the content of the “liberty of the ancients” by recognizing the importance of and enforcing a regime of citizen participation in the legislative process.

This essay proceeds as follows: Part II provides some background to the case and highlights certain key arguments. Since the judgment is 198 pages long, an excerpt immediately follows at the end of this Comment. Part III sets forth the

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*South African Experience*, 5 Loy. U. Chi. Int'l L. Rev. 45 (2007).

7. See, e.g., *S v. T Makwanyane & M Mchunu*, 1995 (3) SA 391 (S. Afr.) at para. 262 (Mahomed J, concurring) (noting that the South African Constitution “retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos, expressly articulated in the Constitution.... What the Constitution expressly aspires to do is to *provide a transition from these grossly unacceptable features of the past to a conspicuously contrasting 'future' founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.*”) (emphasis added).

8. See STEPHEN BREYER, *Active Liberty: Interpreting our Democratic Constitution*, 3-5, 2005. See, also, PIERRE ROSANVALLON, *Book Review: Active Liberty: Interpreting Our Democratic Constitution*, 5 Int'l J. Const. L., 564, 567 (2007) (noting that “modern freedom is of a twofold nature. It is, at once, a vindication of individual autonomy ... and an acceptance of the freedom to participate in collective sovereignty.... By recognizing this essential duality, Breyer reveals, perhaps, the greatest argument in favor of giving greater breadth to the active dimension of liberty in the modern era, thus balancing freedom's dual aspects”).

idea of a fourth-generation right, the right to citizen participation in the legislative process, as a prong of the “revitalized liberty of the ancients”. Part IV focuses on a crucial novelty of *Doctors for Life*, namely the judicial enforceability of the participatory provisions. Part V presents some concluding observations.

## II. *Doctors for Life*: An Overview.

### A. *Background of the case and the constitutional complaint.*

According to section 42(1) of the South African Constitution, the legislative authority is vested in Parliament, which consists of two Houses: the National Assembly and the National Council of Provinces (“NCOP”). These democratic institutions represent different interests in the lawmaking process. The National Assembly represents “the people ... to ensure government by the people” (section 42(3)). The NCOP “represents the provinces to ensure that provincial interests are taken into account in the national sphere of government. It does this mainly by participation in the national legislative process and by providing a national forum for public consideration of issues affecting the provinces”. The NCOP performs functions similar to the National Assembly but from the distinct vantage point of the provinces<sup>9</sup>. Both bodies must therefore act together in making law to ensure that the interests they represent are taken into consideration.

The procedure for bills that affect the provinces gives more weight to the position of the NCOP than does the constitutional procedure for bills that do not affect the provinces. After a bill has been passed by the National Assembly it is referred to the NCOP, which can pass the bill, pass it subject to amendment or reject it. If the NCOP and the National Assembly cannot agree on a bill, it is sent to a mediation committee. If the two chambers cannot reach an agreement following mediation, the original bill lapses but may still become law if it is passed again but now by two-thirds of the members of the National Assembly. In this way, although the NCOP does not wield a final veto, it can delay their passage and force a two-thirds majority in the National Assembly.

The applicant in this case, *Doctors for Life International* (“DFL”), challenged the constitutionality of four pieces of health legislation (“health bills”). These bills were: the Sterilisation Amendment Bill; the Traditional Health Practitioners Bill; the Choice on Termination of Pregnancy Amendment Bill (“CTOP Amendment Act”); and the Dental Technicians Amendment Bill. The CTOP

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9. As the Court explains, the NCOP shares many of its structural characteristics with the German *Bundesrat*, upon which it was modeled (*Doctors for Life*, at para. 80).

Amendment Act made provision for registered nurses, other than midwives, to perform termination of pregnancies at certain public and private facilities, and raised questions of the most intense concern for the petitioners. The applicant’s complaint alleged that the NCOP, in passing these bills, failed to invite written submissions and conduct public hearings as required by its duty to facilitate public involvement in its legislative processes and those of its committees. Hence, 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 provincial legislatures.

*B. The holding of the Court.*

The Court had to consider four questions: first, whether the Constitutional Court is the only court which can hear a matter of this nature; second, whether it is competent for the Court to grant declaratory relief in respect of the proceedings of Parliament; third, the nature and scope of the constitutional obligation of a legislative organ of the state to facilitate public involvement in the lawmaking process; and fourth, whether on the facts of the case the NCOP complied with that obligation when passing the health legislation under challenge, and, if it did not, the consequences of its failure.

The Constitutional Court held that, under Section 167(4)(e) of the Constitution<sup>10</sup>, it is the only court capable of hearing a challenge of this nature because the challenge involved a decision on whether Parliament had failed to fulfill a constitutional obligation. As to the second question, the Court concluded that the challenge to the Sterilisation Amendment Bill must be dismissed while it was under consideration by the President, but that it had the jurisdiction to consider the constitutional challenge to the other three health bills. With respect to the last two questions, the majority of the Court found that Parliament had failed to comply with its constitutional obligation to facilitate public involvement before passing the CTOP Amendment Act and the Traditional Health Practitioners Act as required by section 72(1)(a) of the Constitution, and declared the two Acts invalid. This court order was suspended for a period of 18 months to enable Parliament to re-enact the statutes in a manner consistent with the Constitution. This was an 8-3

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10. Which provides that “[o]nly the Constitutional Court may ... e. decide that Parliament or the President has failed to fulfil a constitutional obligation”.

decision: Justice *Ngcobo* wrote the majority opinion which was concurred in by *Langa CJ*, *Moseneke DCJ*, *Madala J*, *Mokgoro J*, *Nkabinde J* and *O'Regan J*. *Sachs J* wrote a separate concurring opinion supporting the judgment by *Ngcobo J* and adding observations on the special meaning that participatory democracy has come to assume in South Africa. *Yacoob J* wrote the dissenting opinion which was concurred in by *Skweyiya J*, and *van der Westhuizen J* wrote a judgment explaining why he agreed with the dissent of *Yacoob J*.

### *C. The rationale of the Court.*

It was argued in the literature that the seminal value of this case lies in the three bases of the court's approach to the role of legislatures in promoting participatory processes: international human rights law, a unique and specific mandatory constitutional duty, and a contextual and historical approach to public participation<sup>11</sup>.

The Court examines the right to political participation as a fundamental human right in international and foreign law. In this context, it makes reference to the International Covenant on Civil and Political Rights ("ICCPR"), the African [Banjul] Charter on Human and Peoples' Rights ("African Charter"), the American Convention on Human Rights, the Harare Commonwealth Declaration, and the Inter-American Democratic Charter. The majority opinion finds that in most of these international and regional human rights instruments, the right consists of at least two elements: a general right to take part in the conduct of public affairs and a more specific right to vote and/or to be elected. Similarly, Justice *Ngcobo* writes, a growing number of national Constitutions, in particular those adopted since the entry into force of the ICCPR, expressly embrace the principle of participatory democracy. The examples he mentions are those of Tanzania, Portugal, Colombia and Belarus.

However, as we already saw, the Court is faced with the duty to interpret a specific constitutional provision, Section 72(1)(a), mandating that the NCOP facilitate public involvement in the legislative process. To understand this mandate, the majority opinion offers some context on the history of public participation and the nature of the South African constitutional democracy. It explains that the idea of allowing the public to participate in the conduct of public affairs is not a new concept, as reflected in the traditional ideas of *imbizo/lekgotla/bosberaad*. This

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11. KAREN SYMA CZAPANSKIY / RASHIDA MANJOO, *The Right of Public Participation in the Law-Making Process and the Role of [the] Legislature in the Promotion of This Right*, 19 *Duke J.Comp. & Int'l L.*, 1, 3 (2008).

kind of participatory consultation process was, and still is, used within South African communities as a forum to discuss issues affecting the community and is both a practical and symbolic part of the democratic processes. It is a form of participatory democracy. The understanding of the nature of the country’s constitutional democracy, notes the majority, should also be grounded in the historical context of apartheid, a system that excluded the majority of the people from the lawmaking process.

Justice *Ngcobo* then goes on to suggest that in the overall scheme of the Constitution, the representative and participatory elements of the South African democracy should not be seen as being in tension with each other. Rather, the constitutional framework requires the achievement of a balanced relationship between these elements. Section 72(1)(a), like section 59(1)(a) and section 118(1)(a), addresses the vital relationship between representative and participatory elements, which lies at the heart of the legislative function. It imposes a special duty on the legislature and pre-supposes that the legislature will have considerable discretion in determining how best to achieve this balanced relationship. The ultimate question for the Court then is whether there has been the degree of public involvement that is required by the Constitution. The test is whether the legislature acted reasonably in carrying out its duty to facilitate public involvement in its processes. The following factors could be taken into account as especially relevant in determining reasonableness: (i) the nature of the legislation concerned; (ii) the importance of the legislation; (iii) the intensity of its impact on the public. Other relevant factors include practicalities such as time and expense, which relate to the efficiency of the law-making process. What is ultimately important to the Court is that the legislature has taken steps to afford the public a reasonable opportunity to participate effectively in the lawmaking process. And its conclusion is that the legislature did not afford citizens such an opportunity in passing two of the health bills.

### **III. A fourth-generation right to participation: Participation in policymaking within the legislature.**

Schematically, we could roughly distinguish three types of “participation rights” that citizens can exercise vis-à-vis the administration or public authorities more generally. This idea builds on Francesca Bignami’s outline of three generations of participation rights in the European Union<sup>12</sup>. Section A presents these

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12. See FRANCESCA BIGNAMI, *Three Generations of Participation Rights Before the European Commission*, 68 *Law & Contemp. Probs.* 61 (2004).



first three generations and suggests that there has been increasing interest recently – and rightly so – in the third generation of participatory rights: the right to participate in administrative policymaking. However, *Doctors for Life* might indicate the emergence of a fourth generation of participation rights. This new generation of rights pertains to parliamentary lawmaking and more interestingly or surprisingly goes back to and revitalizes the “liberty of the ancients” (Section B).

