THE LAW OF PUBLIC CONSULTATION IN REGULATORY AND LEGISLATIVE PROCESSES IN THE UNITED STATES, UNITED KINGDOM AND THE REPUBLIC OF SOUTH AFRICA

By Živilė Stubrytė

Submitted to
Central European University
Department of Legal Studies

In partial fulfillment of the requirements for the degree of
Doctor of Juridical Science

Supervisor: Professor Michael Hamilton

Budapest, Hungary

2014

The dissertation contains no materials accepted for any other degrees in any other institutions and no materials previously written and/or published by another person unless otherwise acknowledged.

s/Živilė Stubrytė

ABSTRACT

The thesis seeks to determine the effects of the role of law when framing the opportunities for public consultation in government policy and decision-making. The focus is to examine how requirements for decision-makers to hold public consultation enable meaningful participation by interested individuals in decision-making processes leading to a more responsive, professional and less intrusive regulatory government.

The first chapter provides a detailed account of theories of deliberative and participatory democracy, which advocate for transformation of representative institutions. It concludes with an observation that it is worth investigating the existing consultative opportunities in decision-making processes in order to determine whether such transformations are necessary.

The second chapter investigates the developments of law of public consultation taking as a benchmark the criteria for ideal participation and deliberation. The results of the analysis reveal that the nature and scope of consultative obligations are predetermined on such factors as the subject matter and the impact of the decision on an individual or the public in general. In this respect the third and fourth chapters examine consultative processes in particular regulatory areas to determine the similarities and differences of enforcement of participatory rights as well as their impact on regulated industries.

The fifth and final chapter determines how different legal structures recognize participatory rights, and under what conditions consultative obligations can remedy the flaws of representative democracy.

The thesis aims to contribute to the existing debates about transforming representative democracy through introduction of participatory and deliberative mechanisms. The dissertation suggests that in the US, the UK and South Africa the existing legal frameworks are capable of facilitating public participation and deliberation through consultative obligations which reinvigorate representative democracy.

ACKNOWLEDGMENTS

Thanks to my beloved parents for their endless love, understanding, moral support and financial contributions. Thanks to my brothers for their acceptance even without understanding, for how much longer am I going to study. Thanks to my friends for their encouraging words, for their challenging thoughts, for just being there for me.

I feel helplessly indebted to my supervisor Professor Michael Hamilton for his support from the very beginning of this journey, and guidance through what sometimes seemed as obstacles impossible to overcome, for keeping the bar high and pushing to excel. I owe my gratitude for Professor Jeff Lubbers who provided me with constructive criticism and set the right tone to the writing.

Thanks to Central European University and its community, for all the opportunities to learn from the best, the diverse and the open.

The journey was longer than I thought it would be, but I have learned more than I have expected. The process of getting to the finish line was a reward in itself.

TABLE OF CONTENTS

INTRODUCTION

Thesis Outline

The questions of how decisions governing public life are made and by whom are central to any understanding of the role of government. The answers to these questions become particularly acute in the context of a regulatory state, where concerns over the growth of governments' power[1], the misfunctioning of representative democracies[2] and regulatory failures of national bureaucracies prevail.[3] The three most common concerns are a decision-maker's unresponsiveness, lack of professionalism and the issue of over-regulation.

One often suggested remedy by politicians as well as political theorists to the various deficiencies of government invokes participation and deliberation (either by the general public or the specifically affected parties) in public decision-making processes. For instance, in environmental matters, extensive opportunities for public participation and deliberation are seen as inevitable in complex problem solving, in terms of industrial pollution, hazardous waste, preservation of species, sustainable development of natural resources, and more recently climate change.[4] In contrast, opportunities for public

[1] Peter Miller and Nikolas Rose, *Governing the Present: Administering Economic, Social and Personal Life*, Polity Press, 2008.
[2] Jurgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, MIT Press, 1996; Joshua Cohen, *Philosophy, Politics, Democracy: Selected Essays*, Harvard University Press, 2009; Carole Pateman, *Participation and Democratic Theory*, Cambridge University Press, 1989; John S. Dryzek, *Deliberative Democracy and Beyond: Liberals, Critics, Contestations*, Oxford University Press, 2000; Jane Mansbridge et al., "The Place of Self-Interest and the Role of Power in Deliberative Democracy," *The Journal of Political Philosophy*, Vol. 18, No. 1, 2010, 64.
[3] Giandomenico Majone, "The Regulatory State and Its Legitimacy Problems," *West European Politics*, Vol. 22(1), 1999, 1; Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate*, Oxford University Press, 1992.
[4] A. Du Plessis, "Public Participation, Good Environmental Governance and Fulfillment of Environmental Rights," *Potchefstroom Electronic Law Journal* (PER), Vol. 2, 2008, 12; Anne Shepherd and Christi Bowler, "Beyond the Requirements: Improving Public Participation in EIA," *Journal of Environmental Planning and Management*, Vol. 40(6), 1997, 725; Stephen Stec "EU Enlargement, Neighbourhood Policy and Environmental Democracy," in Marc Pallemaerts, ed., The *Aarhus Convention at Ten: Interactions and Tensions between Conventional International Law and EU Environmental Law*, Europa Law Publishing, 2009.

participation and deliberation were initially excluded from the fields of military and foreign affairs or national security.[5]

Of course, consultative processes are themselves vulnerable to accusations of domination by sectional interests,[6] serving as a gateway for their influence in decision-making processes,[7] as a tool for manipulation by decision-makers or as a cause of regulatory delays.[8] Nonetheless, law's intervention might be hoped to offset such deficiencies and forge instead the values of openness, efficient problem solving, legitimacy, government accountability, etc. This thesis aims to assess whether legal constraints and incentives actually assist in the achievement of such goals or whether instead the law has been largely epiphenomenal.

Tensions quickly become apparent between the goals of ensuring procedural fairness 'only to' to the affected parties and of avoiding the capture of public decision-making processes by the affected but economically or politically powerful participants. This is especially important since in many instances a single decision or policy has diverse effects on a variety of actors (such as consumers, manufacturers, producers, mining operators, residents of local areas rich with natural resources, etc.) Other tensions arise concerning the initial role of decision-makers as experts and preservers of the public interest and the emerging concept

[5] Lynn M. Sanders, "Against Deliberation," *Political Theory*, Vol. 25(3), 347; 370, http://faculty.virginia.edu/lsanders/SB617_01.pdf

[6] Jim Rossi, "Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking," *Northwestern University Law Review*, Vol. 92, 1997, 173; Kenneth F. Warren, *Administrative Law in the Political System*, Westview Press, 2004; David Fontana, "Reforming the Administrative Procedure Act: Democracy index Rulemaking," *Fordham Law Review*, Vol. 74(1), 2005, 81, http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=4094&context=flr

[7] Francesca Bignami, "The Administrative State in a Separation of Powers Constitution: Lessons for European Community Rulemaking from the United States," the Jean Monnet Center for International and Regional Economic Law and Justice at NYU School of Law, http://centers.law.nyu.edu/jeanmonnet/papers/99/990501.html#fn0

[8] Jim Rossi, "Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking," *Northwestern University Law Review*, Vol. 92, 1997, 173.

of decision-makers as facilitators of public participation[9] and mediators between different interests.[10]

Attempts to resolve these tensions expose a range of underlying questions, including whether the dominance of powerful sectional interests in consultative processes is predetermined by the institutional and procedural design. How would the discussion in political theories of democracy change once participation and deliberation are recognized as legal concepts in terms of legal duties or rights? Why do aspirations for expanding opportunities for public participation permeate political and policy level debates, despite the existing variety of consultative mechanisms and the so-called 'participation explosion'[11]? Which of the theories of democracy offer the most accurate description of reality? Indeed, which model provides the most suitable benchmark against which to assess the existing consultative mechanisms?

Ultimately, the thesis aims to show that public participation and deliberation if properly structured under law can serve to remedy many of the problems of regulatory government (unresponsiveness, over-regulation and lack of professionalism), but that participatory and deliberative mechanisms are insufficient to eradicate these problems completely.

Choice of Jurisdictions

In order to explore the law of public consultation in depth, three jurisdictions were chosen representing different approaches to the participatory and deliberative aspects of policy and decision-making processes. First, South Africa was chosen because the importance

[9] Steven P. Croley, *Regulation and Public Interests: the Possibility of Good Regulatory Government*, Princeton University Press, 2007, 118.
[10] A. Baudrier, *Independent Regulation and Telecommunications Performance in Developing Countries*, Berkley, 2001, Annual ISNIE Conference, 5, http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.202.4868&rep=rep1&type=pdf
[11] Donald N. Zillman et al, *Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources*, Oxford University Press, 2002, 11.

of public participation is recognized at a constitutional level. The *Constitution of South Africa* establishes the obligation for legislatures to consult interested parties before enacting any law.[12] Indeed, the country also has a long standing tradition of public participation which continues to be followed by South African communities,[13] and which found its way to the supreme law of the country. South Africa's Constitution is generally regarded as an exemplary source of constitutional arrangement for governments across the globe. For instance, one of the judges of the United States Supreme Court suggested that South Africa's Constitution could be used as a model for countries when drafting their constitutions in 2012.[14]

The second jurisdiction chosen is the United States (US). The US has a long standing tradition of public participation, which is explicitly established in the country's *Administrative Procedure Act* (APA).[15] The APA sets procedural requirements for US agencies in their rulemaking and adjudication processes.[16] Section 553 of the APA sets out the notice and comment procedure, which requires the US agencies to consult with the public during rulemaking.[17] The APA has been accorded importance in other jurisdictions as well. For example, when considering reforms of administrative rulemaking in the European Union, there have been suggestions to invoke a US-derived consultation requirement in order to

[12] Sections 59(1)(a), 72(1) and 118 (1) (a) of the Constitution of the Republic of South Africa, 1996, text available at: http://www.info.gov.za/documents/constitution/1996/index.htm
[13] *Doctors for Life International v Speaker of the National Assembly*, 2006 (12) BCLR 1399 (CC), at 101, http://www.saflii.org/za/cases/ZACC/2006/11.html
[14] Adam Liptak, "We the People Loses Appeal with People Around the World," *The New York Times*, February 6, 2012, http://www.nytimes.com/2012/02/07/us/we-the-people-loses-appeal-with-people-around-the-world.html?_r=3&hp and Rowan Philp, "In Love with SA's Constitution," *Mail and Guardian Online*, (South Africa), February 24, 2012, http://mg.co.za/article/2012-02-24-in-love-with-sas-constitution The interview with the US Supreme Court Justice Ruth Bader Ginsburg is available at http://www.youtube.com/watch?v=vzog2QWiVaA
[15] § 553 of *Administrative Procedure Act*, 5 U.S.C., 2000, Pub. L. No. 404, 60 Stat. 237, Ch. 324, §§ 1-12 (1946). Codified by Pub. L. No. 89-554 (1966) in 5 U.S.C. §§ 551-559, 701-706, 1305, 3105, 3344. (referred to as *Administrative Procedure Act*, 5 U.S.C., 2000).
[16] Jeffrey S. Lubbers, *A Guide to Federal Agency Rulemaking*, American Bar Association, 2006, 49-51.
[17] § 553 of *Administrative Procedure Act*, 5 U.S.C., 2000.

compensate for the democratic deficit.[18] Indeed, in South Africa too, the country's Constitutional Court has relied on US jurisprudence when determining the nature and scope of legislatures' constitutional duty to allow public involvement. More particularly, the US environmental law is actually the antecedent of European environmental impact assessment and public participation requirements.[19] Thus, the legal regulation of public consultation as it has emerged in the US has also inspired its development in other jurisdictions, and occupies a central place in the academic literature.

As a third jurisdiction the United Kingdom (UK) is interesting from the perspective that there are no general statutory requirements of public consultation. However, the *Code of Practice on Consultation of 2008* (the Code)[20] sets standards which government authorities are encouraged to follow, once they choose to hold public consultations. Moreover, some statutes do recognize a duty of decision-makers to allow for public consultation in certain areas of public life. Lastly, the recent years have witnessed rapid development of case law on the issue.

The three chosen jurisdictions are necessarily distinct and the national procedural requirements concerning consultative processes of each country can be fully understood only if one takes into consideration the legal environment in which it emerged. While this research acknowledges these differences, it also seeks to distil the common traits concerning public participation and deliberation which exist in these countries. Moreover, in all of the three jurisdictions, courts seem to have played a similarly important role in

[18] See, for example, Francesca Bignami, "The Administrative State in a Separation of Powers Constitution: Lessons for European Community Rulemaking from the United States," the Jean Monnet Center for International and Regional Economic Law and Justice at NYU School of Law, http://centers.law.nyu.edu/jeanmonnet/papers/99/990501.html#fn0 and Anne Meuwese et al., "Towards a European Administrative Procedure Act," in *Review of European Administrative Law. European Administrative Law: Top-Down and Bottom-Up*, ed. K. J. de Graaf et al., Europa Law Publishing, 2009, 22, 29.
[19] Joseph Foti et al, *Voice and Choice: Opening the Door to Environmental Democracy*, World Resources Institute, 2008, 32.
[20] *Code of Practice on Consultation*, the Cabinet Office, July 2008, http://www.berr.gov.uk/files/file47158.pdf

expanding the opportunities for public participation and deliberation in decision-making processes.

Methodology

The law of public consultation is a developing area of public law, the contours of which are emerging in a rather amorphous manner. To help identify the core and delineate the boundaries of the law of public consultation, this thesis draws upon comparative analysis method.[21] The comparative method allows thorough comparison of the similarities and differences of the phenomenon at stake and a better understanding of the legal systems in which it exists.[22] A comparative analysis of policy documents, legal rules and jurisprudence makes it possible to distill the three main components of consultations (duty to provide notice, duty to allow submission of comments, duty to consider the comments) and to compare their developments at different levels of government decision-making (legislative, executive and local), and in different jurisdictions. What is the nature and scope of the law of public consultation? What are the expectations and unintended consequences of consultative processes? A comparative method allows for an assessment of the existing legal frameworks concerning consultative processes in the light of the ideal of participation and deliberation as expounded under political theories of democracy.[23] How deliberative are consultative processes? How (if at all) are they suitable for remedying the deficiencies of regulatory governments associated with lack of legitimacy, accountability and expertise? What is the role of the judiciary in enforcing participatory rights and fostering the values of transparency, openness and responsible government?

[21] John C. Reitz, "How to Do Comparative Law," *American Journal of Comparative Law*, Vol. 46, 1998, 617; Paul W. Khan, "Comparative Constitutionalism in a New Key," *Michigan Law Review*, Vol. 101, 2003, 2677; Martha C. Nussbaum, "Introduction to Comparative Constitutionalism," *Chicago Journal of International Law*, Vol. 3, 2002, 429; Norman Dorsen et al., *Comparative Constitutionalism: Cases and Materials*, West Publishing Company, 2003, 1.
[22] John C. Reitz, "How to Do Comparative Law," *American Journal of Comparative Law*, Vol. 46, 1998, 636.
[23] John C. Reitz, "How to Do Comparative Law," *American Journal of Comparative Law*, Vol. 46, 1998, 623.

A functionalist approach[24], which is at the center of the comparative method helps to answer further questions of: What were the initial functions behind the opportunities for participation in public decision-making, and are they still relevant today? What does law have to offer in terms of easing the tensions between facilitating participation of the affected parties, which have powerful economic or political power, and leveling their influence of in public policy and decision-making?

The limitations of the methods employed should be acknowledged as well. Probably, the principal limitation of the research arise its restriction of sources to legal acts, cases and scholarly treatises. However, this narrow gaze is critical to providing a more comprehensive account of the enhanced role for individuals from legal and constitutional perspectives.

Relevance of the Research and its Contribution

Public participation, deliberation and involvement by individuals in government decision-making processes have long been the centre of attention for the political sciences.[25] For quite a while the common perception by political scientists was that the opportunities for the public participation and deliberation are guaranteed primarily through mechanisms of direct democracy such as referendums or the right to petition. In practice, however, since 1980s, the ideas of ensuring certain roles for individuals beyond the tools of direct democracy gradually found their way into policy documents, laws and even Constitutions as well as international treaties. The terms of participation, involvement, deliberation and consultation

[24] Christopher A. Whytock, "Legal Origins, Functionalism, and the Future of Comparative Law," *Brigham Young University Law Review*, Vol. 6, 2009, 1879.
[25] Jurgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, MIT Press, 1996; Joshua Cohen, Philosophy, Politics, Democracy: Selected Essays, Harvard University Press, 2009; Carole Pateman, *Participation and Democratic Theory*, Cambridge University Press, 1989; John S. Dryzek, Deliberative Democracy and Beyond: Liberals, Critics, Contestations, Oxford University Press, 2000; Benjamin Barber, Strong Democracy: Participatory Politics for a New Age, University of California Press, 1984; Robert E. Goodin, *Innovating Democracy: Democratic Theory and Practice After the Deliberative Turn*, Oxford University Press, 2008.

have never been as widely employed in political and legal contexts across various jurisdictions as they are now.

Yet, there is relatively little legal research addressing the development area of the law of public consultation. The existing legal treatises are either not up to date or address the law of public consultation in a piecemeal fashion usually relying heavily either on the potential of participatory rights,[26] or on the shortcomings associated with the increased opportunities for participation.[27] One of the more comprehensive studies on public participation in Europe and the US dates back to 2001.[28] However, since then there have been significant changes in both Europe and the US.

This research aims to fill the existing gaps in legal literature as well as contributing to a better understanding of public participation and deliberation. While acknowledging that public consultation can variously be perceived as imperative, beneficial, detrimental, ineffective or entirely unnecessary (depending on how it is structured, and from whose perspective it is viewed), this research aims to emphasize the role of law in structuring requirements for decision-makers to facilitate public participation and deliberation to meet the requirements of procedural fairness and justice. Such analysis is crucial in addressing the problems of the regulatory state.

[26] Joana Mendes, *Participation in European Union Rulemaking: A Rights-Based Approach*, Oxford University Press, 2011; Rory O'Connell, "Towards a Stronger Concept of Democracy in the Strasbourg Convention," *European Human Rights Law Review*, Vol. 3, 2006, 281.
[27] Jim Rossi, "Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking," *Northwestern University Law Review*, Vol. 92, 1997, 173, and Francesca Bignami, "The Administrative State in a Separation of Powers Constitution: Lessons for European Community Rulemaking from the United States," the Jean Monnet Center for International and Regional Economic Law and Justice at NYU School of Law, http://centers.law.nyu.edu/jeanmonnet/papers/99/990501.html#fn0
[28] Theodora Ziamou, *Rulemaking, Participation and the Limits of Public Law in the USA and Europe*, Ashgate, 2001.

1. Public Deliberation and Participation as a Solution to the Challenges faced by Regulatory Government

1.1. From Representative to Regulatory Government

The questions of how decisions governing public life are made and by whom are central to any understanding of the role of government and the assessment of its legitimacy. This section examines the changing roles of government and 'the people', the location of political power, as well as the relationship between government and the governed.

Traditionally, governments were seen as relatively well-organized structures, where policies and decisions are made in a centralized and hierarchical manner, and accountability is ensured through elections.[29] The scope of government functions was seen as rather limited. For instance, Hobbes distinguished between four such tasks: guaranteeing security and protection from external foes; ensuring internal peace among the citizens; securing opportunities to acquire wealth and enjoyment of liberty.[30]

Not only did the government have a limited role, it was considered to be the sole and most competent actor concerning public decision-making. Generally, under the conditions of representative government, politics were regarded as a domain of individuals with special knowledge and expertise.[31] There was an inherent distrust of lay people, whose activities were "confined to passing judgments on their representatives in elections."[32] The main reasons for keeping the people at a distance from public decision-making processes were related to their

[29] See, for example, R.A.W. Rhodes, *Understanding Governance: Policy Networks, Governance, Reflexivity and Accountability*, Open University Press, 1997, 5.
[30] Thomas Hobbes, *On the Citizen*, eds. Richard Tuck and Michael Silverthorne, Cambridge University Press, 1998, 144.
[31] See, for example, Urmila Sharma et al., *Principles and Theory in Political Science*, Vol. 1, Atlantic Publishers, 2000, 24-25; Benjamin Barber, *Strong Democracy: Participatory Politics for a New Age*, University of California Press, 1984, 152.
[32] Ian Budge, "Direct Democracy: New Approaches to Old Questions," in Michael Saward, ed., *Democracy: Critical Concepts in Political Science*, Vol. 3, Routledge, 2007, 194; 205, (referring to Schumpeter, Plamenatz and Sartori)

alleged lack of knowledge and expertise. Notably, for example, the same reasons were also employed to limit the suffrage of women.[33]

Other than electoral process, interaction between the government and the governed was seen as unnecessary and potentially harmful. According to Rousseau, even the process of voting does not necessarily have to be preceded by any preliminary discussions, otherwise the "voters might be swayed by eloquence and demagogy."[34] John Stuart Mill was of the opinion that some 'backward' people are not capable of governing themselves.[35] As Adam Przeworski puts it, there was a clear location of the political power, since the power rested with the elected representatives, and elections were seen as the only means of accountability for the exercise of this power.[36]

In representative democracies, elections were, generally, considered as a sufficient condition for the legitimacy of the state, while the right to vote was the main mechanism for ensuring accountability of elected representatives. Indeed, for a while the concept of 'bound mandates'[37] was seen as another way of holding representatives accountable for their activities. However, this mechanism did not become popular and was rejected most famously by Edmund Burke, who held that a member of parliament has to represent '*one* nation'[38] and '*one* interest'[39] rather than local interests of constituents who elected him.[40] According to Burke, the idea of 'bound mandates' would also be incompatible

[33] Audrey Oldfield, *Woman Suffrage in Australia*, Cambridge University Press, 1992, 190, and Elizabeth Frost-Knappman et al., *Women's Suffrage in America*, Infobase Publishing, 2009, 94.
[34] Jon Elster et al, *Deliberative Democracy*, Cambridge University Press, 1998, 14 (referring to Rousseau)
[35] John Stuart Mill, *Representative Government*, Kessinger Publishing, 2004, 170.
[36] Adam Przeworski, Democracy and the Limits of Self-Government, Cambridge University Press, 2010, 122.
[37] For example, Jon Elster "distinguish[es] between three kinds of bound mandates: (1) instructions about how to vote on specific issues; (2) instructions to refuse to debate specific issues; and (3) instructions to withdraw from the assembly if certain decisions are made," in Jon Elster "Constitutional Bootstrapping in Philadelphia and Paris," in *Constitutionalism, Identity, Difference, and Legitimacy: Theoretical Perspectives*, ed. Michel Rosenfeld, Duke University Press, 1994, 71.
[38] "Mr. Burke's Speech to the Electors of Bristol, 1774" in *Edmund Burke, On Empire, Liberty, and Reform: Speeches and Letters*, ed. David Bromwich**,** Yale University Press, 2000, 55 (emphasis original).
[39] "Mr. Burke's Speech to the Electors of Bristol, 1774" in *Edmund Burke, On Empire, Liberty, and Reform: Speeches and Letters*, ed. David Bromwich**,** Yale University Press, 2000, 55 (emphasis original).
[40] "Mr. Burke's Speech to the Electors of Bristol, 1774" in *Edmund Burke, On Empire, Liberty, and Reform: Speeches and Letters*, ed. David Bromwich**,** Yale University Press, 2000, 55.

with the deliberative nature of the parliament.[41] The issue of ensuring government's legitimacy is closely linked to its representativeness.

According to Hanna Pitkin, the benchmark for measuring representation is the criteria of responsiveness by the representative to the represented.[42] Pitkin distinguishes between the two types of decisions, those which are based on scientifically proven answers and those which are based on values and judgments.[43] According to her, responsiveness is required concerning the decisions based on values rather than decisions based on science.[44]

In addition to electoral rights, the right to the freedom of expression is another common tool in the hands of the people which allows them to participate in public decision-making, thereby helping to ensure its responsiveness and legitimacy. For instance, Weinstein argues that freedom of speech is to be most valued because it enables people to govern themselves.[45] According to the author, the most valuable aspect of free speech is the ability of each person to participate in the formation of public opinion, which is central in guaranteeing the legitimacy of government.[46] The importance of having unhindered freedom of expression is supported by the theory of 'suspicion of government', according to which the government cannot be trusted to distinguish between truth and falsity, and therefore fallibility of government officials has to be recognized.[47] Thus, on the one hand, the government is expected to act with certain knowledge and expertise, on the other hand, its competence to reach infallible decisions is under suspicion. According to this theory, the government could be mistaken about scientifically grounded decisions as well as about decisions, requiring

[41] "Mr. Burke's Speech to the Electors of Bristol, 1774" in *Edmund Burke, On Empire, Liberty, and Reform: Speeches and Letters*, ed. David Bromwich**,** Yale University Press, 2000, 55 (emphasis original).
[42] Hanna Fenichel Pitkin, *The Concept of Representation*, University of California Press, 1967, 209.
[43] Hanna Fenichel Pitkin, *The Concept of Representation*, University of California Press, 1967, 212.
[44] Hanna Fenichel Pitkin, *The Concept of Representation*, University of California Press, 1967, 212.
[45] James Weinstein, "Participatory Democracy and Free Speech," *Virginia Law Review*, Vol. 97 (3), 2011, 491, 497.
[46] James Weinstein, "Participatory Democracy and Free Speech," *Virginia Law Review*, Vol. 97 (3), 2011, 491, 498.
[47] Eric Barendt, *Freedom of Speech*, Oxford University Press, 2005, 21.

value or judgment.[48] Therefore, the channels of communication, allowing the interchange of information between the government and the people, are necessary to enable government officials to receive all the relevant information and knowledge in order to make the right decisions.

Thus, traditionally there was great suspicion about involving lay people in public decision-making processes, and the role of the people was thus confined to electing their representatives. Elections were considered as the main channel of communication between the government and the governed, while the right to the freedom of expression was supposed to fill in the gaps in between elections.

Since the times of Hobbes when government was understood as performing only a limited number of functions, the concept of government has changed significantly. Governments have expanded their tasks through many areas of public life and transferred their functions to a variety of actors. Regulatory governments are now characterized as having accumulated many more powers than they used to hold. Most scholars agree that nowadays governments play a significant part in economic and social activities in order to ensure security and provide welfare for their people.[49] Once, it became clear that these powers can not be carried out in a centralized and hierarchical manner, it has been argued that policy and decision-making became "less and less a matter of ruling through hierarchical authority structures, and more and more a matter of negotiating through a decentralized series of floating alliances."[50]

[48] Hanna Fenichel Pitkin, *The Concept of Representation*, University of California Press, 1967, 212.
[49] Martin Loughlin, *Foundations of Public Law*, Oxford University Press, 2010, 435. To emphasize the negative features of expansive governmental powers, Michel Foucault adopted a notion of 'governmentality,' whereby the government power is seen as exercised primarily to control almost every aspect of a person's life. In Graham Burchell et al., *The Foucault Effect: Studies in Governmentality: with two Lectures by and an Interview with Michel Foucault*, University of Chicago Press, 1991, 87-105
[50] Robert E. Goodin, Martin Rein and Michael Moran, "The Public and its Politics," in *The Oxford Handbook of Public Policy*, eds. Michael Moran et al., Oxford University Press, 2006, 12. See also argument by Peter Miller and Nikolas Rose that "[i]ndividuals are to be governed through their freedom … as members of heterogeneous communities of allegiance," in Peter Miller and Nikolas Rose, *Governing the Present: Administering Economic, Social and Personal Life*, Polity Press, 2008, "Introduction: Governing Economic and Social Life," 25.

Involvement of various actors in public decision-making further shaped the contours of regulatory government. For instance, in the UK, since the 1930s the legislature has increasingly delegated powers to the executive which was seen as an 'inevitable' development given the complexity of the problems at stake.[51] This delegation of functions did not only occur within the government, but many of the functions were out-sourced outside the government as well. Generally there was a move from the concept of government towards that of 'governance'. Under the concept of governance, 'inherent government functions'[52] are carried out by a vast array of actors as described above (e.g. independent regulatory authorities, executive agencies and public-private partnerships).[53] And even where the functions are still retained in the hands of governments, new avenues are built so that non-governmental actors could contribute to policy and decision-making processes.[54] Eventually, the establishment and performance of functions by other actors than the government itself came to be seen as an inevitable and important part of how regulatory governments work.

At the center of all these changes the processes of regulation and contracting-out deserve particular attention. One of the main processes leading to the 'rise of the regulatory state'[55] is the proliferation of independent regulatory authorities. That said, in some countries, independent regulatory agencies have been present for over a century.[56] For instance, in 1887 the Interstate Commerce Commission was the first one among this type of agencies established in the US. In other countries the changes concerning regulatory practices have

[51] Jeffrey Jowell, "The Rule of Law Today," in *The Changing Constitution*, ed. Jeffrey Jowell and Dawn Oliver, Oxford University Press, 2004, 8-9.
[52] Paul R. Verkuil, *Outsourcing Sovereignty: Why Privatization of Government Functions Threatens Democracy and What We Can Do about It*, Cambridge University Press, 2007, 8.
[53] See, for example, B. Guy Peters and Jon Pierre, "Governance, Accountability and Democratic Legitimacy," in *Governance and Democracy: Comparing National, European and International Experiences*, ed. A. Benz and Y. Papadopoulos, Routledge, 2006, 37.
[54] Chris Shore, "'European Governance' or Governmentality? The European Commission and the Future of Democratic Government," *European Law Journal*, Vol. 17(3), 2011, 289, http://onlinelibrary.wiley.com/doi/10.1111/j.1468-0386.2011.00551.x/pdf
[55] Giandomenico Majone, "The Rise of the Regulatory State in Europe," *West European Politics*, Vol. 17, No. 3, 1994, 77-101. See also, Edward L. Glaeser and Andrei Shleifer, "The Rise of the Regulatory State," *Journal of Economic Literature, American Economic Association*, Vol. 41(2), 2003, 401-425.
[56] Lisa Heinzerling and Mark V. Tushnet, *The Regulatory and Administrative State: Materials, Cases, Comments*, Oxford University Press, 2006, 415.

been introduced only more recently. For example, in the UK this type of authority emerged in the late 1970s,[57] and in South Africa even more recently, since for the most part of the 20th century the country's economic infrastructure was dominated by the government.[58]

The reasons for regulatory reform have been similar almost everywhere. As Giandomenico Majone suggests, the main reason was the failure by publicly owned companies to keep pace with technological progress as well as to ensure consumer protection.[59] According to Majone, the solution was to delegate the management powers of these industries to private companies, and vest expert agencies with supervisory powers.[60] Generally, the creation of independent regulatory agencies was based on the idea that non-elected experts would be equipped with better knowledge and information and consequently would perform their functions more efficiently than the legislature or the executive.[61]

Regulatory agencies are not present in all fields of economic and social life. Instead, as Majone argues, "[t]he model of the independent expert agency is most relevant in

[57] See, for example, Gul Sosay, "Consequences of Legitimizing Independent Regulatory Agencies in Contemporary Democracies," in *Delegation in Contemporary Democracies*, eds. Dietmar Braun and Fabrizio Gilardi, Routledge, 2006, 171.

[58] Peter Perkins, "The Role of Economic Infrastructure in Economic Growth: Building on Experience," in *Focus, Making South Africa Work: Rules of the Game, Regulation, Deregulation and Re-regulation*, Helen Suzman Foundation, Issue 60, January 2011, 27, http://www.africa.fnst-freiheit.org/publications/Partners/Focus60web.pdf/download See also, *Regulatory Management Indicators, South Africa, 2011*, the Organisation for Economic Co-operation and Development, OECD, http://www.oecd.org/dataoecd/50/33/47827382.pdf See also, Headline Report, *Counting the Cost of Red Tape for Business in South Africa*, Strategic Partnerships for Business Growth in Africa (SBP), November 2004, 7, http://www.sbp.org.za/uploads/media/Counting_the_Cost_of_Red_Tape_for_Business_in_South_Africa.pdf and the Main Report, *Counting the Cost of Red Tape for Business in South Africa*, Strategic Partnerships for Business Growth in Africa (SBP), June 2005, http://psp.emergingmarketsgroup.com/components/download.aspx?id=a804419d-763f-4e4e-9082-275365d0b1ef

[59] Giandomenico Majone, "The Regulatory State and Its Legitimacy Problems," *West European Politics*, Vol. 22(1), 1999, 1-2. See also, Sidney A. Shapiro and Joseph P. Tomain, who distinguish between regulatory goals to "address market failure" (e.g. competitive conditions, restricted entry or exit, public goods) and those to "achieve social goals" (e.g. prohibit objectionable exchanges, remedy distribution of wealth) in Sidney A. Shapiro and J. Tomain, *Regulatory Law and Policy: Cases and Materials*, LEXIS Law, 1998, 21; Robert Baldwin and Martin Cave, *Understanding Regulation: Theory, Strategy, and Practice*, Chapter 2 "Why Regulate," Oxford University Press, 1999, 9-16; and Stephen Breyer et al., *Administrative Law and Regulatory Policy*, Aspen Publishers, 2006, 4-11.

[60] Giandomenico Majone, "The Regulatory State and Its Legitimacy Problems," *West European Politics*, Vol. 22(1), 1999, 1-2.

[61] Anne Mette Kjaer, *Governance*, Polity Press, 2004, 27-28. See also, Colin Scott, "Regulatory Governance and the Challenge of Constitutionalism," in *The Regulatory State: Constitutional Implications*, eds. Dawn Oliver et al., Oxford University Press, 2010, 19. See also, Orly Lobel, "The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought," *Minnesota Law Review*, Vol. 89, 2004, 373.

limited, but important, areas such as economic and social regulation, or for other administrative activities where expertise, flexibility and reputation are the key to greater effectiveness."[62] The main concerns behind regulatory reforms are those of establishing competition and encouraging technological progress. According to Majone, some industries were always subject to some kind of regulation due to their highly technological infrastructure and economy of scale which incline towards a structure of oligopoly.[63] Also, these industries are distinctive from others because they usually serve most of the population and therefore are especially attractive to politicians.[64] Presumably the appeal is grounded in the idea that supervision of a particular sector through, for example, reduction of prices for the services, increases the likelihood of reelection.

From a historical perspective, the area of electronic communications witnessed one of the early regulatory reforms. In the UK, in the 1980s, electronic communications field was among the first industries to be privatized and subjected to regulatory mechanisms.[65] Similarly, in the US, the telecommunications industry was among the first (others include railroads, airlines, electricity, and gas) to be brought under the umbrella of so-called 'economic regulation'.[66] The implementation of assigned regulatory goals such as ensuring competition in the market and the provision of universal services is vested primarily with such

[62] Giandomenico Majone, "The Agency Model: The Growth of Regulation and Regulatory Institutions in the European Union," 1997, 2, http://www.eipa.eu/files/repository/eipascope/scop97_3_2.pdf
[63] Giandomenico Majone, "The Regulatory State and Its Legitimacy Problems," *West European Politics*, Vol. 22, No. 1, 1999, 5. For more on regulatory processes see also Richard Rawlings, "Introduction: Testing times" in *The Regulatory State: Constitutional Implications*, eds. Dawn Oliver et al., Oxford University Press, 2010, 5, and Colin Scott, "Privatization and Regulatory Regimes," in Michael Moran et al., eds., *The Oxford Handbook of Public Policy*, Oxford University Press, 2006, 651-668.
[64] Giandomenico Majone, "The Regulatory State and Its Legitimacy Problems," *West European Politics*, Vol. 22, No. 1, 1999, 5.
[65] Mark Armstrong et al. *Regulatory Reform: Economic Analysis and British Experience*, the MIT Press, 1994, 195. See also John Braitwhaite *Regulatory Capitalism: How it Works, Ideas for Making it Work Better*, Edward Elgar, 2008, 9.
[66] Sidney A. Shapiro and J. Tomain, *Regulatory Law and Policy: Cases and Materials*, LEXIS Law, 1998, 265-312. See also Jeffrey L. Harrison et al., *Regulation and Deregulation: Cases and Materials*, Thomson West, 2004, 17-19. For a more comprehensive account on history of regulation in the US see John Braitwhaite *Regulatory Capitalism: How it Works, Ideas for Making it Work Better*, Edward Elgar, 2008.

regulatory agencies. The agencies are also subject to a series of procedural requirements which are expected to constrain possible abuses of power.

In environmental matters, as a part of 'social regulation,'[67] the expertise and efficiency aspects of regulation were further intensified due to the uncertainty of environmental problems, their impact on large parts of the population, their potentially 'adverse,' irreversible and perhaps 'catastrophic' effects as well as the inherent difficulty in controlling these effects.[68] Here the regulatory practices were expected to provide a suitable mechanism for dealing with problems of air and water pollution and climate change, to name but a few. Environmental matters are interesting as an exemplary regulatory area where economic, social and moral considerations collide.[69] Moreover, accommodation of all the diverse interests at stake could be burdened with the strategic behaviour of the involved parties.[70] Furthermore, according to some scholars, the advancement of environmental concerns fostered the spread of regulatory reforms elsewhere.[71]

In addition to regulatory reform, contracting-out is used by the authorities and agencies to transfer their functions in terms of the provision of services. The concept of 'contracting out' generally refers to the process of "inviting private companies to tender for the provision of a service which had hitherto been provided by the government."[72] For instance, in the US, in the airport security area, the Transportation Security Agency (TSA)[73]

[67] Tony Prosser, "Models of Economic and Social Regulation," in *The Regulatory State: Constitutional Implications*, eds. Dawn Oliver et al., Oxford University Press, 2010, 43.
[68] Robert V. Percival et al., *Environmental Regulation: Law, Science, and Policy*, 3rd ed., Aspen Law and Business, 2000, 3-7, as reprinted in Lisa Heinzerling and Mark V. Tushnet, *The Regulatory and Administrative State: Materials, Cases, Comments*, Oxford University Press, 2006, 4-5.
[69] See, for example, Sidney A. Shapiro and J. Tomain, *Regulatory Law and Policy: Cases and Materials*, LEXIS Law, 1998, 399-443; and Lisa Heinzerling and Mark V. Tushnet, *The Regulatory and Administrative State: Materials, Cases, Comments*, Oxford University Press, 2006, 818.
[70] Sidney A. Shapiro and J. Tomain, *Regulatory Law and Policy: Cases and Materials*, LEXIS Law, 1998, 410. 818.
[71] Martin Shapiro, "'Deliberative', 'Independent' technocracy v. Democratic Politics: Will the Globe Echo the E.U.?" *Law and Contemporary Problems*, Vol. 68, 2005, 341. See also, Martin Levin and Martin Shapiro, *Transatlantic Policymaking in an Age of Austerity: Diversity and Drift*, Georgetown University Press, 2004.
[72] A.C.L. Davies, *Accountability: A Public Law Analysis of Government by Contract*, Oxford University Press, 2001, 3. In the UK, the government started to rely more heavily on contracting-out in the 1980s. Ibid.
[73] *Transport Security Administration*, Home, http://www.tsa.gov/

has contracted-out the development of body-scanners, which are security mechanisms with the Advanced Imaging Technology (AIT), to private actors.[74] The main rationale behind 'contracting out' was that private companies would be motivated by the profit to improve the performance through innovation and make the provision of the services more efficient.[75]

Thus, the rationales behind the processes of regulation, privatization and contracting-out were similar. Firstly, all of these processes were driven by the urge for greater effectiveness in the government's performance and the desirability to minimize bureaucratic burdens. Secondly, there has typically been an expectation that non-governmental actors would be more knowledgeable and would possess more expertise than government workers. There has also been an expectation that regulatory reform and privatization would ensure policies and decisions which would foster competition (in fields such as telecommunications) and be more responsive to consumer concerns.

The mentioned processes of regulation, privatization and contracting-out also significantly influenced the scope and intensity of judicial review. Initial reliance on the expertise of agencies and other actors influenced the role of the judiciary in several ways. Given the (often assumed) expertise and knowledge of the decision-maker, judicial review is usually built on the principle of 'deference,' particularly, where issues involve technical and complex matters. For instance, in the US, the courts' deference occurs under the 'Chevron doctrine',[76] whereby the degree of court's deference depends on the context.[77]

[74] *Electronic Privacy Information Center v United States Department of Homeland Security*, No. 10-1157, (D.C. Cir. July 15, 2011), p.3, http://www.cadc.uscourts.gov/internet/opinions.nsf/B3100471112A40DE852578CE004FE42C/$file/10-1157-1318805.pdf
See also, Calvin Biesecker, "TSA Awards Whole Body Imaging Contract to Rapiscan," *Defense Daily*, 1 October 2009, http://www.allbusiness.com/government/government-bodies-offices-government/13377309-1.html and U.S. and

[75] A.C.L. Davies, *Accountability: A Public Law Analysis of Government by Contract*, Oxford University Press, 2001, 3. See also Stephanie Palmer, "Public Functions and Private Services: A Gap in Human Rights Protection," *International Journal of Constitutional Law*, Vol. 6, July-October, 2008, 586.

[76] See, for example, Alan B. Morrison, "Administrative Agencies are Just Like Legislatures and Courts – Except When They're Not," *Administrative Law Review*, Vol. 59, 2007, 79; Lisa Schultz Bressman, "Chevron's Mistake," *Duke Law Journal*, Vol. 58(4), 2009, 549; Elizabeth V. Foote, "Statutory Interpretation or Public

The judiciary defers to the substance of decisions by agencies and government authorities because they reach their decisions only after a certain course of procedures has been followed. For example, in the UK, it is assumed that decisions of the legislature and the executive have legitimacy because their procedures involve 'democratic debate' between the government and the governed.[78] Moreover, it is argued that government institutions are better equipped to gather all the necessary evidence and because of their expertise to balance all the different opinions and views.[79]

Another argument behind the concept of judicial deference is related to the assumed political accountability of legislatures to their representatives, and of regulators to the executive and to the legislature. Indeed, initially in the US, the elected President's political accountability to the American people and the administration's control over the agencies was the main reason for the deference by the judges to statutory interpretations by the agencies.[80] Likewise in the UK, judicial deference to the decisions of the legislature and executive is partly based on the nature of the government's accountability to the voters, as opposed to the democratically non-accountable nature of judiciary.[81] More recently, however, political accountability came to be considered a fiction rather than an actual tool of control, for such reasons as decreasing voter turnouts, and ever expanding powers of the regulatory agencies.[82]

Administration: How Chevron Misconceives the Function of Agencies and Why it Matters," *Administrative Law Review*, Vol. 59, 2007, 673.

[77] Robert J. Martineau, David P. Novello, *The Clean Air Act Handbook*, American Bar Association, 2004, 647.

[78] Alison L. Young, "In Defence of Due Deference," *The Modern Law Review*, Vol. 72(4), 2009, 554, at 566.

[79] Alison L. Young, "In Defence of Due Deference," *The Modern Law Review*, Vol. 72(4), 2009, 554, at 570.

[80] Glen Staszewski, "Reason-Giving and Accountability," *Minnesota Law Review*, Vol. 93, 2008-2009, 1260.

[81] Alison L. Young, "In Defence of Due Deference," *The Modern Law Review*, Vol. 72 (4), 2009, 554, at 565.

[82] Evan J. Criddle, "Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking," *Texas Law Review*, Vol. 88(3), 2010, 441, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1371717&download=yes See also, Glen Stasewszki, "Political Reasons, Deliberative Democracy, and Administrative Law," *Iowa Law Review*, Vol. 97(3), 2012, 1.

For instance, concerning substantive review, courts in the US and the UK developed the so-called 'hard-look'[83] review doctrine, which ultimately altered the approach of judicial deference. Indeed, scholars have persuasively argued for the abandonment of the deference doctrine. For example, in the context of rulemaking in the US, Criddle admits that agencies' political accountability to the President is no longer viable in practice, and suggests that it should be replaced with 'fiduciary representation'.[84] Under the 'fiduciary representation' model, during their rulemaking procedures agencies serve as representatives of the people, and one of the main conditions of such representation is that the process has to be deliberative.[85] Others are also skeptical about the deference doctrine. For instance, Staszewski argues that the theory of administrative law, which "emphasizes the importance of political control of agency decision-making by the President (or other elected officials),"[86] is misguided and should be abandoned as being "based on untenable conceptions of democracy and implausible empirical assumptions."[87] Similarly, another legal scholar argues that "[a]s the federal regulatory state has grown, legislative control over regulatory policy has declined … agencies continue to adopt regulations and implement policies with relatively little legislative input or oversight."[88]

Regulatory and other reforms led to a situation where those responsible for the decisions affecting the daily life of individuals could not be held accountable through the

[83] For the UK 'hard-look' review, see, Richard Rawlings, "Changed Conditions, Old Truths: Judicial Review in a Regulatory Laboratory," in *The Regulatory State: Constitutional Implications*, ed. Dawn Oliver et al., Oxford University Press, 2010, 292. For the US 'hard-look' review, see, for example, Jeffrey S. Lubbers, *A Guide to Federal Agency Rulemaking*, American Bar Association, 2006.
[84] Evan J. Criddle, "Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking," *Texas Law Review*, Vol. 88, 2010, 441, at 464.
[85] Evan J. Criddle, "Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking," *Texas Law Review*, Vol. 88, 2010, 441, at 466.
[86] Glen Staszewski, "Political Reasons, Deliberative Democracy, and Administrative Law," *Iowa Law Review*, Vol. 97(3), 2012, 1.
[87] Glen Staszewski, "Political Reasons, Deliberative Democracy, and Administrative Law," *Iowa Law Review*, Vol. 97(3), 2012, 1. See also, Glen Staszewski, "The Challenges of Fiduciary Administration," Legal Studies Research Paper No. 08-17, *Michigan State University College of Law*, 2009, 156, http://ssrn.com/abstract=1678595
[88] Jonathan H. Adler, "Would the REINS Act Rein in Federal Regulation? Congress Makes Another Effort to Regain Control of Regulation," *Regulation*, Case Western Reserve University School of Law, 2011, 22. (on file with the author)

mechanisms of representative democracy such as elections. Moreover, electoral processes are frequently criticized because of flaws in campaign financing,[89] and increasingly low voter turnouts.[90] Thus, in the context of regulatory government, participation by individuals in a country's public affairs through elections is not regarded anymore as an instrument sufficient to hold public institutions to the account.

1.2. Revitalizing Representative Government through Participation and Deliberation

As already mentioned the quality of elections as a communicative channel between the people and the government has deteriorated. Given the changing nature of the government and the flaws in electoral processes, the representative nature of the government and the vitality of representative democracy is now questioned more than ever. In the light of these flaws, governmental and non-governmental actors in the three countries at the centre of analysis propose introducing participatory and deliberative instruments into the existing legal frameworks. Currently, there seems to be a trend emerging to broaden the opportunities for participation and deliberation for members of the public. In the UK, since 2007, reforms have been proposed under an initiative entitled *Re-Invigorating Our Democracy*.[91] The proposals suggest allocating more power to the people as well as enhancing their rights and

[89] Lawrence Lessig, *Republic Lost: How Money Corrupts Congress – And a Plan to Stop It*, Twelve, 2011.
[90] For example, in the US the trend of electoral turnout has been generally downward since 1960. See, John Haskell, *Direct Democracy or Representative Government? Dispelling the Populist Myth*, Westview Press, 2001, 3. In the UK, during 2001 elections the turnout fell to less than 60% of the voting age population, which evidenced its lowest level since 1918. See, Vernon Bogdanor, *The New British Constitution*, Hart Publishing, 2009, 291. See also, *Citizens as Partners. Information, Consultations and Public Participation in Policy-Making*, the Organisation for Economic Co-operation and Development, OECD, 2001, http://213.253.134.43/oecd/pdfs/browseit/4201131E.PDF
[91] *The Governance of Britain*, Presented to Parliament by the Secretary of State for Justice and Lord Chancellor, July 2007, http://www.official-documents.gov.uk/document/cm71/7170/7170.pdf

responsibilities.[92] More particularly, the suggestion is to require public authorities to involve people in their decision-making processes at local as well as national levels.[93]

In the US, reforms introducing more deliberative mechanisms into regulatory processes were proposed at the end of 2011. The US House of Representatives passed the *Regulatory Accountability Act of 2011*(RAA).[94] The draft which is not yet passed in the Senate, includes suggestions to change administrative procedures by making them more transparent and open to the public. For example, Section 3 of the draft requires decision-makers to enhance the opportunities for participation by interested individuals in their decision-making processes.[95]

At the same time, several members of the US Congress have sought to introduce reforms to the *Federal Communications Commission's* (the FCC) rulemaking procedure. The proposed darfts which were introduced in November 2011, would place additional requirements on the FCC concerning its rulemaking process.[96] Again, the core suggestion is to make the FCC's rulemaking procedures more open to those whom they affect. For example, the Bill H.R. 3309, which is also referred to as the *Federal Communications Commission Process Reform Act of 2011*, details how the agency should consult with the

[92] *The Governance of Britain*, Presented to Parliament by the Secretary of State for Justice and Lord Chancellor, July 2007, 5, http://www.official-documents.gov.uk/document/cm71/7170/7170.pdf
[93] *The Governance of Britain*, Presented to Parliament by the Secretary of State for Justice and Lord Chancellor, July 2007, 7-11, 49-52, http://www.official-documents.gov.uk/document/cm71/7170/7170.pdf
[94] *Regulatory Accountability Act of 2011*, H.R. 3010, 112th Cong. (2011), http://www.govtrack.us/congress/bill.xpd?bill=h112-3010 For the legislative history of the bill see http://thomas.loc.gov/cgi-bin/query/z?c112:H.R.3010: and http://politics.nytimes.com/congress/votes/112/house/1/888
[95] Section 3 of *Regulatory Accountability Act of 2011*, H.R. 3010, 112th Cong. (2011), http://www.govtrack.us/congress/bill.xpd?bill=h112-3010 In 2012 and 2013 there were further unsuccessful attempts to reintroduce the draft in the Senate: http://www.foreffectivegov.org/return-of-the-regulatory-accountability-act
[96] *Federal Communications Commission Process Reform Act of 2011*, H.R. 3309, 112th Cong. (2011), http://republicans.energycommerce.house.gov/Media/file/Markups/FullCmte/112911/HR3309_As_Amended.pdf and *Federal Communications Commission Consolidated Reporting Act of 2011*, H.R. 3310, 112th Cong. (2011), http://republicans.energycommerce.house.gov/Media/file/Markups/FullCmte/112911/HR3310_As_Amended.pdf See also, Walden, Heller Unveil FCC Process Reform Legislation, Energy and Commerce Committee, Press Release, 2 November, 2011, http://energycommerce.house.gov/press-release/walden-heller-unveil-fcc-process-reform-legislation

interested parties on its proposed new rules and requires every final rule to be 'a logical outgrowth' of the language of the proposal.[97]

While the reforms suggested by the governments in the UK and the US concerning enhanced opportunities for public participation and deliberation need to go through various processes (such as public debates or hearings) before they could be properly adopted, public participation is already recognized as a core principle of South Africa's constitutional framework. For instance, under South Africa's Constitution, the country's legislatures are required to "facilitate public involvement in the legislative and other processes."[98] Not to mention that public participation and consultation have their roots in traditions of local communities, whereby the members would get together to discuss the issues which affect them.[99] Recently, also in South Africa, industry representatives made suggestions to reform the government policy and decision-making processes through the introduction of more opportunities for participation and deliberation.[100]

Also, the rhetoric of public participation and participatory democracy already for a while occupied fields of public policy and public law. In various disciplines there has been a call for more deliberative mechanisms to be employed in policy and decision-making processes. For example, in policy studies it has been argued that "powerful, well-documented forces are pushing policy systems in the direction of deliberation, consultation, and

[97] Section 13(2) of the *Federal Communications Commission Process Reform Act of 2011*, H.R. 3309, 112th Cong. (2011), http://republicans.energycommerce.house.gov/Media/file/Markups/FullCmte/112911/HR3309_As_Amended.pdf The second Bill, *the Federal Communications Commission Consolidated Reporting Act of 2011*, clarifies the FCC's reporting to the Congress requirements, http://republicans.energycommerce.house.gov/Media/file/Markups/FullCmte/112911/HR3310_As_Amended.pdf

[98] Sections 59 (1) (a), 72 (1) (a) and 118 (1) (a) of the Constitution of the Republic of South Africa, 1996, text available at: http://www.info.gov.za/documents/constitution/1996/index.htm

[99] *Doctors for Life International v Speaker of the National Assembly*, 2006 (12) BCLR 1399 (CC), at 101, http://www.saflii.org/za/cases/ZACC/2006/11.html

[100] *Counting the Cost of Red Tape for Business in South Africa*, the Main Report, SBP, Strategic Partnerships for Business Growth in Africa, June 2005, 90, http://psp.emergingmarketsgroup.com/components/download.aspx?id=a804419d-763f-4e4e-9082-275365d0b1ef See also *Strategic Partnerships for Business Growth in Africa* (SBP), About Us, Our History, http://www.sbp.org.za/index.php?id=12

accommodation."[101] In the field of public law, Julia Black suggests that the opportunities for deliberation should be included in procedural laws in order to ensure more legitimacy of the processes.[102] To give another example, Javier Barnes argues that rulemaking procedures have to be complemented with the requirements for public participation.[103] Similarly, other scholars have suggested tying 'administrative reforms' to the precepts of 'participatory democracy'[104] and 'deliberative democracy,'[105] or have developed a theory of 'administrative democracy.'[106] Not surprisingly, the suggested reforms by the UK's Government's have also been described as ending 'the era of pure representative democracy'.[107]

Before proceeding to analyze the more specific reasons behind the proposed changes to public policy and decision-making processes, it is necessary to determine how participation and deliberation is defined by the theories of democracy. Therefore what follows is the analysis of deliberative and participatory conceptions of democracy.

1.3. The Ideals of Participation and Deliberation

There are different understandings of 'participation' and 'deliberation' in the expansive literature dealing with theories of democracy. Usually deliberation is understood as

[101] Robert E. Goodin, Martin Rein and Michael Moran, "The Public and its Politics," in *The Oxford Handbook of Public Policy*, eds. Michael Moran et al., Oxford University Press, 2006, 15.
[102] Julia Black, "Proceduralizing Regulation: Part I," *Oxford Journal of Legal Studies*, Vol. 20(4), 2000, 597, 614. See also, Julia Black, "Proceduralizing Regulation: Part II" *Oxford Journal of Legal Studies*, Vol. 21(1), 2001, 33.
[103] Javier Barnes, "Transforming Administrative Procedure: Towards a third generation of administrative procedures," Paper for Workshop on Comparative Administrative Law, Yale Law School, May 7-9, 2009, 4, http://www.law.yale.edu/documents/pdf/CompAdminLaw/Javier_Barnes_CompAdLaw_paper_%28rev%29.pdf
[104] See for example, Christopher Ansell and Jane Gingrich, "Reforming the Administrative State" in Bruce Cain et al., eds., *Democracy Transformed*: *Expanding Political Opportunities in Advanced Industrial Democracies*, Oxford University Press, 2006, 164; and Paul P. Craig, *Public Law and Democracy in the United Kingdom and the United States of America*, Clarendon Press, 1990, Chapter 11 "Participatory Democracy: The Radical View," 366-414.
[105] Christopher Ansell and Jane Gingrich, "Reforming the Administrative State" in Bruce Cain et al., eds., *Democracy Transformed*: *Expanding Political Opportunities in Advanced Industrial Democracies*, Oxford University Press, 2006, 164
[106] Mariano-Florentino Cuellar "Rethinking Public Engagement in the Administrative State," Center for Law and Society, School of Law, University of California, Berkeley, November 2003, http://www.law.berkeley.edu/institutes/csls/cuellarpaper.pdf
[107] Vernon Bogdanor, *The New British Constitution*, Hart Publishing, 2009, 298; Andrew Gamble and Robert Thomas, "The Changing Context of Governance: Implications for Administration and Justice," in Michael Adler, ed., *Administrative Justice in Context*, Hart Publishing, 2010, 17.

some sort of communicative interaction and 'a dialogical process' or a situation where people should be ready to present and defend their arguments in front of others.[108] Generally participation is explained as active (although not necessarily dialogical) involvement in some processes.[109] Most often participation is understood as taking part in elections or referenda, probably because public participation implies close links and associations with the term of 'political participation'. For instance, the 'right to political participation' is a political right recognized under international human rights' instruments and most broadly understood as a right to vote in elections and be elected.[110]

Thus, initially it seems that participatory process need not possess the same qualities as a deliberative one. Participatory decision-making process would mean that individuals have opportunities to be involved in the process through some mechanisms. Deliberative decision-making process on the other hand, would mean that participants need to be provided with opportunities to discuss and debate the proposed decisions. The following examination of the theories of democracy provides a more comprehensive understanding of participation and deliberation.

The two central strands of participatory democracy and deliberative democracy are represented by Carole Pateman and Jurgen Habermas, respectively. In the late 1960s Carole Pateman developed the theory of participatory democracy.[111] Pateman found that, in heavily industrialized societies, individuals were deprived of any opportunities for participation (except for those afforded by periodic elections). [112] She suggested that given the importance of work in one's life, first and foremost individuals should be given some control

[108] For example, the Oxford Dictionaries define deliberation as a 'long and careful consideration or discussion,' http://www.oxforddictionaries.com/definition/english/deliberation See also, James Bohman *Public Deliberation: Pluralism, Complexity and Democracy*, The MIT Press, 2000, 17; and Carole Pateman, "Participatory Democracy Revisited", *Perspectives on Politics*, Vol. 10, Issue 1, 2012, 8.
[109] For example, the Oxford Dictionaries define participation as 'the action of taking part in something,' http://www.oxforddictionaries.com/definition/english/participation?q=participation
[110] Henry J. Steiner, "Political Participation as a Human Right," *Harvard Human Rights Year Book*, Vol. 1, 1988, 77; 85-89.
[111] Carole Pateman, *Participation and Democratic Theory*, Cambridge University Press, 1989.
[112] Carole Pateman, *Participation and Democratic Theory*, Cambridge University Press, 1989, 68.

over their work and its environment.[113] According to Pateman, allowing employees greater influence over their work and its conditions could have an educative effect, which consequently should enable them to overcome generalized political apathy and increase the role of individuals in spheres of their lives other than employment.[114] Similarly to Pateman, Barber suggests a form of self-government, which he calls 'strong democracy,' where the people have the opportunities to make the decisions and policies which affect them by themselves.[115] According to Barber, in order to ensure the legitimacy of government and of politics, self-governing should be the rule rather than the exception – frequent rather than occasional.[116] More precisely, this form of participatory democracy, according to Barber, should provide new solutions, contribute to the creation of communities where individuals are ready to change their preferences and transform their private interests into public interests.[117] Like Pateman, Barber relies on the educative function of strong democracy, whereby involvement by individuals in government of public matters educates them about how to think in terms of the public good.[118]

More than two decades after Pateman developed the theory of participatory democracy, Jurgen Habermas drew the contours of the so-called deliberative democracy. In order to make public policy and decision-making more deliberative, Habermas emphasizes the importance of the so-called 'public sphere,' which he defines as an "intermediary structure

[113] Pateman refers to such opportunities as "industrial participation," i.e. participation which "involves a modification, to a greater or lesser degree, of the orthodox authority structure; namely one where decision-making is the "prerogative" of management, in which workers play no part," in Carole Pateman, *Participation and Democratic Theory*, Cambridge University Press, 1989, 68.
[114] Carole Pateman, *Participation and Democratic Theory*, Cambridge University Press, 1989, 44.
[115] Benjamin Barber, *Strong Democracy: Participatory Politics for a New Age*, University of California Press, 1984, 151.
[116] Benjamin Barber, *Strong Democracy: Participatory Politics for a New Age*, University of California Press, 1984, Preface, xxii.
[117] Benjamin Barber, *Strong Democracy: Participatory Politics for a New Age*, University of California Press, 1984, 151.
[118] Benjamin Barber, *Strong Democracy: Participatory Politics for a New Age*, University of California Press, 1984, 152.

between the political system, on the one hand, and the private sectors … on the other."[119] For Habermas, one of the main functions attached to the 'public sphere' is to problematize public concerns, whereby it should "not only detect and identify problems but also convincingly and *influentially* thematize them, furnish them with possible solutions, and dramatize them."[120]

These theories of participatory and deliberative democracy have prompted further discussions and refinement by political theorists concerning the processes of public policy and decision-making. For example, Robert Goodin relies on deliberation as conceived by Habermas but extends this concept by introducing the theory of 'reflective democracy'.[121] According to him, it is important to ensure that deliberation happens 'within' the elected representative and other decision-makers.[122] The 'democratic deliberation within' means that the decision-makers should adopt the views and arguments of those whose interests they ought to represent.[123] As another example, under the theory of 'associationalism', Paul Hirst suggests that public affairs are best managed through 'voluntary and democratically self-governing associations.'[124] Hirst considers that political tools of accountability, which were developed two centuries ago are insufficient to keep an oversight on the government officials.[125] According to Hirst, the concept of limited government is not feasible anymore mainly because the government grew bigger, particularly, due to the extended right to vote and the new-found necessity of the state to deal with complex issues as well as to meet the increasing needs of the people.[126] According to Hirst, changes related to increasing public

[119] Jurgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, MIT Press, 1996, 373.
[120] Jurgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, MIT Press, 1996, 359 (emphasis original).
[121] Robert E. Goodin, *Reflective Democracy*, Oxford University Press, 2003, 1-14.
[122] Robert E. Goodin, *Reflective Democracy*, Oxford University Press, 2003, 1-14.
[123] Robert E. Goodin, *Reflective Democracy*, Oxford University Press, 2003, 1-14.
[124] Paul Hirst, *Associative Democracy: New Forms of Economic and Social Governance*, Polity Press, 1994, 19.
[125] Paul Hirst, *Associative Democracy: New Forms of Economic and Social Governance*, Polity Press, 1994, 4.
[126] Paul Hirst, *Associative Democracy: New Forms of Economic and Social Governance*, Polity Press, 1994, 4.

welfare resulted in unaccountable decision-making as well as curtailment of individual rights and freedoms.[127]

Despite the different approaches to participation and deliberation, the underlying idea of the above mentioned theories is that the existing forms of representation need to be reformed to more deliberative and participatory ones. The central claim is that communicative channels between the decision-makers and those to whom the decisions apply must be developed. These suggestions echo the earlier mentioned trend in current politics to 'revitalize' representative structures of government. Perhaps the main difference between the revitalization of representative government as suggested by politicians and as offered by the proponents of the theories of participatory and deliberative democracy, is the degree to which they envision that changes are necessary.[128] According to Barber every citizen should become a self-governor who gets involved in public decision-making processes which matter to him/her. The practice of participation and engagement in public affairs should eventually reformulate the 'hedonistic self-interest' in public terms.[129] Although Barber calls his proposals 'complementary'[130] to the existing structure of representative government, the suggested mechanisms seem more transformative than complementary. For instance, Barber suggests transforming not only the institutions to make them more open for participation by individuals but according to him the life style and routine of citizens should change as well. Dryzek on the one hand, rejects the representative elements of democracy to the extent that they involve aggregative mechanisms; on the other hand, he agrees that the representative structure of the government can facilitate deliberation, but it should not be considered the

[127] Paul Hirst, *Associative Democracy: New Forms of Economic and Social Governance*, Polity Press, 1994, 5.
[128] Section *1.2 Revitalizing Representative Government through Participation and Deliberation*
[129] Benjamin Barber, *Strong Democracy: Participatory Politics for a New Age*, University of California Press, 1984, 13.
[130] Benjamin Barber, *Strong Democracy: Participatory Politics for a New Age*, University of California Press, 1984, 25.

only possible option for deliberation to flourish.[131] Regardless of variations concerning the mentioned theories of democracy, the central concern remains the same: ensuring more open policy and decision-making processes so that interested individuals could take part in them, and contribute to the final outcomes.

While the advocates of theories of participatory and deliberative democracy have suggested reforming the existing institutions and decision-making mechanisms, the politicians, as already mentioned, have proposed more subtle reforms, whereby the existing decision-making processes would be supplemented with opportunities for public involvement in public matters through dialogue and discussion. Due to the variations offered by political theorists concerning participation and deliberation a deeper analysis is needed to distil the central requirements which would allow some measurement of the participatory and deliberative nature of existing public decision-making processes, and evaluation of how much further transformation may be necessary. The next section examines in more detail the circumstances under which the deliberative and participatory ideals could be achieved. These circumstances include the requirements of informed and reasoned debate, where all those affected or interested could participate on equal grounds and where an opportunity to influence the final decision exists.

1.4. Defining the Meaningfulness of Participation and Deliberation

Some scholars have argued that the deliberative and participatory theories of democracy could serve as 'an ultimate evaluative principle'[132] of how a government with a more central role for individuals would look like.[133] However, other scholars have accused

[131] John S. Dryzek, *Deliberative Democracy and Beyond: Liberals, Critics, Contestations*, Oxford University Press, 2000, 3.
[132] Arnold S. Kaufman, "The Nature and Function of Political Theory," *The Journal of Philosophy*, Vol. 51(1), 1954, 5, http://www.jstor.org/stable/2021323
[133] See, for example, Alice Woolley, "Legitimating Public Policy," *University of Toronto Law Journal*, Vol. 58, No. 2, 2008, 153; 172.

theorists of participatory and deliberative democracy of being too unrealistic, and therefore regard such theories as too impractical to be used as a frame of reference.[134]

The following sections provide a closer look at the requirements which are usually invoked by the advocates of the theories of participatory and deliberative democracy when assessing policy and decision-making processes.

1.4.1. Informed Debate

The first condition that most proponents of theories of participatory and deliberative democracy tend to agree upon is the requirement of informing individuals about the proposed policy or decision. Apart from the agreement that some information needs to be provided, there is no clear agreement as to the nature and scope of such a requirement.[135]

For instance, Fishkin contends that individuals willing to be involved in public deliberations should be provided with relevant information, which is necessary to make up their minds in order to make a certain decision.[136] Also, according to Fishkin, participants have to be provided with information which is adequate and sufficient so they could evaluate various alternatives concerning the issue at stake.[137]

More specifically, Bostwick argues that participants should be informed about contributions made by other participants.[138] This is particularly crucial when deliberation happens in the form of consultation where the consultees are not necessarily aware of each other's submissions. In addition, Abelson emphasizes the quality of information and contends

[134] Colin Farrelly, "Making Deliberative Democracy a More Practical Political Ideal," *European Journal of Political Theory*, Vol. 4, 2005, 200, at 201 (referring to Michael Walzer, "Deliberation, and What Else?" in *Deliberative Politics: Essays on Democracy and Disagreement*, ed. Stephen Macedo, Oxford: Oxford University Press, 1999, 68)

[135] See, for example, Julia Abelson et al., "Towards More Meaningful, Informed and Effective Public Consultation," Canadian Health Services Foundation, February 2004

[136] James S. Fishkin, *When the People Speak: Deliberative Democracy and Public Consultation*, Oxford University Press, 2009, 34.

[137] James S. Fishkin, *When the People Speak: Deliberative Democracy and Public Consultation*, Oxford University Press, 2009, 35.

[138] Matthew Bostwick, "Twelve Angry Citizens: Can Citizens' Juries Improve Local Democracy in New Zealand?" *Political Science*, Vol. 50, No. 2, 1999, 236, 243.

that in order to ensure meaningful of consultation, the "information [must be] presented clearly, honestly, and with integrity."[139] Although theories of democracy emphasize that deliberation and participation should meet the basic standards of an 'informed debate',[140] they lack more precise criteria, the presence or absence of which would allow for an assessment of the meaningfulness of deliberative and participatory processes. Public participation requirements as they exist in constitutional and administrative law could offer some illustration and guidance.

