TOWARDS DEMOCRATIC DECISION-MAKING IN ENVIRONMENTAL LAW: AN INVESTIGATION OF THE IMPLEMENTATION OF PUBLIC PARTICIPATION AND ACCESS TO ADMINISTRATIVE JUSTICE

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A mini-thesis submitted in partial fulfilment of the requirement for the Magister Legum in the Law Faculty, University of the Western Cape.

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DECLARATION

I declare that *Towards democratic decision-making in environmental law: An investigation of the implementation of public participation and access to administrative justice* is my own work, that it has not been submitted for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged by complete references.

Raphael Chisubo Masesa

Signed: .....

MAY 2010

KEY WORDS

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LIST OF ABBREVIATIONS

COP	Conference on the Contracting Parties
CRC	Convention on the Rights of the Child
CBO	Community Based Organisation
DFA	Development Facilitation Act
DEAT	Department of Environmental Affairs and Tourism
ECA	Environmental Conservation Act
EIA(s)	Environmental Impact Assessment(s)
EIR	Environmental Impact Report
EMP	Environmental Management Plan
GDP	Gross Domestic Product
GMOA	Genetically Modified Organisms Act
LRC	Law Resource Centre
LTMS	Long-Term Mitigation Scenario
MPRDA	Mineral and Petroleum Resources Development Act
NEMA	National Environmental Management Act
NGO	Non-governmental organisation
NPO	Non-profit organisation
ODAC	Open Democracy Advice Centre
PAIA	Promotion of Access to Information Act
PAJA	Promotion of Administration of Justice Act
PBMR	Pebble bed modular reactor
PIL	Public Interest Litigation
UNECE	United Nations Economic Commission for Europe
UNEP	United Nations Environment Plan
UNFCCC	United Nations Framework Convention on Climate Change

TABLE OF CONTENTS

CHAPTER ONE

INTRODUCTION

1.1 Background to, and Overview of, the Study

An environment, which is not dangerous to the health or well-being of individuals, is every South African's basic human right.[1] In addition, it is every South African's basic human right to have the environment protected for the "benefit of present and future generations, *through reasonable legislative and other measures*".[2] These measures must aim at preventing pollution and ecological degradation. The measures must further advance conservation, and guarantee ecologically sustainable development and use of natural resources.[3] Stakeholders, such as, non-governmental organisations (henceforth NGOs), and the community as a whole have important roles to play.[4] As such, a partnership between government, on one hand, and stakeholders and the community on the other hand, must be fostered, as a

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1 Section 24(a), Constitution of the Republic of South Africa, 1996.
2 My emphasis. Section 24(b), Constitution of the Republic of South Africa, 1996.
3 *Ibid.*
4 See Barnard (1999) *Environmental Law for all: A Practical Guide for the Business Community, the Planning Professionals, environmentalists, and Lawyers* 33-37 who has argued that involvement of people who have to live with the results or impacts of decisions is a prerequisite for successful planning, government and decision-making in general.

prerequisite for effective and sustainable development.[5] Thus, environmental governance and management is not an exclusive task of government.[6]

To begin with, government is under a constitutional obligation to protect the environment, by taking the necessary protective steps. On one hand, government must make laws that prevent pollution and damage to the environment; promote conservation; and balance economic, social and environmental development.[7] On the other hand, government must make laws and regulations that allow communities and stakeholders to become involved in decisions that affect them. For example, communities should take part in decision-making concerning the kind of development that should take place in their areas. This mini-thesis primarily investigates the question of the 'who' and the 'how' of the participation of persons or groups of persons in environmental decision-making. It is argued that the quality of final decisions will largely depend on how the public takes part in the process. Government has endeavoured to enact laws that aim at protecting the environment. It has further attempted to enact laws that allow the public to participate in development activities. However, there are instances, as shall be discussed below, where decision-makers have taken environmental decisions without

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5 In terms of section 1(1), National Environmental Management Act, 1998 (Act No. 107 of 1998), "**Sustainable development**" means the integration of social, economic and environmental factors into planning, implementation and decision-making so as to ensure that development serves present and future generations."

6 See Oosthuizen (2008) *An Evaluation of a Public Participation Process for Fairness and Competence* 5 who has argued that "there has been a growing awareness that the government, industry and the population as a whole are jointly responsible for the well-being of the environment.

7 Du Bois and Glazewki "The environment and the Bill of Rights: the right of access to environmental information" in the *Bill of Rights Compendium* [2009] para 2B12.

involving the public. Failure to do so, has had, not only a devastating effect on the environment, but has also had a damaging effect on participatory rights of citizens.

Secondly, South African citizens have the right to expect government to make fair decisions in matters that affect the environment. In this regard, the Constitution provides that "everyone has a right to administrative action that is lawful, reasonable and procedurally fair".[8] Any decision an administrator takes that adversely or materially affects people's rights qualifies as administrative action.[9] The administration is made up of all government departments, and parastatals, like Eskom, Telkom and the SABC.[10] Prior to the taking of an environmental decision, decision-makers must listen to the concerns of people. This entails that the decision-makers must first tell the people what decision is being planned. Secondly, decision-makers must endeavour to let the people tell their side of story. Thirdly, they must inform the people of the decision that is taken, and their right to have that decision appealed or reviewed. Fourthly, they must inform the people that they have the right to request reasons. Fifthly, they must provide the people with appropriate written reasons for the decision. Lastly, people must be able to challenge the decision in an independent court.[11] This is derived from the notion that within

8 Section 33(1).
9 Section 1, Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000).
10 Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000), "Information for citizens". [Online]. Available: <http://www.justice.gov.za/paja/citizen.htm> [Accessed: 18/01/2010 12:14].
11 *Ibid.*

the field of environmental law, government decisions greatly impact on the environment in which citizens live.

Accordingly, the idea that the public holds a legal right to participate generally in government decision-making is widely accepted both in South Africa and internationally. In South Africa, the Peoples' Assembly, an event that affords members of Parliament an opportunity to engage with ordinary citizens, influences decision-making regarding laws affecting them; to give meaning to the notion of a Peoples' Parliament that strives to improve the quality of life of all South Africans; and to strengthen democracy.[12] Therefore, change in legal and administrative decision-making in environmental concerns means that the public be given an opportunity to participate in matters that affect their fundamental right to the environment.[13] At the international level, many states have broad environmental public participation rights and environmental regulatory schemes that guarantee public involvement in governmental decision-making.[14] This mini-thesis is motivated on the basis that public

12 See Parliament of the Republic of South Africa *People's Voices: Shaping the Future, Report of the People's Assembly 2005* in Announcements, Tablings and Committee Reports No 63, 5 June 2006 at s 1.1.

13 See *Director: Mineral Development, Gauteng Region and Another v Save the Vaal Environment and Others* 1999 (8) BCLR 845 (SCA) at para 20.

14 See the United States Environmental Protection Agency (EPA). [Online]. Available: <http://www.epa.gov/epahome/whatwedo.htm> [Accessed: 27/09/2009 22:55]. EPA has created several non-regulatory programmes aimed at including the public meaningfully in the decision-making process. See however, National Research Council of the National Academies (2007), *Models in environmental regulatory decision-making* 1, which has argued that the EPA has not sufficiently leveraged opportunities to improve its regulatory decisions by adopting a comprehensive strategy for periodically evaluating and refining its models. See also the United Nations Economic Commission for Europe (UNECE) Convention on Access to Information (Aarhus Convention), which has implemented its public participation provisions for the European Union and the European Community.

participation is vital in environmental decision-making processes in environmental concerns.[15]

1.2 Defining Concepts

1.2.1 Democracy

It is not easy to define the concept of democracy since it is broad and unclear. It has many "faces" and people define it "to accord with their views and ideologies rather than to measure their ideologies against some fixed criterion".[16] The word *democracy* is made up of two Greek words, *demos* meaning people, and *kratia* meaning rule. It literally means "people rule". Abraham Lincoln rightly points out that "there can be no moral right in connection with one man's making a slave of another".[17] Lincoln defines democracy as follows: "as I would not be a slave, so I would not be a

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15 The concept adopted in this mini-thesis is that of "environmental decision-making processes" as opposed to "environmental decision-making process". The argument proposed is that there is not one particular process of arriving at a decision that involves the public in environmental matters. There are also a number of methods and techniques available to facilitate public participation. See for example Regulation 56, GNR 385 of 21 April 2006: Regulation in terms of Chapter 5 of the National Environmental Management Act, 1998 (Act No. 107 of 1998); section 4, Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000). See also in this regard "Public participation in environmental decision-making in the new South Africa: a research project to identify practical lessons learned". *Final Research Project Report*. May 2007 at 13, in which is it argued that within a number of methods available to facilitate public participation, they all have different strengths and weaknesses. They would therefore be appropriate in particular contexts. Government should identify those methods which accommodate best the decision-process at hand and can be implemented effectively within available resources.

16 Burns (1999) *Administrative Law under the 1996 Constitution* 4.

17 Lincoln (1955) *The living Lincoln: the man, his mind, his times, and the war he fought, reconstructed from his own writings* 170.

master".[18] Elsewhere he says that "no man is good enough to govern another man, without that other's consent".[19] This, in essence, is the meaning of the rule of law, which arises from the concept that all human beings are created equal. Those who are subjected to the law, by implication, have an equal right in the creation of the law, and those who create the law have a corresponding duty to be subjected to it.[20] In South Africa, the basic principles which form the basis of democracy and inform the rest of the Constitution are: equality, fairness, justice, freedom and open democracy.[21] Thus, the Constitution, which is the supreme law of the Republic,[22] lays a foundation for a democratic and open society, in which government is based on the will of the people, and every citizen is equally protected.[23]

According to the Institute for Democracy in South Africa (henceforth Idasa), democracy is defined as "a *principle* that informs the development of political institutions, norms and procedures".[24] In this context, Idasa has endeavoured to develop a "Democracy Index" that attempts to measure the quality, and evaluate the performance of democracy in South Africa.[25] This index is designed around two key principles: 1) The extent to which South Africans

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18 Unidentified author, "Lincoln's definition of democracy". *The New York Times.* [September 13, 1895]. [Online]. Available: <http://query.nytimes.com/mem/archive-free/pdf?_r=1&res=9402E6D71039E033A25750C1A96F9C94649ED7CF> [Accessed: 28/03/2010 23:02].

19 Jaffa (2000) *A new birth of freedom: Abraham Lincoln and the coming of the civil war* 336.

20 *Ibid.*

21 See Preamble, Constitution of the Republic of South Africa, 1996.

22 See section 2, Constitution of the Republic of South Africa, 1996.

23 See Preamble, Constitution of the Republic of South Africa, 1996.

24 See *About Idasa* "Defining Democracy". [Online]. Available: <http://www.idasa.org.za/> [Accessed: 27/01/2010 21:05].

25 *Ibid.*

can control those who make decisions about public affairs; 2) The extent to which South Africans are equal to one another in this process.[26] In other words, the question is: how much influence do citizens have over the actions of government and how equal are they in exercising such influence? The approach in this mini-thesis is rights-oriented and the interest is in the constitutional means and mechanisms designed to protect individuals' basic human rights. As a result, the exercise of participatory rights by the public would be optimised.

1.2.2 Decision

The Oxford English Dictionary defines *decision* as the making up of one's mind on any point or on a course of action.[27] According to the same dictionary, to decide is to come to a conclusion, make up one's mind; it means to determine, which means to bring to an end, or to end, conclude.[28] Thus, every process of making decisions produces a final choice. In terms of the Promotion of Administrative Justice Act[29] (henceforth PAJA) decision means "any decision of an administrative nature *made*, *proposed to be made*, or *required to be made*, under an empowering provision[.]"[30]Du Bois and

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26 *Ibid.*

27 The Oxford English Dictionary (1989), Second Edition, Volume IV, 332.

28 The Oxford English Dictionary (note 27 above) 329.

29 Promotion of Administrative Justice Act, 2000 (No 3 of 2000).

30 My emphasis. Section 1(v), PAJA. The definition includes a decision relating to (a) making, suspending, revoking or refusing to make an order, award or determination; (b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission; (c) issuing, suspending, revoking or refusing to issue a licence, authority or other instrument; (d) imposing a condition or

Glazewski have pointed out that numerous decisions that affect the environment are made on a daily basis in the carrying out of discretionary administrative powers.[31] Examples of such decisions concern waste management, township development, the construction of roads and dams as well as the extraction of resources.[32] The bearing of such decisions on the environment may exceed mere physical changes to the environment and could affect the function of the ecosystem.[33] Therefore, the views of the public community occupying that environment, and as a result bearing the cost of its degradation, should be considered during development and implementation of any decision or policy. For this reason, section 4 of PAJA provides that

> In cases where a decision materially and adversely affects the rights of the public, an administrator, in order to give effect to the right to procedurally fair administrative action, decide whether -
> (*a*) to hold a public enquiry...;
> (*b*) to follow a notice and comment procedure...;
> (*c*) [to hold a public enquiry and] to follow [a notice and comment procedure]....[34]

1.2.3 Public

The Concise Oxford Dictionary of Current English[35] defines *public* as: 1) "the community in general, or members of the community." 2) "A section of

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restriction; (e) making a declaration, demand or requirement; (f) retaining, or refusing to deliver up, an article; or (g) doing or refusing to do any other act or thing of an administrative nature, and a reference to a failure to take a decision must be construed accordingly. See De Ville (2003) *Judicial Review of Administrative Action in South Africa* 39 who has argued that "the definition of 'decision' is to be read as a guide to administrators ... rather than as an attempt by Parliament to further limit the scope of application of PAJA".

31 Du Bois and Glazewski (note 7 above) para 2B7.

32 *Ibid.*

33 *Ibid.*

34 Section 4(1), PAJA.

community having particular interest or in some special connection."[36] It appears that the concept of "public" includes an individual who is interested in or is affected by a development or activity. Who or what is included in the "public" depends very much on activities under consideration. In this regard, the Draft Environmental Impact Assessment Regulations[37] (henceforth Draft EIA Regulations) defines *interested and affected party* as including "*any person*, group of persons or organisation interested in or affected by an activity[.]"[38] For the purposes of section 4 of PAJA, *public* is defined as "including any group or class of the public."[39]

1.2.4 Public participation and public participation process

Public participation means different things for different people. Public participation stems from the concept of democracy and is an important element of any system that considers itself democratic. However, it has been argued that there is no agreed definition of what constitutes public

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35 (1990) 8ed 966.

36 Some synonyms of "public" include: people, society, the community, populace, citizens, and the nation.

37 National Environmental Management Act, 1998 (Act 107 of 1998), GNR.165 of 2009.

38 My emphasis. Section 1(1), Draft EIA Regulations (note 37 above). See Murombo, "Beyond Public Participation: The disjuncture between South Africa's Environmental Impact Assessment (EIA) Law and Sustainable Development" [2008] *Potchefstroom Environmental Report* 18. [Online]. Available: <http://www.saflii.org/za/journals/PER/2008/18.html> [Accessed: 04/11/2009 20:47] who has argued that "there should be no harm in allowing any interested person to participate and make inputs into proposed development activities, in accordance with the democratic governance process. It is argued that given the elusive nature of the concept of the "public" it is better to err on the side of caution by adopting an all-inclusive notion. An exclusive notion may lead to project delays and unnecessary costs, as some of those excluded challenge the process".

39 Section 1(xi), PAJA.

participation.[40] Moreover, the National Environmental Management Act[41] (henceforth NEMA) does not define the concept of public participation, which in turn has shown handicaps in public participation.[42]

Du Plessis has described public participation as "all interaction between government and civil society[.]"[43] Oosthuizen has defined it as a process leading to an effort that is combined by stakeholders, technical specialists, the authorities and supporters "(of the proposed activity) who work together to produce better decisions than if they had acted independently".[44] According to the author, this definition has been adopted by the International Association for Public Participation (henceforth IAP2).[45] This combination and interaction is also a *process* by which government and civil society initiate dialogue, create partnerships, and share information.[46] Furthermore, the interaction involves designing, implementing, and evaluating development policies, projects, and programmes.[47] Defining public participation as a process-related rationale is the view adopted in the mini-thesis rather than

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40 Murombo, "Beyond Public Participation: The disjuncture between South Africa's Environmental Impact Assessment (EIA) Law and Sustainable Development" [2008] *Potchefstroom Environmental Report* 18. [Online]. Available: <http://www.saflii.org/za/journals/PER/2008/18.html> [Accessed: 04/11/2009 20:47].

41 National Environmental Management Act, 1998 (Act No. 107 of 1998).

42 Murombo (note 40 above) 18.

43 See Du Plessis "Public participation, good governmental governance and fulfilment of environmental rights" *Potchefstroom Environmental Report* 2008, Vol 2. 3.

44 Oosthuizen, (2008) *An Evaluation of a Public Participation Process for Fairness and Competence* 1. [Online]. Available: <http://ujdigispace.uj.ac.za:8080/dspace/bitstream/10210/659/3/1%20-%20Chapter%201%20-%20Introduction.pdf> [Accessed: 03/11/2009 08:47].

45 *Ibid*.

46 My emphasis. Du Plessis (note 40 above) 6.

47 *Ibid*.

substantive-related rationale.[48] The reason is that the goal of public participation is to take part and influence the outcome of the decision-making process.[49] Moreover, public participation is not a once-off exercise; it takes place throughout the lifecycle of a development, project or programme.[50] In view of that, attention in this mini-thesis is devoted, not only to environmental public participation processes based on national and international legal and policy documents, but also on how these texts perform in South Africa.[51]

The Draft EIA Regulations defines 'public participation process' as a "process in which potential interested and affected parties are given an opportunity to comment on, or raise issues relevant to specific matters."[52] This definition, as

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48 See Field (Date unknown) *Bringing Public Participation in Environmental Decision-making into Focus Through Lenses of Environmental Rights and Regulations* who has argued that "process-related rationale includes the following; i.e. that public participation: raises public awareness and educates the public; [it] gives the public an opportunity to express its concerns; [it] allows for representation of diverse interests; [it] fosters a sense of empowerment amongst participants; [it] encourages the development of trust amongst normally antagonistic groups; [it] strengthens local communities and other groups; [it] reduces conflict amongst competing interests; [it] facilitates government accountability; [it] increases public acceptance of decisions reached; and [it] confers greater legitimacy on decisions".