A. *The first three generations of participation rights.*

1. *The first generation: Right of defense.*

The first generation of participation rights essentially consists in a “right of defense”: that is, an individual or a firm has the right to be heard before adverse administrative action is taken against it. The idea here is that citizens participate in the formation of acts that adversely, but individually, affect them. The value served is fairness since this process is a safeguard against arbitrariness: when the administration is planning on taking action of direct and individual concern to a citizen (e.g., a sanction against them), that citizen should be entitled to take notice and make their case before the administration. In a similar vein, certain legal orders provide for mechanisms to review within the administrative apparatus administrative acts after their adoption. For instance, in the French system, citizens may, under certain conditions, ask the administrative agency who issued an act to review its decision (*recours gracieux*) or resort to a hierarchically superior body (*recours hiérarchique*). What distinguishes the first generation of participation rights from the third and the fourth is that these rights only apply to individual measures with a direct and personal link to a specific person. They do not apply to policymaking – either by an administrative agency or by the Parliament – that affects the population more generally<sup>13</sup>.

2. *The second generation: transparency.*

This is the right of the public to have access to information regarding the

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13. The European Court of Justice highlighted this distinction in the case *Atlanta AG v. Council & Commission*, Court of Justice of the European Communities Case C-104/97 P, Judgment of 14 October 1999. The Court held that no right to be heard prior to the adoption of a legislative act (which in this case involved a choice of economic policy) can be deduced from the provision of then Article 173(4) of the Treaty. This provision stipulated that any natural or legal person may institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former.

policymaking processes and outcomes. It entails the possibility to be physically present at the decisionmaking public bodies, e.g., the Parliament, or receive information about their operations through the press. One of the most important instantiations of this right is the individual right of access to documents<sup>14</sup>. Although the right to transparency is not in itself a right to participation in policymaking, it is its necessary precondition laying the ground for the emergence of the third-generation right of civil society participation in administrative rulemaking.

In the last two decades there has been what was described as a "global explosion" of freedom of information laws: while twenty-five years ago only ten nations had laws that specifically guaranteed the rights of citizens to access government information, by October 2005, a total of 66 countries had passed such laws<sup>15</sup>. Different agencies, such as the *Commission d'accès aux documents administratifs* in France, the European Ombudsman in the European Union and the Federal Institute for Access to Information in Mexico<sup>16</sup> (IFAI in Spanish), have taken on the role of promoting and guaranteeing the right to transparency in various jurisdictions.

The South African Constitution is illustrative of the connection between the second-generation right to transparency and what we call the fourth-generation right to participate in the legislative process. Sections 72(1)(b) and 72(2), which immediately follow the key provision of section 72(1)(a) about public involvement in the legislative process, read: "[The National Council of Provinces must] b. conduct its business in an open manner, and hold its sittings, and those of its committees, in public, but reasonable measures may be taken -

i. to regulate public access, including access of the media, to the Council and its committees; and

ii. to provide for the searching of any person and, where appropriate, the refusal of entry to, or the removal of, any person.

2. The National Council of Provinces may not exclude the public, including the media, from a sitting of a committee unless it is reasonable and justifiable to do so in an open and democratic society".

The Constitutional Court itself acknowledged in *Doctors for Life* that "pub-

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14. FRANCESCA BIGNAMI, *supra* note 12, at 68.

15. JOHN M. ACKERMAN / IRMA E. SANDOVAL-BALLESTEROS, *The Global Explosion of Freedom of Information Laws*, 58 Admin. L. Rev. 85, 85-86 (2006).

16. Which, in fact, stands out on the global stage as a particularly powerful oversight agency (see JOHN M. ACKERMAN, *Mexico's Freedom of Information Law in International Perspective*, in *Mexico's Right-to-Know Reforms: Civil Society Perspectives* 314, 314-317, Jonathan Fox ed., 2007).

lic involvement in the legislative process requires access to information”. Furthermore, it referred to the Freedom of Information and Protection of Privacy Act of 1993 in Nova Scotia, Canada, which recognized that access to government information may be necessary “to facilitate informed public participation in policy formulation”<sup>17</sup>. Although the Court does not refer to the South African access to information framework, it is worth noting that the right of access to information is recognized in Section 32 of the Constitution<sup>18</sup> and the Promotion of Access to Information Act 2 of 2000, the constitutionally mandated legislation to give effect to the right.

3. *The third generation: The right to civil society participation in administrative policymaking.*

The first two generations of participatory rights seemed to exclude from their ambit a significant piece of modern administrative action: rulemaking. The first-generation right of defense accommodated participation but only in the formulation of individual measures. On the other hand, the second-generation right to transparency promoted access to public policymaking but was a more passive form of participation since it did not allow in itself for the exercise of direct citizen influence on policymaking. The realization of this gap becomes more salient once we take into account an ongoing development: the rise of the administrative state<sup>19</sup>. In the modern administrative/regulatory state the quality of the democratic process should, therefore, also be judged against the criterion of the democratic quality of the administrative rulemaking process, since rules produced at the ad-

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17. Doctors for Life, at para. 131 n. 30.

18. Section 32 (“Access to information”):

1. Everyone has the right of access to -

a. any information held by the state; and

b. any information that is held by another person and that is required for the exercise or protection of any rights.

2. National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.

19. Almost sixty years ago, Justice *Jackson* characterized the rise of the administrative state as “probably the most significant legal trend of the last century” (*Federal Trade Comm'n v. Ruberoid Co.*, 343 U.S. 470, 487 (1952) (Jackson, J., dissenting)). The phrase “rise of the administrative state” can be found over 500 times in the literature (JONATHAN R. SIEGEL, *Law and Longitude*, 84 Tul. L. Rev. 1, 57 n. 285). For the rise of the administrative state in Europe, see GIANDOMENICO MAJONE, *The Rise of Statutory Regulation in Europe*, in *Regulating Europe* 47, Giandomenico Majone ed., 1996.

ministrative level are increasingly important, both in terms of their volume and their scope<sup>20</sup>.

The traditional model of administrative law, premised upon an idealized perception of representative democracy, would conceive of the administrative agency as a mere “transmission belt” for implementing specific legislative directions in particular cases<sup>21</sup>. The “transmission belt” theory fails both empirically and normatively: empirically, because “broad legislative directives will rarely dispose of particular cases once the relevant facts have been accurately ascertained. More frequently, the application of legislative directives requires the agency to reweigh and reconcile the often nebulous or conflicting policies behind the directives in the context of a particular factual situation with a particular constellation of affected interests”<sup>22</sup>. Normatively, because “[a]lthough democratic legislation can provide guiding principles, parliaments have neither the time nor the expertise to sift the changing scientific data in search of responsible regulatory solutions”<sup>23</sup>; therefore, we would want (and need) supplementary administrative policymaking. Furthermore, if the transmission belt theory were true, this would mean that what would also be “transmitted” into administrative action would be the legitimacy inefficiencies of parliamentary institutions identified above. Last, even if the legislature exercises certain forms of oversight by means of parliamentary control (for example, hearings, commissions of inquiry) and its budgetary powers, this would be far from ensuring the “transmission belt” ideal<sup>24</sup>.

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20. See SUSAN ROSE-ACKERMAN, *American Administrative Law Under Siege: Is Germany a Model?*, 107 Harv. L. Rev. 1279, 1295-1296 (1994). See, also, CORNELIUS M. KERWIN, *Rulemaking. How Government Agencies Write Law and Make Policy*, 13-20, 3<sup>rd</sup> ed., 2003 (compiling data to document the “formidable volume” of rules. For instance, the average number of pages in the Code of Federal Regulations during the Ford, Carter, Reagan, Bush, and Clinton administrations was 71.982, 94.777, 109.599, 125.664, and 134.173 respectively).

21. See A.A. BERLE, JR., *The Expansion of American Administrative Law*, 30 Harv. L. Rev. 430, 431 (1917) (noting that “administrative law is the law applicable to the transmission of the will of the state, from its source to the point of its application”).

22. RICHARD B. STEWART, *The Reformation of American Administrative Law*, 88 Harv. L. Rev. 1669, 1684 (1975). See, also, JERRY L. MASHAW, *Due Process in the Administrative State* 22 (1985) (noting that congressional statutes themselves require administrative agencies to make trade-offs between, for example, the need for public health or safety and the need for employment, product diversity, and a vibrant economy).

23. BRUCE ACKERMAN, *The New Separation of Powers*, 113 Harv. L. Rev. 633, 694 (2000) (noting as an example that “when parliaments have tried to make specific environmental decisions, the results have sometimes been egregiously counterproductive”).

24. See SUSAN ROSE-ACKERMAN, *Regulation and Public Law in Comparative Perspec-*

A similar criticism would apply to a closely related construction which seems to be still influential in European parliamentary systems. This is the “chain of legitimacy” idea. According to this view, administrative action is legitimate not only when (or because) it enacts specific legislative mandates, but because administrative institutions themselves draw their legitimacy from the public through this chain reaching down to the people. The picture is this: people elect their parliamentarians that elect the Prime Minister that selects her cabinet that, in turn, appoints agency officials. This description should suffice to suggest its deficiencies: this chain of legitimacy seems to be too long, thus increasing the risk of an individual link breaking loose – in addition to the legitimacy lacunae associated with each individual stage. The picture becomes even more complicated if we take into account that many of these agencies are designed as independent authorities, thus challenging the very formal existence of this “chain of legitimacy” in the first place.