Thus, the following aspects of informed debate could be seen as requiring further clarification: Should the consultees be provided with background information on the subject matter at stake? How much information should be provided? Should they be informed about alternative proposals as well? How should the quality of this information be assessed?

1.4.2. Equality

Equality is yet another condition for meaningful participation and deliberation. For instance, Thomas Christiano holds the principle of equality to be the core of public deliberation. According to Christiano, equality entails "equal respect for every citizen, which ensures that each citizen has equal opportunities to contribute to the formation of the agenda for collective decision-making and which ensures equality in the cognitive conditions for citizen decision-making."[141]

Joshua Cohen distinguishes[142] between what he refers to as "formal equality" and "substantive equality." According to Cohen, participants of deliberation "are formally

[139] Julia Abelson et al., "Towards More Meaningful, Informed and Effective Public Consultation," Canadian Health Services Foundation, February 2004, i, http://www.chsrf.ca/migrated/pdf/abelson_final_e.pdf
[140] See, for example, David Held, *Models of Democracy*, Stanford University Press, 2006, 232, and Seyla Benhabib "Toward a Deliberative Model of Democratic Legitimacy," in *Democracy and Difference: Contesting the Boundaries of the Political*, ed. Seyla Benhabib, Princeton University Press, 1996, 71.
[141] Thomas Christiano, *The Constitution of Equality: Democratic Authority and its Limits*, Oxford University Press, 2008, 191.
[142] Joshua Cohen "Deliberation and Democratic Legitimacy," in *Deliberative Democracy: Essays on Reason and Politics*, ed. James Bohman, MIT Press, 1997, 74.

equal in that … each can put issues on the agenda, propose solutions, and offer reasons in support of or in criticism of proposals,"[143] while substantive equality entails that differences in resources do not impair their opportunities for deliberation.[144]

Under deliberative theories of democracy, equality requires that everyone is provided with adequate opportunities to take part in policy and decision-making processes despite their status or resources. Moreover, participants should have equal opportunities to influence the final outcomes of policy and decision-making processes. While this may seem like a plausible requirement, it is not clear how it could be realized in practice, particularly where decision-makers retain discretion as to whom and at what level of decision-making process to include.

1.4.3. Inclusiveness and Representation

Theories of deliberative democracy suggest that ideally policy and decision-making processes should be as inclusive as possible. In reality, however, even under circumstances where most people might ostensibly be able to participate in the policy or decision-making process, not everyone would do so for one reason or another. Yet participation by only a few does not necessarily render the process meaningless. For example, Christiano considers that, where not all the members of society are involved, involvement by the few can still have a positive impact on those not willing to be involved.[145] According to Christiano, the participating individuals set a desirable example, which other members of the society would be willing to follow.[146] Also, Gargarella argues that "what matters is the full

[143] Joshua Cohen "Deliberation and Democratic Legitimacy," in *Deliberative Democracy: Essays on Reason and Politics*, ed. James Bohman, MIT Press, 1997, 74.
[144] Joshua Cohen "Deliberation and Democratic Legitimacy," in *Deliberative Democracy: Essays on Reason and Politics*, ed. James Bohman, MIT Press, 1997, 74.
[145] Thomas Christiano, *The Constitution of Equality: Democratic Authority and its Limits*, Oxford University Press, 2008, 195.
[146] Thomas Christiano, *The Constitution of Equality: Democratic Authority and its Limits*, Oxford University Press, 2008, 195.

representation of views rather than of individuals … as long as all views are represented and decisions are made purely by rational argument, numbers shouldn't matter."[147]

As already mentioned, representativeness of public institutions depends on how much their policies and decisions are responsive to views and interests of the members of the public.[148] According to Pitkin, representatives should retain certain discretion and judgment when choosing how best to respond to the wishes of the represented.[149]

One way of ensuring representativeness as well as responsiveness would be to determine whether individuals or their groups could be affected by the proposed policy or decision. Again, according to Goodin, the issue of whom to include in the decision-making process raises the problem of "constituting the demos."[150] Although the issue of who constitutes the 'demos' primarily arises concerning the right to vote in representative democracies, it is of no less importance in other contexts as well.[151] Broadly speaking, the problem arises because seeking to include "all *actually* affected interests"[152] in the process of decision-making means that one cannot foresee who can be affected without drafting the decision itself.[153] In other words, what constitutes the 'actually affected' interests depends on the decision-maker: "[i]t is like the winning lottery ticket being pulled out of the hat by whomever has won that selfsame lottery."[154] Therefore, Goodin suggests a more expansive approach whereby once there is a possibility that a person might be affected by a government's proposed decision, he or she needs to be involved in decision-making on this

[147] Jon Elster, ed., *Deliberative Democracy*, , Cambridge University Press, 1998, "Introduction," 14.
[148] See Section *1.1. From Representative to Regulatory Government*
[149] Hanna Fenichel Pitkin, *The Concept of Representation*, University of California Press, 1967, 210.
[150] Robert E. Goodin, "Enfranchising All Affected Interests, and Its Alternatives," *Philosophy and Public Affairs*, Vol. 35(1), 2007, 40, 41.
[151] Robert E. Goodin, *Innovating Democracy: Democratic Theory and Practice After the Deliberative Turn*, Oxford University Press, 2008, 129.
[152] Robert E. Goodin, "Enfranchising All Affected Interests, and Its Alternatives," *Philosophy and Public Affairs*, Vol. 35(1), 2007, 40, 52 (emphasis added).
[153] Robert E. Goodin, "Enfranchising All Affected Interests, and Its Alternatives," *Philosophy and Public Affairs*, Vol. 35(1), 2007, 40, 52.
[154] Robert E. Goodin, "Enfranchising All Affected Interests, and Its Alternatives," *Philosophy and Public Affairs*, Vol. 35(1), 2007, 40, 52.

matter.[155] Dryzek suggests inclusion of as many people as possible in the public affairs regardless of how impacted by a particular decision they would be.[156] However, he also denotes that inclusions of as many interests as possible suggests that the decisions and policies need to be rather indeterminate.[157]

1.4.4. Reasoned Debate

The general idea is that those involved in policy setting or decision-making processes would provide reasons for their opinions and choices. One of the common features of the different theories of democracy is that reasons are at the heart of public deliberation and participation.[158] For example, according to John S. Dryzek, the authority of a person depends on the persuasiveness of his arguments or ideas.[159] Also Cohen agrees that ideal deliberation requires participants to substantiate their proposals or critiques with reasons.[160]

While most agree on the importance of reasoned deliberation, there is less agreement as to what kind of reasons should be provided. Traditionally, deliberative democrats suggested that the reasons of participants should be formulated in such a manner which is acceptable to others.[161] For instance, Cohen argues that participants have to come up with reasons which go beyond personal preferences in order to advance their proposal.[162] According to Cohen, under the conditions of ideal deliberation, the reasons should be

[155] Robert E. Goodin, "Enfranchising All Affected Interests, and Its Alternatives," *Philosophy and Public Affairs*, Vol. 35(1), 2007, 40, 68. See also Robert E. Goodin, *Innovating Democracy: Democratic Theory and Practice After the Deliberative Turn*, Oxford University Press, 2008, 150 and 153.
[156] John S. Dryzek, *Deliberative Democracy and Beyond: Liberals, Critics, Contestations*, Oxford University Press, 2000, 93.
[157] John S. Dryzek, *Deliberative Democracy and Beyond: Liberals, Critics, Contestations*, Oxford University Press, 2000, 93.
[158] Jane Mansbridge et al., "The Place of Self-Interest and the Role of Power in Deliberative Democracy," *The Journal of Political Philosophy*, Vol. 18, No. 1, 2010, 64, 65 (internal quotations omitted).
[159] David Held, *Models of Democracy*, Stanford University Press, 2006, 254 (referring to Dryzek).
[160] Joshua Cohen "Deliberation and Democratic Legitimacy," in *Deliberative Democracy: Essays on Reason and Politics*, ed. James Bohman and William Rehg**,** MIT Press, 1997, 74.
[161] Joshua Cohen "Deliberation and Democratic Legitimacy," in *Deliberative Democracy: Essays on Reason and Politics*, ed. James Bohman and William Rehg**,** MIT Press, 1997, 74.
[162] Joshua Cohen "Deliberation and Democratic Legitimacy," in *Deliberative Democracy: Essays on Reason and Politics*, ed. James Bohman and William Rehg**,** MIT Press, 1997, 76.

'politically acceptable,' meaning that they have to be acceptable to those with a different background or conviction.[163] Similarly, Elster considers that even those promoting private interests are obliged to argue in terms of public good.[164] On the other hand, Thomas Christiano contends that it might not be possible to solve all the arising disagreements. According to him, some differences and disagreements would still remain because of the different backgrounds of the people. Moreover, Christiano contends that discussions could also stir additional disagreements. [165]

More recently, however, a group of advocates of deliberative democracy reviewed the requirement of 'reason-giving' and came to the conclusion that "deliberative democracy must include self-interest and conflicts among interests in order to recognize and celebrate … the diversity of free and equal human beings."[166] Thus, the ideal deliberation would need to be substantiated with reasons, which do not necessarily have to be expressed in terms of the public interest.

In following chapters, particularly, in Chapter 2, these arguments are picked up and examined in the context of consultative processes. It is also analyzed how the failure by decision-makers and participants to provide reasons affects the overall meaningfulness of public consultation and influences the quality and efficiency of decision-making processes.

1.4.5. Influence and Respect

Another important aspect of meaningful participation and deliberation is that the contributions made by participants should be accorded some weight by decision-makers

[163] Joshua Cohen "Deliberation and Democratic Legitimacy," in *Deliberative Democracy: Essays on Reason and Politics*, ed. James Bohman and William Rehg**,** MIT Press, 1997, 102.
[164] *Deliberative Democracy*, ed. Jon Elster, Cambridge University Press, 1998, "Introduction," 12. See also, Henry Richardson arguing that "democratic reasoning must be regarded primarily as truly collective reasoning about public ends," in Henry S. Richardson, *Democratic Autonomy: Public Reasoning about the Ends of Policy*, Oxford University Press, 2002, 19.
[165] Thomas Christiano, *The Constitution of Equality: Democratic Authority and its Limits*, Oxford University Press, 2008, 191-196.
[166] Jane Mansbridge et al., "The Place of Self-Interest and the Role of Power in Deliberative Democracy," *The Journal of Political Philosophy*, Vol. 18(1), 2010, 64; 69.

when making the final decision. For instance, Rowe argues that if the outcome of deliberation is not considered seriously by decision-makers, the participants are likely to become skeptical about the whole decision-making procedure, and deepening their distrust of public officials.[167] But participants and decision-makers need not necessarily seek consensus. Actually, there is no common stance on the issue of consensus among advocates of deliberative democracy. For instance, Joshua Cohen suggests that the whole process of deliberation should aim at consensus among its participants, because during deliberation everyone is regarded as equal to each other and everyone should seek for arguments that would be 'persuasive to all.'[168] However, even he agrees that consensus may not be always feasible.[169] By way of contrast, Thomas Christiano argues that consensus is not a necessary precondition for ideal public deliberation since disagreement serves to overcome the ignorance, which persists in modern societies.[170]

Procedural fairness is a value on its own and the meaningfulness of participatory processes should not be measured only by the actual influence of the participants on the final decision. One way to overcome the potential skepticism with decision-making processes involving deliberation and participation is to provide participants with clear information on how their input will be considered and later to inform them about the effect of their contributions on the final decision. Letting the participants know about the fate of their inputs can make a consultative process more meaningful by demonstrating respect towards those who were consulted.[171] Some scholars go even further by arguing that decision-makers

[167] Gene Rowe and Lynn J. Frewer, "Public Participation Methods: A Framework for Evaluation," *Science, Technology, and Human Values*, Vol. 25(1), 2000, 3; 14.
[168] Joshua Cohen "Deliberation and Democratic Legitimacy," in *Deliberative Democracy: Essays on Reason and Politics*, ed. James Bohman and William Rehg**,** MIT Press, 1997, 75.
[169] Joshua Cohen "Deliberation and Democratic Legitimacy," in *Deliberative Democracy: Essays on Reason and Politics*, ed. James Bohman and William Rehg**,** MIT Press, 1997, 75.
[170] Thomas Christiano, *The Constitution of Equality: Democratic Authority and its Limits*, Oxford University Press, 2008, 197.
[171] *Merafong Demarcation Forum v President of the Republic of South Africa*, (CCT 41/07) [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 968 (CC) (13 June 2008), 55, http://www.saflii.org/za/cases/ZACC/2008/10.html On the value of participation in enhancing respect between

should acquire in advance the approval of participants as to how their suggestions will be considered and what impact they could have on the final outcome.[172]

Thus, the theories of deliberative democracy and participatory democracy provide a rather elaborate list of requirements for government institutions, which should make public decision-making processes more open to the public and more receptive of the public's views and opinions. The above mentioned principles serve as standards against which policy and decision-making processes can be measured to evaluate deliberativeness of such processes. Nonetheless, because of the multiple variations that these principles could take, it is difficult to be prescriptive in terms of identifying the predicate conditions for meaningful participation. Indeed, the real issue here is how to ensure that consultative mechanisms are meaningful in terms of achieving the particular goals for which they were established.

The suggestions by Barber and other proponents of theories of participatory and deliberative democracy are based on several assumptions which are worth mentioning here. First, according to all the theories of participatory and deliberative democracy, members of the public (i.e. lay people) are regarded as responsible and competent individuals who if provided proper opportunities for participation would be willing to get involved in the public affairs.[173] Under the second assumption, the current institutions of representative government are non-participatory and citizens have no opportunities to get involved in any of the processes of public policy and decision-making.[174] Third, the lack of efficient communicative

---

the institutions and the individuals affected by the rules, see D. J. Galligan, *Due Process and Fair Procedures*, Clarendon Press, 1996, 36.

[172] Gene Rowe and Lynn J. Frewer, "Public Participation Methods: A Framework for Evaluation," *Science, Technology, and Human Values*, Vol. 25(1), 2000, 3; 14.

[173] See, generally, Benjamin Barber, Strong Democracy: Participatory Politics for a New Age, University of California Press, 1984; and Jurgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, MIT Press, 1996.

[174] Carole Pateman, *Participation and Democratic Theory*, Cambridge University Press, 1989.

channels between the people and public institutions, is the source of most problems faced by governments.[175]

All these assumptions seem to be borne out by critiques of representative government. The first assumption about the competence of the members of the public, does not necessarily lead to a conclusion that everyone who is capable of delivering decisions or drafting policies should be doing so. The competence of the people, could be better used to control the government and hold it accountable rather than drafting decisions and policies. The second assumption, and, more importantly, its evaluation is at the centre of the thesis. Even under the conditions of the representative government, certain opportunities for participation do exist. Particularly, in the context of freedom of expression and right of political participation, the people have opportunities and guarantees for taking part in public affairs. The real issue is whether the existing opportunities are efficient and meaningful, in a sense of ensuring a lively public sphere. The non-efficiency of communicative mediums between the individuals and decision-makers is basis for the third assumption. In order to address this issue the meaningfulness of consultative processes is another focus of the thesis. One way to assess the meaningfulness of the public consultation is through examination of the purposes for which they were established. Therefore, the next section analyses the reasons for establishing new opportunities for participation and (or) maintaining the meaningfulness of the existing mechanisms.

1.5. Why Representative Government Needs Participatory Rights

The processes of regulation, privatization and contracting-out sought to address some crucial problems related to the functioning of the government, but these processes have not necessarily been easy. This section draws attention to the most common problems of

[175] See, for example, Denise Vitale, "Between Deliberative and Participatory Democracy: A Contribution on Habermas", *Philosophy Social Criticism*, Vol. 32, 2006, 753-754.

regulatory government such as unprofessionalism[176] and the unresponsiveness of governmental institutions and agencies.[177] It also highlights how the opportunities for public participation and deliberation could contribute to solving the problems.

1.5.1. Democracy and Procedural Fairness

Usually public participation as a guarantee of procedural fairness is associated with civil and criminal trials, where it is recognized as a part of the right to be heard.[178] However, with the advancement of government's intervention into various spheres of public and private life, procedures of how public policies and decisions are made have gained more attention than ever. For instance, in environmental matters it is now a widespread notion that persons whose environmental rights are affected should be provided with some opportunity to participate in key decision-making process.[179]

Procedural laws ensure that the law is applied in a just and accurate manner. According to Galligan, procedures are inevitable is law and public institutions are to achieve their aims.[180] Therefore, Galligan holds that law as well as procedures are integral in the pursuit of social goals such as procedural justice.[181] According to Galligan, procedural justice is impossible to achieve unless procedural requirements ensure a fair treatment of those to whom particular substantive rules apply.[182] Also Verkuil admits that the requirements of

[176] See, for example, Frank Fischer, *Technocracy and the Politics of Expertise*, Sage Publications, 1990.
[177] David Beetham, "Do Parliaments Have a Future?" in *The Future of Representative Democracy*, ed. Sonia Alonso et al., Cambridge University Press, 2011, 124. For instance, Andrew Gamble and Robert Thomas argue that "shift to new patterns of governance has undermined responsible governance" in Andrew Gamble and Robert Thomas, "The Changing Context of Governance: Implications for Administration and Justice," in Michael Adler, ed., *Administrative Justice in Context*, Hart Publishing, 2010, 17.
[178] For instance, Galligan explains the importance of a criminal law right to a fair trial guarantees for the accused person an opportunity to have a say and be heard in the trial, in D. J. Galligan, *Due Process and Fair Procedures*, Clarendon Press, 1996, 137.
[179] See, for example, A. Du Plessis, "Public Participation, Good Environmental Governance and Fulfilment of Environmental Rights," *Potchefstroom Electronic Law Journal* (PER), Vol. 2, 2008, 12; Anne Shepherd and Christi Bowler, "Beyond the Requirements: Improving Public Participation in EIA," *Journal of Environmental Planning and Management*, Vol. 40(6), 1997, 725; 726, Stephen Stec and S. Casey-Lefkowitz, *The Aarhus Convention: An Implementation Guide*, United Nations, 2000, 85-122, http://www.unece.org/env/pp/acig.pdf
[180] D. J. Galligan, *Due Process and Fair Procedures*, Clarendon Press, 1996, 5.
[181] D. J. Galligan, *Due Process and Fair Procedures*, Clarendon Press, 1996, 5.
[182] D. J. Galligan, *Due Process and Fair Procedures*, Clarendon Press, 1996, Introduction, xviii.

procedures are crucial for the realization of procedural justice.[183] Fairness could be ensured only if persons have the opportunities for participation in legal processes that affect them.[184] One central requirement concerning the guarantee of procedural fairness through participation is that affected individuals be provided with information on what is at issue, allowing them to present their own views and to respond to opposing arguments.[185] As already mentioned, decision-maker's commitment to provide relevant information to the participants of public deliberation is also considered necessary for meaningfulness of such process.[186] Not only participation is necessary to ensure procedural fairness, but also procedural fairness promotes equal opportunities for participation, as well as the values of dignity, respect and equal treatment.[187]

Procedural fairness is important for its own non-instrumental values as well. Therefore, the opportunities for participation should not be limited even if their effect on the outcomes of decision-making is very minimal. In this regard, Galligan admits that the distinction between instrumental and non-instrumental values could be difficult to draw. However, he insists that some values like the right to be heard are completely distinct from the outcomes and stand on their own.[188] According to him, "[t]he value of being heard is said to flow directly from the principle of respect for persons."[189]

[183] Paul R. Verkuil, *Outsourcing Sovereignty: Why Privatization of Government Functions Threatens Democracy and What We Can Do about It*, Cambridge University Press, 2007, 86. See also, Michael Adler, "Understanding and Analysing Administrative Justice," in Michael Adler, ed., *Administrative Justice in Context*, Hart Publishing, 2010, 129.
[184] D. J. Galligan, *Due Process and Fair Procedures*, Clarendon Press, 1996, 131.
[185] D. J. Galligan, *Due Process and Fair Procedures*, Clarendon Press, 1996, 131.
[186] See Section *1.4.1. Informed Debate*
[187] Michael Adler, "Understanding and Analysing Administrative Justice," in Michael Adler, ed., *Administrative Justice in Context*, Hart Publishing, 2010, 135. Another example is provided by Carol Harlow and Richard Rawlings, who recognize transparency, participation and accountability as the main values of administrative law, see Robert Thomas, Book Review, "Carol Harlow and Richard Rawlings, *Law and Administration*, Cambridge University Press, 2009," *Modern Law Review*, Vol. 74(1), 2011, 153; 155. See also, Alfred C. Aman, "Privatization and Democracy: Resources in Administrative Law," in Jody Freeman and Martha Minow, eds., *Government by Contract: Outsourcing and American Democracy*, Harvard University Press, 2009, 263.
[188] D. J. Galligan, *Due Process and Fair Procedures*, Clarendon Press, 1996, 36.
[189] D. J. Galligan, *Due Process and Fair Procedures*, Clarendon Press, 1996, 36.

Thus, the central element of fairness is the requirement to ensure that those affected by the procedures are provided with an opportunity to get involved in decision-making processes. However, there is a danger that the value of respect would be recognized only symbolically by decision-makers, hence, downgrading the value of public consultation. The principle of respect could be seen as symbolic, where it requires the government institutions to pay the duty of respect to the participants of, for example, consultations as 'concerned citizens'.[190] It does become practical, however, where it serves as a guarantee of a dialogue between the consulting institution and the participants, requiring the former to make the best use of the inputs that were made.[191]

Could the requirement of procedural fairness be a source of certain tensions where it applies to the parties enjoying significant industry and financial power during their participation in consultative processes? This issue is examined in Chapter 3 when analyzing the law of public consultation in telecommunications. Eventually in Chapter 5 an answer is proposed to how (if at all) is the principle of fairness addressed in the proposed reforms aiming to enhance the opportunities for participation?

1.5.2. Unprofessionalism in Regulatory Government

Initially the changes leading to regulatory government were supposed to promote professionalism and efficiency, instead, regulatory reforms produced policy and decision-making processes where the competence of regulatory authorities and other experts in government was often deemed to be insufficient. For example, Peter Miller and Nikolas Rose argue that in 'advanced liberal' democracies, expertise has been transferred from

[190] *Doctors for Life International v Speaker of the National Assembly*, 2006 (12) BCLR 1399 (CC), 235, http://www.saflii.org/za/cases/ZACC/2006/11.html

[191] *Doctors for Life International v Speaker of the National Assembly*, 2006 (12) BCLR 1399 (CC), 235, http://www.saflii.org/za/cases/ZACC/2006/11.html See also, *R(Bapio Action) v Secretary of State for the Home Department*, [2007] EWHC 199 (Admin); [2007] EWCA Civ 1139, 18.

political actors to "experts within a market governed by the rationalities of competition, accountability and consumer demand."[192]

As already mentioned, the complexity of the problems with which regulatory governments have to deal requires a broad range of expertise, which was meant to be facilitated through the transfer of public decision-making powers to a variety of actors with diverse expertise inside and outside of government. Governing through expert-led decision-making is usually referred to as 'technocracy'. While expertise is a necessary element of efficient governing it may also entrench the influence of more powerful interests in public policy and decision-making. Here again the issues of power concentration and dominance of certain interest groups become central. For instance, Frank Fischer argues that concentration of expertise by decision-makers also contributes to the alienation of the public. Fischer questions: "How can we begin to *lessen* the very substantial gap between elite decision-making centers and the generally undifferentiated mass of citizens altogether left out of the process."[193] Goodin also notices the danger of institutions of representative democracies being prone to manipulation by a few sectional interests.[194] As later chapters demonstrate, that opportunities for participation can enhance the professionalism and competence of decision-makers.

1.5.3. Alienation of the Public from Politics and the Lack of Responsiveness by Decision-makers

Governmental activities now include such an array of different areas of public and even private life that neither elections nor public opinion could be considered anymore the only sources of the government's legitimacy. In the UK, concerns about the alienation of

[192] Peter Miller and Nikolas Rose, *Governing the Present: Administering Economic, Social and Personal Life*, Polity Press, 2008, 24.
[193] Frank Fischer, *Technocracy and the Politics of Expertise*, Sage Publications, 1990, 31. (emphasis original)
[194] Robert E. Goodin, *Reflective Democracy*, Oxford University Press, 2003, 70.

the governed persist despite the country's constitutional and regulatory reforms (devolution, introduction of Freedom of Information Act, etc.)[195] One of the explanations for the endurance of these disappointments is that power was redistributed only between different government institutions and not between the government and the people.[196]

The already mentioned proposals concerning governance reform in the UK recognize the disconnect between the government and the people as a central problem of the country.[197] The reform proposed in the UK recognizes the need to transfer more power to the people and enhance the opportunities for public participation in order to strengthen the ties between the government and the governed as well as among the people themselves.[198] For example, concerns over the government's alienation from the people have been articulated in the report on *How Democratic is the UK? The 2012 Audit*.[199] According to this report, the peoples' trust in the executive and legislative institutions is dramatically declining.[200] The report suggests that 'open and systematic' public consultation could be a solution to the unresponsive character of the government.[201]

In the US, where the polity faces many similar problems, results of a national polling of 2013 present a more vivid description of the existing situation.[202] In 2013 a poll

---

[195] See, for example, Vernon Bogdanor, *The New British Constitution*, Hart Publishing, 2009, 291; Andrew Gamble and Robert Thomas, "The Changing Context of Governance: Implications for Administration and Justice," in Michael Adler, ed., *Administrative Justice in Context*, Hart Publishing, 2010, 13.
[196] Vernon Bogdanor, *The New British Constitution*, Hart Publishing, 2009, 297.
[197] See Section *1.2. Revitalizing Representative Government through Participation and Deliberation*, and Philip Norton, "Regulating the Regulatory State," *Parliamentary Affairs*, Vol. 57(4), 2004, 785, http://pa.oxfordjournals.org/content/57/4/785.full.pdf
[198] *The Governance of Britain*, Presented to Parliament by the Secretary of State for Justice and Lord Chancellor, July 2007, 11, http://www.official-documents.gov.uk/document/cm71/7170/7170.pdf See also, Philip Norton, "Regulating the Regulatory State," *Parliamentary Affairs*, Vol. 57(4), 2004, 785, http://pa.oxfordjournals.org/content/57/4/785.full.pdf
[199] S. Wilks-Heeg, A. Blick, and S. Crone, *How Democratic is the UK? The 2012 Audit*, Democratic Audit, 2012, http://democracy-uk-2012.democraticaudit.com/how-democratic-is-the-uk-the-2012-audit
[200] S. Wilks-Heeg, A. Blick, and S. Crone, *How Democratic is the UK? The 2012 Audit*, Democratic Audit, 2012, 9, http://democracy-uk-2012.democraticaudit.com/how-democratic-is-the-uk-the-2012-audit
[201] S. Wilks-Heeg, A. Blick, and S. Crone, *How Democratic is the UK? The 2012 Audit*, Democratic Audit, 2012, 213-216, http://democracy-uk-2012.democraticaudit.com/how-democratic-is-the-uk-the-2012-audit
[202] *Congress Less Popular than Cockroaches, Traffic Jams*, Public Policy Polling, 8 January 2013, http://www.publicpolicypolling.com/pdf/2011/PPP_Release_Natl_010813_.pdf and http://www.publicpolicypolling.com/main/2013/01/congress-somewhere-below-cockroaches-traffic-jams-and-nickleback-in-americans-esteem.html

tested popularity of the US Congress against 26 various subjects and objects (such as vegetables, countries, accidents and other things).[203] According to the poll, the Congress ranks lower than many of the subjects, including cockroaches and traffic jams.[204] Even if the polling has a comic flavour to it, overall the findings do add to the across-the-board distrust and skepticism of the people with their governments.

The need for governmental responsiveness to the people is even more heightened in transitioning countries such as South Africa. In South Africa, the concerns about trust in government and people's alienation from the government institutions are further intensified due to the country's history of apartheid and discrimination, where for a long time people have not only been alienated from the government but deprived of the most basic human rights.[205] In this vein a Draft Report of the National Council of Provinces suggests that the opportunities for public involvement in South Africa's lawmaking processes could make these processes more open to the public and the legislature more responsive to the members of the public.[206]

The Constitution making process in South Africa is itself a manifestation of respect for public participation and government responsiveness since the Constitution was constructed through wide public participation.[207] In South Africa, the government's responsiveness to the public is one of the country's constitutional founding principles.[208] As already mentioned, South Africa's Constitution confers an obligation on both houses of the

[203] *Congress Less Popular than Cockroaches, Traffic Jams*, Public Policy Poling, 8 January 2013, http://www.publicpolicypolling.com/pdf/2011/PPP_Release_Natl_010813_.pdf
[204] *Congress Less Popular than Cockroaches, Traffic Jams*, Public Policy Poling, 8 January 2013, http://www.publicpolicypolling.com/pdf/2011/PPP_Release_Natl_010813_.pdf
[205] See generally, Heinz Klug, *The Constitution of South Africa: A Contextual Analysis*, Hart Publishing 2010.
[206] Section 7 "Public Participation" of Draft Report of The National Council of Provinces 2004 - 2009, www.pmg.org.za/docs/2009/comreports/090316ncopreport2.doc
[207] See, for example, Heinz Klug, *The Constitution of South Africa: A Contextual Analysis*, Hart Publishing 2010, 48-58, Ziyad Motala and Cyril Ramaphosa, *Constitutional Law: Analysis and Cases*, Oxford University Press (South Africa), 2002, 4-11, and Siri Gloppen, *South Africa: The Battle Over the Constitution*, Ashgate, 1997, 58-59.
[208] Section 1 of the *Constitution of the Republic of South Africa*, 1996, http://www.info.gov.za/documents/constitution/1996/index.htm

national parliament, as well as the parliaments of the provinces to "facilitate public involvement in the legislative and other processes."[209] South Africa is the only country which establishes such an obligation at a constitutional level. Therefore, not surprisingly, its Constitution is considered by some commentators as 'a symbol of participation'.[210]

The issue of responsiveness has also been addressed by theorists of participatory and deliberative democracy. Opportunities for public participation hold the promise of increasing public trust in and responsiveness of, government institutions. For example, Jackson argues that deliberation could promote trust in public institutions.[211] Goodin argues that law making processes are not responsive to the preferences of the public in the way that they should be. According to Goodin, the deficiencies of legislative processes are also related to the flaws of electoral processes, creating a situation whereby elected representatives are ignorant of the interests of the people they ought to represent, as well as being unaccountable for their performance.[212]

According to Cass Sunstein, public deliberations have the potential not only to improve public decision-making, but to result in policies which are more responsive to citizens' will.[213] Also Botswick considers that public deliberation could strengthen the links between the people and the representatives of government institutions, as well as lessen the alienation between them.[214] In order to achieve this goal, the procedures should ensure that

[209] Sections 59 (1) (a), 72 (1) (a) and 118 (1) (a) of the Constitution of the Republic of South Africa, 1996, text available at: http://www.info.gov.za/documents/constitution/1996/index.htm
[210] Tom Ginsburg, "On the Constitutional Character of Administrative Law," a draft prepared for the Conference on Comparative Administrative Law, Yale Law School, May 7-9, 2009, 2, http://www.law.yale.edu/documents/pdf/CompAdminLaw/Tom_Ginsburg_CompAdLaw_paper.pdf
[211] Roland Jackson et al., "Strengths of Public Dialogue on Science-related Issues," *Critical Review of International Social and Political Philosophy*, Vol. 8, No. 3, 2005, 349, 352
[212] Robert E. Goodin, *Reflective Democracy*, Oxford University Press, 2003, 65. See, also, James Bohman *Public Deliberation: Pluralism, Complexity and Democracy*, The MIT Press, 2000, 54-55, and Amy Gutmann and Dennis Thompson, *Democracy and Disagreement*, Harvard University Press, 1996, 128-165.
[213] Cass R. Sunstein, *Democracy and the Problem of Free Speech*, The Free Press, 1995, 243-244. See also Jon Elster, Introduction, in Jon Elster, ed., *Deliberative Democracy*, Cambridge University Press, 1998, 11.
[214] Matthew Bostwick, "Twelve Angry Citizens: Can Citizens' Juries Improve Local Democracy in New Zealand?" *Political Science*, Vol. 50, No. 2, 1999, 236, 242.

deliberation serves as a medium for communication between the institutions and the people.[215]

Habermas contends that despite election mechanisms, power between the members of the public and the political institutions does not circulate properly.[216] According to Habermas this problem arises because of the bureaucratic nature of government and the lack of channels which would allow 'constitutionally regulated circulation of power.'[217] Habermas argues that this results in government's lack of legitimacy and its unresponsiveness to the citizens.[218] He also recognizes that many channels of communication are too much influenced by money, which makes them less accessible to public debate.[219]

The issue of the responsiveness of government, and particularly of regulatory authorities to the regulated industries, has received some attention in the field of regulatory law. For instance, Ian Ayres and John Braithwaite suggested the concept of 'responsive regulation,' according to which the regulation has to respond to the needs and performance of regulated industries.[220] The concept was further developed by Robert Baldwin and Julia Black who suggested a more expansive approach of responsive regulation by suggesting that regulation should be responsive not only to the regulated industries but also to a broader range of actors, including groups representing the public interest.[221]

The common suggestion by the above mentioned theories is solving the lack of government responsiveness through the involvement of a broader range of interests, such as

[215] Matthew Bostwick, "Twelve Angry Citizens: Can Citizens' Juries Improve Local Democracy in New Zealand?" *Political Science*, Vol. 50, No. 2, 1999, 236, 242.
[216] Jurgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, MIT Press, 1996, 341-359.
[217] Jurgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, MIT Press, 1996, 329.
[218] Edward L. Rubin, Commentary, "The New Legal Process, The Synthesis of Discourse, and the Microanalysis of institutions," *Harvard Law Review*, Vol. 109, 1995-1996, 1393.
[219] Edward L. Rubin, Commentary, "The New Legal Process, The Synthesis of Discourse, and the Microanalysis of institutions," *Harvard Law Review*, Vol. 109, 1995-1996, 1393.
[220] Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate*, Oxford University Press, 1992, 4-7.
[221] Robert Baldwin and Julia Black, "Really Responsive Regulation," *LSE Law, Society and Economy Working Papers*, 15/2007, 4, 10, http://ssrn.com/abstract=1033322 See also, Phillippe Nonet and Philip Selznick, *Law and Society in Transition: Toward Responsive Law*, Harper and Row, 1978.

various groups of lay people and industry representatives who could be affected by a particular policy or decision, in policy and decision-making processes.

1.5.4. Over-regulation, Big Government and the Potential of Public Participation to Enhance Governmental Accountability

Over-regulation also known as 'big government' is another challenge which has to be dealt with by regulatory governments. The following analysis illustrates that over-regulation is considered the main source of the alleged inefficiency and unaccountability of the regulatory government.

The issue of over-regulation is mainly associated with the practices of regulatory authorities. For instance, in the US, the nature and scope of agencies' powers are usually established in enabling statutes. In practice, however, "administrative agencies have always exercised more power than the statutes seemed to permit … agencies actually make more public policies than the legislative branch and decide more legal issues than the courts."[222] Under the current reforms proposed in the US, the concerns of over-regulation and big government are recognized as a result of the unaccountable character of decision-makers such as agencies, and their concentration of all the decision-making power. The common suggestion of these reforms is development of more stringent procedural requirements, particularly, those concerning public participation.

The already mentioned draft *Regulatory Accountability Act of 2011*(RAA),[223] which subjects the US agencies to stricter procedural requirements concerning public

[222] Kenneth F. Warren, *Administrative Law in the Political System*, Westview Press, 2004, 62. Note also that "[l]egal experts have estimated … that more than 90 percent of the laws that regulate American life are made by nonelected career bureaucrats with extreme job security," ibid, at 64. As long as rulemaking by agencies in the US is at stake, there has been a suggestion "that it would be both wiser and more faithful to … admit that agency rulemaking is legislative power," Kenneth F. Warren, *Administrative Law in the Political System*, Westview Press, 2004, 63, (citing Justice John Stevens, concurring in *Whitman v. American Trucking Association*, 121 S. Ct. 903, 920 (2001)).

[223] *Regulatory Accountability Act of 2011*, H.R. 3010, 112th Cong. (2011), http://www.govtrack.us/congress/bill.xpd?bill=h112-3010 For the legislative history of the bill see http://thomas.loc.gov/cgi-bin/query/z?c112:H.R.3010: and http://politics.nytimes.com/congress/votes/112/house/1/888

participation, seeks to address the burgeoning field of agency regulation and aims at minimizing 'unnecessary burdens on job creators,'[224] through reducing regulation.[225] More particularly, the bill amends the *Administrative Procedure Act* (APA) by changing the rulemaking procedures for agencies through placing additional requirements on the agencies concerning public participation and impact assessment analysis.[226] A very similar approach and requirements are established under the draft *Federal Communications Commission Process Reform Act of 2011*.[227] The proposals are also aimed at promoting 'transparency' and 'predictability,' which should eventually "ensure the commission's work encourages job creation, investment, and innovation."[228]

Also in South Africa, the concern of reducing regulatory burdens is expressed by business associations and non-governmental organizations. The report on *Counting the Cost of Red Tape for Business in South Africa* suggests that the regulatory government in South Africa has grown too big and too detached from the regulated industries.[229] One of the proposed solutions is related to the introduction of consultative mechanisms between the government and business representatives.[230]

---

[224] *Bipartisan Bill Reduces Red Tape on Job Creators*, Committee on the Judiciary, the US House of Representatives, Sept. 22, 2011, http://judiciary.house.gov/news/09222011.html

[225] *Regulatory Accountability Act of 2011, Key Provisions*, Senators Rob Portman and Mark Pryor, and Representatives Lamar Smith and Collin Peterson, 2, http://portman.senate.gov/public/index.cfm/files/serve?File_id=472d1a09-93d5-4454-964a-54baf0d930cc

[226] *Regulatory Accountability Act of 2011, Key Provisions*, Senators Rob Portman and Mark Pryor, and Representatives Lamar Smith and Collin Peterson, http://portman.senate.gov/public/index.cfm/files/serve?File_id=472d1a09-93d5-4454-964a-54baf0d930cc

[227] *Federal Communications Commission Process Reform Act of 2011*, H.R. 3309, 112th Cong. (2011), http://republicans.energycommerce.house.gov/Media/file/Markups/FullCmte/112911/HR3309_As_Amended.pdf The second Bill, *the Federal Communications Commission Consolidated Reporting Act of 2011*, clarifies the FCC's reporting to the Congress requirements, http://republicans.energycommerce.house.gov/Media/file/Markups/FullCmte/112911/HR3310_As_Amended.pdf

[228] Walden, Heller Unveil FCC Process Reform Legislation, Energy and Commerce Committee, Press Release, 2 November, 2011, http://energycommerce.house.gov/news/PRArticle.aspx?NewsID=9064

[229] *Counting the Cost of Red Tape for Business in South Africa*, the Main Report, SBP, Strategic Partnerships for Business Growth in Africa, June 2005, 90, http://psp.emergingmarketsgroup.com/components/download.aspx?id=a804419d-763f-4e4e-9082-275365d0b1ef See also *Strategic Partnerships for Business Growth in Africa* (SBP), About Us, Our History, http://www.sbp.org.za/index.php?id=12

[230] *Counting the Cost of Red Tape for Business in South Africa*, the Main Report, SBP, Strategic Partnerships for Business Growth in Africa, June 2005, 90, http://psp.emergingmarketsgroup.com/components/download.aspx?id=a804419d-763f-4e4e-9082-275365d0b1ef

The issue of over-regulation by agencies has been addressed in the UK as well. In 2011 the British government enacted a policy called *One-in, One-out*, which sets additional procedural requirements for the adoption of "new primary or secondary UK legislation,"[231] and assigns the Reducing Regulation Committee power to enforce the policy.[232] The rule requires government authorities before adopting a new measure "which imposes a direct annual net cost on business or civil society organisations (IN) … [to] … identify and remove existing regulations with an equivalent value (OUT)."[233] The purposes of this rule, as described by the government under the policy are to:

- "bear down on the cost and volume of regulation in the economy; and
- encourage departments to implement regulation only as a last resort, having first considered the use of non-regulatory alternatives."[234]

The problems of over-regulation and big government are widely recognized and the common remedy seems to rest on suggestions for the introduction of more participatory and deliberative mechanisms. Across the jurisdictions studied, there is a widespread discontent by the public and industry actors not only with the overreaching nature of government's activities but also with the quality of government's performance. The bills of the US Congress suggest the same remedy – more stringent procedural requirements (in particular concerning public participation), in dealing with deficiencies of regulatory processes. Since the bills stem from the will of legislature, it could be that the rules of

[231] *Operating a 'One In, One Out' Rule for Regulation*, Department for Business Innovation and Skills, Home, Policies, Better Regulation, One In, One Out, http://www.bis.gov.uk/policies/bre/better-regulation-framework/one-in-one-out

[232] *Operating a 'One In, One Out' Rule for Regulation*, Department for Business Innovation and Skills, Home, Policies, Better Regulation, One In, One Out, http://www.bis.gov.uk/policies/bre/better-regulation-framework/one-in-one-out

[233] *One-In, One-Out (OIOO) Methodology*, Department for Business Innovation and Skills, July 2011, p. 3. "[A]n IN is defined as a regulation whose direct incremental economic cost to business and civil society organisations exceeds its direct incremental economic benefit to business and civil society organisations… [accordingly] … an OUT is defined as a deregulatory measure whose direct incremental economic benefit to business and civil society organisations exceeds its direct incremental economic cost to business and civil society organisations," Paragraphs 17-18, p. 6, http://www.bis.gov.uk/assets/biscore/better-regulation/docs/o/11-671-one-in-one-out-methodology.pdf

[234] *One-In, One-Out (OIOO) Methodology*, Department for Business Innovation and Skills, July 2011, p. 3, http://www.bis.gov.uk/assets/biscore/better-regulation/docs/o/11-671-one-in-one-out-methodology.pdf

procedure are intended to be used by legislatures to exert control over executive and regulatory authorities. On the other hand, it is not clear how the enhanced opportunities for public participation could decrease the amount of regulation. Less regulation is not necessarily a good thing. The primary purpose of regulatory activities is the protection of the 'public interest'[235], for instance, by guaranteeing consumer rights. Therefore, the proposals in the US to limit the powers of the agencies, should include considerations about proper protection of public interest.

Concerning the changes suggested for the FCC, it is not clear why there is a need for special regulation of public participation in the area of telecommunications in the US? A closer examination of the public participation requirements in the sector regulating telecommunications is provided in Chapter 3.

The issues of government's inefficiency and lack of accountability are also addressed by several theories of democracy. For example, Habermas argues that on the one hand, aspiring for efficiency is an inevitable component of regulatory governments, while on the other hand, if efficiency is sought at the expense of public accountability, this could create a 'legitimation dilemma.'[236] In which case, "[e]ither the administration uses its discretion to efficiently implement legal programs and thus becomes further removed from public accountability, or it creates links to public accountability at the price of efficient administration."[237] Paul Hirst also recognizes the problem of over-regulation and big government whereby the scale and complexity of the problems which regulatory governments

[235] See, for example, Steven P. Croley, *Regulation and Public Interests: The Possibility of Good Regulatory Government*, Princeton University Press, 2007.
[236] Jurgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, MIT Press, 1996, 386.
[237] Terence Kelly, "Unlocking the Iron Cage: Public Administration in the Deliberative Democratic Theory of Jurgen Habermas," *Administration and Society*, Vol. 36, No. 1, 2004, 54. For example, Verkuil argues that "[a]ccountability is a countervailing principle of democracy. It may but need not be efficient." In Paul R. Verkuil, *Outsourcing Sovereignty: Why Privatization of Government Functions Threatens Democracy and What We Can Do about It*, Cambridge University Press, 2007, 4.

have to deal with contribute to the problems of accountability and concentration of power.[238] Unlike deliberative democrats whose main focus is on legislative processes and accountability of elected representatives, Hirst accords more attention to the administration and bureaucracy of state.[239]

1.5.5. Supplementing the Rights of Freedom of Expression and Freedom of Information

As mentioned earlier, freedom of expression is an important foundation for democratic government. The right to freedom of expression is not sufficient however. For example, it is necessary for the formation of public opinion and increasing awareness of the members of the public before participation in the elections. But the legitimacy of the government is not solely dependent on the unhindered formation of public opinion. Also, before one can make a relevant contribution to the public opinion, one needs access to a variety of information, which would help to consider different viewpoints and to make up one's mind on a specific issue.

Weinstein provides an understanding of freedom of speech, whereby he links the freedom of speech to the concept of participatory democracy.[240] But while his approach to the right of freedom of speech as a part of participatory democracy explains the importance of this right on the one hand, it limits the concept of participatory democracy on the other hand. Participatory democracy as advocated by Pateman and Barber, for instance, is not only about the public opinion and its formation.[241] Weinstein, however, necessarily links participatory rights to the expectation that these rights are indispensible for the formation of public opinion.

While freedom of speech guarantees informal opportunities for people to discuss the performance of the government through informal channels, freedom of information (FOI)

[238] Paul Hirst, *Associative Democracy: New Forms of Economic and Social Governance*, Polity Press, 1994, 4-5.
[239] Paul Hirst, *Associative Democracy: New Forms of Economic and Social Governance*, Polity Press, 1994, 22 and onwards.
[240] James Weinstein, "Participatory Democracy and Free Speech," *Virginia Law Review*, Vol. 97 (3), 2011, 491.
[241] Carole Pateman, *Participation and Democratic Theory*, Cambridge University Press, 1989, and Benjamin Barber, Strong Democracy: Participatory Politics for a New Age, University of California Press, 1984.

acts suggest that at some instances this could not be possible without the access to certain information held by the government. FOI acts promote transparency and openness of the government by guaranteeing people's access to the information possessed by the government authorities.[242] Under FOI regimes 'any person' can seek information concerning government's decision-making processes.[243] FOI rules guarantee a general right to access information which could include disclosure of preparatory and internal documents as well.[244] Freedom of information regime contributes to the legitimacy of the government since it makes the government more transparent and provides the tools for the people to acquire the information they may consider necessary for making up their minds about the performance of the government.[245] However, the difficulty with the internal information possessed by an authority is that the person has to be aware of, for example, the existence of a certain preparatory document. Otherwise no general request for information on a specific issue could be lodged.

In the light of deliberative theory, which stresses the importance of a genuine dialogue, one of the main limitations of the right to freedom of information is that it ensures the flow of information from the government but does not guarantee that those concerned would be given anything like a 'right to be heard'.[246] Also, the flow of information is accidental rather than a constant one. This means that the information is provided only upon a particular request from an interested party, who usually needs to provide a reason concerning

[242] Patrick Birkinshaw, *Freedom of Information – The Law, the Practice and the Ideal*, Cambridge University Press, 2010, 29.
[243] See, for example, Philip Coppel et al., eds., *Information Rights: Law and Practice*, Hart Publishing, 2010, 5-6, and William F. Fox, *Understanding Administrative Law*, M. Bender, 2000, 367; Jonathan Klaaren and Glenn Penfold, Chapter 62 "Access to Information," in I. Ellis et al., eds., *The Law of South Africa*, Vol. 4, 2nd ed., LexisNexis, 2002.
[244] *Documents under Preparation*, Right2info, Home, Scope of Covered Information, http://www.right2info.org/scope-of-covered-information/preparatory-documents
[245] See, for example, Patrick Birkinshaw, *Freedom of Information – The Law, the Practice and the Ideal*, Cambridge University Press, 2010, 29; Herwig C.H. Hofmann, Gerard C. Rowe, Alexander H. Türk, Administrative Law and Policy of the European Union, Oxford University Press, 2011, 469, and Seyoum Y. Hameso, *Development, State and Society: Theories and Practice in Contemporary Africa*, iUniverse, 2001, 227.
[246] Annemarie Bridy, "Copyright Policymaking as Porcedural Democratic Process: A Discourse-Theoretic Perspective on ACTA, SOPA, and PIPA", *Cardozo Arts and Entertainment Law Journal*, Vol. 30, 2012, 14.

the usage of such information. Thirdly, the existing FOI regimes do not ensure that other non-requested but important and related to the matter-at-stake materials will be revealed.

Thus, under what circumstances (if at all) could consultative processes supplement the rights to freedom of expression and freedom of information and to open new avenues for the enjoyment of these rights? Moreover, could there be too much of participation? The latter issue is addressed further.

1.6. Enhanced Opportunities for Public Participation and Deliberation: A Critique and its Rebuttal

The main criticisms related to the enhanced opportunities for public participation include concerns of:

1) strategic use of public participation either by majority or by particular interest groups for the reasons of exerting either undue influence on the final decision or delaying the outcome of a decision-making process;

2) inability by people to participate meaningfully;

3) decrease of trust by the people in the government and its institutions;

4) inefficient public involvement;

5) undermining the concept of government's accountability;

6) additional burdens on the institution concerning time and finances.

Firstly, many scholars are concerned that the enhanced opportunities for public participation would lead to a situation where most powerful and wealthy individuals and their groups would dominate the public forum.[247] David Fontana, for example, after analyzing several empirical studies on public participation contends that "participation is minimal, of

[247] Paul B. Clarke and Joe Foweraker, eds., *Encyclopedia of Democratic Thought*, Routledge, 2001, 139.

low quality, and dominated by powerful interests."[248] But the existing empirical studies are not consistent in suggesting that the only beneficiaries of consultative processes are most powerful actors (such as business representatives).[249] The most credible evidence provided by these studies is that business interests are present during consultative processes. But so are the other interests, as long as consultative processes are open for all interested individuals.[250] Moreover, according to Sanders, deliberative practices by requiring participants to express their opinions in terms of public good rather than personal interests eliminate the views and perspectives which are important only to particular participants.[251] There is also evidence of a certain trend where low-income communities, non-governmental organizations and other non-business actors use the consultative processes to gain access to services or to promote their causes more efficiently.[252] Another missing point in all those criticisms is that the problem of the influence of private business interests does not start with the introduction of participatory or consultative processes into policy and decision-making. These influences persist at different times and at different layers of governing. Public participation only unveils the existing affected interests and serves to raise awareness concerning their influence in certain areas, which are usually of public concern as well.

Secondly, the critics argue that lay people are not able to participate meaningfully in policy and decision-making processes because they lack basic knowledge or

[248] David Fontana, "Reforming the Administrative Procedure Act: Democracy index Rulemaking," *Fordham Law Review*, Vol. 74(1), 2005, 81; 85, http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=4094&context=flr

[249] See, generally, Cornelius M. Kerwin, *Rulemaking: How Government Agencies Write Law and Make Policy*, CQ Press, 2003, and Jim Rossi, "Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking," *Northwestern University Law Review*, Vol. 92, 1997, 173.

[250] In the field of electronic communications some NGOs are rather active in regulatory processes. See, for example, Consumer Focus response to Ofcom's consultation on changes to the mobile number porting process, May 2010, http://www.consumerfocus.org.uk/files/2009/06/Consumer-Focus-response-to-Ofcom-Annual-Plan.pdf

[251] Lynn M. Sanders, "Against Deliberation," *Political Theory*, Vol. 25(3), 347; 370, http://faculty.virginia.edu/lsanders/SB617_01.pdf

[252] Prakash Naidoo, "Social Rights. Parallel Route for Poor," *Financial Mail (South Africa)*, August 14, 2009.

because they could be easily manipulated by other more powerful participants.[253] By contrast, proponents of participatory and deliberative democracies suggest that opportunities for public participation have an educative effect.[254] Furthermore, it is difficult to square the mentioned criticism with the evidence of increasing public participation in such scientifically complex regulatory areas as environmental matters and telecommunications.[255]

As will be demonstrated in the following chapters of the thesis, lay individuals are willing and able to participate in public decision-making. Particularly since the regulatory matters became so complex that no single decision-maker now possesses all the needed expertise.[256]

Thirdly, enhanced opportunities for public participation could further undermine the trust in public decision-makers. For example, Durodie contends that promoting deliberation could actually decrease the trust of the people as the emergence of what the author calls 'new experts,' who also regard themselves as true representatives of public opinion, makes it even more complicated for members of society to decide whom to trust.[257] There could be a threat that opportunities for public participation discredit the expertise of scientists and competence of decision-makers.

On the contrary another view suggests that decision-makers' expertise is not discredited by contributions from the public and affected individuals, but instead is

[253] Jim Rossi, "Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking," *Northwestern University Law Review*, Vol. 92, 1997, 173; 177, (referring to Jose Ortega y Gasset, Walter Lippman and Hannah Arendt)
[254] Carole Pateman, *Participation and Democratic Theory*, Cambridge University Press, 1989, 44; and Matthew Botswick, "Twelve Angry Citizens: Can Citizens' Juries Improve Local Democracy in New Zealand?" *Political Science*, Vol. 50(2), 1999, 236, 239.
[255] See, for example, Javier Lezaun and Linda Soneryd, "Government by Elicitation: Engaging Stakeholders or Listening to the Idiots?" London School of Economics and Political Science, Center for Analysis of Risk and Regulation, *Discussion Paper* No. 34, May 2006, 2, and Jenny Steele, "Participation and Deliberation in Environmental Law: Exploring a Problem-solving approach," *Oxford Journal of Legal Studies*, Vol. 21, 2001, 437.
[256] See the earlier section on unprofessionalism of government institutions
[257] Bill Durodie, "Limitations of Public Dialogue in Science and the Rise of New 'Experts'", *Critical Review of International Social and Political Philosophy*, Vol. 6, No. 4, 2003, 82; 86.

supplemented and improved by such input.[258] Also, as mentioned above, the proponents of the theories of deliberative and participatory democracy suggest that actually the opportunities for public participation could build up the trust by the members of society in government institutions.[259] In other words, as long as the final decision embeds the best of the knowledge of decision-makers and the participants, the trust of the government institutions is maintained.

Fourthly, while some critics are concerned with the overwhelming influence of public participation, others warn that deliberation is not an effective instrument, which would help the participants to achieve certain goals. Instead, the critique goes, deliberative processes are used by the politicians and government officials to legitimize their decisions without giving serious consideration to the inputs made by the members of the public.[260] Thus, it is often argued that consultative processes are useless as the participants do not possess enough leverage to influence the final decision.[261] Indeed, the meaningfulness of deliberative processes is undermined where decision-makers fail to go further than simply collecting submissions made by the public.[262] Even if some opportunities for participation are inefficient these criticisms fail to explain why this is so. Moreover, this criticism contradicts the earlier

[258] See, for example, Archon Fung and Erik Olin Wright, "Deepening Democracy: Innovations in Empowered Participatory Governance," in Michael Saward, ed., *Democracy: Critical Concepts in Political Science*, Vol. 3, Routledge, 2007, 156; 170, and Roland Jackson et al., "Strengths of Public Dialogue on Science-related Issues," *Critical Review of International Social and Political Philosophy*, Vol. 8, No. 3, 2005, 349; 350. See also, Anwar Tlili and Emily Dawson, "Mediating Science and Society in the EU and UK: From Information-Transmission to Deliberative Democracy?" *Minerva*: *A Review of Science, Learning and Policy*, Vol. 48, 2010, 429; 445, for the argument that "public engagement with science should become integral to the substantive content of active citizenship as individuals' participation in the democratic process requires the ability to arrive at informed reasoning and judgment about science-related issues; just as it requires scientists to be party to the dialogical process whereby opinions about science are negotiated and formed."

[259] See *Section 1.5.3. Alienation of the Public form Politics and the Lack of Responsiveness by Decision-makers*

[260] Gene Rowe and Lynn J. Frewer, "Public Participation Methods: A Framework for Evaluation," *Science, Technology, and Human Values*, Vol. 25(1), 2000, 3; 14.

[261] *Power to the People*, The report of Power: An Independent Inquiry into Britain's Democracy, The centenary project of the Joseph Rowntree Charitable Trust and the Joseph Rowntree Reform Trust, 2006, http://www.jrrt.org.uk/uploads/PowertothePeople_001.pdf (also cited in Paul Ginsborg, *Democracy: Crisis and Renewal*, Profile Books, 2008, 59) See also, Testimony by Howard Coble in "APA at 65: Is Reform Needed to Create Jobs, Promote Economic Growth, and Reduce Costs?" *Hearing before the Subcommittee on Courts, Commercial and Administrative Law of the Committee on the Judiciary*, House of Representatives, 112th Congress, 1st Session, February 28, 2011, No. 112-17, p. 2(6), http://judiciary.house.gov/hearings/printers/112th/112-17_64854.PDF

[262] Noel Cass, "Participatory-Deliberative Engagement: a literature review," *Working Paper 1.2. of the research project "Beyond Nimbyism: a multidisciplinary investigation of public engagement with renewable energy technologies,"* August 2006, 22.

mentioned concern of the strategic use of the opportunities for participation, since it is difficult to imagine why would anyone seek to use opportunities, which are inefficient.

Also, some critics doubt the potential of public participation to serve as a tool of accountability. For example, according to Bovens, accountability could be defined as "a relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgment, and the actor may face consequences".[263] However, Bovens contends that consultation falls short of "justification, judgment, and consequences," which are all necessary elements of accountability.[264] Richard Stewart explains that participants in consultative and other processes possess no ability to pressure the officials of the consulting institution to account for the final decision.[265] By contrast to these criticisms, the further analysis of cases from different jurisdictions reveals that judicial review serves as one of the mechanisms to hold the decision-makers to the account.

Other skeptics argue that too broad opportunities for participation could impair the overall accountability of decision-makers towards the members of the public: "public dialogue in science deflects blame from those whom we ought to hold to account and … [p]ublic dialogue allows the authorities to claim that we were all consulted should things go wrong in the future, but it is also an abdication of responsibility and leadership by those best placed to decide."[266] Similarly Jackson notices "[i]ndeed, if decision-makers do view dialogue

[263] Mark Bovens, "Analysing and Assessing Public Accountability. A Conceptual Framework," *European Governance Papers*, No. C-06-01, 16 January 2006, 9, http://www.connex-network.org/eurogov/pdf/egp-connex-C-06-01.pdf

[264] Mark Bovens, "Analysing and Assessing Public Accountability. A Conceptual Framework," *European Governance Papers*, No. C-06-01, 16 January 2006, 13, http://www.connex-network.org/eurogov/pdf/egp-connex-C-06-01.pdf

[265] Richard B. Stewart, "Accountability, Participation, and the Problem of Disregard in Global Regulatory Governance," *Discussion Draft January 2008*, 19, http://www.iilj.org/courses/documents/2008Colloquium.Session4.Stewart.pdf

[266] Bill Durodie, "Limitations of Public Dialogue in Science and the Rise of New 'Experts'", *Critical Review of International Social and Political Philosophy*, Vol. 6, No. 4, 2003, 82; 88. See also Noel Cass, "Participatory-Deliberative Engagement: a literature review," *Working Paper 1.2. of the research project "Beyond Nimbyism: a multidisciplinary investigation of public engagement with renewable energy technologies,"* August 2006, 23;

and consultation as purely cosmetic, if they 'talk the talk' but do not 'walk the walk' then public cynicism and mistrust will surely follow."[267] Thus, as rightly noticed by Jackson even if there is a threat of diluted accountability, it is probable only in the context of sham consultation. Also, another problem concerning deliberation and participation is what Boven calls 'the problem of many hands'.[268] According to Bovens, once there are many actors involved in decision-making processes, it becomes more difficult to determine "who has contributed in what way to the conduct of agency and who, and to what degree, can be brought to account for its actions."[269] As mentioned earlier, already there are many actors involved in policy and decision-making processes. Thus, formal opportunities for public participation, where the participants make comments on a proposed matter at stake make it easier to determine who suggested what and to what extent decision-makers took the comments into consideration. On the contrary, where no formal opportunities for involvement exist, various experts and advisers are still able to express their views and opinions, but since the process is informal it contributes very little to the public's understanding of how decisions are made. In representative democracies, this understanding is necessary in order for the people to make their minds before the elections, for example.

On the other hand, many scholars acknowledge that participatory and deliberative mechanisms are similar to traditional means of accountability, since the participants are able to assess the nature of proposed decisions and provide suggestions as to

Julia Black, "Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes," *Regulation and Governance*, Vol. 2, 2008, 137; 150-152.

[267] Roland Jackson et al., "Strengths of Public Dialogue on Science-related Issues," *Critical Review of International Social and Political Philosophy*, Vol. 8, No. 3, 2005, 349; 351

[268] Mark Bovens, "Analysing and Assessing Public Accountability. A Conceptual Framework," *European Governance Papers*, No. C-06-01, 16 January 2006, p.18, http://www.connex-network.org/eurogov/pdf/egp-connex-C-06-01.pdf

[269] Mark Bovens, "Analysing and Assessing Public Accountability. A Conceptual Framework," *European Governance Papers*, No. C-06-01, 16 January 2006, p.18, http://www.connex-network.org/eurogov/pdf/egp-connex-C-06-01.pdf

the possible effects of the decisions.[270] Julia Black while relying on the concept of accountability as defined by Bovens, suggests that there is a "communicative dimension" to it, which becomes present in decision-making processes that include deliberation.[271] Another link between public deliberation and accountability is the publicity side of deliberation. Publicity is considered one of the main elements of accountability, which is related to the openness of governmental policy and decision-making processes.[272] Similarly, Carol Harlow links accountability with openness of decision-making processes.[273] In practice, the value of openness is recognized under procedural requirements of administrative law.

Lastly, the critics express their concern that the opportunities for public participation could be costly in terms of finances and time. For instance, Smith argues that involvement of individuals in government decision-making processes "has resource implications, both in terms of organising engagement and the potential restructuring of administrative procedures and working practices to accommodate participation."[274] Also Baldwin and Black suggest that making regulation more responsive could be burdensome to the regulated industries as well as to the regulators.[275]

While enhanced opportunities for participation require certain financial and other resources, these resources could not be weighed at all times with the benefits of more participatory and deliberative decision-making processes. For instance, Adler finds that the resource implications of public participation are difficult to weigh against such values as

[270] Richard B. Stewart, "Accountability, Participation, and the Problem of Disregard in Global Regulatory Governance," *Discussion Draft January 2008*, 22, http://www.iilj.org/courses/documents/2008Colloquium.Session4.Stewart.pdf
[271] Julia Black, "Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes," *Regulation and Governance*, Vol. 2, 2008, 137; 151-152.
[272] See, for example, Amy Gutmann and Dennis Thompson, *Democracy and Disagreement*, Harvard University Press, 1996, 97 (referring to Jeremy Bentham "Of Publicity," in *The Works of Jeremy Bentham*, ed. John Bowring, 1839, 310-312.
[273] Richard B. Stewart, "Accountability, Participation, and the Problem of Disregard in Global Regulatory Governance," *Discussion Draft January 2008*, 21, referring to Carol Harlow, *Accountability in the European Union*, Oxford University Press, 2002.
[274] Graham Smith, *Democratic Innovations: Designing Institutions for Citizen Participation*, Cambridge University Press, 2009, 19.
[275] Robert Baldwin and Julia Black, "Really Responsive Regulation," *LSE Law, Society and Economy Working Papers*, 15/2007, 14, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1033322

procedural justice which they are meant to serve.[276] According to him, given the potential benefits to the affected parties it might be not necessary to attach a 'price tag' to the consultative process.[277]

To sum up, most of the above mentioned criticisms do not question the necessity of participatory opportunities so much as their meaningfulness. This research seeks to show, the real issue here is to determine how law's intervention could diminish the mentioned deficiencies and provide for meaningful consultative processes with potential of forging the benefits of public participation and deliberation. For example, how to strike a proper balance between allowing sufficient influence for participants and to ensure that this influence is not abused by a single interest group in order to realize meaningful public participation? How to ensure public participation without diluting the accountability of decision-makers? Could public participation help to equalize the power relations in public decision-making processes?

Conclusions

In the light of the challenges faced by regulatory governments (such as unprofessionalism and alienation from the public), there is a common trend in politics across jurisdictions to adjust procedures of policy and decision-making to meet the standards of participation and deliberation.[278] More particularly, new reforms call for the inclusion of more consultative mechanisms in public decision-making processes.[279] The analysis of deliberative and participatory theories of democracy dispelled the myth that lay people cannot participate in public affairs, moreover the proponents of these theories suggest a framework for assessing

[276] Michael Adler, "Understanding and Analysing Administrative Justice," in Michael Adler, ed., *Administrative Justice in Context*, Hart Publishing, 2010, 136.
[277] Michael Adler, "Understanding and Analysing Administrative Justice," in Michael Adler, ed., *Administrative Justice in Context*, Hart Publishing, 2010, 136.
[278] Section *1.1. From Representative to Regulatory Government*
[279] Section *1.2. Revitalizing Representative Government through Participation and Deliberation*

the dialogic nature of procedures.[280] The underlying benefits of the opportunities for participation include a more responsive, efficient, trustworthy and less intrusive government.[281]

The following chapters seek to address such questions as how (if at all) are the requirements for ideal deliberation and participation expressed under current procedural rules and judicial practices of the three jurisdictions? What is the role of law in ensuring more meaningful and successful consultative processes?

[280] Section *1.3. The Ideals of Participation and Deliberation*
[281] Section *1.5. Why Representative Government Needs Participatory Rights*

2. The Emerging Law of Public Consultation

2.1. Opportunities to Participate in Rulemaking in the United States of America

In the US, the principal requirements for public participation have been controlled by the *Administrative Procedure Act* (the APA), enacted in 1946.[282] There were various reasons behind the adoption of the Act. One of them was related to the fear that the agencies, given their powers and discretion would become "a 'fourth branch' of Government, for which there is no sanction in the Constitution."[283] Interestingly, initially the agencies were established as expert decision-makers, however, from the very beginning there was scepticism as to the limits of their knowledge and expertise. Such fears were accompanied by concerns over the insufficiency of the expertise of the rulemakers and the preservation of the interests of regulates. The drafters of the APA were concerned that in the absence of public participation requirements, the agencies could not be held accountable for their decisions, because their deliberations are not public and their officials are under no direct political control.[284] Moreover, requiring an agency to consider the inputs made by the interested parties completes the rulemaker's expertise and informs how the regulated industries will be affected.[285] Thus, in the US the public participation requirements were originally accorded two types of functions. First, they were seen as a guarantee of decision-maker's accountability towards the general public. As explained in Chapter 1, this approach is similar to the concerns raised by the proponents of the deliberative democracy as well as expressed by the politicians

[282] *Administrative Procedure Act*, 5 U.S.C., 2000, Pub. L. No. 404, 60 Stat. 237, Ch. 324, §§ 1-12 (1946). Codified by Pub. L. No. 89-554 (1966) in 5 U.S.C. §§ 551-559, 701-706, 1305, 3105, 3344. (further referred to as *Administrative Procedure Act*, 5 U.S.C., 2000)
[283] *Administrative Procedure Act: Legislative History*, *79th Congress*, 1944-46, United States, Congress, Senate, Committee on the Judiciary, 1997, 55.
[284] *Administrative Procedure Act: Legislative History*, *79th Congress*, 1944-46, United States, Congress, Senate, Committee on the Judiciary, 1997, 19-20.
[285] *Administrative Procedure Act: Legislative History*, *79th Congress*, 1944-46, United States, Congress, Senate, Committee on the Judiciary, 1997, 19-20.

under currently proposed procedural reforms. The second function attached to the notice and comment requirements is related to safeguarding the interests of the regulated industry. The latter guarantee is not considered as a function of participation or deliberation by the proponents of the theories of democracy. On the contrary, the involvement by powerful business interests in decision-making processes is considered as potential threat to the public interest as well as impinging on the opportunities for participation by the lay people.[286] The analysis of cases which follows, seeks to address this issue and determine whether the participation of business interests in decision-making processes by default affects the involvement by other interest groups (such as non-governmental organizations).