49 *The People's Voices: Shaping the future* (note 12 above) has proposed that "based on the premise that the public must and should have a say in the decisions and actions that affect their lives… [p]ublic participation should encompass a sense that the public's contribution will influence the final outcome. The public participation process must communicate the interests of and meet the process needs of participants. The process must seek out and facilitate the involvement of those potentially affected. That means that consideration must be given to how unorganised communities or interest groups can be brought together as participants. Participants should be involved in defining the manner in which they wish to participate. Participants should be provided with the information they need to make their contribution meaningful. Participants need to be informed as to the manner in which their submissions were accounted for and how they are reflected in the decisions made".

50 See also in this regard Murombo (note 40 above).

51 See chapters 3 and 4 below.

52 Section 1(1), Draft EIA Regulations (note 37 above). See also DEAT (2005) *Guidelines 4: Public Participation, in support of the EIA Regulations, 2005 Integrated Environmental Management Guidelines Series*, Department of Environmental Affairs and Tourism (DEAT), Pretoria.

rightly noted by the Constitutional Court, is consistent with the Constitution, which demands an open and transparent government.[53] In addition, the Constitution requires legislative authority[54] of the State to facilitate public participation in the making of laws.[55] The Constitution further provides for the facilitation of public involvement in the legislative and other processes of the National Assembly,[56] the National Council of Provinces,[57] provincial legislatures,[58] and local government.[59] Consequently, such provisions may have a direct or indirect effect in determining the extent of public participation in environmental decision-making processes.

The following are some examples of statutory and policy frameworks that allow participation by the public in environmental decision-making processes: in terms of the Development Facilitation Act[60] (henceforth DFA), one of the principles that apply to all land development is that members of communities affected by land development should actively participate in that process.[61] In terms of the White Paper on Integrated Pollution and Waste Management for

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53 See *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amicus Curiae)* 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC) at para 113.

54 In t he Republic, the legislative authority of the national sphere of government is vested in Parliament…; [that] of the provincial sphere of government is vested in the provincial legislatures…; and [that] of local sphere of government is vested in the Municipal Councils…. See section 43, Constitution of the Republic of South Africa, 1996.

55 *New Clicks South Africa case* (note 53 above) para 113.

56 Section 59(1)(a), Constitution of the Republic of South Africa, 1996.

57 Section 72(1)(a), Constitution of the Republic of South Africa, 1996.

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

59 Section 152(1)(e) and section 160(4)(d), Constitution of the Republic of South Africa, 1996.

60 Development Facilitation Act, 1995 (Act 67 of 1995).

61 Section 2(1)(d).

South Africa[62] (henceforth Pollution and Waste Management Policy), one of the strategic goals of the policy is to establish mechanisms and processes that ensure effective public participation in integrated pollution and waste management governance.[63] In terms of the National Environmental Management Act: Waste Act[64] (henceforth the Waste Act), the notice must invite members of the public to submit to the relevant authority, written representations on or objections to the proposed exercise of power. In addition, such notice must contain sufficient information to enable members of the public to submit representations or objections.[65] These examples highlight the significance of partnerships between government and interested and affected parties in achieving sustainable development. Moreover, the recognition of the role of the community, through public participation, in helping decision-makers make good decisions for the environment ensures that the requirements of the Constitution are fulfilled.

1.3 The Aims of the Study

The aim of the mini-thesis is first to look at how South Africa has created regulatory mechanisms for public participation in environmental law, and how it has been successful at inserting those rights into broad, far-reaching environmental legislation. Secondly, and this is the main focus in the mini-

62 Pollution and Waste Management Policy, Department of Environmental Affairs and Tourism, GN 227 of 17 March 2000.
63 Para 5.2.4.
64 National Environmental Management Act: Waste Act of 2008 (Act No. 59 of 2008).
65 Sections 73(2)(*a*) and (*b*), Waste Act (note 62 above).

thesis, it is aimed at identifying some of the major barriers to participatory rights in environmental decision-making that exist in South Africa. The question is first, whether such barriers are, to some extent, linked to the performance and achievement of democracy in South Africa. Secondly, what barriers exist in the exercise, by the public, of participatory rights enshrined in the South African Bill of Rights and national legislation? Finally, whether a comparison between the current South African practices, with emerging international trends, can assist to overcome such barriers which has been identified.

1.4 Justification of the Study

This mini-thesis is founded on the notion that most of the environmental decisions and governance in South Africa are concerned with establishing rights and obligations over the use of common natural resources, such as, water, land and air. It is submitted that basic participatory rights, enshrined in the South African Bill of Rights and national legislation, aim at providing checks and balances on administrative government and to improve the quality of decisions.

Participatory rights in environmental decision-making include, *inter alia*, the right of access to environmental information.[66] Meaningful participation in environmental decision-making requires that individuals have access to

[66] See section 31, NEMA.

information that is relevant to the decision to be made.[67] Therefore, decision-making should be based on sound information, in which all relevant issues have been investigated and subjected to a systematic, clear and responsible decision-making processes.

There are several reasons why the right of access to information in the environmental decision-making context is important. First, a significant amount of information is held by organs of State. This information is based on the condition of the environment as well as on the environmental impacts of the activities of a wide range of bodies and organisations.[68] Secondly, access to information would advance the capacity of persons concerned with environmental protection, and enable those whose environmental activities are regulated to exercise their rights through various means. These include litigation, administrative procedures and negotiation with administrative decision-makers.[69] Arguably, the right of access to information is an important

67 "Every person is entitled to have access to information held by the State and organs of state which relates to ... any ... law affecting the environment, and to the state of the environment and actual and future threats to the environment, including any emissions to water, air or soil and the production, handling, transportation, treatment, storage and disposal of hazardous waste and substances." See section 31(1)(a), NEMA. See also *The People's Voices: Shaping the future* (note 12 above) which has pointed out that "effective public participation depends on dedicated education, information and outreach strategies aimed at providing the knowledge and means to access what may otherwise appear to be a set of remote and incomprehensible institutions. The purpose of such strategies is to bring those who exist on the margins and periphery of society into the mainstream political process, creating a system of governance that is inclusive, responsive and transparent. The goal is to consolidate a form of democracy that eng ages with and recognises the interests of all. Thus public participation in South Africa may play a valuable role in the transformation of what is still a fundamentally unequal society".

68 Du Bois and Glazewki (note 7 above).

69 *Ibid*.

instrument in the hands of individuals or environmental groups whose rights have been affected.[70]

This mini-thesis advances a simple argument: in the South African democratic and open society, participatory rights are required in the environmental decision-making processes. Such rights should not be ignored by the government or any decision-making body. There is a connection between sustainable development and the need for environmental regulations containing guarantees of public participation in the environmental decision-making processes.[71] Where development or related activity takes place, public concern for the protection of air, land, and water eventually follow. As South Africa goes through the stages of development and growth of industry, the resulting environmental stressors increase concern for the protection of the environment among its public.

1.5 Research Problem

While the concept of environmental public participation in decision-making is growing more popular in South Africa, it is not universally applied. Although government purports to make some provision for the public to participate in environmental regulation, the scope and effect of that participation are not

70 See in this regard Du Bois and Glazewski (note 7 above) para 2B12.
71 Murombo (note 40 above).

consistent. Moreover, the outlines of the public's "right" to participate in the environmental decision-making processes are not clear and certain.

1.6 Methodology

In this research a literature based study will be undertaken to examine specific environmental cases in detail. It will involve a description of major impediments to genuine public participation in environmental decision-making. At the same time it will provide examples of cases where pressure from individual and community groups has resulted in change of policy by government agencies with regard to certain substantive rights. The research will rely on primary sources, including, constitutions, white papers on environmental management, conventions, treaties, and cases dealing with the topic. It will also rely on secondary sources comprising of books, journal articles and websites.

1.7 Overview of Chapters

Chapter 2 discusses the concept of public participation in environmental decision-making in relation to legal and philosophical questions about the nature of democracy. The chapter defines democracy as a system of government in which the supreme power is vested in the people and exercised by them directly or indirectly through a system of representation.

With the adoption of the Constitution, a foundation was laid for a democratic and open society in which government is based on the will of the people, and every citizen protected by law.[72] There are numerous of theories as to what democracy means.[73] However, this chapter centres on theories that seek to reconcile some of the intrinsic variations in aspiring for increased public participation, and the desire for greater expertise and effectiveness, in environmental decision-making processes. The chapter will also highlight the position in the South African context.

Chapter 3 lists and analyses substantive rights to public participation that are enshrined in environmental laws and decision-making processes. These include: access to information which is relevant to the decision to be made; the rights of the public to make representations, how this right should be exercised and what type of decision or development will attract this right; the right to obtain reasons for the decision; the right to appeal; and judicial review.

Chapter 4 will discuss International trends in terms of which impediments to public participation in environmental decision-making identified and discussed in previous chapters will be compared. The chapter will highlight whether or not emerging international standards are relevant to South African

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72 See the Preamble of the Constitution of the Republic of South, 1996.
73 See Held D (2006) *Models of Democracy* 2-4.

environmental decision-making, and the extent to which inclusion is necessary to South African law.

In chapter 5, the concluding chapter, recommendations, applicable to individuals, administrative government organs as well as non-governmental institutions and conservation groups, will be made. These recommendations will hopefully contribute to a better understanding and implementation of the procedural aspects of public participation in environmental decision-making in South Africa.

CHAPTER TWO

PUBLIC PARTICIPATION AND MODELS OF DEMOCRACY

2.1 Introduction

It is in the interest of South Africa to take decisions about the environmental management of public and natural resources seriously. The government's national policy on environmental management as set out in the White Paper on Environmental Management Policy for South Africa[74] (henceforth Environmental Management Policy), has fundamentally changed the opportunities for public participation in decision-making by government organs.[75] The policy has, for example, established mechanisms and processes that ensure effective public participation in environmental governance. These are supported by the following four key objectives: 1) *Participation structures, mechanisms and processes*. These are aimed at establishing "multi-sectoral advisory structures in all spheres of government" in order to facilitate participation by all stakeholders in environmental

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74 White Paper on Environmental Management Policy for South Africa (1998). GNR.749 of 15 May 1998. The purpose of the policy is to give effect to the "many rights in the Constitution that relate to the environment. They include rights relating specifically to the environment, as well as those relating to governance such as the legal standing of parties, administrative justice, accountability and public participation. The policy furthermore defines the essential nature of sustainable development as the combination of social, economic and environmental factors. It takes ownership of sustainable development as the accepted approach to resource management and utilisation in South Africa, thus entrenching environmental sustainability in policy and practice".

75 See Goal 4 of the Environmental Management Policy (note 74 above) 35.

governance. They are also aimed at "developing public participation mechanisms and processes" that are fair, clear and effective, thereby promoting the participation of marginalised sectors of society. They are further aimed at "allocating government resources (financial and human) to build institutional capacity" at all levels of government for effective management of participation in environmental governance.[76] 2) *Communication and participation*. These are aimed at ensuring that "in all spheres of government, communication strategies" deal with needs for public participation.[77] 3) *Strategic alliances*. These are aimed at encouraging partnerships between government and stakeholders in implementing this policy, which will ensure "environmental sustainability in achieving sustainable development".[78] 4) *Marginalised and special interest groups*. This is aimed at encouraging and supporting the involvement of special interest groups. These include, *inter alia*, "women, workers... traditional biers, the elderly, and others in all structures and programmes of environmental governance".[79]

Similarly, the White Paper on the Energy Policy of the Republic of South Africa[80] (henceforth Energy Policy), in an endeavour to improve energy governance, has clarified the "relative roles and functions of various energy governance institutions".[81] These institutions would become more

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76 *Ibid.*
77 *Ibid.*
78 *Ibid.*
79 *Ibid.*
80 White Paper on the Energy Policy of the Republic of South Africa (1998).
81 Energy Policy (note 80 above) 8.

accountable and transparent, and consist of members that would be more "representative, particularly in terms of participation by blacks and women".[82] Equally, DEAT (2005) *Guidelines 4: Public Participation*[83] (henceforth DEAT (2005) *Guidelines 4*), emphasises the significance of participation by the public. It provides that public participation is the only prerequisite for which "exemption cannot be granted unless no rights are affected by an application".[84]

From the above, it appears that there have been substantial changes in the context of environmental decision-making and the involvement of the public.[85] However, little attention has been paid to the question of whether these changes have made the environmental decision-making processes more representative of democratic values, human dignity and the advancement of fundamental human rights. It has been highlighted that South Africa is still a society that is intensely divided between "those who have access to the resources of the country and those who remain poor and marginalised".[86] This reality influences significantly the ways and extent to which citizens can

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82 *Ibid.*

83 DEAT (2005) *Guidelines 4: Public Participation, in support of the EIA Regulations, 2005 Integrated Environmental Management Guidelines Series.*

84 Section 2, DEAT (2005) *Guidelines 4* (note 83 above). This stems from the requirement that people have a right to be informed about potential decisions that may affect them and that they must be afforded an opportunity to influence those decisions. Effective public participation also improves the ability of the competent authority to make informed decisions and result in improved decision-making as the views of all parties are considered.

85 The development of specific constitutional legislation dealing with access to information and administrative justice have largely enhanced public participation.

86 De Villiers (2001) "A people's government, the people's voice: a review of public participation in the law and policy-making process in South Africa." [Online]. Available: <http://www.idasa.org.za/gbOutputFiles.asp?WriteContent=Y&Rid=1554> [Accessed: 29/08/2008 11:45] 11.

take advantage of the opportunities for participation offered by the Constitution and legislation.[87]

This chapter discusses three perspectives in connection with the realisation and implementation of public participation in South African democracy. The first and second theoretical perspectives are normative models, that is, the participatory democracy and representative democracy models. These models are about *how* the public ought to be involved in environmental decision-making. The third critical perspective, that is, environmental pressure groups are about *who* is most likely to be involved, given political and institutional frameworks in place. The results indicate that socio-economic perspectives in South Africa are important considerations for creating sensible relationships between society and the environment. First, a brief look at the historical background of public participation in South Africa and how it has impacted on the present participatory framework.

2.2 Democracy and Public Participation: Pre- and Post-Apartheid Era

A brief historical background of South Africa reveals that the country has a short history of public participation. This is because the involvement of the public in decision-making did not "form part of the frame of mind during the

87 *Ibid.*

previous dispensation".[88] In addition, the history of South Africa has been one in which a huge group of the population has been excluded from participation in the political decision-making systems of society.[89]

It has been argued that the legacy of apartheid forced removals to areas that were less productive and less desirable. Moreover, people were separated from their land and resources, which contributed to unequal access to environmental services, unjust use of land policies and environmental degradation.[90] This was due to overcrowding in the so-called 'homelands', discriminatory policies which affected blacks living in or near cities, and the migratory labour system.[91] The economic growth during apartheid was based

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88 Oosthuizen, (2008) *An Evaluation of a Public Participation Process for Fairness and Competence*. 55 [Online]. Available: <http://hdl.handle.net/10210/659> [Accessed: 23/10/2009 19:45]. See also Field (note 48 above) who has argued that "Environmental issues were seen as the concern of the white community which in turn influenced what was deemed to be an environmental issue. [W]hites tended to live in affluent, well-serviced areas situated far from industrial activity and were therefore in general less likely to be concerned about 'brown' environmental issues such as the control and abatement of pollution or the difficult questions that arise around equitable access to scarce environmental resources such as water and land. 'Green issues' – such as saving endangered plant and animal species and establishing conservation areas – therefore tended to dominate the environmental agenda. The disenfranchised 'black' (including Indian and coloured people) community had no voice in the development and implementation of environmental policies and was alienated from a construction of 'environmental issues' that disregarded the basic needs of the black community and the intersection of these needs with the natural environment".

89 *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (12) BCLR 1399 (CC) at 1445 the Court stated that "[a] majority of the people had, for many years, been denied the right to influence those who ruled over them. They had been discriminated against in almost every sphere of life. The result was gross inequality in education, financial resources, access to knowledge and other areas that are crucial for effective participation in the law-making process". See also Khan (1998) Public Participation and Environmental Decision-Making in South Africa – The Frankdale Environmental Health Project in *South African Geographical Journal* Volume 80, Issue 2, 73-80.

90 Unidentified author, *Sustainable Development in South Africa: Introduction to Basic Concepts*. [Online]. Available: <http://www.saep.org/media/docs/123444107312.pdf> [Accessed: 01/09/2009 03:29].

91 *Ibid*.

on an "unsustainable dependence on extractive activities, and cheap electricity from dirty power like coal and oil". [92] This has left a legacy of development that is not sustainable and to environmental chaos.

Thus, democratic values and public involvement processes, especially at grassroots level, was poor. The effect was that broad-based public participation in environmental decision-making was very small.[93] Therefore, after 1994, it was necessary to build the new post-apartheid South Africa, in order to promote broad-based participation.[94] Although public participation is evolving and developing as South African democracy matures, the poor population of the country still lack involvement in decision-making processes.[95] The reason is that environmental conditions are related to three key dimensions of poverty discussed below.

First, the sources of revenue of poor people tend to be most directly dependent on natural resources.[96] They are therefore the first to suffer when

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92 *Ibid*.

93 Khan (1998) Public Participation and Environmental Decision-Making in South Africa – The Frankdale Environmental Health Project in *South African Geographical Journal* Volume 80, Issue 2, 79.

94 Oosthuizen (note 88 above) 55. De Villiers (note 86 above) 14, has been noted that "although there is no longer the unequal de jure access to formal participation that existed under apartheid, South Africa may, unless remedial steps are taken, experience a de facto inequality of access to participation – a division along almost identical lines to those of the past. Hence, it may be argued that constitutional and legislative requirements for open and accessible processes are a necessary but insufficient condition for effective public participation in the South African socio-economic context. The right to legal access and participation must be backed up by dedicated strategies and programmes aimed at involving the broadest possible spectrum of society".

95 Unidentified author (note 90 above).

96 *Ibid*.

these resources are degraded. Secondly, poor people's health suffers most when the environment is polluted because pollution sources, such as water and air, are often placed in or near communities of people.[97] Thirdly, poor people, on the one hand, are most often vulnerable and exposed to environmental hazards and environment-related conflict. Furthermore, they are less capable of coping when such dangers occur. Wealthier people, on the other hand, are able to afford medical care for pollution related sicknesses like asthma and are able to move out of congested and polluted areas, poor people cannot.[98] Therefore, the public, especially the historically disadvantaged, must be engaged as an equal partner in responsible environmental decision-making.