This is where the third-generation participation rights come in. If the policymaking work that administrative agencies carry out is indeed important and elections at periodic intervals have limits in their legitimizing force, we are in need of an additional legitimating mechanism. The direct involvement of the public in the administrative policymaking process could provide such a mechanism. The U.S. Administrative Procedure Act (A.P.A.), which was adopted in 1946, provides such a model especially with respect to informal rulemaking. Section 553 of the A.P.A. stipulates that, when making rules or regulations having binding effect on private parties, the agency must provide notice of its proposal, an opportunity for affected parties to comment, and “a concise general statement” of the basis and purpose of the rules<sup>25</sup>. Furthermore, the A.P.A. empowers a reviewing court to hold unlawful and set aside agency action, findings, and conclusions found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”<sup>26</sup>. Variations of the A.P.A. notice-and-comment model have spread into various jurisdictions, so far as Taiwan or Argentina. Recent trends at the EU administration level indicate that the EU – in particular, the European Commission – might also be moving toward recognizing a right of civil society participation in European governance. This was quite clearly indicated in the

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*tive*, 60 U. Toronto L.J. 519, 526 (“just as the legislature does not have the time, expertise, or foresight to write detailed statutes *ex ante*, so, too, it lacks the ability to provide comprehensive oversight *ex post*”).

25. 5 U.S.C. § 503 (b)-(c).

26. 5 U.S.C. § 706(2)(A).

2001 White Paper on Governance<sup>27</sup>, in which participation features prominently as one of the principles underpinning good governance in the Union. The Commission stresses that “the quality, relevance and effectiveness of EU policies depend on ensuring wide participation throughout the policy chain – from conception to implementation. Improved participation is likely to create more confidence in the end result and in the Institutions which deliver policies. Participation crucially depends on central governments following an inclusive approach when developing and implementing EU policies”. In 2002, the Commission issued the “Communication on Consultation”<sup>28</sup> which reiterates its commitment to encouraging “more involvement of interested parties through a more transparent consultation process” and provides general principles and standards for consultation that help the Commission to rationalize its consultation procedures. This emphasis on stakeholder participation is a recurring theme in Commission policy documents<sup>29</sup> and relevant provisions are included in the Treaty of Lisbon<sup>30</sup>. However, *Doctors for Life* moves beyond that in bringing back direct citizen input into the legislative process itself. Therefore, the following section will argue that this introduces a fourth generation of participation rights.

*B. The fourth generation of participation rights: Participation in legislative policy-making and the “liberty of the ancients”.*

It has been argued in the literature that the structure and decisionmaking

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27. COMMISSION OF THE EUROPEAN COMMUNITIES, *European Governance: A White Paper*, COM (2001) 428 final, Brussels, 25.7.2001.

28. COMMISSION OF THE EUROPEAN COMMUNITIES, *Communication from the Commission: Towards a reinforced culture of consultation and dialogue - General principles and minimum standards for consultation of interested parties by the Commission*, COM (2002) 704 final Brussels, 11.12.2002.

29. A relatively recent one being the European Commission’s Third strategic review of Better Regulation in the European Union, Brussels, 28.1.2009, COM(2009) 15 final, p. 7.

30. According to Article 11 of the consolidated versions of the Treaty on European Union and of the Treaty on the Functioning of the European Union,

“1. The institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action.

2. The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society.

3. The European Commission shall carry out broad consultations with parties concerned in order to ensure that the Union’s actions are coherent and transparent”.

processes of the U.S. Congress are conducive neither to participation from the public nor to deliberation. Although legislative hearings – when they occur – nominally allow various interest groups to present and explain their positions, Congress, as a body, does not spend much time mulling over the issues and arguments raised. Legislative committees control, in essence, the legislative process. The members of these committees engage in agenda control, vote trading, and log-rolling in order to obtain votes for the regulatory legislation that they support<sup>31</sup>. The legislatures of other countries are not immune from such criticism. In fact, I would argue that this reflects a broader pattern of what could be called a “legislative democratic deficit” inherent in modern democratic systems, whereby easy associations between legislative performance and democratic preferences are viewed with skepticism<sup>32</sup>.

In view of this “legislative democratic deficit,” a reading of the Court’s statement in *Doctors for Life* that the South African constitutional democracy combines representative and participatory elements would be that the latter complement the former. Or even that these participatory elements remedy potential deficiencies of the representative system. The Court accepts the idea of complementarity: “In the overall scheme of our Constitution, the representative and participatory elements of our democracy should not be seen as being in tension with each other. They must be seen as mutually supportive. General elections, the foundation of representative democracy, would be meaningless without massive participation by the voters. The participation by the public on a continuous basis provides vitality to the functioning of representative democracy”<sup>33</sup>. However, this passage is less explicit regarding the idea of remedying representative deficiencies. A related passage from Justice *Sachs*’ concurring opinion is also telling: “This constitutional matrix makes it clear that although regular elections and a multi-party system of democratic government are fundamental to our constitutional democracy, they are not exhaustive of it. Their constitutional objective is explicitly declared at a foundational level to be to ensure accountability, responsiveness and openness. The express articulation of this triad of principles would

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31. For these arguments, see MARK SEIDENFELD, *A Civic Republican Justification for the Bureaucratic State*, 105 Harv. L. Rev. 1511, 1544-45 (1992).

32. See SUSAN ROSE-ACKERMAN, *Rethinking the Progressive Agenda. The Reform of the American Regulatory State*, 34-38 (1992). See, also, YVES MÉNY / YVES SUREL, *The Constitutive Ambiguity of Populism*, in *Democracies and the Populist Challenge* 1, 7-11, YVES MÉNY & YVES SUREL (eds.), 2002.

33. *Doctors for Life*, at para. 115.

be redundant if it was simply to be subsumed into notions of electoral democracy. Clearly it is intended to add something fundamental to such notions”<sup>34</sup>.

When it comes to the specifics of the duty to facilitate public involvement in the context of this representative/participatory democracy, the majority explains that “Parliament and the provincial legislatures have broad discretion to determine how best to fulfil their constitutional obligation to facilitate public involvement in a given case, so long as they act reasonably. Undoubtedly, this obligation may be fulfilled in different ways and is open to innovation on the part of the legislatures. In the end, however, the duty to facilitate public involvement will often require Parliament and the provincial legislatures to provide citizens with a meaningful opportunity to be heard in the making of the laws that will govern them. Our Constitution demands no less”<sup>35</sup>.

This is one of the novelties of *Doctors for Life*: Traditionally, parliamentary policymaking was (and still is) perceived as the hallmark of representative democracy. And it was after the emergence of the third-generation participation rights that the idea of direct public input came to the fore. But then the focus of bringing the people into the policymaking process was on administrative policymaking. This was understandable from a practical point of view as well, given that agencies have fewer members than legislatures do and they regulate a narrower set of issues; hence, administrative agencies were probably a more effective locus for direct citizen participation. In other words, the argument would be: since nowadays much of policymaking occurs outside the legislature, and if I was convincing that the “transmission belt” and “chain of legitimacy” theories do not operate well once we move into the domain of administrative policymaking, then civil society participation in this type of policymaking not only makes sense but is also a desirable policy. However, *Doctors for Life* goes beyond that, for it brings this process of direct public input back into the legislative realm.

Therefore, in an interesting twist, by promoting participatory rights in *legislative* policymaking, *Doctors for Life* renders citizen participation in *administrative* policymaking an older-generation right, even while other legal orders are currently still moving toward adopting such participatory processes in the regulatory realm. Nevertheless, even as a fourth-generation participation right, I would argue that the right to participate in the legislative process is not all that novel. The rationale underlying civil society participation in both legislative and administrative policymaking is essentially the same. That is to say, representative democracy and

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34. *Doctors for Life*, at para. 228.

35. *Doctors for Life*, at para. 145



periodic elections have – as I already argued – their limits as to how much legitimacy they can confer upon an ever expanding public policymaking whether it is produced in the legislature or in administrative agencies. The difference is in the number of links between the citizenry and the policymaking body in the context of the “chain of legitimacy” picture discussed above. In legislative policymaking, the first and only link is between the people and the representative body, whereas in administrative policymaking, the intervening steps are more in that administrative agencies produce policy subsequent to the adoption of a legislative framework. However, the shared feature in both cases is that exclusive reliance on elections brings out the weakness of the first link, i.e., the one between the people and elected representatives. One could further argue that precisely because legislatures discuss the general framework in which value judgments are more often implicated, direct public input would be especially relevant at this stage.

The second reason that this fourth-generation right is not as novel as one would expect is that, as suggested earlier and in the title of this essay, it revitalizes the “liberty of the ancients”. The “liberty of the ancients” was not just about selecting public officials but, in fact, more about “active and constant participation in collective power,” in other words, about citizens being directly involved in decisionmaking that affected the community. In recent years, it seemed as if the former prong of the “liberty of the ancients” had somewhat overshadowed the latter. The emphasis – especially in countries in transition – was on ensuring free, fair, and competitive elections, broad suffrage and a multi-party system that would allow for alternations in power. This is the reasonable and necessary first step in a reform strategy, but it does not conclude the process. What is needed is what was termed as transition “from elections to democracy”<sup>36</sup>. *Doctors for Life* reminds us of this broader scope of the “liberty of the ancients” in allowing the citizenry to have a say at step one, when policy is adopted in the quintessential institution of representative democracy, the Parliament. As Justice *Sachs* wrote in his concurring opinion:

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 the right to vote in periodical

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36. See SUSAN ROSE-ACKERMAN, *From Elections to Democracy: Building Accountable Government in Hungary and Poland*, 2005, (arguing that full democracy cannot be attained unless the policymaking process is accountable to citizens through transparent procedures that seek to incorporate public input).