One of the main procedures for ensuring accountable and procedurally fair rulemaking process under the APA is the notice and comment requirement. Section 553 of the APA sets out the notice and comment procedure, which requires the rulemaking agencies to consult with the interested parties.[287] The notice and comment procedure requires agencies to issue a notice of the proposed rule along with the text and the summary of the rule.[288] Upon publishing the notice, the agency is obliged to provide an opportunity to comment on the proposed rule by giving "interested persons *an opportunity to participate* in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation."[289] Finally, after receiving the public input, the agency has to consider the submissions made by the public. Section 553(c) the APA establishes that "[a]fter *consideration of the relevant matter* presented, the agency shall incorporate in the rules

[286] See Section *1.6. Enhanced Opportunities for Public Participation and Deliberation: A Critique and its Rebuttal*

[287] In some of American administrative law and public administration literature the terms 'notice and comment procedure' and 'consultation' are used interchangeably. See, for example, Cornelius M. Kerwin, *Rulemaking: How Government Agencies Write Law and Make Policy*, CQ Press, 1994, 169.

[288] §553 (b) of the *Administrative Procedure Act*, 5 U.S.C., 2000, reads: "General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law." See also Steven P. Croley, "Theories of Regulation: Incorporating the Administrative Process," *Columbia Law Review*, Vol. 98, No. 1, 1998, 1; 107, and Jeffrey S. Lubbers, *A Guide to Federal Agency Rulemaking*, American Bar Association, 2006.

[289] *Administrative Procedure Act*, 5 U.S.C., 2000, §553 (c) (emphasis added) http://usgovinfo.about.com/library/bills/blapa.htm

adopted a *concise general statement of their basis and purpose*."[290] The 'statement of basis and purpose' constitutes the preamble to the rule and it serves as a source of information to the public about the reasons of the final rule and its application.[291] Although the APA refers to 'opportunities' of participation in rulemaking (rather than a 'right' to participate'), both scholars and the courts have recognized involvement by interested parties in the notice and comment procedure as part of statutory rights.[292]

Other legal acts also establish an opportunity for public participation in US public affairs. For instance, in 1993 the US President adopted an Executive Order on *Regulatory Planning and Review*, one of the main purposes of which was to ensure that the regulatory process is more open and responsive to the needs of the people and guarantees "health, safety, environment, and well-being and improves the performance of the economy without imposing unacceptable or unreasonable costs on society."[293] The Order requires agencies, before adopting new regulations, to identify (among other things) the problems which they seek to address, assess the impact of the existing regulations on the problem at stake, identify and evaluate alternative solutions and base the regulation on the best available scientific and other expert information.[294] Although the Order does not adopt the language of 'public participation' it does require agencies wherever possible to facilitate consultation with local and other officials, where their regulations might have a significant effect on their performance.[295] After almost 20 years the same concerns were reiterated in another Executive

[290] *Administrative Procedure Act*, 5 U.S.C., 2000, 553 (c), (emphasis added) http://usgovinfo.about.com/library/bills/blapa.htm
[291] Jeffrey S. Lubbers, *A Guide to Federal Agency Rulemaking*, American Bar Association, 2006, 376.
[292] George B. Shepherd, "Fierce Compromise: The Administrative Procedure Act Emerges from the New Deal Politics," *Northwestern University Law Review*, Vol. 90, 1996, 1557; 1678, and D. J. Galligan, *Due Process and Fair Procedures*, Clarendon Press, 1996, 496.
[293] Exec. Order No. 12866, (Sept. 30, 1993), as amended by Exec. Order No. 13258 (Feb. 26, 2002) and Exec. Order No. 13422 (Jan. 18, 2007,) http://www.dol.gov/ebsa/pdf/eo12866.pdf
[294] Paragraph (b), the Principles of Regulation, of the Exec. Order No. 12866, (Sept. 30, 1993), as amended by Exec. Order No. 13258 (Feb. 26, 2002) and Exec. Order No. 13422 (Jan. 18, 2007,) http://www.dol.gov/ebsa/pdf/eo12866.pdf
[295] Paragraph (9) of Sec 1(b) of the Exec. Order No. 12866, (Sept. 30, 1993), as amended by Exec. Order No. 13258 (Feb. 26, 2002) and Exec. Order No. 13422 (Jan. 18, 2007,) http://www.dol.gov/ebsa/pdf/eo12866.pdf

Order by the US President on *Improving Regulation and Regulatory Review*.[296] Unlike the earlier provisions, however, the latter Order adopts the language of 'public participation' and devotes an entire section to it. The order requires the agencies to consult with a wider range of parties than before. In addition to officials of State, local and tribal institutions, the agencies are obliged to consult the experts in the field, as well as the general public.[297] Moreover, the order requires agencies to consider involving affected parties as early as possible, i.e. even before publishing the proposed rule.[298]

To sum up, in the US, the requirements for public participation are established at various levels of the public decision-making. Initially public participation was considered by the lawmakers as a control mechanism for the Federal agencies and a source of information for the rulemakers. The more recent practice reveals the broader goals of the opportunities for participation and also suggests that involvement of wider range of interests could benefit the rulemaking process.

2.2. 'Obligation to facilitate participation' under South Africa's Constitution

Public participation in South Africa is accorded constitutional protection. Sections 59 (1) (a), 72 (1) (a) and 118 (1) (a) of South Africa's Constitution confer an obligation on the National Assembly (NA) and the National Council of Provinces (NCOP), which are the two houses of the national parliament, as well as the provincial legislatures to "facilitate public involvement in the legislative and other processes."[299] Although public

[296] Sec. 1 of the Exec. Order No. 13563 (Jan. 18, 2011), http://www.whitehouse.gov/the-press-office/2011/01/18/improving-regulation-and-regulatory-review-executive-order
[297] Sec. 2 of the Exec. Order No. 13563 (Jan. 18, 2011), http://www.whitehouse.gov/the-press-office/2011/01/18/improving-regulation-and-regulatory-review-executive-order
[298] Sec. 2(c) of the Exec. Order No. 13563 (Jan. 18, 2011), http://www.whitehouse.gov/the-press-office/2011/01/18/improving-regulation-and-regulatory-review-executive-order
[299] *Constitution of the Republic of South Africa*, 1996, Section 59(1)(a) reads: "The National Council of Provinces must facilitate public involvement in the legislative and other processes of the Council and its committees;" Section 72(1): "National Council of Provinces must facilitate public involvement in the legislative

participation in the legislative process is accorded constitutional significance, it is not part of the bill of rights. The provisions concerning the constitutional duties to facilitate public involvement are placed in Chapters 4 and 6 of the South African Constitution, which deal with the functions of the legislatures.

Further, in South Africa, the *Promotion of Administrative Justice Act of 2000*, (PAJA)[300] sets basic requirements of lawfulness, reasonableness and procedural fairness for administrative procedures.[301] South Africa's Constitution also prescribes certain procedural requirements. For example, Section 1 of the Constitution establishes that South Africa's democratic foundation includes the values of "accountability, responsiveness and openness."[302] These values are realized through different mechanisms such as the right to vote (which, exercised through elections, supposedly leads to a multi-party system),[303] the right to access to information,[304] opportunities for public participation in law making at local and national levels,[305] and participatory rights under administrative law.[306]

---

and other processes of the Council and its committees;" Section 118 (1) (a): "A provincial legislature must facilitate public involvement in the legislative and other processes of the legislature and its committees." Text available at: http://www.info.gov.za/documents/constitution/1996/index.htm

[300] *Promotion of Administrative Justice Act*, 2000, Government Gazette, Vol. 416, No. 20853, 3 February 2000, (South Africa), http://www.saflii.org/za/legis/num_act/poaja2000396.pdf

[301] Preamble to the *Promotion of Administrative Justice Act*, 2000, Government Gazette, Vol. 416, No. 20853, 3 February 2000, (South Africa), http://www.saflii.org/za/legis/num_act/poaja2000396.pdf . See also, for the introduction of the Act the homepage of the Department of Justice and Constitutional Development of the Republic of South Africa: http://www.justice.gov.za/paja/about/intro.htm

[302] Section 1 of the *Constitution of the Republic of South Africa*, 1996, provides:
"The Republic of South Africa is one, sovereign, democratic state founded on the following values:

a. Human dignity, the achievement of equality and the advancement of human rights and freedoms.
b. Non-racialism and non-sexism.
c. Supremacy of the constitution and the rule of law.
d. Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness."

Text available at http://www.info.gov.za/documents/constitution/1996/index.htm

[303] Heinz Klug, *The Constitution of South Africa: A Contextual Analysis*, Hart Publishing 2010, 181-182.

[304] C. G. Can Der Merwe and Jacques E. Du Plessis, *Introduction to the Law of South Africa*, Kluwer Law International, 2004, 83 (referring to Section 32 on Access to Information of South Africa's Constitution, 1996, http://www.info.gov.za/documents/constitution/1996/96cons2.htm#32 and *Access to Information Act 2000*)

[305] Heinz Klug, *The Constitution of South Africa: A Contextual Analysis*, Hart Publishing 2010, 181-182; and C. G. Can Der Merwe and Jacques E. Du Plessis, *Introduction to the Law of South Africa*, Kluwer Law International, 2004, 83 (referring to Section 59 on Public Access and Involvement in National Assembly, of the Constitution of the Republic of South Africa, 1996)

In various cases the South African judiciary has recognized the constitutional obligations of legislatures as legally enforceable standards as well as a material requirement of the law making process.[307] Moreover, the public's 'involvement' in the country's legislative processes is recognized as constitutive part of the right to political participation.

According to the country's Constitutional Court, the right of political participation, as established under Article 25 of the *International Covenant on Civil and Political Rights*, extends beyond the right to take part in the elections and, under South Africa's legal framework includes the opportunities for the public to participate in the country's legislative processes.[308] Thus the constitutional duty for legislatures 'to facilitate public involvement' is 'a manifestation of the international law right to political participation.'[309] The country's Constitutional Court ruled that the constitutional obligation for South African legislatures to facilitate public involvement consists of two general requirements: "[t]he 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."[310]

Another important aspect of having public participation as a constitutional guarantee in South Africa relates back to the country's history and its democratic structure. South Africa's Constitution establishes a dual nature of democracy by recognizing

[306] C. G. Can Der Merwe and Jacques E. Du Plessis, *Introduction to the Law of South Africa*, Kluwer Law International, 2004, 83 (referring to Section 33 on Right to Just Administrative Action of the *Promotion of Administrative Justice Act of 2000*)
[307] *Doctors for Life International v Speaker of the National Assembly*, South African Constitutional Court, 2006 (12) BCLR 1399 (CC), http://www.saflii.org/za/cases/ZACC/2006/11.html and *Matatiele Municipality v President of the Republic of South Africa* (2)(CCT73/05A)[2006] ZACC 12 [2006] ZACC 26; 2007 (1) BCLR 47 (CC) (18 August 2006), (Matatiele 2), http://www.saflii.org/za/cases/ZACC/2006/12.html
[308] *Doctors for Life International v Speaker of the National Assembly*, South African Constitutional Court, 2006 (12) BCLR 1399 (CC), 90-94, 98, http://www.saflii.org/za/cases/ZACC/2006/11.html
[309] *Doctors for Life International v Speaker of the National Assembly*, South African Constitutional Court, 2006 (12) BCLR 1399 (CC), 107, http://www.saflii.org/za/cases/ZACC/2006/11.html
[310] *Doctors for Life*, at 129, http://www.saflii.org/za/cases/ZACC/2006/11.html See also for the reference to this part of the judgment in the *Matatiele 2* case, at 54, http://www.saflii.org/za/cases/ZACC/2006/12.html

representative and participatory aspects of government.[311] In addition to the representative aspect of the government most commonly associated with the electoral systems, participatory side of the government requires institutions to facilitate consultative mechanisms and providing individuals with opportunities to participate in the government decision-making in between elections. The links between representative and participatory democracy were confirmed by the Constitutional Court as well.[312] According to South Africa's Constitutional Court, participatory democracy is particularly important in the country given the existing inequalities among its citizens concerning wealth and power.[313] Also, the Court stressed the importance of public participation in the context of South Africa's history of racial discrimination and the necessity of the transition to a democratic society.[314]

2.3. The Government's Commitment to Consultation in the United Kingdom

In the UK, where public authorities choose to consult, they enjoy discretion about how to do it. However, most public authorities have committed themselves to following the requirements of the *Code of Practice on Consultation* (the Code or the Code of Practice).[315] While the Code does not place a general requirement for public authorities to consult the public nor does it create any rights for individuals, it does however codify the best

[311] See, Sections 57, 70, and 116 of *Constitution of the Republic of South Africa*, 1996, text available at http://www.info.gov.za/documents/constitution/1996/index.htm
[312] See for example, *Matatiele Municipality v President of the Republic of South Africa* (2)(CCT73/05A)[2006] ZACC 12 [2006] ZACC 26; 2007 (1) BCLR 47 (CC) (18 August 2006), (Matatiele 2), 54-55, http://www.saflii.org/za/cases/ZACC/2006/12.html and *Doctors for Life International v Speaker of the National Assembly*, South African Constitutional Court, 2006 (12) BCLR 1399 (CC), 129, http://www.saflii.org/za/cases/ZACC/2006/11.html
[313] *Matatiele Municipality v President of the Republic of South Africa* (2)(CCT73/05A)[2006] ZACC 12 [2006] ZACC 26; 2007 (1) BCLR 47 (CC) (18 August 2006), (Matatiele 2), 59, http://www.saflii.org/za/cases/ZACC/2006/12.html
[314] *Doctors for Life International v Speaker of the National Assembly*, South African Constitutional Court, 2006 (12) BCLR 1399 (CC), 130, http://www.saflii.org/za/cases/ZACC/2006/11.html
[315] *Code of Practice on Consultation*, the Cabinet Office, July 2008, http://www.berr.gov.uk/files/file47158.pdf A full list of public bodies, which are following the Code in their practices, is provided under the section, 'Policies for Better Regulation' of the website of the Department for Business Innovation and Skills: http://www.bis.gov.uk/policies/better-regulation/consultation-guidance

practices of consultation and sets seven so-called 'consultation criteria'. The Code is of a voluntary nature meaning that government institutions are not obliged to adopt the consultation requirements during their consultative processes. It has been argued that the value of the voluntary Code is that of "enhancing access to regulation and countering charges of 'personalized' processes, without running into the greatest dangers of legalism."[316]

The 'consultation criteria' establish particular requirements concerning public consultation for public sector organizations such as government departments which choose to commit themselves to the Code.[317] The criteria prescribe the conditions such as the necessity and length of consultation, contents of the consultation documents and the responsiveness by the consulting institution to the inputs of the consultees.[318]

The main expectations behind the Code include "transparency, responsiveness and accessibility of consultations."[319] Some scholars admit that the Code could also serve as a significant tool for holding the government authorities accountable to the members of the public.[320] The next chapter examines whether such accountability indeed could be ensured particularly in the context of participatory and deliberative democracies.

In the UK, the duty to consult is a part of the common law principles of 'legitimate expectations' and procedural fairness.[321] Under common law, the duty for government authorities to consult the public and other interested parties could emerge where authorities made a promise to consult or where the earlier practice of communication between the authority and the members of the public was such as to create an expectation of future

[316] Robert Baldwin and Martin Cave, *Understanding Regulation: Theory, Strategy, and Practice*, Oxford University Press, 1999, 321.
[317] http://www.bis.gov.uk/policies/bre/consultation-guidance
[318] See generally, *Code of Practice on Consultation*, the Cabinet Office, July 2008, http://www.berr.gov.uk/files/file47158.pdf
[319] *Code of Practice on Consultation*, the Cabinet Office, July 2008, 3, http://www.berr.gov.uk/files/file47158.pdf
[320] Ian Mann, "Consultation Criteria," *New Law Journal*, 10 November 2006, 5.
[321] See, for example, Hilaire Barnett, *Constitutional and Administrative Law*, Routledge, 2009, 750-759, and Ian Loveland, *Constitutional Law, Administrative Law, and Human Rights: A Critical Introduction*, Oxford University Press, 2009, 492-505.

consultation.[322] In other words, decision-makers need to consult, whereas the individuals affected by a proposed decision expect that they will be consulted.

According to case law, there are two types of procedural legitimate expectations which could trigger a duty to consult. The test of legitimate expectations has been summarized by Lord Justice Laws in *R (Bhatt Murphy) v The Independent Assessor* case (the Bhatt case).[323] While the facts of the case are addressed in the next chapter, at this point the test is simply described. The test is based on criteria for distinguishing between the legitimate expectations arising from the government's promise or established practice on the one hand, and alternative circumstances where such expectations could emerge on the other hand. The former situations are to be considered a "paradigm case of procedural legitimate expectations"[324] and they would occur where the government gave a clear and express assurance either by a promise or prior practice that it will consult on decision to alter a policy.[325]

Where the government or public authority neither held consultations nor promised to do so, a duty to consult would arise only in "exceptional situations."[326] Such exceptional situations, Lord Justice Laws defined as a "secondary case of procedural expectation."[327] Under these circumstances the court could recognize procedural expectations

[322] See, for example, *R (Cheshire East Borough) v Secretary of State for the Environment, Food and Rural Affairs* [2011] EWHC 1975 (Admin), http://www.bailii.org/ew/cases/EWHC/Admin/2011/1975.html *R (Bhatt Murphy) v The Independent Assessor*, [2008] EWCA Civ 755, http://www.bailii.org/ew/cases/EWCA/Civ/2008/755.html *R(Bapio Action) v Secretary of State for the Home Department*, [2007] EWHC 199 (Admin); [2007] EWCA Civ 1139, and *R (Coughlan) v North & East Devon Health Authority*, [2001] QB 213, http://www.bailii.org/ew/cases/EWCA/Civ/1999/1871.html

[323] *R (Bhatt Murphy) v The Independent Assessor*, [2008] EWCA Civ 755, 26-51, http://www.bailii.org/ew/cases/EWCA/Civ/2008/755.html

[324] *R (Bhatt Murphy) v The Independent Assessor*, [2008] EWCA Civ 755, 29

[325] *R (Bhatt Murphy) v The Independent Assessor*, [2008] EWCA Civ 755, 29. Similarly, in the Greenpeace case, Justice Sullivan held that: "[w]here a public authority has issued a promise or adopted a practice which represents how it proposes to act in a given area, the law will require the promise or practice to be honoured unless there is good reason not to do so. *Greenpeace*, at 47, [2007] EWHC 311 (Admin), (citing Laws LJ at paragraph 68 of R (Nadarajah and Abdi) v Secretary of State for the Home Department [2005] EWCA Civ 1363).

[326] *R (Bhatt Murphy) v The Independent Assessor*, [2008] EWCA Civ 755, 41

[327] *R (Bhatt Murphy) v The Independent Assessor*, [2008] EWCA Civ 755, 39

only where the institution' past conduct had a 'pressing and focused'[328] impact on the parties. To assess how much the parties were affected, the court would look at first whether there was an identifiable group of individuals and, secondly, whether the conduct had some substantive impact on that group.[329] If both these conditions were met, the public authority would be required to consult before changing its policy or decision. Where the government did not consult in such a situation, the failure to meet the legitimate expectations of those potentially affected would result in unfairness, 'abuse of power' or infringement of the 'principle of good administration'.[330] The test for "secondary case of procedural expectation" suggests that the recognition of expectations concerning consultations is dependent on the potential existence of some expectations related to the substance of the policy at stake.

Thus, generally, procedural legitimate expectations could arise either from a promise to consult or an established practice of consultation.[331] In addition, in the absence of a promise or previous practice of consultation, the government might still be obliged by the common law to hold public consultations, and these would be considered 'exceptional situations'.[332]

In the UK, the decision-makers are not obliged to consult in the course of their activities unless required by a specific statute or the common law. Quite often the decision-maker's enjoy discretion concerning the substance of the rules as well as the procedures that are followed. According to the courts, in the absence of legal requirements, generally it is the

[328] *R (Bhatt Murphy) v The Independent Assessor*, [2008] EWCA Civ 755, 49
[329] Lord Justice Laws went on to explain that: "[o]ne would expect at least to find an individual or group who in reason have substantial grounds to expect that the substance of the relevant policy will continue to enure for their particular benefit: not necessarily for ever, but at least for a reasonable period, to provide a cushion against the change. In such a case the change cannot lawfully be made, certainly not made abruptly, unless the authority notify and consult." *R (Bhatt Murphy) v The Independent Assessor*, [2008] EWCA Civ 755, 49
[330] *R (Bhatt Murphy) v The Independent Assessor*, [2008] EWCA Civ 755, 48-51
[331] *R (Bhatt Murphy) v The Independent Assessor*, [2008] EWCA Civ 755, http://www.bailii.org/ew/cases/EWCA/Civ/2008/755.html R *(Luton Borough Council) v Secretary of State for Education* [2011] EWHC 217 (Admin), http://www.bailii.org/ew/cases/EWHC/Admin/2011/217.html *R (Majed) v London Borough of Camden* [2009] EWCA Civ 1029, http://www.bailii.org/ew/cases/EWCA/Civ/2009/1029.html
[332] *R (Bhatt Murphy) v The Independent Assessor*, [2008] EWCA Civ 755, 41, http://www.bailii.org/ew/cases/EWCA/Civ/2008/755.html

decision-maker's choice whether to consult or not.[333] Also, the decision-makers are considered by the judiciary to be the 'masters of procedure' when designing consultative exercises.[334] Yet in certain areas, the duty to consult is becoming a common practice rather than an exception. For example, in a significant environmental case one British High Court held that "[w]hatever the position may be in other policy areas, in the development of policy in the environmental field consultation is no longer a privilege to be granted or withheld at will by the executive,"[335] and that therefore, it is not entirely up to decision-makers to decide whether they need to consult.[336] Similarly, as in the US, the consultative process in the UK seems to be gaining a firm recognition as a part of procedural rules. The issue of whether there are particular reasons for more stringent requirements concerning public participation in environmental matters is examined in Chapter 4 (The Law of Public Consultation in Environmental Matters).

2.4. Opportunities for Public Participation at the International Level

The promotion of public participation and deliberation has preoccupied the highest political levels not only in the US, the UK and South Africa but also in international arena. Requirements for decision-makers to ensure public participation are established under various human rights treaties, constitutional and legislative provisions. Most broadly, public participation is understood as a right to be involved in the public affairs through such mechanisms as elections or referendums.[337] Thus, right to political participation is usually understood as a right to vote in elections and be elected. For instance, Article 25 of the

[333] *R (Bhatt Murphy) v The Independent Assessor*, [2008] EWCA Civ 755, 54, http://www.bailii.org/ew/cases/EWCA/Civ/2008/755.html
[334] *R (Luton Borough Council) v Secretary of State for Education* [2011] EWHC 217 (Admin), 84, http://www.bailii.org/ew/cases/EWHC/Admin/2011/217.html
[335] *R (Greenpeace) v Secretary of State for Trade and Industry*, [2007] EWHC 311 (Admin), [2007] NPC 21, [2007] Env LR 29, [2007] JPL 1314, 49, http://www.bailii.org/ew/cases/EWHC/Admin/2007/311.html
[336] *R (Greenpeace) v Secretary of State for Trade and Industry*, [2007] EWHC 311 (Admin), [2007] NPC 21, [2007] Env LR 29, [2007] JPL 1314, 49, http://www.bailii.org/ew/cases/EWHC/Admin/2007/311.html
[337] See, for example, Henry J. Steiner, "Political Participation as a Human Right," *Harvard Human Rights Year Book*, Vol. 1, 1988, 77.

International Covenant on Civil and Political Rights (the Covenant) guarantees a right to every citizen "to vote and to be elected at genuine periodic elections."[338] The less concrete and therefore less discussed provision of the Covenant's Article 25 provides that citizens also have a right "to take part in the conduct of public affairs, directly or through freely chosen representatives."[339] Given the vague formulation of the right to participate in public affairs, the governments of the countries who are parties to the Covenant, are generally free to decide as to the content of the right and what is necessary under the national frameworks for the protection of this right. Although under the Covenant the right to political participation is lumped together with other civil and political rights (e.g., freedom from torture, right to life and freedom of expression) it still lacks immediate effect and is characterized instead as a 'programmatic right.'[340]

In the environmental field, Principle 10 of the United Nations' *Rio Declaration on Environment and Development* (*The Rio Declaration*) encourages national governments to open their decision-making processes for public participation; the instrument is now considered a foundation of 'participatory democracy' in environmental matters.[341] More specifically, public participation is defined under the *Aarhus Convention*[342] which aims to

[338] *International Covenant on Civil and Political Rights*, adopted by UN General Assembly Resolution 2200A (XXI), December 16, 1966, http://www2.ohchr.org/english/law/ccpr.htm

[339] *International Covenant on Civil and Political Rights*, adopted by UN General Assembly Resolution 2200A (XXI), December 16, 1966, http://www2.ohchr.org/english/law/ccpr.htm See also Paragraph 1 of the General Comment No. 25 "The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25)," 12/07/96, CCPR/C/21/Rev.1/Add.7, http://www.unhchr.ch/tbs/doc.nsf/0/d0b7f023e8d6d9898025651e004bc0eb?Opendocument

[340] Henry J. Steiner, "Political Participation as a Human Right," *Harvard Human Rights Year Book*, Vol. 1, 1988, 77; 131-132. See also, Jeremy Waldron, "Participation: The Right of Rights," in Jeremy Waldron, *Law and Disagreement*, Oxford University Press, 2001, 232-255.

[341] See, for example, Robert McCracken, "EIA, SEA and AA, present position: where are we now?" *Journal of Planning and Environmental Law*, Vol. 12, 2010, 1515, 1529; Brant McGee, "The Community Referendum: Participatory Democracy and the Right to Free, Prior and Informed Consent to Development," *Berkeley Journal of International Law*, Vol. 27, 2009, 570; 571; Jens Newig and Oliver Fritsch, "Environmental Governance: Participatory, Multi-Level – and Effective?" *Environmental Policy and Governance*, Vol. 19, 2009, 197; Jens Newig, "Does Public Participation in Environmental Decisions Lead to Improved Environmental Quality? Towards an Analytical Framework," *CCP*, Vol. 1, 2007, 51, http://www.usf.uos.de/~jnewig/03_Forschung_Newig_final.pdf

[342] *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, (Aarhus Convention), The United Nations Economic Commission for Europe (UNECE), adopted 25 June 1998, entered into force 30 October 2001, http://www.unece.org/env/pp/documents/cep43e.pdf

ensure enhanced opportunities for the members of public to participate in environmental policy and decision-making processes. The member states of the Aarhus Convention have committed themselves to guarantee that the policy and decision-makers are ready to help the members of the public and their groups to get involved in consultative processes.[343]

Another example at the international level is the report by one of the working groups of the *Organisation for Economic Co-operation and Development* (OECD) which suggests that if public participation is a tool of the government's accountability towards the citizens, government institutions should strive to ensure that unhindered opportunities exist for those willing to take part in policy and decision-making processes.[344] According to the report, such efforts include "a) lowering the barriers (e.g. distance, time, language, access) for those who wish to participate and b) building capacity, skills and knowledge to participate effectively."[345]

Also the European Court of Human Rights (ECtHR) to some extent has identified participatory rights under the Convention in its jurisprudence. For example, in the context of protection of freedom of association and assembly (Article 11), the Court has recognized 'a right to be heard.'[346] Also in the context of private and family life (Article 8), the Court under its proportionality test would be concerned whether national public

[343] Article 4 Paragraph 4 of the *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, (Aarhus Convention), The United Nations Economic Commission for Europe (UNECE), adopted 25 June 1998, entered into force 30 October 2001, http://www.unece.org/env/pp/documents/cep43e.pdf See also the Implementation Guide on Article 6 "Public Participation in Decisions on Specific Activities" of the Aarhus Convention, which recognizes that "people have the right to take part in basic decisions affecting their lives" and requires public authorities to provide "incentives for applicants to engage in early dialogue," in Stephen Stec and S. Casey-Lefkowitz, *The Aarhus Convention: An Implementation Guide*, United Nations, 2000, 41, http://www.unece.org/env/pp/acig.pdf

[344] *Mind the Gap: Fostering Open and Inclusive Policy Making*, an Issues Paper of third meeting of the Steering Group on Open and Inclusive Policy Making, the Organisation for Economic Co-operation and Development, OECD, 2008, 3.

[345] *Mind the Gap: Fostering Open and Inclusive Policy Making*, an Issues Paper of third meeting of the Steering Group on Open and Inclusive Policy Making, the Organisation for Economic Co-operation and Development, OECD, 2008, 6

[346] Rory O'Connell, "Towards a Stronger Concept of Democracy in the Strasbourg Convention," *European Human Rights Law Review*, Vol. 3, 2006, 281; 287-288.

institutions have allowed individuals to take part in their decision-making processes.[347] Another example could be drawn from the Court's case law concerning freedom of religion and belief. The Court has confirmed that when there is an interference with an individual's right to manifest religion it is not only the substance of decision by national authorities that matters but also the process of decision-making, and particularly the inclusiveness of likely affected individuals in such processes.[348]

2.5. The Law of Public Consultation: Different Contexts, Similar Requirements

The law of public consultation is gaining a firm ground in various jurisdictions and at various levels of public decision-making processes. There is a clear trend towards the legal formalization of opportunities for consultation.

The most common approach is that of establishing minimum legal requirements for agencies, government authorities, and even legislatures (collectively these bodies are referred to here as policy and decision-makers). In addition to the general requirements of public participation as mentioned above, there are more specific requirements established under the statutes which apply in particular regulatory areas.[349] While the duty for decision-makers to consult the public on different matters seems, in certain cases, to be well established, the unsettled issue is how to consult, and how to do it in a meaningful way so that the rationales of responsive, open and accountable government (as explained in Chapter 1) are met.

[347] *Hatton v. the United Kingdom*, Application No. 36022/97, 8 July 2003, at 99 and 104, and *Tysiąc v. Poland*, Application No. 5410/03, 24 September 2007, See also, Rory O'Connell, "Towards a Stronger Concept of Democracy in the Strasbourg Convention," *European Human Rights Law Review*, Vol. 3, 2006, 281; 288.
[348] *Dogru v. France*, App. No., 27058/05, 4 March 2009
[349] For instance, obligations of consultation are set in following acts in the UK: the Food Standards Act 1999, the Railways Act 2005, the Housing Benefits Act, 1982 and the Consumer Protection Act, 1987, enshrine a duty for particular public authorities to consult in their delegated law making processes.

There are various ways in which members of the public could realize the opportunities for public participation. The particular way of consulting (with whom, when, etc.) is left almost entirely at the discretion of the relevant institution. As already mentioned, in the UK, the government authorities still retain wide discretion concerning consultative processes. And, in South Africa, the Constitutional Court held that the legislative bodies enjoy 'broad discretion' (within the boundaries of reasonableness) in choosing the ways to comply with the constitutional duty to 'facilitate public involvement.'[350] In the US, as early as in 1970s the US Supreme Court ruled that state legislatures and the decision-makers themselves are and should remain the primary authority concerning the scope of public participation.[351] One of the main problems for the courts is that they cannot impose any additional requirements upon the agencies concerning public participation than the ones already established under Section 553 of the APA.[352] In practice, despite the decision by the US Supreme Court, the vague language of the APA made it possible for the courts to interpret the notice and comment requirements in a broad manner, which would favour the participants' interests. For example, under the current judicial practice, the agencies have to disclose various documents to the interested parties as part of the notice and comments procedure, this requirement, however, is nowhere established under the APA.[353] Indeed, as will be illustrated in the following sections, the judiciary seems to play a similarly prominent role in developing the law of public consultation in the other two jurisdictions as well.

[350] *Poverty Alleviation Network and Others v President of the Republic of South Africa and Others* (CCT86/08) [2010] ZACC 5; 2010 (6) BCLR 520 (CC) (24 February 2010), Para 56, http://www.saflii.co.za/za/cases/ZACC/2010/5.pdf (citing *Doctors for Life International v Speaker of the National Assembly and Others*, South African Constitutional Court, 2006 (12) BCLR 1399 (CC), 146), *Matatiele Municipality and Others v President of the Republic of South Africa and Others* (2)(CCT73/05A)[2006] ZACC 12 [2006] ZACC 26; 2007 (1) BCLR 47 (CC) (18 August 2006), (Matatiele 2), 67-68, http://www.saflii.org/za/cases/ZACC/2006/26.html

[351] *Vermont Yankee Nuclear Power v. Natural Resources Defense Council*, 435 U.S. 519 (1978)

[352] The Court also held that "Congress intended that the discretion of the agencies and not that of the courts be exercised in determining when extra procedural devices should be employed," *Vermont Yankee Nuclear Power v. Natural Resources Defense Council*, 435 U.S. 519 (1978), at 546.

[353] Jeffrey S. Lubbers, *A Guide to Federal Agency Rulemaking*, American Bar Association, 2006, 469-540

Given the understanding of public participation and deliberation as a central part of procedural rules, the role of law then is to ensure sufficient and meaningful opportunities for participation and deliberation in such a way that the values of procedural justice and fairness are observed. For example, according to Meadow, in regulatory state, lawyers should act "not only as architects of process, but as architects of participatory democracy."[354] The criteria of meaningful deliberation and participation are used as a benchmark to measure the deliberative and participatory character of existing consultative processes.[355] The following analysis of different steps of consultative processes reveals the difficulties of the law in ensuring inclusive, representative, and overall meaningful public consultation.

2.5.1. Opportunities to Comment on a Proposed Decision or Policy

In order to ensure opportunities for the members of the public to make comments on proposed policies and decisions, the government authorities need to decide whom to involve in consultative processes and when to do that. The ideal of public participation and deliberation demands that opportunities for public participation should be as broad as possible. The decision-makers are expected to either allow participation of all interested individuals or at least to ensure a wide representation of all the various interests.[356]

Generally the legal acts guarantee opportunities for broad participation, and do not limit consultation to particular groups of stakeholders. For instance, the British Code of Practice on Consultation establishes that consultative processes "should be open to *anyone* to respond but should be designed to seek views from those who *would be affected* by, or those who have a *particular interest* in the new policy or change in policy. In the US, under the APA the regulatory agencies are required to "give *interested persons* an opportunity to

[354] Carrie Menkel-Meadow, "The Lawyer's Role(s) in Deliberative Democracy: A Commentary by and Responses to Professor Carrie Menkel-Meadow," *Nevada Law Journal*, Vol. 5, 347; 369.
[355] See Section *1.4. Defining the Meaningfulness of Participation and Deliberation*
[356] See, for example, Robert E. Goodin, "Enfranchising All Affected Interests, and Its Alternatives," *Philosophy and Public Affairs*, Vol. 35(1), 2007, 40, 51; and *Deliberative Democracy*, ed. Jon Elster, Cambridge University Press, 1998, "Introduction," 14.

participate in the rule making."[357] Under South Africa's Constitution the only requirement for legislatures is to ensure that the participation is 'public'.[358] Some statutes establish even broader opportunities for participation, for instance, the *Planning Policy Statement* in the UK, which states that: "[t]he outcomes from planning affect *everyone*, and *everyone* must therefore have the opportunity to play a role in delivering effective and inclusive planning."[359] Another example, related to environmental matters is the *Aarhus Convention*, which embeds the approach that "once someone has entered the participation process, he or she becomes a member of the 'public concerned' and acquires a 'sufficient interest' as meant in Article 9(2) of the Aarhus Convention."[360] The issue whether there is a more liberal approach towards broad involvement of individuals in decision-making process concerning the environmental matters is explored in Chapter 4 on The Law of Public Consultation in Environmental Matters. In practice, the opportunities for everyone might be more limited than it seems at the outset. One of the reasons is that decision-makers enjoy broad discretion concerning whether to consult and how to structure the consultative processes, and they are free to choose whom to involve or to exclude.

In the UK, in 2005, the Home Secretary changed the *Immigration Rules*. The changes, which altered the scheme of employment of foreign nationals, made it impossible for some doctors of Indian origin to stay in the United Kingdom anymore, however, none of those doctors were consulted on the proposals.[361] Although not required under any statute, the Secretary selectively consulted with several associations representing doctors and medical

[357] *Administrative Procedure Act*, 5 U.S.C., 2000, §553 (c) (emphasis added) http://usgovinfo.about.com/library/bills/blapa.htm
[358] Sections 59 (1) (a), 72 (1) (a) and 118 (1) (a) of the Constitution of the Republic of South Africa, 1996, text available at: http://www.info.gov.za/documents/constitution/1996/index.htm
[359] *Planning Policy Statement 1: Delivering Sustainable Development*, Office of the Deputy Prime Minister, 2005, http://www.communities.gov.uk/documents/planningandbuilding/rtf/planningpolicystatement1.rtf cited in *The Bard Campaign v The Secretary of State for Communities and Local Government*, [2009] EWHC 308 (Admin), 15, (emphasis added) http://www.bailii.org/ew/cases/EWHC/Admin/2009/308.html
[360] Jonathan Verschuuren, "The Netherlands," in Louis J. Kotze and Alexander R. Peterson, eds., *The Role of the Judiciary in Environmental Governance: Comparative Perspectives*, Wolters Kluwer, 2009, 62.
[361] See generally *R(Bapio Action) v Secretary of State for the Home Department*, [2007] EWHC 199 (Admin); [2007] EWCA Civ 1139

trainees.[362] The *British Association of Physicians of Indian Origin* (BAPIO) representing doctors and trainees of Indian origin, challenged the changes arguing that the government should have consulted their organization before adopting the proposed changes. According to the claimants, the principles of procedural fairness and procedural legitimate expectations required to hold consultations "in respect of those who have committed time, energy and resources in pursuit of a goal [of practicing as doctors in the UK]."[363]

The claimants were worried that the new and more stringent requirements concerning work permits as suggested under the amendments to the *Immigration Rules* would put the immigrant doctors into worse situation than before.[364] The court found that according to the principles of procedural fairness and legitimate expectations, the individuals and their groups could legitimately expect that they would be consulted about changes to decisions and policies in which they are 'interested' because of 'some ultimate benefit'. According to the court, where an institution is to make a decision, which could have an adverse effect on a party because of, for example, a certain benefit being withdrawn, a consultation needs to be held with those likely to be affected.[365]

The government responded that the claimants relied on the 'benefit' which was 'too speculative and remote to earn protection,' and that allowing consultation opportunities to the claimants would have served as a 'forewarning', which could have affected the implementation of the rules.[366] The court, however, disagreed with the government, and instead found that the changes had an 'adverse impact' on members of the Bapio

[362] *R(Bapio Action) v Secretary of State for the Home Department*, [2007] EWHC 199 (Admin); [2007] EWCA Civ 1139, 38
[363] *R(Bapio Action) v Secretary of State for the Home Department*, [2007] EWHC 199 (Admin); [2007] EWCA Civ 1139, 19
[364] *R(Bapio Action) v Secretary of State for the Home Department*, [2007] EWHC 199 (Admin); [2007] EWCA Civ 1139, 24
[365] *R(Bapio Action) v Secretary of State for the Home Department*, [2007] EWHC 199 (Admin); [2007] EWCA Civ 1139, 23, (citing *R(Baker) v Devon County Council*, [1995] 1 All ER 73, 88-9)
[366] *R(Bapio Action) v Secretary of State for the Home Department*, [2007] EWHC 199 (Admin); [2007] EWCA Civ 1139, 26-27

association.[367] According to the court, the changed immigration requirements affected the opportunities for Indian doctors to pursue their career in the UK. The court went on to explain that the fact of adverse impact was not, of itself, enough because of the broadness of the common law duty to consult. The court acknowledged that "common law could recognise a general duty of consultation in relation to proposed measures which are going to adversely affect an identifiable interest group or sector of society."[368] However, the court held that such duty could emerge only with respect to those 'most directly and adversely affected', otherwise the duty is too general to be imposed by the courts and instead, it is the legislature who should decide on whom to consult and how.[369] According to the court, imposition of a duty to consult requires "specificity which the courts, concerned as they are with developing principles, cannot furnish without assuming the role of a legislator."[370] Since in the current case, the court could not establish that members of BAPIO were more affected by the changes to the rules than other individuals to whom the rules apply and who were also not consulted, the court held that the government was under no obligation to consult the claimants.[371]

Thus, in the *Bapio* case the court confirmed that the discretion enjoyed by decision-makers is rather broad and in the absence of statutory prescriptions they are required to consult only those 'most directly and adversely affected'. Such interpretation of the scope of duty to consult represents a rather limited approach of the principle of procedural fairness, which as explained earlier requires consultation out of respect for those who are affected in some way by government's decisions.

[367] *R(Bapio Action) v Secretary of State for the Home Department*, [2007] EWHC 199 (Admin); [2007] EWCA Civ 1139, 42
[368] *R(Bapio Action) v Secretary of State for the Home Department*, [2007] EWHC 199 (Admin); [2007] EWCA Civ 1139, 43
[369] *B R(Bapio Action) v Secretary of State for the Home Department*, [2007] EWHC 199 (Admin); [2007] EWCA Civ 1139, 44-47
[370] *R(Bapio Action) v Secretary of State for the Home Department*, [2007] EWHC 199 (Admin); [2007] EWCA Civ 1139, 47
[371] *R(Bapio Action) v Secretary of State for the Home Department*, [2007] EWHC 199 (Admin); [2007] EWCA Civ 1139, 47

In the UK, in the absence of statutory requirements for consultation unless there is a clear promise or a prior practice of consultation interested individuals would find it difficult to challenge the lack of consultation with them. One of the main reasons is that the duty to consult is still a developing concept under the common law, and lacks specificity which would allow the courts to determine and enforce it.

Broadness of the duty to consult was an issue in the case of *R (Bhatt Murphy) v The Independent Assessor*, where a challenge was brought to the changes introduced by the government to the assessment schemes of compensation for victims of miscarriage of justice.[372] The claimants were several law firms, with an established practice in the field of law of miscarriage of justice, as well as individuals, alleged victims of miscarriage of justice. All of the claimants were dissatisfied with the changes which made the compensation recovery process more difficult.[373] They have argued that the Secretary of State and the Independent Assessor should have consulted them before adopting the changes to the compensation schemes.[374] Since there was no prior promise or practice of consultation, according to Lord Justice Laws, these claims should be analyzed under the concept of the 'secondary case of procedural legitimate expectation,'[375] meaning that the court would have to determine whether the changes to the miscarriage of justice compensation schemes had a 'pressing and focused' impact on the claimants.[376] The judges found that the proposed rules did not have such an impact on the claimants; also the court dismissed the case on the ground

[372] *R (Bhatt Murphy) v The Independent Assessor*, [2008] EWCA Civ 755, 26-51, http://www.bailii.org/ew/cases/EWCA/Civ/2008/755.html
[373] *R (Bhatt Murphy) v The Independent Assessor*, [2008] EWCA Civ 755, 1 http://www.bailii.org/ew/cases/EWCA/Civ/2008/755.html
[374] *R (Bhatt Murphy) v The Independent Assessor*, [2008] EWCA Civ 755, 56-57, http://www.bailii.org/ew/cases/EWCA/Civ/2008/755.html
[375] *R (Bhatt Murphy) v The Independent Assessor*, [2008] EWCA Civ 755, 56-57, http://www.bailii.org/ew/cases/EWCA/Civ/2008/755.html
[376] *R (Bhatt Murphy) v The Independent Assessor*, [2008] EWCA Civ 755, 49, 56-57, http://www.bailii.org/ew/cases/EWCA/Civ/2008/755.html

of the duty to consult being too broad.[377] Similarly, like in BAPIO, the court held that in the absence of statutory duty to consult, the judges cannot overtake the role from politicians and design such a duty by themselves. According to the judge, the duty to consult is itself too broad to be established by the courts, unless the factual circumstances of a certain case 'bring it within the narrow and specific compass.'[378] The court held, that none of the facts of the present case could have narrowed down the scope of the claimed duty to consult.[379]

In another case, also concerning the absence of the duty to consult, the broadness of such duty was not considered as an issue which is outside the judiciary's domain. Thus, a different approach was adopted in the *R (Luton Borough Council) v Secretary of State for Education* (Luton Borough)[380] case, where the test of procedural legitimate expectations was actually applied. In order to follow the steps of the test as determined in the *Bhatt* case, first, the judge assumed that the claimants, who were local authorities, were 'potentially affected' by the proposal from the executive government to stop the funding for a national program aimed at rebuilding and refurbishing secondary schools in England.[381] Second, the judge looked at the actual communication which existed between the department and the claimants to establish that "the impact of the department's past conduct on the five claimants was indeed 'pressing and focused.'"[382] According to the judge, there was not only an ongoing dialogue between the parties, but also in the exchange of emails the communication was rather informal.[383] Moreover, the claimants had certain expectations

[377] *R (Bhatt Murphy) v The Independent Assessor*, [2008] EWCA Civ 755, 58-59, http://www.bailii.org/ew/cases/EWCA/Civ/2008/755.html
[378] *R (Bhatt Murphy) v The Independent Assessor*, [2008] EWCA Civ 755, 59, http://www.bailii.org/ew/cases/EWCA/Civ/2008/755.html
[379] *R (Bhatt Murphy) v The Independent Assessor*, [2008] EWCA Civ 755, 59, http://www.bailii.org/ew/cases/EWCA/Civ/2008/755.html
[380] *R (Luton Borough Councils) v Secretary of State for Education* [2011] EWHC 217 (Admin), http://www.bailii.org/ew/cases/EWHC/Admin/2011/217.html
[381] *R (Luton Borough Council) v Secretary of State for Education* [2011] EWHC 217 (Admin), 2, http://www.bailii.org/ew/cases/EWHC/Admin/2011/217.html
[382] *R (Luton Borough Council) v Secretary of State for Education* [2011] EWHC 217 (Admin), 93-94, http://www.bailii.org/ew/cases/EWHC/Admin/2011/217.html
[383] *R (Luton Borough Council) v Secretary of State for Education* [2011] EWHC 217 (Admin), 93, http://www.bailii.org/ew/cases/EWHC/Admin/2011/217.html

concerning financial benefits of the proposed policy, whereby the price of the projects was rather high.[384] As to the Secretary of State's concern that the consultation would have been too time consuming, the judge disagreed holding that the consultation with such a 'discrete group', on matters which have been discussed before, would not have been too burdensome time wise.[385] Lastly, the judge added another qualification to test the scope of duty to consult and held that consultation could have been omitted if there was an 'overriding public interest' not to consult.[386] In this case, concerning legitimate expectations, the judge held that the decision-making process by the Secretary of State because of the failure to consult was so unfair that it amounted to 'abuse of power'.[387] There are two aspects of the case which distinguish it from the earlier examined cases, and presuppose difference from judicial approach concerning the consultative mechanisms in the earlier examined cases. First, in the present case the court noted that the matter concerning allocation of the funds was of economic and political importance.[388] Second, the claimants were local authorities which elevated the matter to the policy of national importance. As already mentioned the importance of the matter at stake to the parties or the whole economy is a significant factor which usually is taken by the courts in favour of making the decision-making processes consultative. The following case illustrates that the national importance of the matter at stake is not necessarily determined by the participation of government authorities. Such matters as energy efficiency even if deliberated between various public authorities, still require consultation with non-governmental actors as well.

[384] *R (Luton Borough Council) v Secretary of State for Education* [2011] EWHC 217 (Admin), 93, http://www.bailii.org/ew/cases/EWHC/Admin/2011/217.html
[385] *R (Luton Borough Council) v Secretary of State for Education* [2011] EWHC 217 (Admin), 94, http://www.bailii.org/ew/cases/EWHC/Admin/2011/217.html
[386] *R (Luton Borough Council) v Secretary of State for Education* [2011] EWHC 217 (Admin), 96, http://www.bailii.org/ew/cases/EWHC/Admin/2011/217.html
[387] *R (Luton Borough Council) v Secretary of State for Education* [2011] EWHC 217 (Admin), 96, http://www.bailii.org/ew/cases/EWHC/Admin/2011/217.html
[388] *R (Luton Borough Council) v Secretary of State for Education* [2011] EWHC 217 (Admin), 48, http://www.bailii.org/ew/cases/EWHC/Admin/2011/217.html

For example, in the *Greenpeace* case (discussed in greater detail in Chapter 4), the environmental organization claimed that given the "weighty policy decision about the future of nuclear power" in Britain, the minimum period of 12 weeks was not enough for the consultees to sufficiently address the issue.[389] In addition, the claimants raised the concern that the minimal length of the consulting period could be seen as insufficient given the government's "promise of 'the fullest public consultation'"[390] which was "extended to the adult population of the United Kingdom."[391] The Court held that the government's decision to support the building of new nuclear plants was unlawful because of its failure to consult properly in part because of the length of the consultation period.[392] The court emphasized that "[o]n its own, the short period of consultation is not conclusive, but it is part of the overall picture that was presented to consultees."[393]

As explained in Chapter 1, under certain circumstances it might be necessary to hold more lengthy consultations, but the process should not become too burdensome. Moreover, public authorities might have no opportunities to provide even the minimum time for consulting, in such a case the decision on a shorter time for consulting should be substantiated by adequate reasons. Under the British Code of Practice decision-makers are required to state the reasons for holding shorter than the minimum period of consultations.[394] For example, in the case of *R (N) v Leeds City Council*, the British Court of Appeal held that "shortness of period of consultation," which lasted for three weeks only, on the issue of closing a local school did not result in "procedural unfairness" of the decision by local

[389] *R (Greenpeace) v Secretary of State for Trade and Industry*, [2007] EWHC 311 (Admin), [2007] NPC 21, [2007] Env LR 29, [2007] JPL 1314, 83, http://www.bailii.org/ew/cases/EWHC/Admin/2007/311.html
[390] *R (Greenpeace) v Secretary of State for Trade and Industry*, [2007] EWHC 311 (Admin), [2007] NPC 21, [2007] Env LR 29, [2007] JPL 1314, 88, http://www.bailii.org/ew/cases/EWHC/Admin/2007/311.html
[391] *R (Greenpeace) v Secretary of State for Trade and Industry*, [2007] EWHC 311 (Admin), [2007] NPC 21, [2007] Env LR 29, [2007] JPL 1314, 88, http://www.bailii.org/ew/cases/EWHC/Admin/2007/311.html
[392] *R (Greenpeace) v Secretary of State for Trade and Industry*, [2007] EWHC 311 (Admin), [2007] NPC 21, [2007] Env LR 29, [2007] JPL 1314, 67, http://www.bailii.org/ew/cases/EWHC/Admin/2007/311.html
[393] *R (Greenpeace) v Secretary of State for Trade and Industry*, [2007] EWHC 311 (Admin), [2007] NPC 21, [2007] Env LR 29, [2007] JPL 1314, 67, http://www.bailii.org/ew/cases/EWHC/Admin/2007/311.html
[394] Paragraph 2.3. of the *Code of Practice on Consultation*, the Cabinet Office, July 2008, 8, http://www.berr.gov.uk/files/file47158.pdf

education authority. In reaching its conclusion, the Court considered that the decision was urgent and that there have been former discussions with the consultees.[395]

Allowing sufficient time to make comments which are reasonable and intelligent is another condition for meaningful public consultation. For instance, the British Code of Practice establishes the minimum time, which should be allowed for consultations, the second criterion on provides that the usual length of the public consultation is 12 weeks, and could be prolonged in the case of, for instance, national holidays, when people might be less prone to get involved.[396] The complexity of the proposed issue is yet another reason for a prolonged period of consultations under the Code.[397] As the cases illustrated the general approach by the British courts has been that the length of the consultation should make it possible for the consultees to become familiar with the matter in order to prepare a proper response.

In the US, there is no statutory time limit for the commenting stage under the APA and the practice by courts has been varying. For example, in the case of *Connecticut Light & Power Company v. Nuclear Regulatory Commission*, the claimant, an electric utility service provider, has argued that a thirty days period for submitting comments has been "inadequate given the complexity and relatively innovative character of the rules at issue."[398] However, the court found that the issue at stake of "fire protection at nuclear plants"[399] was not a new one, and has been an object of discussions between the claimant and the regulatory commission for several years already.[400] In another case, the US court held that even the

[395] *R (N) v Leeds City Council*, [1999] ELR 324, (per J Tucker). Similarly, in the case of *R (M) v Secretary of State for Education and Employment*, [1996] ELR 162, the Court upheld propriety of consultations despite the short period of consulting.
[396] *Code of Practice on Consultation*, the Cabinet Office, July 2008, 8, http://www.berr.gov.uk/files/file47158.pdf
[397] *Code of Practice on Consultation*, the Cabinet Office, July 2008, 8, http://www.berr.gov.uk/files/file47158.pdf
[398] *Connecticut Light & Power Company v. Nuclear Regulatory Commission*, 673 F.2d 525, 218 U.S.App.D.C. 134, 527
[399] *Connecticut Light & Power Company v. Nuclear Regulatory Commission*, 673 F.2d 525, 218 U.S.App.D.C. 134, 534
[400] *Connecticut Light & Power Company v. Nuclear Regulatory Commission*, 673 F.2d 525, 218 U.S.App.D.C. 134, 534

fifteen-day commenting period on the issue of setting a uniform fee on operators of nuclear power plants was adequate given the timetable imposed by the Congress on the agency concerning adoption of the final rule.[401]

As explained in Chapter 1, a major expectation behind the broad opportunities for public participation is that of leveling the influence of otherwise dominant powerful interests. The general idea is that the more interested parties are involved and consulted, the more the power of influence by sectional interests would be weakened. On the other hand, allowing broad participation in decision-making processes might mean that the interests of those who are more affected by the proposed decisions would not be accorded adequate weight by the consulting authority. Another case illustrates that some of those involved in consultative processes could be supportive of a consultation with a limited scope. The latest decision by South Africa's Constitutional Court concerning the Matatiele municipality serves to aptly illustrate the controversies which could arise over such issues as inclusion and representation. The decision follows an earlier successful challenge by the Matatiele municipality in 2006, where the Constitutional Court found that the legislatures failed to meet their constitutional obligation when they did not hold public hearings with the members of the municipality of Matatiele before its relocation from one province to another. Following the Constitutional Court's decision, the legislatures allowed opportunities for public participation. However, the boundaries of the provinces remained unchanged (thus, entrenching the boundaries settled under previous legislation, enacted without public involvement).[402] In 2010, once again a challenge was brought before the Constitutional Court as to the meaningfulness of the process of public involvement.

[401] *Florida Power & Light Company v. United States*, 846 F. 2d 765, (D.C. Cir. 1988), 766, 768, 772

[402] *Poverty Alleviation Network and Others v President of the Republic of South Africa and Others* (CCT86/08) [2010] ZACC 5; 2010 (6) BCLR 520 (CC) (24 February 2010), 46-49. See also Parliament of the Republic of South Africa, Announcements, Tablings and Committee Reports, No. 104, September 2007, 4th Session, 3rd Parliament, Paragraph 4.1., 1855, http://www.parliament.gov.za/live/commonrepository/Processed/20091112/51217_1.pdf

One of the arguments by the residents of Matatiele municipality was that *only their views* should have been considered, otherwise allowing all those interested to participate the views of the Matatiele residents 'were watered down.'[403] The claimants relied on the Court's earlier judgment, where it held that reasonableness required the legislatures to consult on proposed legislation those likely to be affected parties, particularly, where the impact of the proposal allows identifying such a group.[404]

In the present case, South Africa's Constitutional Court held that the legislature's obligation to include an 'identifiable and discrete group' of individuals in consultative processes does not necessarily mean exclusion of the other individuals or their groups.[405] The Court found that other municipalities were also affected by the changes of provincial boundaries and therefore it would have been 'unreasonable' for the legislatures to exclude their residents.[406] Thus, the case from South Africa confirms that broad inclusion rather than a limited one levels the interests of the participants.

Another argument for ensuring broad participation and representation is that given the expansion of government powers, a single rule may have some impact on majority of the population. For instance, privacy concerns related to the security checks in airports are relevant to all of those who are traveling. After September 11, 2001, the US Congress passed the *Aviation and Transportation Security Act* (ATSA), which created the Transportation

[403] *Poverty Alleviation Network and Others v President of the Republic of South Africa and Others* (CCT86/08) [2010] ZACC 5; 2010 (6) BCLR 520 (CC) (24 February 2010), 50, http://www.saflii.org/za/cases/ZACC/2010/5.html

[404] *Poverty Alleviation Network and Others v President of the Republic of South Africa and Others* (CCT86/08) [2010] ZACC 5; 2010 (6) BCLR 520 (CC) (24 February 2010), 52 (*citing Matatiele Municipality v President of the Republic of South Africa*, [2006] ZACC 12; 2007 (1) BCLR 47 (CC); 2007 (6) SA 477 (CC) (Matatiele 2), 68, http://www.saflii.org/za/cases/ZACC/2006/12.html) (emphasis added)

[405] *Poverty Alleviation Network and Others v President of the Republic of South Africa and Others* (CCT86/08) [2010] ZACC 5; 2010 (6) BCLR 520 (CC) (24 February 2010), 53, http://www.saflii.org/za/cases/ZACC/2010/5.html

[406] *Poverty Alleviation Network and Others v President of the Republic of South Africa and Others* (CCT86/08) [2010] ZACC 5; 2010 (6) BCLR 520 (CC) (24 February 2010), 53, http://www.saflii.org/za/cases/ZACC/2010/5.html

Security Administration (TSA).[407] The agency is responsible for an array of security matters in the air transportation industry, such as "federal security screening operations for passenger air transportation and intelligence information related to transportation security...[etc.]."[408] The TSA has authority to carry out screening of passengers boarding commercial airline flights, "in order to ensure … [they are] not carrying unlawfully a dangerous weapon, explosive, or other destructive substance."[409] There are various ways of performing the screening; however, "[t]he Congress generally has left it to the agency to prescribe the details of the screening process, which the TSA has documented in a set of Standard Operating Procedures not available to the public."[410] Yet, "[t]he Congress did … in 2004, direct the TSA to give a high priority to developing, testing, improving, and deploying at airport screening checkpoints a new technology that detects nonmetallic, chemical, biological, and radiological weapons, and explosives, in all forms."[411] Body scanners were chosen as a suitable technology and the TSA contracted-out the development of such devices to private actors.[412] The deployment of body scanners in the US started in 2007.[413] Since then, privacy advocates have identified several concerns about deployment of such technology. For instance, one of

[407] *Aviation and Transportation Security Act*, Pub. L. No. 107-71, §114, 115 Stat. 597, (2001), http://www.tsa.gov/assets/pdf/Aviation_and_Transportation_Security_Act_ATSA_Public_Law_107_1771.pdf
[408] J. G. Wensveen, *Air Transportation: A Management Perspective*, Ashgate, 2007, 95.
[409] *Electronic Privacy Information Center v United States Department of Homeland Security*, No. 10-1157, (D.C. Cir. July 15, 2011), 2, http://www.cadc.uscourts.gov/internet/opinions.nsf/B3100471112A40DE852578CE004FE42C/$file/10-1157-1318805.pdf
[410] *Electronic Privacy Information Center v United States Department of Homeland Security*, No. 10-1157, (D.C. Cir. July 15, 2011), 2, http://www.cadc.uscourts.gov/internet/opinions.nsf/B3100471112A40DE852578CE004FE42C/$file/10-1157-1318805.pdf
[411] *Electronic Privacy Information Center v United States Department of Homeland Security*, No. 10-1157, (D.C. Cir. July 15, 2011), 2, citing Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 4013(a), 118 Stat. 3719 (codified at 49 U.S.C. § 44925(a)), (internal quotations are omitted)
[412] There are two types of body scanners, "one that uses millimeter wave technology, which relies upon radio frequency energy, and another that uses backscatter technology, which employs low-intensity X-ray beams. Each technology is designed to produce a crude image of an unclothed person, who must stand in the scanner for several seconds while it generates the image," in *Electronic Privacy Information Center v United States Department of Homeland Security*, No. 10-1157, (D.C. Cir. July 15, 2011), 3, http://www.cadc.uscourts.gov/internet/opinions.nsf/B3100471112A40DE852578CE004FE42C/$file/10-1157-1318805.pdf
[413] *TSA Announces Testing of New Passenger Imaging Technologies at Security Checkpoints*, Press Release, July 31, 2007, http://www.tsa.gov/press/releases/2007/press_release_07312007.shtm

the main worries was that the device reveals a picture of the passenger's naked body because of the *Advanced Imaging Technology* (AIT) built in it.[414] Already in February 2010, a human rights activist contended that the biggest threat of deploying such technologies without having proper procedures in place is that the scanned pictures of the people later could be leaked.[415] These worst fears came true when in November of the same year thousands of pictures were reported to have been leaked.[416] Subsequently, on November 1, 2010 the Electronic Privacy Information Center (EPIC) filed a lawsuit against the TSA's policy concerning body scanners.[417] After the emergence of these controversies and after the lawsuit against TSA was filed, the agency announced that it had taken measures to address privacy concerns "by eliminating passenger-specific images and instead [the machine] auto-detects potential threat items and indicates their location on a generic outline of a person."[418]

In their legal challenge, EPIC challenged the policy on, among other grounds, that it was enacted in the absence of necessary notice and comment procedures.[419] The TSA argued that it was not required to carry out notice and comment since, under the APA, the adopted rule was exempted from requirements concerning public participation because it was the so-called 'interpretive rule'. Interpretive rules of the US agencies are different from the regular rules because they do not set any requirements for the regulated industries, instead

[414] Paul Giblin and Eric Lipton, "New Airport X-Rays Scan Bodies, Not Just Bags," *The New York Times*, February 24, 2007, http://www.nytimes.com/2007/02/24/us/24scan.html?_r=1 See also, William Saletan, "Digital Penetration: Invasion of the Naked Body Scanners," *Slate*, March 3, 2007, http://www.slate.com/articles/health_and_science/human_nature/2007/03/digital_penetration.html
[415] Jeffrey Rosen, "Nude Awakening," *The New Republic*, February 4, 2010, 10, http://epic.org/privacy/travel/Rosen_Article.pdf
[416] Joel Johnson, "One Hundred Naked Citizens: One Hundred Leaked Body Scans," *Gizmodo*, November 16, 2010, http://gizmodo.com/5690749/these-are-the-first-100-leaked-body-scans
[417] *Electronic Privacy Information Center (EPIC) v Homeland Security*, No. 10-1157, November 1, 2010, http://epic.org/EPIC_Body_Scanner_OB.pdf
[418] *TSA Begins Testing New Advanced Imaging Technology Software*, Press Release, February 1, 2011, www.tsa.gov/press/releases/2011/0201.shtm
[419] *Electronic Privacy Information Center v United States Department of Homeland Security*, No. 10-1157, (D.C. Cir. July 15, 2011), 2, http://www.cadc.uscourts.gov/internet/opinions.nsf/B3100471112A40DE852578CE004FE42C/$file/10-1157-1318805.pdf

they explain the ambiguous statutory terms or definitions.[420] The circuit court found that the rule at stake could not fall under either of the exemptions of the APA, particularly, because of its impact on the public.[421] The change in the way screening of passengers is performed in the airports has a heavy impact on the travelers, which necessitates opportunities for public participation.[422] The court also emphasized that the purpose of the notice and comment procedure is to guarantee that the decision-makers have all the relevant information before making a decision.[423]

While the court did not uphold the claims concerning rights violations, it did find that TSA's failure to pursue a notice and comment procedure was unjustifiable.[424] In order not to disrupt the security checks in the airports, the court did not vacate the rule but instructed the agency to hold a notice and comment procedure.[425] However, months after the judgment no public notice was released, and no invitation for comments was published. Moreover, the agency continued to deploy the scanners across the US.[426] Therefore, on December 23, 2011, the Electronic Privacy Information Center petitioned the court again to

[420] Jeffrey S. Lubbers, *A Guide to Federal Agency Rulemaking*, American Bar Association, 2006, 73-74.
[421] *Electronic Privacy Information Center v United States Department of Homeland Security*, No. 10-1157, (D.C. Cir. July 15, 2011), 7-8, http://www.cadc.uscourts.gov/internet/opinions.nsf/B3100471112A40DE852578CE004FE42C/$file/10-1157-1318805.pdf
[422] *Electronic Privacy Information Center v United States Department of Homeland Security*, No. 10-1157, (D.C. Cir. July 15, 2011), 8, http://www.cadc.uscourts.gov/internet/opinions.nsf/B3100471112A40DE852578CE004FE42C/$file/10-1157-1318805.pdf
[423] *Electronic Privacy Information Center v United States Department of Homeland Security*, No. 10-1157, (D.C. Cir. July 15, 2011), 8, http://www.cadc.uscourts.gov/internet/opinions.nsf/B3100471112A40DE852578CE004FE42C/$file/10-1157-1318805.pdf
[424] *Electronic Privacy Information Center v United States Department of Homeland Security*, No. 10-1157, (D.C. Cir. July 15, 2011), 18, http://www.cadc.uscourts.gov/internet/opinions.nsf/B3100471112A40DE852578CE004FE42C/$file/10-1157-1318805.pdf
[425] *Electronic Privacy Information Center v United States Department of Homeland Security*, No. 10-1157, (D.C. Cir. July 15, 2011), 18, http://www.cadc.uscourts.gov/internet/opinions.nsf/B3100471112A40DE852578CE004FE42C/$file/10-1157-1318805.pdf
[426] *TSA Announces Additional Advanced Imaging Technology Deployments at U.S. Airports*, Press Release, January 26, 2012, http://www.tsa.gov/press/releases/2012/0126.shtm Jere Downs, "New Body Scanners Deployed at Louisville International Airport," *The Courier Journal*, February 21, 2012, http://www.courier-journal.com/article/20120221/NEWS01/302210084/New-body-scanners-deployed-Louisville-International-Airport

have the order requiring the notice and comment procedure, enforced.[427] Moreover, the deployment of body scanners continued in some of the states despite the court's decision, but so did the controversies around the choice of such technology for ensuring travel security. For instance, in Florida, the legislature of one of the counties demanded the agency to provide evidence, which would show that the scanners do not contribute to the risk of cancer or otherwise to remove the machines from the airports.[428] Most recently, female passengers have brought their concerns about the body scanners to the courts. In February 2012 around 500 women petitioned the courts alleging that the scanners were used by the officials of the TSA to sexually harass them.[429] The women claimed that because of their good looks they were asked by the officials to go through the checks several times so the screeners could peek at their naked images.[430] Also in January 2013, the TSA ordered removal of those body scanners from the airports which could not produce 'generic images' of the passengers.[431]

The example of body scanners deployment, which is also a complex technological matter, serves to illustrate several issues concerning the likely effects of public consultation. Firstly, although the agency did not allow for notice and comment procedure, eventually it did hear and take into consideration the concerns expressed by the privacy advocates. As mentioned above, while the initial technology produced naked images of

[427] Petitioner's *Second* Motion to Enforce the Court's mandate, (December 23, 2011) (No. 10-1157), *Electronic Privacy Information Center v United States Department of Homeland Security*, No. 10-1157, (D.C. Cir. July 15, 2011), http://epic.org/privacy/body_scanners/Second-Motion-to-Enforce-final.pdf
[428] Ralph De La Cruz, "South Florida Officials Lead National Push against Airport Body Scanners," *Florida Center for Investigative Reporting*, December 19, 2011, http://fcir.org/2011/12/19/south-florida-officials-leading-national-push-against-airport-body-scanners/ See also, About County Government, Organization of Broward County Government, http://www.broward.org/COMMISSION/Pages/AboutCountyGovernment.aspx
[429] Jonathan Benson, "Attractive Females Targeted by TSA Agents for Multiple Naked Body Scanner Screenings," *Natural News*, February 20, 2012, http://www.naturalnews.com/035018_TSA_body_scanners_women.html
[430] Jonathan Benson, "Attractive Females Targeted by TSA Agents for Multiple Naked Body Scanner Screenings," *Natural News*, February 20, 2012, http://www.naturalnews.com/035018_TSA_body_scanners_women.html
[431] Jeff Plungis, "Naked-Image Scanners to Be Removed From U.S. Airports," *Bloomberg News*, January 19, 2013, http://www.bloomberg.com/news/2013-01-18/naked-image-scanners-to-be-removed-from-u-s-airports.html

people, later the software was adopted to produce only 'a generic outline of a person.'[432] However, this software is installed only in some of the deployed scanners.[433] Thus, it might have been the case that opportunities for public participation would have allowed the agency to address the privacy (and health) concerns in a more timely and efficient manner, which also could have mitigated the public's hostility towards the technology. Secondly, the issues, which could have been raised and addressed during the notice and comment procedure remain unsolved. On the other hand, the body scanners example is unique in comparison to other cases where public consultations were carried out, since it involves national security, which is a sensitive issue and, generally, a matter not subject to public scrutiny or discussion. One of the main issues, illustrated by the body scanners case is that decision-makers are not sole experts on the matters at stake, and there might be alternative solutions as well which could be brought into the decision-making process from outside of the agency. For instance, future proposals concerning air transport security could take into account suggestions by aviation security experts.[434]

2.5.2. Disclosure as a Prerequisite of Proper Notification

Once decision-makers are bound by the duty to consult usually another step is to inform the interested individuals and the public in general about the proposed rule, regulation or law. It is not enough that an agency or other government institution decides to hold consultation, it is also necessary that the potential participants of such consultation are aware about it and about the proposals at stake. As one would expect, the primary purpose of the notification requirement is to ensure that the interested individuals are informed of the

[432] TSA, How it Works, What TSA Sees, http://www.tsa.gov/approach/tech/ait/how_it_works.shtm
[433] Ralph De La Cruz, "South Florida Officials Lead National Push against Airport Body Scanners," *Florida Center for Investigative Reporting*, December 19, 2011, http://fcir.org/2011/12/19/south-florida-officials-leading-national-push-against-airport-body-scanners/
[434] Olga Mironenko, "Body Scanners vs. Privacy and Data Protection," *Computer Law and Security Review*, 2011, Vol. 27, Issue 2, 243, (forthcoming) http://www.uio.no/studier/emner/jus/jus/JUR5630/v11/undervisningsmateriale/Mironenko_article_13012011.pdf

proposed decisions or policies and the main issues at stake. As already mentioned, in the US, the general idea under the APA is that the notification about the opportunities for public participation has to be adequate in terms of providing necessary information to the interested parties.[435] Also in the UK, the Code establishes that the main purpose of the notification requirement is that of 'raising awareness' amongst interested parties.[436]

In the US, the notice about the upcoming consultation has to be 'legally adequate'[437], however, the APA does not set clear standards that a notice should meet. Section §553 (b) of the APA, only requires agencies to make a notice of the proposed rule and publish it in the *official gazette* (the Federal Register).[438] The APA does not elaborate on the substance of such notice except that the agencies must include the formal requisites such as date, place and reference to legal authority as well as some information on the substance of the proposed rule.[439] Neither does the British *Code of Practice on Consultation* provide more guidance on the issue. The Code requires the public authorities to inform the potential consultees about the consultation process and the contents of the proposals (including the cost

[435] *Administrative Procedure Act: Legislative History*, *79th Congress*, 1944-46, United States, Congress, Senate, Committee on the Judiciary, 1997, 200. See also, Jeffrey S. Lubbers, *A Guide to Federal Agency Rulemaking*, American Bar Association, 2006, 275-280, 282.