2.3 Models of Democracy Favouring Public Participation

2.3.1 Participatory democracy

Participatory democracy perspectives argue for the broad participation of the public in environmental and other forms of public decision-making.[99] Since public participation is about access to power and decision-makers, it will appear that certain people or interests will have greater access to power and decision-makers than others.[100] The question is: how can the public influence

97 *Ibid.*
98 *Ibid.*
99 Du Plessis (note 43 above) 3.
100 De Villiers (note 86 above) 14.

or contest the environmental regulations over natural resources? It is a requirement that all Environmental Impact Assessments (henceforth EIAs) involve public participation processes.[101] However, Fakier has argued that in environmental matters the poor, disadvantaged or rural communities are not engaged sufficiently and appropriately.[102] Although the principle is that all groups in society should have a say in the decisions that affect them, it is often the powerful and the organized that are able to make the best use of the opportunities available.[103] As such, models of access will be inclined to reflect the socio-economic setting and inequalities of South African society. Moreover, even well-functioning democratic systems, to some extent, "tend to support the views of the powerful and organised over the poor and unorganised".[104] Therefore, the socio-economic status of South Africa determines significantly how the public exercise its right of access to participation.

It is submitted that, first, participatory forms of democracy under discussion, includes that which is created by the Constitution. Secondly, as shall be discussed later, it includes part of the emerging international trend designed

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101 Regulation 56, GNR.385 of 21 April 2006: Regulations in terms of Chapter 5 of the National Environmental Management Act, 1998 (Act No. 107 of 1998).

102 See Fakier *et al* (2005) "Environmental governance: background research paper produced for the South Africa environment outlook report on behalf of the Department of Environmental Affairs and Tourism 5. [Online]. Available: <http://soer.deat.gov.za/dm_documents/Environmental_Governance_-_Background_Paper_WU45Q.pdf> [Accessed:04/10/2009 23:50]

103 See De Villiers (note 86 above) 14-15.

104 Fakier *et al* (note 102 above) 5.

to generate channels for dialogue between governments and people.[105] There are a number of views expressed in this regard. Derman has proposed that nature and *its use* must be democratised.[106] Others have demanded the re-creation of civil society through grass-roots social movements and community action groups in matters that affect the environment;[107] and still others argue that representative democracy must be overtaken by a participatory democracy to prevent further environmental erosion of "civic-mindedness and community self-efficacy".[108] In this regard, Du Plessis has pointed out that:

> Public participation in environmental decision-making relates to the notion of participatory democracy and environmental justice and often comes to the fore in academic analyses of environmental rights. It has been observed that a 'participation explosion' has been occurring throughout the world over the last four decades and that by whatever name (public participation, citizen involvement, indigenous peoples' rights, local community consultation, et cetera), the idea that the governed should engage in their own governance is gaining ground and rapidly expanding in both law and practice.[109]

Consequently, the main objective of participatory democracy is to include a wide range of the South African public in decision-making in order to rebuild a sense of community. Furthermore, it aims at restoring a capacity for community self-value among the public in those communities.[110] In this

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105 See chapter four below.

106 My emphasis. Derman (2000) *Democratizing environmental use?: land and water in Southern Africa at the end of the century* 33-34.

107 Anheier (2004) *Civil society: measurement, evaluation, policy* 113.

108 Knopp and Cardbeck. "The role of participatory democracy in forest management" (1990) **88** *Journal of Forestry* 13-18.

109 Du Plessis (note 43 above) 3.

110 See *Matatiele Municipality and Others v President of the Republic of South Africa and Others* 2007 (1) BCLR 47 (CC) at para 59, where the Constitutional Court pointed out that participatory democracy is of special importance to those who are relatively

regard, the Constitutional Court has pointed out that the South African constitutional democracy includes, as one of its basic and fundamental principles, the principle of participatory democracy.[111] Moreover, as the Constitutional Court pointed out, the notion of a People's Assembly[112] and traditional means of public participation, known as "*imbizo* or *lekgotla* or *bosberaad*, are consistent with the participative nature of democracy".[113] Participatory democracy is especially important to those who are comparatively disempowered in South Africa where great inequalities of wealth and influence exist.[114] However, at a structural level, participatory democracy is faced with some challenges that hinder the attainment of its objectives.[115] Some of the challenges facing participatory democracy which are an impediment to the achievement of public participation in environmental decision-making are now discussed.

- **Challenges to participatory democracy**

a) Socio-economic barriers

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disempowered in a country like ours where great disparities of wealth and influence exist."

111 See *Doctors for Life International case* (note 89 above) at 1442.

112 *Doctors for Life International case* (note 89 above) at 1441. De Villiers (note 86 above) at 14 has pointed out that the purpose of the People's Assembly is to enable the public to impact on decision-making with regard to laws affecting them and give meaning to the notion of a People's Parliament that strives to improve the quality of life of all South Africans and to strengthen democracy.

113 *Doctors for Life International case* (note 89 above) at 1436.

114 *Doctors for Life International case* (note 89 above) at 1442.

115 Hegel, quoted in Shlomo Avineri (1972) *Hegel's theory of the modern state* at 52, stated that "the size of the modern states makes it quite impossible to realise the ideal of giving every free individual a share in debating and deciding political affairs of universal concern".

In proposing that public participation in environmental decision-making functions in line with a participatory democracy, it has been observed that the socio-economic characteristics of participants are at variance compared to the public at large.[116] The prevailing of socio-economic conditions are still basically influenced by the country's apartheid past.[117] In this regard, the Constitutional Court has observed that the majority of South Africans remain ignorant of their civic rights and responsibilities, and are systematically excluded from processes of decision-making that affect their lives.[118] Added to this point is the argument that the decision-maker is not always familiar with the socio-economic condition of community members.[119]

Similarly, it has been observed that South Africa is categorised as a middle income country.[120] Thus, standard measures and indicators do not entirely show the development and quality of the life of citizens.[121] It has been stated that a high gross domestic product (GDP),[122] on one hand, does not entail equal distribution of resources, nor does a growth in GDP mean an improvement in standards of living. On the other hand, a higher GDP may mean lower standards of living for the majority of the South African people.[123]

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116 Du Plessis (note 43 above) 8.
117 De Villiers (note 86 above).
118 See *Matatiele Municipality case* (note 110 above) para 61.
119 Du Plessis (note 43 above) 7.
120 Taylor *et al* (2000) *South Africa: Transformation for Human Development* 55.
121 Taylor *et al* (note 120 above) 48.
122 GDP is often used to rank nations in reference to one another, particularly for investment purposes.
123 De Villiers (note 86 above) 12.

Therefore, in order to make public participation a reality and meaningful, it is imperative to empower disadvantaged and less empowered individual South Africans.

b) Exclusion of public at initial stage

In South Africa, prior to the granting of approval for a particular development project, an environmental impact assessment (EIA)[124] must be conducted. The EIA is basically a decision-making instrument in which prospective bio-physical and socio-economic impacts of a proposed development are assessed prior to the decision being taken.[125] Inherent in a thorough EIA process is extensive public consultation and participation.[126] However, there are instances where the public have not been given an opportunity to express an opinion before the initiation of a project affecting the environment.[127] Consequently, this raises significant and imperative questions about how public participation activities function, that is, who brings pressure to bear on decisions over national environmental projects and developments.

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124 The EIA is also known as Integrated Environmental Management in South Africa.

125 See section 4, DEAT (2005) *Guideline 3: General Guide to the Environmental Impact Assessment Regulations, 2005, Integrated Environmental Management Guideline Series,* Department of Environmental Affairs and Tourism (DEAT), Pretoria. Hereinafter called DEAT (2005) *Guideline 3.*

126 The main components of a public participation process in terms of Chapter 6 of the Draft EIA Regulations (note 37 above), are: interested and affected parties (I&APs) of the application must be notified and informed of all relevant facts; the register of the names and contact details of all I&APs must be kept; all I&APs must be provided with a reasonable opportunity to comment on the application; and comments made by the I&APs and the responses to those comments made by the applicant must be reported to the competent authority. See also section 3.4, DEAT (2005) *Guideline 3* (note 124 above).

127 See Masondo, "Devastation: how rampant mining is destroying the farms in SA's breadbasket." *The Times.* [Monday, January 25, 2010] 1.

Du Plessis has argued that instances in which public participation becomes limited to the important issue-formulation stage of decision-making processes must be avoided at all costs.[128] Moreover, information intended to be submitted to the public must be a detailed outline of the final form of a project or development that has been agreed upon by government bodies, developers and other decision-makers.[129] The result will be that the idea of public participation will be well interpreted and will become "a truly significant exercise from as early as issue-identification for decision-making processes".[130] Therefore, as a decision-making mechanism, an EIA must not only include broad public discussions and involvement, but must also be included at the very initial stage of decision-making processes.

c) Lack of empowerment

Many government players have continued to reject citizen participation and fear "loss of power".[131] However, the aim of dynamic citizenship and participatory governance is not to substitute established institutions of representative democracy but rather to help them work better. Moreover, models of so-called representative and participatory democracy are not

128 Du Plessis (note 43 above) 7.
129 *Ibid.*
130 *Ibid.*
131 Kently, "Citizens must reclaim power in energy debate". *Cape Times*. [Monday, September 17, 2007] 11.

conflicting, but mutually reinforcing.[132] In *Doctors for Life International case* the Constitutional Court per Ngcobo J observed:

> [T]he representative and participatory elements of our democracy should not be seen as being in tension with each other [but] mutually supportive.... The participation by the public on a continuous basis provides vitality to the functioning of representative democracy. It encourages citizens of the country to be actively involved in public affairs, identify themselves with the institutions of government and become familiar with the laws as they are made. It enhances the civic dignity of those who participate by enabling their voices to be heard and taken account of. ... Participatory democracy is of special importance to those who are relatively disempowered in a country like ours where great disparities of wealth and influence exist.[133]

Accordingly, the model of participatory democracy in environmental decision-making, therefore, is about empowering citizens at all levels. It is about honouring and putting together the energy and the inspiration of ordinary people, and is not, as has been argued, to be seen "as hampering decision-making progress."[134] The aim of participatory democracy is to serve the people and "create opportunity for the public, particularly the most marginalised communities".[135] Moreover, public participation processes in South Africa have always been firmly established in the "constitutional imperative of democratic participation and keeping society involved in

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132 See *Matatiele Municipality case* (note 110 above) para 59. See also De Villiers (note 86 above) who points out that "public participation processes strengthen and further democratise the institutions of representative democracy. Participatory democracy is not necessarily a new or different form of democracy, but a strengthening or expansion of formal representative democracy to include greater levels of participation by civil society. While participation may and has indeed been used to assimilate and manipulate social movements ..., the form of participatory democracy envisaged... aims to empower civil society to drive legislative and policy agendas from the grassroots".

133 *Doctors for Life International case* (note 89 above) at 1442. See also *Matatiele Municipality case* (note 110 above) para 59.

134 Du Plessis (note 43 above) 8.

135 *Matatiele Municipality case* (note 110 above) para 61.

decision-making processes".[136] It is submitted that when people, in all sectors of society, have problems they also have solutions to those problems. Therefore, the key is to have faith in the wisdom of the people and then to draw the energy and inspiration from them.

d) Gender inequality

Empowerment of women and gender equality is a constraint and challenge to broad participation by the public. In South Africa, women, especially black women, have historically been subordinated, marginalised, underprivileged and disadvantaged.[137] Although the government and civil organisations have exhibited an increasing commitment to rectifying this situation, the development in translating policy commitments into effective plans and programmes for implementation, has been slow.[138]

e) Time constraints

Time has been identified as a constraint and challenge to broad public participation. Time is an important cost to poorer sections of the population, especially women and those who are unemployed. It has been observed that:

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136 Section 3.3, Parliament of the Republic of South Africa Announcements, Tablings and Committee Reports No 63, 5 June 2006.

137 Taylor *et al* (note 120 above).

138 *Ibid*.

> Heavy time obligations prevent active participation in anything beyond basic survival and the maintenance of livelihood. [It] is an important cost associated with many of the livelihood plans constructed by the poor, especially for women, who are often singly responsible for child-care, cleaning the house, fetching and heating water, washing and ironing, shopping, collecting firewood, cooking and washing dishes. The long and arduous working hours experienced in many households are exacerbated by seasonal demands in rural communities.[139]

Consequently, the above would imply that inappropriate times of public meetings pose a challenge and constraint to broader participation by the public.[140] Moreover, unsuitable times for public meetings where the majority of participants would take part in decision-making processes, can lead to apathy.[141] Therefore, broader public participation can arguably be said to create false impressions and not achieving its purpose.

f) Transport constraints

Transport poses a challenge and constraint to broad public participation. It is a major factor in facilitating participation and places, particularly the rural poor and people with disabilities, at a serious disadvantage.[142] Statistics on the burden of transport reveal that amongst consumers in the lowest consumption quintile, 62 percent walk to work, while most others use taxis or buses. Moreover, transport costs make up a much larger share of expenditure among the working poor.[143] In this case, making a journey to a decision-

139 De Villiers (note 86 above) 15.
140 Fakier *et al* (note 102 above).
141 *Ibid*.
142 De Villiers (note 86 above) 15.
143 *Ibid*.

maker that may be located in another town, or another side of town, is likely to be both physically and financially discouraging.[144]

g) Lack of education

Education has been another constraint and challenge to South Africa's public participation and has proved one of the more difficult sectors to transform. In South Africa, education requires, on the one hand, an overhaul of the entire education system. On the other, it must redress the huge, "apartheid-bequeathed discrepancies in the availability of teaching sites, materials and personnel within a limited fiscal frame".[145] Since South Africa has one of the highest illiteracy rates in the world, lack of education remains one of the most disempowering factors faced by a large majority of the people in the country.[146] Therefore, illiteracy will affect the ability, of the public, to democratically participate in decision-making, to access information and communicate effectively.

h) Lack of communication

Communication hinders and poses challenges to broad participation by the public. Although access to the media is fundamental for public participation,

144 *Ibid*.
145 Taylor *et al* (note 120 above).
146 De Villiers (note 86 above).

the majority sections of South African population do not receive any.[147] These are likely to be poor, rural, African, and low-educated.[148] They are arguably most in need of information and education about their newly guaranteed Constitutional rights; they need information of points where they can access resources; and they need information of democratic processes.

From the above discussion of challenges, although the imbalanced access to participation, by law, no longer exists under the current democratic dispensation, it has been stressed that South Africa may experience a "*de facto* inequality of access to participation", unless measures are taken to improve the state of affairs.[149] Hence, it has been argued that constitutional and legislative requirements for sincere and accessible processes are a necessary but unsatisfactory condition for effective public participation in the South African socio-economic context.[150] Therefore, the right to participation must be supported by devoted methods and plans aimed at involving the broadest range of the public.[151] This raises important questions about how public participation programmes work, that is, who must influence decisions in environmental issues. In other words, who represents those whose lives

147 *Ibid.*
148 *Ibid.*
149 *Ibid.*
150 *Ibid.*
151 See in this regard De Villiers (note 86 above) at 12, who has pointed out that such methods and plan may include: "education, information and outreach aimed at providing knowledge and means to access to remote and incomprehensible institutions. The idea is to bring those who live on the boundaries of society into the mainstream decision-making processes. This will enhance the creation of a system of governance that is inclusive, responsive and transparent. The end result is to merge a form of democracy that engages with, and recognises the interests of all".

depend on natural resources when decisions concerning these resources are made?

2.3.2 Representative democracy[152]

At least without reservation, the alternative model, which is representative democracy, often maintains that individual citizens do not have the time, knowledge, or interest to participate in civil society and environmental activities.[153] Those advocating representation of the public in environmental decision-making argue that individual citizens tend to be "less understanding of difficult and complex environmental matters".[154] In addition, individual citizens may not have enough time or enthusiasm to learn about the issues, and so may not be expected to understand, compared to experts on a particular environmental issue, how for instance alternatives relate to their inclinations.[155] Others argue that the notion of broad public participation as

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152 The concept of representative democracy discussed here is distinguished from "environmental pressure group" discussed below in this chapter. The former is a broad one. The public elects its representatives who oversee the implementation of their decisions. Effective representation will depend on groups and institutions that are broadly representative of stakeholders or interested groups such as women, people with disabilities, community leaders, children, etc.

153 Moote and McClaran (1997) "Implications of participatory democracy for public land planning." *Journal of Range Management* Volume 50 No. 5: 473-481. [Online]. Available: <https://digitalcommons.library.arizona.edu/objectviewer?o=http%3A%2F%2Fjrm.library.arizona.edu%2FVolume50%2FNumber5%2Fazu_jrm_v50_n5_473_481_m.pdf> [Accessed: 17/06/2008 10:23].

154 DiMento (1977) "Citizen environmental litigation and the administrative process: empirical findings, remaining issues and a direction for future research." *Duke Law Journal*, Volume 1977 No. 2; 409-448. [Online]. Availabe: <http://www.jstor.org/stable/1372042.pdf> [Accessed: 17/06/2008 20:11].

155 DiMento (note 154 above). Du Plessis (note 43 above) 8, has argued that "it is not unthinkable that broad participation by the public is viewed as a barrier to decision-making process. This is because peoples have different value and cultural systems,

widely advocated, presents few concrete guidelines as to how to achieve such involvement by the public.[156] Another dilemma of broad participation by the public relates to its implementation, which is often viewed as hindering the decision-making progress.[157]

Therefore, in the face of the constraints and challenges faced by the participatory democracy model, a representative democracy offers an alternative model to overcome such challenges and constraints. A representative democracy model proposes that individuals overcome intellectual, motivational, and time-related resource obstacles by supporting or electing representative citizens.[158] The outcome is that the chosen group or groups are likely, in environmental policy debates, discussions, and decision-making processes, to represent fairly the environmental interest at a given time in society.

different development priorities and needs as well as different levels of education. Moreover, uneducated people or people with bad motives or intentions often take part in public participation processes, which could affect the merits of their input. The success of public participation hence requires innovation and creativity on the part of administrators making environmental decisions".

156 Du Plessis (note 43 above) 8.

157 *Ibid*.

158 The findings in the research done at the University of Cape Town show that the capacity of stakeholder to participate adequately was affected by (a) timeframes: which were too short for them to understand, review and comment on the documents;(b) language barriers: which were related to the legal languages used; and financial resources: which were related to respondents travelling to attend meetings. See in this regard "Public participation in environmental decision-making in the new South Africa: a research project to identify practical lessons learned" *Final Research Project Report* May 2007. University of Cape Town, 20.