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 sidelines 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 processes of law-making. Elections are of 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 ongoing legislative and other activities of government. Thus it would be a travesty of our Constitution to treat democracy as going into a deep sleep after elections, only to be kissed back to short spells of life every five years<sup>37</sup>.

This section tried to situate the novelty of *Doctors for Life* within the evolution of participatory rights while also putting the degree of this “novelty” into perspective. A right that revitalizes the “liberty of the ancients” definitionally cannot be all that novel. This is not to say that this fourth-generation right comes without challenges of its own. The last two parts of this article will touch on these challenges.

#### **IV. Judicial enforcement of the fourth-generation participation right.**

##### *A. The novelty of Doctors for Life: A judicially enforceable constitutional mandate for legislative participatory processes.*

As the Court notes, in a number of jurisdictions, legislatures have increasingly held public hearings and consultations with civil society organizations and citizens in order to facilitate participation in their law-making processes<sup>38</sup>. However, a major distinguishing factor is that the South African Constitutional Court opted for ensuring that participatory democracy functions as an immediately enforceable feature of the legislative process<sup>39</sup>. The majority of the Court characterized the obligation to facilitate public involvement as a requirement of the lawmaking pro-

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37. *Doctors for Life*, at para. 230.

38. *Doctors for Life*, at para. 143 (especially n.152); see also para. 230 n. 6.

39. See *Doctors for Life*, at para. 231 (*Sachs J*, concurring): “Although in other countries nods in the direction of participatory democracy may serve as hallmarks of good government in a political sense, in our country active and ongoing public involvement is a requirement of constitutional government in a legal sense. It is not just a matter of legislative etiquette or good governmental manners. It is one of constitutional obligation”.

cess and stressed that the Court not only has a right but also has a duty to ensure that the lawmaking process prescribed by the Constitution is observed. And if the conditions for law-making processes have not been complied with, it has the duty to say so and declare the resulting statute invalid. On that basis, it declared two of the health bills unconstitutional.

The question of whether the Court could impose obligations of consultation upon the legislature divided the members of the Court. And rightly so. Judicial review is the key feature that, in essence, determines the difference between a programmatic constitutional provision and an enforceable mandate. The U.S. experience would be relevant in this respect: as we already mentioned, the U.S. A.P.A. introducing rulemaking procedures was passed in 1946; however, it was not until a few decades later that U.S. courts beefed up those provisions and imposed more and more obligations on U.S. agencies with respect to participatory processes. The level of robustness of judicial review that the Court put forth in *Doctors for Life* warrants closer examination. It was argued in the literature that “the court effectively concluded that the right of public participation in the law-making process weighs more heavily in the South African democracy than the need for the court to defer to a democratically elected parliament on such issues”<sup>40</sup>. It is true that the Court struck down two statutes on the basis of the NCOP’s failure to comply with the prescribed legislative process and that this would characteristically invoke the “counter-majoritarian difficulty”<sup>41</sup>. However, the passage just quoted needs qualification as the Court tried to take steps in a more minimalist direction as well. The following section takes on these questions.

*B. Limits on and self-restraint from the judiciary in enforcing legislative participatory processes.*

In order to appreciate the scope of the Court’s intervention in *Doctors for Life*, it would be useful to invoke the idea of judicial review involving a “spectrum of deference” to the political branches<sup>42</sup>. In this scheme, the political question doctrine occupies the one extreme end, that is to say, courts abstain altogether from reviewing certain decisions of the political branches (“political questions”).

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40. REYNAUD N. DANIELS / JASON BRICKHILL, *The Counter-Majoritarian Difficulty and the South African Constitutional Court*, 25 Penn St. Int’l L. Rev. 371, 396-397 (2006).

41. As the term was famously coined, in ALEXANDER BICKEL, *The Least Dangerous Branch. The Supreme Court at the Bar of Politics*, 2<sup>nd</sup> ed., 1986.

42. See RACHEL E. BARKOW, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 Colum. L. Rev. 237, 250 (2002).

Along the spectrum are other issues on which the political branches enjoy considerable, but not absolute, deference. Finally, at the other end are the questions on which the Court alone provides interpretation almost without giving any deference to the other branches.

First, it might surprise some readers that the South African Constitutional Court went so far as to examine the adequacy of the legislative process as carried out by the NCOP. To them, this would be a textbook example of “*interna corporis*,” internal procedures of the legislative body that would qualify as non-reviewable “political questions”. However, what in certain other legal orders would be a political question outside the purview of the judiciary is justiciable in South Africa given a specific textual hook in the Constitution: As already noted, Section 167(4) confers exclusive jurisdiction on the Constitutional Court in a number of crucial political areas, including the question of whether Parliament has failed to fulfill a constitutional obligation (subsection (e))<sup>43</sup>.

This logically prior issue resolved, the question now pertains to the appropriate degree of deference the Court should give to the legislature’s decision as to how to discharge the duty to facilitate public involvement under Section 72(1)(a). I would argue that the degree of deference hinged on two competing approaches to Section 72(1)(a) although which one prevailed is not as clear. The first approach would view Section 72(1)(a) as part of the structural Constitution regulating how political bodies conduct their business. The second approach would view this Section as guaranteeing a fundamental right. The “structural” view would find textual and contextual support given that Section 72(1)(a) is part of Chapter 4 of the South African Constitution on Parliament and not of Chapter 2 (“Bill of Rights”). The Court was aware of this when it acknowledged that “[w]e are not, of course, in this case directly concerned with the provisions of the Bill of Rights but with section 72 of the Constitution. There are powerful reasons why a restricted approach to standing of litigants is appropriate in cases such as this”<sup>44</sup>.

The “structural” approach differs from an alternative reading of the case which points to a “fundamental rights” approach. It was suggested in the literature that the case “does not focus on the substance of the statutes that were the source of the challenge. Instead, the court, as the enforcer of human rights, examined whether the Legislature denied the enjoyment of one component of the fundamental human right to political participation, the general right to take part in the con-

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43. See *Doctors for Life*, at para. 21ff.

44. *Doctors for Life*, at para. 217.

duct of public affairs”<sup>45</sup>. Opponents of this position would point out that it cannot find explicit textual support in the judgment. Even when the Court writes that “[t]he duty to facilitate public involvement in the legislative process is an aspect of the right to political participation”<sup>46</sup>, this does not amount to its actually saying that there is a “fundamental right” to be involved in the legislative process equal in nature to the right to vote in general elections. I think it would be fair to say that the language of the Court is not very clear regarding this point, but it should not be construed to exclude the “fundamental rights” approach. Similarly, the mode of judicial reasoning would not be hostile to such an approach either. It is telling that, as we already saw, Justice *Ngcobo* begins the part of his opinion related to “public involvement” by citing a number of international human rights instruments. This does not mean that the majority draws from international and foreign legal sources to establish the basis of or “create” from scratch a right to participation in the legislative process that was otherwise non-existent in the South African constitutional order. The dissent itself does not suggest that this is the nature of the majority’s enterprise. Rather, Justice *Yacoob* argues that none of these sources “properly read provide that legislation will be invalid unless some generally stated unspecific requirement of public involvement is fulfilled”<sup>47</sup>. However, the way the majority structures the first part of its argumentation around human rights documents indicates that the “fundamental rights” approach might be guiding its reasoning even if the language is not equally straightforward.

The importance of choosing between these approaches – both of which are plausible – is that a “fundamental rights” approach would accommodate a more searching judicial scrutiny: Courts are traditionally more comfortable in reviewing the constitutionality of acts that implicate fundamental rights. And – one could say – they would, in any case, be more comfortable doing that than telling the legislature how to conduct its business internally. Regardless of whether a “fundamental rights” approach is indeed guiding the Court, I would add that the majority opinion did try to take some precautions and did not move in as a maximalist direction as one might have thought at first sight.

More specifically, the Court adopted – as mentioned above – a reasonableness test to evaluate the conduct of the legislature. This raised concerns with both Justice *Yacoob* writing in dissent and Justice *van der Westhuizen* writing a separate opinion concurring in the dissent; they highlighted that the reasonableness

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45. KAREN SYMA CZAPANSKIY / RASHIDA MANJOO, *supra* note 11, at 3.

46. *Doctors for Life*, at para. 90.

47. *Doctors for Life*, at para. 329 (*Yacoob J*, dissenting).

standard cannot offer clear-cut and objective solutions. A complete opposite position criticized the test as a minimalist approach to public participation<sup>48</sup>. The reasonableness test recalls the “arbitrary and capricious” standard that U.S. courts employ under the A.P.A. to review administrative acts, including the procedure through which they were adopted. It is true that in the U.S. experience courts have utilized this standard to expand their reach<sup>49</sup>. However, this does not mean that the South African Constitutional Court, in endorsing the reasonableness test, will overstep its boundaries. In addition to enunciating the test, the Court indicated a few factors that it will be taking into account in applying that test:

Reasonableness is an objective standard which is sensitive to the facts and circumstances of a particular case. “In dealing with the issue of reasonableness,” this Court has explained, “context is all important”. Whether a legislature has acted reasonably in discharging its duty to facilitate public involvement will depend on a number of factors. The nature and importance of the legislation and the intensity of its impact on the public are especially relevant. Reasonableness also requires that appropriate account be paid to practicalities such as time and expense, which relate to the efficiency of the law-making process. Yet the saving of money and time in itself does not justify inadequate opportunities for public involvement. In addition, in evaluating the reasonableness of Parliament’s conduct, this Court will have regard to what Parliament itself considered to be appropriate public involvement in the light of the legislation’s content, importance and urgency. Indeed, this Court will

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48. See LINDA NYATI, *Public Participation: What has the Constitutional Court given the public?*, 12 *Law, Development & Democracy* 102, 109, 2002, (noting that “[t]he fact that the test for reasonableness in the duty to facilitate public involvement has no procedural safeguards leaves the legislature with ample discretion to meet the just minimums set in both the rationality and the reasonableness tests”).