[436] Paragraph 2.4 of the Code provides: "When planning a consultation, it is important to take steps to raise awareness of the exercise among those who are likely to be interested. In particular, departments should consider ways to publicise consultations at the time of, or if possible before, the launch-date so that consultees can take advantage of the full consultation period to prepare considered responses," in *Code of Practice on Consultation*, the Cabinet Office, July 2008, 8, http://www.berr.gov.uk/files/file47158.pdf and *Administrative Procedure Act*, 5 U.S.C., 2000, 553 (c), http://usgovinfo.about.com/library/bills/blapa.htm

[437] Phillip M. Kannan, "The Logical Outgrowth Doctrine in Rulemaking," *Administrative Law Review*, Vol. 48, 1996, 213; 220.

[438] §553 (b) of the of the *Administrative Procedure Act*, 5 U.S.C., 2000, See also National Archives, The Federal Register, About the Federal Register, http://www.archives.gov/federal-register/the-federal-register/about.html

[439] §553 (b) of the *Administrative Procedure Act*, 5 U.S.C., 2000, reads:
"(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include -
(1) a statement of the time, place, and nature of public rule making proceedings;
(2) reference to the legal authority under which the rule is proposed; and
(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except when notice or hearing is required by statute, this subsection does not apply -
(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or
(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefore in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."

and benefits analysis).[440] The substance of consultation is specified under Criterion 4 of the Code on 'Accessibility of Consultation Exercises.' Consulting authorities are required to ensure that the information provided to the consultees on the proposal is 'concise' and 'easy to understand'.[441] Thus, the British Code stands out as it considers the interests of the consultees in receiving comprehensible information, and therefore requires the consulting authorities to make the information clear and understandable. As already mentioned in Chapter 1, the Constitution of South Africa has been recognized as 'a symbol of participation.'[442] However, apart from the general requirement to facilitate 'public involvement', the Constitutional provisions do not specify that the legislatures should inform the members of the public about the opportunities for public participation or how it should be done.[443]

Despite the mentioned importance of the notification requirement, none of the statutes in either of the jurisdictions elaborates on the substance of the information, which needs to be provided to the public. The legal provisions either do not specify how the public should be notified or establish only very minimal requirements for decision-makers to inform interested individuals about upcoming changes and proposals.

In practice, the courts have adopted certain approach towards the notification requirement. According to the courts, notification about the consultation on proposed changes is adequate if it allows participants to come up with meaningful comments and to make a relevant contribution to the decision-making process.

[440] Criterion 3 "Clarity of Scope and Impact," of the *Code of Practice on Consultation*, the Cabinet Office, July 2008, 9, http://www.berr.gov.uk/files/file47158.pdf
[441] Paragraph 4.2 of the *Code of Practice on Consultation*, the Cabinet Office, July 2008, http://www.berr.gov.uk/files/file47158.pdf
[442] Tom Ginsburg, "On the Constitutional Character of Administrative Law," a draft prepared for the Conference on Comparative Administrative Law, Yale Law School, May 7-9, 2009, 2, http://www.law.yale.edu/documents/pdf/CompAdminLaw/Tom_Ginsburg_CompAdLaw_paper.pdf
[443] Sections 59 (1) (a), 72 (1) (a) and 118 (1) (a) of the *Constitution of the Republic of South Africa*, 1996, text available at: http://www.info.gov.za/documents/constitution/1996/index.htm

According to South Africa's Constitutional Court, public participation means a meaningful involvement by the members of the public in the lawmaking, where the institutions are required to provide access to the information concerning the issue at stake and to facilitate learning and understanding of lay citizens.[444] In the UK, in addition to the freedom of information requirement, the courts have stressed that decision-makers need to substantiate their proposals with reasons.[445] Also, in the US, the courts have continuously confirmed that a requirement for agencies to give reasons serves to enhance the meaningfulness of public consultations and guarantees that the process is more than just an 'empty charade'.[446] This also means that the notification requirement is legally adequate if it enables the interested parties to make 'meaningful' and 'intelligent' comments.

But what does 'intelligent' and 'meaningful' comment mean? At several instances the British courts held that decision-makers are required to provide 'sufficient information' so that the consultees are able to 'challenge'[447] the correctness of the factual information as well as the reasons used by the decision-makers, and even to 'persuade'[448] the government. Similarly, in the US, the courts require the agencies during notice and comment procedures to provide the participants with sufficient descriptions concerning the proposed rules, so that the participants are able to make critical comments, where necessary.[449]

---

[444] *Doctors for Life International v Speaker of the National Assembly and Others*, South African Constitutional Court, 2006 (12) BCLR 1399 (CC), 131 and 134.
[445] *R (Coughlan) v North & East Devon Health Authority*, [2001] QB 213, 108, http://www.bailii.org/ew/cases/EWCA/Civ/1999/1871.html (citing *R(Gunning) v Brent London Borough Council*,(1985) 84 LGR 168) The concept was confirmed more recently in the *R (Greenpeace) v Secretary of State for Trade and Industry*, [2007] EWHC 311 (Admin), [2007] NPC 21, [2007] Env LR 29, [2007] JPL 1314, 55, 56 and 116, http://www.bailii.org/ew/cases/EWHC/Admin/2007/311.html
[446] See for example, *Connecticut Light & Power Co. v. NRC*, 673 F.2d 525, (D.C.Cir.), (1982), 528 or *Ethyl Corporation v. Environmental Protection Agency*, 541 F.2d 1, 48 (D.C.Cir.), 426 U.S. 941, 96 S.Ct. 2663, 49 L.Ed.2d 394 (1976)
[447] *Bushell v Secretary of State for the Environment* [1980] UKHL 1, [1981] AC 75, 96D, http://www.bailii.org/uk/cases/UKHL/1980/1.html and *Edwards v The Environment Agency* [2006] EWCA Civ 877
[448] *R (United States Tobacco International) v Secretary of State for Health*, [1990] QB 351, 371C
[449] *Ethyl Corporation v. Environmental Protection Agency*, 541 F.2d 1, 48 (D.C. Cir. 1976) (citing *Portland Cement Association v. Ruckelshaus*, 486 F.2d 375, 392-394 (1973)). See also *Home Box Office, Inc. v. Federal Communications Commission (FCC)*, 567 F.2d 9, 35, 62, (D.C. Cir.(1977)) and *Connecticut Light & Power Co. v. NRC*, 673 F.2d 525, (D.C.Cir.), (1982), 530-531

Providing opportunities for the consultees to challenge and criticize the decision-makers echoes the concerns that the opportunities for participation could compromise the competence of decision-makers.[450] The cases do not provide any evidence for the alleged deficiency of public consultation, since neither the decision-makers nor the courts considered that public consultation could pose any threat to the expertise of the decision-makers.

The approach concerning meaningful consultation as elaborated by the courts stretches the mere requirement of notification to a requirement of disclosure. For example, in the UK, generally there is no obligation to disclose details of internal decision-making processes.[451] But at several instances the British courts have recognized the disclosure of various scientific and other data as part of the guarantee of the meaningfulness of the consultative processes.[452] According to the courts, procedural fairness may require decision-makers to disclose even internal documents. Disclosure of an internal document containing scientific data was a central issue in the British case of *R (United States Tobacco International) v Secretary of State for Health*.[453] The court held that during a consultation process concerning the prohibition of 'oral snuff' tobacco, the principle of fairness required the Government to disclose the internal scientific report as requested by the participants.[454] The court supported its holding with the following three reasons. First, the court found that because of the earlier history leading to the development of a ban on 'oral snuff' the Secretary of State must have been aware of the 'serious' effects the policy would have on the

[450] See Section 1.6. Enhanced Opportunities for Public Participation and Deliberation: A Critique and its Rebuttal

[451] *Edwards v The Environment Agency* [2006] EWCA Civ 877 (07 July 2006) http://www.bailii.org/ew/cases/EWCA/Civ/2006/877.htm (citing *Bushell v Secretary of State for the Environment* [1980] UKHL 1, [1981] AC 75, http://www.bailii.org/uk/cases/UKHL/1980/1.html See also *R (Richmond upon Thames London Borough Council) v Secretary of State for Transport*, [1996] 4 All ER 903, [1996] 1 WLR 1460, where the Court held that there are there is "a limit to the amount that it is reasonable to require a statutory authority to spell out in a consultation document."

[452] See, for example, the British cases of *R (Greenpeace) v Secretary of State for Trade and Industry*, [2007] EWHC 311 (Admin), [2007] NPC 21, [2007] Env LR 29, [2007] JPL 1314, 166, http://www.bailii.org/ew/cases/EWHC/Admin/2007/311.html and *R (United States Tobacco International Inc) v Secretary of State for Health*, [1990] QB, at 371 F-H.

[453] *R (United States Tobacco International) v Secretary of State for Health*, [1990] QB 351

[454] *R (United States Tobacco International) v Secretary of State for Health*, [1990] QB 351, 369H-372A

claimant.[455] Second, although the ban was of general application, it had most effect on the claimant as the main importer of 'oral snuff' tobacco into the UK.[456] Lastly, the court held that disclosure was necessary because of the likely 'catastrophic' effects to the business of the claimant, development of which was initially supported by the government.[457] Moreover, the disclosure of requested report was necessary since it was "a very important, if not the most important, factor in persuading"[458] the Secretary of State to reach a different decision on the same facts.[459]

Also in the US, at several instances the courts have required full disclosure of all materials related to the proposed policy or decision. For instance, in the *United States v Nova Scotia Food Products* (*Nova Scotia*) case petitioners, a fish processing company, argued that the notice as issued by the agency concerning adoption of the rule on the standards for raw fish processing was inadequate because the agency failed to disclose scientific materials on which it relied in the rulemaking process.[460] Under the authorization of the *Food Drug and Cosmetics Act*,[461] in order to ensure public health, the agency adopted a rule which set standards for the processing of fish products. According to the petitioner, who was fined for the lack of compliance with the standards, it could not have complied with the standards under the rule because the required processing of fish under a certain temperature would have made the fish products 'unmarketable'.[462] The rule was challenged among other issues on the grounds of inadequate provision for notice and comment, and, particularly, because of the agency's non-disclosure of the data on which it relied when adopting the standards.

The court found in favor of the petitioners. According to the court, the non-disclosure could have prevented the agency from taking all relevant factors into consideration

[455] *R (United States Tobacco International) v Secretary of State for Health*, [1990] QB 351, 370B-C
[456] *R (United States Tobacco International) v Secretary of State for Health*, [1990] QB 351, 370C-D
[457] *R (United States Tobacco International) v Secretary of State for Health*, [1990] QB 351, 370C-D
[458] *R (United States Tobacco International) v Secretary of State for Health*, [1990] QB 351, 371C
[459] *R (United States Tobacco International) v Secretary of State for Health*, [1990] QB 351, 371C
[460] *United States v Nova Scotia Food Products*, 568 F2d 240 (2nd Cir. 1977)
[461] http://www.fda.gov/regulatoryinformation/legislation/federalfooddrugandcosmeticactfdcact/default.htm
[462] *United States v Nova Scotia Food Products*, 568 F2d 240 (2nd Cir. 1977), 243

when drafting the proposal concerning such scientifically complex matter. The court held, that participants should have been provided with the scientific studies, on which the agency relied, so they could assess for themselves the methodology used and the statistical results.[463] In addition, the court emphasized that 'deliberative process' in the rulemaking requires disclosure of various information with an exclusion of commercial secrets and issues concerning national security.[464] After finding that the requested scientific data was 'readily available' within the agency, the court ordered disclosure of the materials.[465]

Thus, in order to properly understand and scrutinize the policies and decisions as they are proposed by decision-makers, interested members of the public might need access to various types of documents (scientific data, methodologies, etc.), including those which would be excluded from disclosure as internal working documents. And as long as such disclosure does not compromise, for instance, national security, the requested information needs to be disclosed.

As already mentioned in Chapter 1, disclosure of government held information and data is also a part of the freedom of information (FOI) regimes. Yet, in comparison to FOI regimes, the main difference is the reasoning used by the courts, which (as will be illustrated in Chapter 3 and Chapter 5) was used in some instances to overcome the exemptions of FOI regimes.[466]

Decision-makers do not always need detailed discussion of every aspect of their proposed decisions; this issue was made clear by the British court in the following case. In *R (Compton) v Wiltshire Primary Care Trust* (herein, Compton case), the claimant, a former employee of a closed hospital, challenged the decision by Wiltshire Primary Care Trust (Trust) to close the hospital. Among other arguments, the claimant contended that the

[463] *United States v Nova Scotia Food Products*, 568 F2d 240 (2nd Cir. 1977), 251
[464] *United States v Nova Scotia Food Products*, 568 F2d 240 (2nd Cir. 1977)
[465] *United States v Nova Scotia Food Products*, 568 F2d 240 (2nd Cir. 1977), 251
[466] See, for example, Section *5.2.2. Requirements for Decision-makers to Disclose Relevant Materials during Consultative Processes*

decision-making process by the Trust was flawed because the consultation process was not proper. According to the claimant, there was no information early on concerning one of the options, which became final in the end (the decision to close the hospital).[467] As to the argument concerning the lack of information, the court found that while the option of hospital closure was not explicitly spelled out during the consultation, it should have been obvious for the claimant that there was a possibility of the hospital being closed since the discussion evolved mainly around providing medical services at residents' homes instead of the hospital.[468] Thus, the court held that the consultation was indeed meaningful, since the decision-maker publicly invited the claimant and the other parties to participate in consultation, and later considered the views which were expressed, before taking the final decision.[469]

In order for the consultees to be able to foresee the turn that the government's policy or decision-making process could take, they might need access to each other's comments. The availability to access the comments that were made is another way of enhancing the knowledge of the consultees on the subject matter. Although no such requirement exists either in the US, South Africa or in the UK,[470] in practice, the US Federal agencies not only publish the submissions made by participants of notice and comment procedure, but also allow commenting on them.[471] The so-called 'reply comment period' means that time is allowed for the participants to familiarize and respond to each others'

[467] *R(Compton) v Wiltshire Primary Care Trust*, [2009] EWHC, 1824 (Admin), 98-103
[468] *R(Compton) v Wiltshire Primary Care Trust*, [2009] EWHC, 1824 (Admin), 114-115
[469] *R(Compton) v Wiltshire Primary Care Trust*, [2009] EWHC, 1824 (Admin), 114
[470] *R(United States Tobacco International) v Secretary of State for Health*, [1990] QB 351, 370 E-G, See also Jonathan Auburn, "Consultation," Conference Paper, 10, http://www.4-5.co.uk/uploads/docs/section5/JRconferencepaperConsultation.doc
[471] Steven J. Balla, "Public Commenting on Federal Agency Regulations: Research on Current Practices and Recommendations to the Administrative Conference of the United States," Draft Report, the *Administrative Conference of the United States*, 15 March 2011, http://www.acus.gov/wp-content/uploads/downloads/2011/04/COR-Balla-Report-Circulated.pdf

comments.[472] The main purpose behind such opportunities is to contribute to the quality of the information available to the participants.[473] Also a Recommendation by the *Administrative Conference of the United States* (ACUS) suggests that agencies should make use of 'reply comment periods' and allow participants to familiarize themselves with each others comments and to react on them.[474] The practice of disclosing the contributions by other participants, is yet another factor which distinguishes the law of public consultation from the FOIA requirements.

2.5.3. Consideration of the Inputs made by the Participants

The requirement to consider the input of the participants is usually another necessary element of any process of meaningful participation. This requirement serves several purposes, which are illustrated below. For example, the requirement for decision-makers to consider the input of the participants provides them with a possibility to influence the position of the decision-maker.

From the perspective of deliberative democracy, early involvement by participants in deliberation is a crucial condition for ensuring that participants not only give out their information but also have the opportunity to influence the final outcome.[475] For the opportunity of influence to occur, the consultations have to take place when proposals are still proposals rather than a final decision. If public consultations are held at a time when there is

[472] Steven J. Balla, "Public Commenting on Federal Agency Regulations: Research on Current Practices and Recommendations to the Administrative Conference of the United States," Draft Report, the *Administrative Conference of the United States*, 15 March 2011, http://www.acus.gov/wp-content/uploads/downloads/2011/04/COR-Balla-Report-Circulated.pdf

[473] Steven J. Balla, "Public Commenting on Federal Agency Regulations: Research on Current Practices and Recommendations to the Administrative Conference of the United States," Draft Report, the *Administrative Conference of the United States*, 15 March 2011, http://www.acus.gov/wp-content/uploads/downloads/2011/04/COR-Balla-Report-Circulated.pdf

[474] *Administrative Conference Recommendation 2011-2, Rulemaking Comments*, the Administrative Conference of the United States, June 16, 2011, http://www.acus.gov/wp-content/uploads/downloads/2011/06/Recommendation-2011-2-Rulemaking-Comments.pdf

[475] Jenny Steele, "Participation and Deliberation in Environmental Law: Exploring a Problem-solving approach," *Oxford Journal of Legal Studies*, Vol. 21, 2001, 415; 429.

still room for a potential change of position, the whole process of consulting could approximate to the ideals deliberation and participation. [476]

At several instances the British courts confirmed that "[c]onsultation involves the opportunity for representations to be made and for them to be conscientiously taken into account before the proposals are finalized,"[477] and that meaningful consultation should be held at the 'formative stage' of the decision-making process.[478]

Once public consultation is held at an early phase, the decision-makers enjoy discretion in choosing how to treat the inputs that were made. Three stages could be distinguished: 1) reviewing all the comments that were made; 2) considering the more important comments; 3) changing the initial position in line with the comments that were made. The analysis of cases reveals that the discretion of the decision-makers increases as the public consultation proceeds from stage 1 to stage 3. The following is a more in-depth analysis of each of the stages.

In the UK, the duty to consider the inputs of the participants is explicit under the *Code of Practice on Consultation*. The Criterion 6 "Responsiveness of consultation exercises," of the Code requires the government to consider the substance of comments that were made, whereby Paragraph 6.1 of the Code specifies that: "[a]ll responses … should be analysed carefully, using the expertise, experiences and views of respondents to develop a more effective and efficient policy… Analysing consultation responses is primarily a *qualitative* rather than a quantitative *exercise*."[479] Moreover, even where the statutes do not require decision-makers to take into account the inputs of the consultees, the British courts

[476] Alice Woolley, "Legitimating Public Policy," *University of Toronto Law Journal*, Vol. 58, No. 2, 2008, 153; 167-168.
[477] *R (Pow) v North & East Devon Health Authority*, [1997] EWHC Admin 765 (4th August, 1997), 56, http://www.bailii.org/ew/cases/EWHC/Admin/1997/765.html
[478] R (*Coughlan) v North & East Devon Health Authority*, [2001] QB 213, 108, http://www.bailii.org/ew/cases/EWCA/Civ/1999/1871.html See also the *R* (*Greenpeace) v Secretary of State for Trade and Industry*, [2007] EWHC 311 (Admin), 55, http://www.bailii.org/ew/cases/EWHC/Admin/2007/311.html
[479] Paragraph 6.1 of the *Code of Practice on Consultation*, the Cabinet Office, July 2008, 12, (emphasis added) http://www.berr.gov.uk/files/file47158.pdf

have interpreted the requirement to consider the inputs to be inherent under the general duty to consult. Thus, the decision-maker has to keep a 'receptive mind' whether the consultation is required under statute or not.[480]

Ideally, decision-makers would have to take into account all comments that were made during public consultations. However, this kind of requirement might be neither feasible, for example, because of voluminous amount of comments; nor necessary, for example, when several participants hold same or similar positions on an issue. Therefore the second stage is to choose between the more and less important inputs.

For example, in the US, the agencies are not required to consider each and every comment which is received.[481] However, the APA requires consideration of "*the relevant matter* presented"[482] during notice and comment procedure. Generally, agencies enjoy wide discretion in dealing with the comments. For example, Kenneth Warren explains that it is the 'absolute discretionary power' of the agencies in the US which allows them to "ignore or honor any or all inputs from interested parties attempting to shape the rules in their favor."[483] The courts have been consistent in holding that there is no need for agencies "to discuss every item of fact or opinion included in the submissions,"[484] as well as in requiring agencies to "demonstrate the rationality of … decision-making process by responding to those comments that are *relevant and significant*."[485] In this respect the US and the UK have developed rather similar approaches since in both countries the benchmark is the 'significance' of the

[480] *R (Partingdale Lane Residents' Association) v Barnet London Borough Council* [2003] EWHC 947 (Admin) (02 April 2003), 45 http://www.bailii.org/ew/cases/EWHC/Admin/2003/947.html (emphasis added)
[481] See, for example, Jeffrey S. Lubbers, *A Guide to Federal Agency Rulemaking*, American Bar Association, 2006, 383.
[482] 553 (c) of *Administrative Procedure Act*, 5 U.S.C., 2000, (emphasis added) http://usgovinfo.about.com/library/bills/blapa.htm
[483] Kenneth F. Warren, *Administrative Law in the Political System*, Westview Press, 2004, 232.
[484] *Louisiana Federal Land Bank Association v Farm Credit Administration*, 336 F.3d 1075, (2003), 1080 (citing *Public Citizen v Federal Aviation Administration*, 988, F.2d 186, 197 (D.C.Cir. 1993)).
[485] *Grand Canyon Air Tour Coalition v Federal Aviation Administration* (FAA), 154 F.3d 455, (D.C. Cir. 1998), 46. (emphasis added) See also *United States Satellite Broadcasting v. Federal Communications Commission* (FCC), 740 F.2d 1177, 1188 (D.C. Cir. 1984) (cited in Phillip M. Kannan, "The Logical Outgrowth Doctrine in Rulemaking," *Administrative Law Review*, Vol. 48, 1996, 213)

comments at stake. The real challenge for agencies and courts is deciding which of the comments are 'relevant' or 'significant' and therefore have to be given adequate consideration. In determining 'relevance' and 'significance' of comments, the courts would require agencies to consider and respond to comments, which "if true … would require a change in [the] proposed rule,"[486] or which would "challenge the fundamental premise"[487] of the proposed rule. As already mentioned, in the US agencies are left with discretion to determine which comments are relevant and which are not.[488] However, courts would not necessarily defer to an agency's decision concerning the relevance of received materials, even where the matter at stake is highly specific or technical.[489]

The criterion of relevance or 'significance' of comments is also established under the British Code of Practice on Consultation, 2008.[490] After public consultations, British public authorities are required to summarize in writing the "significant comments"[491] as well as to provide an account of "what was learnt from the consultation exercise."[492] Unlike in the US, the British courts have not yet considered how the principle of 'significance' should be interpreted and applied.

In South Africa, the requirement to consider the comments is not explicit under the Constitution; nevertheless it was weaved into the constitutional obligation to facilitate public involvement by the country's Constitutional Court. In the *Matatiele Municipality v President of the Republic of South Africa* (herein, Matatiele 2), the South African

[486] *Louisiana Federal Land Bank Association v Farm Credit Administration*, 336 F.3d 1075, (2003), 1080 (citing American Mining Congress v Environmental Protection Agency, 907 F.2d 1179, 1188 (D.C.Cir.1990).
[487] *MCI Worldcom v the Federal Communications Commission* (FCC), 209 F.3d 760, 341 U.S.App.D.C. 132, (2000), 765
[488] Kenneth F. Warren, *Administrative Law in the Political System*, Westview Press, 2004, 232.
[489] See, for example, *Louisiana Federal Land Bank Association v Farm Credit Administration*, 336 F.3d 1075, 357 U.S.App.D.C. 403, (2003)
[490] Criterion 6.4. of the *Code of Practice on Consultation*, the Cabinet Office, July 2008, 12, http://www.berr.gov.uk/files/file47158.pdf
[491] Criterion 6.4. of the *Code of Practice on Consultation*, the Cabinet Office, July 2008, 12, http://www.berr.gov.uk/files/file47158.pdf
[492] Criterion 6.4. of the *Code of Practice on Consultation*, the Cabinet Office, July 2008, 12, http://www.berr.gov.uk/files/file47158.pdf

Constitutional Court held that "law-makers must provide opportunities for the public to be involved in *meaningful ways*, to listen to their concerns, values, and preferences, *and to consider these in shaping their decisions and policies*."[493] According to the Court, "[w]ere it to be otherwise, the duty to facilitate public participation would have no meaning."[494]

In practice, decision-makers not only have to consider the input made by participants but also have to provide some evidence that they actually did so. In the US, as part of notice and comment procedure, the agencies have to respond to the issues raised by participants and include them in the 'statement of basis and purpose.'[495] Also in the UK, the government is required to "provide a summary of who responded to the consultation exercise and a summary of the views expressed to each question … [t]his feedback should normally set out what decisions have been taken in light of what was learnt from the consultation exercise."[496] As illustrated below, these statements and summaries serve as the source of evidence for the courts' scrutiny of decision-maker's compliance with the requirements of meaningful participation.

While decision-makers have to consider the inputs of the participants and to provide written proof of that, public consultation is not a referendum and they are not obliged to comply with the comments made during the public consultation. For instance, in the US while the APA requires agencies to consider the comments before reaching the final decision, it does not require agencies to comply with any of the views expressed during notice and

[493] *Matatiele Municipality and Others v President of the Republic of South Africa and Others* (2)(CCT73/05A)[2006] ZACC 12 [2006] ZACC 26; 2007 (1) BCLR 47 (CC) (18 August 2006), (Matatiele 2), 97, http://www.saflii.org/za/cases/ZACC/2006/12.html (emphasis added)
[494] *Matatiele Municipality v President of the Republic of South Africa* (2)(CCT73/05A)[2006] ZACC 12 [2006] ZACC 26; 2007 (1) BCLR 47 (CC) (18 August 2006), (Matatiele 2), 97, http://www.saflii.org/za/cases/ZACC/2006/26.html (emphasis added)
[495] Jeffrey S. Lubbers, *A Guide to Federal Agency Rulemaking*, American Bar Association, 2006, 376 and 60. See also Thomas O. McGarity, "Some Thoughts on "Deossifying" the Rulemaking Process," *Duke Law Journal*, Vol. 41, 1991-1992, 1400.
[496] Criterion 6.4. of the *Code of Practice on Consultation*, the Cabinet Office, July 2008, 12, http://www.berr.gov.uk/files/file47158.pdf

comment procedure.[497] Also in the UK, the decision-makers are not bound by 'something like a positive mandate from the consultees'.[498]

One of the main critiques of consultative processes is that it could be ineffective, whereby participants are not guaranteed that their input would change or at least influence the final outcome.[499] Indeed, there is the difficulty of ensuring meaningful participation in the absence of a requirement for decision-makers to seek consensus or comply with the responses received during public consultation, however, as the following analysis of the cases reveals the sole fact that decision-makers are not completely bound by the inputs of the participants does not necessarily imply that the whole consultative process is meaningless.

Also the courts in all the three jurisdictions have developed the 'open' and 'receptive' mind criteria to determine the limits of decision-maker's discretion. The concept of a decision-maker's 'open' mind means that as a part of the consultation the consulting institution has to consider and to take into account the comments that were made.[500] In the US, if the agency had a 'closed mind' the final rule may be invalidated or the decision-maker could be disqualified.[501]

In the UK, the courts could require the decision-makers to re-start the public consultation process in order to fulfill the requirement of consideration. For instance, a successful challenge concerning decision-maker's reluctance to consider the input by

[497] Cary Coglianese, "The Internet and Citizen Participation in Rulemaking", *I/S: A Journal of Law and Policy*, Vol. 1(1), 2005, 33; 37, http://www.is-journal.org/V01I01/I-S,%20V01-I01-P033,%20Coglianese.pdf
[498] *R (Smith) v East Kent Hospital NHS Trust* [2002] EWHC 2640 (Admin), 60-61, http://www.bailii.org/ew/cases/EWHC/Admin/2002/2640.html See also, *R (Coughlan) v North & East Devon Health Authority*, [2001] QB 213, 108, http://www.bailii.org/ew/cases/EWCA/Civ/1999/1871.html
[499] Section 1.3 *Critique of Enhanced Opportunities for Public Participation and Deliberation*
[500] See generally, Jonathan Auburn, "Consultation," Conference Paper, 14, paragraph 27, http://www.4-5.co.uk/uploads/docs/section5/JRconferencepaperConsultation.doc Ronald M. Levin, "Nonlegislative Rules and the Administrative Open Mind," *Duke Law Journal*, Vol. 41, 1992, 1497; Kristin E. Hickman, "A Problem of Remedy: Responding to Treasury's (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements," *George Washington Law Review*, Vol. 76, 2008, 1153; 1192; and Jack M. Beermann, "Presidential Power in Transitions," *Boston University Law Review*, Vol. 83, 2003, 947.
[501] See, for example, Kristin E. Hickman, "A Problem of Remedy: Responding to Treasury's (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements," *George Washington Law Review*, Vol. 76, 2008, 1153, at 1191-1192.

consultees was brought in the British case of *R (Cran) v Camden London Borough Council*.[502] In the *Cran* case, an order by the local authority of Camden which introduced controlled parking zones in the area was challenged by a group local residents and businesses.[503] Before adoption of the order, there were consultations held, during which 95 per cent of participating residents expressed their disapproval of the changes concerning parking space in the area.[504] Despite these contradictions, the authority adopted the order which also set charges and time limitations on parking spaces.

Before the court, the petitioners argued that the consultative process was not meaningful since the local authority failed to consider their objections as required by the *Local Authorities' Traffic Orders Regulations* (the Regulations).[505] The Regulations provide that before adopting an order the authority as to consult with the users of those roads, which will be affected by the proposal and that the authority has to take into consideration all the objections that would be made.[506]

The Court found that the local authority failed to comply with its statutory duty to carry out consultations and to do it 'fairly'. According to the Court, fairness requires that during any consultation process the local authority keep a 'receptive mind' and explained that

[502] *R (Cran) v Camden London Borough Council*, [1995] R.T.R. 346, http://www.bailii.org/ew/cases/EWHC/Admin/1995/13.html See also *R (Partingdale Lane Residents' Association) v Barnet London Borough Council* [2003] EWHC 947(Admin), http://www.bailii.org/ew/cases/EWHC/Admin/2003/947.html Other British cases, where the courts relied on the concept of 'receptive mind' to a lesser extent include: *Bullmore v West Hertfordshire Hospitals NHS Trust* [2007] EWHC 1636 (Admin) (09 July 2007), http://www.bailii.org/ew/cases/EWHC/Admin/2007/1636.html and *Pitmans Trustees v The Telecommunications Group* [2004] EWHC 181 (Ch) (10 February 2004), 59, http://www.bailii.org/ew/cases/EWHC/Ch/2004/181.html

[503] *R (Cran) v Camden London Borough Council*, [1995] R.T.R. 346, 350, http://www.bailii.org/ew/cases/EWHC/Admin/1995/13.html

[504] *R (Cran) v Camden London Borough Council*, [1995] R.T.R. 346, 350, http://www.bailii.org/ew/cases/EWHC/Admin/1995/13.html

[505] *Local Authorities' Traffic Orders (Procedure) (England and Wales) Regulations 1981* (SI 1989 No 1120) Regs 5, 7, 8, 12, 16, 20, 29A

[506] *R (Cran) v Camden London Borough Council*, [1995] R.T.R. 346, 348-349, http://www.bailii.org/ew/cases/EWHC/Admin/1995/13.html

before the authority makes the final order it has to listen and consider the inputs of the consultees even those which may seem incorrect or erroneous.[507]

In order to establish whether in the current case the local authority was open enough to consider the comments that were made, the court examined the preparatory documents which led to the proposal of the order, and found that the purpose of consultation was to inform the participants about the benefits of having controlled parking in the borough rather than to seek views on the necessity of such changes. Moreover, the Court found that the local authority was determined to introduce the controlled parking zones regardless of the views of local residents because during one of the meetings the officials sought to avoid a voting procedure, after realizing the hostility by the participants against the proposal (eventually the voting revealed that more than 90 per cent of attendees were against proposal).[508] Also, in the consultation documents the authority limited the subjects of consultation by not providing any alternatives to its proposed regulation of parking spaces (e.g. whether the control should be for the whole day or for shorter hours), the local authority was not responding to inquiries by the concerned individuals and ignored their proposals.[509] According to the Court, this type of consultative process did not meet the statutory requirements which require 'respectful mutual co-operation' in terms of holding the consultation prior to the adoption of the policy.[510] Therefore it ordered the institution to hold another round of consultations.[511]

[507] *R (Cran) v Camden London Borough Council*, [1995] R.T.R. 346, 374, http://www.bailii.org/ew/cases/EWHC/Admin/1995/13.html
[508] *R (Cran) v Camden London Borough Council*, [1995] R.T.R. 346, 375, 378, http://www.bailii.org/ew/cases/EWHC/Admin/1995/13.html
[509] *R (Cran) v Camden London Borough Council*, [1995] R.T.R. 346, 381, 400-401, http://www.bailii.org/ew/cases/EWHC/Admin/1995/13.html
[510] *R (Cran) v Camden London Borough Council*, [1995] R.T.R. 346, 381, 401-404, http://www.bailii.org/ew/cases/EWHC/Admin/1995/13.html
[511] *R (Cran) v Camden London Borough Council*, [1995] R.T.R. 346, 381, 404, http://www.bailii.org/ew/cases/EWHC/Admin/1995/13.html

Another case where the issue of decision-maker's openness was raised is *R (Medway Council and Kent County Council) v Secretary of State for Transport* (*Medway*)[512]. Here claimants representing several county councils challenged the government's proposed policy on development of air transport in the country arguing that the Secretary of State for Transport (the Secretary of State) should not have excluded the option of the expansion at Gatwick airport from its proposed strategy which was open for consultation.[513] The Court refused to agree with the claimants that during the consultation, the Secretary of State had a 'closed mind' when it did not include the issue of Gatwick airport's capacity in the consultation documents. However, it found that inclusion of the issue was necessary under the concept of procedural fairness.[514] According to the Court, the exclusion of some options from consultation does not necessarily mean that the Secretary of State had a 'closed mind', since the Secretary of State possesses discretion in "determining the parameters within which a policy will eventually be formulated and consulting within those parameters."[515] The claimants were 'disadvantaged' once the option of Gatwick airport's expansion was excluded from the consultative process whereas fairness required parties to be given opportunity to make representations and provide alternatives to the proposals which affect them.[516] The Court also rejected the argument by the Secretary of State that fairness could remove his discretion as to the nature and scope of consultation.[517]

While reliance on the decision-maker's duty to keep an 'open' mind could become a powerful tool in the hands of participants whose comments were not considered in the course of decision-making, a difficulty remains of how to determine whether the decision-maker was genuinely open to taking into account all the inputs made. For instance, even

[512] *R (Medway Council) v Secretary of State for Transport*, [2002] EWHC 2516 Admin
[513] *R (Medway Council) v Secretary of State for Transport*, [2002] EWHC 2516 Admin, 1
[514] *R (Medway Council) v Secretary of State for Transport*, [2002] EWHC 2516 Admin, 23-33
[515] *R (Medway Council) v Secretary of State for Transport*, [2002] EWHC 2516 Admin, 25
[516] *R (Medway Council) v Secretary of State for Transport*, [2002] EWHC 2516 Admin, 29-32
[517] *R (Medway Council) v Secretary of State for Transport*, [2002] EWHC 2516 Admin, 31-32

where the decision-maker seems to be willing to consider the inputs made by the participants, certain political settings (such as statutory limitations) could make it difficult to prove that an open consideration of the comments has occurred. The latter difficulty is further illustrated by two cases from South Africa and the US.

The first is the *Grand Canyon Air Tour Coalition v Federal Aviation Administration*[518] case from the US. In 1996 the *Federal Aviation Administration* (FAA), as instructed by the Congress under the *Overflights Act*, sought to regulate the adverse impacts by the aircraft flights over the Grand Canyon on the natural quiet of the park.[519] During notice and comment procedure the agency received numerous comments, which later were summarized and responded to in the statement of basis and purpose of the rule.[520] Despite the suggestions made by some of the interested parties, the FAA adopted some of the provisions without any changes into the final rule. The operators of air-tours over the Grand Canyon argued that the FAA neither considered nor responded to the comments since when determining 'natural quiet' and other concepts it adopted the same definitions as suggested under the proposed rule.[521]

At first, the court confirmed the link between decision-maker's 'open mind' and the meaningfulness of notice and comments procedure: the "agency is required to provide a *meaningful* opportunity for comments, which means that the agency's *mind must be open* to considering them,"[522] and that the "agency must also demonstrate the rationality of its decision-making process by responding to those comments that are relevant and

[518] *Grand Canyon Air Tour Coalition v Federal Aviation Administration* (FAA), 154 F.3d 455, (D.C. Cir. 1998)
[519] *The National Parks Overflight Act of 1987*, Public Law 100-91, http://www.nps.gov/grca/naturescience/upload/PL100-91.pdf See also Federal Aviation Administration, Offices, Regions, and Center Operations, Programs, Grand Canyon Overflights, http://www.faa.gov/about/office_org/headquarters_offices/arc/programs/grand_canyon_overflights/
[520] *Grand Canyon Air Tour Coalition v Federal Aviation Administration* (FAA), 154 F.3d 455, (D.C. Cir. 1998), 467.
[521] *Grand Canyon Air Tour Coalition v Federal Aviation Administration* (FAA), 154 F.3d 455, (D.C. Cir. 1998), 468
[522] *Grand Canyon Air Tour Coalition v Federal Aviation Administration* (FAA), 154 F.3d 455, (D.C. Cir. 1998), 468 (citing *McLouth Steel Products Corp. v. Thomas*, 838 F.2d 1317, C.A.D.C., 1988, at 1323**)** (emphasis added)

significant."[523] Then it found that in the current case the agency was relieved of the duty to respond to comments concerning definitions because the statute (i.e. the *Overflights Act*) also divided the competence between the two institutions, instructing the FAA to accept the definitions as suggested by the Park Service without any changes.[524]

The second case where the difficulty of determining the decision-maker's openness was at stake is *Merafong Demarcation Forum v President of the Republic of South Africa*. An organization representing the city of Merafong community[525] challenged the process by which the provincial legislature held public hearings and consultations on the issue of relocating the local municipality of Merafong from the province of Gauteng to North West.[526] According to the petitioner, the provincial legislature failed to meet the constitutional obligation of public involvement under section 118(1)(a) of South Africa's Constitution.

In South Africa, in 2005 as part of the efforts to ensure better administrative functioning and service delivery at municipal level by rejoining municipalities which were located in more than one province, the Parliament proposed the *Constitution Twelfth Amendment Act* which changed the boundaries of country's nine provinces.[527] The issue arose as to which one of the two provinces (Gauteng or North West) should the Merafong

[523] *Grand Canyon Air Tour Coalition v Federal Aviation Administration* (FAA), 154 F.3d 455, (D.C. Cir. 1998), 468.
[524] *Grand Canyon Air Tour Coalition v Federal Aviation Administration* (FAA), 154 F.3d 455, (D.C. Cir. 1998), 468-469.
[525] The Merafong Demarcation Forum consists of "members of the community drawn from political organisations, taxi associations, the women's movement, students, trade unions, churches, businesses and professionals, including teachers, nurses and lawyers." *Merafong Demarcation Forum v President of the Republic of South Africa*, (CCT 41/07) [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 968 (CC) (13 June 2008), 2, 33, 135, http://www.saflii.org/za/cases/ZACC/2008/10.html
[526] *Merafong Demarcation Forum v President of the Republic of South Africa*, (CCT 41/07) [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 968 (CC) (13 June 2008), http://www.saflii.org/za/cases/ZACC/2008/10.html See also, *News, Merafong Residents Consulted on Relocation, Committees Told*, Parliament of the Republic of South Africa, 2009, http://www.parliament.gov.za/live/content.php?Item_ID=826
[527] Heinz Klug, *The Constitution of South Africa: A Contextual Analysis*, Hart, 2010, 274-284; *Constitution Twelfth Amendment Act of 2005*, Government Gazette, Republic of South Africa, Vol. 486, 23 December 2005, No. 28364, http://us-cdn.creamermedia.co.za/assets/articles/attachments/12666_const12.pdf See also, Constitution Thirteenth Amendment Bill, Centre for Public Participation, 2007, http://www.cpp.org.za/main.php?include=docs/news/2007/nz0620.html&menu=_menu/main.html&title=News

municipality be relocated. The proposed Amendment suggested relocating Merafong municipality to North West.

South Africa's Constitution requires that Constitutional amendments concerning changes to administrative boundaries be adopted by the national legislature with a prior approval by certain provincial legislatures.[528] Also, under the Constitution in order to adopt such an approval the provincial legislatures need to 'facilitate public involvement'.[529]

The provincial legislatures of Merafong, North West and Gauteng held public hearings during which the majority of Merafong community's members expressed their support for being located in the Gauteng province rather than North West.[530] Notably, the Gauteng province is much more developed and wealthier than the North West.[531] The provincial legislature agreed with the views of Merafong community's majority and sought to present its position in front of the national parliament. However, soon it learned that it could not propose any new changes to the Amendment, instead it could either adopt it the way it is or veto it.[532] The provincial legislature did not consider veto as an option and therefore changed its initial decision as agreed with the members of the Merafong community and approved the amendment which relocated the municipality to North West.[533] The adoption of the Constitutional Amendment resulted in unrest in the community leading to protests and marches.[534]

[528] Section 74 of the *Constitution of the Republic of South Africa*, 1996, text available at: http://www.info.gov.za/documents/constitution/1996/index.htm
[529] Sec 118 of the *Constitution of the Republic of South Africa*, 1996, text available at: http://www.info.gov.za/documents/constitution/1996/index.htm
[530] *Merafong Demarcation Forum v President of the Republic of South Africa*, (CCT 41/07) [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 968 (CC) (13 June 2008), 141, http://www.saflii.org/za/cases/ZACC/2008/10.html
[531] See, for example, Gauteng Province, South Africa, http://www.southafrica.info/about/geography/gauteng.htm and http://nowwithouthesitation.blogspot.hu/2009/11/merafong-demarcation-forum.html
[532] *Merafong Demarcation Forum v President of the Republic of South Africa*, (CCT 41/07) [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 968 (CC) (13 June 2008), 36-37, 155,
[533] *Merafong Demarcation Forum v President of the Republic of South Africa*, (CCT 41/07) [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 968 (CC) (13 June 2008), 39,
[534] *Merafong Demarcation Forum v President of the Republic of South Africa*, (CCT 41/07) [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 968 (CC) (13 June 2008), 135, See also, Wyndham Hartley, "South

In the case before the country's Constitutional Court, the petitioner argued that the provincial legislatures should at least have informed them about their changed position.[535] As mentioned earlier, the South Africa's Constitution is silent on how the public input should be considered, nor does it require seeking consensus with members of the public. In this respect the Constitutional Court indicated that the legislatures enjoy discretion in choosing ways to meet the constitutional obligation, and that they are also free to come up with innovative solutions.[536] At the same time the Court held that the legislature is bound by the criteria of reasonableness which requires different opportunities for involvement depending on the importance of the statutes and the possible impact the legislation would have on the public.[537]

According to the Court, the constitutional obligation to facilitate public involvement does not require legislatures when holding public hearings and consultations to conform to the views expressed therein.[538] The Court also held that public participation as an element of participatory democracy would endanger the representative form of government rather than supplement it.[539] However, the national and provincial legislatures are obliged to listen and to consider the views expressed by the members and to be 'open' for persuasion by members of the public.[540] The Court emphasized that the purpose of the consultative processes is to allow the parliament to receive information about "fears and concerns of the

Africa: New Chapter for Merafong as MPs Move to Rectify Blunder," *Business Day*, 19 February 2009, http://allafrica.com/stories/200902190080.html

[535] *Merafong Demarcation Forum v President of the Republic of South Africa*, (CCT 41/07) [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 968 (CC) (13 June 2008), 44-46, 54

[536] *Merafong Demarcation Forum v President of the Republic of South Africa*, (CCT 41/07) [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 968 (CC) (13 June 2008), 27

[537] *Merafong Demarcation Forum v President of the Republic of South Africa*, (CCT 41/07) [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 968 (CC) (13 June 2008), 27

[538] *Merafong Demarcation Forum v President of the Republic of South Africa*, (CCT 41/07) [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 968 (CC) (13 June 2008), 49-50

[539] *Merafong Demarcation Forum v President of the Republic of South Africa*, (CCT 41/07) [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 968 (CC) (13 June 2008), 50

[540] *Merafong Demarcation Forum v President of the Republic of South Africa*, (CCT 41/07) [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 968 (CC) (13 June 2008), 51

people affected."[541] According to the majority of the Court, the Committee considered the arguments for relocation, and since poor delivery of municipal services was among the main concerns, the municipality already took measures to improve it. Since the Court did not elaborate on the evidence in front of it concerning the improved quality of the services, it is difficult to assess the actual improvements that were made.

As to the argument that the legislatures, after realizing the need to change the initially agreed position should have informed the community about it and held another round of public hearings, the Court found that although additional opportunities for public participation might have been desirable in terms of ensuring 'respectful dialogue' and 'accountability' of the members of the parliament, they were not necessitated by the Constitution.[542] The Court held that even if the legislatures held additional public hearings their impact would not have been greater than increasing understanding of the community of political procedures.[543] According to the Court, nothing could have been done to change the final outcome and the adoption of the Constitutional Amendment, therefore even in the absence of additional opportunities for public participation, the provincial legislatures complied with their constitutional obligations.[544] Lastly, the Court held that provincial legislatures could be held accountable for such a 'discourteous conduct' through other processes of the democratic system, such as regular elections.[545]

The Court's approach in this case seems to embed a conflicting message concerning the purpose of consultative processes. On the one hand, the Court did recognize that the opportunities for public participation serve to ensure 'respectful dialogue', and that

[541] *Merafong Demarcation Forum v President of the Republic of South Africa*, (CCT 41/07) [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 968 (CC) (13 June 2008), 282
[542] *Merafong Demarcation Forum v President of the Republic of South Africa*, (CCT 41/07) [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 968 (CC) (13 June 2008), 55
[543] *Merafong Demarcation Forum v President of the Republic of South Africa*, (CCT 41/07) [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 968 (CC) (13 June 2008), 59
[544] *Merafong Demarcation Forum v President of the Republic of South Africa*, (CCT 41/07) [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 968 (CC) (13 June 2008), 59-61
[545] *Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others*, (CCT 41/07) [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 968 (CC) (13 June 2008), 60

they could be seen as an important mechanism of accountability of the representatives. But on the other hand, it held that the opportunities for participation could also endanger the representative form of government if the legislatures were required to report back to the participants. As mentioned, the Constitution of South Africa establishes dual foundation of its democracy, which is partly representative, and partly participatory. Therefore, it seems that the main challenge for the Court was to find a proper balance between these two pillars of country's democracy. The current approach by the Court seems unnecessarily limited concerning public participation since the Court relied heavily on the importance of the elections. However, as explained in Chapter 1, elections should not be seen as the only means for ensuring government's accountability or 'respectful dialogue'. For example, as explained by Galligan, respect by the government towards the governed is central to a decision-making process which is to be fair.[546] Actually, in his concurring opinion Justice Sachs adopted a rather similar approach.

According to Justice Sachs, the provincial legislature failed to fulfill the constitutional duty to facilitate public involvement by not reporting to the community members about the change of its position.[547] Participatory democracy, as an inseparable principle of South Africa's constitutionalism, requires a dialogue to be established between the government and the governed.[548] Only such genuine communication between the elected representatives and the people could ensure "a counterweight to secret lobbying and influence peddling."[549] Failure by the legislatures to report back to the community about the changed

[546] D. J. Galligan, *Due Process and Fair Procedures*, Clarendon Press, 1996, 131.
[547] *Merafong Demarcation Forum v President of the Republic of South Africa*, (CCT 41/07) [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 968 (CC) (13 June 2008), 287-302
[548] *Merafong Demarcation Forum v President of the Republic of South Africa*, (CCT 41/07) [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 968 (CC) (13 June 2008), 291 (per J Sachs)
[549] *Merafong Demarcation Forum v President of the Republic of South Africa*, (CCT 41/07) [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 968 (CC) (13 June 2008), 292 (per J Sachs)

position not only impaired the legitimacy of the law making process but also brought about perceptions by the members of the municipality that the whole consultation was 'a sham'.[550]

According to Justice Sachs, participatory democracy in addition to its instrumental value related to the opportunities by the people to influence public decision-making is valuable for its potential through channels of communication to ensure respectful and trustworthy relationship between the government and the people.[551] This trust was broken because of the failure by the legislatures to inform the community about their changed position.[552]

Eventually, however, the decision by the Committee was changed and the demands by the community members were satisfied. In 2009, a new bill was proposed and passed in the national parliament of South Africa in terms of 16th Amendment to the Constitution which approved the relocation of Merafong back to Gauteng province.[553] The course of events only proves that the improvements concerning the service delivery were not sufficient to satisfy the needs of the residents.

The two cases illustrate the difficulties faced by courts when they are asked to determine whether the decision-maker considered the responses received during the consultation. The courts could examine various sorts of documents and communication of the consulting authority in order to determine whether it kept an 'open mind' or 'receptive mind' during the decision-making process. The true difficulty is determining whether the actual

[550] *Merafong Demarcation Forum v President of the Republic of South Africa*, (CCT 41/07) [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 968 (CC) (13 June 2008), 292 (per J Sachs)
[551] *Merafong Demarcation Forum v President of the Republic of South Africa*, (CCT 41/07) [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 968 (CC) (13 June 2008), 299 (per J Sachs)
[552] *Merafong Demarcation Forum v President of the Republic of South Africa*, (CCT 41/07) [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 968 (CC) (13 June 2008), 300-301 (per J Sachs)
[553] *Constitution Sixteenth Amendment Act of 2009*, Republic of South Africa, Government Gazette, Vol. 525, No. 32065, 26 March 2009, http://www.info.gov.za/view/DownloadFileAction?id=98327 and *NCOP Passess Merafong Bills*, Parliament of South Africa, 19 March 2009, http://www.parliament.gov.za/live/content.php?Item_ID=849 See also *Merafong Residents Consulted on Relocation, Committees Told*, Parliament of South Africa, 2009, http://www.parliament.gov.za/live/contentpopup.php?Item_ID=826&Category_ID= and *State of the Province Address by Gauteng Premier Nomvula Mokonyane*, Gauteng Legislature, Johannesburg, 21 February 2011, http://www.info.gov.za/speech/DynamicAction?pageid=461&sid=16396&tid=28554

consultation was indeed meaningful and whether all the inputs were considered genuinely by the consulting institution.

Moreover, the cases exemplify the purposes of the requirement to consider the public input. In response to the earlier described criticism of enhanced opportunities for public participation,[554] it has to be said that public consultation is not only about the possibility of influence by participants on the final decision. As South Africa's Constitutional Court emphasized in *Merafong* case and the British court in *Cran* case, the purpose of the requirement for legislatures or government authorities to consider the opinions of the members of the public participating in lawmaking or decision-making processes is to guarantee a respectful and accountable communication between the government and the governed.

Conclusions

The cases in this section reveal that while the possibility of influence over the final decision is an important aspect of consultative processes, it is not the only measure of the meaningfulness of such processes. There are other values inherent in the opportunities for public participation – indeed, ensuring a trustworthy (*Merafong* case) and respectful (*Cran* case) relationship between the government and the governed are among the most pertinent of such values. The concept of an open, receptive mind as developed by the judiciary illustrates how public consultation could be meaningful without being a referendum and without creating tensions between the representative and participatory concepts of democracy. The cases also illustrate the problems by decision-makers to demonstrate that they actually considered the submissions made by the consultees.

[554] See Section *1.6. Enhanced Opportunities for Public Participation and Deliberation: A Critique and its Rebuttal*

3. Public Consultations in Specific Regulatory Areas – Telecommunications

The previous Chapters indicate that the scope of the obligation of consultation is very much an issue dependent. Public consultation is inevitable and the opportunities for consultation would be broader where the issues are such that directly affect particular individuals or their groups. Earlier analysis also reveals that public consultation as part of the procedural requirements gains particular importance in areas of public policy, where the regulatory functions are carried out by independent authorities. The area of the telecommunications seems to represent both of these criteria. Moreover, the telecommunications is an interesting area to explore because of its technological edge. Regulation in telecommunications must be tailored to suit the specifics of the sector and be efficient in responding to the frequent technological innovations.[555] Also, given the nature and complexity of the telecommunications sector, regulatory authorities are established and perceived as expert agencies. The perceived competence and expertise suggest that the agencies should not need additional advices, which could be delivered through the consultative processes. Lastly, in each of the three jurisdictions concerned special legislation concerning rulemaking practices in telecommunications exists.

[555] Nikos Th. Nikolinakos, *EU Competition Law and Regulation in the Converging Telecommunications, Media and IT Sectors*, Kluwer Law International, 2006, 4.

3.1. Regulation in Telecommunications: Protection of Consumer Interests and Promotion of Competition

Since the 1980s in most countries the telecommunications sector has undergone changes leading to the introduction of competition in the market (mainly through privatization of state owned monopolies) and the establishment of regulatory authorities in order to oversee the sector.[556]

The regulation in the sector of telecommunications is carried out by independent regulatory authorities. Telecommunications regulatory authorities are responsible for the implementation of the following regulatory goals:

a) to ensure efficient and optimal usage of a scarce resource – radio frequency spectrum;

b) to preserve competition in the market;

c) to ensure provision of universal services.[557]

In order to carry out their functions, telecommunications regulators are authorized to intervene into the performance of private business actors through the imposition of obligations, sanctions or other regulatory tools. For instance, the intervention by the regulators in activities of electronic communications services providers is most visible when it is necessary to ensure access to and provision of universal services, such as access to public pay phones or determining optimal usage of spectrum under the national spectrum policy.

In South Africa, the two main institutions involved in the field of electronic communications are the Minister of Communications, who is responsible for setting general policies, and the *Independent Communications Authority of South Africa* (ICASA),[558] which

[556] Scott Wallsten, "Of Carts and Horses: Regulation and Privatization in Telecommunications Reforms," *Policy Reform*, Vol. 6(4), 2003, 217; 219.
[557] Lisa Thornton, et al., eds., *Telecommunications Law in South Africa*, STE Publishers, 2006, 1, 19. See also, generally, Nikos Th. Nikolinakos, *EU Competition Law and Regulation in the Converging Telecommunications, Media and IT Sectors*, Kluwer Law International, 2006, Richard A. Gershon "Deregulation, Privatization and the Changing Global Media Environment," in Oliver Boyd-Barrett, ed., *Communications Media Globalization*, Libbey, 2006.
[558] http://www.icasa.org.za/

is a national regulatory authority for electronic communications. ICASA has the power of implementing government policies through the issuance of regulations.[559] In South Africa, the underlying approach is that ICASA has to regulate the telecommunications sector in line with the "public interest."[560] The *Electronic Communications Act* obliges ICASA to ensure consumer protection while securing wide range of telecommunications services as well as their affordable prices and good quality.[561] In order to achieve these goals, ICASA has to promote competition between the providers of the electronic communications services and encourage investments in the telecommunications infrastructure.[562] In relation to the role of telecommunications regulator in South Africa, many scholars tend to emphasize that the country's telecommunications regulator first and foremost should protect the consumers when ensuring fair business practices and high quality products as well as services.[563]

In the US, the *Federal Communications Commission* (FCC) [564] is an independent government agency, which is responsible for regulation of communications through different mediums such as radio, television and cable. The Federal Communications Commission has to exercise its powers in such a way that the standards of 'public convenience, interest, or necessity'[565] are met. Both the Congress and the judiciary

[559] Section 4 of *Electronic Communications Act 2005*, South Africa, Government Gazette, April 18, 2006.
[560] Section 2 (b) "Object of Act" of the *Independent Communications Authority of South Africa Act, 2000*, as amended by Broadcasting Amendment Act, No. 64 of 2002. See also, Lerato Mokgosi, explaining that ICASA has "to regulate telecommunications in the public interest and achieve the objects contemplated by the underlying statutes. The underlying statutes include he IBA Act, the Broadcasting Act and the Telecommunications Act," in Lisa Thornton, et al., eds., *Telecommunications Law in South Africa*, STE Publishers, 2006, 107. See also ibid at 19 and 110.
[561] Section 2(n) of *Electronic Communications Act 2005*, South Africa, Government Gazette, April 18, 2006. http://www.icasa.org.za/Portals/0/Acts/Electronic%20Communications%20Act/Electronic%20Communications%20Act,%202005.pdf
[562] Lisa Thornton, et al., eds., *Telecommunications Law in South Africa*, STE Publishers, 2006, 110.
[563] Lisa Thornton, et al., eds., *Telecommunications Law in South Africa*, STE Publishers, 2006, 111-112.
[564] http://www.fcc.gov/what-we-do
[565] See, for example, Erwin G. Krasnow and Jack N. Goodman, "Public Interest Standard: The Search for the Holy Grail," *Federal Communications Law Journal*, Vol. 50, 1997-1998, 605.

acknowledge the agency's expertise in making economic as well as technical decisions in the field of electronic communications.[566]

In the UK, the powers of implementing telecommunications policies are vested with the *Office of Communications* (Ofcom) which is an independent regulator and competition authority for the UK electronic communications industries.[567] Section 3(1) of the *Communications Act 2003*, which refers to the *General Duties of Ofcom*, establishes that the primary goal of the regulator when carrying out its functions is to promote the interests of consumers of the electronic communications and where necessary ensure competition in the regulated markets.[568]

The nature of regulatory policies and decisions in telecommunications is such that the regulators are primarily seen as promoters of the 'public interest'. In all three jurisdictions, the regulatory authorities have similar mandates and while overseeing the electronic communications market have to put the consumers' interests to the first place. The mandate also provides these institutions with certain powers, allowing them efficiently to oversee the regulated industries. For example, the UK and the other members of the European Union are bound to ensure effective provision of universal services to the public. In the EU, the *Universal Service Directive* promotes consumer interests by obliging member states to ensure "a minimum level of availability and affordability of basic electronic communications services and … a set of basic rights for users and consumers of electronic communications services."[569] In order to ensure wide access to telephone services, under Article 6 of the

[566] Daniel Brenner, "Research in Government Agency Decisions: Observations about the FCC," *International Journal of Communication*, Vol. 2, 2008, 429, http://ijoc.org/ojs/index.php/ijoc/article/download/330/166
[567] http://www.ofcom.org.uk/
[568] Section 3(1) of *Communications Act 2003*, c. 21, http://www.legislation.gov.uk/ukpga/2003/21/section/3
[569] Nikos Th. Nikolinakos, *EU Competition Law and Regulation in the Converging Telecommunications, Media and IT Sectors*, Kluwer Law International, 2006, 179.

Directive a national regulator could require the building of as many public pay telephones as it considers necessary in order to satisfy the demand from the consumers.[570]

In the US, provision of public phone services to everybody requires cooperation between several companies involved in the process, such as payphone service providers (PSPs), facilities-based phone companies as well as resellers of phone services.[571] Due to the technological specificity, the actual providers of certain services might not be the direct economic beneficiaries. It is then the regulator's responsibility to design such a compensation scheme between different companies involved in the provision of such services which would ensure competition between the companies, and guarantee public access to the payphones.

Another example where regulatory authorities can exercise their powers over the telecommunications service providers in order to ensure interests of consumers is a number portability. Number portability means that consumers of mobile or fixed telephone services may change the provider of such services while still retaining their number.[572] The general idea behind the opportunity for a consumer to change provider while preserving their number is to promote consumer choice.[573] Here, again, the regulatory authority can require phone companies to use their resources in order to facilitate such processes.

Given that the functions of the telecoms regulators are to promote competition and protect consumers, the underlying rationale for such regulation seems to be the

570 Article 6 of the Universal Service Directive, *Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on Universal service and users' rights relating to electronic communications networks and services*, OJ L 108, 24.4.2002, 51, (Universal Service Directive) (as amended by the Directive 2009/136/EC, OJ L 337, 18.12.2009, 11)

571 See, for example, *Report and Order in the Matter of The Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, the Federal Communications Commission, October 3, 2003, http://www.1800afta.org/FCC_Payphone_Compensation_Order.pdf

572 See, for example, Article 30 of *Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws*, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32009L0136:EN:NOT or definition provided on the website of Ofcom, *Number Portability information and useful links*: http://stakeholders.ofcom.org.uk/telecoms/numbering/guidance-tele-no/number-portability-info/

573 http://stakeholders.ofcom.org.uk/telecoms/numbering/guidance-tele-no/number-portability-info/

guardianship of public interest. This was also the purpose for establishing consumer representative panels within the telecommunications regulatory authorities. The idea is that through participation in such panels consumer representatives could strengthen their positions in the regulatory decision-making process.[574]

For instance, in the UK (in addition to regular consultations with consumers as required by the EU directives), the British *Communications Act 2003* instructs Ofcom to hold consultations with the so-called Consumer Panel.[575] The Consumer Panel advises the regulator as well as the government on how to ensure that consumer interests are afforded the best protection in the technologically specific and rapidly developing field. [576] Also in the US, there is a consumer representative body – the Consumer Advisory Committee – established in the Federal Communications Commission.[577]

But how much protection for the public interest regulatory authorities could ensure and should it be a primary concern or just one of the concerns?

There is no doubt that protection of public interest (and consumer protection in particular) deserves proper attention from the government institutions such as telecommunications regulatory authorities. But there are scholars, who tend to consider the 'public interest' theory not entirely exhaustive. For example, Miller and Nikolas Rose suggest that the problems with which the governments are required to deal nowadays necessitate consideration of various interests. According to them, the 'modern experience of power' consists of various 'complexes', which are comprised of various individuals, with different

[574] See, for example, Ian Lloyd, *Cyber Law in the United Kingdom*, Kluwer Law International, 2010, 35-36, and Michael A. Crew and David Parker, *International Handbook on Economic Regulation*, Edward Elgar Publishing, 212-213.
[575] Section 16 of *Communications Act 2003*, c. 21, (the UK), http://www.legislation.gov.uk/ukpga/2003/21/data.pdf
[576] Communications Consumer Panel, About Us, http://www.communicationsconsumerpanel.org.uk/smartweb/about-us/about-us
[577] http://www.fcc.gov/encyclopedia/consumer-advisory-committee See also http://www.fcc.gov/consumers

knowledge and experience, as well as of various processes leading to certain judgments.[578] Concerning the regulatory area of telecommunications, other scholars suggest that regulatory authorities should be seen as 'independent referees between various interests,'[579] rather than guarantors of solely public interest.

The analysis of the following cases concerning public consultation on telecommunication matters illustrate that sometimes the public interest could not be served without proper consideration of private interests at stake.

3.2. Consultative Obligations of Telecommunications Regulatory Authorities

In performance of their functions telecommunications regulatory authorities are subject to the procedural requirements, including the duty to consult. The requirements for the telecommunications regulators concerning the opportunities for participation are set under the general procedural acts as well as under the specific laws.