For example, the respondent in *Petro Props (Pty) Ltd v Barlow and Another*[159] launched a campaign through the press, and by means of letters to relevant government departments and Sasol, to stop the applicant from constructing a fuel service station in the middle of a wetland. The respondent was the chairperson of the Libradene Wetland Association. The Association was formed when the need for a more formalised structure became apparent at a time when litigation to stop the development was contemplated. Previously, there had been in existence for some time, an informal group of residents called the Save the Vlei Action Group. The group was concerned about the wetland and environmental degradation issues. The applicant, in this case, was the owner of a property in Boksburg on which it was to build a fuel service station and convenience store. It claimed that it had taken all the steps and had lawfully obtained all the necessary consents and decision for it to do so.

The Libradene Wetland Association in the *Barlow case* represented an ecologically and environmentally sensitive wetland in Libradene, Gauteng. The Court had to essentially weigh up section 25, the constitutional property right of the applicant against section 16, the constitutional right to freedom of expression of the respondent. It found that the interests of the respondent and her associates had been selfless and that their approach had been completely peaceful and geared towards balanced public participation. It pointed out the following:

159 2006 (5) SA 160 (W).

> Ms Barlow and the Association bear a standard that any vibrant democratic society would be glad to have raised in its midst. Their interest and motivation is selfless, being to contribute to environmental protection in the common good. None of them stands to gain material personal profit. Their *modus operandi* is entirely peaceful. It is mobilised within a self-funding voluntary association. It is geared towards public participation, information gathering and exchange, discussion and the production of community-based mandates. Its accompanying public discourse and media coverage have been fair, with participants and readers alike being presented in a balanced way with the viewpoints of all sides. In my view, conduct of that sort earns the support of our Constitution. In this context, it should be borne in mind that the Constitution does not only afford a shield, to be resorted to passively and defensively. It also provides a sword, which groups like the Association can and should draw to empower their initiatives and interests.[160]

The court made it clear that no decision-making power or process in terms of the Environment Conservation Act 73 of 1989 could be exempted from public debate or the lodging of representations. Moreover, the intention of the Court was to prevent a situation that would deter people with environmental objections from stepping forward as active citizens.[161]

Although the Libradene Wetland Association in the *Barlow case* represented reasonably and fairly the environmental interests of the community in Libradene, its representation and the outcome of the court's decision, have not overcome obstacles faced in environmental decision-making. Arguably the dispute in the *Barlow case* could have been avoided had the public been involved in the decision-making process of authorising, by the relevant decision-maker, the construction of a fuel service station on a wetland. Where there is lack of public participation there is less transparency and

160 *Petro Props (Pty) Ltd v Barlow and Another* 2006 (5) SA 160 (W) at para 55.
161 *Barlow case* (note 160 above) at para 60.

accountability in decision-making. This is because the viewpoints of the public do not always influence the process and the decisions of the competent authority.[162] Towards the end of the discussion in this chapter, some of the challenges of inventing detailed plans and putting public participation into action will be highlighted.

In some public participation processes, lack of capacity and resources amongst those whose participation is considered most necessary, that is, the poor and marginalised, can pose a major limitation.[163] Indeed, increased opportunities for public participation by representative groups generally may even worsen existing inequalities.[164] Whilst public participation by groups representing the public is often seen as a form of empowerment, the danger is that only the already empowered may be able to enjoy its benefits.[165] This argument is supported since in South Africa, participation by the public especially those less empowered strengthen the functioning of representative democracy.[166]

A representative and democratic decision-making process is a well-considered legal structure for South Africa,[167] which can achieve results that

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162 See DEAT (2005) *Guidelines 4* (note 83 above).
163 De Villiers (note 86 above) 14.
164 Du Plessis (note 43 above) 8.
165 De Villiers (note 86 above) 13.
166 *Doctors for Life International case* (note 89 above)
167 The Constitution of the Republic South Africa, 1996 and the key legislation such as Promotion of Access to Information Act No 2 of 2000, Promotion of Administrative Justice Act No 3 of 2000, Chapter 4 of the Local Government: Municipal Systems Act of 2000, Chapter 4 of the Local Government: Municipal Structures Act of 1998, Local

encourage active participation by citizens as seen in the *Barlow case*. However, it has been pointed out that the facilitative principles, structures and processes for public participation in environmental decision-making are sometimes not working in practice as it was intended to.[168]

As such, a number of the environmental disputes related to issues of public participation have been brought before the courts in the democratic period.[169] For example, in *Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs & Tourism and Another*,[170] a case discussed in detail below, the Court found that the applicant had not been afforded an opportunity to make submissions on the final report preceding the respondent's decision. Accordingly, it rendered the latter's decision fatally flawed.[171] The matter was submitted to the respondent with directions to afford the applicant and other interested parties an opportunity of addressing further written submissions. The respondent was to consider such submissions before making a decision anew on Eskom's application.[172] While it appeared that the applicant was successful in this case, the judgment did not have much impact on the outcome of the decision by Eskom. For this

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Government: Municipal Finance Management Act No 56 of 2003 and the Batho Pele White Paper of 1997 provide a powerful legal framework for participatory local democracy.

168 De Villiers (note 86 above) 5.

169 See *Director: Mineral Development, Gauteng Region v Save the Vaal Environment* 1999 (2) SA 709 (SCA); *Van Huyssteen NO v Minister of Environmental Affairs and Tourism* 1995 (9) BCLR 1191 (C); *Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs and Tourism* 2005 (3) SA 156 (C); and *Trustees, Biowatch Trust v Registrar Genetic Resources* 2005 (4) SA 111 (T).

170 *Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs and Tourism* [2006] 2 All SA 44 (C).

171 *Earthlife Africa (Cape Town)* (note 170 above) at para 77.

172 *Earthlife Africa (Cape Town)* (note 170 above) at para 78.

reason it is unclear whether such court decisions are leading to better decision-making or stimulating a more democratic culture on issues relating to the environment.

Similarly, it is submitted that the facilitative principles, structures and processes for public participation are not working properly in practice. This is because the representative democracy model tends to favour those with resources to participate at the expense of the poor, marginalised, academic sectors and business sectors.[173] For example, research done by the University of Cape Town (henceforth UCT) reveals that engagement efforts, by the Department of Environmental Affairs and Tourism (henceforth DEAT) in its environmental legislative process,[174] were focused on other government departments and spheres, and Contact Trust[175] which worked with public interest and community groups.[176] Accordingly, government was speaking to government regarding the process, that is, National to Provincial, National to

173 See "Public participation in environmental decision-making in the new South Africa: a research project to identify practical lessons learned" *Final Research Project Report* May 2007. University of Cape Town, 20.

174 During the development of the White Paper on the Conservative and Sustainable use of South Africa's Biological Diversity, GN 1095, May 1997.

175 Contact Trust started in 1998, as an organisation that responded to the fact that new legislation was passing through Parliament with very little input from organised poor communities who were still finding ways to relate to the new South African State. The organisation was established to empower those who have little or no conventional power to negotiate basic needs and basic rights by developing people-centered advocacy. The organisation closed at the end of 2003 due to a lack of funding. Its vision was to promote a democracy that is characterised by a strong state with active, organised citizens who hold it accountable and root its policies in social and administrative reality. See Charlene Houston, *Contact Trust – reflection: 2003 -2005.* [Online]. Available: <http://www.participation.org.za/docs/ctreflections.pdf> [Accessed: 22/04/2010 19:31]

176 *Final Research Project Report* May 2007 (note 173 above) 20.

National or Provincial to Provincial.[177] Other sectors such as business and industry, local governments and the general public "were left out of the loop and were not kept up-to-date on meetings, workshops, comment periods, etc".[178]

Equally, although many government structures may have been transformed, there are several practices that work against the participation of the poor and marginalised. One such practice is found in the area of mining. The poor are sometimes persuaded to relocate and conclude agreements with unrepresentative, undemocratic and unaccountable structures. For example, in the Bushveld Complex,[179] which includes parts of North West, Limpopo and Mpumalanga Provinces, almost ninety percent of the world's platinum is found. One of the mining companies operating in this area is Rhino Minerals, a subsidiary of a French company Imerys. In 2007, the company intended to expand its operations around the village of Segorong. In order for it to do this, it meant that two hundred and forty-four families living in the area would have to move. The move had brought tension between the mining company and the community.

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177 *Ibid.*

178 *Ibid.*

179 See "Script: Mineral Curse". [Online]. Available: <http://196.35.74.234/specialassignment/features/1106/script.html#> [Accessed: 10/02/2010 17:59]. The Bushveld Complex case was a documentary programme on Special Assignment on 11 June 2008, SABC3, at 21h 30. The programme looked at the tensions between mines and communities, and the persistent forced removals which have been given politically correct terms of "relocation and resettlement". Communities that find themselves living on lands which are rich in minerals believe those holding mineral rights beneath the land they occupy have unlimited powers. The programme looked at three communities in Limpopo, divided by allegations of bribery, rumours of importation of mercenaries from the DRC to protect mine properties and families distraught at the desecration of their graves.

It appears that there was no proper or formal participation by the community, during the company's decision to expand its mining operation. Moreover, the company made consultation under representation of specific stakeholder which is the traditional authority. There was an unequal relationship between the two sides; one very poor, and without resources and the other very rich, with great resources and skills. The traditional leader and her group refused to sign the agreement to have the community moved. However, the community because of hardships dishonoured the chief's instructions and signed the agreement.

It is observed, from the above mining example, that poor South African citizens do not have much influence over the actions of government or those who make decisions over the land on which they live. The principal claim of a representative democracy model rests, in theory, on the assertion that it can accomplish representativeness, of the public, more economically and efficiently, and without distortion, through interest-group participation.[180] Although the South African Constitution lays a foundation for a democratic, equal and open society, there is no equality[181] in the exercising of such

180 Du Plessis (note 43 above) 7-8.

181 Section 9 of the Constitution provides that: (1) Everyone is equal before the law and has the right to equal protection and benefit of the law. (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken. (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language

influence especially by poor communities.[182] Public participation processes require that any person, group of persons or organisation interested in or affected by an activity, or any organ of state that may have jurisdiction over any activity, be "given an opportunity to comment on, or raise issues relevant to, specific matters in order to reflect the interests of the public".[183] However, in Bushveld Complex, this did not take place and the result did not reflect the interest of the community.

Another practice found in the area of mining concerns the farmers. The Times Newspaper Editorial published the results of their investigation into ground water pollution in the Free State and Mpumalanga provinces.[184] The issue at stake was the way in which mining licences were being granted without appropriate environmental-impact studies, and without consultation with farmers on whose land mining prospecting is to take place. In most cases, farmers first became aware that their land was being prospected for minerals when the prospectors arrived holding a licence issued by the department of minerals and energy.[185] In other cases, farmers in these two provinces complained that the first they heard of applications approved by the

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and birth. (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination. (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

182 See *About Idasa* "Defining democracy" (note 24 above).

183 See section 3.1, DEAT (2005) *Guidelines 4* (note 83 above).

184 The Editor, "Environmental impact of mining underestimated". *The Times Newspaper*. [January 24, 2010]. [Online]. Available: <http://www.timeslive.co.za/opinion/editorials/article275670.ece> [Accessed: 10/02/2010 21:55]. See also Masondo, "Devastation: how rampart mining is destroying the farms in SA's breadbasket". *The Times*. [Monday, January 25, 2010] 1.

185 *Ibid*.

department of mineral resources was when representatives of mining companies arrived on their farms to start drilling.[186] One farmer stated that the Department of Minerals and Energy (henceforth DME) had granted two coal mining companies licences to prospect on his farm. However, he was only made aware of this decision when a representative of one of the companies arrived on his farm to inform him that he had 14 days in which to object to the department's decision.[187] Accordingly, in the last eighteen months, up to 25 notices have been served on farmers informing them that mining companies have been granted rights to prospect on their land.[188]

Prospecting is a process that entails far-reaching drilling to establish the depth and quality of mineral deposits, which affects not only the value of the farmer's land but the productivity of the soil.[189] There is little a farmer can do once a notice for the right to prospect the land has been served. For the land owner, there is no process of participation; it is basically a negotiation between two third parties, the department of mineral resources and the prospecting companies.[190] The implication is that the role of the affected farmer is irrelevant.

It is submitted that the issue in the above example appears not to have sufficient public support to generate interest groups affected by the mining

186 Masondo (note 127 above) 1.
187 Masondo (note 127 above) 6.
188 *Ibid.*
189 *Ibid.*
190 *Ibid.*

activity that would represent the farmers' preferences at participation level. The reason is that there are significant different interests of participants that would constitute a representative group. It has been argued that interests of participants are defined by the nature of the very benefits they pursue.[191] For instance, the State pursues state interests, mining companies pursue mining interests, farmers pursue farming interests, local people pursue community interest and environmentalists pursue environmental interests.[192] In this connection, state interests and mining interests can be "over-represented, while farming interests, community interest or environmental interests can be under-represented. The result is that since there is an imbalance, representativeness cannot be accomplished without distortion, as observed in the above two mining examples. Such a situation can be overcome by, for

191 Wilson (1980) *The Politics of Regulation*. 41.

192 See for example *Director, Mineral Development, Gauteng Region and Another v Save the Vaal Environment and Others* 1999 (8) BCLR 845 (SCA) at para 13-15. In which the Court pointed out that section 9 of the Minerals Act 50 of 1991, involved the inclusion of environmental interests and issues. These would require an enquiry into the manner in which an applicant [mining company] intended to rehabilitate disturbances to the surfaces which would be caused by the mining operations. It would also require the Director [government organ] to enquire into the nature and extent of the terrain which would be violated by the relevant mining operations, the effect of such violation and how the terrain could and were to be rehabilitated. In this case, the Director would have to take into account the alleged likelihood of damage to the Rietspruit wetland and the question if, and to what extent, the wetland were to be rehabilitated. These were environmental matters about which the respondents [environmental interest group] had legitimate concerns. The Court concluded that the Director would have to give the respondents an opportunity to be heard at that stage unless there were other provisions of the Act which require them to defer raising their environmental concerns until some other time. Sasol Mining, on the other hand, contended that the fact that the legislature enumerated the so-called "jurisdictional facts" in section 9(3), indicates, by necessary implication, a total exclusion of the *audi* rule. The Court was of the view that the Counsel's argument was fallacious. The Court asked the following: "are we to infer that it was the intention of Parliament to exclude a fundamental principle such as the *audi* rule merely because the section under discussion has enumerated certain factors which the Director must take into account in exercising his discretion?"The Court concluded that the *audi* rule would be excluded in almost every instance where some factors which an official had to take into account were enumerated. Accordingly, such an approach would weaken the principles of natural justice.

instance, looking at the possibility of representatives going out to the public in order to hear their views.[193] However, like broad participation, representative democracy also faces barriers and relatively disadvantaged in influencing decision-making processes. The reason is that it must mobilise a public that would have sufficient support and with fewer selective benefits to participate.[194] The discussion below focuses on participation, representivity and accountability relating to environmental civil society groups.

2.3.3 Environmental pressure groups[195]

The White Paper on Integrated Pollution and Waste Management for South Africa[196] (henceforth Pollution and Waste Management Policy) has highlighted that government has recently promulgated comprehensive legislation and regulations to deal with risks to environmental and human health.[197] However, although the Policy seeks a legitimate environmental decision-making process, it has highlighted that one of the limitations that has become clear in pollution and waste management is, *inter alia*, limited civil society involvement.[198] The first question therefore is: what roles should civil societies, in general, play in environmental decision-making and governance

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193 De Villiers (note 86 above) 13.
194 *Ibid*.
195 In this mini-thesis, environmental pressure groups and civil societies are used interchangeably; they include non-governmental organisations, community-based organisation and stakeholders.
196 Pollution and Waste Management Policy, Department of Environmental Affairs and Tourism, GN 227 of 17 March 2000.
197 Pollution and Waste Management Policy (note 196 above) at 13.
198 *Ibid*.

system? This mini-thesis argues that civil societies should play a major role in five key areas. These are: access to environmental information; right to make representations; right to obtain reasons for a decision; right of appeal; and judicial review.[199] Secondly, do existing structures and policies enable civil society to fulfil these roles effectively? If not, what reform measures should be offered to facilitate the participation of civil society in environmental decision-making and governance?

Significantly, several institutional changes have affected the ways in which competing interest groups may perceive interests to participate in national environmental policies. Since 1994, environmental non-governmental organisations in South African have been making inroads and increased involvement in environmental governance.[200] In terms of National Environmental Management Act[201] (henceforth NEMA), there is a framework for facilitating the role of civil society in environmental governance. The framework includes the National Environmental Advisory Forum (henceforth NEAF), with a broad based stakeholder representation, which advises the minister on, *inter alia*, appropriate methods of monitoring compliance with the

199 See chapter three below.

200 See for example Liefferink "Proposed amendment to the National Environmental Management Act: public concern". [Online]. Available: <http://www.environment.co.za/topic.asp?TOPIC_ID=1730> [Accessed:19/02/2010 03:10] where the Director, Department of Environmental Affairs proposed that all conservancies and NGOs, as well as civil society groups make written submissions for and on behalf of their organisations or associations to the Honourable Minister of Environmental Affairs and to the MEC of their province.

201 National Environmental Management Act, 1998 (Act No. 107 of 1998).

principles in section 2 of NEMA.[202] It is submitted that the trend of civil society engagement, has levelled the playing field by shifting the types of legal and procedural resources at their disposal.[203] It is a shift in the balance of power to civil society groups as both the stakeholders and the driving force behind effective environmental decision-making processes.[204] This is particularly the case for citizen standing to sue, the right to appeal, judicial review, and oversight of agency activities.[205]

The question is whether the shift in the balance of power to environmental civil society groups has been captured by environmental interests in ways that either distort or increase public participation. It is both difficult and beyond the scope of this mini-thesis to measure the size and scope of the civil society sector concerning environmental governance and involvement in decision-making. Statistically, Fakier has argued that in 2002, out of 98 920 non-profit organisations (henceforth NPOs) in South Africa, environmental groups accounted for 5 percent compared with 2 percent in other countries studied.[206] He further argued that the environmental group is divided into environmental protection and animal protection.[207] The conclusion the author makes is that there has been a dramatic improvement in civil society involvement.