49. See PATRICIA M. WALD, *Judicial Review in Midpassage: The Uneasy Partnership Between Courts and Agencies Plays On*, 32 *Tulsa L.J.* 221, 233-234, 1996, (“Arbitrary and capricious’ has turned out to be the catch-all label for attacks on the agency’s rationale, its completeness or logic, in cases where no misinterpretation of the statute, constitutional issues or lack of evidence in the record to support key findings is alleged. Frequently the arbitrary and capricious charge is grounded on the complaint that the agency has departed from its prior rationale in other cases without admitting it or explaining why. Sometimes, the agency is rebuffed because it did not give adequate consideration to an alternative solution. But most often the court simply finds the agency’s explanation for what it is doing ‘inadequate.’ (internal citations omitted)).

pay particular attention to what Parliament considers to be appropriate public involvement.

This means that there will be cases in which it might be easier to conclude that there has been a violation of the duty to facilitate public involvement in the legislative process. One such example would be when the legislature has publicly committed to carrying out consultations on a very significant bill that has already engendered considerable interest among citizens, and then it reneges on this commitment. Other cases will require a more delicate exercise in balancing.

It is worth noting that subsequent judgments by the Constitutional Court do not seem to confirm the fear of maximalism. In a judgment handed down the day after *Doctors for Life*<sup>50</sup>, the Court with the same 8-3 majority held that a provincial legislature whose provincial boundary is being altered is required by the Constitution to approve such alteration. The Court explained that the proposed constitutional amendment would have had the effect of relocating a whole community from one province to another province. Therefore, it had a direct impact on a discreet and identifiable section of the population, as it threatened an important and not easily reversible change to the provincial status of that community. The consequences of the amendment were of considerable symbolic and practical importance, affecting the identity of the people to be transferred and changing the structures and personnel responsible for welfare payments, health services and education. Therefore, the provincial legislature, in not holding any public hearings or inviting any written submissions, had acted unreasonably and failed to fulfill its duty to involve the public in making its decision. For that reason, the majority concluded that the relative part of the Amendment altering the boundary was invalid.

A more recent judgment<sup>51</sup> similarly concerned an Amendment altering provincial boundaries. However, this time the outcome was different. *Van der Westhuizen J* (writing for a majority of nine justices) found that the legislature had fulfilled its constitutional duty to facilitate public involvement having taken reasonable measures to solicit public comment: it called for and received submissions on the location of the municipality in question. A public hearing was also held. In the last judgment<sup>52</sup> in this series of cases, the Court was unanimous in

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50. See *Matatiele Municipality v. President of the Republic of South Africa n° 2*, 2007 (6) South African Law Reports 477 (CC) (Judgment of 18 August 2006).

51. *Merafong Demarcation Forum v. President of the Republic of South Africa*, [2008] ZACC 10 (Judgment of 13 June 2008).

52. *Poverty Alleviation Network and Others v. President of the Republic of South Africa*

finding no violation. The case concerned the validity of two Acts seeking to relocate a municipality to a different province. The Court found that from the content of various transcripts of public hearings, held both at national and provincial level, it was clear that public participation had been facilitated by both Parliament and the provincial legislature. The Minister had published both Acts for public comment in accordance with section 74(5)(a) of the Constitution and persons wishing to comment on the proposed amendment had been invited to send their written submissions. Therefore, the Court concluded that public participation had indeed been facilitated by both Parliament and the provincial legislature.

What this series of cases suggests is that after the pair of the 2006 judgments (*Doctors for Life* and *Matatiele*) on no other occasion has the Constitutional Court struck down legislation on the basis of lack of sufficient public involvement in the legislative process. One might say that this is perhaps an indication of the Court exercising judicial restraint. However, I would be more sympathetic to a reading suggesting that the legislature is taking its constitutional obligations after *Doctors for Life* seriously. *Merafong* and *Poverty Alleviation* represented much less clear-cut cases of failure than did *Doctors for Life* or *Matatiele*, where the legislatures themselves had envisaged a standard of what was appropriate in terms of public involvement and then some of them had failed to meet it. *Merafong* and *Poverty Alleviation* do not necessarily indicate a retreat from the earlier position or show new judicial restraint because it was much less obvious in these cases that there was a violation. At any rate, the cases after *Doctors for Life* indicate that, at least in terms of practical outcomes, the fears of judicial excesses in the aftermath of *Doctors for Life* have not materialized.

#### **V. Conclusion: Lessons from *Doctors for Life*.**

*Doctors for Life* was welcomed by scholars viewing in it a promise for encouraging a participatory and deliberative legislature, a fact that would already be in line with a rich tradition of deliberative democracy<sup>53</sup>. In a similar vein, it was argued that the Court, though appearing to “act counter-majoritarian,” is essentially supporting democracy in enforcing these participatory provisions<sup>54</sup>. However, even those convinced by *Doctors for Life* that participatory elements constitute a beneficial addition to a representative democracy add a cautionary note against

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and *Others*, Case CCT 86/08 (Judgment of 24 February 2010).

53. See DENNIS M. DAVIS, *Transformation and the Democratic Case for Judicial Review: The South African Experience*, 5 *Loy. U. Chi. Int'l L. Rev.* 45, 56-57 (2007).

54. REYNAUD N. DANIELS / JASON BRICKHILL, *supra* note 40, at 399.



the automatic expansion of this model to other countries: “A transformation of human rights norms to include participatory democracy ... should be based in greater knowledge about what it means on the ground in countries with different histories and varied social and economic contexts”<sup>55</sup>.

Adding an additional layer of accountability in legislative operations, namely the judicially enforceable mandate that the legislature receive public input, will likely lead to delays in a process that is already generally moving slowly. This invokes the familiar – in the U.S. administrative law literature – notion of the “ossification” of the rulemaking process due to all the accountability requirements. A skeptic would say that the danger of “ossification” might even be graver in the context of legislative policymaking due to its potentially more severe repercussions: a paralyzed legislature would mean that major initiatives would be put to a halt; this, in turn, might have an impact on the administrative implementation of programs that might be a priority for the democratically elected government.

Our response to that fear would, in fact, replicate similar responses given to the “ossification” argument in the administrative context: “Procedural constraints that require consultation and openness ... introduce delay into the process, but they provide an important alternative route to democratic legitimacy that permits the participation of groups whose interests may be poorly represented by political parties in the legislature”<sup>56</sup>. Furthermore, the South African Constitutional Court seems to be conscious of such dangers. *Doctors for Life* struck down legislation because the legislature had followed no process of public involvement whatsoever, not because a certain process was not sufficiently elaborate or sophisticated. The reasonableness test might offer adequate safeguards against excesses on both sides: the legislature may not completely ignore its constitutional obligation to receive public input on significant bills, but the judiciary may not impose burdens of the sort that would freeze the operation of the representative institution.

However, a constitutional mandate and its judicial enforcement will most likely not suffice for the construction of a deliberative legislature with robust citizen participation. Legal reform should be accompanied by initiatives aiming at building civil society capacity on the ground and reaching out to less represented or salient groups to solicit their comments. This would allow more members of the public to be involved in and benefit from these participatory processes. Under these conditions, *Doctors for Life* might be offering a very interesting lesson in

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55. KAREN SYMA CZAPANSKIY / RASHIDA MANJOO, *supra* note 11, at 40.

56. SUSAN ROSE-ACKERMAN, *Introduction*, in *Economics of Administrative Law* xxiv (Susan Rose-Ackerman ed., 2007).

revitalizing the “liberty of the ancients” and bringing it back into the liberal democracy of the moderns.

**Doctors for Life International v. the Speaker of the National Assembly  
& Others**

Constitutional Court of South Africa  
2006 (12) BCLR 1399 (CC)

[Note: As indicated in my Comment, this is a 198-page long judgment. Therefore, the excerpt below has been heavily edited. All internal citations have been omitted]

*VI. Did the NCOP and the provincial legislatures facilitate public involvement in their respective legislative processes as required by the Constitution?*

*What do the public involvement provisions require?*

[73] The requirement to facilitate public involvement in the legislative processes of the NCOP is governed by section 72, which provides:

“(1) The National Council of Provinces must –

- (a) facilitate public involvement in the legislative and other processes of the Council and its committees; and
- (b) conduct its business in an open manner, and hold its sittings, and those of its committees, in public, but reasonable measures may be taken –
  - (i) to regulate public access, including access of the media, to the Council and its committees; and
  - (ii) to provide for the searching of any person and, where appropriate, the refusal of entry to, or the removal of, any person.

(2) The National Council of Provinces may not exclude the public, including the media, from a sitting of a committee unless it is reasonable and justifiable to do so in an open and democratic society”.

[74] Identical duties are imposed on the National Assembly by section 59 and on the provincial legislatures by section 118....

[77] It is therefore common cause between all the parties to these proceedings that sections 72(1)(a) and 118(1)(a) require public participation in the legislative processes of the NCOP and the provincial legislatures. However, the parties differ on the nature and scope of the duty to facilitate public involvement.