For instance, in South Africa, consultations are required at ministerial as well as at regulatory levels. Under the *Electronic Communications Act 2005*, the Minister of Communications, before issuing a policy concerning electronic communications, is required to consult the regulator as well as all interested individuals.[580] The same Act obliges South Africa's regulator in the field to consult with interested individuals, whenever it intends to issue a regulation under the *Electronic Communications Act 2005*.[581] Section 4(4) of the Act

[578] Peter Miller and Nikolas Rose, *Governing the Present: Administering Economic, Social and Personal Life*, Polity Press, 2008, 200.
[579] INDIREG, Preliminary Final Report, Indicators for independence and efficient functioning of audiovisual media services regulatory bodies for the purpose of enforcing the rules in the AVMS Directive, SMART 2009/001, by Hans Bredow Institute for Media Research et al., January, 2011, 14, (citing A. Baudrier, *Independent Regulation and Telecommunications Performance in Developing Countries*, Berkley, 2001, Annual ISNIE Conference)
[580] Chapter 2 "Policy and Regulations," Ministerial Policies and Policy Directions, Section 3(5) of the *Electronic Communications Act 2005*, Government Gazette, 18 April 2006, (South Africa), http://www.icasa.org.za/tabid/86/Default.aspx
[581] Section 4(4) "Regulations by Authority" of the *Electronic Communications Act 2005*, Government Gazette, 18 April 2006, (South Africa), http://www.icasa.org.za/tabid/86/Default.aspx

obliges ICASA to publish proposed regulations and to allow interested parties to make written comments on it:

> "The Authority must, not less than thirty (30) days before any regulation is made, publish such regulation in the Gazette, together with a notice:
>
> (a) declaring the Authority's intention to make that regulation; and
>
> (b) inviting interested parties to make written representations on the regulation."[582]

In South Africa, the policy concerning the regulation of communications service providers is still evolving, therefore the clarity and certainty of laws is a huge concern.[583] One of the main expectations in South Africa concerning broad involvement of various interests in policy and decision-making is the potential of consultative mechanisms to contribute to the building of a comprehensive regulatory framework, which would serve as a guarantee of competition in the market. Public consultation is expected to enable the involvement of a variety of stakeholders as well as the general public in the process of building the legal framework on communications regulation and is of major importance in South Africa, where such framework is still developing.

In the UK, there is no single source of consultation requirements. Ofcom is subject to the common law requirements concerning consultative obligations; also in 2007 Ofcom adopted its own guidelines on consultation processes.[584] Moreover, the UK's *Communications Act 2003* implements the *Telecommunications Package* of the EU, which sets more specific duties regarding public participation.[585] In the EU, obligations to consult for national regulatory authorities are established under the acts comprising the *Telecommunications Package*. For instance, the Framework Directive, which is a part of the

[582] Section 4(4) "Regulations by Authority" of the *Electronic Communications Act 2005,* (South Africa), http://www.icasa.org.za/tabid/86/Default.aspx
[583] Lerato Mokgosi, Chapter 4 "The Telecommunications Regulators," in Lisa Thornton, et al., eds., *Telecommunications Law in South Africa*, STE Publishers, 2006, 126, http://www.idrc.ca/uploads/user-S/1161960454104TelecRegul.pdf
[584] *How will Ofcom Consult?* Ofcom, Home, Stakeholders, Consultations. http://stakeholders.ofcom.org.uk/consultations/how-will-ofcom-consult
[585] *Communications Act 2003*, c. 21, (the UK), http://www.legislation.gov.uk/ukpga/2003/21/data.pdf

Telecommunications Package, emphasizes the importance of regulatory authorities consulting 'all interested parties' and taking into account their inputs before final decisions are made."[586] Article 6 of the Framework Directive on "Consultation and Transparency Mechanism" requires national regulatory authorities to consult interested individuals on their proposed regulations, when the proposed drafts are likely to affect the telecommunications market.[587] As explained earlier, the regulatory decisions are likely to affect the market where they place certain obligations on the providers of electronic communications services. Moreover, in order to preserve the 'single market' of the EU, the regulators are also required to consult their counterparts from other member states as well as the Commission: "[i]n order to ensure that decisions at national level do not have an adverse effect on the single market or other Treaty objectives, national regulatory authorities should also notify certain draft decisions to the Commission and other national regulatory authorities to give them the opportunity to comment."[588] Procedures for consultations as required by Articles 6 and 7 of the *Framework Directive* are established under Section 48 of the *Communications Act 2003*.[589] Section 48 sets the consultation procedure which Ofcom is obliged to follow. It leaves broad discretion with the regulator concerning the particular process of consultation, but it details some of the procedural requirements. In the UK, Ofcom is required in addition to the notification of its

[586] Recital (15) of the Framework Directive, *Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a Common Regulatory Framework for Electronic Communications Networks and Services* (Framework Directive), OJ L 108, 24.4.2002, 33 (emphasis added) http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32002L0021:EN:NOT

[587] Article 6 of the Framework Directive, *Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a Common Regulatory Framework for Electronic Communications Networks and Services* (Framework Directive), OJ L 108, 24.4.2002, 33–50 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32002L0021:EN:NOT

[588] Recital (15) of the Framework Directive, *Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a Common Regulatory Framework for Electronic Communications Networks and Services* (Framework Directive), OJ L 108, 24.4.2002, 33–50 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32002L0021:EN:NOT The obligation of such consultations and cooperation is established under Article 7 of the Framework Directive. Ibid.

[589] Section 48 of the *Communications Act 2003*, c. 21, (the UK), http://www.legislation.gov.uk/ukpga/2003/21/data.pdf For an account of the UK's history of telecommunications regulation see, for example, Clare Hall et al., *Telecommunications Regulation. Culture, Chaos and Interdependence Inside the Regulatory Process*, Routledge, 2000, 15-30 and 82-106.

proposal to provide the reasons which led to its adoption.[590] In the US, the FCC as an independent agency is subject to the general procedural requirements of the APA. In addition to the notice and comment requirements of the APA, the FCC has to comply with the *Telecommunications Act 1996*, [591] which however does not specify the notice and comment obligations of the FCC.

Although not explicit under any of the legal sources mentioned above, it seems that the main expectation behind the procedural requirements concerning consultative mechanisms is that the opportunities for public participation would aid the regulators in their functions of promoting public interest by ensuring consumer protection through securing fair competition between electronic communications service providers. The following analysis of case law reveals that the participants of the consultative processes as well as the courts tend to assign a more sophisticated role for the public consultation concerning matters of electronic communications, such as providing the regulatory authorities with additional expert knowledge concerning the solutions to the occurring problems.

3.3. Public Consultation as a Means for Furthering Telecommunications Regulatory Policies

Telecommunications regulatory policies are complex in the way that they address technological matters usually through regulatory agency's intervention into the free market. A regulatory agency needs to address various interests which could be affected by its policy (such as the interests of phone companies, consumers or other government

[590] Paragraph (2)(c) of the Section 48 of the *Communications Act 2003*, c. 21, (the UK), http://www.legislation.gov.uk/ukpga/2003/21/data.pdf
[591] *Telecommunications Act of 1996*, Pub. L. No. 104-104, 110 Stat. 56 (the US) http://www.fcc.gov/Reports/tcom1996.pdf See, for example, Sec 253 (d) "Removal of Barriers to Entry" or Sec 254(a)(1) "Universal Service," of the *Telecommunications Act of 1996*

institutions). Public consultation process provides the agency with information which is crucial in addressing the competing interests. Through consultative processes not only the relevant issues get problematized[592] but also solutions emerge. The following example from the US provides additional insight into how consultative processes could reveal the scale and complexity of problems at the center of telecommunications policies as well as provide suggestions for solving them.

In April 2011, the United States *Federal Communications Commission* (FCC) announced a notice and comment process on the issue of accelerating broadband deployment throughout the country.[593] Given the Commission's mandate from the Congress to encourage timely development of the infrastructure needed to improve internet coverage, the agency sought views and opinions from a variety of stakeholders before taking the initiative of changing policies concerning rights of way and wireless facilities siting requirements.[594] One of the main concerns behind the proposed initiatives was that the current process of ensuring internet access to Americans was too slow mainly due to the costs in terms of time and money as incurred by internet service providers.[595] In practice, broadband deployment means that broadband service providers have to deal with a variety of legal issues as they seek to deploy the necessary equipment (such as antennas or cables) on or adjacent to the already existing infrastructure (such as roads, towers or roof tops), ownership rights of which belong either to

[592] Jurgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, MIT Press, 1996, 359.
[593] Notice of Inquiry in the matter of Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting, April 7, 2011, *Federal Communications Commission*, 1, http://fjallfoss.fcc.gov/ecfs/document/view?id=7021686903
[594] Notice of Inquiry in the matter of Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting, April 7, 2011, *Federal Communications Commission*, Para 2, p. 1, http://fjallfoss.fcc.gov/ecfs/document/view?id=7021686903
[595] Notice of Inquiry in the matter of Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting, April 7, 2011, *Federal Communications Commission*, Para 2, p. 1, http://fjallfoss.fcc.gov/ecfs/document/view?id=7021686903

private, federal, state or municipal actors.[596] According to the FCC, the deployment is complicated because of the competition between various interests involved and the differences in legal frameworks existing in each state.[597] Therefore, in April, 2011 the agency issued a notice of inquiry. While the notice identified some of the challenges faced by broadband service providers, it did not include any solutions to the existing problems, instead it invited various stakeholders to share best practices, so that later the agency could come up with a plan concerning potential solutions.[598] Thus, the FCC had neither a clear, nor a firm position on how to address the obstacles to a smooth broadband deployment.

The notice and comment procedure received tremendous attention from other government institutions, regulated industry and consumer representatives. All participants offered some useful insights into the problems proclaimed by the FCC, also they revealed several other issues behind the impaired process of broadband development.[599] The FCC was already aware of the problems that broadband service providers were facing when seeking to site their infrastructure on municipal and federal properties.[600] However, it was lacking a more specific knowledge as to the substance of the problems and possible solutions. The notice and comment procedure revealed that one of the main obstacles concerning siting of the broadband infrastructure on federal property was related to the work of land management

[596] Notice of Inquiry in the matter of Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting, April 7, 2011, *Federal Communications Commission*, Para 3, p. 2, http://fjallfoss.fcc.gov/ecfs/document/view?id=7021686903

[597] Notice of Inquiry in the matter of Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting, April 7, 2011, *Federal Communications Commission*, Para 4, p. 2, http://fjallfoss.fcc.gov/ecfs/document/view?id=7021686903

[598] Notice of Inquiry in the matter of Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting, April 7, 2011, *Federal Communications Commission*, Para 9, p. 5, http://fjallfoss.fcc.gov/ecfs/document/view?id=7021686903

[599] Notice of Inquiry in the matter of Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting, April 7, 2011, *Federal Communications Commission*, http://fjallfoss.fcc.gov/ecfs/comment/view?id=6016823093

[600] Notice of Inquiry in the matter of Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting, April 7, 2011, *Federal Communications Commission*, Para 5, p. 3, http://fjallfoss.fcc.gov/ecfs/comment/view?id=6016823093

agencies.[601] In addition, it is important to note that the issue was previously raised by the FCC's Technical Advisory Committee (TAC),[602] which recommended the agency to request the President to adopt a relevant Executive Order.[603] However, the process was expedited only after the agency received numerous comments dealing with these concerns. In June 2011, the President signed an Executive Order on Accelerating Broadband Infrastructure Deployment.[604]

To sum up, the success of consultative process seems to rest on the opportunities for interaction by different stakeholders. But what are the conditions and legal structures which could facilitate such interaction between the agency and different stakeholders? Another example from the US, illustrates that a meaningful interaction between the agency and the participants of public consultation is dependent on 'a genuine interchange' of information between both sides.

In the *American Radio Relay League v. Federal Communications Commission (FCC)*[605] case, the agency proposed a rule concerning introduction of new technology for access to high speed internet, called the *Access Broadband over Power Line* (Access BPL). This new technology was supposed to serve consumer interests of providing better access to internet services and to promote competition between manufacturers of different technologies used for internet access.[606] The biggest downside of this new technology, which uses radio

[601] See, for example, a comment by *American Tower Corporation*, September 30, 2011, p. 12, http://fjallfoss.fcc.gov/ecfs/comment/view?id=6016843714 or a comment by *Centurylink*, September 30, 2011, fn 34, 14, 23, http://fjallfoss.fcc.gov/ecfs/comment/view?id=6016843769

[602] http://www.fcc.gov/encyclopedia/technology-advisory-council

[603] *Memorandum, Technical Advisory Council Chairman's Report*, Federal Communications Commission, April 22, 2011, 2, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-306065A1.pdf

[604] *Executive Order, Accelerating Broadband Infrastructure Deployment*, June 14, 2012, The White House, http://www.whitehouse.gov/the-press-office/2012/06/14/executive-order-accelerating-broadband-infrastructure-deployment

[605] *American Radio Relay League v Federal Communications Commission (FCC)*, 524 F.3d 227, 390 U.S.App.D.C. 34

[606] *American Radio Relay League v Federal Communications Commission (FCC)*, 524 F.3d 227, 390 U.S.App.D.C. 34, 245, Justice Kavanaugh (concurring in part and dissenting in part)

spectrum, was its potential to interfere with other users of the spectrum, such as radio operators.

The general approach by the Federal Communications Commission concerning spectrum interference is, firstly, to require operators not to cause 'harmful interference,' and, secondly, to terminate operation of the device if it causes such interference.[607] However, usually some interference to the radio frequency of different devices are allowed, and it is the role of national regulators to ensure that such interferences have only a minimal affect on other industry actors as well as consumers. Assessment of what constitutes a harmful interference is at the center of such regulation.

Under its proposed rule, concerning the Access BPL devices, the FCC set standards for certification and placed limits on frequency emissions. The agency stated that the interference, even if caused by these devices, would not reach the level of 'harmful' interference.[608] Accordingly, the operators of Access BPL technology would not be required to terminate usage of their devices, where such interference occurs. Amateur radio operators were among those most likely to be affected by interferences caused by Access BPL. During the notice and comment period, *American Radio Relay League* (herein, ARRL or the League),[609] which is the largest association of amateur radio operators in the US, sought disclosure under the *Freedom of Information Act*[610] of the agency's materials, which it relied upon in determining the potential of 'low' interference by Access BPL systems in its proposed regulation. Eventually, the agency disclosed some of the documents but in a redacted form and only after the promulgation of the final rule. The League challenged the adopted rule on several grounds, including the inadequacy of the notice, since the agency

[607] *American Radio Relay League v Federal Communications Commission (FCC)*, 524 F.3d 227, 390 U.S.App.D.C. 34, 231.
[608] *American Radio Relay League v Federal Communications Commission (FCC)*, 524 F.3d 227, 390 U.S.App.D.C. 34, 231, 234.
[609] http://www.arrl.org/about-arrl
[610] *The Freedom of Information Act*, 5 U.S.C. §552, as Amended by Public Law No. 110-175, 121 Stat. 2524, and Public Law No. 111-83, §564, 123 Stat. 2142, 2184, http://www.justice.gov/oip/amended-foia-redlined-2010.pdf

failed to fully disclose the studies it relied on. The court held that the purpose of notice and comment procedure was to improve the agency's rulemaking process, whereby consultees are able to "point out where … information is erroneous or where the agency may be drawing improper conclusions from it."[611] According to the court, public participation would be meaningful if 'a genuine interchange' of information between the agency and the interested parties occurs, meaning that the agency is not allowed "to play hunt the peanut with technical information, hiding or disguising the information that it employs."[612]

As to the FCC's argument that the studies were internal documents exempt from the disclosure requirement, the court held that once the agency relied on them in its rulemaking process and made the redacted versions available to the public, they could not be treated as entirely internal documents and should be disclosed in full.[613] Particularly, the court relied on the fact that excluded sections were likely to contain contradictory information, which could cast doubt over the agency's choice of methodologies.[614] According to the court, while the agency is free to choose which data from its studies to rely on, during the notice and comment procedure it is not free to withhold information which was the basis for its decision.[615] The *American Radio Relay League* case illustrates the links which exist between the two requirements for decision-makers to provide notice and other information to the public regarding proposed decisions and to provide opportunities for interested parties to make submissions on the proposals.

[611] *American Radio Relay League v Federal Communications Commission (FCC)*, 524 F.3d 227, 390 U.S.App.D.C. 34, 236 (citing *Nat'l Ass'n of Regulatory Util. Comm'rs* ("*NARUC* ") *v. FCC*, 737 F.2d 1095, 1121 (D.C.Cir.1984))
[612] *American Radio Relay League v Federal Communications Commission (FCC)*, 524 F.3d 227, 390 U.S.App.D.C. 34, 237.
[613] *American Radio Relay League v Federal Communications Commission (FCC)*, 524 F.3d 227, 390 U.S.App.D.C. 34, 239 (citing *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 161, 95 S.Ct. 1504, 44 L.Ed.2d 29 (1975), and *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C.Cir.1980))
[614] *American Radio Relay League v Federal Communications Commission (FCC)*, 524 F.3d 227, 390 U.S.App.D.C. 34, 239.
[615] *American Radio Relay League v Federal Communications Commission (FCC)*, 524 F.3d 227, 390 U.S.App.D.C. 34, 239.

Firstly, in order to provide adequate notice, an agency has to reveal the information it considered during the rulemaking process and not only that on which it relied when reaching its decision. Secondly, the inadequacy of notice may also impinge on the commenting process and prevent meaningful comments, which (had they been given) could in the end improve the final decision. Therefore, only a full disclosure of materials as requested by the consultees could result in the interchange of the information between the agency and the participants which is 'genuine' as required by the court.

A similar approach, which emphasizes the importance of exchange of information for the meaningfulness of participation, was adopted by the United Kingdom Competition Appeal Tribunal (the Tribunal)[616] in a case concerning consumer interests to retain their phone number while switching to a different phone service provider (a service otherwise known as number portability).

In 2007, Ofcom sought to change the number portability system in order to ensure better protection for those customers who chose to retain their phone numbers but switch phone service providers.[617] The proposal suggested changing the system of porting numbers in such a way that after switching providers, customers would not be dependent anymore on the existence of their old operator.[618] This concern was based on an incident when one of the service providers went bankrupt, and those customers who had ported their numbers to other providers were still not able to make or receive any calls.[619] While the changes would have been beneficial for the customers, they required investment on the side of

[616] The United Kingdom Competition Appeal Tribunal, Home, http://www.catribunal.org.uk/
[617] *Arrangements for Porting Phone Numbers when Customers Switch Supplier*, A Review of General Condition 18, Office of Communications, 17 July 2007, http://stakeholders.ofcom.org.uk/binaries/consultations/gc18review/summary/numberportability.pdf
[618] *Arrangements for Porting Phone Numbers when Customers Switch Supplier*, A Review of General Condition 18, Office of Communications, 17 July 2007, 1, http://stakeholders.ofcom.org.uk/binaries/consultations/gc18review/summary/numberportability.pdf See also David Meyer, "Ofcom Changes Rules on Number Porting," 18 July 2007, http://www.zdnet.co.uk/news/networking/2007/07/18/ofcom-changes-rules-on-number-porting-39288098/ See also, *Vodafone v Office of Communications (Ofcom)*, Competition Appeal Tribunal, 18 September 2008, 98.
[619] End of the Line for Atlantic Customers, *BBC News*, 2 January 2002, http://news.bbc.co.uk/2/hi/uk_news/scotland/1738232.stm

service providers, who would have to create and maintain a database of all the numbers. Unsatisfied with such proposals, *Vodafone* and other *Mobile Network Operators* (MNOs) in the country, whose financial interests would have been the most affected challenged the decision by Ofcom. In *Vodafone v Office of Communications (Ofcom)*[620] case, the petitioners argued that Ofcom did not follow the correct procedures in its decision-making process.

According to the petitioners, Ofcom's estimation as to the costs of the transfer from one model to another was not accurate and during the consultation process the regulator failed to clarify how those estimates were made. Also the petitioners argued that Ofcom failed to involve 'all interested persons' and that the whole process of consultation was not transparent as required under the *Communications Act 2003*.[621] According to the petitioners, Ofcom did not provide sufficient information concerning its cost-benefit analysis related to the introduction of new porting model, lack of such information also prevented the MNOs from assessing the likely costs they would incur and making relevant comments in the end.[622]

In response to the petitioners' claim, Ofcom held that inaccuracies in the cost-benefit analysis arose because of a failure by the MNOs and Vodafone to cooperate with the institution and to provide relevant information, which would be necessary to assess the costs of proposed changes.[623] Moreover, according to Ofcom, the petitioners have brought the appeal in order to delay the process of changing the existing porting system.[624]

The Tribunal highlighted that the purpose of the consultation was to invite opinions and information from the industry, which would allow the regulator to assess the

[620] *Vodafone v Office of Communications (Ofcom)*, Competition Appeal Tribunal, 18 September 2008
[621] *Vodafone v Office of Communications (Ofcom)*, Competition Appeal Tribunal, 18 September 2008, 91; See also, Sections 47 and 49 of the *Communications Act 2003*, c. 21, (the UK), http://www.legislation.gov.uk/ukpga/2003/21/data.pdf
[622] *Vodafone v Office of Communications (Ofcom)*, Competition Appeal Tribunal, 18 September 2008, 92.
[623] *Vodafone v Office of Communications (Ofcom)*, Competition Appeal Tribunal, 18 September 2008, 96.
[624] Interestingly, the concern that consultees may use consultation processes to delay issuance of regulations has been retained in Ofcom's Annual Report of 2009/10: "[w]here stakeholders submit responses after a consultation closes we are still required to have due regard to their contents. While there are sometimes legitimate reasons for late submission, we have noted a tendency on the part of some stakeholders to use late submission for what appear to be tactical purposes." Ofcom, *Annual Report and Accounts*, for the period 1 April 2009 to 31 March 2010, 38, http://www.ofcom.org.uk/files/2010/06/annplan1011.pdf

difficulties that the industry could face if the new approach of recipient-led porting model was adopted.[625] The Tribunal found that the failure by Ofcom to provide sufficient information concerning its cost-benefit analysis impinged on Vodafone's ability to make relevant comments and this way to contribute to the quality of regulator's assessment.[626]

Generally, it is within the discretion of the decision-maker to design the structure of consultation (including the decision as to how much information should be revealed), where the purpose of consultation is to receive information from the interested parties. However, in this case, the Tribunal, relying on the judicially developed criteria of consultation, held that Ofcom had to "allow stakeholders fully to provide intelligent and realistic responses to the questions asked of them,"[627] for instance, by disclosing some of the technical information as requested by Vodafone.[628]

In the end, the Tribunal remitted the matter back to the regulator for consideration, instructing Ofcom to hold new consultations. As of February 2012, the donor led system is still in place in the UK. However, there are continuing consultations held on the issue and the final decision is expected once the more general issue of 'consumer switching' between communications providers (broadband and pay TV providers among others) is settled.[629]

The case reveals the approach by the Tribunal that consultative process should serve as a medium where relevant information is transferred from the regulator to the regulatees and vice versa. The information held by Vodafone and other operators was

[625] *Vodafone v Office of Communications (Ofcom)*, Competition Appeal Tribunal, 18 September 2008, 94.
[626] *Vodafone v Office of Communications (Ofcom)*, Competition Appeal Tribunal, 18 September 2008, 95-97.
[627] *Vodafone v Office of Communications (Ofcom)*, Competition Appeal Tribunal, 18 September 2008, 95
[628] *Vodafone v Office of Communications (Ofcom)*, Competition Appeal Tribunal, 18 September 2008, 91-97
[629] Michael House, *Ofcom Needs to Act Quickly on Number Porting Rules: Three*, 9 February 2012, http://www.mobilenewscwp.co.uk/2012/02/ofcom-needs-to-act-quickly-on-number-porting-rues-three/ See also, Paras 2.28-29 of Ofcom, Changes to the Mobile Number Porting Process, Including notification of a proposed modification to General Condition 18, Statement and Consultation, 1 April 2010, http://stakeholders.ofcom.org.uk/binaries/consultations/mnp/summary/mnp_condoc.pdf and Strategic review of consumer switching, http://stakeholders.ofcom.org.uk/binaries/consultations/consumer-switching/summary/switching.pdf

necessary for the regulatory authority in order to properly assess the costs which could be incurred by phone companies after changes affecting their way of performance are introduced.

Also in the UK, certain statutory limitations concerning public participation exist, which limit Ofcom's discretion in implementing telecommunications policy. For example, the procedure which Ofcom should follow when changing the conditions of the licenses is set in Section 3(4) of the British *Broadcasting Act 1990.*[630] The Act permits Ofcom to vary a license's conditions concerning its period only after obtaining consent from the license holder.[631] In the *Data Broadcasting International v Office of Communications (Ofcom)*[632] case, the DBI petitioned the court and challenged the regulator's failure to conform with the statutory duty and to seek consent of licensees before terminating broadcasting of their stations as a part of switchover process.[633]

The demand by actors within the industry for more frequencies is mainly increasing due to the development of new technologies, such as mobile 4G networks. Different strategies for the optimal usage of spectrum have now become available after the digital switchover, whereby more slots of frequency are being freed for the benefit of some and the detriment of other business actors. The British government's policy concerning the switchover from analogue to digital broadcasting was open for consideration by the public since 1995.[634] In 2004, Ofcom, as an authorized body to implement the switchover, informed the holders of spectrum licenses about the upcoming changes and that it would seek to change

[630] S3(4)(a) of the *British Broadcasting Act*, 1990, http://www.legislation.gov.uk/ukpga/1990/42/section/3
[631] "Ofcom may vary a licence by a notice served on the licence holder if (a) in the case of a variation of the period for which the licence is to continue in force, the licence holder consents," S3(4)(a) of the *British Broadcasting Act*, 1990, http://www.legislation.gov.uk/ukpga/1990/42/section/3
[632] *Data Broadcasting International v Office of Communications (Ofcom)*, [2010] EWHC 1243 (Admin), 13 May 2010
[633] *Data Broadcasting International v Office of Communications (Ofcom)*, [2010] EWHC 1243 (Admin), 13 May 2010
[634] *Data Broadcasting International v Office of Communications (Ofcom)*, [2010] EWHC 1243 (Admin), 13 May 2010, 15.

conditions of some licenses and terminate other licenses.[635] Among the notified license holders was *Data Broadcasting International (DBI)*, a broadcasting service provider, whose business entirely depended on the usage of analogue spectrum and changes to the licenses would have been detrimental to its activities. The DBI objected Ofcom's proposal to change these licenses as part of the switchover from analogue to digital broadcasting plan. In 2006, Ofcom notified the DBI about proposed variations to their licenses but after receiving their feedback agreed to defer the changes.[636] Between 2008 and 2009 after exchange of written communications between Ofcom and the petitioners, but without consent from the latter, the regulator changed petitioners' licenses by removing certain stations from the licensed area.[637]

Ofcom argued that it was not required to seek consent, since it altered the area of broadcasting rather than the expiry date of the license.[638] According to the petitioners, distinctions between a license's conditions concerning the license period and licensed area is not clear cut, and one cannot be changed without having an effect on the other.[639] The main issue is the decrease in broadcasting area, therefore the petitioners maintained that when the coverage is reduced to zero, the time limit of the license has no practical effect.[640] According to them, given the 'dramatic' nature of the variations of the petitioners' licensed broadcasting area, the changes affected the period of licenses and, therefore, the regulator should have sought licensees' consent.[641] Another argument pursued by the petitioners was that by enacting section 3(4)(a) of the *Broadcasting Act 1990* and requiring Ofcom to seek consent

[635] *Data Broadcasting International v Office of Communications (Ofcom)*, [2010] EWHC 1243 (Admin), 13 May 2010, 31.
[636] *Data Broadcasting International v Office of Communications (Ofcom)*, [2010] EWHC 1243 (Admin), 13 May 2010, 31
[637] *Data Broadcasting International v Office of Communications (Ofcom)*, [2010] EWHC 1243 (Admin), 13 May 2010, 33-35
[638] *Data Broadcasting International v Office of Communications (Ofcom)*, [2010] EWHC 1243 (Admin), 13 May 2010, 1.
[639] *Data Broadcasting International v Office of Communications (Ofcom)*, [2010] EWHC 1243 (Admin), 13 May 2010, 58
[640] "[a] licence with zero coverage cannot remain a license valid for the period of its original duration," in *Data Broadcasting International v Office of Communications (Ofcom)*, [2010] EWHC 1243 (Admin), 13 May 2010, 58
[641] *Data Broadcasting International v Office of Communications (Ofcom)*, [2010] EWHC 1243 (Admin), 13 May 2010, 61

when altering the period of licenses, Parliament intended to provide protection for licensees.[642]

The Court held that the *Broadcasting Act 1990* required Ofcom to obtain consent only concerning the change of license period, whereas, in this case the change affected licensed area instead.[643] Therefore, Ofcom was not obliged to seek the consent of the petitioners. The Court noted that even if the licenses were not changed, the petitioners would not be able to broadcast in areas where the switchover took place. Moreover, the Court maintained that the variations made by Ofcom were in line with the statutory requirement of furthering public interest in terms of ensuring efficient usage of the spectrum.[644] According to the Court, the interests of the licensees had not been overlooked either, since before the license was renewed its fee was reduced, taking into account the costs of the forthcoming switchover.[645] Indeed during the consultation process the petitioners had a chance to put their case forward concerning the costs they would incur due to the changes in the spectrum policy. Consequently, Ofcom took into consideration these costs and introduced compensatory mechanisms to partly cover the costs of the DBI.

To sum up, both cases from the US and the UK confirm that public consultation could serve a means for furthering telecommunications regulatory policies. They also illustrate that a necessary precondition is to design and implement such a consultative process which would enable exchange of information between the institution and the participants. The examined cases reveal that the regulatory authorities enjoy a wide discretion in choosing the particular manner in which to consult. Also they illustrate how this discretion could be used to limit the opportunities for the likely affected parties' interests to participate in rulemaking

[642] *Data Broadcasting International v Office of Communications (Ofcom)*, [2010] EWHC 1243 (Admin), 13 May 2010, 62
[643] *Data Broadcasting International v Office of Communications (Ofcom)*, [2010] EWHC 1243 (Admin), 13 May 2010, 71-80
[644] *Data Broadcasting International v Office of Communications (Ofcom)*, [2010] EWHC 1243 (Admin), 13 May 2010, 76
[645] *Data Broadcasting International v Office of Communications (Ofcom)*, [2010] EWHC 1243 (Admin), 13 May 2010, 76

processes. In order to determine whether this discretion was not misused the courts would insist that consultative mechanisms be designed in such a way as to further exchange of information between the agency and the participants. As the cases illustrate even though the communications regulators are the primary source of expertise and the guarantor of consumer interests, their functions cannot be carried out properly without the input from industry actors, who have to bear the regulatory burdens.

3.4. Taming the Broad Discretion of the Telecommunications Regulatory Authorities with Procedural Fairness and the Strictness of the Rules

Although some requirements for the regulators concerning public consultation are more specific in telecommunications area, generally the agencies are subject to very similar obligations like the rest of the decision-makers. Also they enjoy a wide in designing consultative mechanisms, which, as described earlier, could be used to limit the opportunities for a meaningful participation.

One way of limiting such discretion is through invoking procedural fairness, which is one of the concerns behind the consultative obligations in telecommunications sector. As examined in Chapter 2, in the context of consultative obligations, procedural fairness requires government authorities to consult with those likely to be affected by their proposed decisions or policies.

It is worth mentioning that regulation in telecommunications sector is different from other sectors in that usually the immediate and most direct effect of regulatory policies and decisions is primarily experienced by the actors from the industry and not individuals who are users of telecommunications services. For instance, where the policies and decisions

are aimed at promoting competition the most affected ones are those who benefit from the lack of competition.

The following example from the US illustrates how the courts in the US invoke procedural fairness to enforce the requirement of 'adequate notice'. In the *MCI Telecommunications v. Federal Communications Commission (FCC)*[646] case, the issue arose as to whether the petitioner, one of the biggest long distance phone companies at that time, and other long distance companies had been adequately informed about the regulator's decision to change the rules of access by long distance companies to the infrastructure and services of local phone companies. The proposed changes concerning access were a part of an unbundling process[647] aimed at increasing competition in the market.[648]

In general, the unbundling requirements for local phone companies affected long distance phone companies as well as *Enhanced Service Providers* (ESPs).[649] The Federal Communications Commission sought to regulate both types of providers and their access concerning local phone companies. However, instead of issuing two separate notices for its proposals, the Commission adopted a notice concerning only the rules for ESPs, and used a footnote in the same notice to establish that similar requirements will be adopted concerning the long distance service providers.[650]

On substantive grounds the petitioner opposed the suggested changes mainly because of the inconveniences and costs they would incur when changing the payment

[646] *MCI Telecommunications v Federal Communications Commission (FCC)*, 57 F.3d 1136, 313 U.S.App.D.C. 51

[647] For a description of unbundling processes see, for example, David S. Konczal "Telephone – Obscuring Notice through Footnotes in FCC Rulemaking Procedures," *George Washington Law Review*, Vol. 64, 1996, 975-976, and *The FCC's Open Network Architecture*, National Institute of Standards and Technology, Computer Security Resource Center, http://csrc.nist.gov/publications/nistpubs/800-11/node4.html

[648] David S. Konczal "Telephone – Obscuring Notice through Footnotes in FCC Rulemaking Procedures," *George Washington Law Review*, Vol. 64, 1996, 974 (citing *California v. FCC*, 4 F.3d at 1507-08)

[649] For example, an enhanced service is when "a customer dials a number to obtain access to stored information, such as … sports scores," *MCI Telecommunications v Federal Communications Commission*, 57 F.3d 1136, 313 U.S.App.D.C. 51, 1138. On distinction between long distance and enhanced service providers, see Peter William Huber et al., *Federal Telecommunications Law*, Aspen Publishers Online, 1999, 37-39.

[650] *MCI Telecommunications v Federal Communications Commission*, 57 F.3d 1136, 313 U.S.App.D.C. 51, 1140

systems, which had been based on bundled services.[651] As to the procedures, the petitioner argued that the agency failed to provide an adequate notice since the only instance where the proposal was mentioned was a footnote in a notice of proposed rulemaking on another issue.[652] The court held that the purposes of notice and comment were to ensure fairness to the affected parties as well as to provide the regulator with relevant information on the issue at stake.[653] According to the court, these purposes were not met since the agency placed its notice in a footnote of another notice on a different matter, which made it impossible for the interested parties to participate in the consultation.[654] Moreover, after establishing this procedural error, the court refused to address the merits of the decision. The court partly vacated the rule and remanded the matter back to the agency for further proceedings. Thus, in the US, the telecommunications regulator owes a guarantee of fairness to the parties in its rulemaking process. In other words, public consultation ensures procedural fairness to the parties because during rulemaking process individuals who are likely to be affected by the final rule, are able to express their views and concerns about the proposals made by the regulator and the regulator has to take them into account.

The case of *Sprint v. Federal Communications Commission*[655] offers additional insights into the specific nature of rulemaking process concerning telecommunications. It also suggests how the requirement of procedural fairness serves to limit the regulator's discretion in withholding public consultation procedure.

Under the *Telecommunications Act 1996* the FCC is authorized by the Congress to establish a compensation scheme for pay phone service providers (PSPs) "[i]n order to promote competition among pay phone service providers and promote the widespread

[651] *MCI Telecommunications v Federal Communications Commission*, 57 F.3d 1136, 313 U.S.App.D.C. 51, 1138
[652] *MCI Telecommunications v Federal Communications Commission*, 57 F.3d 1136, 313 U.S.App.D.C. 51, 1141
[653] *MCI Telecommunications v Federal Communications Commission*, 57 F.3d 1136, 313 U.S.App.D.C. 51, 1141
[654] *MCI Telecommunications v Federal Communications Commission*, 57 F.3d 1136, 313 U.S.App.D.C. 51
[655] *Sprint v Federal Communications Commission*, 315 F.3d 369, 354 U.S.App.D.C. 288

deployment of pay phone services to the benefit of the general public."[656] In 1996, the FCC exercising its powers issued a regulation establishing the compensation scheme. The compensation is necessary because provision of pay phone services is not always profitable and without additional incentives from the government phone companies most likely would terminate provision of such services. Efficient provision of pay phone services to the public depends on cooperation between several industry actors. While PSPs are responsible for provision of such services, the actual beneficiaries are phone companies performing as *Interexchange Carriers* (IXCs) as well as *Switch-Based Resellers* (SBRs). were recognized as initial economic beneficiaries of the calls made from payphones and, therefore, liable for compensation to the PSPs.[657] However, the compensation system was not efficient because there was a difficulty of tracking some calls and many of the PSPs could not receive proper compensation. In 2001, the FCC changed the scheme by shifting the burden of compensation solely to the IXCs, who, according to the agency, were best placed to track the calls, which needed to be compensated.[658]

The agency did not follow the notice and comment procedure which would have been necessary if a new rule was adopted. Instead, it adopted the changes as a 'reconsideration order.'[659] Sprint, which is an IXC, challenged the adopted changes arguing among other things that the FCC should have enacted the changes through adoption of a new rule rather than the order, which allowed the FCC to avoid the notice and comment procedure.[660] The Federal Communications Commission argued that under the

[656] Section 276(b)(1) of the *Telecommunications Act of 1996*, Pub. L. No. 104-104, 110 Stat. 56 (1996) http://www.fcc.gov/Reports/tcom1996.pdf
[657] *Sprint v Federal Communications Commission*, 315 F.3d 369, 354 U.S.App.D.C. 288, 371-372.
[658] *Sprint v Federal Communications Commission*, 315 F.3d 369, 354 U.S.App.D.C. 288, 372. Initially the reconsideration was triggered by a petition submitted by several PSPs to the FCC in 1999. Ibid.
[659] *Sprint v Federal Communications Commission*, 315 F.3d 369, 354 U.S.App.D.C. 288, 373
[660] *Sprint v Federal Communications Commission*, 315 F.3d 369, 354 U.S.App.D.C. 288, 373

Telecommunications Act 1996, it does have the authority to change the rules by a 'reconsideration order' as long as the original rule was adopted after a notice and comment.[661]

The court, in agreement with the petitioners, explained that such authority is not unlimited and that the agency's own regulations permitted it to reconsider an action only within 30 days after the notice of the proposal was made, whereas in the current case it has been more than 4 years after the adoption of the original rule.[662] Moreover, according to the court, there was a need for a new rule rather than a reconsideration order because the introduced changes were too substantial given their effect on the financial responsibilities of some companies. According to the court, the notice and comment procedure "improves the quality of agency rulemaking by exposing regulations to diverse public comment, ensures fairness to affected parties, and provides a well-developed record that enhances the quality of judicial review."[663] According to the court, there was a lack of procedural fairness in the agency's decision-making procedures. More particularly, the court held that the FCC erred in not following the notice and comment procedure since the changes it adopted were such that substantially affected the regulated industry, by increasing financial responsibilities of some companies while exempting the others.[664] According to the judges, the necessity of public participation is predetermined by the nature of the rulemaking process, whereby regulations by an agency establish firmly prescribed standards, and usually have an effect on prospective acts of the agency as well as on the regulated industries.[665]

[661] *Sprint v Federal Communications Commission*, 315 F.3d 369, 354 U.S.App.D.C. 288, 375
[662] *Sprint v Federal Communications Commission*, 315 F.3d 369, 354 U.S.App.D.C. 288, 375 (citing 47 C.F.R. § 1.108)
[663] *Sprint v Federal Communications Commission*, 315 F.3d 369, 354 U.S.App.D.C. 288, 373 (citing *Small Refiner Lead Phase-Down Task Force v. United States EPA*, 705 F.2d 506, 547 (D.C.Cir.1983) (internal citations omitted)
[664] *Sprint v Federal Communications Commission*, 315 F.3d 369, 354 U.S.App.D.C. 288, 374 (emphasis original)
[665] "[i]n contrast to an informal adjudication or a mere policy statement, which 'lacks the firmness of a [prescribed] standard,' an agency's imposition of requirements that "affect subsequent [agency] acts" and have a 'future effect' on a party before the agency triggers the APA notice requirement," *Sprint v Federal Communications Commission*, 315 F.3d 369, 354 U.S.App.D.C. 288, 373

Therefore the court held that the IXCs should have been given an opportunity to challenge the agency's assertion that among other phone companies they are best placed to track the calls and gather other information necessary for determining the amount of compensation.[666]

Another way of limiting the discretion of independent regulatory agencies is through establishing more stringent requirements concerning the procedures which they follow. Due to the openness and publicity of consultative processes, consultations could be seen as a part of procedural constraints on regulator's discretion, allowing the interested individuals, their groups as well as the legislature and courts to exercise an oversight function over the authority. In particular, the oversight function is important given the nature of regulators' powers, including the imposition of various obligations on operators, the introduction of price caps, and the issuance and revocation of licenses as a part of management of radio spectrum. Once the discretion of the regulators is tamed with more detailed procedural requirements, one would expect the rulemaking process to become more participatory. Given the particular nature of the sector and the role of the regulators as the guardians of the public interest, is there a need for a more specific and detailed regulation concerning opportunities for participation in telecommunications field?

In 2011, in the US Congress, proposals were made to reform the way the FCC makes its rules and, particularly, the way it carries out notice and comment procedures.[667] The bill sought to address various concerns such as the high unemployment rates and the lack of new investments.[668] According to the drafters, limiting the discretion of the FCC concerning

[666] *Sprint v Federal Communications Commission*, 315 F.3d 369, 354 U.S.App.D.C. 288, 376-377
[667] *Federal Communications Commission Process Reform Act of 2011*, H.R. 3309, http://republicans.energycommerce.house.gov/Media/file/Markups/FullCmte/112911/HR3309_As_Amended.pdf and *Federal Communications Commission Consolidated Reporting Act of 2011,* H.R. 3310, *Federal Communications Commission Consolidated Reporting Act of 2011,* H.R. 3310, 112th Cong. (2011), http://republicans.energycommerce.house.gov/Media/file/Markups/FullCmte/112911/HR3310_As_Amended.pdf
[668] *Federal Communications Commission Process Reform Act of 2011*, H.R. 3309, *Federal Communications Commission Consolidated Reporting Act of 2011,* H.R. 3310, 112th Cong. (2011), 2, lines 7-14, http://republicans.energycommerce.house.gov/Media/file/Markups/FullCmte/112911/HR3309_As_Amended.pdf

the notice and comment procedure as well as setting more stringent requirements concerning the process of consultation would allow to achieve the above mentioned goals.[669] For example, the proposed draft establishes a minimum period of 30 days for commenting and the same minimum time allowance for responding to comments,[670] details the content of a notice by requiring the agency to address the possible burdens 'on industry or consumers' and to include 'specific language of the proposed rule'.[671]

Nevertheless, the more formal and stringent requirements concerning public participation do not necessarily translate into more deliberative and participatory processes, and instead may become burdensome on decision-makers. Given that one of the main functions of the regulatory authority in the area of electronic communications is to protect the consumers of such services, there is a danger that performance of the institution is hampered. For instance, regarding the bill on the FCC's process reform, the Consumer Union expressed its concerns that the mentioned proposals would make it more difficult for the FCC fulfill its function of consumer protection.[672] The fears concerning consumer interests are based on the proposed requirement for the FCC to refrain from rulemaking, which is burdensome to the industry. According to the Union, the rules which could be perceived as burdens by the industry representatives often would be beneficial for the consumers.[673] Also, as a consumer representative organization, the Consumer Union is concerned that the bill would constrain

[669] *Federal Communications Commission Process Reform Act of 2011*, H.R. 3309, http://republicans.energycommerce.house.gov/Media/file/Markups/FullCmte/112911/HR3309_As_Amended.pdf and *Federal Communications Commission Consolidated Reporting Act of 2011,* H.R. 3310, *Federal Communications Commission Consolidated Reporting Act of 2011,* H.R. 3310, 112th Cong. (2011), http://republicans.energycommerce.house.gov/Media/file/Markups/FullCmte/112911/HR3310_As_Amended.pdf

[670] *Federal Communications Commission Process Reform Act of 2011*, H.R. 3309, *Federal Communications Commission Consolidated Reporting Act of 2011,* H.R. 3310, 112th Cong. (2011), 2, lines 7-14, http://republicans.energycommerce.house.gov/Media/file/Markups/FullCmte/112911/HR3309_As_Amended.pdf

[671] *Federal Communications Commission Process Reform Act of 2011*, H.R. 3309, *Federal Communications Commission Consolidated Reporting Act of 2011,* H.R. 3310, 112th Cong. (2011), 2-4, http://republicans.energycommerce.house.gov/Media/file/Markups/FullCmte/112911/HR3309_As_Amended.pdf

[672] http://www.consumersunion.org/pub/core_telecom_and_utilities/018272.html

[673] *FCC Reform Bills Put Consumer Interests at Risk*, November 29, 2011, Para 1 of the Consumers Union's letter to the House Committee on Energy and Commerce, http://www.consumersunion.org/pub/core_telecom_and_utilities/018272.html

the agency's powers in preventing harm to consumers by requiring rules to be made only where it could prove occurrence of the 'actual consumer harm.'[674]

Generally, opportunities for public participation are established as a tool to oversee the performance of the government institutions, whether legislative, executive or regulatory, and to serve as a mechanism of accountability. One of the difficulties concerning formalization of opportunities for participation is related to the search for a proper balance between enabling participation by interested parties and preserving the discretion of government institutions which is necessary in their decision-making process. Too stringent procedures could curb or even halt the work of the decision-makers, whose most important function is the protection of public interest. For instance, in the US, the above mentioned bill of *Regulatory Accountability Act* was strongly opposed by academics and practitioners in the field of administrative law for the reasons of it being too burdensome on the agencies' rulemaking processes, making it more difficult for agencies to issue regulations, even where they would be required to do so under congressional mandate, as well as interfering with 'long-standing judicial review doctrines.'[675] Similar concerns are behind the proposals by the US Congress concerning the changes to the process of rulemaking by the FCC. For instance, Professor Levin in his testimony before the Subcommittee on Communications and Technology has argued that the proposals concerning notice and comment procedure are too stringent, leaving insufficient opportunity for the agency to address meaningfulness of public participation.[676] Therefore, the suggested notice and comment procedure might be

[674] *FCC Reform Bills Put Consumer Interests at Risk*, November 29, 2011, Para 2 of the Consumers Union's letter to the House Committee on Energy and Commerce, http://www.consumersunion.org/pub/core_telecom_and_utilities/018272.html

[675] *Letter to House Judiciary Committee on HR 3010, the Regulatory Accountability Act of 2011*, October 24, 2011, 1-2, http://www.law.upenn.edu/blogs/regblog/Letter%20to%20House%20Judiciary%20Committee%20on%20HR%203010.pdf

[676] Testimony of Ronald M. Levin, William R. Orthwein Distinguished Professor of Law, Washington University in St. Louis, before the U.S. House of Representatives, Committee on Energy and Commerce, Subcommittee on Communications and Technology, *Hearing on "Reforming FCC Process,"* June 22, 2011, 6,

counterproductive and result in unnecessary delays.[677] Professor Levin suggested that the bill should incorporate 'a good cause provision', which would allow the agency to choose a more efficient notice and comment procedure, for example, the agency could set shorter periods for the filing of comments during its notice and comment procedure than the proposed minimum requirement of 30 days.[678]

There are two ideas inherent in the efforts by the governments to limit regulation through procedural reforms, which are aimed at increasing participation and deliberation. Firstly, there seems to be an assumption that regulation is necessarily costly (whereby the cost is primarily understood in economic terms and as a burden on influential private interests) and, therefore, not desirable. Secondly, if regulation as such seems to be unnecessary, then the suggested promotion of public participation seems to be at best superfluous.

The first proposition stands in stark contrast to the more general perception of regulators as preservers of competition and promoters of public interest. For instance, it is at least contradictory given the authority of the FCC as established under the Telecommunications Act, whereby the agency has to promote public interest through protection of consumers.[679] Also, the attempt to curb the regulatory powers of agencies stands in stark contrast to the literature, where protection of the public interest is seen as one of the

http://republicans.energycommerce.house.gov/Media/file/Hearings/Telecom/062211%20FCC%20Process%20Reform/Levin.pdf

[677] Testimony of Ronald M. Levin, William R. Orthwein Distinguished Professor of Law, Washington University in St. Louis, before the U.S. House of Representatives, Committee on Energy and Commerce, Subcommittee on Communications and Technology, *Hearing on "Reforming FCC Process,"* June 22, 2011, 6, http://republicans.energycommerce.house.gov/Media/file/Hearings/Telecom/062211%20FCC%20Process%20Reform/Levin.pdf

[678] Testimony of Ronald M. Levin, William R. Orthwein Distinguished Professor of Law, Washington University in St. Louis, before the U.S. House of Representatives, Committee on Energy and Commerce, Subcommittee on Communications and Technology, *Hearing on "Reforming FCC Process,"* June 22, 2011, 7(5) (referring to ACUS recommendation of 1993), http://republicans.energycommerce.house.gov/Media/file/Hearings/Telecom/062211%20FCC%20Process%20Reform/Levin.pdf

[679] See, for example, "Competitive Debacle in Local Telephony: Is the 1996 Telecommunications Act to Blame?" *Washington University Law Quarterly*, Vol. 81(1), 2003, 1-2, http://lawreview.wustl.edu/inprint/81-1/p%201%20Dibadj.pdf

justifications for regulatory processes.[680] Furthermore, the assumption of unnecessary costs and burdens of regulation fails to take into account situations where a proposed rule could be beneficial for consumers but burdensome for the industry. For example, a labelling requirement for mobile phone retailers could be seen as burdensome for the industry, but beneficial for consumers, whose 'right-to-know' about radio frequency emissions is at stake.[681] Similarly, any other labelling requirement on manufacturers (e.g. concerning GMO) could be seen from the same perspective. Lastly, the interests of industry and of consumers are not necessarily the only rationales for enacting new rules, and in most cases decision-makers are obliged to consider a wide range of factors before reaching a final decision. As to the second proposition, if regulation as such seems to be unnecessary, then the suggested promotion of public participation, transparency and openness seems to be unnecessary as well. Thus, instead of promoting meaningful opportunities for public participation the above mentioned drafts are based on the assumption that participation requirements are a burden on the agencies, which could be used to deter them from acting over all, and particularly, from issuing new regulations. Thus, in order to ensure meaningful opportunities for public participation, the law should strike a proper balance between formalizing public participation and also leaving ample discretion for the decision-makers so that procedural requirements do not overburden regulatory practices.

Yet another way of ensuring more deliberative process is maintaining the agencies' discretion as to the design of consultative procedures except for the requirement to

[680] Steven P. Croley, *Regulation and Public Interests: The Possibility of Good Regulatory Government*, Princeton University Press, 2007, and Mike Feintuck, The Public Interest in Regulation, Oxford University Press, 2004.

[681] Jesse McKinley, "San Francisco Passes Cellphone Radiation Law," *The New York Times*, June 15, 2010, http://www.nytimes.com/2010/06/16/us/16cell.html See also, a decision by the United States District Court for the Northern District of California, *CTIA v The City and County of San Francisco*, No. C 10-03224, WHA, http://www.consumerclassactionsmasstorts.com/uploads/file/cellphones.pdf and A Report "The Potential Dangers of Electromagnetic Fields and their Effect on the Environment," *Parliamentary Assembly, Council of Europe*, May 6, 2011, http://assembly.coe.int/Documents/WorkingDocs/Doc11/EDOC12608.pdf

take pro-active measures to involve individuals and their groups (such as consumer associations). For example, such requirement exists in South Africa.

One more solution could be subjecting the representatives of the regulated industry to consultative obligations. As already discussed, the regulation by agencies has only an indirect impact on the users of electronic communication services as they usually address the performance of the regulated sector. It is the activities by the providers of such services which have a direct impact on consumers and their choices. May be a requirement for the business actors to consult the consumers could make the regulatory processes more deliberative? Indeed the requirement for private actors to consult individuals and certain local communities is a rather common practice in environmental matters. Therefore, the requirement and its potential to enhance deliberative and participatory nature of policy and decision-making are examined in the next Chapter.

4. Public Consultations in Specific Regulatory Areas – Environmental Matters

As described in Chapter 2, the core of procedural fairness is the principle that when one's interests are affected by a certain decision, the legal or natural person has to be informed about such decision and must be able to present representations to the decision-maker.[682] This Chapter seeks to answer how (if at all) the procedural fairness principle is different in environmental matters, where the protection of the environment and its quality are the main concerns. Chapter 2 demonstrated that the scope of opportunities for public participation is generally at the discretion of the decision-maker and that procedural fairness of the decision-making process (including the requirement for meaningful consultation) serve as a certain constraint preventing an abuse of the granted powers.

4.1. Public Participation as a Guiding Principle in Environmental Governance

For a long time there was no recognition of environmental interests or rights. There also was a lack of procedural environmental rights either. First and foremost, the requirement of public participation was established as a part of environmental impact assessment (EIA) under the *National Environmental Policy Act* (NEPA) in 1969 in the US.[683] Later, in 1985, in the European Union, the Directive on the *Assessment of the Effects of Certain Public and Private Projects on the Environment* (the Environmental Impact

[682] See, for example, Hilaire Barnett, *Constitutional and Administrative Law*, Routledge, 2009, 748.
[683] Anne Shepherd and Christi Bowler, "Beyond the Requirements: Improving Public Participation in EIA," *Journal of Environmental Planning and Management*, Vol. 40(6), 1997, 726.

Assessment [EIA] Directive)[684] was adopted as "the first piece of Community environmental legislation to focus almost exclusively on the imposition of processes and procedures – a pattern that has been continued by subsequent directives in this field."[685] Now many constitutions recognize the right to a healthy environment.[686] Even the Parliament in the UK considered including this right into the *Human Rights Act*.[687] Additionally, nowadays procedural rights receive greater attention from political and judicial actors, to the extent which has led some environmental scholars to observe that public's environmental participatory rights have been strengthened.[688]

Environmental rights are, in a way, different from other rights recognized under the bill of rights. Environmental rights are usually recognized as 'third generation' rights. These rights, which are also known as 'solidarity rights', are usually concerned with the interests of groups of people such as the right to self-determination, the right to peace and the right to a healthy environment.[689] Another distinctive feature of such rights is that their protection requires coordinated efforts from a variety of actors: public institutions, private businesses, the general public, non-governmental institutions, etc.[690]

Procedural environmental rights and, particularly, public participation are at the center of environmental governance which deals with a range of complex environmental problems and issues. For example, environmental protection bodies are committed to the principle of public participation and involvement. In the US, the Environmental Protection

[684] Council Directive of 27 June 1985 on the Assessment of the effects of certain public and private projects on the environment, 85/337/EEC, *OJL 175, 05/07/1985 P. 0040 – 0048*. http://ec.europa.eu/environment/eia/full-legal-text/85337.htm
[685] Richard Macrory and Sharon Turner, "Participatory Rights, Transboundary Environmental Governance and EC Law," *Common Market Law Review*, Vol. 39, 2002, 489; 498
[686] Stephen J. Turner, *A Substantive Environmental Right: An Examination of the Legal Obligations of Decision-Makers towards the Environment*, Kluwer, 2008, 27-36
[687] http://www.publications.parliament.uk/pa/jt200708/jtselect/jtrights/165/16509.htm
[688] Jonas Ebbesson, "Public Participation and Privatisation in Environmental Matters: An Assessment of the Aarhus Convention," *Erasmus Law Review*, Vol. 4(2), 2011, 71; 72.
[689] See, for example, Stephen J. Turner, *A Substantive Environmental Right: An Examination of the Legal Obligations of Decision-Makers towards the Environment*, Kluwer, 2008, 16-17.
[690] Stephen J. Turner, *A Substantive Environmental Right: An Examination of the Legal Obligations of Decision-Makers towards the Environment*, Kluwer, 2008, 16-17

Agency (EPA) declares that environmental policies and regulations should be formed with the 'meaningful involvement of all people' irrespective of their background, income or other qualities.[691] For instance, in South Africa, one of the main responsibilities of South Africa's Department of Environmental Affairs and Tourism is to promote 'stakeholder participation.'[692] Thus, in addition to being responsible for environmental protection policies and their implementation, environmental agencies should devote a portion of their efforts to facilitate public participation.

Public participation is established under various national statutes and international treaties, in which it is recognized as a crucial tool for dealing with environmental problems. For example, in the US, section 7607 (d) the *Clean Air Act* requires that the US Environmental Protection Agency (EPA), when enacting air quality standards issues a public notice, which informs about a proposed rule, and, allows anyone to contribute to the rulemaking process by submitting comments, information or other data.[693] Moreover, an agency is required to "give *interested persons* an opportunity for the oral presentation of data, views, or arguments, in addition to an opportunity to make written submissions."[694]

As discussed in Chapter 2, public participation in environmental matters has received international recognition. For instance, requirements of public participation are established under Principle 10 of *The Rio Declaration* and the *Aarhus Convention*. The various reasons for establishing requirements of public participation under the *Aarhus Convention* range from raising concern on specific environmental matters - such as climate change - to the protection of human rights, such as the right to life and the right to a healthy

[691] http://www.epa.gov/environmentaljustice/
[692] South Africa's Department of Environmental Affairs and Tourism (DEAT), Roles and Responsibilities, http://www.environment.gov.za/ClimateChange2005/DEAT_roles_and_responsibilities.htm
[693] §7607(3) and §7607(5)(i) of *Clean Air Act* 2008, (the US), http://www.gpo.gov/fdsys/pkg/USCODE-2008-title42/pdf/USCODE-2008-title42-chap85.pdf
[694] §7607(5)(ii) of *Clean Air Act* 2008, (the US) (emphasis added) http://www.gpo.gov/fdsys/pkg/USCODE-2008-title42/pdf/USCODE-2008-title42-chap85.pdf

environment.[695] Therefore the *Aarhus Convention* is not only seen as an environmental protection instrument but also as a document invoking, "a larger debate within society about the role of the individual versus the role of the State."[696] The *Aarhus Convention* establishes minimum requirements for public participation, with which States have to ensure that their authorities comply while making decisions on specific activities (Article 6), developing plans, programs and policies related to the environment (Article 7) or drafting any legally binding rules (Article 8).[697]

In order to guarantee sufficient environmental protection it may be necessary for environmental agencies to consult not only the public and the likely affected individuals but other institutions whose decisions may also affect the environment. Therefore, in the US, the environmental agency and other agencies, when their regulations have the potential to impact on the environment must cooperate in decision-making. They regularly do this through the mechanisms established by 'interagency consultation'.[698] For instance, *The Endangered Species Act* (ESA)[699] demands that federal agencies, when their rulemaking or other activities are likely to affect species which are at risk, consult with two specialized institutions entrusted with the enforcement of the act.[700] As a result of consultations, the Secretary of State issues a written statement summarizing the input made by the agencies and suggests a solution based on those inputs.[701] Additionally, interagency consultations serve to provide

[695] Jane Holder and Maria Lee, *Environmental Protection, Law and Policy*, 2nd ed., Cambridge University Press, 2007, 98-99.
[696] Stephen Stec "EU Enlargement, Neighbourhood Policy and Environmental Democracy," in Marc Pallemaerts, ed., *The Aarhus Convention at Ten: Interactions and Tensions between Conventional International Law and EU Environmental Law*, Europa Law Publishing, 2009.
[697] Stephen Stec and S. Casey-Lefkowitz, *The Aarhus Convention: An Implementation Guide*, United Nations, 2000, 85-122, http://www.unece.org/env/pp/acig.pdf
[698] Richard J. Lazarus, "Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future," *Cornell Law Review*, Vol. 94, 1153; 1217, fn 270.
[699] *Endangered Species Act 1973* (the US), 16 U.S.C. §1531 http://epw.senate.gov/esa73.pdf
[700] The two authorities to be consulted with are U.S. Fish and Wildlife Service and the National Marine Fisheries Service of the National Oceanic and Atmospheric Administration, http://www.epa.gov/regulations/laws/esa.html
[701] Sec. 7 [16 U.S.C. 1536] (b) (3) (A) of the *Endangered Species Act 1973* (the US), 16 U.S.C. §1531, http://epw.senate.gov/esa73.pdf

assistance for agencies at a federal level to coordinate their actions in a way which does not endanger natural habitats.[702]

The cooperative process of consultation under section 7 of the ESA requires agencies to substantiate their decisions and assessments with the best available data.[703] The institutions responsible for the enforcement of the ESA may lack crucial information needed for the protection of endangered species. Therefore, such cooperation with other agencies can contribute to filling these gaps within the knowledge.[704] The requirement for consultations under the ESA is considered by decision-makers in the field as a powerful tool allowing for better protection of, for example, the conservation of endangered species.[705] The scope of consultation requirement under the ESA was assessed by the US Supreme Court in the case of *National Association of Home Builders v. Defenders of Wildlife*.[706] In this case a conflict arose as to the application of two different laws the ESA and the *Clean Water Act* (CWA), which was originally enacted in 1972, and establishes the *National Pollutant Discharge Elimination System* (NPDES) program.

Under CWA, the *Environmental Protection Agency* (the EPA) is authorized to regulate how certain waste is discharged into the national waters.[707] The CWA also requires the EPA to transfer its regulatory powers under the program to a State if statutory-established

[702] National Oceanic and Atmospheric Administration, Fisheries Service, Office of Protected Resources, *Interagency Consultation (ESA Section 7)* http://www.nmfs.noaa.gov/pr/consultation/
[703] Sec. 7 [16 U.S.C. 1536] (a)(2) of the ESA, http://epw.senate.gov/esa73.pdf See also, *Endangered Species Act Consultation Handbook*, Procedures for Conducting Section 7, Consultations and Conferences, adopted by U.S. Fish and Wildlife Service National Marine Fisheries Service, March 1998, 1-2, (27), http://www.nmfs.noaa.gov/pr/pdfs/laws/esa_section7_handbook.pdf
[704] *Endangered Species Act Consultation Handbook*, Procedures for Conducting Section 7, Consultations and Conferences, adopted by U.S. Fish and Wildlife Service National Marine Fisheries Service, March 1998, 1-2 – 1-3 (27-28), http://www.nmfs.noaa.gov/pr/pdfs/laws/esa_section7_handbook.pdf
[705] *Endangered Species Act Consultation Handbook*, Procedures for Conducting Section 7, Consultations and Conferences, adopted by U.S. Fish and Wildlife Service National Marine Fisheries Service, March 1998, 1-1, (26) http://www.nmfs.noaa.gov/pr/pdfs/laws/esa_section7_handbook.pdf
[706] *National Association of Home Builders v. Defenders of Wildlife*, 2009 WL 226048 (C.A.9 (Ariz.)) See also, Jonathan H. Adler, "Business, the Environment, and the Roberts Court: A Preliminary Assessment," *Case Research Paper Series in Legal Studies*, Working Paper 09-6, March 2009 (revised April 2009), 115-116 http://ssrn.com/abstract=1351906
[707] The US Environmental Protection Agency, National Pollutant Discharge Elimination System, Clean Water Act, http://cfpub.epa.gov/npdes/cwa.cfm?program_id=45 See also, The US Environmental Protection Agency, Agriculture, Clean Water Act, http://www.epa.gov/oecaagct/lcwa.html#Summary

criteria concerning waste management are met.[708] The agency refused to transfer its powers to the state of Arizona, without prior consultation as specified under the ESA. In a 5 to 4 decision, the US Supreme Court held that the requirement of consultations under the ESA applies only for the actions of a federal agency, where it enjoys certain discretion, and since the requirements of the CWA were mandatory for the EPA, it was not obliged to consult.[709] According to the majority, the EPA had no discretion but rather it was obliged by the Congress to transfer its authority where the States met the criteria under the CWA.[710]

The dissenting judges argued that by removing the consultation requirement for agencies' mandated actions, the majority failed to ensure the 'co-existence' of the two statutes and to preserve the intent of the legislature, which was to prioritize environmental concerns over the other actions of the agencies.[711] According to the dissenting Justice Stevens, the consultations requirement under the ESA is reconcilable with provisions of the CWA. For instance, even if the results of consultation suggest that certain species could be endangered, the Secretary of State has the opportunity to come up with alternative solutions.[712] Thus, Justice Stevens held that the transfer of authority to the State could still have happened, but it could have been done with due respect to the consultation requirements of the ESA.[713] He held that consultations involve cooperation of authorities resulting in better decisions by reconciling the competing environmental and other concerns. Justice Stevens' opinion is also emphasized in the Consultation Handbook, which is issued by the United States Fish and

[708] Section 402(b) of the *Clean Water Act*, (the US) http://epw.senate.gov/water.pdf
[709] *National Association of Home Builders v. Defenders of Wildlife*, 2009 WL 226048 (C.A.9 (Ariz.)), 673
[710] In their decision, majority relied on the federal regulation 50 CFR §402.03 (2006), which was adopted to "interpret and implement" the interagency consultation requirements under the ESA. Particular provision on which the majority of the court has relied concerns "applicability" of consultation requirements and states that these requirements "apply to all actions in which there is **discretionary** Federal involvement or control." (emphasis added), available at http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr;rgn=div5;view=text;node=50%3A7.0.3.11.2;idno=50;cc=ecfr;sid=b2f230962cd676bfe7bbd1c34b596d1d#50:7.0.3.11.2.1
[711] Dissent by J Stevens in *National Association of Home Builders v. Defenders of Wildlife*, 2009 WL 226048 (C.A.9 (Ariz.)), (citing *TVA v. Hill*, 437 U.S. 153 (1978))
[712] Dissent by J Stevens in *National Association of Home Builders v. Defenders of Wildlife*, 2009 WL 226048 (C.A.9 (Ariz.)), citing ESA, Sec. 7 [16 U.S.C. 1536] (b) (3) (A),
[713] Dissent by J Stevens in *National Association of Home Builders v. Defenders of Wildlife*, 2009 WL 226048 (C.A.9 (Ariz.)),

Wildlife Service and National Marine Fisheries Service, the two institutions responsible for implementation of the ESA.[714]

Another case in which the scope of public consultation on environmental matters was at stake in the US, is the case of *Rybachek v. Environmental Protection Agency*.[715] In 1985 under the already mentioned *Clean Water Act (CWA),*[716] the EPA proposed a set of rules regulating waste disposal in the processes of mineral mining.[717] Pollution control under the CWA rests on the concept of the *Best Available control Technology* (BAT).[718] The BAT strategy means that private companies, where their business activities generate certain risks to the environment, should establish the best available damage control technology, taking into consideration the possible costs and their impact on company's performance.[719] The *Clean Water Act* provides the EPA with certain discretion in choosing the avenues of compliance with statutory requirements, on the one hand, and enables Congress to monitor an agency's activities through the processes of information disclosure and consultation.[720]

As a part of the rulemaking process, the EPA held several rounds of consultations by way of notice and comment. The consultative processes revealed that one of

[714] The Foreword for the Consultation Handbook states that "[t]he Handbook provides internal guidance and establishes national policy for conducting consultation and conferences." *Consultation Handbook: Procedures for Conducting Consultation and Conference Activities under Section 7 of the Endangered Species Act*, adopted by U.S. Fish and Wildlife Service and National Marine Fisheries Service, March 1998, p. 2, 27-28, http://www.nmfs.noaa.gov/pr/pdfs/laws/esa_section7_handbook.pdf

[715] *Rybachek v EPA*, 904 F.2d 1276 (9th Circuit.1990)

[716] *Federal Water Pollution Control Act* (Clean Water Act), 33 U.S.C. 1251, as amended P. L. 107-303, November 27, 2002, http://epw.senate.gov/water.pdf

[717] *Rybachek v EPA*, 904 F.2d 1276 (9th Circuit.1990), 1283

[718] Bruce A. Ackerman and Richard B. Stewart, "Reforming Environmental Law: The Democratic Case for Market Incentives," *Columbia Journal of Environmental Law*, Vol. 13, 1988, 172; "BAT was embraced by Congress and administrators in the early 1970s in order to impose immediate, readily enforceable federal controls on a relatively few widespread pollutants, while avoiding widespread industrial shutdowns," in Bruce A. Ackerman and Richard B. Stewart, "Reforming Environmental Law," *Stanford Law Review*, Vol. 37, 1985, 1333.