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202 See Fakier (note 102 above).
203 Cf Hoberg (1992) *Pluralism by Design: Environmental Policy and the American Regulatory State* 197-201.
204 See Fakier (note 102 above).
205 Hoberg (note 203 above) 199.
206 See Fakier (note 102 above).
207 *Ibid.*

However, counterclaims of environmental pressure groups have been raised in such a way as to question whether increased participation of civil societies' interests, in environmental governance, reduces or increases distortion in public participation.[208] It is submitted that environmental groups increase participation rather than distorting it, since the system of environmental management and decision-making, is complex. The environmental planning and instruments to coordinate and manage the elements of such a complex system requires that all the relevant stakeholders be part of the process.[209]

In view of the above argument, the roles of environmental groups, in decision-making, must be clear. Thornhill has argued that while government departments and other state organs are defining their role with regard to each other, the roles of non-governmental organisations (NGOs) and stakeholders are "less clearly spelt out".[210] The author has further argued that the NGO sector should realise and define its own roles, responsibilities and accountabilities. This should be done within a "structure set down through what is currently a fairly exclusive inter-departmental process".[211] Furthermore, according to the author, it will entail NGOs having to organise

208 *Ibid.*

209 See in this regard Thornhill *et al* (Date Unknown) *The Environment as Catalyst: Understanding Environmental Governance for Sustainable Development* 6. [Online]. Available: <www.phelamanga.co.za/images/papers/39_env_**catalyst**.pdf> [Accessed: 09/11/2009 17:21].

210 Thornhill *et al* (note 209 above) 9.

211 *Ibid.*

themselves and make their interests and objectives clear.[212] The result will be that NGOs will become visible to government departments; the latter usually cooperate and collaborate with institutions rather than individuals.

Although the above may be the case, there can be challenges that environmental groups sometimes face. A case in point is *Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs & Tourism and Another*.[213] The second respondent, Eskom, intended to construct a demonstration model 110 MegaWatt class pebble bed modular reactor (PBMR) at the site of its Koeberg Nuclear Power Station near Cape Town. The applicant was a non-governmental organisation, a voluntary association of environmental and social activists in Cape Town. It brought an application on its own behalf, on behalf of the residents of Cape Town who were exposed to potential risks posed by the PBMR, and in the interest of the public. In the view of the Court, the application concerned a sensitive and controversial issue of nuclear power, which potentially affected the safety and environmental rights of vast numbers of people, resulting in the generation of considerable local and national interest.[214] Therefore, the civil society or conservation groups can be more easily mobilised by a direct or indirect, immediate or gradual threat to their environmental values, than the public at large.

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212 *Ibid.*

213 *Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs & Tourism and Another* [2006] 2 All SA 44 (C) at para 77.

214 *Earthlife Africa (Cape Town)* (note 213 above) at para 32.

The decision in the *Earthlife Africa* case dealt solely with the procedural fairness of the Director-General's decision from an administrative law perspective.[215] However, there were more than 70 complicated appeals against the decision of the Director-General in terms of section 35 of the Environment Conservation Act.[216] In the opinion of the Court, the course of action best served not only the interests of the applicant, but also the interests of the State and of the public.[217] The judgment was mainly decided in favour of Earthlife and the Director-General was ordered to review the matter, this time clearly taking the environmental group's concerns into account. However, when the Director-General re-decided the matter there was no difference in the substantive outcome of his decision.[218]

The view adopted in this mini-thesis is that broad participatory groups and representative groups are disadvantaged in bringing environmental interests to bear on environmental policies and decision-making processes. For this reason, strong representation of environmental groups in this case appears to have created a better reflection and representation of public participation than broad participation and representative groups. As was pointed out in *Earthlife*

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215 *Earthlife Africa (Cape Town)* (note 213 above) at para 79.
216 Act 73 of 1989.
217 *Earthlife Africa (Cape Town)* (note 213 above) at para 32.
218 *Ibid.*

Africa case, environmental groups seek to protect different environmental interests in accordance with their varied objectives.[219]

In line with the above, the White Paper on Integrated Pollution and Waste Management for South Africa[220] (henceforth Integrated Pollution and Waste Management), in its prevention strategy, represents a paradigm shift on how to deal with waste. The White Paper is a shift from dealing with waste only after it is generated, towards, *inter alia*, involvement of all sectors of society in pollution and waste management.[221] The White Paper has pointed out that it is not easy to identify, consult with and involve interested and affected parties and stakeholders in pollution and waste management-related decision making.[222] Importantly, it addressed issues that include representation by the stakeholders and how to allocate responsibilities for finding solutions to pollution problems, since there are no appropriate guidelines for public participation by authorities and communities.[223] According to the White Paper, government will recognise and acknowledge the roles of NGOs and Community Based Organisations (henceforth CBOs) by ensuring participation.[224] The key to the success of these groups are environmental rights, which include *inter alia*, the right of access to information. This will enable environmental groups to "inform their constituents of their rights and

219 See also Thornhill (note 209 above) 9.
220 Pollution and Waste Management Policy (note 196 above).
221 Pollution and Waste Management (note 196 above) 10.
222 Pollution and Waste Management (note 196 above) 24.
223 *Ibid.*
224 Pollution and Waste Management (note 196 above) 40.

opportunities" and to "become better organised and more strongly positioned to advance their interests".[225]

2.4 Conclusion

Whilst South Africa's history of public participation is short and still maturing, environmental policies and legislation have made substantial changes in the context of environmental decision-making and the involvement of the public. Moreover, citizens can take advantage of the opportunities for participation that the Constitution offers. Having said that, not much attention has been paid to the question of whether substantial changes have made the environmental decision-making processes more representative of democratic values, human dignity and the advancement of fundamental human rights. South Africa has continued to be a society that is intensely divided between those who have access to the resources of the country and those who remain poor and marginalised. As a result, the implementation and realisation of democracy in the country remains a challenge. The question therefore is: who should be involved in, and influence, environmental decision-making? In answering this question, it is observed that the socio-economic status of South African citizens is the major determinant of the public's right of access to participation.

[225] Pollution and Waste Management (note 196 above) 30.

The following conclusions are made. First, to the extent that participation is conditioned by unequal and different interests and characteristics of the public, the participatory democracy model and the representative democracy model, cannot succeed without overcoming structural and socio-economic barriers to participation. Secondly, interests of the public must be supported by socio-economic reforms. Lastly, since the structure of environmental management and decision-making is a complex one, the shift in the balance of power to environmental groups should aim at increasing participation in decision-making rather than distorting the process.

CHAPTER THREE

SUBSTANTIVE HUMAN RIGHTS TO PUBLIC PARTICIPATION

3.1 Introduction

The processes of making administrative decisions in environmental law enshrine substantive human rights to public participation in South Africa. Rights to public participation provide checks and balances on administrative government and substantially improve the quality of decisions that are made.[226] The approach in this chapter is to use a rights theory in looking at public participation whilst at the same time using regulatory theory as a means through which the rights to participate in environmental decision-making processes are exercised. The discussion therefore will list, explain, and analyse the sources and status of the rights to public participation that are enshrined in the South African Bill of Rights.

Some of the rights with regard to public participation in environmental decision-making are basic human rights. The South African Constitution is the primary source of the right to participate in decisions involving the environment as located in its Bill of Rights. These constitutional rights have been given effect by enacting them into national legislation, making them the

[226] The Constitutional Court in *Doctors for Life International case* (note 89 above) at 1446-1447, has highlighted measures that need to be taken to facilitate public participation in the law-making process.

likely sources of the right to participate in environmental decision-making. The relevant legislative frameworks for this discussion as a source of these rights are the Promotion of Access to Information Act[227] (henceforth PAIA), National Environmental Management Act[228] (henceforth NEMA) and Promotion of Administrative Justice Act[229] (henceforth PAJA).

This chapter discusses the following five key areas of participatory rights in environmental decision-making processes. 1. The right of access to environmental information, which is relevant to environmental decisions to be made. 2. The right of the public to make representations. The discussion endeavours to answer the following question: how is the right to make representation exercised, and what type of decision or development attracts this right? 3. The right to obtain reasons for the decision. In this regard, the discussion focuses on the importance of giving reasons and the reluctance by decision-makers to do so. It is argued that giving reasons is a requirement for improved quality environmental decisions; moreover, giving reasons by decision-makers, is not a waste of time. 4. The right to appeal against decisions that affect the rights of the public. The discussion attempts to answer the following question: which environmental legislation attracts the right to appeal; who has standing to appeal; and what arguments are for and against this right? 5. The right to have the decision reviewed by a competent court if the decision affects the rights of the public. The discussion focuses on

227 Promotion of Access to Information Act, 2000 (Act No. 2 of 2000).
228 National Environmental Management Act, 1998 (Act No. 107 of 1998).
229 Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000).

the importance of this right in environmental decision-making and whether it is used in practice.

3.2 Access to Environmental Information

The Constitution provides that good quality decisions must be founded on appropriate, consistent, accessible and accurate information.[230] This foundation includes environmental decisions. Where, on the one hand, there are serious inconsistencies and inaccuracies in accessing environmental information, it will to a large extent impede attempts to improve the decision-making processes in environmental matters.[231] These inconsistencies and inaccuracies that hinder the process of making good quality decisions in environmental matters is the focus of this chapter. On the other hand, where there is a good quality environmental information base and the public has access to it, it will improve not only the processes of making environmental

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230 See section 195(1)(*g*) of the Constitution of the Republic of South Africa of 1996.

231 See Humby (2009) "Reflections on the Biowatch dispute – reviewing the fundamental rules on costs in the light of the needs of constitutional and/or public interest litigation." *Potchefstroom Environmental Report* 2009 4. [Online]. Available: <http://www.saflii.org/za/journals/PER/2009/4.html> [Accessed: 09/10/2009 03:26] at footnote 78 where the authors argues whether Biowatch was successful as regards to its actual requests for access to information. He argues that on the basis of Dunn AJ's "finding on the requests that were necessary for purposes of citing in the notice of motion, they were successful on eight out of eleven items (a success rate of some 72%). However, a more formalistic approach would take into account those items of information formulated in the first to third requests, which were dismissed as unnecessary by the judge. If one construes dismissal as failure, then Biowatch's success rate as regards its actual information requests was lower. However, given that Dunn AJ found that most of the items in the first to third requests were incorporated in the fourth request, this approach – in my view – is overly technical and inaccurate. In the case of its actual requests for information, Biowatch was successful in establishing a clear right to *most* of the information to which it sought access, but this victory was qualified by the respondents' one victory on a question of law, namely that relating to the retrospectivity of Part 2, Chapter 4 of PAIA".

decisions but also the quality of decisions that are made.[232] The following are some of the inconsistencies and inaccuracies in accessing environmental information that affect the full realisation of the right to participate in environmental decision-making.

First, it is not easy, on the one hand, for Individuals or environmental groups to participate significantly in environmental decision-making if they have no access to information relevant to the decision to be made. The collection, dissemination and access of environmental information is said to be discriminatory, factually incorrect and sometimes invalid.[233] The result is that it will weaken accountability of a decision-maker in a way that conflicts, rather than complements, the accountability that can be imposed by courts or by a minister. Moreover, it will hinder a check on the bureaucracy and possible disregard of democratic values, including those underlying environmental rights.[234] On the other hand, environmental rights can be fulfilled by a state where there is collecting and sharing of environmental information and a well-informed public.[235] The Constitution provides that:

> Everyone has the right of access to any information held by the state; and any information that is held by another person and that is required for the exercise or protection of any right. National legislation must be enacted to

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232 The Preamble of PAIA (note 227 above) recognises that section 32(1)(a) of the Constitution provides that everyone has the right of access to any information held by the State; and that section 32(1)(h) of the Constitution provides for the horizontal application of the right of access to information held by another person to everyone when that information is required for the exercise or protection of any right.

233 Du Plessis (note 43 above) 14.

234 *Ibid.*

235 *Ibid.*

> give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.[236]

In view of this right, the Open Democracy Advice Centre[237] (henceforth ODAC), has argued that the right of access to information is a right central to the values and purposes fundamental to South African constitutional democracy.[238] ODAC has further argued that the right of access to information is a 'right not premised on a "need to know" basis but provides for the right to access to information based on a "right to know".[239] Therefore, access to environmental information is a foundation for the fulfilment of the rights of the public to participate in environmental decision-making.

Secondly, since 1994 access to information and public participation have been the major principles not only of policies but also of all legislation.[240] However, the observation by the South African government is that although legal provisions for access to environmental information are strong, operation of these laws is not strong and many citizens are unaware of these rights.[241] It has further noted that such a situation would hinder the realisation of better environmental decision-making processes and environmental justice.[242]

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236 Section 32(1).
237 ODAC is a leading supporter of the right to know in South Africa.
238 *The Trustee for the Time Being of the Biowatch vs The Registrar: Genetic Resources* Case No: 23005/2002 (T) para 35. ODAC intervened in this matter as the *Amicus Curiae*.
239 *The Trustee for the Time Being of the Biowarch case* (note 238 above) para 37.
240 See Environmental information, "Serious gaps in environmental data." [Online]. Available: <http://soer.deat.gov.za/themes.aspx?m=498> [Accessed: 15/07/2009 03:12].
241 *Ibid.*
242 *Ibid.*

Therefore, for the effective participation by members of the public in environmental decision-making, simple access to important, accurate and up-to-date environmental information is vital.

Thirdly, the Constitution further obliges the State to put a law in place to give effect to this right.[243] For this reason PAIA has been promulgated. Besides giving effect to the constitutional right of access to information, PAIA may also be used to stop the abuse of power; stop human rights violations; promote transparency and accountability; and protect the rights of citizens.[244] However, as far as section 32(1) (*a*) of the Constitution and the provisions of PAIA are concerned, the courts have observed that reconciling and balancing the two can be problematic in practice.[245] For this reason Hoexter and Lyster have pointed out that PAIA "does not replace the constitutional right; but because it purports to 'give effect to' it, parties must assert the right *via* the Act".[246]

Fourthly, in participating in environmental decision-making, the limitation of the right to environmental information by individuals or groups, if violated, is

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243 Section 32(2).

244 See Preamble of PAIA (note 227 above). See also *The Guide on how to use the Promotion of Access to Information Act2 of 2000*, (2003) 15.

245 Griesel J in *Institute for Democracy in South Africa and Others v African National Congress and Others* 2005 (5) SA 39 (C) at para 17 examined the relationship between PAIA and the section 32 right and found that section 32 is not capable of serving as an independent legal basis or cause of action for enforcement of rights of access to information unless there is a challenge to the validity or constitutionality of any of the provisions of PAIA. To hold otherwise would encourage the development of two parallel systems, which would be "singularly inappropriate".

246 Hoexter & Lyster (Currie ed) (2001) *The New Constitutional and Administrative Law* Vol 2 at 57.

not clearly defined. The Court in *The Trustee for the Time Being of the Biowatch vs The Registrar: Genetic Resources*[247] (henceforth *Trustees, Biowatch Trust* case) has noted that although section 32(1)(*a*) of the Constitution is not a limited right, it is also not an absolute right and is subject to limitation in terms of section 36 of the Constitution.[248] The Court further noted that section 31(1) of NEMA may amount to a permitted limitation on the right of access to information in section 32(1) (a) of the Constitution. However, it pointed out that the provisions of section 31(1) of NEMA ceased to apply the moment PAIA was enacted.[249] Therefore, an application requesting information made in reliance on section 31 of NEMA may be misplaced.

For example, in the *Trustees, Biowatch Trust* case the applicant applied for an order for access to information relating to genetically modified organisms held by the first and second respondents. The application was based on the Genetically Modified Organisms Act[250] (henceforth GMOA), NEMA and section 32 of the Constitution. It was contended that PAIA was applicable to the applicant's request or requests for the information that it sought and that it

247 See (note 238 above).

248 *Trustees, Biowatch Trust case* (note 238 above) at para 35. See also the Preamble of PAIA which provides that the right of access to any information held by a public or private body may be limited to the extent that the limitations are reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom as contemplated in section 36 of the Constitution.

249 *Trustees, Biowatch Trust case* (note 238 above) at para 36. Section 31(1) has been deleted by section 14 of the National Environmental Laws Amendment Act, 2009 (No. 14 of 2009).

250 Genetically Modified Organisms Act, 1997 (Act 15 of 1997).

had failed to exhaust the internal appeal procedures before instituting court proceedings.

The Court pointed out that although section 18 of the GMOA constitutes a permissible limitation on the right of access to information in section 31(1) (*a*) of the Constitution, the prohibition against such disclosure of information in section 18(1) was not absolute.[251] A number of exceptions to the prohibition existed and allowed disclosure.[252] Referring to the GMOA, the Court said that no person shall disclose any information that is acquired by him or her through the exercise of his or her powers or the performance of his or her duties. However, information shall be disclosed where it is necessary for the proper application of the provisions of the Act; and when ordered to do so by any competent court.[253]

In the view of the Court the terms of the exception in section 18(1) (*c*) of the GMOA were clear. Any person who has acquired information through the exercise of his or her powers or the performance of his or her duties in terms of the GMOA can be authorised to disclose such information if and when ordered to do so by any competent court.[254] The Court assumed that this exception would also apply to the Registrar since any information in his possession would of necessity have been acquired by him through the

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251 See *Trustees, Biowatch Trust* (note 238 above) para 37.
252 *Trustees, Biowatch Trust* (note 238 above) paras 36 and 37 at 134C-F.
253 Sections 18(1)(*a*) and 18(1)(*c*), GMOA (note 250 above).
254 See *Trustees, Biowatch Trust* (note 238 above) paras 36 and 37.

exercise of his powers or the performance of his duties in terms of the GMOA.[255]

The question before the Court was whether, *inter alia*, the exception in section 18(1) (*a*), that is, disclosure permitted insofar as it is necessary for the proper application of the provisions of the GMOA, is a necessary addition for the proper application of its provisions. The Court indicated that the right of access to information was intended to serve a wider purpose, specifically to ensure that there is open and accountable administration at all levels of government.[256] This, according to the Court, is an essential element in South Africa's new constitutional dispensation and in an open and democratic society.[257] The disclosure of information, or the granting of access to information, should in the view of the Court, be required for the proper application of the provisions of the GMOA.[258] In other words, the Registrar was not prohibited from disclosing any information acquired by him through the exercise of his powers or the performance of his duties under the GMOA, if such disclosure was aimed at giving effect to the right of access of information enshrined in section 32(1)*(a)* of the Constitution.[259]

255 *Trustees, Biowatch Trust* (note 238 above) para 37.
256 *Ibid.*
257 *Ibid.*
258 *Trustees, Biowatch Trust* (note 238 above) para 38.
259 *Trustees, Biowatch Trust* (note 238 above) para 37 at 134E-135C.