[78] The contentions of the parties require this Court to consider the mean-

ing and scope of the duty to facilitate public involvement. This duty must be construed and understood in the light of: (a) the constitutional role of the NCOP in the national legislative process and, in particular, its relationship to the provincial legislatures; (b) the right to political participation under international and foreign law; and (c) the nature of our constitutional democracy....

*The right to political participation under international and foreign law*

[90] The right to political participation is a fundamental human right, which is set out in a number of international and regional human rights instruments. In most of these instruments, the right consists of at least two elements: a general right to take part in the conduct of public affairs; and a more specific right to vote and/or to be elected. Thus, article 25 of the International Covenant on Civil and Political Rights (“ICCPR”) provides:

“Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.

[91] Significantly, the ICCPR guarantees not only the “right” but also the “opportunity” to take part in the conduct of public affairs. This imposes an obligation on states to take positive steps to ensure that their citizens have an opportunity to exercise their right to political participation. The right enshrined in article 25 must be understood in the light of article 19 of the ICCPR, which provides:

“2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice”.

[92] Both articles 19 and 25 guarantee not only the positive right to political participation, but simultaneously impose a duty on states to facilitate public participation in the conduct of public affairs by ensuring that this right can be realised. Taken together, they seek to ensure that citizens have the necessary information and the effective opportunity to exercise the right to political participation.

[93] Since the adoption of the ICCPR, various regional human rights instruments and declarations have reaffirmed the right to political participation. The

relevant regional human rights instrument in the context of our country is the African [Banjul] Charter on Human and Peoples’ Rights (“African Charter”), adopted on 27 June 1981, which was acceded to by our country on 9 July 1996. The African Charter is more specific than the ICCPR in spelling out the obligation of states parties to ensure that people are well informed of the rights in the African Charter. The relevant articles are articles 9, 13 and 25 which provide:

“Article 9

1. Every individual shall have the right to receive information.
2. Every individual shall have the right to express and disseminate his opinions within the law....

Article 13

1. Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.

Article 25

States parties to the present Charter shall have the duty to promote and ensure through teaching, 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 and duties are understood”.

[94] Similarly, the American Convention on Human Rights provides in article 23 that all citizens shall enjoy the right and opportunity “to take part in the conduct of public affairs, directly or through freely chosen representatives”. The Harare Commonwealth Declaration proclaims the “individual’s inalienable right to participate by means of free and democratic processes in framing the society in which he or she lives”. The Inter-American Democratic Charter re-affirms that “the participatory nature of democracy in [the American] countries in different aspects of public life contributes to the consolidation of democratic values and to freedom and solidarity in the Hemisphere”. It further asserts that “[i]t is the right and responsibility of all citizens to participate in decisions relating to their own development. This is also a necessary condition for the full and effective exercise of democracy. Promoting and fostering diverse forms of participation strengthens democracy”.

*Nature and scope of the right.*

[95] The precise nature and scope of the international law right to participate in the conduct of public affairs is a matter for individual states to determine through their laws and policies....

[96] The right to political participation has been described as an open-textured “programmatic” right, which is open to experimental reformulation and which will necessarily change in the light of ongoing national experiences ...

[98] The right to political participation includes but is not limited to the right to vote in an election. That right, which is specified in article 25(b) of the ICCPR, represents one institutionalisation of the right to take part in the conduct of public affairs. The broader right, which is provided for in article 25(a), envisages forms of political participation which are not limited to participation in the electoral process. It is now generally accepted that modes of participation may include not only indirect participation through elected representatives but also forms of direct participation....

[101] The idea of allowing the public to participate in the conduct of public affairs is not a new concept. In this country, the traditional means of public participation is imbizo/lekgotla/bosberaad. This is a participatory consultation process that was, and still is, followed within the African communities. It is used as a forum to discuss issues affecting the community. This traditional method of public participation, a tradition which is widely used by the government, is both a practical and symbolic part of our democratic processes. It is a form of participatory democracy.

[102] Neither is the idea of allowing the public to participate in the parliamentary decision-making process a new concept. The right to political participation has deep historical roots, dating back to the Middle Ages. The Magna Carta guaranteed the right to petition the government for the redress of grievances ...

[103] More recently, a growing number of national Constitutions, in particular those adopted since the entry into force of the ICCPR, expressly embrace the principle of participatory democracy. Several, like our Constitution, include provisions that promote participation in law-making, whether through written petitions, oral hearings or other mechanisms of public involvement. For example, the Constitution of Tanzania provides that “[e]very citizen has the right and the freedom to participate fully in the process leading to the decision on matters affecting him, his well-being or the nation”. Citizens of Portugal have the right to submit petitions, representations or complaints to governmental institutions and the law must determine conditions under which the National Assembly, sitting in plenary session, will consider these submissions.

[104] The Constitution of Colombia includes as one of the essential goals of the state, the goal “to facilitate the participation of everyone in the decisions that affect them and in the economic, political, administrative, and cultural life of the nation”. More specifically, it provides that “[a]ny citizen has the right to participate in the establishment, exercise, and control of political power. To make this decree effective the citizen may ... [p]articipate in elections, plebiscites, referendums, popular consultations, and other forms of democratic participation”. Other jurisdictions also provide for the direct involvement of their citizens in the law-making process.

*Conclusions from international law and foreign law.*

[105] The international law right to political participation encompasses a general right to participate in the conduct of public affairs and a more specific right to vote and/or be elected into public office. The general right to participate in the conduct of public affairs includes engaging in public debate and dialogue with elected representatives at public hearings. But that is not all; it includes the duty to facilitate public participation in the conduct of public affairs by ensuring that citizens have the necessary information and effective opportunity to exercise the right to political participation.

[106] While the right to political participation in international law can be achieved in multiple ways, it is clear that this right does not require less of a government than provision for meaningful exercise of choice in some form of electoral process and public participation in the law-making process by permitting public debate and dialogue with elected representatives. In addition, this right is supported by the right to freedom of expression which includes the freedom to seek, receive and impart information. In our country, the right to political participation is given effect not only through the political rights guaranteed in section 19 of the Bill of Rights, as supported by the right to freedom of expression but also by imposing a constitutional obligation on legislatures to facilitate public participation in the law-making process.

[107] The duty to facilitate public involvement in the legislative process under our Constitution must therefore be understood as a manifestation of the international law right to political participation. Public involvement in the legislative and other processes of legislatures of our country is a more specific form of political participation than the participation in the conduct of public affairs that is contemplated by article 25 of the ICCPR.

[108] Thus, the Constitutional Assembly, in framing our Constitution, was

not content only with the right to vote as an expression of the right to political participation. It opted for a more expansive role of the public in the conduct of public affairs by placing a higher value on public participation in the law-making process....

*The nature of our constitutional democracy.*

[110] The international law right to political participation reflects a shared notion that a nation's sovereign authority is one that belongs to its citizens, who "themselves should participate in government – though their participation may vary in degree". This notion is expressed in the preamble of the Constitution, which states that the Constitution lays "the foundations for a democratic and open society in which government is based on the will of the people". It is also expressed in constitutional provisions that require national and provincial legislatures to facilitate public involvement in their processes. Through these provisions, the people of South Africa reserved for themselves part of the sovereign legislative authority that they otherwise delegated to the representative bodies they created.

[111] Our Constitution was inspired by a particular vision of a non-racial and democratic society in which government is based on the will of the people. Indeed, one of the goals that we have fashioned for ourselves in the Preamble of the Constitution is the establishment of "a society based on democratic values, social justice and fundamental human rights". The very first provision of our Constitution, which establishes the founding values of our constitutional democracy, includes as part of those values "a multi-party system of democratic government, to ensure accountability, responsiveness and openness". Commitment to principles of accountability, responsiveness and openness shows that our constitutional democracy is not only representative but also contains participatory elements. This is a defining feature of the democracy that is contemplated. It is apparent from the preamble of the Constitution that one of the basic objectives of our constitutional enterprise is the establishment of a democratic and open government in which the people shall participate to some degree in the law-making process....

[115] In the overall scheme of our Constitution, the representative and participatory elements of our democracy should not be seen as being in tension with each other. They must be seen as mutually supportive. General elections, the foundation of representative democracy, would be meaningless without massive participation by the voters. The participation by the public on a continuous basis provides vitality to the functioning of representative democracy. It encourages cit-

izens of the country to be actively involved in public affairs, identify themselves with the institutions of government and become familiar with the laws as they are made. It enhances the civic dignity of those who participate by enabling their voices to be heard and taken account of. It promotes a spirit of democratic and pluralistic accommodation calculated to produce laws that are likely to be widely accepted and effective in practice. It strengthens the legitimacy of legislation in the eyes of the people. Finally, because of its open and public character it acts as a counterweight to secret lobbying and influence peddling. Participatory democracy is of special importance to those who are relatively disempowered in a country like ours where great disparities of wealth and influence exist....

*The meaning and scope of the duty to facilitate public involvement.*

[118] Public involvement is not a uniquely South African concept. In other countries, notably, in the United States, it is a concept that is used in the context of rule-making by administrative agencies. It is one of the requirements of the rule-making process by these agencies. In the international terrain, there is a growing number of instruments that make provision for the principle of public participation, in particular, in the context of environmental issues. It is commonly used to refer to the active participation of the public in the decision-making processes. The words “public involvement” and “public participation” are often used interchangeably.

[119] The phrase “facilitate public involvement” is a broad concept, which relates to the duty to ensure public participation in the law-making process. The key words in this phrase are “facilitate” and “involvement”. To “facilitate” means to “make easy or easier,” “promote” or “help forward”. The phrase “public involvement” is commonly used to describe the process of allowing the public to participate in the decision-making process. The dictionary definition of “involve” includes to “bring a person into a matter” while participation is defined as “[a] taking part with others (in an action or matter); ... the active involvement of members of a community or organization in decisions which affect them”.