[719] Bruce A. Ackerman and Richard B. Stewart, "Reforming Environmental Law: The Democratic Case for Market Incentives," *Columbia Journal of Environmental Law*, Vol. 13, 1988, 172-173 (reprinted in Susan Rose-Ackerman, *Economics of Administrative Law*, Edward Elgar, 2007, 424-425)

[720] James T. Hamilton and Christopher H. Schroeder, "Strategic Regulators and the Choice of Rulemaking Procedures: the Selection of Formal vs. Informal Rules in Regulating Hazardous Waste," *Law and Contemporary Problems*, Vol. 57, No. 2, 1994, 111, (reprinted in Susan Rose-Ackerman, *Economics of Administrative Law*, Edward Elgar, 2007, 119)

the main concerns by some commenters was that the regulations would have an adverse effect on small mines. To these comments the EPA responded by opening another round of consultations by asking the commenters to present additional data before it could modify the proposed regulation.[721] Eventually, the EPA enacted the final rule without any changes concerning small mines. The claimants, the *Alaska Miners Association* (herein, the Association), and a couple of citizens sought a review of the enacted rules in the courts. [722] The claimants argued that under the *Clean Water Act* the EPA did not have a mandate to regulate mineral mining.[723] The court held, however, that it was the intention of Congress that the EPA regulate discharges to the national waters, including the waste discharged by mineral mines.[724] Secondly, the claimants argued that they had been deprived of 'a right to meaningful public participation,' since the EPA supplemented the final rule with new documents containing thousands of pages on which the claimants did not have an opportunity to comment.[725] The court, disagreeing with the claimants, held that the notice and comment procedure was meaningful, particularly since there had been several rounds of that process. Moreover, the court found that the added documents were the agency's response to the previously made comments.[726] According to the court, meaningfulness of the right to make comments was not undermined since it did not include a right 'to comment in a never-ending way',[727]

Despite the variety of the sources, a similar structure of the consultative requirements for public participation is maintained in environmental matters as compared to the structure applicable in other matters. Thus, decision-makers are obliged to make a notice, provide opportunities for participation and consider the inputs submitted by the participants.

[721] *Rybachek v EPA*, 904 F.2d 1276 (9th Circuit.1990), 1284
[722] *Rybachek v EPA*, 904 F.2d 1276 (9th Circuit.1990)
[723] *Rybachek v EPA*, 904 F.2d 1276 (9th Circuit.1990), 1285
[724] *Rybachek v EPA*, 904 F.2d 1276 (9th Circuit.1990), 1285-1286
[725] *Rybachek v EPA*, 904 F.2d 1276 (9th Circuit.1990), 1286
[726] *Rybachek v EPA*, 904 F.2d 1276 (9th Circuit.1990), 1286
[727] *Rybachek v EPA*, 904 F.2d 1276 (9th Circuit.1990), 1286

Different reasons, however, for such reliance on public participation persist. The following examination of various rationales of public participation in environmental governance should serve to determine the scope of such opportunities and the links with procedural fairness.

4.2. Public Participation as a Means of Exchanging Environmental Information between the Decision-makers and Interested Parties

As already mentioned the most common function of public participation in environmental matters is ensuring that interested parties are informed about possible environmental impacts as well as given an opportunity to voice their own concerns.[728] In decision-making processes concerning environmental issues the exchange of information between the government institution and those who would be affected by the final rule is useful for the both sides. As already mentioned, where environmental matters are complex and require particular knowledge or expertise, the decision-makers could benefit from the relevant submissions made by those interested in proposed regulations and possessing necessary information, opinions or competence. The complexity of the environmental issues could be described by an example analyzed below, which includes government's proposal to build a new runway for one of the airports in the UK. The proposal to construct a new runway does not only involve such environmental problems as increased pollution and noise but also concerns pertaining to the country's economic situation. Providing opportunities for participation by interested individuals in the decision-making process, where they could contribute their relevant knowledge, would also make it easier for the government to make the right estimations and to strike the proper balance between conflicting concerns.

[728] See, generally, Robert McCracken, "EIA, SEA and AA, present position: where are we now?" *Journal of Planning and Environmental Law*, Vol. 12, 2010, 1515.

The concept of exchanging information suggests that there are benefits for the both parties to this process. Individuals and their groups participating in environmental decision-making process seek to receive the information about the substance of the proposal, the methods used to find solutions and the reasons behind the proposed course of action. All this information is necessary for the interested parties such as the residents of an area where government's proposed constructions if commenced would affect their daily lives and the environment.

For instance, in *R (Brown) v. North Yorkshire County Council*, a local authority was consulted before setting conditions for a quarry of limestone. It did not, however, carry out an *Environmental Impact Assessment* (EIA).[729] Local residents, concerned with the environmental impacts likely caused by excavation of the quarry, challenged North Yorkshire County Council's decision due to the absence of EIA. It is a common practice that the operation of a quarry disturbs the surroundings with noise and dust, and therefore government institutions have to interfere in order to preserve the natural habitats and to prevent harm for the public's health. In a case before a UK court, Lord Hoffmann observed that the EIA requirements were intended to ensure proper assessments were made where planning decisions were likely to affect the environment.[730] The court, finding for the petitioners, held that given the possibility of a significant effect by the quarry on the surrounding environment, conditions for operation of the site should have been set only after considering the necessity of an EIA.[731] Although the court did not directly touch upon the link between the consultations that were held and the EIA process, it is obvious that the two procedural requirements are complimentary in well-informed decision-making. In the present case, the

[729] *R (Brown) v North Yorkshire County Council*, [1999] UKHL 7, [2000] 1 AC 397, [1999] 1 All ER 969, [1999] 1 PLR 116, [1999] 2 WLR 452, http://www.bailii.org/uk/cases/UKHL/1999/7.html
[730] *R (Brown) v North Yorkshire County Council*, [1999] UKHL 7, [2000] 1 AC 397, [1999] 1 All ER 969, [1999] 1 PLR 116, [1999] 2 WLR 452, http://www.bailii.org/uk/cases/UKHL/1999/7.html
[731] *R (Brown) v North Yorkshire County Council*, [1999] UKHL 7, [2000] 1 AC 397, [1999] 1 All ER 969, [1999] 1 PLR 116, [1999] 2 WLR 452, http://www.bailii.org/uk/cases/UKHL/1999/7.html

process of public consultation was a primary source of information for local residents about the operation of the mine, which also signified a need for a more thorough evaluation of the possible effects of mining activities in terms of an EIA.

Also in another case concerning an EIA, the court held that the claimant, a resident of an area for which mining permission was granted, should have been afforded a meaningful opportunity to participate in consultation before excavation activities began.[732] Primarily relying on the importance of the effect that the mining could have had on the claimant, the court held that the need for an EIA was predetermined by European Directive on EIA, which although not fully implemented by the UK at that time, according to the court, was of direct effect.[733] The examined cases serve to illustrate that not only could the public offer valuable information, which would lead to a better assessment of environmental harms, but also that the EIA serves as a primary tool of informing the public about proposed decisions. The information is necessary for individuals who could be

The importance of exchange of information in the decision-making process is illustrated by another case from the US. In the US, the main statute in the field of hazardous waste management is the *Resource Conservation and Recovery Act (RCRA),*[734] which was enacted in order to regulate the handling of hazardous waste from unregulated sites.[735] The RCRA establishes consultation requirements under the so-called 'public participation directive.' This directive requires the regulators (either at a federal or a state level) to ensure opportunities for consultation when developing or changing regulations and the rules

[732] *R (Huddleston) v Durham County Council* [1999] EWCA Civ 792 (15 February 1999), 43 per LJ Brooke http://www.bailii.org/ew/cases/EWCA/Civ/1999/792.html
[733] *R (Huddleston) v Durham County Council* [1999] EWCA Civ 792 (15 February 1999), 25-27, 43, http://www.bailii.org/ew/cases/EWCA/Civ/1999/792.html
[734] The US Resource Conservation and Recovery Act (RCRA), http://epw.senate.gov/rcra.pdf See also, the *RCRA Public Participation Manual*, the United States Environmental Protection Agency, 1996 ed., http://www.epa.gov/osw/hazard/tsd/permit/pubpart/manual.htm
[735] Sarah L. Inderbitzin, "Throwing Out the Baby with the Bath Water: The Impact of *United States v. Goodner Brothers Aircraft*," *William and Mary Environmental Law and Policy Review*, Vol. 19, No. 1, 1994, 51.

regarding the implementation of those regulations.[736] The regulators should make public notices on proposed issuance of permits concerning the handling of hazardous waste.[737] Upon such notice, anyone is able to expresses their opposition to the proposed decision regarding the permit.[738] In *Shell Oil v. Environmental Protection Agency (EPA)* several companies representing the oil and mining industries challenged the rulemaking procedure of the EPA concerning the enactment of a rule dealing with the management of hazardous waste.[739]

In 1977, the EPA commenced a rulemaking procedure concerning the handling of hazardous waste. Among other issues the agency sought to determine the requirements for defining 'hazardous waste.' The entire rulemaking process witnessed attention from related industries, mainly because the classification of waste as 'hazardous' material subjects a company to the requirements of the RCRA concerning the handling of such substances.[740] While the rulemaking process involved a series of public hearings and meetings with professionals, as well as those interested in the matter, several participants representing manufacturing groups challenged the final court ruling arguing that they were deprived of 'adequate'[741] opportunities for notice and comment.[742] According to the petitioners, the agency erred when it failed to include in its notice of proposed rulemaking the two specific criteria (the 'mixture' and 'derived from' rules)[743] when defining hazardous waste, which

[736] § 6974(b) (1) of the US Resource Conservation and Recovery Act (RCRA) , 42 U.S.C. (1976) provides: "[p]ublic participation in the development, revision, implementation, and enforcement of any regulation, guideline, information, or program under this chapter shall be provided for, encouraged, and assisted by the Administrator and the States," http://epw.senate.gov/rcra.pdf
[737] § 6974(2) of the US Resource Conservation and Recovery Act (RCRA) , 42 U.S.C. (1976), http://epw.senate.gov/rcra.pdf
[738] § 6974(2) of the US Resource Conservation and Recovery Act (RCRA) , 42 U.S.C. (1976), http://epw.senate.gov/rcra.pdf
[739] *Shell Oil v Environmental Protection Agency*, 950 F.2d 741, (1991)
[740] Sarah L. Inderbitzin, "Throwing Out the Baby with the Bath Water: The Impact of *United States v. Goodner Brothers Aircraft*," *William and Mary Environmental Law and Policy Review*, Vol. 19, No. 1, 1994, 52.
[741] *Shell Oil v Environmental Protection Agency*, 950 F.2d 741, 745, (1991)
[742] *Shell Oil v Environmental Protection Agency*, 950 F.2d 741, 745 (1991)
[743] The 'mixture' rule "classifies as a hazardous waste any mixture of a 'listed' hazardous waste with any other solid waste," while the 'derived-from' rule "classifies [as a hazardous waste] any residue derived from the treatment of hazardous waste. *Shell Oil v Environmental Protection Agency*, 950 F.2d 741, 745

were later used in the final ruling.[744] Ultimately, the definition of what constitutes 'hazardous waste' was broader in the final rule than in the proposed one, meaning that there was also a heavier regulatory burden for private businesses.[745]

The agency agreed that the two criteria concerning the definition of hazardous waste were new and that they were not included in the proposed rule. However, according to the EPA, these provisions were enacted in order to respond to and clarify the concerns expressed in comments.[746] Moreover, according to the agency, at least some of the consultees had anticipated the broader definitions of hazardous waste. The court, however, disagreed with the agency after finding that the comments on which the EPA relied when enacting the final rule had not, in actuality, addressed the substance of the 'mixture' and 'derived from' rules.[747] Through the application of the 'logical outgrowth' standard, the court held that the final rule was different from the proposed rule and commenters could not have foreseen the changes which occurred at the last stage of rulemaking. The court vacated the parts of regulation concerning 'mixture' and 'derived-from' standards and remanded the case back to the agency to readopt the rules under a proper notice and comment procedure.

This case illustrates how a judicially-developed principle of 'logical outgrowth' serves to preserve the meaningfulness of public participation. When applying this principle, the courts assess whether, and how, the agency considered the comments that were submitted, and the adequacy of notice on the proposed rules. The general idea is that the final rule should

[744] *Shell Oil v Environmental Protection Agency*, 950 F.2d 741, 745 (1991)
[745] *Shell Oil v Environmental Protection Agency*, 950 F.2d 741, 745 (1991). See also, Lori Caramanian, "Hazardous Waste Management After *Shell Oil*," *Pace Environmental Law Review*, 1993, Vol. 11, No. 1, 265. The author also explains, that "[a] mistake about the hazardousness of the material, regardless of the fact that it occurs in good faith, subjects the generator to liability. Criminal penalties may be imposed on the generator when its actual knowledge of the waste's hazardous nature is an issue," ibid, at 270; and, Charles M. Denton and Barbara A. Magel, "RCRA Hazardous Waste Regulations – A Cautionary Tale," January 27, 2011, http://apps.americanbar.org/litigation/committees/environmental/articles/012711-rcra-hazardous-waste-regulations.html
[746] *Shell Oil v Environmental Protection Agency*, 950 F.2d 741, (1991)
[747] *Shell Oil v Environmental Protection Agency*, 950 F.2d 741, 747-752, (1991)

not be unforeseen by the consultees and that it should succeed, at least to some extent, the initial proposal.[748]

In a different case, the US court upheld a claim by a non-governmental environmental organization that the Environmental Protection Agency's final rule did not constitute a 'logical outgrowth' because when adopting it, the agency had abandoned the original proposal, on which comments were sought.[749] The court emphasized that the regulatory process cannot be used by agencies "to pull a surprise switcheroo on regulated entities."[750] The exchange of information between the consultees and the decision-makers preserves the principle of legal certainty in a regulatory state.

As the following example shows, opportunities for public participation in environmental matters, through the facilitation of an exchange of information between the decision-makers and the interested parties encourages emergence of alternative solutions to the problems at hand. In environmental literature, there is a recognition that one of the most common ways to deal with climate change is through a process which facilitates engagement of various stakeholder interests.[751] In the UK, the *Climate Change Act 2008*[752] aims to align economic interests with civil society's demands for low carbon emissions.[753] Under *The Climate Change Act 2008*, cutting down on greenhouse gas emissions is the main remedy for dealing with climate change., Successful implementation of this largely depends on a reconciliation of environmental and economic objectives.[754]

[748] Phillip M. Kannan, "The Logical Outgrowth Doctrine in Rulemaking," *Administrative Law Review*, Vol. 48, 1996, 214-215

[749] *Environmental Integrity Project v. Environmental Protection Agency (EPA)*, 425 F.3d 992, 368 U.S.App.D.C. 116, 998.

[750] *Environmental Integrity Project v. Environmental Protection Agency (EPA)*, 425 F.3d 992, 368 U.S.App.D.C. 116, 996. See also, *ConocoPhillips Co. v. Environmental Protection Agency (EPA)*, 612 F.3d 822, C.A.5, 2010, and *Public Citizen v. Mineta*, 427 F.Supp.2d 7, D.D.C., 2006.

[751] Mark Stallworthy, "Legislating Against Climate Change: A UK Perspective on a Sisyphean Challenge," *The Modern Law Review*, Vol. 72(3), 2009, 412, 416.

[752] The UK *Climate Change Act 2008*, http://www.legislation.gov.uk/ukpga/2008/27/contents

[753] Mark Stallworthy, "Legislating Against Climate Change: A UK Perspective on a Sisyphean Challenge," *The Modern Law Review*, Vol. 72(3), 2009, 412.

[754] Mark Stallworthy, "Legislating Against Climate Change: A UK Perspective on a Sisyphean Challenge," *The Modern Law Review*, Vol. 72(3), 2009, 412, 417.

In 2007 the UK's Department for Transport held a consultation process on "Adding Capacity at Heathrow Airport."[755] The main issue of the consultation process was whether to enhance the capacity of Heathrow airport by using the existing runways or by building a new one.[756] As to the purpose of consultation, the Department for Transport maintained that the consultation should contribute to a better understanding of the attitudes of local communities concerning the benefits of enhancing the capacity of the airport. The government sought to hear the opinions and promised to take them into account when further developing final decisions.[757] The consultation was said to be in compliance with the requirements set out in the Code of Practice on Consultation.[758] It resulted in nearly 70 000 responses which is the largest consultative process facilitated by the Department for Transport.[759] In its final policy document, the government suggested enhancing Heathrow's capacity by building an additional runway.

Initially, the environmental issues were not included in the public consultation.[760] However, after the consultation process concluded in February of 2008[761] but

[755] UK Department for Transport, Consultation Documents, "Adding Capacity at Heathrow Airport," 2007, (closing date 27 February 2008) http://collections.europarchive.org/tna/20080305120253/dft.gov.uk/consultations/closed/heathrowconsultation/
[756] UK Department for Transport, Consultation Documents, "Adding Capacity at Heathrow Airport," Summary, 8, http://collections.europarchive.org/tna/20080305120253/http://www.dft.gov.uk/consultations/closed/heathrowconsultation/consultationdocument/pdfsummary.pdf
[757] UK Department for Transport, Consultation Documents, "Adding Capacity at Heathrow Airport," Summary, 3-4, http://collections.europarchive.org/tna/20080305120253/http://www.dft.gov.uk/consultations/closed/heathrowconsultation/consultationdocument/pdfsummary.pdf
[758] UK Department for Transport, Consultation Documents, "Adding Capacity at Heathrow Airport," Summary, http://collections.europarchive.org/tna/20080305120253/http://www.dft.gov.uk/consultations/closed/heathrowconsultation/consultationdocument/annexa.pdf
[759] UK Department for Transport, "Britain's Transport Infrastructure. Adding Capacity at Heathrow: Decisions Following Consultation," January 2009, Paragraph 12, http://www.baa.com/assets/Internet/BAA%20Airports/Downloads/Static%20files/Capacity_at_Heathrow.pdf See also, UK Department for Transport, "Adding Capacity at Heathrow Airport: Report on Consultation Responses," December 2008, 7, http://webarchive.nationalarchives.gov.uk/+/http://www.dft.gov.uk/pgr/aviation/heathrowconsultations/heathrowdecision/responses/responses.pdf
[760] UK Department for Transport, Consultation Documents, "Adding Capacity at Heathrow Airport," Chapter 1 "The Policy Context," 18, http://collections.europarchive.org/tna/20080305120253/http://www.dft.gov.uk/consultations/closed/heathrowconsultation/consultationdocument/chapter1.pdf

before the final policy was made and presented to Parliament in January, 2009,[762] the *Climate Change Act 2008*, which required the government to consider reduction of greenhouse gas emissions when adopting planning policies, came into effect. In other words, the issues that were not consulted upon appeared in the final policy document once it was presented in the Parliament. While the government did consider the effects of its policy as required by the *Climate Change Act 2008*, the public did not have an opportunity to express its views on relevant environmental issues.

A group of local authorities, local residents, civil society and environmental organizations opposing the building of a third runway at Heathrow airport challenged the legality of the government's policy decision of 2009. One of the main arguments brought by the petitioners was that they should have been given an opportunity to make comments on environmental issues, which were introduced in the policy document presented to Parliament.[763] According to them, the decision-making process was unfair because the final decision included matters which were completely different from the ones on which consultation had been held.[764] In its judgment the court disagreed with the claimants on several grounds. The court found that the policy was not final after all, and still subject to further hearings, including those in Parliament.[765] Moreover, according to the court, the proposal at stake was just a 'policy statement' which could not have any substantive effect and further consultative processes were scheduled in which the petitioners could engage.[766]

---

[761] UK Department for Transport, "Adding Capacity at Heathrow Airport: Report on Consultation Responses," December 2008, 7 (paragraph 2.1.7) http://webarchive.nationalarchives.gov.uk/+/http://www.dft.gov.uk/pgr/aviation/heathrowconsultations/heathrowdecision/responses/responses.pdf

[762] Tories Warn Firms off Runway Plan, 16 January 2009, *BBC News*, http://news.bbc.co.uk/2/hi/uk_news/politics/7832693.stm

[763] *R (London Borough of Hillingdon) v Secretary of State for Transport* [2010] EWHC 626 (Admin) (26 March 2010), 29, http://www.bailii.org/ew/cases/EWHC/Admin/2010/626.htm

[764] *R (London Borough of Hillingdon) v Secretary of State for Transport* [2010] EWHC 626 (Admin) (26 March 2010), 29, http://www.bailii.org/ew/cases/EWHC/Admin/2010/626.htm

[765] *R (London Borough of Hillingdon) v Secretary of State for Transport* [2010] EWHC 626 (Admin) (26 March 2010), 42, http://www.bailii.org/ew/cases/EWHC/Admin/2010/626.htm

[766] *R (London Borough of Hillingdon) v Secretary of State for Transport* [2010] EWHC 626 (Admin) (26 March 2010), 48 and 77, http://www.bailii.org/ew/cases/EWHC/Admin/2010/626.htm

The described case illustrates more general aspects of public participation and deliberation. While the initial purpose of holding consultations was to acquire opinions from local communities about the impact of building a new runway, the consultation process not only revealed strong opposition towards the construction but also incentivized the emergence of alternatives for dealing with an increasing demand for flights. For instance, one of the proposals in dealing with the increasing demand for flights suggests the construction of a high speed rail network.[767]

This case illustrates that the proposal at stake had an impact on a variety of interests. It has been argued that, "[t]he strongest calls for action on airport capacity have come from business,"[768] while the most intensive opposition came from environmental organizations, such as Greenpeace.[769] For instance, the efforts by Greenpeace in opposing the building of a third runway for the Heathrow airport received significant support from the wider public. In January, 2009 (before the decision in the case of *R (London Borough of Hillingdon) v Secretary of State for Transport* was reached), Greenpeace announced that it purchased a 0.4 ha plot of land in the Village of Sipson, an area supposedly to be used for building the third runway of Heathrow airport.[770] Greenpeace was willing to sell small portions of the land to the members of the public, and by the end of January 2010, already 60 000 people shared ownership rights of the plot.[771]

After the court's decision was rendered in March of 2010, in May of the same year the Conservative and Liberal Democrat Coalition government made an agreement to

[767] Dan Milmo, "No Heathrow Direct Link in High Speed Rail Plans," *The Guardian*, 4 March 2010, http://www.guardian.co.uk/uk/2010/mar/04/heathrow-high-speed-rail But see also, Dan Milmo, "High-Speed Rail is no Substitute for Airport Runways, says ex-HS2 Boss," The Guardian, 25 January 2011, http://www.guardian.co.uk/world/2011/jan/25/ex-hs2-boss-attacks-tory-rail-link-plans

[768] James Pickford, "Mayor Vows to Fight Third Heathrow Runway," *The Financial Times*, 26 March 2012, http://www.ft.com/cms/s/0/b732975e-7743-11e1-93cb-00144feab49a.html#axzz1tG3XQTs3

[769] Mira Bar, "Fortress Heathrow: Bid to Block Runway," *The Evening Standard (London)*, 28 January 2010.

[770] "Greenpeace Seeks Fortress' Architect," *Building Design*, January 29, 2010, 3, and "Runway Critics Fight on," *Planning*, January 23, 2009, 10.

[771] "Runway Critics Fight on," *Planning*, January 23, 2009, 10, and "Greenpeace Seeks Fortress' Architect," *Building Design*, January 29, 2010, 3.

cancel the new runway at Heathrow and to refuse any additional runways in other airports.[772] Although early in 2013, the discussion about the expansion of the airport has reemerged, the same year it was put on hold after more than 100 000 UK residents living closest to the airport opposed its expansion in a referendum run by two councils in the summer of 2013.[773] To improve the chances of the government approving the launch of the third runway, in July 2014, the airport launched a consultation to receive the opinions of local residents, who could be affected by the proposed construction, on the compensation scheme for the probable inconveniences.[774]

So far the analysis of the cases provides support for the argument that various interested parties are included in consultations because the information provided by them can contribute to the quality of decisions impacting the environment.[775] They also illustrate how allowing meaningful opportunities for participation can unveil creative alternative solutions to problems at hand. However, due to the discretion accorded to decision-makers this rationale of public participation could also be used to limit the scope of consultation as the following case illustrates this issue.

[772] Coalition Government Cancel London's Heathrow Airport Third Runway, http://www.general-election-2010.co.uk/coalition-government-cancel-londons-heathrow-airport-third-runway.html See also, "Heathrow Runway Plan Ditched," *UK Politics*, 12 May 2010, http://www.politics.co.uk/news/transport/heathrow-runway-plan-ditched-$21377371.htm "Heathrow Airport Third Runway Plans are 'Untenable,' says Judge," *The Telegraph*, 26 March 2010, http://www.telegraph.co.uk/travel/travelnews/7527255/Heathrow-Airport-third-runway-plans-are-untenable-says-judge.html But in 2012 suggestions for reconsideration of the option of the new runway seem to be reviving again, see, for example, James Pickford, "Mayor Vows to Fight Third Heathrow Runway," *The Financial Times*, 26 March 2012, http://www.ft.com/cms/s/0/b732975e-7743-11e1-93cb-00144feab49a.html#axzz1tG3XQTs3

[773] Matthew Beard and Pippa Crerar, "100 000 Heathrow Neighbours Say 'No' to Third Runway or Increase in Flights", *London Evening Standard*, 21 May 2013, http://www.standard.co.uk/news/london/exclusive-100000-heathrow-neighbours-say-no-to-third-runway-or-increase-in-flights-8625407.html Full history of events concerning the third runway of Heathrow Airport is available here: http://www.guardian.co.uk/environment/2012/sep/06/heathrow-third-runway-travel-and-transport

[774] Greg Pitcher, "Heathrow launches third runway compensation consultation," *New Civil Engineer*, 24 July 2014, http://www.nce.co.uk/heathrow-launches-third-runway-compensation-consultation/8666172.article See also http://your.heathrow.com/consultation/

[775] Jens Staerdahl et al., "Environmental Impact Assessment in Malaysia, South Africa, Thailand, and Denmark: Background, Layout, Context, Public Participation and Environmental Scope," *The Journal of Transdiciplinary Environmental Studies*, Vol. 3(1), 2004, 1, http://www.journal-tes.dk/vol%203%20no%201/Jens%20St%E6rdahl_lav.pdf?id=00028

In the case of *The Bard Campaign v The Secretary of State for Communities and Local Government* (herein, the Bard case), consultees disagreed with the government's proposal to include one of the locations in the list of possible areas for developing eco-towns.[776] The consultation at stake was held in 2008 concerning a housing development proposal concerning eco-towns.[777] The Government's proposal of building eco-towns was based on the rationale of meeting an increasing housing demand while doing so in an environmentally friendly way.[778] The Government sought public comments in order to ensure sustainable development and good governance. According to the government, affordable and sustainable homes could be built with input from the public to help identify the right approach and where the interests of the construction companies, housing associations and the residents are aligned.[779] The Consultation was said to be in line with the Code of Practice on Consultation.[780] During consultation, residents of neighboring towns argued that the construction of an eco-town in a site next to their town would have adverse effects on infrastructure as well as the natural environment.[781] Although claimants expressed their concerns during the process of consultation, they argued that no adequate opportunities for consultation were provided since they could not comment on alternative proposals and the proposals on which their opinion was sought were not substantiated with reasons.[782] The High Court acknowledged the importance of consultations, and confirmed that common law

[776] *The Bard Campaign v The Secretary of State for Communities and Local Government*, [2009] EWHC 308 (Admin), http://www.bailii.org/ew/cases/EWHC/Admin/2009/308.html
[777] Department for Communities and Local Government, *Eco-Towns: Living a Greener Future*, April 2008, http://www.communities.gov.uk/documents/housing/pdf/livinggreenerfuture.pdf
[778] Building A Greener Future: Towards Zero Carbon Development, *Consultation Paper*, Department for Communities and Local Government, December 2006, Foreword by the Secretary of State, 1 http://www.communities.gov.uk/documents/planningandbuilding/pdf/153125.pdf
[779] Homes for the Future: More Affordable, More Sustainable, Presented to Parliament by the Secretary of State for Communities and Local Government by Command of Her Majesty, Department for Communities and Local Government, July 2007, Ministerial foreword, 4-5, http://www.communities.gov.uk/documents/housing/pdf/439986.pdf
[780] Department for Communities and Local Government, *Eco-Towns: Living a Greener Future*, April 2008, p. 55, http://www.communities.gov.uk/documents/housing/pdf/livinggreenerfuture.pdf
[781] See generally, the website of Bard Campaign for the reasons concerning establishment of the campaign: http://www.bardcampaign.org/bardcampaign/23009/bard_campaign.html
[782] *The Bard Campaign v The Secretary of State for Communities and Local Government*, [2009] EWHC 308 (Admin), 90, http://www.bailii.org/ew/cases/EWHC/Admin/2009/308.html

requires public consultations to be 'proper'.[783] However, the Court held that because the government's purpose for holding preliminary consultations was to acquire 'knowledge' from the public on the issues at stake; even if the consultation process had some flaws it was still a proper process, as long as the Government received the information it needed from the affected communities.[784]

In practice, public consultation could stir dissatisfaction and criticism of a government's proposed policy or decision, for this reason the decision-makers will be inclined to refrain from holding consultations. Indeed decision-makers do have certain discretion in choosing whether to consult or not. However, where the proposed decision is likely to affect an individual or a group of individuals, specific laws or procedural rules usually require the decision-makers to hold public consultation, regardless of the discontent that such procedures could produce.

The following case illustrates, that the more controversy a decision is to generate, the bigger necessity arises to hold public consultation. In the US case of *Fort Funston Dog Walkers v Babbit*[785], the court found that the National Park Service erred in withholding notice and comment procedure while adopting regulations on restricting usage of certain parts of a public park. In 1999, the National Park Service decided to close some parts of Fort Funston Park in order to preserve restoration of swallow habitat.[786] Under the National Park Service's regulations concerning closure of parks, the agency is required to provide notice and comment opportunities if a closure of a park is 'controversial' and changes the general patterns of how the park is used by the members of the public.[787] The National Park Service considered that the closure at Fort Funston park did not meet such conditions and

[783] *The Bard Campaign v The Secretary of State for Communities and Local Government*, [2009] EWHC 308 (Admin), 64
[784] *The Bard Campaign v The Secretary of State for Communities and Local Government*, [2009] EWHC 308 (Admin), 138,
[785] *Fort Funston Dog Walkers v Babbitt*, 96 F.Supp.2d 1021, (2000)
[786] *Fort Funston Dog Walkers v Babbitt*, 96 F.Supp.2d 1021, (2000), 1024-1025
[787] *Fort Funston Dog Walkers v Babbitt*, 96 F.Supp.2d 1021, (2000), 1022 (citing regulations 36 C.F.R. 1.5(b))

concluded that the notice and comment process was not required. An association of local dog walkers, who were the main users of the park's area subject to closure, challenged the decision to close the park in the court arguing that such a decision should have been made after a proper process of public consultation. The court upheld the challenge for several reasons. Firstly, the court found that public consultation by the way of notice and comment procedures is necessary where the public opinion is divided on the issue at stake. According to the court, the inputs from the members of the public should help the agency to improve its decision.[788]

Secondly, after reviewing the internal communication of the agency's officials the court found that the officials considered the closure of the park a controversial issue which could stir dissatisfaction among the members of local community.[789] Moreover, according to the court, the members of the association were ready to propose adjustments for the borderlines of suggested closure, and, therefore, should have been provided with opportunities for notice and comment.[790] Lastly, the court considered that due to the closure, many park visitors had to change their habits, for instance, dog owners, were precluded from walking their dogs off-leash. Given the alterations of the general patterns concerning the usage of the park the agency's regulations required public consultation to be held.[791] After considering all these reasons, the court remanded the matter back to the agency for holding notice and comment procedures.[792]

The cases examined in this section illustrate how the exchange of the information between the decision-makers and the members of the public is important for a meaningful consultative process to occur. For instance, in the case concerning the construction of a new runway for the busiest airport in the UK, the government held public

[788] *Fort Funston Dog Walkers v Babbitt*, 96 F.Supp.2d 1021, (2000), 1035-1038
[789] *Fort Funston Dog Walkers v Babbitt*, 96 F.Supp.2d 1021, (2000), 1038
[790] *Fort Funston Dog Walkers v Babbitt*, 96 F.Supp.2d 1021, (2000), 1036
[791] *Fort Funston Dog Walkers v Babbitt*, 96 F.Supp.2d 1021, (2000), 1038
[792] *Fort Funston Dog Walkers v Babbitt*, 96 F.Supp.2d 1021, (2000), 1040

consultation in order to receive the views from the various groups of stakeholders. While the government received many inputs from the public, the consultees also expressed their concern that the lack of the information concerning the proposed construction, limited the number of options which the consultees could have expressed.

The decision-making procedures concerning the building of so-called eco-towns in the UK, were also challenged for the lack of information provided by the government to the consultees. The court held that as long as the goal of the consultation was reached, meaning that the government received the views it sought from the participants, the flaws of the consultative procedures were not relevant. This approach by the court does not promote the meaningfulness of public consultation. In order to receive genuine inputs from the consultees the decision-makers also need to ensure that sufficient information is provided to them about the process.

In the absence of a genuine exchange of information, none of the functions of the consultative processes could be fulfilled. For instance, as illustrated by the *Hillingdon* case, where the decision-makers provide only very little information on the consulted matter, the members of the public might find it difficult to foresee the direction of the decision-making process as well as the alternatives to the final decision. If the consultees are not provided with sufficient information on the matter at stake, their opportunities to make new suggestions for the proposed decision or provide alternative solutions are also limited.

While the provision of information by the consultees to the decision-makers is not the only value of a consultative process, the following section illustrates the potential for public participation in ensuring the protection of environmental rights.

4.3. Public Participation as a Tool for the Protection of Environmental Rights

In the field of environmental matters, public consultation is recognized as part of public participation concept. Also in environmental matters procedural rights are expected to protect substantive environmental rights and to ensure their proper promotion.[793] The issue of whether interested parties can raise their environmental concerns in the process of application for a mining license and in this way protect their environmental rights arose in the case from South Africa, which is examined below.

South Africa's *Minerals Act 50 of 1991* did not detail opportunities for participation at the stage of application for a mining license. During the process of application for a mining license in the area of the river Vaal, the authority responsible for consideration of such application refused to provide opportunities for public participation to an environmental organization – Save the Vaal – as well as some local residents on the basis that it would be 'premature' to hold a hearing at such an early stage of application for the license.[794]

After the license was granted and no opportunities for the participation of interested parties were provided at any of the stages, Save the Vaal organization and local residents challenged the authority's decision to refuse them an opportunity of a hearing.[795] In the case of *Director Mineral Development, Gauteng Region v Save the Vaal Environment* (Save the Vaal case), the applicants argued that they should have been given an opportunity to raise environmental concerns, such as the destruction of wetland, pollution, endangerment of fauna and flora and a worsened quality of water, as well as to bring to attention the possibility

[793] Carl Bruch and Sarah King, "Constitutional Procedural Rights: Enhancing Civil Society's Role in Good Governance" in *The New "Public:" The Globalization Of Public Participation*, Environmental Law Institute, 2002, 22, http://www.eli.org/pdf/PPP/part1chap1.pdf

[794] *Director: Mineral Development, Gauteng Region v Save the Vaal Environment*, (133/98) [1999] ZASCA 9; [1999] 2 All SA 381 (A) (12 March 1999), 1, http://www.saflii.org/za/cases/ZASCA/1999/9.html

[795] South Africa, Supreme Court of Appeal, *Director: Mineral Development, Gauteng Region and Another v Save the Vaal Environment and Others* (133/98) [1999] ZASCA 9; [1999] 2 All SA 381 (A) (12 March 1999), 1, 4.

of a decrease in the value of their properties.[796] The applicants argued that the government authority was obliged to provide them with opportunities to be heard under the rule of *audi alteram partem* (*Latin*, hear the other side).[797] According to the applicants, this rule requires governmental authorities to provide a right to be heard when they adopt rules which could affect person's basic rights or interests.[798] The applicants argued that the environmental rights as established under the bill of rights within South Africa's Constitution were affected due to the government's decision.[799]

South Africa's Supreme Court of Appeals held that *audi alteram partem* was indeed applicable, which meant that the applicant should have been informed about the application for the license and provided with an opportunity to make objections if necessary.[800] According to the Court, such an opportunity for participation is necessary for several reasons. First, the Supreme Court of Appeals held that the inclusion of environmental rights into South Africa's Constitution ensured that these rights are justiciable and that they deserve proper substantive as well as procedural protection. Second, the opportunity for participation, according to the Court, serves to bring environmental concerns to the forefront of governmental decisions.[801] More importantly, while the applicants argued for a right to be heard because of the likely effects that the mining activities would have on their environment

[796] South Africa, Supreme Court of Appeal, *Director: Mineral Development, Gauteng Region v Save the Vaal Environment* (133/98) [1999] ZASCA 9; [1999] 2 All SA 381 (A) (12 March 1999), 6.
[797] South Africa, Supreme Court of Appeal, *Director: Mineral Development, Gauteng Region v Save the Vaal Environment* (133/98) [1999] ZASCA 9; [1999] 2 All SA 381 (A) (12 March 1999), 9. According to Louis Kotzé, "[t]his principle is derived from the South African common law (natural justice) and, plainly put, means that everyone has a right to be heard where his or her interests could be affected by an administrative or government decision," in "Promoting Public Participation in Environmental Decision-making through the South Africa Courts: Myth or Reality?" available at http://www.yale.edu/envirocenter/envdem/docs/Track%203.4.%20Access%20to%20Justice/KOTZE/Kotze%20paper.doc
[798] South Africa, Supreme Court of Appeal, *Director: Mineral Development, Gauteng Region v Save the Vaal Environment* (133/98) [1999] ZASCA 9; [1999] 2 All SA 381 (A) (12 March 1999), 9
[799] South Africa, Supreme Court of Appeal, *Director: Mineral Development, Gauteng Region v Save the Vaal Environment* (133/98) [1999] ZASCA 9; [1999] 2 All SA 381 (A) (12 March 1999), 9
[800] South Africa, Supreme Court of Appeal, *Director: Mineral Development, Gauteng Region and Another v Save the Vaal Environment and Others* (133/98) [1999] ZASCA 9; [1999] 2 All SA 381 (A) (12 March 1999), 20.
[801] South Africa, Supreme Court of Appeal, *Director: Mineral Development, Gauteng Region v Save the Vaal Environment* (133/98) [1999] ZASCA 9; [1999] 2 All SA 381 (A) (12 March 1999), 20

and property, the court recognized even broader implications of the decision-making process in the absence of opportunities for participation. In particular, the court emphasized the possible impact on 'future generations'.[802] The court's invocation of the concept of 'future generations' is not coincidental, since Vaal River is one of the main sources of drinking water in parts of the country.[803] However, the Court did not explain how the opportunities for participation could provide better protection for the interests of future generations, or who should represent the interests of next generations. However, the case is essential for the illustration it offers concerning the range of interests which should be included or at least represented in consultative processes.

Where environmental rights are not accorded constitutional significance, their protection could be ensured through procedural guarantees, including the requirement for public participation, under the international instruments such as the *Aarhus Convention*. For example, in a case concerning the building of a nuclear plant, a British court relying on the *Aarhus Convention*'s provisions on public participation, held that, particularly, in the environmental field there should be a general guarantee rather than 'a privilege' of public consultation.[804]

The analyzed cases show that courts in different jurisdictions recognize the necessity of opportunities for public participation when policies concern environmental matters and that procedural guarantees serve to intensify the amount of attention paid by the governments and decision-makers to environmental concerns.

[802] South Africa, Supreme Court of Appeal, *Director: Mineral Development, Gauteng Region v Save the Vaal Environment* (133/98) [1999] ZASCA 9; [1999] 2 All SA 381 (A) (12 March 1999), 20. It is worth mentioning that the interests of 'future generations' are also addressed in the *Aarhus Convention*.
[803] See, for example, Herold Chris, "Des Midgley Memorial Lecture The Water Crisis in South Africa," *Civil Engineering : Magazine of the South African Institution of Civil Engineering*, Vol. 18, Issue 5, 2010, 6. See also, Wyndham Hartley, "Cabinet Approves R7,3 bn Water Plan," *Business Day (South Africa)*, May 12, 2008.
[804] *R* (*Greenpeace) v Secretary of State for Trade and Industry*, [2007] EWHC 311 (Admin), 49, http://www.bailii.org/ew/cases/EWHC/Admin/2007/311.html

4.4. Public Participation as an Element of Procedural Fairness in Environmental Matters

In addition to environmental concerns public participation retains its value as an element of procedural fairness. First and foremost, procedural fairness determines the necessity of public consultation concerning environmental matters. Consultation on environmental matters is particularly important for those whose livelihood depends solely on the environment in which they live in. For instance, where local communities are provided with the opportunities to participate in consultations concerning the licensing processes of mining and prospecting activities, they could use the information received during the consultation to plan taking administrative or legal actions if necessary.

In September, 2006 Genorah Resources, a mining company, was awarded 'prospecting rights'[805] over certain lands in South Africa, which are inhibited by several communities.[806] While under the *Mineral and Petroleum Resources Development Act*,[807] the mining company should have consulted with community members, it failed to initiate such consultation. One of the affected communities – the Bengwenyama community – successfully challenged this failure in the Constitutional Court of South Africa.[808]

---

[805] South Africa's Mineral and Petroleum Resources Development Act, 2002 defines 'prospecting right' as a right which allows "searching for any mineral by means of any method-
(a) which disturbs the surface or subsurface of the earth, including any portion of 50 the earth that is under the sea or under other water; or
(b) in or on any residue stockpile or residue deposit, in order to establish the existence of any mineral and to determine the extent and economic value thereof; or
(c) in the sea or other water on land;" See also Chapter 1 "Definitions" of the Mineral and Petroleum Resources Development Act, 2002, http://cer.org.za/wp-content/uploads/2010/08/MPRDA-2002.pdf

[806] *Bengwenyama Minerals v Genorah Resources* (CCT 39/10) [2010] ZACC 26; 2011 (4); SA 113 (CC); 2011 (3) BCLR 229 (CC) (30 November 2010), 2-7, http://www.saflii.org/za/cases/ZACC/2010/26.html

[807] Section 16(4) of the Mineral and Petroleum Resources Development Act, 2002, provides that "[a]ny person who wishes to apply to the Minister for a prospecting right must lodge the application," and Section 16(4) of the same Act specifies that once "the Regional Manager accepts the application, the Regional Manager must, within 14 days from the date of acceptance, notify the applicant in writing-
(a) to submit an environmental management plan; and
(b) to notify in writing and consult with the landowner or lawful occupier and any other affected party and submit the result of the consultation within 30 days from the date of the notice,"
http://cer.org.za/wp-content/uploads/2010/08/MPRDA-2002.pdf

[808] *Bengwenyama Minerals v Genorah Resources* (CCT 39/10) [2010] ZACC 26; 2011 (4); SA 113 (CC); 2011 (3) BCLR 229 (CC) (30 November 2010), 2-7, http://www.saflii.org/za/cases/ZACC/2010/26.html

Concerning consultation under South Africa's *Mineral and Petroleum Resources Development Act*, South Africa's Constitutional Court, held that the opportunities for participation in government decision-making processes are inherent under the principle of procedural fairness.[809] According to the country's Constitutional Court, since the granting of a license interferes with the landowner's rights to use the land, consultation provides the possibility to see if accommodation between the potentially conflicting interests is possible.[810] The Court drew attention to the fact that although the legal requirements under the *Mineral and Petroleum Resources Development Act* do not oblige the parties to come to a common agreement, however, in practice, the failure to agree on the license conditions could mean that the mining company has to compensate the landowner for the inconveniences.[811]

The Court also emphasized the importance of consultations as a mechanism to inform the landowners about the activities which will be carried out on their land and to help them decide whether any administrative action is necessary to protect their rights and interests.[812] After the Court's decision to quash the award of the license because there was no consultation with the petitioner, the other two communities residing in the area proclaimed their ownership rights to the same land.[813] It was argued that the Court made an error when ruling in favor of the petitioner and thus failed to identify other communities which could be affected as well.[814]

[809] *Bengwenyama Minerals v Genorah Resources* (CCT 39/10) [2010] ZACC 26; 2011 (4); SA 113 (CC); 2011 (3) BCLR 229 (CC) (30 November 2010), 66, http://www.saflii.org/za/cases/ZACC/2010/26.html
[810] *Bengwenyama Minerals v Genorah Resources* (CCT 39/10) [2010] ZACC 26; 2011 (4); SA 113 (CC); 2011 (3) BCLR 229 (CC) (30 November 2010), 64-66, http://www.saflii.org/za/cases/ZACC/2010/26.html
[811] *Bengwenyama Minerals v Genorah Resources* (CCT 39/10) [2010] ZACC 26; 2011 (4); SA 113 (CC); 2011 (3) BCLR 229 (CC) (30 November 2010), 65, (citing Section 54 of the Mineral and Petroleum Resources Development Act, 2002), http://www.saflii.org/za/cases/ZACC/2010/26.html
[812] *Bengwenyama Minerals v Genorah Resources* (CCT 39/10) [2010] ZACC 26; 2011 (4); SA 113 (CC); 2011 (3) BCLR 229 (CC) (30 November 2010), 65, http://www.saflii.org/za/cases/ZACC/2010/26.html
[813] See, for example, Wiseman Khuzwayo, "The Disputes Ruling on Genorah Rights," *Business Report*, December 14, 2010, http://www.iol.co.za/business/business-news/tribe-disputes-ruling-on-genorah-rights-1.1001037 and Martin Creamer, "Bengwenyama Misled Constitutional Court in Prospecting Rights Case – Nkwe," *Mining Weekly*, 7 December, 2010, http://www.miningweekly.com/article/bengwenyama-misled-constitutional-court-in-rights-case-nkwe-2010-12-07
[814] Wiseman Khuzwayo, "The Disputes Ruling on Genorah Rights," *Business Report*, December 14, 2010, http://www.iol.co.za/business/business-news/tribe-disputes-ruling-on-genorah-rights-1.1001037

In the field of industrial pollution, public participation under the European Union legal framework is recognized as an essential remedy for dealing with the problems at stake as well as at the same time for ensuring good governance through more accountable and transparent decision-making processes.[815] In practice, the consultations concerning decision-making on the matters of environmental pollution usually often serve to ensure the procedural fairness to those who are likely to be affected by the final decisions. At several occasions the British courts have confirmed that the guarantee of procedural fairness to the parties is a central element of consultative processes.[816] For example, in the British case of *Edwards v the Environment Agency* case, a group of local residents challenged the Environment Agency's issuance of a conditional permit under the *Pollution Prevention and Control (England and Wales) Regulations 2000* (PPC Regulations)[817] for the operation of a cement plant by one of the leading cement producers in the country.[818] The application for the permit concerned the proposals for continuation of the operation of a cement plant and for the expansion of the activities by starting to burn used tires in order to minimize fuel consumption in the plant.[819]

As part of the procedures for the issuance of the permit, a consultation was held pursuant to the *PPC Regulations*. It attracted a variety of participants from the public as well as from governmental bodies including local public health institutions which were particularly concerned about the emissions from the factory in the light of the proposed way of substituting the fuel consumption with the burning of the used rubber.[820] In response to the

[815] Recital 24 of the Directivee 2008/1/EC of the European Parliament and of the Council of 15 January 2008, Concerning Integrated Pollution Prevention and Control, (Codified version), OJ L 24/8 29.1.2008, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:024:0008:0029:en:PDF See also, Uwe M. Erling, "Approaches to Integrated Pollution Control in the United States and the European Union," *Tulane Environmental Law Journal*, Vol. 15, Winter 2001, 1.
[816] *Edwards v the Environment Agency*, 2006 EWCA Civ 877. See also *R (Greenpeace) v Secretary of State for Trade and Industry*, [2007] EWHC 311 (Admin), [2007] NPC 21, [2007] Env LR 29, [2007] JPL 1314, 59, http://www.bailii.org/ew/cases/EWHC/Admin/2007/311.html
[817] *Pollution Prevention and Control (England and Wales) Regulations 2000*, No. 1973, http://www.legislation.gov.uk/uksi/2000/1973/contents/made
[818] *Edwards v the Environment Agency*, 2006 EWCA Civ 877, 1. See also the website of CEMEX at http://www.cemex.co.uk/ce/ce_lp.asp
[819] *Edwards v the Environment Agency*, 2006 EWCA Civ 877, 1.
[820] *Edwards v the Environment Agency*, 2006 EWCA Civ 877, 5.

consultees' concerns concerning pollution resulting from the tire burning, the Environment Agency requested additional information from the cement plant operator, and made it public during the consultation process.[821] In order to address the raised concerns, the Environment Agency also requested one of its units to perform a more thorough environmental impact analysis. The resulting reports were not, however, made available to the public.[822] Eventually, the Agency included in the permit a condition according to which the works in the factory could be carried out only if the process of burning tires passed a test concerning the potential pollution.[823]

The consultation process was challenged on the grounds that it was flawed because the Agency failed to disclose the reports concerning the more thorough environmental impact assessment.[824] In response, the Agency argued that the disclosure of information as requested by the consultees was not necessary during public consultations since the documents were a part of internal discussions and 'integral' to the final decision.[825] The court held that the information, which was not disclosed by the Agency, was of particular relevance to the final decision to be made and accordingly to the members of public interested in the results of such decision. Therefore, according to the court, the agency was in a breach of a common law duty of fairness.[826] Before reaching its conclusion concerning the common law duty of fairness, the court sought to determine whether the agency's non-disclosure breached any of the statutory requirements such as those of the *Environmental Impact Assessment Directive*[827] or the *PPC Regulations*.

[821] *Edwards v the Environment Agency*, 2006 EWCA Civ 877, 5-6.
[822] *Edwards v the Environment Agency*, 2006 EWCA Civ 877, 7-11.
[823] *Edwards v the Environment Agency*, 2006 EWCA Civ 877, 1.
[824] *Edwards v the Environment Agency*, 2006 EWCA Civ 877, 5.
[825] *Edwards v the Environment Agency*, 2006 EWCA Civ 877, 11.
[826] *Edwards v the Environment Agency*, 2006 EWCA Civ 877, 106.
[827] Directive 85/337/EEC, as amended by Directive 97/11/EC on the Assessment of the Effects of Certain Public and Private Projects on the Environment, *Official Journal L 073 , 14/03/*1997, p. 0005 – 0015, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31997L0011:EN:HTML

The court held that under the *Environmental Impact Assessment Directive* as well as under the *PPC Regulations*, the Environment Agency enjoys discretion in deciding on the adequacy and sufficiency of information it provides during a consultation.[828] According to the court, none of the statutory requirements included a duty for the Agency to disclose the additional findings it made in the course of the environmental impact assessment.[829]

As to the common law duty of fairness, according to the court, generally, the fairness of a decision-making process does not require disclosure of the internal information used by the institution.[830] However, the specific circumstances of a case may demand such disclosure. Under the common law, such circumstances include situations where new issues emerge,[831] and where the internal document is of particular importance to the final decision to be made.[832] According to the court, in the Edwards case, given the importance of the environmental impact assessment to the final decision, procedural fairness required disclosure of the internal information.[833] Furthermore, the court also emphasized the concern by consultees that the withheld document made it more difficult for them to adequately assess the potential environmental harm.[834]

Although finding that there was a breach of the common law duty of fairness, the court dismissed the claim, since it found that the trial of burning the tires passed successfully and it would have made no sense to consult the members of the public on the outdated information.[835] Thus, the case also illustrates how the court's reliance on subject

[828] *Edwards v the Environment Agency*, 2006 EWCA Civ 877, 70-85.
[829] *Edwards v the Environment Agency*, 2006 EWCA Civ 877, 70.
[830] *Edwards v the Environment Agency*, 2006 EWCA Civ 877, 91.
[831] *Edwards v the Environment Agency*, 2006 EWCA Civ 877, 94 and 103(citing *Interbrew SA v Competition Commission* [2001] EWHC Admin 367)
[832] *Edwards v the Environment Agency*, 2006 EWCA Civ 877, 94 and 103 (citing *R v Secretary of State for Health, ex p United States Tobacco International Inc* [1992] QB, 353, CA, at 370-371 (per Taylor LJ) and 376 (per Morland J))
[833] *Edwards v the Environment Agency*, 2006 EWCA Civ 877, 106.
[834] *Edwards v the Environment Agency*, 2006 EWCA Civ 877, 106.
[835] *Edwards v the Environment Agency*, 2006 EWCA Civ 877, 126.

matter, particularly, on environmental concerns could limit the scope of public participation; which by contrast would be broader if considered under the principle of procedural fairness.

In a case from the US, the court's reliance on procedural concerns offered protection for the claimants, who sought to be provided with the opportunities for public participation.[836] In the *International Harvester v. Ruckelshaus* case, several leading car manufacturers in the US challenged the Environmental Protection Agency's (EPA) decision concerning limitations on emissions from the vehicles because of a lack of opportunities to comment on the methodology used by the agency.[837] Following amendments to the *Clean Air Act* in 1970, the EPA, was authorized by the US Congress to set standards for limiting emissions from so-called 'light duty vehicles.'[838] The application of the standards meant that the car manufacturers would have to adapt their technologies accordingly by the year 1975. The *Clean Air Act* also provided for a possibility of postponing the commencement of application of these standards for one more year (until 1976) subject to a submission of a petition to the EPA.[839] In 1972 the EPA received petitions for suspension from several car manufacturers. After examining and holding hearings as required under the Act, the agency decided to refuse their petitions.[840] The EPA found that the suspension was unnecessary because the petitioners were unable to prove that adoption of the standards was technologically impossible.[841] The manufacturers challenged the agency's refusal to suspend the introduction of automotive emission standards. Among other grounds, the applicants argued that during the hearings they should have been allowed to challenge the agency's

[836] *International Harvester v. Ruckelshaus*, February 12, 1973, 478 F.2d 615, 155 U.S.App.D.C. 411
[837] *International Harvester v. Ruckelshaus*, February 12, 1973, 478 F.2d 615, 155 U.S.App.D.C. 411
[838] *International Harvester v. Ruckelshaus*, February 12, 1973, 478 F.2d 615, 155 U.S.App.D.C. 411, 419, 428
[839] *International Harvester v. Ruckelshaus*, February 12, 1973, 478 F.2d 615, 155 U.S.App.D.C. 411, 418-419
[840] *International Harvester v. Ruckelshaus*, February 12, 1973, 478 F.2d 615, 155 U.S.App.D.C. 411, 420
[841] *International Harvester v. Ruckelshaus*, February 12, 1973, 478 F.2d 615, 155 U.S.App.D.C. 411, 422

methodology used for determining the possibility of manufacturers' compliance with the set standards.[842]

The majority of the court emphasized that in administrative proceedings scrutiny of rulemaking agency's methodology is a common activity by those interested in the agency's proposed rules or regulations.[843] However, the court concluded that although the opportunity to comment on methodology used by the EPA would have been exemplary, it was not legally necessary since the methods were developed at least partly in response to the comments. Thus, on the one hand, the materials on which comments were sought need not include the methodology.[844] On the other hand, according to the judges, the non-disclosure of the methodology used by the agency also burdened the court's ability to scrutinize the agency's actions.[845] Moreover, the court found that its ability to determine whether the agency complied with Congress's intentions concerning restrictions on pollution from the vehicles was further impinged because the agency failed to address all of the statutorily demanded conditions for the issuance of petitioners' requested suspension.[846] Therefore, the case was remanded to the agency for holding further procedures in order to address the issues previously neglected by it.

One of the main implications of the case for the law of public consultation, is the recognition by the court the value of public participation to the quality of judicial review. This is an interesting factor concerning requirements for public participation, which is not so uncommon in the US. This is an important aspect of public participation, especially, in environmental matters where the judiciary takes a significant role in enforcing environmental

[842] *International Harvester v. Ruckelshaus*, February 12, 1973, 478 F.2d 615, 155 U.S.App.D.C. 411, 427-428 It has also been argued that "tightening of automobile emissions standards and fuel-efficiency standards have been consistently and vigorously opposed by American automakers on the grounds that automobiles represent only a portion of the air pollution problem (and thus should not shoulder a larger portion of the pollution reduction burden), and that the automotive industry has already done enough to reduce pollution." In Shi-Ling Hsu, "Fairness versus Efficiency in Environmental Law," *Ecology Law Quarterly*, Vol. 31, 2004, 303
[843] *International Harvester v. Ruckelshaus*, February 12, 1973, 478 F.2d 615, 155 U.S.App.D.C. 411, 428
[844] *International Harvester v. Ruckelshaus*, February 12, 1973, 478 F.2d 615, 155 U.S.App.D.C. 411, 428
[845] *International Harvester v. Ruckelshaus*, February 12, 1973, 478 F.2d 615, 155 U.S.App.D.C. 411, 428
[846] *International Harvester v. Ruckelshaus*, February 12, 1973, 478 F.2d 615, 155 U.S.App.D.C. 411, 445

values.[847] However, this issue has not been addressed by any of the theories of participatory and deliberative democracy.

The relationship between the regulatory authority and the judiciary was also addressed by Chief Judge Bazelon in his concurring opinion. Chief Judge Bazelon argued that the case should have been remanded back to the agency on the basis that the regulator failed to provide sufficient reasons in its decision-making process.[848] Moreover, according to Chief Judge Bazelon, the majority, by disallowing a challenge to the agency's methodology by means other than judicial review, required the judiciary to deal with particularly complex and technical matters; matters which would have been better addressed through debate and discussion involving scientific opinions.[849] The concurrence by Judge Bazelon emphasized that opportunities for public participation through the requirement for decision-makers to state their reasons and to allow consultees to challenge methodologies contribute to more reasoned decision-making. According to the judge, the rulemaking agencies need to substantiate their proposed decisions with reasons so that the scientists as well as lay people could express their views, make relevant suggestions, and this way serve as the guards against flawed decisions.[850]

The case illustrates a more general approach prevailing in environmental literature that participation by individuals in the process of environmental decision-making contributes to the knowledge of a decision-maker. As mentioned, one of the common criticisms concerning public consultation is related to the fear that once the relevant inputs by

[847] See, generally, *The Role of the Judiciary in Environmental Governance*, ed. Louis Kotze and Alexander Paterson, Wolters Kluwer, 2009.
[848] *International Harvester v. Ruckelshaus*, February 12, 1973, 478 F.2d 615, 155 U.S.App.D.C. 411, 447
[849] *International Harvester v. Ruckelshaus*, February 12, 1973, 478 F.2d 615, 155 U.S.App.D.C. 411, 448
[850] *International Harvester v. Ruckelshaus*, February 12, 1973, 478 F.2d 615, 155 U.S.App.D.C. 411, 448

the consultees are adopted as part of the final decision or policy, the competence of the public officials will be discredited.[851]

In practice, however, where highly specialized environmental matters are considered (such as the licensing of mining projects or building new airport runways) the competence of professional decision-makers is actually supplemented with the input from the interested parties rather than undermined. Indeed expert knowledge is necessary in environmental matters but the sources of the knowledge need not necessarily come from the inside of the decision-making institution. Also Daniel J. Fiorino suggests that in environmental governance even the problems concerning various risks could not be resolved solely by official decision-makers and experts from outside of the institution need to be consulted as well.[852] Fiorino's approach is also adopted by Holder and Lee, who argue in a similar vain that in addition to technical expertise the consultees could bring moral and social concerns to the decision-maker's attention.[853] As mentioned in Chapter 1 this issue has implications for areas other than just those with an environmental focus.

While in the *International Harvester v. Ruckelshaus* case the industry actors were united in their stand against the regulatory authority, in the *Husqvarna v. Environmental Protection Agency* case, the industry actors were deeply divided about the US Environmental Protection Agency's (EPA) assessment of the 'greatest degree of emission reduction achievable' standard for handheld engines.[854] Under the *Clean Air Act*,[855] the EPA is authorized to adopt emission standards for non-road engines. According to Section 213 of the *Clean Air Act* Congress instructed the agency to adopt standards which would ensure the

[851] See Section *1.6. Enhanced Opportunities for Public Participation and Deliberation: A Critique and its Rebuttal*
[852] Daniel J. Fiorino, "Citizen Participation and Environmental Risk: A Survey of Institutional Mechanisms," Science, *Technology, and Human Values*, Vol. 15, No. 2, Spring 1990, 227.
[853] Jane Holder and Maria Lee, *Environmental Protection, Law and Policy*, 2nd ed., Cambridge University Press, 2007, 41.
[854] *Husqvarna v Environmental Protection Agency (EPA)*, 254 F.3d 195, 349 U.S.App.D.C. 118
[855] Section 213 of *Clean Air Act*, 42 U.S.C., http://www.law.cornell.edu/uscode/text/42/7547

lowest degree of emissions and would take into consideration the costs to be incurred by the manufacturers when adopting new technologies. [856]

In order to implement the provisions of the *Clean Air Act*, the agency after the notice and comment procedure adopted a rule which set the emission standards. The EPA identified the 'greatest degree of emission reduction achievable' as a primary factor, and 'cost, noise, energy and safety' as secondary factors.[857] Two of the biggest manufacturers of handheld engines, Husqvarna and Deere & Company, disagreed as to the correctness of the agency's assessment. Deere & Company declared its support for the standards since it aligned with the company's goals related to the promotion of technological innovation and better environmental protection.[858] Husqvarna, on the other hand, opposed the new rule and challenged it by arguing that the EPA failed to provide adequate notice and comment opportunity in the absence of a summary describing the facts and information which led to the adoption of the specific standards.[859]

The court, disagreeing with the allegations, held that there were adequate opportunities for comments. Firstly, the court found that the factual information was made public, particularly, given the fact that the petitioner as well as other participants relied heavily on this information in their comments.[860] Moreover, the agency prolonged the initial consultation period in order to allow longer period for making submissions.[861] Lastly, according to the court, even if there was a 'procedural error', the petitioner failed to show its significance for the substance of the final rule, therefore the challenge was rejected.[862]

To sum up, the scope of public consultation seems to depend on particular circumstances of each case rather than on the rationale for which it was established. However,

[856] Section 213 (a)(3)(1) of *Clean Air Act*, 42 U.S.C., http://www.law.cornell.edu/uscode/text/42/7547
[857] *Husqvarna v Environmental Protection Agency (EPA)*, 254 F.3d 195, 349 U.S.App.D.C. 118
[858] *Husqvarna v Environmental Protection Agency*, 254 F.3d 195, 349 U.S.App.D.C. 118, Brief of Intervenor, John Deere Consumer Products, Inc., 1.
[859] *Husqvarna v Environmental Protection Agency*, 254 F.3d 195, 349 U.S.App.D.C. 118, 203
[860] *Husqvarna v Environmental Protection Agency*, 254 F.3d 195, 349 U.S.App.D.C. 118, 126.
[861] *Husqvarna v Environmental Protection Agency*, 254 F.3d 195, 349 U.S.App.D.C. 118, 126.
[862] *Husqvarna v Environmental Protection Agency*, 254 F.3d 195, 349 U.S.App.D.C. 118, 126.

some cases exemplify the tensions between procedural fairness and other rationales of public participation concerning its meaningfulness. The latter issue is examined in greater depth in Chapter 5.[863]

Conclusions

No matter what area of environmental governance is concerned, public participation is a central and guiding principle for the implementation of environmental policies and decisions. A closer examination of the case law concerning procedural rights in environmental governance suggests that opportunities for public participation serve a variety of functions.

Also it must be noted that in environmental matters, public consultations seem to be most important when a proposed decision or policy requires a balance of different and sometimes even conflicting interests. In such cases, concerning either the building of a new airport runway, a nuclear plant or the imposition of new requirements for car manufacturers in order to diminish air pollution, consultation processes allow a discussion between a variety of interests, which may be affected in one way or another by a proposed decision. The variety of interests includes representatives of industry, environmentally concerned groups as well as lay people and their communities. Another category of consultative community includes the interests of future generations, which were addressed by South Africa's judiciary.[864] The broad opportunities for participation for different interests make it possible to level the more powerful interests, because decision-makers are required to consider all the submissions made during consultative processes as long as they are relevant to the subject matter of the proposed decision.

[863] Section *5.1. The Difficulty of Balancing Procedural Values in Order to Ensure Meaningful Consultation*
[864] *Director: Mineral Development, Gauteng Region v Save the Vaal Environment* (133/98) [1999] ZASCA 9; [1999] 2 All SA 381 (A) (12 March 1999), 20

Some of the cases illustrate that the knowledge and experience of public officials is usually insufficient to cope with the complexity of environmental problems, and that interested parties may be able to offer a solid supplement for the lack of some expertise. Thus, the traditional approach in environmental matters where public institutions were seen as the only qualified decision-makers is replaced with an approach where expert knowledge by the officials is seen as reconcilable with the knowledge of the public and, particularly, those likely to be affected by the decisions at stake.