A similar provision is found in the Nuclear Energy Act[260] (henceforth NEA). In terms of sections 31(2)(*a*) and 31(2) (*b*) information can be disclosed where it is essential for the exercise of any power; or for the performance of any function of the corporation; or for the performance of any work that is connected with such function; or on the order of a competent court of law. Sections 18(1) (*a*) and 18(1) (*b*) of the GMOA and sections 31(2) (*a*) and 31(2) (*b*) of NEA deal with information held by governments and other public bodies. It is therefore important to define the extent to which such access to environmental information can justifiably and reasonably be limited.

Fifthly, these laws dealing with environmental information can often be costly and time consuming to use, which can hinder public participation. As far as time is concerned, in South Africa interest groups or a person requesting information have up to 30 days within which the information officer has to decide whether or not to grant the request.[261] By the time the information officer decides to grant or not grant the request, the opportunity to participate in a decision-making process may have passed.[262]

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260 Nuclear Energy Act, 1999 (No.46 of 1999).

261 Section 25(1)(*a*), PAIA (note 227 above).

262 In *Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs and Tourism and Another* 2006 (10) BCLR 1179 (C) at para 12, during the period from June to September 2002, the Legal Resource Centre made various efforts on behalf of Earthlife Africa to obtain access to information and documents relating to the draft Environmental Impact Report from the Department of Environmental Affairs and Tourism, Eskom, the Consultants and others. The efforts were largely unsuccessful.

Sixthly, the public do not always have access to the same information as the decision-maker, be it the state, a government institution or a private body.[263] This state of affairs does not support, and, is contrary to the following principles found in NEMA: a) The principle that equitable access to environmental resources, benefits and services must ensure that human needs are met. Moreover, human well-being must be pursued and special measures may be taken to ensure access to such information by categories of persons disadvantaged by unfair discrimination.[264] b) The principle that participation of all interested and affected parties in environmental governance must be promoted. Moreover, in order that equitable and effective participation is achieved, all people must have the opportunity to develop the understanding, skills and capacity involved in such participation.[265] c) The principle that decisions must be taken in an open and transparent way.[266] However, it has been observed above that this does not sufficiently occur in practice.[267] Therefore, it is difficult for the public to exercise it right to participate in environmental decision-making processes where it does not have the same information as the decision-maker.

Seventhly, failure to access environmental information could arguably amount to violation of a "right" to participate in environmental information. However, it is difficult to justify such a violation in terms of South African general limitation

263 Du Plessis (note 43 above) 7.
264 Section 4(d), NEMA (note 228 above).
265 Section 4(f), NEMA (note 228 above).
266 Section 4(k), NEMA (note 228 above).
267 See example of Bushveld Complex (note 167 above).

clause contained in section 36 of the Constitution. The right of access to information, as pointed out *Trustees, Biowatch Trust* case, is not an unlimited right and it has to be weighed against reasonable and justifiable governmental and private interests for maintaining confidentiality of certain information.[268] However, many individuals and environmental groups have complained about their inability to get information from government departments, local councils or private bodies.[269] Moreover, obtaining information from companies is almost impossible unless it is voluntarily provided or accessed indirectly through government records.

Eighthly, some municipalities require the payment of a fee for the provision of such information so as to cover the cost of granting the information requested.[270] However, the cost aspect of information requested can be discouraging unless a person is "fortunate" enough to be "sufficiently poor" to be entitled to free information under the relevant waiver of fees provision.[271]

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268 See *Trustees, Biowatch Trust* (note 238 above) at para 39.

269 In *Earthlife Africa (Cape Town Branch) v Eskon Holding Ltd* [2006] 2 All SA 632 (W) at para 6 the heart of the matter was that the applicant was furnished certain information it sought from the respondent. However the respondent contended that its withholding of the reminder of the information was sanctioned and justified by the Information Act.

270 See for example section 9(b) of PG (EC) 1997 198 No. 122 Maletswai Local Municipality.

271 Sections 22(1), 22(6), 22(7) and 22(8), PAIA (note 227 above). Mendel (date unknown) proposes that the cost of dealing with any request for information should be covered first and foremost by the public authority or by public funds; any charges that are applicable should not be so large as to act as a hindrance to requests. He suggests that one approach is to charge more for commercial requests. Public authorities should be under an obligation to waive all charges where this would be in the public interest. And a public interest in disclosure should be presumed where the information is sought by the media for reasons of publication. "Freedom of information: Guiding principles for access to information laws." [Online]. Available: <http://www.fxi.org.za/pages/Publications/Medialaw/freedom.htm> [Accessed :13/03/2009 12:24].

Non-governmental organisations, such as, the Open Democracy Advice Centre (ODAC) and the Legal Resource Centre (LRC) have been privileged in that many of their clients, though poor, are passionate gatherers of environmental information.[272] Another option is to channel one's application requesting information through a member of parliament who is also entitled to a free information allowance.[273] However, there is no provision for a waiver of fees on public interest grounds.

It is submitted therefore, that access of information laws should really be a final option in gathering environmental information. The better approach, found in the objectives of PAIA, is to encourage government and public organs to make material information available to members of the public as a matter of course, rather than having to rely on information laws.[274] The similar practice should take place in environmental decision-making for the promotion of the exercise of the "right" to participate. The reason for this is not just the cost and delay, but to promote cultural change within state organs,

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272 See ODAC's mission. [Online]. Available: <http://www.opendemocracy.org.za/activities/litigation> [Accessed: 17/07/2009 12:15]. See also what the Legal Resource Centre does. [Online]. Available: <http://www.lrc.org.za/about-us> [Accessed: 17/07/2009 12:25].

273 Section 17 of the Constitution provides that everyone has a right to *inter alia* present petitions. A petition is the right of every citizen, groups of people or an organisation to ask for some form of relief and it is a way of bringing an issue of public concern to the attention of Parliament. Only a Member of Parliament can present a petition to Parliament for it to be formally considered. See Appendix Four: "How to know your public participation rights." [Online]. Available: <http://www.parliament.gov.za/live/content.php?Item_ID=315> [Accessed: 3/30/2009 22:50].

274 Among the objectives which PAIA (note 227 above) seeks to achieve is to encourage openness and to establish voluntary and mandatory mechanisms or procedures which give effect to the right of access to information in a speedy, inexpensive and effortless manner as reasonably possible. See *The Guide on how to use the Promotion of Access to Information Act – Act 2 of 2000.*

government institutions and private bodies.[275] The issue at stake here is more than just the provision of the information. It is also the issue of how public bodies after 1994 interrelate with the public outside the strict requirements of Acts or Regulations.[276] Therefore, although it might seem naïve, environmental non-governmental organisations should encourage public bodies to make relevant information available. The reason for doing so is that they should identify the general public as important stakeholders and not because legislation forces them to give access to documents and files.

- **Obtaining copies of land development applications**

In all the procedures involved in planning law, the input of the public is required from the inception of a particular planning procedure to its implementation.[277] For instance, in terms of the Local Government: Municipal Systems Act[278] (henceforth Municipal Systems Act), a municipality must communicate information about all available mechanisms, processes and

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275 See Thornhill et al (note 209 above) 8-9.

276 Section 1 of the Constitution lays the foundation of a new society which espouses the values of a system of democratic government which ensures accountability, responsiveness and openness. This signifies a shift from the past. It requires that information in the hands of the government which impacts directly on civil society must fall into t he public domain. See the Open Democracy Advice Centre ODAC (Amicus Curiae) intervening in *CCII Systems (Pty) Limited v Shauket Fakie NO and Others* Case No: 4636/2002 at para 69. Section 9(*e*) of PAIA provides that the [object] of this Act [is] generally, to promote transparency, accountability and effective governance of all public and private bodies by, including, but not limited to, empowering and educating everyone (i) to understand their rights in terms of this Act in order to exercise their rights in relation to public and private bodies; (ii) to understand the functions and operation of public bodies; and (iii) to effectively scrutinise, and participate in, decision-making by public bodies that affects their rights.

277 Van Wyk (2004) "Planning law and the promotion of administrative justice." *The Right to Know*, Lange, C and Wessels, J (Eds), 81, 88.

278 Local Government: Municipal Systems Act, 2000 (No. 32 of 2000).

procedures to its community to encourage and facilitate community participation.[279] It must also communicate the matters that encourage community participation and that inform them of their rights and duties.[280] When communicating the information a municipality must consider "language preferences and usage in the municipality; and the special needs of people who cannot read or write".[281]

In another instance, under the Development Facilitation Act[282] (henceforth DFA), designated authorities, which are mostly local municipalities, are obliged to make certain information about development applications available for inspection by members of the public.[283]

Although the above planning and implementation laws encourage members of the community to have access to information, the situation is different in practice. Some municipal managers or officers take the view that members of the public should have access to all relevant land or environmental information on their files, including, detailed plans and reports prepared by

279 Section 18, Municipal Systems Act (note 278 above).
280 section 16(1)(*a*), Municipal Systems Act (note 278 above).
281 sections 18(1) and 18(2), Municipal Systems Act (note 278 above). Du Plessis (note 43 above) 23, has observed that little provision is made for the socio-economic challenges that may hinder the maximisation of public participation and for, *inter alia*, public participation tools that will suit the situation in rural areas or for inventive means to get illiterate people involved.
282 Development Facilitation Act, 1995 (Act No. 67 of 1995).
283 Section 31(4)(*a*), DFA (note 282 above). See also sections 4(5) and 56(1)(***b***)**(i)**, Western Cape Planning and Development Act, 1999 (Act 7 of 1999).

municipal planning staff.[284] Photocopying of this material will often be provided on request.[285] Others are somewhat too concerned with details concerning their obligations. They only provide the basic minimum amount of information required to satisfy the legal requirements.[286]

Members of the public, including staff of ODAC and LRC, requesting information about pending development applications have been forced to copy the required details by writing out words in full by hand.[287] It was stated that it was policy, not to provide photocopies, on the basis of the floodgates argument.[288]

The result of this type of approach is often that interest groups appearing before decision-makers have only a fraction of the information held by the latter. When clients approach the ODAC and LRC with this scenario, they are encouraged to lodge an appeal, as that is the only way they can be assured of getting access to all the necessary paper work concerning a development

284 See Mbanjwa, "New twist in Menlyn Maine development." *Pretoria News* [December 14, 2007] 4.

285 Regulation 6(1) of Regulations and Rules in terms of the Development Facilitation Act, 1995, GNR.1 of 7 January 2000. Henceforth DFA Regulations.

286 See Mbanjwa (note 284 above) 4. The author pointed out that the negative impact of the massive scale of the planned developments on neighbouring residential areas had not been alluded to during all the public participation negotiations.

287 See for example Makhalemele (2005) *Summary of case law in terms of the Promotion of Access to Information Act: the South African Experience*, 16. [Online]. Available: <http://www.opendemocracy.org.za/documents/section_file_detail/9> [Accessed: 09/03/2009 00:56].

288 Makhalemele (note 287 above).

and planning.[289] In effect, many members of the public have been effectively encouraged to commence legal proceedings in order to obtain full details about a development in relation to which they have legal rights of participation.[290] However, this is hardly an efficient system.

The good news is that the National Development and Planning Commission[291] had proposed certain underlying and crucial requirements that must be met in any new system of land development management mechanisms.[292] Among these requirements are public participation and transparency.[293] The Commission had highlighted that the notification of all parties that are affected by an application for land development or land use change is an important step in ensuring that there was adequate public participation in the decision-making process.[294]

289 See *Hlatshwayo v ISCOR Ltd* – Applicant's Founding Affidavit, paras 47-58. [Online]. Available: <http://www.opendemocracy.org.za/cases/case_file_detail/17> [Accessed: 09/03/2009 00 :04].

290 *Hlatshwayo v ISCOR Ltd* (note 289 above).

291 In terms of section 5(2), DFA, the Minister may, by notice in the Gazette, disestablish the commission as soon as its functions in the Act have been concluded. Having completed the tasks which it was asked to fulfil, the Commission came to the end of its life and the term of office of its members was terminated on 31 March 2000 in terms of section 8(3) of the Act. See National Development and Planning Commission: Draft Green Paper on Development and Planning 1999. [Online]. Available: <http://www.info.gov.za/view/DownloadFileAction?id=68918> [Accessed: 10/11/2009 01:03].

292 National Development and Planning Commission: Draft Green Paper on Development and Planning 1999 at 53. [Online]. Available: <http://www.info.gov.za/view/DownloadFileAction?id=68918> [Accessed: 10/11/2009 01:03].Henceforth Draft Green Paper Development and Planning.

293 *Ibid.*

294 Draft Green Paper Development and Planning (note 292 above) at 58.

Any land development decision-making requires a particularly thoughtful and systematic process. In South Africa illiteracy is prevalent, many people are not familiar with the mechanism of a land development management system in particular, and administrative processes in general, and the capacity of many people to dedicate themselves to community affairs is severely compromised by poverty.[295] Thus, special care has to be taken to ensure that all affected parties are fully informed of the implications of a proposed development or land use change, as well as informed of their rights in the adjudication process.[296] Unfortunately, there are still many local types of council which refuse this level of access; thereby, unnecessary appeals will still have to be lodged, simply to level the information playing field.

In some cases there is a problem, where land that is being developed does not belong to a municipality or council. In such situation, the consultants used for the EIAs and public participation processes are not appointed by or paid by a municipal or council concerned for the development proposal.[297] This in turn creates difficulties in monitoring whether a public participation process has been followed by the developer or not. For instance, in the Menlyn Maine Development, the Tswane Metro Council could not say whether public participation took place since it did not conduct the impact study. The reason for not conducting the impact study was that the Council did not own the land

295 *Ibid.*
296 *Ibid.*
297 See Mbanjwa (note 284 above) 4. See also Mbanjwa, "Row over 20-storey Menlyn towers." *Pretoria News.* [November 05, 2007] 1.

which was being developed. Moreover, the Council could not guarantee whether the public participation process was inclusive or satisfied the broad parameters of a comprehensive process.[298] This could result in developers getting preferential treatment by the Council. In addition, such a decision to allow developers to develop the land would be unilateral rather than involving stakeholders. This in turn would affect the "right" of the public to participate in decision-making process.

3.3 Right to Make Representations

It is not sufficient only to have access to environmental information relevant to the decision being made; the process also involves making representations and submissions as part of the decision-making processes. Public participation in environmental decision-making often entails members of the public being allowed to make submissions and representations to the decision-making body.[299] Ideally, this right should be exercised in writing and/or in person. The result is that the decision-maker must also be legally obliged to take submissions into account before making a decision.[300] In this regard, PAJA provides that where a decision by an administrator affects the public, an administrator must decide to either hold a public inquiry or to follow

298 Mbanjwa (note 268 above).

299 See Regulation 58(1) of the GNR. 385 of 2006: Regulations in terms of Chapter 5 of the National Environmental Management Act, 1998.

300 See *Earthlife Africa (Cape Town)* (note 158 above) para 58.

a notice and comment procedure or both or a fair procedure but different.[301] If such procedure is followed, an administrator must take steps to communicate that decision to those likely to be affected by it and call for their comments. In addition, an administrator must consider any comments received from those affected by a decision.[302] However, the prevailing philosophy behind most environmental Acts, as will be discussed below, is that the decision-making process is generally a matter between the regulator and the regulated, and should not involve participation of the public.

The spectrum of the rights of representation that exist in the South African legislative framework are to be found in the following examples: first, the system which comes closest to the exercise of the right to make representations is the land development application system in terms of the DFA. Even under this Act, only a small section of non-complying or other more contentious types of development attract this right.[303] Although there is no limit on the extent of detail which can be taken into account in written representations, it is general practice in most municipalities to allow a few minutes for persons to make verbal submissions, and other less formal comments via workshops or discussions with officials.[304]

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301 Section 4(1)(*a*) – (*e*), PAJA (note 229 above).

302 Sections 4(3)(*a*) and (*b*), PAJA (note 229 above).

303 Section 49(4)(b), DFA (note 282 above).

304 See section 5(1)(*a*)(ii), Municipal Systems Act (note 278 above) which provides that members of the local community have the right ... to submit written or oral recommendations, representations or complaints, to the municipal council, or ... the administration of the municipality. See also section 17(2) which requires municipalities to establish appropriate mechanisms, processes and procedures to enable the local community to participate in the affairs of the municipality, and must for this purpose

The problem arises where a developer is said to have interfered in the participation of the public concerning the EIAs.[305] For example, the Far South Peninsula Community Forum, an umbrella body of several ratepayer, community and environmental organisations, wrote to the Western Cape Department of Environmental Affairs and Development Planning drawing the Department's attention to actions by Noordhoek developer Sybrand van der Spuy.[306] The community forum claimed that the developer threatened the objectors to the proposed development to abandon the development, and encourage shack dwellers or refugees to invade their property if they did not withdraw their comments.[307] Since the development in this case could not take place without comments from the affected community, the threat by the developer is a barrier for the public to participate fully in the decision-making process.

Secondly, the publication for comment under the Environmental Conservation Act[308] (henceforth ECA) required a draft notice to be first published in the Government Gazette requesting interested members of the public to submit

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

305 During the EIAs, the law requires that the public be allowed to make comments on proposed development application.

306 Unidentified author, "Authorities probe claims that developer interfered in EIAs." *Cape Times*, [May 19, 2009] 3.

307 *Ibid*.

308 Environmental Conservation Act, 1989 (Act No. 73 of 1989).

comments in connection with the proposed regulation, direction, declaration, identification or determination of policy.[309] This means that any competent authority in terms of the Act must have regard to the written submissions before making its decision. However, it is not clear whether in practice local municipalities provide local groups with the opportunity to raise their concerns personally, even where there is law in terms of the ECA.

Thirdly, under the Mineral and Petroleum Resources Development Act[310] (henceforth MPRDA), the Regional Manager must call upon interested and affected persons to submit their comments regarding an application for a prospecting right, a mining right or a mining permit.[311] However, representations from individuals or conservation groups are often ignored and few mining and prospecting licences are refused on environmental grounds.[312] According to the Department of Mineral Resources annual report, 20 163 mines and prospects applications were received between 2004 and 2009. Out of the application received, 16 190 were accepted and 3 653 were rejected. Of the 16 190, 5 805 were issued with mining and prospecting licences.[313] In *Save the Vaal Environment case*,[314] Olivier JA pointed out the following:

> [T]hat on a proper construction of ... section 9(3) ... some of the matters therein referred to involve environmental issues. .... This provision requires

309 Section 32(2)(b), ECA (note 308 above).
310 Mineral and Petroleum Resources Development Act, 2002 (No. 28 of 2002).
311 Section 10(1)(*b*), MPRDA (note 311 above).
312 See Masondo (note 127 above) 1.
313 *Ibid.*
314 *Save the Vaal Environment case* (note 13 above) at para 13.