[120] According to their plain and ordinary meaning, the words public involvement or public participation refer to the process by which the public participates in something. Facilitation of public involvement in the legislative process, therefore, means taking steps to ensure that the public participate in the legislative process. That is the plain meaning of section 72(1)(a)....

[122] Our constitutional framework requires the achievement of a balanced relationship between representative and participatory elements in our democracy.



Section 72(1)(a), like section 59(1)(a) and section 118(1)(a), addresses the vital relationship between representative and participatory elements, which lies at the heart of the legislative function. It imposes a special duty on the legislature and pre-supposes that the legislature will have considerable discretion in determining how best to achieve this balanced relationship. The ultimate question is whether there has been the degree of public involvement that is required by the Constitution....

[124] It follows that Parliament and the provincial legislatures must be given a significant measure of discretion in determining how best to fulfil their duty to facilitate public involvement. This discretion will apply both in relation to the standard rules promulgated for public participation and the particular modalities appropriate for specific legislative programmes. Yet however great the leeway given to the legislature, the courts can, and in appropriate cases will, determine whether there has been the degree of public involvement that is required by the Constitution.

[125] What is required by section 72(1)(a) will no doubt vary from case to case. In all events, however, the NCOP must act reasonably in carrying out its duty to facilitate public involvement in its processes....

[129] What is ultimately important is that the legislature has taken steps to afford the public a reasonable opportunity to participate effectively in the law-making process. Thus construed, there are at least two aspects of the duty to facilitate public involvement. The first is the duty to provide meaningful opportunities for public participation in the law-making process. The second is the duty to take measures to ensure that people have the ability to take advantage of the opportunities provided. In this sense, public involvement may be seen as “a continuum that ranges from providing information and building awareness, to partnering in decision-making”. This construction of the duty to facilitate public involvement is not only consistent with our participatory democracy, but it is consistent with the international law right to political participation. As pointed out, that right not only guarantees the positive right to participate in the public affairs, but it simultaneously imposes a duty on the State to facilitate public participation in the conduct of public affairs by ensuring that this right can be realised. It will be convenient here to consider each of these aspects, beginning with the broader duty to take steps to ensure that people have the capacity to participate.

*The duty to take steps to facilitate public involvement.*

[130] The Constitutional Assembly was acutely aware that our legacy of ra-

cial discrimination, which was still fresh in their minds, could undermine the national effort to construct “a democratic and open society in which government is based on the will of the people”. A majority of the people had, for many years, been denied the right to influence those who ruled over them. They had been discriminated against in almost every sphere of life. The result was gross inequality in education, financial resources, access to knowledge and other areas that are crucial for effective participation in the law-making process. Merely to allow public participation in the law-making process is, in the prevailing circumstances, not enough. More is required. Measures need to be taken to facilitate public participation in the law-making process.

[131] Thus, 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 requires access to information and the facilitation of learning and understanding in order to achieve meaningful involvement by ordinary citizens. In this regard, article 25 of the African Charter imposes an obligation on states parties to “promote and ensure through teaching, education and publication” the right to political participation. As the U.N. Human Rights Committee has asserted in interpreting the international law right to political participation, “[w]hatever form of constitution or government is in force, the [ICCPR] requires States to adopt such legislative and other measures as may be necessary to ensure that citizens have an effective opportunity to enjoy the rights it protects”. (The emphasis is mine.) . . .

*Public participation in the law-making process.*

[141] In my judgment, public participation in the law-making processes of the NCOP is the goal of the duty to facilitate public involvement comprehended in section 72(1)(a). Participation is the end to be achieved. To hold otherwise would be contrary to the participative nature of our democracy and the Constitution’s commitment to the principles of accountability, responsiveness and openness. Parliament and all nine provinces therefore, in my view, properly conceded that the duty to facilitate public involvement contemplates public participation in the law-making process.

[142] The conventional method of public participation in the law-making process is through the submission of written or oral representations on the bill under consideration by Parliament or through a combination of both written and oral submissions....

[145] To sum up, the duty to facilitate public involvement must be construed in the context of our constitutional democracy, which embraces the principle of participation and consultation. Parliament and the provincial legislatures have broad discretion to determine how best to fulfil their constitutional obligation to facilitate public involvement in a given case, so long as they act reasonably. Undoubtedly, this obligation may be fulfilled in different ways and is open to innovation on the part of the legislatures. In the end, however, the duty to facilitate public involvement will often require Parliament and the provincial legislatures to provide citizens with a meaningful opportunity to be heard in the making of the laws that will govern them. Our Constitution demands no less.

[146] In determining whether Parliament has complied with its duty to facilitate public participation in any particular case, the Court will consider what Parliament has done in that case. The question will be whether what Parliament has done is reasonable in all the circumstances.... In determining the appropriate level of scrutiny of Parliament's duty to facilitate public involvement, the Court must balance, on the one hand, the need to respect parliamentary institutional autonomy, and on the other, the right of the public to participate in public affairs. In my view, this balance is best struck by this Court considering whether what Parliament does in each case is reasonable.

*Did the NCOP and the provinces comply with the public involvement provisions?*

[154] ... There is no suggestion on the record that the NCOP held public hearings or invited written representations on any of the Bills. Insofar as the provincial legislatures are concerned, some but not all of the provinces held hearings in respect of some but not all of the Bills....

[163] Whether public hearings conducted by provincial legislatures 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 NCOP delegations were involved in and have access to the information gathered during that process.

*[Traditional Health Practitioners Act]*

[181] On the record, six of nine provinces did not hold public hearings on this Bill nor did they invite written representations on it. In these circumstances, failure by the NCOP to hold public hearings on the THP Bill was unreasonable. In the result, I conclude that the NCOP did not comply with its obligation to facilitate public involvement in relation to the THP Bill as required by section 72(1)(a).

*CTOP Amendment Act.*

[182] The CTOP Amendment Bill concerned the termination of pregnancy. This is not an uncontroversial matter. The Bill makes provision for registered nurses, other than midwives, to perform termination of pregnancies at certain public and private facilities. As its preamble declares, its purpose is to “empower a Member of the Executive Council to approve facilities where a termination of pregnancy may take place; to exempt a facility offering a 24-hour maternity service from having to obtain approval for termination of pregnancy services under certain circumstances”. There was great interest in this Bill as demonstrated by the requests for public hearings by interested groups. The NCOP responded to these requests by informing the interested groups that hearings would be held in the provinces. The NCOP itself considered that public hearings were desirable on the Bill. So too did the majority of provinces.

[183] As reflected in the requests for public hearings received by the NCOP Chairperson, the CTOP Amendment Bill was of particular concern to the applicant and other interested parties. These requests led to the NCOP’s decision that hearings on the Bill should be held at the provincial level. However, while it appears that four provinces – Gauteng, KwaZulu-Natal, Limpopo and Northern Cape – wished to hold public hearings on the Bill, only Limpopo conducted a hearing....

[186] On the record, I am satisfied that of the provincial legislatures, only Limpopo and the Western Cape held public hearings or invited written submissions in respect of the CTOP Amendment Bill. It is true that the applicant was permitted to make a submission to the KwaZulu-Natal legislature. However, the applicant contacted the Chairperson of the Health Committee on its own initiative, and no other members of the public were invited or given an opportunity to make submissions. Moreover, it is clear that both the NCOP and a majority of the provinces considered that it was necessary to conduct public hearings, or at least invite written submissions, in relation to the CTOP Amendment Bill....

[188] Once it was conveyed to the NCOP that, contrary to its decision, a majority of the provinces did not hold public hearings, it was incumbent upon it to hold such hearings. The NCOP is not a rubber stamp of the provinces when it comes to the duty to facilitate public involvement. It is required by the Constitution to provide “a national forum for public consideration of issues affecting the provinces”. These considerations, in my judgment, lead to the conclusion that the NCOP and the provinces failed in their duty to facilitate public involvement in their legislative and other processes in relation to the CTOP Amendment Bill.

[189] In all the circumstances, I am satisfied that the NCOP acted unreasonably in failing to hold public hearings on the CTOP Amendment Bill. In the event, the NCOP failed to comply with its obligation to facilitate public involvement in relation to this Bill as required by section 72(1)(a)....

*VII. Remedy.*

[198] I have found that the NCOP failed to fulfil its constitutional obligation comprehended in section 72(1)(a) in relation to the CTOP Amendment Bill and the THP Bill. Pursuant to section 172(1)(a) of the Constitution, this Court is obliged to declare that the conduct of the NCOP in this regard is inconsistent with the Constitution and is therefore invalid. The respondents did not contend otherwise. A declaration to that effect must accordingly be made. The question which was debated in the Court is whether the CTOP Amendment Act and the THP Act must as a consequence be declared invalid. Counsel for the respondents contended that this Court has no power to declare the resulting statute invalid. To do so, it was submitted, would infringe upon the doctrine of separation of powers....

[201] The provisions of section 172(1)(a) are clear, and they admit of no ambiguity; “[w]hen deciding a constitutional matter within its power, a court ... must declare that any law or conduct that is inconsistent with the Constitution is invalid”....

[202] As I see the question therefore, it is not whether we have the constitutional authority to declare invalid these two statutes. The power to do so is there. The specific question presented in this case is whether the failure by the NCOP to comply with the provisions of section 72(1)(a) in relation to the CTOP Amendment Act and the THP Act renders these statutes invalid. This case presents a unique question. It is not concerned with the substance of the legislation. It is concerned with the process by which the legislation was adopted. The answer to this question depends, among other things, upon the importance that the Constitution attaches to the requirement of public participation in the law-making process.