In the regulatory state, seeking expertise is one solution - but not the only solution - to problems such as 'ecological urgency',[865] 'industrial pollution, toxic substances, nuclear risk'[866] or 'climate change'.[867] As long as opportunities for public consultation are meaningful in terms of allowing participants to express their views, opinions and insights, they could enrich the decision-making process with new information and even, "fill gaps in [decision-makers'] knowledge."[868] The 'useful insights'[869] as well as 'situated knowledge,'[870]

[865] Richard Falk, "The Second Cycle of Ecological Urgency: an Environmental Justice Perspective," in *Environmental Law and Justice in* Context, ed. Jonas Ebbesson and Phoebe Okowa, Cambridge University Press, 2009, as cited in Stephen Stec, "EU Enlargement, Neighbourhood Policy and Environmental Democracy," in *The Aarhus Convention at Ten: Interactions and Tensions between Conventional International Law and EU Environmental Law*, ed. Marc Pallemaerts, Europa Law Publishing, 2009.
[866] Richard Falk, "The Second Cycle of Ecological Urgency: an Environmental Justice Perspective," in *Environmental Law and Justice in* Context, ed. Jonas Ebbesson and Phoebe Okowa, Cambridge University Press, 2009, as cited in Stephen Stec, "EU Enlargement, Neighbourhood Policy and Environmental Democracy," in *The Aarhus Convention at Ten: Interactions and Tensions between Conventional International Law and EU Environmental Law*, ed. Marc Pallemaerts, Europa Law Publishing, 2009.
[867] See, generally, Mark Stallworthy, "Legislating Against Climate Change: A UK Perspective on a Sisyphean Challenge," *The Modern Law Review*, Vol. 72(3), 2009, 412; Daniel H Cole, "Climate Change and Collective Action," *Current Legal Problems*, Vol. 61, No. 1, 2008, 229.
[868] Jane Holder and Maria Lee, *Environmental Protection, Law and Policy*, 2nd ed., Cambridge University Press, 2007, 88. See also Jenny Steele, "Participation and Deliberation in Environmental Law: Exploring a Problem-solving approach," *Oxford Journal of Legal Studies*, Vol. 21, 2001; Ciaran O'Faircheallaigh, "Public Participation and Environmental Impact Assessment: Purposes, Implications, and Lessons for Public Policy Making," *Environmental Impact Assessment Review*, Vol. 30, 2010, 19-27, and A. Diduck and B. Mitchell, "Learning, Public Involvement and Environmental Assessment: A Canadian Case Study," *Journal of Environmental Assessment Policy and Management*, Vol. 5, No. 3, 2003, 339-364.
[869] Javier Lezaun and Linda Soneryd, "Government by Elicitation: Engaging Stakeholders or Listening to the Idiots?" London School of Economics and Political Science, Center for Analysis of Risk and Regulation, *Discussion Paper* No. 34, May 2006, 2.
[870] Jenny Steele, "Participation and Deliberation in Environmental Law: Exploring a Problem-solving approach," *Oxford Journal of Legal Studies*, Vol. 21, 2001, 437.

offered by individuals could lead to the extension of the 'range of potential solutions'[871] to the problems at hand. Similarly, O'Faircheallaigh argues that public consultations allow, "decision-makers to draw on alternatives that are not present in their existing array of responses."[872] For example, in the previously mentioned British case of *Edwards v. the Environment Agency*, additional investigations were performed as to the possible effects of operating a cement plant and burning used tires only due to concerns raised by the public during the consultation, which was a part of EIA.[873] More generally, this is also a value of participation and deliberation as acknowledged by Habermas.[874]

Moreover, there is a variety of interests involved in consultation processes, for example, it could be residents of an area for which mining[875] or cement plant operation[876] permits are sought, or residents of a neighborhood where a new city is to be built.[877] Aside from decision-makers those usually engaged in consultations are environmental organizations, business and industry actors as well as other government or regulatory authorities. Not only do governmental institutions and agencies participate in consultations as decision-makers but they also get involved as consultees. For instance, in the US and the UK, several statutes require government institutions to consult each other, institutions such as local authorities

[871] Jenny Steele, "Participation and Deliberation in Environmental Law: Exploring a Problem-solving approach," *Oxford Journal of Legal Studies*, Vol. 21, 2001, 438; See also, Jennifer M. P. Stewart and A. John Sinclair, "Meaningful Public Participation in Environmental Assessment: Perspectives from Canadian Participants, Proponents, and Government," *Journal of Environmental Assessment Policy and Management*, Vol. 9, No. 2, 2007, 162.
[872] Ciaran O'Faircheallaigh, "Public Participation and Environmental Impact Assessment: Purposes, Implications, and Lessons for Public Policy Making," *Environmental Impact Assessment Review*, Vol. 30, 2010, 21.
[873] See generally, *Edwards v the Environment Agency*, 2006 EWCA Civ 877.
[874] See generally, Jurgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, MIT Press, 1996.
[875] South Africa, Supreme Court of Appeal, *Director: Mineral Development, Gauteng Region and Another v Save the Vaal Environment and Others* (133/98) [1999] ZASCA 9; [1999] 2 All SA 381 (A) (12 March 1999), *R (Huddleston) v Durham County Council* [1999] EWCA Civ 792 (15 February 1999) http://www.bailii.org/ew/cases/EWCA/Civ/1999/792.html; *R (Brown) v North Yorkshire County Council*, [1999] UKHL 7, [2000] 1 AC 397, [1999] 1 All ER 969, [1999] 1 PLR 116, [1999] 2 WLR 452, http://www.bailii.org/uk/cases/UKHL/1999/7.html
[876] *Edwards v the Environment Agency*, 2006 EWCA Civ 877.
[877] *Bard Campaign v The Secretary of State for Communities and Local Government*, [2009] EWHC 308 (Admin), http://www.bailii.org/ew/cases/EWHC/Admin/2009/308.html

when making planning decisions have to consult each other.[878] Some scholars even notice that other than consulting institutions participate in consultative processes on equal grounds with the non-governmental participants.[879] Thus, public participation demonstrates how various interests interact in reaching a final decision; which will eventually have wide reaching effects. The diversity of actors does not necessarily mean that the interests they represent are irreconcilable. For instance, local authorities do sometimes act, "as representative institutions of the affected communities,"[880] while business actors are not necessarily united in challenging regulatory decisions.[881] Exposure of different interests also pushes decision-makers to seek a solution which can accommodate those interests.

Furthermore, in regard to the involvement of business actors in environmental cases their participation is premised on the impact of environmental decisions. On the other hand, even where certain groups of the public are not directly involved in the environmental policy and decision-making processes, this does not mean that they will not be affected by the final decision or policy. Often environmental policies or decisions would have significant economic impact as well.[882] However, participation by business interests does not necessarily mean that they will have a prevailing influence on final decisions. For example, Jonathan H. Adler, after reviewing environmental cases of the US Supreme Court for the period of 2005 to

[878] See, for example, Regulation 10 "Consultations before the grant of permission" of the Town & Country Planning (General Development Procedure) Order 1995 (SI 1995/419)), http://legislation.data.gov.uk/uksi/1995/419/made/data.htm?wrap=true See also, *R (Griffin) v London City Airport Ltd*. [2011] EWHC 53 (Admin) (20 January 2011), 48, http://www.bailii.org/ew/cases/EWHC/Admin/2011/53.html

[879] J. R. DeShazo and Jody Freeman, "Public Agencies as Lobbyists," *Columbia Law Review*, Vol. 105, 2005, 2217, 2262.

[880] Theodora Th. Ziamou, *Rulemaking, participation and the limits of public law in the USA and Europe*, Ashgate, 2001, 151. See, for example, the case of *R (London Borough of Hillingdon) v Secretary of State for Transport* [2010] EWHC 626 (Admin) (26 March 2010) http://www.bailii.org/ew/cases/EWHC/Admin/2010/626.htm

[881] See, for example, *International Harvester v. Ruckelshaus*, February 12, 1973, 478 F.2d 615, 155 U.S.App.D.C. 411

[882] Jonathan H. Adler, "Business, the Environment, and the Roberts Court: A Preliminary Assessment," *Case Research Paper Series in Legal Studies*, Working Paper 09-6, March 2009 (revised April 2009), 102, http://ssrn.com/abstract=1351906

2008, did not find evidence that business interests would be given more protection than the other interests.[883]

Other cases illustrate how public participation can ensure better protection for substantive environmental rights. More importantly, this potential of public participation is not attributable solely to environmental rights. For instance, Martinez in the context of procedural justice, notes that procedural requirements could ensure substantive values and the rights of detainees of the war on terror.[884] Indeed, most environmental cases, in addition to complex and specific environmental matters, also include such concerns as transparency, good governance, reasoned decision-making, etc. As described in Chapter 1, these are values which are important outside the environmental field as well. Since the rationale for public participation goes beyond environmental concerns, this supports the argument concerning the necessity of public participation in areas other than environmental matters.

Last, but not least, a point should be made about the role of the judiciary in ensuring substantive as well as procedural environmental values and rights. There is a general perception that the judiciary serves an important role in developing environmental governance. For instance, regarding the UK, Karen Morrow argues that, "[t]he courts are very much in the driving seat in this area, both in terms of procedure and the development of the substantive law."[885] Concerning South Africa, Du Plessis considers that the judges are very much concerned with the enforcement of participatory requirements because these requirements have close links with other constitutional rights and values such as freedom of speech and the administrative justice.[886] The cases analyzed above not only serve to illustrate

[883] Jonathan H. Adler, "Business, the Environment, and the Roberts Court: A Preliminary Assessment," *Case Research Paper Series in Legal Studies*, Working Paper 09-6, March 2009 (revised April 2009), 102, http://ssrn.com/abstract=1351906

[884] Jenny S. Martinez, "Process and Substance in the War on Terror," *Columbia Law Review*, Vol. 108(5), 2008, 1013, http://www.columbialawreview.org/assets/pdfs/108/5/Martinez.pdf

[885] Karen Morrow, "United Kingdom" in *The Role of the Judiciary in Environmental Governance*, ed. Louis Kotze and Alexander Paterson, Wolters Kluwer, 2009, 162.

[886] A. Du Plessis, "Public Participation, Good Environmental Governance and Fulfilment of Environmental Rights," *Potchefstroom Electronic Law Journal* (PER), Vol. 2, 2008, 21.

and provide support for this general perception of the courts' role in environmental governance, but they also reveal how the courts tend to establish themselves in this area through the development of law of public consultation. For instance, in the *International Harvester v. Ruckelshaus* case, the US court argued that "the lack of such opportunity [of notice and comment] has had serious implications for the court given the role of judicial review," since it impinged on the court's ability to scrutinize the agency's actions.[887]

Despite the variety of contexts, most successful challenges to inadequate consultations were based on the reasons of the likely impact that the proposed decision might have on a particular group of individuals (e.g. as a consequence of granting a license for mining or prospecting) or the public in general (e.g. building a nuclear plant). Reluctance by the courts and by decision-makers to ensure broader opportunities for consultation mainly occurred in cases where the consultation itself was held at an early stage of decision-making and no final decision could be foreseen.

Criticisms about the processes of consultation usually hinge on inadequate opportunities being afforded to consultees in terms of lack of information, insufficiency of reasons and unavailability to comment on them as well as on methodologies. On several occasions, these concerns were also accompanied with dismay about sham consultations.[888] In most of the cases it was the decision-making authority responsible for holding public consultation. In one of the cases from South Africa, however, the South Africa's *Mineral and Petroleum Resources Development Act, 2002* also obliges private persons seeking a permit of prospecting rights to consult with local communities. As noted earlier, any meaningful consultation process depends on certain standards, which are to be followed by the initiators of consultation. However, the South Africa's Mineral and Petroleum Resources Development

[887] *International Harvester v. Ruckelshaus*, February 12, 1973, 478 F.2d 615, 155 U.S.App.D.C. 411, 428
[888] See, for example, "G2: The end of their world: At least 700 homes will be destroyed if Heathrow airport gets its third runway. Thousands of other people will be severely affected. Patrick Barkham meets some of those who have most to fear," *The Guardian* (London), January 14, 2009; "2,500 vent fury at 'sham' Heathrow consultation," Mark Blunden, *The Evening Standard* (London), February 26, 2008.

Act of 2002, does not require an applicant for a prospecting or mining right to comply with any criteria when consulting land owners.[889] Of course, this does not preclude companies from enacting consultation standards by themselves. For example, SASOL, a mining company and a party to the *Save the Vaal* case, declared its commitment to consultative processes under its own *Public Participation Guidelines*.[890]

Lastly, there is a variety of expectations concerning public participation in environmental matters and they range from the promotion of sustainable development and dealing with climate change to the contribution of protection of substantive rights.[891] Cases reveal tensions between the various functions of public participation. For instance, public consultations as part of an EIA informed the public about the likely environmental effects of a proposed decision as well as enabled the decision-maker to gather information necessary to assess protection of environment.

Thus, in environmental matters, public consultations are valued because of their generally recognized potential to inform the public about proposed decisions, improve policy and decision-making processes as well as to promote openness and transparency. Moreover, in environmental matters, courts seem to be inconsistent when approaching the value of public consultations: at least two approaches can be distinguished. On the one hand, public consultations are seen as a part of administrative law and good governance, in which case governmental authorities enjoy a wide discretion in setting standards for consultations. On the other hand, public consultations are more than just another principle of public law, since at least in environmental matters their effects reach beyond purely procedural implications such

[889] Section 16(4) of the South Africa's Mineral and Petroleum Resources Development Act, 2002 only specifies that the applicant for a prospecting right has to consult "with the landowner or lawful occupier and any other affected party," http://cer.org.za/wp-content/uploads/2010/08/MPRDA-2002.pdf

[890] http://www.sasol.com/sasol_internet/downloads/Public_Participation_Guidelines_1039104304094.pdf

[891] Jane Holder and Maria Lee, *Environmental Protection, Law and Policy*, 2nd ed., Cambridge University Press, 2007, 98-99 (referring to the *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, (Aarhus Convention), The United Nations Economic Commission for Europe (UNECE), adopted 25 June 1998, entered into force 30 October 2001, http://www.unece.org/env/pp/documents/cep43e.pdf)

as providing relevant information for a decision-maker. Public consultations can influence the substance of proposed decisions by bringing environmental concerns to the forefront of decision-makers' minds.[892] Therefore, another approach is that public consultations are seen as a necessary element in certain environmental areas, (such as sustainable development) where the involvement by individuals seems to contribute to a more efficient problem solving. In the latter case, standards of public consultations as designed by decision-makers are measured against regulatory objectives and the complexity of a particular environmental area. The latter approach could eventually diminish the possibility of sham consultations, since it acknowledges the importance of the involvement by individuals in decision-making processes, and contributes to limiting decision-makers' discretion when designing public consultations.

[892] See also *Section 1.5.5. Supplementing the Rights of Freedom of Expression and Freedom of Information*

5. Consultative Obligations: Triggers and Thresholds

This thesis sought to verify the hypothesis that the legal control and the structuring of public participation, if properly structured under law, to some extent remedies the problems of regulatory government, such as over-regulation, lack of professionalism and public institutions' unresponsiveness to the public.

The existing literature on the subject is mainly focused on the benefits and drawbacks of public consultation but is inconclusive about the role of law in structuring participatory and deliberative decision-making processes. While Chapter 1 sought to establish the normative necessity of facilitating participatory rights in a representative democracy, chapters 2 to 4 examined the various models of public consultation and the extent to which they are legally protected in different areas of public life.

The current chapter seeks to provide answers to the four related research questions:

1) Are decision-making processes more participatory and deliberative where participatory democracy is recognized as a part of a country's constitutional structure?
2) How (if at all) do the existing legal requirements concerning public consultation animate the 'public sphere'?
3) What is the role of the judiciary in ensuring dialogic communication between the government institutions and the people?

5.1. Are Decision-making Processes More Participatory and Deliberative where Participatory Democracy is Recognized as a Part of a Country's Constitutional Structure?

As described in Chapter 1, according to Rousseau and Mill under the conditions of the representative government participation by lay people in public decision-making processes was seen as an unnecessary if not a harmful practice.[893] One of the main reasons was that the people were regarded as uneducated and therefore unable to participate in public affairs by other means than voting in the elections.

By contrast, according to deliberative democrats, deliberation cannot simply be accommodated within the representative structure of the government. As explained in Chapter 1, the proponents of the theories of participatory and deliberative democracy suggest reforming the representative institutions into more deliberative and participatory ones or even replacing the former with the latter. Political theorists ranging from Pateman to Fishkin suggest creation of public spaces or introduction of deliberative mechanisms such as deliberative polls, citizens' juries which would serve as a platform for deliberation and exchange of ideas about public affairs among the citizens.[894] In this light, Barber suggests that individuals and their groups are capable of making significant contributions if given opportunities for taking part in public decision-making processes.[895] Fishkin suggests new methods of democratic design and the innovative application of deliberative forums. For instance, Fishkin promotes the idea of a public deliberation event, which he calls 'Deliberation Day'.[896]

The initial analysis of the above mentioned theories of democracy in Chapter 1 seems to suggest that in countries such as South Africa, where participatory democracy is considered a part of their constitutional structure, participatory rights would be better protected than in countries such as the US where representative government structure is

[893] See Section *1.1. From Representative to Regulatory Government*
[894] See Section *1.3. The Ideals of Participation and Deliberation*
[895] Benjamin Barber, Strong Democracy: Participatory Politics for a New Age, University of California Press, 1984.
[896] James S. Fishkin, *When the People Speak: Deliberative Democracy and Public Consultation*, Oxford University Press, 2009.

recognized.[897] The examination of the case law from the three chosen jurisdictions presents a different picture.

In South Africa the constitution recognizes the dual nature of the country's democracy. Under the country's Constitution, the elements of participatory and representative government coexist. As explained in Chapter 2, in South Africa, the requirements of public participation are established under the country's constitution. The entrenchment of participatory rights in South Africa's Constitution has its root in the country's history. Historically the constitutional inclusion of participatory rights and duties in South Africa was meant to appease the devastating consequences of apartheid. For example, South Africa's judiciary have elaborated on several occasions how the legislatures could facilitate the public's involvement in the legislative processes of the country. In one of the cases, South Africa's Constitutional Court has suggested that the country's provincial parliaments could organize workshops in the regions, publish materials about the ways to influence lawmaking activities or conduct road shows.[898] All these methods should help to facilitate a dialogue between the public and the elected representatives.[899] Thus, in South Africa, consultative processes and other means of the public's involvement are recognized by the judiciary as necessary tools to start a dialogue between the elected representatives and the citizens. Participatory rights in South Africa, although recognized as a part of participatory democracy, are limited, and the limitations come from the representative nature of the government. Also, the courts have held on several occasions that participatory rights serve to enable the full enjoyment of political rights, which are at the centre of representative government. Thus, the overarching goal of the dialogue is to enable more informed public participation in the elections.

[897] Hanna Fenichel Pitkin, *The Concept of Representation*, University of California Press, 1967, 230.
[898] *Doctors for Life International v Speaker of the National Assembly*, South African Constitutional Court, 2006 (12) BCLR 1399 (CC), 132, http://www.saflii.org/za/cases/ZACC/2006/11.html
[899] *Doctors for Life International v Speaker of the National Assembly*, South African Constitutional Court, 2006 (12) BCLR 1399 (CC), 101 and 106, http://www.saflii.org/za/cases/ZACC/2006/11.html

For instance, in one of the cases, the Constitutional Court found that public consultation keeps the legislature abreast of the public's opinion on legislative proposals.[900] In another case, South Africa's Constitutional Court held that country's legislatures need to facilitate discussions between the members of different communities when the bills introduced in the parliaments affect them.[901] As explained in Chapter 1, responsiveness by the government institutions is particularly important in transitioning countries, where the institutions have ignored the basic needs of the people for decades.[902] Indeed, in South Africa, the consultative obligations for legislatures are more strict than requirements for decision-makers concerning public consultation in the two other jurisdictions, probably because according to South Africa's Constitutional Court, participatory democracy has to revitalize the representative democracy by encouraging greater involvement by the citizens in general elections.[903] Thus, South Africa's Constitutional Court's examination of the participatory opportunities in the context of political and civil rights locates the participatory rights within the contours of representative democracy.

As already mentioned, the suggestion under the participatory and deliberative theories of democracy is that the representative government institutions should be reformed into participatory and deliberative ones. Also as explained in Chapter 2, some legal scholars suggest that the role of law is not only to ensure that proper procedures are followed by decision-makers, but also to build the foundation for participatory democracy.[904] Contrary to these proposals, where participatory democracy is accorded a primary role in comparison to the representative form of the government, the approach by South Africa's judiciary is more

[900] *Merafong Demarcation Forum v President of the Republic of South Africa*, (CCT 41/07) [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 968 (CC) (13 June 2008), 53, http://www.saflii.org/za/cases/ZACC/2008/10.html

[901] *Doctors for Life International v Speaker of the National Assembly and Others* [2006] ZACC 11; 2006 (6) SA 416 (CC), 101, http://www.saflii.org/za/cases/ZACC/2006/11.html

[902] *Section 1.5.3. Alienation of the Public from Politics and the Lack of Responsiveness by Decision-makers*

[903] *Doctors for Life International v Speaker of the National Assembly and Others* [2006] ZACC 11; 2006 (6) SA 416 (CC) 115, http://www.saflii.org/za/cases/ZACC/2006/11.html

[904] Carrie Menkel-Meadow, "The Lawyer's Role(s) in Deliberative Democracy: A Commentary by and Responses to Professor Carrie Menkel-Meadow," *Nevada Law Journal*, Vol. 5, 2004, 347; 369.

moderate. Under South Africa's Constitution, the duty to facilitate public involvement is established as one of the functions of the legislatures. In practice, the courts have attributed such importance to participatory rights that public participation could be considered as one of the core functions of the parliaments in South Africa.

Indeed the participatory opportunities are not seen as a tool to deconstruct the representative nature of country's democracy, instead, South Africa's judiciary adopts the view that the participatory rights should reinvigorate the activities of the representative institutions. Thus, South Africa represents an example of a country where the constitutional arrangements accommodate the participatory and representative elements of democracy, but in practice the preference for the representative form of the government is retained.

The attempts to reconcile the participatory elements within the structure of representative government appear in the other two jurisdictions as well, notwithstanding the absence of any express constitutional recognition of the ideals of 'participatory democracy'. In the US and the UK, participatory democracy is recognized as a supplement of representative democracy. On at least one occasion a British court recognized the common law duty to consult to be inherent in participatory democracy.[905] Although the *Cheshire East Borough* case was an environmental one, the judge invoked the concept of participatory democracy when addressing the value of public consultation. According to the judge, there is an inherent value in consultation as an element of participatory democracy in the sense that it generates respect between the decision-maker and the consultees. The judge also emphasized that consultative mechanisms have the value of contributing to the expertise of decision-

[905] *R (Cheshire East Borough) v Secretary of State for the Environment, Food and Rural Affairs* [2011] EWHC 1975 (Admin), 80, http://www.bailii.org/ew/cases/EWHC/Admin/2011/1975.html The concept of participatory democracy does not seem to be novel for the European Court of Human Rights either. See, for example, Rory O'Connell, "Towards A Stronger Concept of Democracy in the Strasbourg Convention," *European Human Rights Law Review*, Vol. 3, 2006, 281; 285-293

makers.[906] As explained in Chapter 1, the value related to participatory democracy is much broader than described by the British court in the *Cheshire East Borough* case. However, the case is significant for the fact that the judiciary acknowledged public consultation as a part of participatory democracy, despite the absence of constitutional recognition.

In the US, some scholars suggest that participatory democracy instead of being an adversary of the representative form of the government, is actually inherent in some of the fundamental rights, such as the right to freedom of speech. As mentioned, Weinstein invokes participatory democracy to explain the freedom of speech doctrine in the US.[907]

While the analysis of cases and legal rules confirms the notion suggested by Meadow that law could serve as an architect of participatory democracy it also offers an additional insight. In many cases the law does not build participatory democracy from scratch, instead it serves to shape the existing mechanisms to provide the people with participatory opportunities within the contours of representative democracy. As noted in Chapter 2, the international instruments for the protection of human rights, such as the *International Covenant on Civil and Political Rights* also recognize that the right to political participation entails opportunities for participation beyond those related to the electoral processes.[908]

Thus, there is no straight forward answer to the question asked at the beginning of this chapter about the dependence of the participatory and deliberative nature of the public decision-making processes on the country's constitutional arrangements. However, one certain observation could be made, the analysis of the case law from South Africa, the US and the UK suggests that institutional structure of representative government can facilitate participatory rights. In all of the three jurisdictions the issue concerning the coexistence of participatory and representative democracies is left mainly in the hands of the judges. In

[906] *R (Cheshire East Borough) v Secretary of State for the Environment, Food and Rural Affairs* [2011] EWHC 1975 (Admin), 80, http://www.bailii.org/ew/cases/EWHC/Admin/2011/1975.html
[907] James Weinstein, "Participatory Democracy and Free Speech," *Virginia Law Review*, Vol. 97 (3), 2011, 491; 513.
[908] Section *2.4. Opportunities for Public Participation at International Level*

South Africa, where the participatory and representative forms of democracy coexist, the judiciary overcomes the possibility of potential tensions by assigning primary role to the representative form of the government and holding that participatory elements are there to contribute to a better functioning of representative institutions. Particularly, with the help of judiciary, the participatory rights are firmly located within the realm of representative democracy.

In conclusion, even in jurisdictions where participatory democracy is not established as a part of the country's constitutional structure, participatory rights can and are guaranteed protection. Also in South Africa, where participatory democracy is recognized as a part of country's constitutional arrangements, the judiciary tends to reconcile it with the representative nature of the government. As examined in Chapter 1, a similar approach is adopted by the politicians from the US and the UK, who claim that greater protection of participatory rights and opportunities is necessary for revitalization of representative democracy. Once suggested by Steiner that the right to take part in public affairs should be seen as a 'programmatic'[909] right, meaning that its gradual realization leads to institutionalization of participatory mechanisms, past quarter of a century there seems to be much progress in the field.

5.2. How (if at all) do the Existing Legal Requirements Concerning Public Consultation Animate the 'Public Sphere'?

The thesis has sought to explore the participatory rights and opportunities available for individuals in the government policy and decision-making. Chapter 1 noted that the advocates of deliberative and participatory democracies are concerned how the 'public

[909] Henry J. Steiner, "Political Participation as a Human Right," *Harvard Human Rights Year Book*, Vol. 1, 1988, 77; 132.

sphere' could be reinvigorated through participation and deliberation.[910] Political theorists suggest that the main guarantees for a meaningful deliberation and participation include: provision of sufficient information to the consultees about the proposal and the consultation process, equal opportunities to participate and deliberate in consultation, provision of reasons to the consutees about the final outcomes. The existing literature is inconclusive on the fundamental question of how these conditions should be established in practice in order to ensure meaningful opportunities for participation and deliberation.

As explained in Chapter 2, concerning the emergence of law of public consultation, in each jurisdiction, the opportunities for consultation are established under different legal frameworks. In the US, there is a general administrative law requirement for the rulemaking agencies to consult the interested individuals. In the UK, there is no general statutory requirement concerning consultation, but most of the government's departments and agencies have agreed to comply with the Code of Practice on Consultation, which is a soft law instrument. A constitutional obligation for the legislatures to consult the public on the draft laws is established under South Africa's Constitution.

The thesis sought to examine the practical implications of law when incentivizing people or deterring them from participation in consultative processes in the three jurisdictions. The role of law is most visible where the decision-makers are required to accommodate public consultation in their decision-making processes as well as where the individuals are guaranteed a right to take part in the public consultation. It is observed that the following legal incentives contribute to dialogic nature of decision-making process, and consequently animate the public sphere:

a) duty for decision-makers to invite interested parties to consultative processes;

[910] Section *1.3. The Ideals of Participation and Deliberation*

b) duty for decision-makers to disclose information and documentation relevant for the consultative process;

c) duty of institutional openness to avoid prejudgment and surprise switcheroos.

5.2.1. Imposition of Positive Duties on Decision-Makers concerning Inclusion in the Consultative Processes

One of the requirements which animates the 'public sphere' is the duty of decision-makers to invite individuals and their groups to public consultations. As noted in Chapter 1, the advocates of deliberative and participatory democracy suggest that in order for deliberation to be meaningful, the process should be open for individuals and their groups with various interests.[911] A genuine interaction emerges where different views are presented and deliberated.[912] Similarly, the case law concerning public consultation reveals the importance of how the invitation to take part in consultative processes is structured. Another issue is the extent to which the decision-makers are willing to comply with legal demand to include a variety of interests, affects the quality of a dialogue, which is at the centre of any consultative process.

The concerns about inclusion and representation are especially pronounced in the context of political transition where institutions have long failed to engage with citizens and to respond to their concerns.[913] For example, in South Africa, the Constitutional Court highlighted how a decision by a public institution concerning the change of boundaries of several provinces has a long term affect on local residents, entrepreneurs as well as the most socially vulnerable groups (such as women's rights organizations and associations of social

[911] See Section *1.4.3. Inclusiveness and Representation*
[912] Robert E. Goodin, "Enfranchising All Affected Interests, and Its Alternatives," *Philosophy and Public Affairs*, Vol. 35(1), 2007, 40, 68 and John S. Dryzek, *Deliberative Democracy and Beyond: Liberals, Critics, Contestations*, Oxford University Press, 2000, 93.
[913] See Section *1.5.3. Alienation of the Public form Politics and the Lack of Responsiveness by Decision-makers*

workers).[914] The requirement for the decision-makers to accommodate participation by the people in public affairs is of high importance to those groups of society, which for one reason or another (for instance, lack of resources) might not be aware of the upcoming changes that could affect them.

The case law analysis reveals the difficulty of determining in advance *who* should be provided with opportunities for participation. Generally, procedural fairness is the guiding principle when deciding whom to include in consultative processes. As noted in Chapter 1, procedural fairness requires decision-makers to guarantee a right to be heard for individuals where the proposed decisions could affect them.[915] Procedural fairness is usually associated with the right to be heard and is therefore guaranteed only to those who could be directly affected by a proposed rule, policy or decision.[916]

It is observed that procedural fairness guarantees the opportunities for participation, for example, to private companies where the proposed decisions are likely to have an impact on their usual course of business. In one of the cases from the UK, a tobacco manufacturer was consulted by the government on its policy concerning public health, which, if adopted, would have meant the end of the company's business.[917] In another case also from the UK, local residents were consulted on an order proposed by the municipality concerning different arrangements for parking areas.[918] In several cases from the US, the judiciary has emphasized that the notice and comment procedure serves to guarantee procedural fairness in the rulemaking process. In the US, one of the functions assigned by the courts to the consultative procedure of notice and comment, is to ensure 'fairness to affected parties' particularly in the context of rulemaking, where the 'unrepresentative agencies' were vested

[914] *Merafong Demarcation Forum v President of the Republic of South Africa*, (CCT 41/07) [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 968 (CC) (13 June 2008), http://www.saflii.org/za/cases/ZACC/2008/10.html
[915] Section *1.5. Democracy and Procedural Fairness*
[916] See, for example, D. J. Galligan, *Due Process and Fair Procedures*, Clarendon Press, 1996, 137.
[917] *R (United States Tobacco International) v Secretary of State for Health*, [1990] QB 351
[918] *R (Cran) v Camden London Borough Council*, [1995] R.T.R. 346, http://www.bailii.org/ew/cases/EWHC/Admin/1995/13.html

with governmental powers.[919] For example, the US courts held at several instances that fairness demands federal agencies to consult with private actors where proposed rules affect compensation schemes on which their businesses depend.[920]

Under the principle of procedural fairness, the right to be heard is guaranteed to someone who is directly affected by a certain decision, under the law of public consultation, there seems to emerge a trend that not only individuals who are directly affected by the decision-making process are granted participatory rights and given opportunities for consultation. Public consultation as part of procedural rules makes it possible for those who could be indirectly affected by a proposed policy or decision to speak out and have their voices heard. For example, in a case analyzed in Chapter 2, the *Transportation Security Administration*, a US agency, was obliged to consult one of the most active research centers in the field of privacy protection. In addition to serving the function of procedural fairness, the consultative process could have contributed to improving rulemaking process, since the non-governmental organization signalled several shortcomings concerning the agency's policy on the security checks of airport passengers, which eventually were addressed by the agency but only after the judicial procedures were closed.

While procedural fairness usually requires decision-makers to take into account the directly affected interests, the law of public consultation expands the traditional scope of procedural fairness. As noted in Chapter 1, under the conditions of the regulatory government, public policies and decisions address the issues which affect more than one particular group of the society and usually have at least indirect effect on majority of the members of the public. The examination of the jurisprudence reveals the common trend that in all three jurisdictions even those individuals who are not directly affected tend to be provided with the

[919] See, for example, *MCI Telecommunications v Federal Communications Commission (FCC)*, 57 F.3d 1136, 313 U.S.App.D.C. 51; 56.
[920] See, for example, *MCI Telecommunications v Federal Communications Commission (FCC)*, 57 F.3d 1136, 313 U.S.App.D.C. 51, and *Sprint v Federal Communications Commission*, 315 F.3d 369, 354 U.S.App.D.C. 288

opportunities for participation in policy and decision-making processes. In other words, the law of public consultation transforms the conventional concept of procedural fairness by ensuring a right to be heard to a broader circle of people. The concept of participatory rights under administrative laws was transformed mainly by the courts, and what used to be known as a right to be heard, currently implies many of the characteristics attributed to participatory and deliberative rights.

Under certain circumstances, decision-makers are also required to ensure that the interests of future generations are represented in public consultation as well. The analysis of the cases concerning public consultation in the environmental field reveals that decision-makers could be required under the law to consider the interests of future generations. For instance, one of the cases from South Africa revolved around the issue of protection of the river Vaal and prevention of devastating practices by the industry in the neighbourhoods of the river valley. In this case, South Africa's Supreme Court of Appeal brought attention to the fact that the decision concerning mining practices for which permission was sought in the area would have had an impact on the future generations.[921] The court relied on the internationally recognized principle, which requires assessing whether a proposed decision is not compromise the "the ability of future generations to meet their own needs."[922] The mentioned principle is very broad and does not offer sufficient clarity with which a line could be drawn between decisions requiring inclusion of the interests of future generations and those that do not require such consideration. Although the interests of future generations currently are brought to bear only under special circumstances (for instance, such as environmental matters), the issue is increasingly gaining importance in other areas of regulatory government

[921] *Director: Mineral Development, Gauteng Region v Save the Vaal Environment* (133/98) [1999] ZASCA 9; [1999] 2 All SA 381 (A) (12 March 1999), 20, as analyzed in Chapter 4 *Section 4.3. Public Participation as a Tool for the Protection of Environmental Rights*

[922] *Director: Mineral Development, Gauteng Region v Save the Vaal Environment* (133/98) [1999] ZASCA 9; [1999] 2 All SA 381 (A) (12 March 1999), 20, (referring to *Brundtland Report : World Commission on Environment and Development, Our Common Future*, Oxford University Press 1987)

as well. Actually, some scholars even considered that in order to properly ensure the interests of next generations, some seats in the parliament should be reserved for representatives of those interests.[923] For instance, Ekeli has argued that representation of future generations contributes to the legitimacy of deliberative democracy as well as to the objectivity of deliberative processes.[924] While the representation models of future generations' interests are still being debated, an early observation could be made that during public consultation the concern over the long term effects of certain decision and policies indeed contributes an additional dimension to the deliberations.

The above examined requirements for decision-makers, whether at legislative or executive level, invigorate the decision-making and consultative processes. The opportunities for public consultation make it possible for marginalized groups (such as communities from rural areas) and non-governmental organizations to be present in decision-making processes, and to be consulted under the same conditions as business actors do. As noted in Chapter 2, deliberative decision-making processes, where decisions are reached as a result of cooperation between the public officials and individuals or their groups (such as non-profit, business sector or local communities' representatives), contribute to comprehensiveness of such decisions.[925] The issue of how much effort decision-makers should make in order to facilitate public participation in law and decision-making processes is relevant not only for South Africa. In the UK, the Code of Practice requires decision-makers to take specific measures to ensure the inclusion of those who might be disadvantaged because of their language or age.[926]

[923] See, for example, Kristian Skagen Ekeli, "Giving a Voice to Posterity – Deliberative Democracy and Representation of Future People," *Journal of Agricultural and Environmental Ethics*, Vol. 18, 2005, 429; or Andrew Dobson, "Representative Democracy and the Environment," in W. Lafferty and J. Meadowcroft, *Democracy and the Environment*, 1996, 124.
[924] Kristian Skagen Ekeli, "Giving a Voice to Posterity – Deliberative Democracy and Representation of Future People," *Journal of Agricultural and Environmental Ethics*, Vol. 18, 2005, 429; 446.
[925] See *Section 2.5.1. Opportunities to Comment on a Proposed Decision or Policy*
[926] Criterion 4 of the *Code of Practice on Consultation*, the Cabinet Office, July 2008, http://www.berr.gov.uk/files/file47158.pdf

Inclusion by itself is not enough to guarantee meaningfulness of the consultative process and to animate the public sphere, therefore another important duty of decision-makers when facilitating public consultation is the duty to provide the consultees with relevant information about the proposed rule.

5.2.2. Requirements for Decision-makers to Disclose Relevant Materials during Consultative Processes

The theories of deliberative and participatory democracy suggest that one of the main conditions for a meaningful participation and deliberation to occur is that the individuals and their groups, involved in the public decision-making processes, are aware of the proposals at stake.[927] As already mentioned, the underlying idea is that the consultees should be given opportunities to question the proposed policies and decisions as well as the methods used by the decision-makers when setting various standards. Thus, another positive duty which, as observed, ensures a more vibrant consultative process is a requirement for decision-makers to disclose relevant materials during consultative processes.

Usually the notification requirement of public consultation contains the duty for decision-makers to disclose certain information, such as studies or methodologies relied upon when enacting the proposed rule. For example, decision-makers were required to reveal their methods when adopting standards concerning permissible emissions from the new vehicles (*International Harvester* case),[928] possible dangers to public health (*Nova Scotia* and *US Tobacco* cases),[929] or cost-benefit analysis for establishing new regulatory requirements for the providers of electronic communications services (*Vodafone* case).[930]

[927] See *Section 1.3. The Ideals of Participation and Deliberation*
[928] *International Harvester v. Ruckelshaus*, February 12, 1973, 478 F.2d 615, 155 U.S.App.D.C. 411, 428
[929] *United States v Nova Scotia Food Products Corp*., 568 F2d 240 (2nd Cir. 1977) and *R (United States Tobacco International) v Secretary of State for Health*, [1990] QB 351
[930] *Vodafone v Office of Communications (Ofcom)*, Competition Appeal Tribunal, 18 September 2008

As already mentioned in Chapter 1, the disclosure requirements under the law of public consultation could be compared to the right to freedom of information (FOI). The scope of disclosure under the law of public consultation, however, seems to be broader in comparison to FOI. Most courts held that provision of adequate and sufficient information during consultation process was necessary to enhance the meaningfulness of such processes.[931] More particularly, the courts emphasized the importance of disclosure in enabling the participants to provide relevant and intelligent comments which could eventually contribute to solving the problems at stake.[932] Another difference is that under FOI regimes disclosure occurs upon a request by an interested person,[933] whereas during public consultation the most basic information concerning the proposed decision or policy needs to be provided by decision-makers without prior request from the parties. In addition, during consultation participants can still request additional information, which has to be disclosed if the non-disclosure hinders the ability of the participants to make meaningful comments on the proposal at stake. The disclosure requirements under the law of public consultation go beyond what is required under FOI statutes. The decision-makers could be required to publicize the inputs made by other participants. Here, the practice of a few regulatory authorities in the US stands out, whereby the disclosure of submissions by the interested parties enables them to become aware of each others' interests.[934] This requirement, which is not present in the other two jurisdictions, encourages discussions not only between the agency officials and the participants of consultation but also between the participants themselves. Thus, not only do

[931] See for example, *R (United States Tobacco International) v Secretary of State for Health*, [1990] QB 351; *United States v Nova Scotia Food Products*, 568 F2d 240 (2nd Cir. 1977); *Vodafone v Office of Communications (Ofcom)*, Competition Appeal Tribunal, 18 September 2008; *American Radio Relay League v Federal Communications Commission (FCC)*, 524 F.3d 227, 390 U.S.App.D.C. 34; *Edwards v the Environment Agency*, 2006 EWCA Civ 877.

[932] See for example, *Vodafone v Office of Communications (Ofcom)*, Competition Appeal Tribunal, 18 September 2008

[933] See generally Patrick Birkinshaw, *Freedom of Information – The Law, the Practice and the Ideal*, Cambridge University Press, 2010.

[934] Steven J. Balla, Draft report, "Public Commenting on Federal Agency Regulations: Research on Current Practices and Recommendations to the Administrative Conference of the United States," 15 March 2011, http://www.acus.gov/wp-content/uploads/downloads/2011/04/COR-Balla-Report-Circulated.pdf

the disclosure requirements which are part of law of public consultation contribute to openness and transparency of the decision-making process (as initially intended under the FOI regimes) but they also make the process more deliberative.

As explained in Chapter 2, the requirement for decision-makers to notify the public about the proposed decisions matured into an obligation to publish relevant materials along with the provision of notice of upcoming consultations.[935] The so-called 'relevant materials' in one of the cases from the UK included internal documents of the Secretary of State for Health on scientific data about the harm to human health which could be caused by different types of tobacco. In a case from the US, concerning standards of handling fish products to prevent food poisoning, the decision-maker, the Food and Drug Administration, was obliged to disclose all the materials on which it relied when drafting the standards.[936] The disclosed materials included data on which the assessment of poisoning risk was based, which was successfully challenged by one of the fish producers.

Disclosure of relevant information is also necessary to ensure that participants are able to contribute their own relevant knowledge. During consultative processes the inputs made by the consultees enrich the decision making process by offering alternative approaches towards the issues at stake. For example, the cases illustrated that quite often the knowledge and expertise lay outside of the area of the decision maker's competence. Therefore, the input from participants becomes a source of competence, which is necessary in making a complex decision. In an already mentioned case from the US, local producers of fish products were recognized by the court as having more knowledge on handling of the products while preventing harm to public health and maintaining the quality of the fish than the regulatory agency. As examined in Chapter 2, in the case concerning the deployment of body scanners in the US airports, the US court found that the purpose of notice and comment procedure, which

[935] Section *2.6.2. Requirement to Notify: From mere Notification towards a Requirement to Disclose*
[936] *United States v Nova Scotia Food Products*, 568 F2d 240 (2nd Cir. 1977)

should have been facilitated by the *Transportation Security Administration*, was to receive by the agency all the 'pertinent information' before making a final decision.[937] However, the agency failed to involve all the concerned parties and, therefore, some of the most crucial information concerning the usage of body scanners in a way which ensures privacy of the passengers was missing from the document.

The analysis of the case law reveals that the amount of disclosed information is not by itself the only precondition for a vibrant deliberation, and as the courts in different jurisdictions have emphasized, the key criterion is whether the provided information is sufficient so that the participants are able to make certain conclusions about the proposed policy or decision for themselves as well as relevant submissions during the consultative process.[938] A decision-maker as an initial author of a proposed rule is also the holder of the information and data primarily supporting the enactment of such rule. Once the most relevant information is shared with the participants, a better informed dialogue could occur.

5.2.3. The Duty of Institutional Openness: Prejudgment and 'Surprise Switcheroo'

Duty of institutional openness is another requirement which animates the public sphere and contributes to deliberations occurring within it. As explained in Chapter 2, the consulting authorities are required to be open throughout the consultation process as well as when making the final decision in the end.[939] Decision-makers need to be open at the beginning of the consultation and to make clear presentations of what the proposal is about and how the participants could provide their inputs. They also have to be open later in the

[937] *Electronic Privacy Information Center v United States Department of Homeland Security*, No. 10-1157, (D.C. Cir. July 15, 2011), 8, http://www.cadc.uscourts.gov/internet/opinions.nsf/B3100471112A40DE852578CE004FE42C/$file/10-1157-1318805.pdf

[938] See, for example, International Harvester v. Ruckelshaus, February 12, 1973, 478 F.2d 615, 155 U.S.App.D.C. 411, 428; United States v Nova Scotia Food Products Corp., 568 F2d 240 (2nd Cir. 1977) and R (United States Tobacco International) v Secretary of State for Health, [1990] QB 351; Vodafone v Office of Communications (Ofcom), Competition Appeal Tribunal, 18 September 2008

[939] See *Section 2.6. Requirements for Decision-makers in Consultative Processes*

process when considering the inputs that were made. In order to assess whether decision-makers ensured meaningfulness of consultative processes, the judiciary in all three jurisdictions usually invokes the 'open mind' criteria.

Openness in a policy or decision-making process requires the decision-makers to hold consultation at an early stage and make an honest presentation of the proposed decision. As many cases illustrated, this usually requires disclosure of various documents and methodologies on which the decision-makers have relied.[940] Openness in consultation among other things means that participants should be aware of how their input was considered and how the final decision was made. In the US, openness also requires the rulemakers to respond to the input made by the consultees. For example, in one of the cases analyzed above, the court reiterated that agencies have to consider the comments made by the participants as well as to respond to the most relevant ones in order to ensure procedural fairness to the interested individuals.[941]

The duty of openness is closely related to the principle of legal certainty. For example, in the US, the agencies cannot invite consultation on one type of proposal and in the end adopt a final rule which is completely different from the initially suggested one. This way the participants are guaranteed that no 'surprise switcheroos'[942] will be pulled on them. In addition to the open mind criteria the courts in the US developed the concept of 'logical outgrowth'. As examined in Chapter 4, under the concept of 'logical outgrowth', the final rule could and even is expected to be different from the original proposal.[943] However, the change of the rule has to be rational and anticipated by the participants, and in considering whether

[940] See, for example, *R (United States Tobacco International) v Secretary of State for Health*, [1990] QB 351; *United States v Nova Scotia Food Products*, 568 F2d 240 (2nd Cir. 1977); *R(Compton) v Wiltshire Primary Care Trust*, [2009] EWHC, 1824 (Admin)
[941] *Grand Canyon Air Tour Coalition v Federal Aviation Administration* (FAA), 154 F.3d 455, (D.C. Cir. 1998)
[942] *Environmental Integrity Project v. Environmental Protection Agency (EPA)*, 425 F.3d 992, 368 U.S.App.D.C. 116,
[943] Section *4.2. Public Participation as a Means of Exchanging Environmental Information between the Decision-makers and the Interested Parties*

the departure was rational, the court would inquire whether the participants could have foreseen the changes made to the final rule.

In the US, the law establishes yet another measure which is supposed to prevent decision-makers from making prejudged decisions. If decision-makers were not open enough in their decision-making, they could be disqualified from the process.[944] In practice, however, this measure was criticized as not sufficient to ensure the open-mindedness of decision-makers. For instance, Jack Beermann argues that courts have never disqualified an agency's procedure on the grounds of having an insufficiently 'open mind'. Even where they are asked to do so, judges are reluctant to examine the facts in order to assess the possibility of bias and close-mindedness of decision-maker.[945]

The analysis of the law of public consultation reveals that the difficulty of ensuring meaningful participation depends not only on the willingness of a decision-maker to seriously consider the inputs by participants but also to provide some kind of proof or evidence that there was a proper consideration of the inputs that were made. However, sometimes decision-makers, although willing and ready to consider the inputs made during public consultation, could be constrained by statutory mandates. For instance, in one of the cases from the US, the federal agency responsible for maintaining safety of air and space travelers, could not (after the consultation) change its initial proposal concerning regulations for the flights over one of the national parks, since it did not have enough space for maneuvering due to statutory limitations on its competence.[946] Under such circumstances, the participants at least should be informed about the limited nature of the consultation. Also from the very beginning of the consultative process, the decision-maker should indicate which

[944] Jack Beermann, *Administrative Law*, 2nd ed., Aspen Publishers, 2006, 56, (referring to *Association of National Advertisee Inc. v FTC*, 627 F.2d 1151 (D.C. Cir. 1979))
[945] Jack M. Beermann, "Presidential Power in Transitions," *Boston University Law Review*, Vol. 83, 2003, 947, at 1002. See also, *Association of National Advertisers v Federal Trade Commission*, United States Court of Appeals, District of Columbia Circuit, 627 F.2d 1151, 201 U.S.App.D.C. 165, (1979)
[946] See, for example, *Grand Canyon Air Tour Coalition v Federal Aviation Administration* (FAA), 154 F.3d 455, (D.C. Cir. 1998), as examined in Section 2.6.3. Consideration of the Inputs made by the Participants.

of the aspects of the proposal are subject to change and which are not. This information could further assist the participants and the public in building trust with the decision-maker.

Another important aspect of the openness of decision-making procedures is related to the building of trust between the government and the people. The consultative mechanisms contribute to the trust between the participants and decision-makers, where the public authorities are genuine about the public consultation as well as willing to receive and consider the inputs from the interested individuals. As described in Chapter 1, the critics of the enhanced opportunities for public participation are sceptical that the expert knowledge if not brought from within the public authority could challenge the competence of the authority's officials and disturb the people's confidence in the authority. The results of the research point different direction. Perception that the decision was made by the top experts in the field is not necessarily true, because the law and jurisprudence of public consultation reveal that a final decision is not always an outcome of a scientific investigation. Quite often the final decision is a result of some bargaining between individuals or their groups, particularly, those who would be the most affected by a particular rule. The involvement of these parties into decision making processes is also crucial because they hold the knowledge which fills the gaps of institutional expertise. The analysis of the jurisprudence and the legal requirements suggests that the trust between the people and a public authority is less likely to be broken because the authority receives advices from external experts and lay people, and more likely – if the decision making process is a closed one, where the authority fails to facilitate meaningful consultation mechanisms. Most examples analyzed in the thesis suggest that the cases where the people's lack of trust in public authorities materialized into certain protests concerned the final decisions or policies which were a result of a deficient process. The law and jurisprudence of public consultation suggest that there is only a little likelihood that a certain proposed policy or decision would be as complex as to involve only scientific

matters. After all, public policies and decisions are made by politicians or officials and not the scientists. Thus, there is no reason to exclude the opportunities for public participation simply because the matter at stake requires some expert knowledge or invokes scientific topics. Furthermore, some cases examined above indicated that the decisions which were to be made by the public authorities not only required scientific knowledge but taking into consideration non-scientific aspects of the matter as well. For example, the case concerning body scanners in the airports of the US, which was examined above offers an accurate illustration of scientific uncertainty. On the one hand, the scientific research in the field suggests that even low levels of radiation raise public health issues.[947] On the other hand, there is no clear scientific evidence which levels of radiation from the body-scanners could necessarily cause cancer.[948]

The mentioned legal obligation concerning openness does not only animate the decision-making processes by making them more deliberative, but also contributes to the transparency of the government. For example, the failure by one of the US agencies to hold notice and comment procedures raised a public concern over transparency of this agency's performance.[949] Transparency and openness are particularly acute issues in rulemaking processes, where efficiency of national security has to be weighed against privacy and health care. In conclusion, the legal requirement for institutional openness ensures legal certainty which keeps decision-makers responsive to the public.

[947] Testimony by Professor David J. Brenner before the Committee on Oversight and Government reform, March 16, 2011, http://oversight.house.gov/wp-content/uploads/2012/01/Brenner_Testimony_Complete.pdf
[948] See, for example, Testimony by Professor David J. Brenner before the Committee on Oversight and Government reform, March 16, 2011, http://oversight.house.gov/wp-content/uploads/2012/01/Brenner_Testimony_Complete.pdf and http://ec.europa.eu/health/scientific_committees/docs/citizens_security_scanners_en.pdf
[949] http://www.libertyweek.org/2013/06/26/june-26-2013-tsa-full-body-scanner-transparency/

Conclusions

Under the existing legal frameworks, the above mentioned set of obligations primarily invigorates the decision-making process and provides the fundament necessary for animation of the public sphere. Pateman observes, once established in one area the participatory opportunities become contagious and migrate to other areas of public life, at the same time contributing to the willingness of the people to participate.[950] Indeed a similar observation emerges from analysis of the case law. The above analysis reveals that usually the individuals who participate in consultative processes make use of other means of participation as well. For instance, in the cases concerning health and environmental issues, individuals and their groups sought to promote their causes through media publicity and protests.[951] Similarly, in the US, groups of individuals took measures additional to public consultation in order to secure the right to privacy, the protection of which was put in jeopardy by adoption of a policy concerning the security checks in the US airports.[952] Thus, where the people are affected by certain decision-making process, they resort to consultative opportunities in addition to other ways of expressing their concerns towards the proposed rules or laws.

However, having rules and procedures in place is not enough, and the dialogic nature of decision-making processes depends to a large extent to the implementation of those requirements. In the end, agencies retain discretion and eventually it is the courts which can oversee how these obligations are complied with.

[950] Carole Pateman, *Participation and Democratic Theory*, Cambridge University Press, 1989, 44.
[951] "Greenpeace Seeks Fortress' Architect," *Building Design*, January 29, 2010, 3, and "Runway Critics Fight on," *Planning*, January 23, 2009, 10; Wyndham Hartley, "South Africa: New Chapter for Merafong as MPs Move to Rectify Blunder," *Business Day*, 19 February 2009, http://allafrica.com/stories/200902190080.html
[952] Ralph De La Cruz, "South Florida Officials Lead National Push against Airport Body Scanners," *Florida Center for Investigative Reporting*, December 19, 2011, http://fcir.org/2011/12/19/south-florida-officials-leading-national-push-against-airport-body-scanners/ and Jonathan Benson, "Attractive Females Targeted by TSA Agents for Multiple Naked Body Scanner Screenings," *Natural News*, February 20, 2012

5.3. Judges as Patrons of Participatory Rights

Judges in the US, the UK and South Africa contribute to developing concept of meaningful opportunities for public participation and deliberation. First, judges promote the concept that participatory rights should be available in practice and not on paper only. Even if the decision-makers are required to accommodate public consultation among variety of interests, in practice, the creation of rules concerning public consultation is not enough to guarantee meaningful opportunities for participation and deliberation. A couple of cases from South Africa were illustrative in this respect, where country's Constitutional Court held that additional more practical safeguards are necessary in order to ensure representative participation in consultative processes. In a seminal case in South Africa, the Constitutional Court found that the provincial legislature of Kwazulu-Natal failed to facilitate public consultation where it did not ensure that those who could be interested in the consultative processes were aware of the possibilities of participation.[953] The judges emphasized that the fulfillment of the constitutional requirement for the legislatures to facilitate public involvement depends on the adoption of a legal framework as well as ensuring that the legally provided opportunities are actually available in practice.[954] For instance, according to the court, the legislatures could use different media channels to inform the likely affected individuals about the proposed changes as well as to provide transport to and from the consultation.[955] According to the analysis of the jurisprudence, one of the guiding principles which the legislatures should consider when designing consultative processes, is the impact of the proposed law on the members of the public. Only if understood this way, could the public

[953] *Matatiele Municipality v President of the Republic of South Africa* (2)(CCT73/05A)[2006] ZACC 12 [2006] ZACC 26; 2007 (1) BCLR 47 (CC) (18 August 2006), (Matatiele 2), 67-84, http://www.saflii.org/za/cases/ZACC/2006/12.html

[954] *Matatiele Municipality v President of the Republic of South Africa* (2)(CCT73/05A)[2006] ZACC 12 [2006] ZACC 26; 2007 (1) BCLR 47 (CC) (18 August 2006), (Matatiele 2), 67, http://www.saflii.org/za/cases/ZACC/2006/12.html

[955] *Matatiele Municipality v President of the Republic of South Africa* (2)(CCT73/05A)[2006] ZACC 12 [2006] ZACC 26; 2007 (1) BCLR 47 (CC) (18 August 2006), (Matatiele 2), 67, http://www.saflii.org/za/cases/ZACC/2006/12.html

involvement amount to 'partnering in decision-making,' which is a crucial element of South Africa's broader constitutional concept of participatory democracy.[956] Following this case, the country's legislatures are now obliged to take efforts in addition to simply organizing consultation and to ensure that people are aware of the upcoming consultation and those who are willing to participate are able to do that.

Second, certain level of judicial scrutiny ensures that public institutions do not abuse their discretion. For instance, in the US, the agencies enjoy broad discretion in choosing when to consult and how to do it. Sometimes this discretion is used to avoid holding consultations. For instance, the *Transportation Security Administration* (TSA) when adopting a policy on national security in airports, sought to avoid the public's involvement in the process, despite the fact that the policy concerning the introduction of body scanners in airports also involved issues of public concern such as privacy and public health. The agency sought to avoid consultative processes and, therefore, sought to adopt the rule through a procedure applicable to 'interpretive rules' which does not require facilitation of notice and comment. [957] The court held that an agency cannot justify exclusion of notice and comment procedures from the rulemaking process, where the agency does not possess all the relevant information on the matter that is being proposed.[958] According to the court, *Electronic Privacy Information Center* (EPIC) which is known for its privacy rights advocacy, should have been given opportunities to express its concerns about the proposed policy, especially, because these issues were not raised by the agency itself. Eventually the agency facilitated the

[956] *Matatiele Municipality v President of the Republic of South Africa* (2)(CCT73/05A)[2006] ZACC 12 [2006] ZACC 26; 2007 (1) BCLR 47 (CC) (18 August 2006), (Matatiele 2), 54, http://www.saflii.org/za/cases/ZACC/2006/12.html
(citing *Doctors for Life International v Speaker of the National Assembly*, South African Constitutional Court, 2006 (12) BCLR 1399 (CC), 129, http://www.saflii.org/za/cases/ZACC/2006/11.html)

[957] *Electronic Privacy Information Center v United States Department of Homeland Security*, No. 10-1157, (D.C. Cir. July 15, 2011), 2, http://www.cadc.uscourts.gov/internet/opinions.nsf/B3100471112A40DE852578CE004FE42C/$file/10-1157-1318805.pdf

[958] *Electronic Privacy Information Center (EPIC) v Homeland Security*, No. 10-1157, November 1, 2010, http://epic.org/EPIC_Body_Scanner_OB.pdf

notice and comment procedure, and adopted the changes as suggested by EPIC, leading to a less intrusive body scanning process in the US airports. Also, in the UK, the judges are using procedural failures by public authorities to limit their discretion.[959] The analysis of case law reveals that the principle of legitimate expectations enables the judiciary to indirectly fetter the discretion of public authorities.

The judiciary, however, was not that forceful in establishing the educative function of participatory rights. As explained in Chapter 1, the proponents of the theories of participatory democracy rely heavily on the educative effects of participation. According to them, the opportunities for participation educate individuals to think publicly, which consequently allows overcoming political apathy.[960] A rather common suggestion among the proponents of participatory democracy is that allowing individuals to take part in public affairs would contribute to their understanding of what is required by public interest, and how government decisions are made.[961] In practice, the function of education was neither initially foreseen under any of the laws which establish consultative requirements nor any of the political agenda's of the chosen jurisdictions, this function only sporadically emerged from the case law as an important element of a meaningful public consultation as well as from certain policy documents.

Among the EU countries, the educative function is most apparent in the field of electronic communications. Here, the education of consumers through the opportunities for participation is considered a necessary element of regulatory policies. According to the report by the Body of European Regulators for Electronic Communications, only informed

[959] Ian Loveland, *Constitutional Law, Administrative Law, and Human Rights: A Critical Introduction*, Oxford University Press, 2009, 499-500. See also, *Section 2.5.1. Opportunities to Comment on a Proposed Decision or Policy*

[960] See, for example, Carole Pateman, *Participation and Democratic Theory*, Cambridge University Press, 1989, 44, and Benjamin Barber, *Strong Democracy: Participatory Politics for a New Age*, University of California Press, 1984, 152.

[961] Benjamin Barber, *Strong Democracy: Participatory Politics for a New Age*, University of California Press, 1984, 152; and Carole Pateman, *Participation and Democratic Theory*, Cambridge University Press, 1989, 44.

consumers are able to profit from the competitive offers by the service providers.[962] Educated consumers can choose a mobile or internet services provider which offers the best deal, and if unsatisfied with the services they can switch to another provider. In most cases which were examined, regulatory decisions and policies concerning telecommunication services seek to protect the end-users and usually by placing certain requirements for the providers of the services. The public consultation in telecommunications regulatory processes due to the publicity and disclosure requirements contribute to the existing information in public sphere about the mobile service providers. For example, the consumers become aware of which of the mobile or internet service providers are more willing to invest in provision of better services.[963]

In South Africa, generally the educative function of public consultation is not recognized as an exclusive element of a meaningful participation in lawmaking processes. For example, in *Merafong Demarcation Forum v President of the Republic of South Africa* case, the Constitutional Court of South Africa held that the fact that meaningful opportunities for participation fosters better understanding by the consultees of the government procedures was not enough to require the provincial legislature to inform and educate the affected community about the reversal of the decision, which has been earlier agreed upon.[964] The Constitutional Court, unfortunately, disregarded the importance of the educational function of participation, although the members of the community challenging the meaningfulness of the consultative process were the most socially vulnerable group of the society. Instead South Africa's

[962] *Body of Regulators for Electronic Communications*, Annual Report 2010, May 2011, BoR (11)19, 17, http://www.irg.eu/streaming/BoR%20%2811%29%2019%20BEREC%20Annual%20report_final.pdf?contentId=547173&field=ATTACHED_FILE

[963] *Sprint v Federal Communications Commission*, 315 F.3d 369, 354 U.S.App.D.C. 288, and *Vodafone v Office of Communications (Ofcom)*, Competition Appeal Tribunal, 18 September 2008

[964] *Merafong Demarcation Forum v President of the Republic of South Africa*, (CCT 41/07) [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 968 (CC) (13 June 2008), 59

Constitutional Court relied on the proposition that due to the complete turnover of the agreed decision the consultation would not have led to any different results.[965]

The educational function is not so popular among the courts most likely because the judges are more concerned whether parties could have had some influence on the final decision or policy. Therefore, in the *Merafong* case, the South Africa's Constitutional Court found that there was no need to consult the community on a change of policy decision, where the consultation was to have only an educative and informative effect. One of the reasons for the courts' reluctance to rely on the potential of the public consultation to educate the public is that it is difficult to measure the effects of this function. Where the consultative process is less likely to provide the interested parties with the opportunity to somehow influence the final decision, the courts would not be eager to require the decision-maker to accommodate more meaningful public consultation purely for the reason of raising awareness.

Although neglected by some judges, the educative function of public participation could have another dimension in South Africa, because of the devastating results of apartheid in South Africa, which led to huge inequalities among the people including the inequalities in education.[966] As mentioned, under the theories of democracy, the opportunities for participation in consultation concerning a specific matter are expected to consequently contribute to the peoples' knowledge about the country's most pressing issues. Thus, the law of public consultation could serve as an additional tool for overcoming the various disparities in South Africa. Probably the best illustration of the importance of the educative function of public consultation was provided by one of the most prominent judges in South Africa. In *Doctors for Life* case, in his concurring opinion Justice Sachs emphasized that public consultation provides broad opportunities for participation, requires the politicians to take into

[965] *Merafong Demarcation Forum v President of the Republic of South Africa*, (CCT 41/07) [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 968 (CC) (13 June 2008), 59-61

[966] See, for example, Servaas van der Berg, "Apartheid's Enduring Legacy: Inequalities in Education," *Journal of African Economies*, Vol. 16(5), 2007, 849; 851.

account the inputs made by the participants and therefore enables even those who lack higher education to participate in the political processes of the country.[967]

In conclusion, the role of the judiciary in developing the consultative requirements could be explained by a lack of more concrete and comprehensive rules concerning public consultation. As observed in Chapters 2 and 3, meaningful opportunities for public consultation are ensured where the law strikes a proper balance between strict formalization of the procedures concerning public consultation and discretionary powers of the decision-makers. The formal procedures are necessary for the reasons of legal certainty, so that those who could be affected by rules, decisions or laws proposed by a public institution, would be aware of them. The discretion is necessary among other reasons to guarantee some flexibility for decision-makers in their rulemaking or lawmaking practices. The judges are therefore vested with a difficult task to retain a proper balance between the two occurrences in order to maintain meaningful opportunities for participation.

The efforts by the judges to secure meaningful opportunities for participation contribute to the evidence of the growing power of the judiciary.[968] As mentioned in Chapter 2, in the three jurisdictions at stake, the trend towards broader interpretation of the procedural rules has provided the judiciary with a tool which makes the scrutiny of public authorities' actions easier. The judges are the driving force behind the concept that the opportunities for public consultation should be accommodated in such a way that a genuine dialogue between the public institution and individuals occurs.

[967] *Doctors for Life International v Speaker of the National Assembly and Others* [2006] ZACC 11; 2006 (6) SA 416 (CC), 234, http://www.saflii.org/za/cases/ZACC/2006/11.html
[968] Section *2.5.1. Opportunities to Comment on a Proposed Decision or Policy*

CONCLUSIONS

The thesis sought to establish how the opportunities for public participation and deliberation in decision-making processes might be structured under law in order to remedy the problems of regulatory government (unresponsiveness, over-regulation and lack of professionalism). Ultimately, the following conclusions can be reached.

1. Legally recognized opportunities for participation can facilitate deliberation.

Generally, it is assumed that 'participation' does not imply a dialogue or some sort of interchange of information between the participants, and therefore 'participation' is often confused with the right to vote.[969] This assumption is further intensified by the observation that while the right to public participation is recognized as an enforceable right, none of the existing legal frameworks of the three examined jurisdictions recognizes what could be called a right to deliberate. Nonetheless, since the opportunities for participation are legally recognized as enforceable rights, those who enjoy opportunities for participation in decision-making processes are also potentially guaranteed certain dialogical opportunities – some kind of structured discussion with the relevant decision-maker. The juridification of participatory rights reveals that the protection offered for the participants goes beyond guarantees simply to take part in decision-making processes. In other words, the formulation of participation in terms of legally enforceable rights aids deliberation as well.

Participatory rights, although not expressly linked with the opportunities for deliberation, encompass many requirements for decision-makers which are associated with the criteria attributed by scholars to the ideals of both participation and deliberation . As explained in Chapter 2, the protection of participatory rights and opportunities includes,

[969] See Section *1.3. The Ideals of Participation and Deliberation*

among others, such guarantees as participants' right to receive information in advance on the matter which is being consulted upon, a right to have the submissions considered by the decision-maker, and a right to be informed about the final decision and the reasons behind it. All these requirements and guarantees invigorate the dialogic nature of decision-making processes.

In all three jurisdictions, the judiciary determines the nature and scope of public consultation. In order to determine the meaningfulness of consultative processes, the courts usually assess the (dialogic) nature of these processes against a benchmark of 'genuine interchange' of information. For instance, the courts have recognized that in order to ensure deliberation, decision-makers should consider the submissions of consultees with a 'receptive' and 'open' mind, and should also provide consultees with sufficient information to enable them to challenge the factual basis for a particular decision if necessary.[970] As examined in Chapter 2, the level of judicial scrutiny of the quality of the dialogue depends on the impact of the proposed decision on the particular group affected by the decision and the public in general.[971]

Thus, the requirements concerning public consultation are similar to the criteria advocated by theorists of participatory and deliberative democracy. It is argued here that such processes can therefore enable the reinvigoration of representative democracy.