> the Director to enquire into the nature and extent of the terrain which would be violated by the relevant mining operations, the effect of such violation and how the terrain could and should be rehabilitated. *In casu*, he would have to take into account the alleged likelihood of damage to the Rietspruit wetland and the question if, and to what extent, the wetland could be rehabilitated. These are environmental matters about which the respondents have legitimate concerns. The Director would therefore have to give them an opportunity to be heard at that stage unless there are other provisions of the Act which require them to defer raising their environmental concerns until some other time.

The *Save the Vaal Environment case* was decided in terms of the Minerals Act[315] which was repealed in 2004 and replaced by the MPRDA. The Court concluded that where an application for a mining licence is made in terms of section 9 of the Minerals Act, affected parties should be notified of the application and be given an opportunity to raise their objections in writing.[316] However, the Court in *Sechaba v Kotze and Others*[317] pointed out that the MPRDA introduced a number of fundamental changes to the statutory regulation of the mineral resources of the Republic of South Africa. It further indicated that the provisions of the MPRDA inevitably lead to a conflict between the interests and/or rights of a holder of a prospecting or mining right and that of a landowner. These rights, according to the Court, are central to the rights enshrined in the Bill of Rights.[318]

In the light of the above, it is viewed by some writers that, under the MPRDA, environmental legislation has been taken over, internalised, and modified specifically to the requirements of the Department of Minerals and Energy to

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315 Minerals Act, 1991 (No. 50 of 1991).
316 *Save the Vaal Environment case* (note 13 above) at para 20.
317 *Sechaba v Kotze and Others* [2007] 4 All SA 811 (NC).
318 *Sechaba* (note 317 above) at para 8.

serve the sole interests of the mining industry.[319] A mine can get a licence based on its environmental management plan regardless of the damage it can have on the river or catchment areas.[320]

3.4 Obtaining Reasons for a Decision

If citizens are to have confidence in administrative decisions affecting the environment, then they need to know that these decisions are based on information that is sound. Citizens must investigate all the relevant issues concerning the environment, and decisions must be subjected to a systematic, clear and responsible decision-making process. One of the best ways of instilling this confidence in the community is for decision-makers to be required to give reasons for their decisions.[321] De Ville has pointed out, *inter alia*, that giving reasons is one of the fundamentals of good administration; it encourages rational and structured decision-making; and it encourages open administration.[322] Baxter set out the importance of reasons in the administrative process by arguing that giving reasons is both fair, and

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319 See WESSA Lowveld Region Press Release, [July 19, 2007] 'Coalmining Wetlands, Peatlands, Protected Areas and Agricultural Land' [Online]. Available: <http://www.fishingowl.co.za/WCweb/emailwebcomt27.html> [Accessed: 01/07/2009 02:45].

320 WESSA Lowveld Region Press Release (note 303 above).

321 See De Ville (2003) *Judicial Review of Administrative Action in South Africa* 287. The right to access to information and the request for reasons remain two distinct constitutional rights, both of which can be claimed and used by an aggrieved party. See Wessels "Adequate reasons in terms of the promotions of administrative justice act" in Lange, C & Wessels, J eds (2004) in *The Right to Know* at 130. See however Hoexter, C. "Unreasonableness in the Administrative Justice Act" in Lange, C & Wessels, J Eds (2004) *The Right to Know* 157, who argues that reasonableness entails scrutiny of the merits of administrative decisions.

322 De Ville (note 321 above) 287.

favourable to public confidence, in the administrative decision making process.[323] Hoexter emphasises that reasons must be informative and must explain why a decision was taken or was not taken.[324]

However, the above thinking appears to be in conflict with most of the administrative culture in the community conservation sector. The NEMA Regulations[325] provides that after the competent officer has reached a decision on an application, he or she must, in writing and within 10 days give reasons for the decision to the applicant.[326] The applicant must notify, in writing and within a determined period, all registered interested and affected parties of the reasons for the decision.[327] The competent officer's reasons for the decision must be based on whether he or she complied with NEMA, its Regulations and other applicable legislation. They must further be based on whether the competent officer took into account all relevant factors included in NEMA and its Regulations.[328] This relates to the EIA process.[329] Where reasons for the decision do not reflect the factual involvement of interested and affected parties at any stage, it could amount to the violation of participatory rights.[330] A court has observed that administrators are usually

323 Baxter (1984), *Administrative Law* 228.
324 Hoexter & Lyster (Currie ed) (note 246 above) 244.
325 NEMA Regulations (note 299 above).
326 Regulation 10(1)(*b*), NEMA Regulations (note 299 above).
327 Regulation 10(2)(*a*)(ii), NEMA Regulations (note 299 above).
328 See section 24(4), NEMA (note 228 above). See also Regulation 8, NEMA Regulations (note 299 above).
329 See Regulation 1, NEMA Regulations (note 299 above).
330 See mining example at above. Section 24(4)(*a*)(i), NEMA (note 228 above) provides that "[p]rocedures for the investigation, assessment and communication of the potential consequences or impacts of activities on the environment must ensure, with respect to

hesitant to give reasons for their decisions and they hardly ever do so unless required by law.[331] The reasons for the reluctance are both intellectual and personal.

At an intellectual level, within environmental management bravery is not often welcomed by administrators.[332] Moreover, a more definite course to career advancement of these administrators is to conceal their mistakes in decision-making.[333] This approach is further supported by the burden of South African history, government secrecy, and the confidentiality obligations of public administrators.[334] Although a whistleblower protection law exists in South Africa,[335] it is in general regarded as ineffective and provide no motivation to those disclosing bad or inappropriate decision-making practices.[336]

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every application for an environmental authorisation, public information and participation procedures which provide all interested and affected parties ... with a reasonable opportunity to participate in those information and participation procedures".

331 See *Kiva v Minister of Correctional Service & another* [2006] BLLR 86 (E) para 36. See also *Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd and Another* [2003] 2 All SA 616 (SCA) at para 28 where the court pointed out that it is a mandatory requirement in terms of the Marine Living Resources Act 18 of 1998 that the Chief Director have regard to the redress of certain wrongs of the past. And if he or she were to fail to heed this injunction he would fail in his duty and his decision would be open to attack.

332 See Holtzhausen (2007), *Whistle Blowing and Whistle Blower Protection in the South African Public Sector*, 5.

333 Holtzhauzen (note 332 above) 5-6.

334 See Mbatha (2005), *The Ethical Dilemmas of Whistle-Blowing and Corruption in the South African Public Sector* 4.

335 See Protected Disclosures Act, 2000 (No. 26 of 2000). The purpose of the Act is *inter alia*, to make provision for procedures in terms of which employees in both the private and the public sector may disclose information regarding unlawful or irregular conduct by their employers or other employees in *the* employ of their employers.

336 See Holtzhausen (note 332 above) 5.

At a personal level, there is no individual decision-maker who likes to see his or her decisions torn apart, evaluated or questioned and perhaps reversed. Human beings are by nature protective about their work, their reputations and character. The following can be said to be some of the contributing factors: (a) the courts have observed that administrators perceive their work as basically technical exercises which are outside the scope of the average South African.[337] (b) Some authors have pointed out that administrators often have a poor understanding of the powers and the authority in terms of which they should make their decisions.[338] (c) A common belief is that being required to give reasons for decisions would only be a time-wasting exercise and would add nothing to the quality of decision-making.[339] (d) Even worse, having to provide reasons for decisions would simply promote appeals, overburden the administration, or lead to an increase in the number of review applications.[340] Therefore, public participation is not to be particularly encouraged. Two of the above contributing factors, (c) and (d), will now be looked at in greater detail.

The first factor relates to the following question: is the giving of reasons a requirement for improved quality of environmental decision-making? Wessels

337 See *Maharaj v Chairman of the Liquor Board* 1996 (2) All SA 185 (N) at 190.
338 Wessels "Adequate reasons in terms of the Promotion of Administrative Justice Act" in Lange, C & Wessels, J eds (2004) *Right to Know* at 119.
339 See Muckleneuk/Lukasrand *Property Owners and Residents Association v The MEC: Department of Agriculture, Conservation and Environment, Gauteng Provincial Government and others and Muckleneuk/Lukasrand Property Owners and Residents Association v The HOD: Department of Agriculture, Conservation and Environment, Gauteng Provincial Government and Others* [2007] 4 All SA 1265 (T) at paras 47-48.
340 See De Ville (note 321 above) 287-288.

has argued that where decision-makers are regarded as the efficient and impartial enforcers of government policy, it can be problematic.[341] She has pointed out that such a view ignores issues concerning the guidelines or principles used in making decisions.[342] In terms of the Rules of Procedures for Judicial Review of Administrative Action,[343] any person whose rights are materially and adversely affected by an administrative action may request the administrator to furnish written reasons for the action.[344]

Similarly, section 5 of PAJA which deals with reasons for administrative action, can be summarised as follows: a person whose rights have been materially and adversely affected by administrative action may request reasons for the action. It provides that adequate reasons must be furnished within ninety days from the time a request is received. However, if no reasons are furnished it must be presumed, where the contrary is not proven, that the administrative action was taken without good reason. Thus, in circumstances referred to in section 5(4) of PAJA, there may be a departure from the requirement to furnish reasons. However such departure must be reasonable and justifiable in the circumstances.

An example of unreasonable and unjustifiable departure from the requirement is in the case of *Wessels v Minister for Justice and Constitutional*

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341 Wessels (note 338 above) 118-121.
342 *Ibid.*
343 GNR.966 of 9 October 2009: Rules of Procedure for Judicial Review of Administrative Action (Government Gazette No. 32622).
344 Rule 3(1)(*a*), Rules of PAJA (note 343 above).

Development.[345] The first respondent, after consultation with the Magistrates' Commission, appointed the second respondent as Regional Court President: Limpopo, under and subject to the Magistrates' Courts Act, no 32 of 1944. The applicant requested reasons in terms of section 5(1) of PAJA from first respondent, requesting reasons for the decision to appoint the second respondent. No acknowledgment of receipt of the letter was received. The applicant stated that her rights were materially and adversely affected by the administrative action. The Court clarified that the applicant timeously requested reasons from the then responsible minister. In addition, the Court pointed out that the then minister did not acknowledge receipt of letters, failed to furnish reasons for her decision, did not explain that failure or contended that it was not necessary to furnish reasons.

The Court held that the responsible minister's failure to furnish reasons, seen in that light, could not be seen other than as proof that the administrative action was taken without good reason. The Court stated that the then responsible minister, failed to furnish any reason whatsoever for her decision and failed to say whether and when she intended furnishing reasons when given the opportunity to do so through her legal advisors and functionaries in the ministry. The Court concluded that the responsible minister's decision to

345 *Wessels v Minister for Justice and Constitutional Development* (594/09) [2009] ZAGPPHC 81 (2 June 2009). [Online]. Available: <http://www.saflii.org/za/cases/ZAGPPHC/2009/81.html> [Accessed: 24/02/2010 22:42].

appoint the second respondent as Regional Court President: Limpopo, must be reviewed and set aside.

In environmental decision-making processes, it is argued that giving reasons for decisions would be a good way for persons affected to understand better the role of environmental decision-makers.[346] For that reason, the communities should clearly understand the procedural basis of, for example, a planning decision or waste management decision. If they do, then communities would be better able to consider, as Wessels suggests, whether the relevant practical guidelines and principles actually do the job that they expect.[347] However, it is argued that if administrators are not achieving their objectives, then, law reform can be advanced to improve the environmental outcomes of future decisions.

Another reason for concluding that decision-making quality would improve if reasons were required to be given is the additional discipline imposed on decision-makers that flows from such accountability.[348] Although there are no records to support the view that decisions that are supported in writing are more likely to be made with greater care and consideration, it seems probable

346 The minority judgment by Mokgoro J and Sachs J in *Bel Porto School Governing Body and Others v Premier, Western Cape, and Others* 2002 (3) SA 265 (CC) 313 para 159 reiterated that giving reasons satisfies the individual whose matter has been considered, it also promotes good administrative functioning since the decision-makers are aware that they can be called upon to explain their decisions and thus be forced to evaluate all the relevant considerations correctly and carefully.

347 Wessels (note 338 above) 118-119.

348 See De Ville (note 321 above) 287.

that this would be the case.[349] Arguably, an obligation to give reasons makes it more difficult to make bad decisions, and thus more likely that good decisions will be made. Moreover, there is a connection between the requirement to provide reasons for a decision and the ability of the communities to engage adequately in environmental law and policy making and reform.

The second factor involves this question: is the giving of reasons is a waste of time? De Ville has pointed out that the waste-of-time arguments are unconvincing and can be remedied, to some extent, by applying the requirement of giving reasons in a manner that is contextual and flexible.[350] This could be achieved, for example, by making sure that reasons only have to be given in limited circumstances and not for every decision.[351] In those instances where reasons have to be given, the process could be a two-layered one.

First, it could be a requirement in South Africa that certain environmental decisions relating, for example, to waste management, new pollution licences and major planning authorisations, must consist of written and published reasons.[352] Secondly, there could be a general right to request reasons in

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349 Section 33(2) of the Constitution of South Africa provides that everyone whose rights have been adversely affected by administrative action has a right to be given written reasons.

350 See De Ville (note 321 above) 288.

351 *Ibid.*

352 The requirement of PAJA (note 229 above) in section 5(1) is that a person whose rights have been materially and adversely affected by an administrative action and has

certain circumstances.[353] These proposals would arguably involve more resources than are presently applied to decision-making; however, in South Africa's constitutional democracy, the cost could be justified in terms of more open and accountable government and also by the improved quality of decision-making. As Botha has pointed out: "[t]he new constitutional era in South Africa has a great impact on all spheres of life, and all branches of law".[354]

3.5 Right of Appeal

In South Africa the right to appeal against decisions affecting the environment or relating to the environment, vary according to relevant legislative provisions. Many environmental Acts include appeal rights for affected or aggrieved persons.[355] In terms of NEMA, any person may appeal to the

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not been given reasons for the action may request the administrator to furnish him or her written reasons for the action. See also section 6(2) of the Mineral and Petroleum Resources Development Act No. 28 of 2002 which provides that any decision taken in terms of the Act must be in writing and accompanied by written reasons for such decision. See also De Ville (note 321 above) at 290 who has argued that it is 'written' reasons that need to be furnished; oral reasons furnished at time of the taking of the decision will not suffice. See however Currie, I and Klaaren, J (2001) *The Promotion of Administrative Justice Act Benchbook* at 12 who have submitted that where a request for reasons contains specific questions, it is not necessary to respond to all such questions in full for the reason to qualify as adequate. They argue that the administrator only has to respond to questions that are relevant to the reasons, and not to irrelevant questions or questions already answered.

353 As provided for in section 33(2) of the Constitution of the Republic of South Africa.

354 Botha "Administrative justice and interpretation of statutes: a practical guide" in Lange, C. and Wessels, J. (Eds) (2004) *Right to Know* at 14. See also *Holomisa v Argus Newspapers Ltd* 1996 (6) BCLR 836 (W) at 863J where Cameron J pointed out that the Constitution has changed the "context' of all legal thought and decision-making in South Africa.

355 Section 80 of the Marine Living Resources Act, 1998 (Act No. 18 of 1998) provides that any affected person may appeal to the Minister against a decision taken by any person acting under a power delegated in terms of this Act; section 35 of the

Minister or an MEC against a decision taken by any person acting under a delegated power by the Minister or an MEC.[356] NEMA further provides that any person may appeal to the Minister of Minerals and Energy against a process-related decision taken by a person to whom a function has been delegated.[357] Therefore, members of the public are generally given rights to appeal against decisions that affect their environmental right.

The question is whether, in view of above legislative provisions and framework, the right of appeal promotes better decision-making by administrative authorities. Baxter has pointed out that a right of appeal is a very useful safeguard as it provides assurance to an aggrieved party that the decision taken will be re-considered by a second decision-maker.[358] This view is supported and added to by the consideration that every decision should be made in the knowledge that it could be appealed against to a higher court or tribunal. This would, as Baxter indicates, enforce substantial discipline on the

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Environmental Conservation, 1989 (Act No. 73 of 1989) provides that any person who feels aggrieved at a decision ... in respect of which a power has been delegated to an officer or employee ... may appeal against such decision to the Minister of Water Affairs in the prescribed manner, within the prescribed period and upon payment of the prescribed fee. See in this case *Retailers Association of SA (Pty) Ltd v Director General Environmental Management, Mpumalanga and Others* 2007 (10) BCLR 1127 (SCA). In terms of sections 148(1)(*d*) and 148(1)(*e*) of the National Water Act, 1998 (Act No. 36 of 1998), there is an appeal to the Water Tribunal against a decision of a water management institution on the temporary transfer of a water use authorisation ... by a person affected thereby; and against a decision of a responsible authority on the verification of a water use by a person affected thereby.

356 Section 43(1) and (2), NEMA (note 228 above).

357 Section 43(1B), NEMA (note 228 above).

358 Baxter (note 323 above) 255.

decision-maker to appropriately consider both the decision-making criteria and the best available evidence.[359]

In addition to the above, it has been argued that appeals against a decision have fewer limitations compared to the review of a decision.[360] For example, in terms of appeals, the appellate body can enquire into the merits of the decision and substitute or amend the decision made by the first decision-maker. Moreover, in general an appeal (against an environmental decision) is seen as costing less, being less formal, and more accessible and speedy.[361] However, the question is: how impartial are the officials in the exercising of their power on appeal? De Ville[362] has argued that:

> The current system has been criticised for the absence in many instances of a right of appeal on merits, (where an appeal exists) the lack of independence of appellate bodies or officials, the lack of coherence in the current system, the lack of uniform procedure, uncertainties as to the procedure to be followed, as well as the lack of a controlling body (in so far as the establishment, membership and functioning of these bodies are concerned.[363]

For this reason, in South Africa, there have been proposals and arguments in favour of establishing a general appeals tribunal as a separate system to deal

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359 *Ibid.*

360 De Ville (note 321 above) 384-385. See also Velcich (2000) "Towards a national code of practice for outdoor advertising" at 166, who has pointed out that in an administrative appeal the wisdom or merits of an administrative decision are reconsidered and determined by another decision-maker, at the request of an applicant. It involves a *de novo* reconsideration of the matter as if there had not been previous decision. There is no restriction on the material which the appeal body may consider and no restriction on the type of decision which that body may take.