[203] In the clearest and most unmistakable language possible, the Preamble to our Constitution declares the intention to establish “a democratic and open society in which government is based on the will of the people”. Consistent with this goal, the Constitution: (a) establishes as part of the founding values “a multi-party system of democratic government, to ensure accountability, responsiveness and openness;” (b) embraces a democracy that has both representative and participatory elements; and (c) makes provision for public involvement in the processes of the legislative organs of state.

[204] Thus in peremptory terms, section 72(1)(a) imposes an obligation on the NCOP to facilitate public participation in its legislative and other processes including those of its committees. And the supremacy clause of the Constitution requires that this “obligation [which is] imposed by [the Constitution] must be fulfilled”. Public involvement provisions therefore give effect to an important feature of democracy: its participative nature. The “participation of citizens in government ... forms the basis and support of democracy, which cannot exist without it; for title to government rests with the people, the only body empowered to decide its own immediate and future destiny and to designate its legitimate representatives”.

[205] Public participation in the law-making process is one of the means of ensuring that legislation is both informed and responsive. If legislation is infused with a degree of openness and participation, this will minimise dangers of arbitrariness and irrationality in the formulation of legislation. The objective in involving the public in the law-making process is to ensure that the legislators are aware of the concerns of the public. And if legislators are aware of those concerns, this will promote the legitimacy, and thus the acceptance, of the legislation. This not only improves the quality of the law-making process, but it also serves as an important principle that government should be open, accessible, accountable and responsive. And this enhances our democracy....

[207] Under our Constitution, therefore, the obligation to facilitate public involvement is a requirement of the law-making process....

[211] In my judgment, this Court not only has a right but also has a duty to ensure that the law-making process prescribed by the Constitution is observed. And if the conditions for law-making processes have not been complied with, it has the duty to say so and declare the resulting statute invalid....

*Yacoob J, dissenting.*

[247] This case raises fundamental and difficult issues. They concern the nature of the democracy created by our Constitution, the respective constitutionally appropriate roles and powers of duly elected legislators and the public in general in the process of enacting a law, as well as the nature of the public involvement component and this Court’s role in relation to it....

*The obligation to facilitate public involvement.*

[269] I must clarify the nature of the enquiry before us. We are concerned neither with the merits or demerits of participatory or representative democracies,

nor with what in our view would be the ideal balance between participation and representation in our democracy. This Court must determine what the Constitution requires. Equally this case has nothing to do with the views of the members of this Court in relation to whether public involvement is necessary in a democracy, that public participation would lead to better legislation, that it would be unfair to pass legislation without public hearings or that it is desirable for the public to be given an opportunity to be consulted. I may have answered many of these questions in the affirmative but all we must decide is what our Constitution requires in relation to public involvement. It is true that the Constitution must be interpreted in relation to the international context but the words of the Constitution must not be lost sight of within that context....

[292] Citizens of this country cast their votes in favour of political parties represented in the National Assembly and the provincial legislatures. They have the right to become members of political parties, to campaign for them, to take part in their activities and to call them to account. It is these elected representatives that govern the people and their representative activities are activities of the people. In passing legislation or in conducting any other activity, members of provincial legislatures and the National Assembly do not act on their own whims but represent the people of this country. To undermine these representatives is to undermine the political will of the people and to negate their choice at free and fair elections. Provincial representatives on the NCOP are mandated by the provincial legislatures in their capacities as representatives of the people. They are therefore mandated by the people in the same way as the President is elected by the people when the National Assembly elects him. Constitutionally speaking, it is the people of our country who, through their elected representatives, pass laws.

[293] The Constitution deals extensively with voting, free and fair elections, multi - party democracy, a voters' roll and the means by which decisions may be taken in Parliament. The provisions are detailed and specific. By contrast and leaving aside the provisions for public access, there are only two references to public involvement in relation to each of the National Assembly, the NCOP and the provincial legislatures. First, each of them is required to facilitate public involvement in their legislative and other processes. Second, each of them must have "due regard" to "public involvement" when making their rules....

[308] What does public involvement mean? Perhaps it will be better to start by determining what the term cannot mean in our constitutional context. Public involvement cannot be equated to public participation. This is because the Constitution uses the word participate in context which lend an interesting colour to the relative meaning of the words "involvement" and "participat (e) (ing) (ion)"....

[309] The concept of participation is employed in the context of the legislative process in very interesting ways. First, the National Assembly and the NCOP participate in the legislative process. The Constitution requires that the rules and orders of the National Assembly, the NCOP and the provincial legislatures must provide for the participation in their proceedings and those of their committees of minority parties, and for the participation of provinces in the NCOP in a manner consistent with democracy. Furthermore, the role of the National Executive and local government representatives in the NCOP is described as participation even though none of them has any vote in the NCOP.

[310] [C]itizens participate in the activities of political parties; elected representatives, minority parties, and certain others participate in the processes of the National Assembly, the NCOP and the provincial legislatures; public involvement must be facilitated in the National Assembly, the NCOP and the provincial legislatures. Citizens have the right to participate in political parties. There is a duty to facilitate public involvement of all people including citizens in the legislative and other processes of the NCOP. Involvement must mean something less than participation....

[312] It is impermissible to conclude that the term “public involvement” at the level of interpretation postulates as a minimum that the public must be given an opportunity to comment on draft legislation. The term is not capable of that construction. To interpret the phrase in this way would amount to re-drafting the Constitution....

[316] The process by which legislation is passed is crucial to a constitutional order. It must be clear, specific and sufficiently comprehensible to enable legislators to know exactly what steps they need to pass any legislation. Moreover, as I have said earlier, due regard to the value of the vote requires that acts of elected legislators be set aside only if the pre-requisites not complied with are stated in the clearest possible terms. It is therefore not surprising that the process in the Constitution is set out step by step in a defined way. In so far as it is concerned with legislation other than legislation amending the Constitution the process contains no express provision to the effect that the public must be given any opportunity at all to comment or to be heard as a pre-requisite for the valid adoption of any law. The question is whether such a provision is implied. I have grave doubts as to whether it is permissible for courts to determine implied terms in relation to the process by which national legislation is to be passed but I will assume for the purposes of this judgment in favour of DFL that processes by which national legislation is to be passed can be interpreted by the courts to include implied terms. I would say, however, that if this be the case it must be required that the only pos-



sible inference that can be drawn from all the circumstances is that the term was necessarily implied and that the inference is so compelling that the reasonable legislator would doubtless have understood the implication. The question to be asked therefore is whether an additional step is necessarily implied and is so compelling that it must be read into the national legislative process in so far as it does not concern constitutional amendments by reason of the provisions of section 72(1)(a)....

[319] I therefore conclude that Parliament has to decide how public involvement must be facilitated in the national legislative process and that Parliament is not obliged to ensure that reasonable steps to facilitate public involvement in that process are taken. It is by no means clear or necessarily implied that a public opportunity to be heard or comment on legislation is a pre-condition to validity of legislation according to the Constitution. Nor in my view is it appropriate to expect of the reasonable member of Parliament to understand the relevant constitutional provisions in this way. The effect of reading the relevant provisions in such a way that they oblige legislative bodies to give the public a reasonable opportunity to be heard or consulted before legislation is adopted for it to be valid constitutes a limitation on the power of elected representatives of the people to make law. That limitation is an impermissible intrusion and has a fundamental impact on the value of the right to vote acquired through bitter struggle. The approach undermines the right substantially....

[325] ... [I]t is Parliament that must first decide how participation in the national legislative process is to be facilitated. That decision would be reflected in the rules. If Parliament does not make any decision as it is obliged to do, it will have failed to fulfil an obligation imposed upon it by the Constitution. The NCOP and the National Assembly are both deliberative legislative bodies. All their decisions are deliberative in nature. The only way in which any of these legislative bodies could make a decision that would add requirements that must be complied with for a valid national legislative process would be to make rules or to pass legislation. There is no evidence in this case that Parliament has made any decision in connection with public involvement in the national legislative process. An appropriate decision by Parliament is a pre-condition to review by this Court of the decision in relation to whether it constitutes fulfilment of the constitutional obligation.

*International Law and Foreign Law.*

[328] ... The hard fact is ... that the provisions of the ICCPR are satisfied by

indirect participation reasonably restricted; DFL wants unrestricted indirect participation as well as substantial direct participation. It is not necessary to go through any of the other international instruments. All of them are understandably satisfied with indirect participation without any direct component.

[329] I have examined many constitutions. None of them properly read provide that legislation will be invalid unless some generally stated unspecific requirement of public involvement is fulfilled. Many have manner and form provisions that are clear and specific and that facilitate a measure of public involvement. I have found no judgment of any court anywhere in which a legislative provision properly adopted in an open legislature and having been read through in the way required by the relevant instrument has been found to have been inconsistent with the constitution on the basis of non-compliance with some generalised public involvement provision even if the prescribed manner and form provisions have all been complied with....

*Conclusion.*

[339] The Constitution does not require the section 72(1)(a) or section 118(1)(a) public involvement provision to be complied with as a pre-requisite to any legislation being validly passed. To infer a requirement of this kind when it is not expressly provided for is to impermissibly undermine the legislature and the right to vote. In the circumstances, the fact that no opportunity was given for public comment in the National Council of Provinces and in most of the provinces in the process of the passing of the Health Bills though regrettable is of no constitutional moment in relation either to whether the National Council of Provinces or the provincial legislatures have complied with their constitutional obligations or to whether the Health Bills have been validly passed. In my view, the application accordingly falls to be dismissed.

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