2. Reinvigorating representative democracy?

As emphasized in Chapter 1, the very concept of 'representation' is stretched to breaking point by the shift to regulatory forms of government. The lack of responsiveness by

[970] See, for example, the cases of *United States v Nova Scotia Food Products*, 568 F2d 240 (2nd Cir. 1977), and *R (Cran) v Camden London Borough Council*, [1995] R.T.R. 346, http://www.bailii.org/ew/cases/EWHC/Admin/1995/13.html

[971] See, for example, the cases of *Electronic Privacy Information Center v United States Department of Homeland Security*, No. 10-1157, (D.C. Cir. July 15, 2011); *R(Bapio Action) v Secretary of State for the Home Department*, [2007] EWHC 199 (Admin); [2007] EWCA Civ 1139; *Poverty Alleviation Network and Others v President of the Republic of South Africa and Others* (CCT86/08) [2010] ZACC 5; 2010 (6) BCLR 520 (CC) (24 February 2010).

decision-makers to the people is considered by politicians, scholars and members of the public as an essential problem of regulatory government.[972] In representative democracy, the assurances of governmental responsiveness are generally assumed to be afforded through periodic elections. However (and merely by way of example), the corrupt financing of political campaigns, declines in voter turnout, and the transfer of some government powers to public and private actors whose performance is in no way affected by election cycles, significantly erode the capacity of periodic elections to deliver responsive governance.[973]

The reinvigoration thesis is further enhanced if robust and legally structured decision-making processes can serve to catalyze dialogic interaction in other areas of public life. At this point, Pateman's observation concerning the expansion of participation from one's work place to the other areas of one's life offers some guidance. According to Pateman, once the opportunities for public participation are introduced in the work place, people get used to them and later replicate similar participatory models outside the work space (for instance, in areas concerning political affairs), thus overcoming the political apathy.[974] While the case-law analysis does not of itself provide direct evidence that opportunities for public consultation are later replicated in other fields of public life, it does at least illustrate how the interrelation of participatory rights with other cognate rights requires us to consider the value of consultative obligations through a wider lens. For instance, the right to freedom of expression and freedom of information are reinforced through participatory rights.[975] Participatory rights can give a real bite for individuals where 'speaking' is not enough. As emphasized in Chapter 5, public consultation is often accompanied by other forms of expression or association.[976] Particularly, the requirement for decision-makers to consider the submissions made during

[972] See Section *1.5.3. Alienation of the Public from Politics and the Lack of Responsiveness by Decision Makers*
[973] Evan J. Criddle, "Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking," *Texas Law Review*, Vol. 88(3), 2010, 441, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1371717&download=yes See also, Glen Stasewszki, "Political Reasons, Deliberative Democracy, and Administrative Law," *Iowa Law Review*, Vol. 97(3), 2012, 1.
[974] See, generally, Carole Pateman, *Participation and Democratic Theory*, Cambridge University Press, 1989.
[975] See *Section 1.5.5. Supplementing the Rights of Freedom of Expression and Freedom of Information*
[976] See Section *5.2.3. The Duty of Institutional Openness: Prejudgment and 'Surprise Switcheroo'*

consultative processes can ensure that the interests and views of the consultees will *actually* be considered, and their demands at least recognized.[977] Where the results of public consultation are incorporated in final decisions, the participatory rights contribute to such functions of freedom of expression as 'citizen participation in a democracy'.[978]

Where consultees propose alternative solutions to the proposed decisions of public institutions, the results of the research reaffirm the arguments behind the theory of suspicion of government, according to which the public institutions cannot be trusted as infallible.[979] For example, consultees have contributed important insights and information to decision-making processes in the fields of (among others) national security, national energy planning, and environmental matters.[980] The judiciary in each jurisdiction held on several occasions that meaningful consultative processes were necessary because the submissions made by the consultees provide public institutions with relevant information which they otherwise lack.

The evidence of participation by individuals at various levels of public policy and decision-making processes, and their significant contributions when addressing local as well as national issues, also suggests that there is less room for concentration of expertise in the hands of decision-makers. Thus, contrary to Frank Fischer's concern about the concentration of the knowledge and decision-making power in the hands of public officials, the consultative processes are recognized by both decision-makers and judges as a source of necessary and external expertise.[981] The findings also challenge the point made by Pitkin that responsiveness by the government to the people is more paramount in value laden decisions

[977] See, for example, the cases of *R (London Borough of Hillingdon) v Secretary of State for Transport* [2010] EWHC 626 (Admin) (26 March 2010), http://www.bailii.org/ew/cases/EWHC/Admin/2010/626.htm and *R (Greenpeace) v Secretary of State for Trade and Industry*, [2007] EWHC 311 (Admin), http://www.bailii.org/ew/cases/EWHC/Admin/2007/311.html
[978] Eric Barendt, *Freedom of Speech*, Oxford University Press, 2005, 18.
[979] See Section *1.1. From Representative to Regulatory Government*
[980] See, for example, Section *2.5.1. Opportunities to Comment on a Proposed Decision or Policy*
[981] See Section *1.5.2. Unprofessionalism in Regulatory Government*

than in decisions requiring factual knowledge or scientific expertise.[982] As examined in earlier chapters, individuals participate in decision-making processes concerning scientific matters as well as non-scientific ones.[983] Examination of the law of public consultation reveals that even when decision-making processes involve scientific issues, they are often disputed or contested by the consultees. While scientific expertise in some decisions is usually perceived as necessary and inevitable, consultative processes can serve to expose 'scientific uncertainty'. Indeed, after a closer analysis of how these decisions are made, it becomes clear that very often a particular solution has to be chosen from a spectrum of various alternatives – there is no single correct answer. Illustrative examples of scientifically uncertain matters include the levels of noise produced by airplanes and the degree to which security X-rays may or may not be harmful to human health. Thus, the law of public consultation reveals that government's responsiveness can be secured even with regard to policies and decisions containing scientific matters. This observation is important in order to emphasize that in all three jurisdictions the more decision-makers are subject to robust consultative requirements, less areas remain where public institutions can act without oversight.

3. The limitations of the law of public consultation.

There are certain limitations of the role of law when guaranteeing participation and deliberation in decision-making processes. Such limitations include: (1) the absence of a uniform set of criteria to trigger consultative obligations; (2) difficulties in relation to the definition of the pool of relevant consultees, and (3) the challenge of assessing the meaningfulness of consultative processes for those involved (including, but not limited to,

[982] Hanna Fenichel Pitkin, *The Concept of Representation*, University of California Press, 1967, 212.
[983] See, for example, Section *1.1. From Representative to Regulatory Government* or *Section*; Section *1.5.2. Unprofessionalism in Regulatory Government*; or Section *5.2.2. Requirements for Decision-makers to Disclose Relevant Materials during Consultative Processes*

uncertainties surrounding the level of influence that consultees might have in relation to final outcomes and decisions).

First, because the nature of consultative processes requires flexibility, the law cannot prescribe too strict requirements concerning public consultation. Therefore in all three jurisdictions, the legal requirements are often established in a rather ambiguous manner, potentially leaving decision-makers with excessive space to maneuver when designing consultative processes. As explained in Chapter 2, for example, consultative requirements can be defined in very broad terms, where decision-makers are merely obliged to ensure opportunities for consultation, but the nature and scope of such opportunities is not strictly defined. That said, and as illustrated in Chapter 3, more strict procedural requirements do not necessarily lead to more deliberative or participatory decision-making processes.[984]

This brings to the second limitation of the role of law concerning consultative obligations, which is the difficulty to appropriately define the community of relevant consultees. In practice, it is exceedingly difficult to determine in advance who should be involved and under what conditions. The case-law confirmed that the principle of procedural fairness in the US, the UK and South Africa evolved in such a way so that not only those individuals who might be directly affected by, but also those who have some interest in, the proposed rule or decision are guaranteed meaningful participatory rights. The most illustrative examples are the two cases from the US and the UK, where the courts ordered the involvement of non-governmental organizations, acting respectively in the fields of human rights and environmental protection.[985] As examined in Chapter 1, the theorists of deliberative and participatory democracy envisage the problem of who should be involved in decision-making processes.[986] Several cases illustrate that decisions over whom to involve in public

[984] Section *3.4. Taming the Broad Discretion of the Telecommunications Regulatory Authorities with Procedural Fairness and the Strictness of the Rules*
[985] Section *2.5.1. Opportunities to Comment on a Proposed Decision or Policy*
[986] Section *1.4.3. Inclusiveness and Representation*

consultation raise concerns not only about the meaningfulness of the consultative mechanism, but call into question the very legitimacy of decision-making processes. For example, the opportunities for involvement are still limited in the UK, where no statutory obligation to consult exists, only discrete and particularly affected groups would be guaranteed access to public consultation.[987]

The third limitation of the role of law to ensure more participatory and deliberative public policy and decision-making processes is related to the assessment of the meaningfulness of such processes. One of the reasons behind the difficulty of such assessment is related to the nature of participatory rights because they are regarded as 'programmatic'[988] rights, and therefore subject to continuous developments concerning their proper protection and enforcement.

The level of influence that participants can have in decision making processes to a certain extent affects the nature of meaningfulness of consultative processes. In Chapter 1, it was emphasized that the opportunities for participation and deliberation in decision-making allow individuals to influence final decisions. In Chapter 2, it was observed that decision-makers cannot be bound by submissions made by consultees. This limitation concerning public consultation in decision-making processes also stems from the representative form of government. The judiciary, particularly in South Africa, has been cautious in this regard that the opportunities for public involvement should not conflict with the representative form of government.[989] In order to avoid this conflict, the judges have insisted that decision-makers, while obliged to genuinely consider the submissions made by the participants of consultative

[987] *R (Luton Borough Council) v Secretary of State for Education* [2011] EWHC 217 (Admin), 94, http://www.bailii.org/ew/cases/EWHC/Admin/2011/217.html
[988] Henry J. Steiner, "Political Participation as a Human Right," *Harvard Human Rights Year Book*, Vol. 1, 1988, 77; 132.
[989] Section *2.5.3. Consideration of the Inputs made by the Participants*

processes, cannot be obliged to follow them.[990] Influence over a final decision is an important aspect of a consultative process; however, it is not the only criteria for measuring the necessity and meaningfulness of public consultation. Where the participants cannot exert influence on the outcomes of decision-making through the consultative processes, they could use these processes to raise awareness of the issues important to them. In other words, as suggested by Habermas, the dialogue serves to problematize the issues, which otherwise could be neglected by government officials.[991]

Last but not least, the legal participatory rights do not necessarily satisfy the normative prescriptions of deliberation, as suggested by Cohen and Elster, according to whom personal interests should be transformed into publicly acceptable ones. The analysis of consultative mechanisms suggests that participants are more inclined to emphasize their own interests than to develop publicly acceptable arguments. The findings also reaffirm another view prevailing among theorists of participatory and deliberative democracy, that personal interests are a necessary attribute to a process of deliberation.[992] There is no evidence of transformation of selfish interests to other-regarding interests, also because none of the laws in the three jurisdictions sets requirements concerning the substance of participants' submissions. This limitation could be explained by the principle of procedural fairness, which is the most common basis for participatory rights to occur.[993] As mentioned, generally, procedural fairness was guaranteed to those directly affected by a particular decision. Therefore, if a dispute arises concerning the nature or scope of consultative processes, the courts may seek to determine whether meaningful procedures were guaranteed for those directly affected by the proposed decision.

[990] *Merafong Demarcation Forum v President of the Republic of South Africa*, (CCT 41/07) [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 968 (CC) (13 June 2008), 50
[991] Section *1.3. The Ideals of Participation and Deliberation*
[992] Section *1.4.4. Reasoned Debate*
[993] Section *5.2.1. Imposition of Positive Duties on Decision-Makers concerning Inclusion in the Consultative Processes*

Thus, the limitations to the consultative processes are predetermined by the nature of such processes as well as the circumstances of representative government. These constraints are acceptable as long as they neither undermine the functions of public consultation, nor obstruct its meaningfulness.

4. Robust consultative rights diminish the need for radical transformation of representative government

As examined in Chapter 1, theories of participatory and deliberative democracy commonly argue for the radical transformation of representative democracy by enabling participation in public affairs and providing the people with decisive power over the most important issues.[994] One of the reasons behind the suggested transformations is the fear that public institutions could easily be manipulated by a few sectional interests.[995] However, this thesis reveals that consultative mechanisms are built on the values of ensuring procedural fairness to the affected parties, accountability of decision-makers, promoting legal certainty, and comprehensive policy and decision-making. Moreover, such consultative mechanisms invoke requirements similar to those promoted by theorists of participatory and deliberative democracy. These observations cast some doubt on arguments for the radical transformation of the representative form of the government. It seems that it would be more sustainable to ensure that the existing consultative mechanisms are effective, than to introduce new instruments as suggested by theorists of participatory and deliberative democracy, which would serve the same purpose. Thus, through constitutional guarantees or judicially enforced requirements, the value of both participation and deliberation is recognized in public policy and decision-making processes in all the three jurisdictions. Legally recognized participatory

[994] Section *1.3. The Ideals of Participation and Deliberation*
[995] Section *1.5.2. Unprofessionalism in Regulatory Government*

rights, mediated by principles such as procedural fairness, can enhance the prospects of true deliberation. Such processes, in turn, can effectively address many of the imperfections of representative democracy.

BIBLIOGRAPHY

1. Books, Publications and Periodical Materials

Adler, Michael, "Understanding and Analysing Administrative Justice," in Michael Adler, ed., *Administrative Justice in Context*, Hart Publishing, 2010, 135

Aman, Alfred C., "Privatization and Democracy: Resources in Administrative Law," in Jody Freeman and Martha Minow, eds., Government *by Contract: Outsourcing and American Democracy*, Harvard University Press, 2009, 263

Ansell, Christopher, and Jane Gingrich, "Reforming the Administrative State" in *Democracy Transformed*: *Expanding Political Opportunities in Advanced Industrial Democracies,* ed. Bruce Cain et al., Oxford University Press, 2006

Armstrong, Mark, et al. *Regulatory Reform: Economic Analysis and British Experience*, the MIT Press, 1994

Ayres, Ian, and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate*, Oxford University Press, 1992

Baldwin, Robert and Martin Cave, *Understanding Regulation: Theory, Strategy, and Practice*, Oxford University Press, 1999

Barber, Benjamin, *Strong Democracy: Participatory Politics for a New Age*, University of California Press, 1984

Barendt, Eric, *Freedom of Speech*, Oxford University Press, 2005

Barnett, Hilaire, *Constitutional and Administrative Law*, Routledge, 2009

Beermann, Jack M., "Presidential Power in Transitions," *Boston University Law Review*, Vol. 83, 2003, 947

Beetham, David, "Do Parliaments Have a Future?" in *The Future of Representative Democracy*, ed. Sonia Alonso et al., Cambridge University Press, 2011, 124

Benhabib, Seyla, "Toward a Deliberative Model of Democratic Legitimacy," in *Democracy and Difference: Contesting the Boundaries of the Political*, ed. Seyla Benhabib, Princeton University Press, 1996

Birkinshaw, Patrick, *Freedom of Information – The Law, the Practice and the Ideal*, Cambridge University Press, 2010

Black, Julia, "Proceduralizing Regulation: Part I," *Oxford Journal of Legal Studies*, Vol. 20(4), 2000, 597, 614

Black, Julia, "Proceduralizing Regulation: Part II" *Oxford Journal of Legal Studies*, Vol. 21(1), 2001, 33

Black, Julia, "Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes," *Regulation and Governance*, Vol. 2, 2008, 137

Bogdanor, Vernon, *The New British Constitution*, Hart Publishing, 2009

Bostwick, Matthew, "Twelve Angry Citizens: Can Citizens' Juries Improve Local Democracy in New Zealand?" *Political Science*, Vol. 50(2), 1999, 236

Bohman, James, *Public Deliberation: Pluralism, Complexity and Democracy*, The MIT Press, 2000

Bostwick, Matthew, "Twelve Angry Citizens: Can Citizens' Juries Improve Local Democracy in New Zealand?" *Political Science*, Vol. 50, No. 2, 1999, 236.

Bradley, A. W., and K. D. Ewing, *Constitutional and Administrative Law*, 14th ed., Longman, 2007

Braitwhaite, John, *Regulatory Capitalism: How it Works, Ideas for Making it Work Better*, Edward Elgar, 2008

Brenner, Daniel, "Research in Government Agency Decisions: Observations about the FCC," *International Journal of Communication*, Vol. 2, 2008, 429, http://ijoc.org/ojs/index.php/ijoc/article/download/330/166

Bridy, Annemarie, "Copyright Policymaking as Porcedural Democratic Process: A Discourse-Theoretic Perspective on ACTA, SOPA, and PIPA", *Cardozo Arts and Entertainment Law Journal*, Vol. 30, 2012, 14

Bressman, Lisa Schultz, "Chevron's Mistake," *Duke Law Journal*, Vol. 58(4), 2009, 549

Breyer, Stephen et al., *Administrative Law and Regulatory Policy*, Aspen Publishers, 2006

Budge, Ian, "Direct Democracy: New Approaches to Old Questions," in ed. Michael Saward, ed., *Democracy: Critical Concepts in Political Science*, Vol. 3, Routledge, 2007, 194

Burchell, Graham, et al., *The Foucault Effect: Studies in Governmentality: with two Lectures by and an Interview with Michel Foucault*, University of Chicago Press, 1991

Can Der Merwe, C. G., and Jacques E. Du Plessis, *Introduction to the Law of South Africa*, Kluwer Law International, 2004

Christiano, Thomas, *The Constitution of Equality: Democratic Authority and its Limits*, Oxford University Press, 2008

Clarke, Paul B., and Joe Foweraker, eds., *Encyclopedia of Democratic Thought*, Routledge, 2001

Coglianese, Cary, "The Internet and Citizen Participation in Rulemaking", *I/S: A Journal of Law and Policy*, Vol. 1(1), 2004, 33, http://www.is-journal.org/V01I01/I-S,%20V01-I01-P033,%20Coglianese.pdf

Cohen, Joshua, "Deliberation and Democratic Legitimacy," in *Deliberative Democracy: Essays on Reason and Politics*, ed. James Bohman, MIT Press, 1997

Coppel, Philip, et al., eds., *Information Rights: Law and Practice*, Hart Publishing, 2010

Craig, Paul P., *Public Law and Democracy in the United Kingdom and the United States of America*, Clarendon Press, 1990

Criddle, Evan J., "Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking," *Texas Law Review*, Vol. 88(3), 2010, 441, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1371717&download=yes

Croley, Steven P., "Theories of Regulation: Incorporating the Administrative Process," *Columbia Law Review*, Vol. 98, No. 1, 1998, 1

Croley, Steven P., Re*gulation and Public Interests: The Possibility of Good Regulatory Government*, Princeton University Press, 2007

Davies, A.C.L., *Accountability: A Public Law Analysis of Government by Contract*, Oxford University Press, 2001

DeShazo, J. R., and Jody Freeman, "Public Agencies as Lobbyists," *Columbia Law Review*, Vol. 105, 2005, 2217

Dorsen, Norman, et al., *Comparative Constitutionalism: Cases and Materials*, West Publishing Company, 2003

Dryzek, John S., *Deliberative Democracy and Beyond: Liberals, Critics, Contestations*, Oxford University Press, 2000

Durodie, Bill, "Limitations of Public Dialogue in Science and the Rise of New 'Experts'", *Critical Review of International Social and Political Philosophy*, Vol. 6, No. 4, 2003, 86

Ebbesson, Jonas, "Public Participation and Privatisation in Environmental Matters: An Assessment of the Aarhus Convention," *Erasmus Law Review*, Vol. 4(2), 2011, 71

Edmund Burke, *On Empire, Liberty, and Reform: Speeches and Letters*, ed. David Bromwich**,** Yale University Press, 2000

Elster, Jon, Introduction, in Jon Elster, ed., *Deliberative Democracy*, Cambridge University Press, 1998

Farrelly, Colin, "Making Deliberative Democracy a More Practical Political Ideal," *European Journal of Political Theory*, Vol. 4, 2005, 200

Feintuck, Mike, *'The Public Interest' in Regulation*, Oxford University Press, 2004

Fischer, Frank, *Technocracy and the Politics of Expertise*, Sage Publications, 1990

Fishkin, James S., *When the People Speak: Deliberative Democracy and Public Consultation*, Oxford University Press, 2009

Fontana, David, "Reforming the Administrative Procedure Act: Democracy index Rulemaking," *Fordham Law Review*, Vol. 74(1), 2005, 81, http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=4094&context=flr

Foote, Elizabeth V., "Statutory Interpretation or Public Administration: How Chevron Misconceives the Function of Agencies and Why it Matters," *Administrative Law Review*, Vol. 59, 2007, 673

Foti, Joseph et al, *Voice and Choice: Opening the Door to Environmental Democracy*, World Resources Institute, 2008

Fox, William F., *Understanding Administrative Law*, M. Bender, 2000

Frost-Knappman, Elizabeth, et al, *Women's Suffrage in America*, Infobase Publishing, 2009

Fung, Archon, and Erik Olin Wright, "Deepening Democracy: Innovations in Empowered Participatory Governance," in Michael Saward, ed., *Democracy: Critical Concepts in Political Science*, Vol. 3, Routledge, 2007, 156

Funk, William F., Jeffrey S. Lubbers and Charles Pou, Jr., *Federal Administrative Sourcebook*, 4th ed., 2008

Galligan, D. J., *Due Process and Fair Procedures*, Clarendon Press, 1996

Gamble, Andrew, and Robert Thomas, "The Changing Context of Governance: Implications for Administration and Justice," in *Administrative Justice in Context*, ed. Michael Adler, Hart Publishing, 2010

Gershon, Richard A., "Deregulation, Privatization and the Changing Global Media Environment," in Oliver Boyd-Barrett, ed., *Communications Media Globalization*, Libbey, 2006

Glaeser, L. Edward, and Andrei Shleifer, "The Rise of the Regulatory State," *Journal of Economic Literature, American Economic Association*, Vol. 41(2), 2003, 401

Gloppen, Siri, *South Africa: The Battle Over the Constitution*, Ashgate, 1997

Goodin, Robert E., *Reflective Democracy*, Oxford University Press, 2003

Goodin, Robert E., Martin Rein and Michael Moran, "The Public and its Politics," in *The Oxford Handbook of Public Policy*, eds. Michael Moran et al., Oxford University Press, 2006

Goodin, Robert E., "Enfranchising All Affected Interests, and Its Alternatives," *Philosophy and Public Affairs*, Vol. 35(1), 2007, 40

Gutmann Amy, and Dennis Thompson, *Democracy and Disagreement*, Harvard University Press, 1996

Habermas, Jurgen, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, MIT Press, 1996

Hall, Clare, et al., *Telecommunications Regulation: Culture, Chaos, and Interdependence inside the Regulatory Process*, Routledge, 2000

Hamilton, James T., and Christopher H. Schroeder, "Strategic Regulators and the Choice of Rulemaking Procedures: the Selection of Formal vs. Informal Rules in Regulating Hazardous Waste," *Law and Contemporary Problems*, Vol. 57, No. 2, 1994, 111, (reprinted in Susan Rose-Ackerman, *Economics of Administrative Law*, Edward Elgar, 2007, 119)

Haskell, John, *Direct Democracy or Representative Government? Dispelling the Populist Myth*, Westview Press, 2001

Heinzerling, Lisa and Mark V. Tushnet, *The Regulatory and Administrative State: Materials, Cases, Comments*, Oxford University Press, 2006

Held, David, *Models of Democracy*, Stanford University Press, 2006

Hickman, Kristin E., "A Problem of Remedy: Responding to Treasury's (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements," *George Washington Law Review*, Vol. 76, 2008, 1153

Hirst, Paul, *Associative Democracy: New Forms of Economic and Social Governance*, Polity Press, 1994

Hobbes, Thomas, *On the Citizen*, eds. Richard Tuck and Michael Silverthorne, Cambridge University Press, 1998

Hoexter, Cora, *Administrative Law in South Africa*, Juta, 2007

Holder, Jane and Maria Lee, *Environmental Protection, Law and Policy*, 2nd ed., Cambridge University Press, 2007,

Huber, Peter William, et al., *Federal Telecommunications Law*, Aspen Publishers Online, 1999

Inderbitzin, Sarah L., "Throwing Out the Baby with the Bath Water: The Impact of *United States v. Goodner Brothers Aircraft*," *William and Mary Environmental Law and Policy Review*, Vol. 19, No. 1, 1994, 51

Jackson, Roland, et al., "Strengths of Public Dialogue on Science-related Issues," *Critical Review of International Social and Political Philosophy*, Vol. 8, No. 3, 2005, 349

Jowell, Jeffrey, "The Rule of Law Today," in *The Changing Constitution*, ed. Jeffrey Jowell and Dawn Oliver, Oxford University Press, 2004

Kannan, Phillip M., "The Logical Outgrowth Doctrine in Rulemaking," *Administrative Law Review*, Vol. 48, 1996, 213

Kaufman, Arnold S., "The Nature and Function of Political Theory," *The Journal of Philosophy*, Vol. 51(1), 1954, 5

Kelly, Terence, "Unlocking the Iron Cage: Public Administration in the Deliberative Democratic Theory of Jurgen Habermas," *Administration and Society*, Vol. 36, No. 1, 2004, 38

Kerwin, Cornelius M., *Rulemaking: How Government Agencies Write Law and Make Policy*, CQ Press, 2003

Khan, Paul W., "Comparative Constitutionalism in a New Key," *Michigan Law Review*, Vol. 101, 2003, 2677

Kjaer, Anne Mette, *Governance*, Polity Press, 2004

Klaaren, Jonathan, and Glenn Penfold, Chapter 62 "Access to Information," in I. Ellis et al., eds., *The Law of South Africa*, Vol. 4, 2nd ed., LexisNexis, 2002.

Klug, Heinz, *The Constitution of South Africa: A Contextual Analysis*, Hart Publishing 2010

Konczal, David S., "Telephone – Obscuring Notice through Footnotes in FCC Rulemaking Procedures," *George Washington Law Review*, Vol. 64, 1996, 975

Krasnow, Erwin G., and Jack N. Goodman, "Public Interest Standard: The Search for the Holy Grail," *Federal Communications Law Journal*, Vol. 50, 1997-1998, 605

Lazarus, Richard J., "Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future," *Cornell Law Review*, Vol. 94, 1153

Lessig, Lawrence, *Republic Lost: How Money Corrupts Congress – And a Plan to Stop It*, Twelve, 2011

Levin, Martin, and Martin Shapiro, *Transatlantic Policymaking in an Age of Austerity: Diversity and Drift*, Georgetown University Press, 2004

Levin, Ronald M., "Nonlegislative Rules and the Administrative Open Mind," *Duke Law Journal*, Vol. 41, 1992, 1497

Lloyd, Ian, *Cyber Law in the United Kingdom*, Kluwer Law International, 2010

Lobel, Orly, "The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought," *Minnesota Law Review*, Vol. 89, 2004, 373

Loughlin, Martin, *The Idea of Public Law*, Oxford University Press, 2003

Loughlin, Martin, *Foundations of Public Law*, Oxford University Press, 2010

Loveland, Ian, *Constitutional Law, Administrative Law, and Human Rights: A Critical Introduction*, Oxford University Press, 2009

Lubbers, Jeffrey S., *A Guide to Federal Agency Rulemaking*, American Bar Association, 2006

Mann, Ian, "Consultation Criteria," *New Law Journal*, 10 November 2006, 1

Mansbridge Jane, et al., "The Place of Self-Interest and the Role of Power in Deliberative Democracy," *The Journal of Political Philosophy*, Vol. 18, No. 1, 2010, 64

Martinez, Jenny S., "Process and Substance in the War on Terror," *Columbia Law Review*, Vol. 108(5), 2008, 1013, http://www.columbialawreview.org/assets/pdfs/108/5/Martinez.pdf

Macrory, Richard, and Sharon Turner, "Participatory Rights, Transboundary Environmental Governance and EC Law," *Common Market Law Review*, Vol. 39, 2002, 489

Majone, Giandomenico, "The Rise of the Regulatory State in Europe," *West European Politics*, Vol. 17, No. 3, 1994, 77

Majone, Giandomenico, "The Regulatory State and Its Legitimacy Problems," *West European Politics*, Vol. 22(1), 1999, 1

McCracken, Robert, "EIA, SEA and AA, present position: where are we now?" *Journal of Planning and Environmental Law*, Vol. 12, 2010, 1515

McGarity, Thomas O., "Some Thoughts on "Deossifying" the Rulemaking Process," *Duke Law Journal*, Vol. 41, 1991-1992, 1400

McGee, Brant, "The Community Referendum: Participatory Democracy and the Right to Free, Prior and Informed Consent to Development," *Berkeley Journal of International Law*, Vol. 27, 2009, 570

McGarity, Thomas O., "The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld," *Texas Law Review*, Vol. 75, 1997, 537.

Mendes, Joana, *Participation in European Union Rulemaking: A Rights-Based Approach*, Oxford University Press, 2011

Menkel-Meadow, Carrie, "The Lawyer's Role(s) in Deliberative Democracy: A Commentary by and Responses to Professor Carrie Menkel-Meadow," *Nevada Law Journal*, Vol. 5, 347

Meuwese, Anne et al., "Towards a European Administrative Procedure Act," in *Review of European Administrative Law. European Administrative Law: Top-Down and Bottom-Up*, ed. K. J. de Graaf et al., Europa Law Publishing, 2009

Miller Peter, and Nikolas Rose, *Governing the Present: Administering Economic, Social and Personal Life*, Polity Press, 2008

Mironenko, Olga, "Body Scanners vs. Privacy and Data Protection," *Computer Law and Security Review*, 2011, Vol. 27, Issue 2, 243, (forthcoming) http://www.uio.no/studier/emner/jus/jus/JUR5630/v11/undervisningsmateriale/Mironenko_article_13012011.pdf

Morrison, Alan B., "Administrative Agencies are Just Like Legislatures and Courts – Except When They're Not," *Administrative Law Review*, Vol. 59, 2007, 79

Morrow, Karen, "United Kingdom" in *The Role of the Judiciary in Environmental Governance*, ed. Louis Kotze and Alexander Paterson, Wolters Kluwer, 2009, 162

Motala, Ziyad, and Cyril Ramaphosa, *Constitutional Law: Analysis and Cases*, Oxford University Press (South Africa), 2002

Nonet, Phillippe, and Philip Selznick, *Law and Society in Transition: Toward Responsive Law*, Harper and Row, 1978

Nussbaum, Martha C., "Introduction to Comparative Constitutionalism," *Chicago Journal of International Law*, Vol. 3, 2002, 429

Newig, Jens, and Oliver Fritsch, "Environmental Governance: Participatory, Multi-Level – and Effective?" *Environmental Policy and Governance*, Vol. 19, 2009, 197

Nikolinakos, Nikos Th., *EU Competition Law and Regulation in the Converging Telecommunications, Media and IT Sectors*, Kluwer Law International, 2006

Norton, Philip, "Regulating the Regulatory State," *Parliamentary Affairs*, Vol. 57(4), 2004, 785, http://pa.oxfordjournals.org/content/57/4/785.full.pdf

O'Connell, Rory, "Towards a Stronger Concept of Democracy in the Strasbourg Convention," *European Human Rights Law Review*, Vol. 3, 2006, 281

Oldfield, Audrey, *Woman Suffrage in Australia*, Cambridge University Press, 1992

Palmer, Stephanie, "Public Functions and Private Services: A Gap in Human Rights Protection," *International Journal of Constitutional Law*, Vol. 6, July-October, 2008, 585

Pateman, Carole, *Participation and Democratic Theory*, Cambridge University Press, 1989

Pateman, Carole, "Participatory Democracy Revisited", *Perspectives on Politics*, Vol. 10, Issue 1, 2012, 8

Percival, Robert V., et al., *Environmental Regulation: Law, Science, and Policy*, 3rd ed., Aspen Law and Business, 2000, as reprinted in Lisa Heinzerling and Mark V. Tushnet, *The Regulatory and Administrative State: Materials, Cases, Comments*, Oxford University Press, 2006.

Peters Guy B., Jon Pierre, "Governance, Accountability and Democratic Legitimacy," in *Governance and Democracy: Comparing National, European and International Experiences*, ed. A. Benz and Y. Papadopoulos, Routledge, 2006

Plessis, A. Du, "Public Participation, Good Environmental Governance and Fulfillment of Environmental Rights," *Potchefstroom Electronic Law Journal* (PER), Vol. 2, 2008, 1

Pitkin, Hanna Fenichel, *The Concept of Representation*, University of California Press, 1967

Prosser, Tony, "Models of Economic and Social Regulation," in *The Regulatory State: Constitutional Implications*, eds. Dawn Oliver et al., Oxford University Press, 2010

Rawlings, Richard, "Changed Conditions, Old Truths: Judicial Review in a Regulatory Laboratory," in *The Regulatory State: Constitutional Implications*, ed. Dawn Oliver et al., Oxford University Press, 2010

Reed, Mark S., "Stakeholder Participation for Environmental Management: A Literature Review," *Biological Conservation*, Vol. 141, 2008, 2417

Reitz, John C., "How to Do Comparative Law," *American Journal of Comparative Law*, Vol. 46, 1998, 617

Rhodes, R.A.W., *Understanding Governance: Policy Networks, Governance, Reflexivity and Accountability*, Open University Press, 1997

Richardson, Henry S., *Democratic Autonomy: Public Reasoning about the Ends of Policy*, Oxford University Press, 2002

Rossi, Jim, "Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking," *Northwestern University Law Review*, Vol. 92, 1997, 173

Rossi, Jim, *Regulatory Bargaining and Public Law*, Cambridge University Press, 2005

Rowe, Gene, and Lynn J. Frewer, "Public Participation Methods: A Framework for Evaluation," *Science, Technology, and Human Values*, Vol. 25(1), 2000, 3

Rubin, Edward L., Commentary, "The New Legal Process, The Synthesis of Discourse, and the Microanalysis of institutions," *Harvard Law Review*, Vol. 109, 1995-1996, 1393.

Sanders, Lynn M., "Against Deliberation," *Political Theory*, Vol. 25(3), 347, http://faculty.virginia.edu/lsanders/SB617_01.pdf

Saward, Michael, "Less Than Meets the Eye: Democratic Legitimacy and Deliberative Theory," in Michael Saward, ed., *Democracy: Critical Concepts in Political Science*, Vol. 3, Routledge, 2007

Scott, Colin, "Regulatory Governance and the Challenge of Constitutionalism," in *The Regulatory State: Constitutional Implications*, eds. Dawn Oliver et al., Oxford University Press, 2010, 19

Scott, Colin, "Privatization and Regulatory Regimes," in Michael Moran et al., eds., *The Oxford Handbook of Public Policy*, Oxford University Press, 2006, 651

Shapiro, Martin, "'Deliberative', 'Independent' technocracy v. Democratic Politics: Will the Globe Echo the E.U.?" *Law and Contemporary Problems*, Vol. 68, 2005, 344

Shapiro, Sidney A., and J. Tomain, *Regulatory Law and Policy: Cases and Materials*, LEXIS Law, 1998

Sharma, Urmila, et al., *Principles and Theory in Political Science*, Vol. 1, Atlantic Publishers, 2000

Shepherd, Anne, and Christi Bowler, "Beyond the Requirements: Improving Public Participation in EIA," *Journal of Environmental Planning and Management*, Vol. 40(6), 1997, 725

Shepherd, George B., "Fierce Compromise: The Administrative Procedure Act Emerges from the New Deal Politics," *Northwestern University Law Review*, Vol. 90, 1996, 1557

Shore, Chris "'European Governance' or Governmentality? The European Commission and the Future of Democratic Government," *European Law Journal*, Vol. 17(3), 2011, 289, http://onlinelibrary.wiley.com/doi/10.1111/j.1468-0386.2011.00551.x/pdf

Skagen Ekeli, Kristian, "Giving a Voice to Posterity – Deliberative Democracy and Representation of Future People," *Journal of Agricultural and Environmental Ethics*, Vol. 18, 2005, 429

Smith, Graham, *Democratic Innovations: Designing Institutions for Citizen Participation*, Cambridge University Press, 2009

Sosay, Gul, "Consequences of Legitimizing Independent Regulatory Agencies in Contemporary Democracies," in *Delegation in Contemporary Democracies*, eds. Dietmar Braun and Fabrizio Gilardi, Routledge, 2006

Staerdahl, Jens, et al, "Environmental Impact Assessment in Malaysia, South Africa, Thailand, and Denmark: Background, Layout, Context, Public Participation and Environmental Scope," *The Journal of Transdiciplinary Environmental Studies*, Vol. 3(1), 2004, 1, http://www.journal-tes.dk/vol%203%20no%201/Jens%20St%E6rdahl_lav.pdf?id=00028

Stallworthy, Mark, "Legislating Against Climate Change: A UK Perspective on a Sisyphean Challenge," *The Modern Law Review*, Vol. 72(3), 2009, 412

Staszewski, Glen, "Reason-Giving and Accountability," *Minnesota Law Review*, Vol. 93, 2008-2009, 1253

Staszewski, Glen, "The Challenges of Fiduciary Administration," Legal Studies Research Paper No. 08-17, *Michigan State University College of Lfaw*, 2009, http://ssrn.com/abstract=1678595

Stasewszki, Glen, "Political Reasons, Deliberative Democracy, and Administrative Law," *Iowa Law Review*, Vol. 97(3), 2012, 1

Stec, Stephen, "EU Enlargement, Neighbourhood Policy and Environmental Democracy," in Marc Pallemaerts, ed., The *Aarhus Convention at Ten: Interactions and Tensions between Conventional International Law and EU Environmental Law*, Europa Law Publishing, 2009

Steele, Jenny, "Participation and Deliberation in Environmental Law: Exploring a Problem-solving approach," *Oxford Journal of Legal Studies*, Vol. 21, 2001, 415

Steiner, Henry J., "Political Participation as a Human Right," *Harvard Human Rights Year Book*, Vol. 77, 1988, 131

Sunstein, Cass R., *Democracy and the Problem of Free Speech*, The Free Press, 1995

Thomas, Robert, Book Review, "Carol Harlow and Richard Rawlings, *Law and Administration*, Cambridge University Press, 2009," *Modern Law Review*, Vol. 74(1), 2011, 153

Thornton, Lisa, et al., eds., *Telecommunications Law in South Africa*, STE Publishers, 2006

Tlili, Anwar, and Emily Dawson, "Mediating Science and Society in the EU and UK: From Information-Transmission to Deliberative Democracy?" *Minerva*: *A Review of Science, Learning and Policy*, Vol. 48, 2010, 429

Turner, Stephen J., *A Substantive Environmental Right: An Examination of the Legal Obligations of Decision-Makers towards the Environment*, Kluwer, 2008

Van der Berg, Servaas, "Apartheid's Enduring Legacy: Inequalities in Education," *Journal of African Economies*, Vol. 16(5), 2007, 849

Verkuil, Paul R., *Outsourcing Sovereignty: Why Privatization of Government Functions Threatens Democracy and What We Can Do about It*, Cambridge University Press, 2007

Verschuuren, Jonathan, "The Netherlands," in Louis J. Kotze and Alexander R. Peterson, eds., *The Role of the Judiciary in Environmental Governance: Comparative Perspectives*, Wolters Kluwer, 2009

Waldron, Jeremy, "Participation: The Right of Rights," in Jeremy Waldron, *Law and Disagreement*, Oxford University Press, 2001, 232

Wallsten, Scott, "Of Carts and Horses: Regulation and Privatization in Telecommunications Reforms," *Policy Reform*, Vol. 6(4), 2003, 217

Walzer, Michael, "Deliberation, and What Else?" in Stephen Macedo, ed., *Deliberative Politics: Essays on Democracy and Disagreement*, Oxford University Press, 1999

Warren, Kenneth F., *Administrative Law in the Political System*, Westview Press, 2004

Weinstein, James, "Participatory Democracy and Free Speech," *Virginia Law Review*, Vol. 97 (3), 2011, 491

Wensveen, J. G., *Air Transportation: A Management Perspective*, Ashgate, 2007

Whytock, Christopher A., "Legal Origins, Functionalism, and the Future of Comparative Law," *Brigham Young University Law Review*, Vol. 6, 2009, 1879

Wooley, Alice, "Legitimating Public Policy," *University of Toronto Law Journal*, Vol. 58, No. 2, 2008, 153

Young, Alison L., "In Defence of Due Deference," *The Modern Law Review*, Vol. 72(4), 2009, 554

Zaring, David T., "Reasonable Agencies," *Virginia Law Review*, Vol. 96(1), 2010, 2317, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1561850&download=yes

Ziamou, Theodora, *Rulemaking, Participation and the Limits of Public Law in the USA and Europe*, Ashgate, 2001

Zillman Donald N., et al, *Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources*, Oxford University Press, 2002

2. Constitutions, Statutes, Codes of Practice, other Legal Acts and Drafts

South Africa

Constitution of the Republic of South Africa, 1996, text available at: http://www.info.gov.za/documents/constitution/1996/index.htm

Promotion of Administrative Justice Act, 2000, Government Gazette, Vol. 416, No. 20853, 3 February 2000, (South Africa), http://www.justice.gov.za/paja/acts/2000_3_paja.pdf

Electronic Communications Act 2005, Government Gazette, 18 April 2006, (South Africa), http://www.icasa.org.za/tabid/86/Default.aspx

The United Kingdom

Code of Practice on Consultation, the Cabinet Office, July 2008, http://www.berr.gov.uk/files/file47158.pdf

Communications Act 2003, c. 21, http://www.legislation.gov.uk/ukpga/2003/21/contents

Pollution Prevention and Control (England and Wales) Regulations 2000, No. 1973, http://www.legislation.gov.uk/uksi/2000/1973/contents/made

The United States of America

Administrative Procedure Act, 5 U.S.C., 2000, § 553.

Aviation and Transportation Security Act, Pub. L. No. 107-71, §114, 115 Stat. 597, (2001), http://www.tsa.gov/assets/pdf/Aviation_and_Transportation_Security_Act_ATSA_Public_Law_107_1771.pdf

Endangered Species Act 1973 (the US), 16 U.S.C. §1531 http://epw.senate.gov/esa73.pdf

Exec. Order No. 12866, (Sept. 30, 1993), as amended by Exec. Order No. 13258 (Feb. 26, 2002) and Exec. Order No. 13422 (Jan. 18, 2007,) http://www.dol.gov/ebsa/pdf/eo12866.pdf

Exec. Order No. 13563 (Jan. 18, 2011), http://www.whitehouse.gov/the-press-office/2011/01/18/improving-regulation-and-regulatory-review-executive-order
Clean Air Act 2008, (the US) http://www.gpo.gov/fdsys/pkg/USCODE-2008-title42/pdf/USCODE-2008-title42-chap85.pdf

Federal Communications Commission Process Reform Act of 2011, H.R. 3309, 112th Cong. (2011), http://republicans.energycommerce.house.gov/Media/file/Markups/FullCmte/112911/HR3309_As_Amended.pdf

Federal Communications Commission Consolidated Reporting Act of 2011, H.R. 3310, 112th Cong. (2011), http://republicans.energycommerce.house.gov/Media/file/Markups/FullCmte/112911/HR3310_As_Amended.pdf

Executive Order, Accelerating Broadband Infrastructure Deployment, June 14, 2012, The White House, http://www.whitehouse.gov/the-press-office/2012/06/14/executive-order-accelerating-broadband-infrastructure-deployment
Regulatory Accountability Act of 2011, H.R. 3010, 112th Cong. (2011), http://www.govtrack.us/congress/bill.xpd?bill=h112-3010

The Freedom of Information Act, 5 U.S.C. §552, as Amended by Public Law No. 110-175, 121 Stat. 2524, and Public Law No. 111-83, §564, 123 Stat. 2142, 2184, http://www.justice.gov/oip/amended-foia-redlined-2010.pdf

The National Parks Overflight Act of 1987, Public Law 100-91, http://www.nps.gov/grca/naturescience/upload/PL100-91.pdf

Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) http://www.fcc.gov/Reports/tcom1996.pdf

The European Union

Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on Universal service and users' rights relating to electronic communications networks and services, OJ L 108, 24.4.2002, 51, (Universal Service Directive) (as amended by the Directive 2009/136/EC, OJ L 337, 18.12.2009, 11)

Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a Common Regulatory Framework for Electronic Communications Networks and Services (Framework Directive), OJ L 108, 24.4.2002, 33

Directive 85/337/EEC, as amended by Directive 97/11/EC on the Assessment of the Effects of Certain Public and Private Projects on the Environment, *Official Journal L 073* ,

*14/03/*1997, p. 0005 – 0015, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31997L0011:EN:HTML

International Treaties

International Covenant on Civil and Political Rights, adopted by UN General Assembly Resolution 2200A (XXI), December 16, 1966, http://www2.ohchr.org/english/law/ccpr.htm

Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, (Aarhus Convention), The United Nations Economic Commission for Europe (UNECE), adopted 25 June 1998, entered into force 30 October 2001, http://www.unece.org/env/pp/documents/cep43e.pdf

3. Cases

South Africa

Bengwenyama Minerals v Genorah Resources (CCT 39/10) [2010] ZACC 26; 2011 (4); SA 113 (CC); 2011 (3) BCLR 229 (CC) (30 November 2010), http://www.saflii.org/za/cases/ZACC/2010/26.html

Director: Mineral Development, Gauteng Region v Save the Vaal Environment, (133/98) [1999] ZASCA 9; [1999] 2 All SA 381 (A) (12 March 1999), http://www.saflii.org/za/cases/ZASCA/1999/9.html

Doctors for Life International v Speaker of the National Assembly, 2006 (12) BCLR 1399 (CC), http://www.saflii.org/za/cases/ZACC/2006/11.html

Matatiele Municipality v President of the Republic of South Africa (2)(CCT73/05A)[2006] ZACC 12 [2006] ZACC 26; 2007 (1) BCLR 47 (CC) (18 August 2006), (Matatiele 2), http://www.saflii.org/za/cases/ZACC/2006/12.html

Merafong Demarcation Forum v President of the Republic of South Africa, (CCT 41/07) [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 968 (CC) (13 June 2008), http://www.saflii.org/za/cases/ZACC/2008/10.html

Minister of Health v New Clicks South Africa, 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC)

Poverty Alleviation Network and Others v President of the Republic of South Africa and Others (CCT86/08) [2010] ZACC 5; 2010 (6) BCLR 520 (CC) (24 February 2010), http://www.saflii.co.za/za/cases/ZACC/2010/5.pdf

The United Kingdom

Bushell v Secretary of State for the Environment [1980] UKHL 1, [1981] AC 75, http://www.bailii.org/uk/cases/UKHL/1980/1.html

Data Broadcasting International v Office of Communications (Ofcom), [2010] EWHC 1243 (Admin), 13 May 2010

Edwards v The Environment Agency [2006] EWCA Civ 877

R(Bapio Action) v Secretary of State for the Home Department, [2007] EWHC 199 (Admin); [2007] EWCA Civ 1139

R (Bhatt Murphy) v The Independent Assessor, [2008] EWCA Civ 755 http://www.bailii.org/ew/cases/EWCA/Civ/2008/755.html

R (Cheshire East Borough) v Secretary of State for the Environment, Food and Rural Affairs [2011] EWHC 1975 (Admin), http://www.bailii.org/ew/cases/EWHC/Admin/2011/1975.html

R(Compton) v Wiltshire Primary Care Trust, [2009] EWHC, 1824 (Admin)

R (Cran) v Camden London Borough Council, [1995] R.T.R. 346, http://www.bailii.org/ew/cases/EWHC/Admin/1995/13.html

R (Coughlan) v North & East Devon Health Authority, [2001] QB 213, http://www.bailii.org/ew/cases/EWCA/Civ/1999/1871.html

R (Greenpeace) v Secretary of State for Trade and Industry, [2007] EWHC 311 (Admin), [2007] NPC 21, [2007] Env LR 29, [2007] JPL 1314, http://www.bailii.org/ew/cases/EWHC/Admin/2007/311.html

R *(Luton Borough Council) v Secretary of State for Education* [2011] EWHC 217 (Admin), http://www.bailii.org/ew/cases/EWHC/Admin/2011/217.html

R (Medway Council) v Secretary of State for Transport, [2002] EWHC 2516 Admin

R (N) v Leeds City Council, [1999] ELR 324

R (Partingdale Lane Residents' Association) v Barnet London Borough Council [2003] EWHC 947 (Admin) (02 April 2003), http://www.bailii.org/ew/cases/EWHC/Admin/2003/947.html

R (Pow) v North & East Devon Health Authority, [1997] EWHC Admin 765 (4th August, 1997), http://www.bailii.org/ew/cases/EWHC/Admin/1997/765.html

R (Smith) v East Kent Hospital NHS Trust [2002] EWHC 2640 (Admin), http://www.bailii.org/ew/cases/EWHC/Admin/2002/2640.html

R (United States Tobacco International) v Secretary of State for Health, [1990] QB 351

The Bard Campaign v The Secretary of State for Communities and Local Government, [2009] EWHC 308 (Admin), http://www.bailii.org/ew/cases/EWHC/Admin/2009/308.html

Vodafone v Office of Communications (Ofcom), Competition Appeal Tribunal, 18 September 2008

The United States of America

American Radio Relay League v Federal Communications Commission (FCC), 524 F.3d 227, 390 U.S.App.D.C. 34

Connecticut Light & Power Company v. Nuclear Regulatory Commission, 673 F.2d 525, 218 U.S.App.D.C. 134 (1982)

Electronic Privacy Information Center v United States Department of Homeland Security, No. 10-1157, (D.C. Cir. July 15, 2011), http://www.cadc.uscourts.gov/internet/opinions.nsf/B3100471112A40DE852578CE004FE42C/$file/10-1157-1318805.pdf

Florida Power & Light Company v. United States, 846 F.2d 765, 269 U.S.App.D.C. 377 (1988)

Fort Funston Dog Walkers v Babbitt, 96 F.Supp.2d 1021, (2000)

Grand Canyon Air Tour Coalition v Federal Aviation Administration (FAA), 154 F.3d 455, (D.C. Cir. 1998)

Home Box Office, Inc. v. Federal Communications Commission (FCC), 567 F.2d 9, (1977)

Husqvarna v Environmental Protection Agency (EPA), 254 F.3d 195, 349 U.S.App.D.C. 118

International Harvester v. Ruckelshaus, February 12, 1973, 478 F.2d 615, 155 U.S.App.D.C. 411

Louisiana Federal Land Bank Association v Farm Credit Administration, 336 F.3d 1075 (2003)

MCI Worldcom v the Federal Communications Commission (FCC), 209 F.3d 760, 341 U.S.App.D.C. 132, (2000)

National Association of Home Builders v. Defenders of Wildlife, 2009 WL 226048 (C.A.9 (Ariz.))

Sprint v Federal Communications Commission, 315 F.3d 369, 354 U.S.App.D.C. 288

United States v Nova Scotia Food Products, 568 F2d 240 (2nd Cir. 1977)

Vermont Yankee Nuclear Power v. Natural Resources Defense Council, 435 U.S. 519 (1978)

ECHR

Hatton v. the United Kingdom, Application No. 36022/97, 8 July 2003
Tysiąc v. Poland, Application No. 5410/03, 24 September 2007

Dogru v. France, App. No., 27058/05, 4 March 2009

4. Studies, Reports, Conference Papers, and Internet Sources

Abelson, Julia, et al., "Towards More Meaningful, Informed and Effective Public Consultation," Canadian Health Services Foundation, February 2004, http://www.chsrf.ca/migrated/pdf/abelson_final_e.pdf

Adler, Jonathan H., "Business, the Environment, and the Roberts Court: A Preliminary Assessment," *Case Research Paper Series in Legal Studies*, Working Paper 09-6, March 2009 (revised April 2009), http://ssrn.com/abstract=1351906

Adler, Jonathan H., "Would the REINS Act Rein in Federal Regulation? Congress Makes Another Effort to Regain Control of Regulation," *Regulation*, Case Western Reserve University School of Law, 2011

Administrative Procedure Act: Legislative History, 79th Congress, 1944-46, United States, Congress, Senate, Committee on the Judiciary, 1997

Administrative Conference Recommendation 2011-2, Rulemaking Comments, the Administrative Conference of the United States, June 16, 2011, http://www.acus.gov/wp-content/uploads/downloads/2011/06/Recommendation-2011-2-Rulemaking-Comments.pdf

Arrangements for Porting Phone Numbers when Customers Switch Supplier, A Review of General Condition 18, Office of Communications, 17 July 2007, http://stakeholders.ofcom.org.uk/binaries/consultations/gc18review/summary/numberportability.pdf

Auburn, Jonathan, "Consultation," Conference Paper, http://www.4-5.co.uk/uploads/docs/section5/JRconferencepaperConsultation.doc

Baldwin, Robert, and Julia Black, "Really Responsive Regulation," *LSE Law, Society and Economy Working Papers*, 15/2007, http://ssrn.com/abstract=1033322

Balla, Steven J., "Public Commenting on Federal Agency Regulations: Research on Current Practices and Recommendations to the Administrative Conference of the United States," Draft Report, the *Administrative Conference of the United States*, 15 March 2011, http://www.acus.gov/wp-content/uploads/downloads/2011/04/COR-Balla-Report-Circulated.pdf

Bar, Mira, "Fortress Heathrow: Bid to Block Runway," *The Evening Standard (London)*, 28 January 2010.

Barnes, Javier, "Transforming Administrative Procedure: Towards a third generation of administrative procedures," Paper for Workshop on Comparative Administrative Law, Yale Law School, May 7-9, 2009, http://www.law.yale.edu/documents/pdf/CompAdminLaw/Javier_Barnes_CompAdLaw_paper_%28rev%29.pdf

Baudrier A., *Independent Regulation and Telecommunications Performance in Developing Countries*, Berkley, 2001, Annual ISNIE Conference, http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.202.4868&rep=rep1&type=pdf

Beard, Matthew, and Pippa Crerar, "100 000 Heathrow Neighbours Say 'No' to Third Runway or Increase in Flights", *London Evening Standard*, 21 May 2013, http://www.standard.co.uk/news/london/exclusive-100000-heathrow-neighbours-say-no-to-third-runway-or-increase-in-flights-8625407.html

Bignami, Francesca, "The Administrative State in a Separation of Powers Constitution: Lessons for European Community Rulemaking from the United States," the Jean Monnet Center for International and Regional Economic Law and Justice at NYU School of Law, http://centers.law.nyu.edu/jeanmonnet/papers/99/990501.html#fn0

Body of Regulators for Electronic Communications, Annual Report 2010, May 2011, BoR (11)19, 17, http://www.irg.eu/streaming/BoR%20%2811%29%2019%20BEREC%20Annual%20report_final.pdf?contentId=547173&field=ATTACHED_FILE

Bovens, Mark, "Analysing and Assessing Public Accountability. A Conceptual Framework," *European Governance Papers*, No. C-06-01, 16 January 2006, http://www.connex-network.org/eurogov/pdf/egp-connex-C-06-01.pdf

Bruch, Carl, and Sarah King, "Constitutional Procedural Rights: Enhancing Civil Society's Role in Good Governance" in *The New "Public:" The Globalization Of Public Participation*, Environmental Law Institute, 2002, 22, http://www.eli.org/pdf/PPP/part1chap1.pdf

Cass, Noel, "Participatory-Deliberative Engagement: a literature review," *Working Paper 1.2. of the research project "Beyond Nimbyism: a multidisciplinary investigation of public engagement with renewable energy technologies,"* August 2006

Chris, Herold, "Des Midgley Memorial Lecture The Water Crisis in South Africa," *Civil Engineering : Magazine of the South African Institution of Civil Engineering*, Vol. 18, Issue 5, 2010

Citizens as Partners. Information, Consultations and Public Participation in Policy-Making, the Organisation for Economic Co-operation and Development, OECD, 2001, http://213.253.134.43/oecd/pdfs/browseit/4201131E.PDF

Coalition Government Cancel London's Heathrow Airport Third Runway, http://www.general-election-2010.co.uk/coalition-government-cancel-londons-heathrow-airport-third-runway.html

Congress Less Popular than Cockroaches, Traffic Jams, Public Policy Polling, 8 January 2013, http://www.publicpolicypolling.com/pdf/2011/PPP_Release_Natl_010813_.pdf

Counting the Cost of Red Tape for Business in South Africa, Headline Report, Strategic Partnerships for Business Growth in Africa (SBP), November 2004, http://www.sbp.org.za/uploads/media/Counting_the_Cost_of_Red_Tape_for_Business_in_South_Africa.pdf

Counting the Cost of Red Tape for Business in South Africa, the Main Report, Strategic Partnerships for Business Growth in Africa (SBP), June 2005,

http://psp.emergingmarketsgroup.com/components/download.aspx?id=a804419d-763f-4e4e-9082-275365d0b1ef

Creamer, Martin, "Bengwenyama Misled Constitutional Court in Prospecting Rights Case – Nkwe," *Mining Weekly*, 7 December, 2010, http://www.miningweekly.com/article/bengwenyama-misled-constitutional-court-in-rights-case-nkwe-2010-12-07

Cuellar, Mariano-Florentino, "Rethinking Public Engagement in the Administrative State," Center for Law and Society, School of Law, University of California, Berkeley, November 2003, http://www.law.berkeley.edu/institutes/csls/cuellarpaper.pdf

Documents under Preparation, Right2info, Home, Scope of Covered Information, http://www.right2info.org/scope-of-covered-information/preparatory-documents

Endangered Species Act Consultation Handbook, Procedures for Conducting Section 7, Consultations and Conferences, adopted by U.S. Fish and Wildlife Service National Marine Fisheries Service, March 1998, http://www.nmfs.noaa.gov/pr/pdfs/laws/esa_section7_handbook.pdf

Giandomenico Majone, "The Agency Model: The Growth of Regulation and Regulatory Institutions in the European Union," 1997, http://www.eipa.eu/files/repository/eipascope/scop97_3_2.pdf

Ginsburg, Tom, "On the Constitutional Character of Administrative Law," a draft prepared for the *Conference on Comparative Administrative Law, Yale Law School*, May 7-9, 2009, http://www.law.yale.edu/documents/pdf/CompAdminLaw/Tom_Ginsburg_CompAdLaw_paper.pdf

"Greenpeace Seeks Fortress' Architect," *Building Design*, January 29, 2010
Hartley, Wyndham, "Cabinet Approves R7,3 bn Water Plan," *Business Day (South Africa)*, May 12, 2008

"Heathrow Runway Plan Ditched," *UK Politics*, 12 May 2010, http://www.politics.co.uk/news/transport/heathrow-runway-plan-ditched-$21377371.htm

"Heathrow Airport Third Runway Plans are 'Untenable,' says Judge," *The Telegraph*, 26 March 2010, http://www.telegraph.co.uk/travel/travelnews/7527255/Heathrow-Airport-third-runway-plans-are-untenable-says-judge.html

INDIREG, Preliminary Final Report, Indicators for independence and efficient functioning of audiovisual media services regulatory bodies for the purpose of enforcing the rules in the AVMS Directive, SMART 2009/001, by Hans Bredow Institute for Media Research et al., January, 2011

Khuzwayo, Wiseman, "The Disputes Ruling on Genorah Rights," *Business Report*, December 14, 2010, http://www.iol.co.za/business/business-news/tribe-disputes-ruling-on-genorah-rights-1.1001037

Lezaun, Javier, and Linda Soneryd, "Government by Elicitation: Engaging Stakeholders or Listening to the Idiots?" London School of Economics and Political Science, Center for Analysis of Risk and Regulation, *Discussion Paper* No. 34, May 2006

Martineau, Robert J., and David P. Novello, *The Clean Air Act handbook*, American Bar Association, 2004

McKinley, Jesse, "San Francisco Passes Cellphone Radiation Law," *The New York Times*, June 15, 2010, http://www.nytimes.com/2010/06/16/us/16cell.html

Mind the Gap: Fostering Open and Inclusive Policy Making, an Issues Paper of third meeting of the Steering Group on Open and Inclusive Policy Making, the Organisation for Economic Co-operation and Development, OECD, 2008,

Mouffe, Chantal, "Deliberative Democracy or Agonistic Pluralism," *Institute for Advanced Studies* (IHS), 10(20), http://www.ihs.ac.at/publications/pol/pw_72.pdf

Newig, Jens, "Does Public Participation in Environmental Decisions Lead to Improved Environmental Quality? Towards an Analytical Framework," *CCP*, Vol. 1, 2007, 51, http://www.usf.uos.de/~jnewig/03_Forschung_Newig_final.pdf

Notice of Inquiry in the matter of Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting, April 7, 2011, *Federal Communications Commission*, http://fjallfoss.fcc.gov/ecfs/document/view?id=7021686903

One-In, One-Out (OIOO) Methodology, Department for Business Innovation and Skills, July 2011, http://www.bis.gov.uk/assets/biscore/better-regulation/docs/o/11-671-one-in-one-out-methodology.pdf

Parliament of the Republic of South Africa, Announcements, Tablings and Committee Reports, No. 104, September 2007, 4th Session, 3rd Parliament, http://www.parliament.gov.za/live/commonrepository/Processed/20091112/51217_1.pdf

Perkins, Peter, "The Role of Economic Infrastructure in Economic Growth: Building on Experience," in *Focus, Making South Africa Work: Rules of the Game, Regulation, Deregulation and Re-regulation*, Helen Suzman Foundation, Issue 60, January 2011, http://www.africa.fnst-freiheit.org/publications/Partners/Focus60web.pdf/download

Pickford, James, "Mayor Vows to Fight Third Heathrow Runway," *The Financial Times*, 26 March 2012, http://www.ft.com/cms/s/0/b732975e-7743-11e1-93cb-00144feab49a.html#axzz1tG3XQTs3

Pitcher, Greg, "Heathrow launches third runway compensation consultation," *New Civil Engineer*, 24 July 2014, http://www.nce.co.uk/heathrow-launches-third-runway-compensation-consultation/8666172.article

Power to the People, The report of Power: An Independent Inquiry into Britain's Democracy, The centenary project of the Joseph Rowntree Charitable Trust and the Joseph Rowntree Reform Trust, 2006, http://www.jrrt.org.uk/uploads/PowertothePeople_001.pdf

Regulatory Management Indicators, South Africa, 2011, the Organisation for Economic Co-operation and Development, OECD, http://www.oecd.org/dataoecd/50/33/47827382.pdf

Report and Order in the Matter of The Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Federal Communications Commission, October 3, 2003, http://www.1800afta.org/FCC_Payphone_Compensation_Order.pdf

"Runway Critics Fight on," *Planning*, January 23, 2009, 10

Stephen Stec and S. Casey-Lefkowitz, *The Aarhus Convention: An Implementation Guide*, United Nations, 2000, http://www.unece.org/env/pp/acig.pdf

Stewart, Richard B., "Accountability, Participation, and the Problem of Disregard in Global Regulatory Governance," *Discussion Draft January 2008*, http://www.iilj.org/courses/documents/2008Colloquium.Session4.Stewart.pdf

The Governance of Britain, Presented to Parliament by the Secretary of State for Justice and Lord Chancellor, July 2007, http://www.official-documents.gov.uk/document/cm71/7170/7170.pdf

"The Potential Dangers of Electromagnetic Fields and their Effect on the Environment," *Parliamentary Assembly, Council of Europe*, May 6, 2011, http://assembly.coe.int/Documents/WorkingDocs/Doc11/EDOC12608.pdf

Wilks-Heeg, S., A. Blick, and S. Crone, *How Democratic is the UK? The 2012 Audit*, Democratic Audit, 2012, http://democracy-uk-2012.democraticaudit.com/how-democratic-is-the-uk-the-2012-audit

5. News, Press Releases and other sources

Benson, Jonathan, "Attractive Females Targeted by TSA Agents for Multiple Naked Body Scanner Screenings," *Natural News*, 20 February, 2012, http://www.naturalnews.com/035018_TSA_body_scanners_women.html

Biesecker, Calvin, "TSA Awards Whole Body Imaging Contract to Rapiscan," *Defense Daily*, 1 October 2009, http://www.allbusiness.com/government/government-bodies-offices-government/13377309-1.html and U.S.

De La Cruz, Ralph, "South Florida Officials Lead National Push against Airport Body Scanners," *Florida Center for Investigative Reporting*, 19 December, 2011, http://fcir.org/2011/12/19/south-florida-officials-leading-national-push-against-airport-body-scanners/

Downs, Jere, "New Body Scanners Deployed at Louisville International Airport," *The Courier Journal*, 21 February, 2012, http://www.courier-journal.com/article/20120221/NEWS01/302210084/New-body-scanners-deployed-Louisville-International-Airport

End of the Line for Atlantic Customers, *BBC News*, 2 January 2002, http://news.bbc.co.uk/2/hi/uk_news/scotland/1738232.stm

Giblin, Paul, and Eric Lipton, "New Airport X-Rays Scan Bodies, Not Just Bags," *The New York Times*, February 24, 2007, http://www.nytimes.com/2007/02/24/us/24scan.html?_r=1

Hartley, Wyndham, "South Africa: New Chapter for Merafong as MPs Move to Rectify Blunder," *Business Day,* 19 February 2009, http://allafrica.com/stories/200902190080.html

House, Michael, *Ofcom Needs to Act Quickly on Number Porting Rules: Three*, 9 February 2012, http://www.mobilenewscwp.co.uk/2012/02/ofcom-needs-to-act-quickly-on-number-porting-rues-three/

"ICASA Publishes Draft Regulation on Consumer Advisory Panel," *Sabinetlaw.co.za*, 28 September 2010, http://www.sabinetlaw.co.za/communications/articles/icasa-publishes-draft-regulations-consumer-advisory-panel

Johnson, Joel, "One Hundred Naked Citizens: One Hundred Leaked Body Scans," *Gizmodo*, 16 November 2010, http://gizmodo.com/5690749/these-are-the-first-100-leaked-body-scans

Liptak, Adam, "We the People Loses Appeal with People Around the World," *The New York Times*, 6 February 2012, http://www.nytimes.com/2012/02/07/us/we-the-people-loses-appeal-with-people-around-the-world.html?_r=3&hp

Naidoo, Prakash, "Social Rights. Parallel Route for Poor," *Financial Mail (South Africa)*, August 14, 2009

"Merafong Residents Consulted on Relocation, Committees Told," News, the Parliament of the Republic of South Africa, 2009, http://www.parliament.gov.za/live/content.php?Item_ID=826

Muller, Rudolph, "Damning report about ICASA sidelining consumers," *Mybroadband.co.za*, 28 February 2010, http://mybroadband.co.za/news/telecoms/11613-damning-report-about-icasa-sidelining-consumers.html

Meyer, David, "Ofcom Changes Rules on Number Porting," 18 July 2007, http://www.zdnet.co.uk/news/networking/2007/07/18/ofcom-changes-rules-on-number-porting-39288098/

Miller, Greg, and Karen DeYoung, "Al-Qaeda Airline Bomb Plot Disrupted, U.S. Says," *Washingtonpost.com*, 8 May, 2012, http://www.washingtonpost.com/world/national-security/cia-disrupts-airline-bomb-plot/2012/05/07/gIQA9qE08T_story.html

Philp, Rowan, "In Love with SA's Constitution," *Mail and Guardian Online*, (South Africa), 24 February, 2012, http://mg.co.za/article/2012-02-24-in-love-with-sas-constitution

Plungis, Jeff, "Naked-Image Scanners to Be Removed From U.S. Airports," *Bloomberg News*, January 19, 2013, http://www.bloomberg.com/news/2013-01-18/naked-image-scanners-to-be-removed-from-u-s-airports.html

Rosen, Jeffrey, "Nude Awakening," *The New Republic*, 4 February 2010, http://epic.org/privacy/travel/Rosen_Article.pdf

Saletan, William, "Digital Penetration: Invasion of the Naked Body Scanners," *Slate*, March 3, 2007, http://www.slate.com/articles/health_and_science/human_nature/2007/03/digital_penetration.html

The interview with the US Supreme Court Justice Ruth Bader Ginsburg, http://www.youtube.com/watch?v=vzog2QWiVaA

TSA Announces Testing of New Passenger Imaging Technologies at Security Checkpoints, Press Release, 31 July, 2007, http://www.tsa.gov/press/releases/2007/press_release_07312007.shtm

TSA Begins Testing New Advanced Imaging Technology Software, Press Release, February 1, 2011, www.tsa.gov/press/releases/2011/0201.shtm

TSA Announces Additional Advanced Imaging Technology Deployments at U.S. Airports, Press Release, January 26, 2012, http://www.tsa.gov/press/releases/2012/0126.shtm

Tories Warn Firms off Runway Plan, 16 January 2009, *BBC News*, http://news.bbc.co.uk/2/hi/uk_news/politics/7832693.stm

Walden, Heller Unveil FCC Process Reform Legislation, Energy and Commerce Committee, Press Release, 2 November, 2011, http://energycommerce.house.gov/news/PRArticle.aspx?NewsID=9064