361 De Ville (note 321 above) 385.

362 *Judicial Review of Administrative Action in South Africa* 288.

363 Footnote omitted.

with administrative decisions as in other countries. However, such proposals have been refused and the appeal system has remained the same.[364]

In environmental decisions, there have been arguments that third party appeals should not be allowed, for they will overwhelm the court system. In South Africa only a small number of environmental decisions are able to be appealed by third parties. Velcich has pointed out that:

> Where a licence or other authorisation involving a potentially harmful environmental impact is granted, it is unlikely that the successful applicant will wish to appeal, except if he or she should object to the conditions to which the licence may be subject. However, the conservationists may well be dissatisfied with the granting of the licence, but there is normally no provision for appeal by them. It is only in exceptional instances that legislation provides for appeals in these circumstances, usually referred to as third-party appeals. Moreover, no person with *locus standi* is willing to apply for judicial review.[365]

It is further argued that appeals will intensify the philosophical view that environmental disputes should only be recognised when they exist between what can be termed the regulator and the regulated.[366] However, an unfortunate result would be that there will be no role for intervention by community groups or individuals. Therefore, there is need to consider granting a right to appeal to both aggrieved persons and those not satisfied with the granting of application, as it is implied in the provision of the Constitution and NEMA discussed below.

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364 De Ville (note 321 above) 388.
365 Velcich (2000) "Towards a national code of practice for outdoor advertising" at 167.
366 De Ville (note 321 above) 385.

Thus, a contentious characteristic of the right to appeal is derived from the following question: should this right be limited to persons affected by a decision, or should it be available to any person to challenge the merits of a decision? The Constitution provides that any person acting in his or her own interest, or acting on behalf of another person who cannot act in his or her own name, or acting as a "member of, or in the interest of, a group or class of persons", or acting in the public interest; and an association acting in the interest of its members, has a "right to approach a competent court, alleging that a right has been infringed or threatened".[367]

Similarly, NEMA provides that any person or group of persons may seek appropriate relief regarding any breach or threatened breach of the Act, in that person's or group of person's own interest; in the interest of a person who is unable to do so for practical reasons; in the interest of a group or class of persons whose interests are affected; in the interest of the public; and in the interest of protecting the environment.[368] It is proposed that there should be very few limitations with regard to the right to appeal, since the general public has an interest in decisions affecting the environment.[369]

In line with the above provisions, it is submitted that whilst it may be conceded that those living very close to a proposed development or pollution

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367 Section 38.

368 Section 32(1), NEMA (note 228 above).

369 Section 24(b) of the Constitution provides that everyone has the right to have the environment protected, for the benefit of present and future generations.

activity may have a stronger motivation to challenge a decision, it is not an adequate reason to limit appeals to that category of persons. This submission is related to the socio-economic characteristics of the majority of South Africans, who may not only be affected by an activity, but may be unfamiliar with their right of appeal. Consequently, Velcich has proposed that allowance should be made for so-called third-party appeals. He has argued that to the extent that no provision is made for third-party appeals the total custody of the public interest in environmental conservation is exclusively vested in the administrative body.[370] It is submitted that to limit appeal standing to affected persons only, serves to establish an environmental viewpoint that may unjustifiably discriminate against those outside the "privileged class". It is also submitted that allowing third-party appeal would benefit those that do not have access to resources.

3.6 Judicial Review

The right of citizens to ensure that government follow due legal process is a fundamental principle of democracy and the rule of law in South Africa.[371] De Vos has pointed out that at the heart of the rule of law is the requirement that individuals should be able to enforce their legal rights in a court of law.[372] It is,

370 Velcich (note 365 above) at 166.
371 See section 1 of the Constitution of the Republic of South of 1996.
372 De Vos (2009) "The Rule of Law and "conflicts of interests." [Online]. Available: <http://antieviction.org.za/2009/07/03/the-rule-of-law-and-%E2%80%9Cconflicts-of-interests%E2%80%9D/> [Accessed: 03/08/2009 22:51].

therefore, submitted that the right to have an administrative action reviewed by a court of law is in line with the principles of the rule of law.

For this reason the Constitutional Court has held that the rule of law entails that: a person may not exercise public power or perform public functions unless the authority to do so has been bestowed by law;[373] that when such functionaries exercise power or perform functions, they are required to do so in good faith and they may not misinterpret their powers;[374] that they are required to exercise powers rationally;[375] and the rules must be stated in a 'clear and accessible manner'.[376] Therefore, unless the right to judicial review is removed by Parliament, it extends to all administrative decisions by ministers, administrators and statutory authorities. Such decisions, in my view, include those that are affecting the environment.

The discussions by some authors reveal that judicial review may be an effective mechanism for accountability.[377] However, judicial review does not usually allow the merits of a particular issue to be thoroughly investigated,

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373 *Fedsure Life Assurance Limited v Greater Johannesburg Transitional Metropolitan Council* 1999(1) SA 374 (CC), para 58.

374 *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC) para 148.

375 *Pharmaceutical Manufacturers Association of South Africa; in re: Ex Parte Application of the President of the Republic of South Africa* 2000 (2) SA 674 (CC), paras 89 and 90.

376 *Dawood v Minister of Home Affairs* 2000 (8) *BCLR* 837 (CC), para 47.

377 See for example De Ville (note 321 above) 297-313 where he discusses the judicial review of administrative action which entails an enquiry into the legality of the administrative action, that is, whether a ground of review is present.

only whether or not the decision was appropriately made according to law.[378] A typical remedy arising from such an action would be for the court to order a decision-maker to re-consider its decision.[379] In some cases this will not prevent the decision-maker from making the same decision again as it has been observed in *Earthlife Africa* case discussed above.[380] However, the most that can be expected from judicial review actions is that they can to a large extent slow down and prolong a decision-making process and buy time to gather public support.

3.7 Conclusion

The rights to public participation enshrined in the processes of making environmental decisions are aimed at improving the quality of decisions made by decision-makers. They also provide checks and balances on the latter. First, good quality decisions are a constitutional requirement which must be based on information that is accessible to the public, correct, appropriate and consistent. This is a foundation, not only for the fulfilment of the rights of the public to participate in environmental decision-making, or on which all other participatory rights are exercised, but also for the exercise or performance of the duties of a decision-maker. However, it is difficult for the public to properly exercise this right. The majority of South African citizens are not aware of the

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378 See De Ville (note 321 above) 384-385.

379 *Scenematic Fourteen (Pty) Ltd v Minister of Environmental Affairs and Tourism and Another* 2004 (4) BCLR 430 (C).

380 *Earthlife Africa* case (note 213 above). See also *Scenematic Fourteen (Pty) Ltd* (note 379 above) at 440-441.

right to environmental information. Where this right is violated, its limitation is not clearly defined, and its justification in terms of section 36 of the Constitution is not straightforward. In addition, environmental information can be costly and discouraging to the public; it can also be time consuming to use. Furthermore, the public do not always have the same information as the decision-maker. As a result, it is difficult to monitor participation during the EIAs where consultants are not appointed by a municipality for a proposed development of land not belonging to the latter.

Second, good quality environmental decisions must be based on the active involvement, by the public, in making representations and submissions to the decision-making body. Before making any decision, the decision-maker must be legally obliged to take into account all submissions made. However, it is difficult for the public to properly exercise the right to make representations. The prevailing philosophy behind most environmental Acts is that the process of making decisions is generally a matter between the regulator and the regulated. The result is that the public is excluded.

Third, good quality environmental decisions must be based on the requirement by decision-makers to give reasons for their decisions. The importance of giving reasons is both procedurally fair and instils confidence in the public. It is difficult for the public to exercise this right as some decision-makers are hesitant to give reasons, unless they are required by law.

However, giving reasons is a requirement for improved quality of environmental decision-making process. Moreover, waste of time arguments can be countered in a manner that is contextual and flexible.

CHAPTER FOUR

INTERNATIONAL TRENDS

4.1 Introduction

International environmental law is becoming an increasingly important instrument in attempting to address environmental decision-making mechanisms in areas that affect the ozone layer, change of climate, extinction of species and transformation of fertile land into a desert. The scope of the analysis in this chapter is to focus primarily on emerging international environmental standards in relation to access to information, access to public participation and access to justice that are relevant to South African environmental law.

This chapter discusses, with reference to international trends, the role that public participation is expected to play in South Africa's fulfilment of its citizen's environmental rights. The principle argument is that South Africa is accountable to the international community in terms of international law. Moreover, as it has been discussed above, South Africa is accountable to its own citizens in terms of the Constitution. This means that South Africa has an

internationally recognised obligation to "respect, protect and fulfil" its citizen's human rights, which includes environmental rights.[381]

For instance, the chapter refers to the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (henceforth Aarhus Convention). Particularly, the Aarhus Convention aims at reinforcing the need for public participation in environmental decision-making. Although this is a convention of the United Nations Economic Commission for Europe (henceforth UNECE) and is absolutely not binding on South Africa, it is argued that the Convention is relevant to the South Africa's public participation and environmental decision-making.

South Africa is a party to various international environmental conventions that advocate public participation. The consequences of ratifying international treaties and instruments, and considering what these instruments demand in practice, means that South Africa's fulfilment of environmental rights inevitably will entail public participation in decisions related to environmental issues. Where applicable, the South African context will be used to demonstrate and explain the relevance to international trends.

381 See Du Plessis (note 43 above) 7.

4.2 International Law and Public Participation: South African History

It has been pointed out above that South Africa, as a country, does not have a long history of public participation, since the previous government excluded the involvement of the public in decision-making. Similarly, at international level, Dugard has argued that before 1993, the South African Constitutions did not take public international law into account.[382] The result was that the demand by international bodies, of involving the public in decision-making, was not considered. In addition, for over 40 years international law was less important and was reduced to a lower position in South African law.[383] During this time the apartheid government was condemned by the United Nations as it violated rules of international law which govern human rights and self-determination.[384]

Additionally, the terms of the 1983 South African Constitution[385] provided that the State President had the power to "enter into and ratify international conventions, treaties and agreements".[386] This meant that the power to enter into treaties was assigned entirely to the executive, while the legislature had

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382 Dugard *Public International Law* 13-1. [Online]. Available: <http://www.chr.up.ac.za/centre_publications/constitlaw/pdf/13-Public%20International%20Law.pdf> [Accessed: 24/07/2009 23:56].

383 Dugard (note 382 above). See also Dugard (2005) 3ed *International Law: a South African Perspective* 20-21.

384 Dugard (note 382 above).

385 The Republic of South Africa Constitution Act 110 of 1983.

386 Section 6(3)(e), The Republic of South Africa Constitution Act 110 of 1983. See also Dugard (2005) 3ed *International Law: a South African Perspective* 53.

no part to play in the process.[387] The consequence was that representation of the interests of the majority of the public, in matters that affected their lives and the environment in which they lived, was non-existent. If international conventions and treaties were to have become part of South African law without legislative endorsement, wide law-making powers would have been conferred on the executive.[388] Therefore, it was necessary for the legislature to enact legislation to transform treaties into South African law.

The principle set out by South African courts[389] resulted in section 231(4) of the Constitution, which provides that "any international agreement becomes law in the Republic when it is enacted into law by national legislation[.]"[390] As for the Resolutions of international organisations, they are not formal international agreements and, in most instances, they are not binding on member states.[391] The principle is that if South Africa intends to translate a resolution into domestic law it must do so by legislation.[392] Thus, the 1996 Constitution provides that the legislature is elected to represent the people

387 Dugard (note 382 above).
388 *Ibid.*
389 See *Pan American World Airways Incorporated v SA Fire and Accident Insurance Co Ltd* [1965] 3 All SA 24 (A); *Azapo and Others v President of the Republic of South Africa and Others* 1996 (8) BCLR 1015 (CC).
390 The Constitutional Court reaffirmed the principle in *Azapo and Others v President of the Republic of South Africa and Others* 1996 (8) BCLR 1015 (CC) at para [26] and stated that International conventions and treaties do not become part of the municipal law of our country, enforceable at the instance of private individuals in our courts, until and unless they are incorporated into the municipal law by legislative enactment
391 Dugard (note 382 above).
392 *Binga v Administrator-General, South West Africa and Others* [1984] 4 All SA 459 (SWA).

and to ensure government by the people. It also provides for a national forum for public consideration of issues.[393]

The Stockholm Conference on the Environment in 1972[394] was the beginning of the growth of international environmental law as a separate area of public law. Since then international environmental interest has increased steadily and it is now one of the fastest growing areas of international law.[395]

A current issue of international concern covered by environmental law is the principle of sustainable development. Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs.[396] It contains within it two key concepts: the first is the concept of "needs", in particular the essential needs of the world's poor, to which overriding priority should be given. The second is the idea of limitations imposed by the state of technology and social organization on the environment's ability to meet present and future needs.[397] Thus, sustainable development is based on social and cultural development, political stability, economic growth and ecosystem protection, which all relate to the reducing of the risks of disaster.

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393 Section 42(3), Constitution of the Republic of South Africa, 1996.

394 The official name of the Stockholm Conference is the *United Nations Conference on the Human Environment*.

395 DEAT (2005) Environmental Assessment of International Agreements, Integrated Environmental Management Information Series 19, Department of Environmental Affairs and Tourism (DEAT), at 5. Hereafter referred to as DEAT (2005) Series 19.

396 DEAT (2005) Series 19 (note 395 above) at 7.

397 *Ibid*.

South Africa has a number of areas of international environmental importance as a result of their ratifying in terms of international agreements.[398] Consequently, the World Heritage Sites such as the Ukhahlamba Drakensberg Park and the Cradle of Humankind, and Ramsar Sites such as Nylsvlei and the Greater St. Lucia Wetland Park are among listed sites. These are examples of an international practice from which South Africa obtains the development of its own environmental assessment system.[399] It therefore follows that environmental assessment is a tool of environmental protection which must be integrated in the development and decision-making process.

4.3 Environmental Assessment of International Agreements

Drawing from the above background, South Africa is obliged not only to take care of its own environmental interests in the protection of heritage or wetland

398 These agreements include for example, 1) The Convention for the Protection of the World Cultural and Natural Heritage, known as "The World Heritage Convention", which is the primary instrument in international law protecting natural and cultural sites of universal significance. It was adopted by the General Conference at its seventeenth session Paris, 16 November 1972. The Convention has been ratified by 143 countries, and 440 sites have been placed on the list of properties meriting the world's protection and management. 2) The Convention on Wetlands of International Importance especially as Waterfowl Habitat, known as "The Ramsar Convention", in Ramsar (Iran), 2 February 1971. UN Treaty Series No. 14583. It was amended by the Paris Protocol, 3 December 1982, and Regina Amendments, 28 May 1987. The Ramsar Convention is an intergovernmental treaty that provides the framework for national action and international cooperation for the conservation and wise use of wetlands and their resources.

399 Other listed sites in the Republic of south Africa are: Nylsvley Nature Reserve, Blesbokspruit, Barberspan, Seekoeivlei, Natal Drakensberg Park, Ndumo Game Reserve, Kosi Bay System, Lake Sibaya, Turtle Beaches and Coral Reefs, St Lucia System, Wilderness Lakes, De Hoop Vlei, De Mond State Forest, Langebaan, Verlorenvlei, and Orange River Mouth Wetland.

sites. In addition, it must take into account international guidelines when applying mechanisms of environmental protection such as environmental assessment.[400] Thus, it would not be adequate as a nation to confine environmental governance and decision-making processes to local or national level only. In this regard, the South African Department of Environmental Affairs and Tourism (henceforth DEAT) has written a document for a wide audience to serve as a guide to the environmental assessment requirements of international law.[401]

The purpose of this document is to provide for the following: firstly, it is an indication as to how international environmental law has affected South African law on environmental assessment. Secondly, it contributes to the development of South African environmental assessment legislation. This was particularly important at the time, when the second generation of Environmental Impact Assessment regulations was being developed.[402] Thirdly, the document provides a context within which South Africa can assess the effectiveness of its own legislation against international standards. This includes providing environmental assessment practitioners with an opportunity to review and improve their interpretation and implementation of domestic legislation in the light of global environmental assessment

400 Fakier *et al* (note 102 above) 12-13.
401 DEAT (2005) Series 19 (note 369 above) at 15.
402 *Ibid*. See also DEAT (2004) Linking EIAs and Environmental Management Systems, Integrated Environmental Management Information Series 20, Department of Environmental Affairs and Tourism (DEAT), Pretoria 9-12. Hereafter referred to as DEAT (2004) Series 20.

practice.[403] One of the specific requirements for the environmental assessment of international agreements as a focus of this chapter is the requirement for access to public participation.

4.4 The Aarhus Convention

As a Convention of the United Nations Economic Commission for Europe, this instrument is by no means binding on South Africa.[404] It is introduced in this chapter for two reasons. First, it characterises an international benchmark to which many of the world's most developed countries have agreed.[405] Secondly, the Aarhus Convention provides that any States that are not members of the Economic Commission for Europe, but are members of the United Nations may accede to the Convention upon approval by the Meeting of the Parties.[406] This means that non-European countries can be admitted as parties to the Convention and thus be bound under International Law by its provisions. It appears, as discussed below, that South Africa has shown some

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403 DEAT (2005) Series 19 (note 395 above) 15.

404 DEAT (2005) Series 19 (note 395 above) at 16.

405 The signatories to the Aarhus Convention are the European Community and thirty-nine European States in which the current twenty-five Member States of the European Union, with the exception of Slovakia, and the three of the accession countries (Bulgaria, Croatia and Romania) are included. Turkey is neither a signatory nor a party to the Convention but participates as an observer in the meetings of the Aarhus Convention, since it is a member of UN/ECE. A large majority of these countries have already ratified the Convention, with the exception of Germany, Greece, Ireland, Latvia, Luxembourg, Sweden, and the United Kingdom. See Kremlis, G (date unknown) *The Aarhus Convention and its Implementation in the European Community* 141. [Online]. Available: <www.inece.org/conference/7/vol1/22_Kremlis.pdf> [Accessed: 27/10/2009 18:40].

406 Article 19(3), Aarhus Convention.

interest in the Convention.[407] The Convention has influenced South Africa in its implementation of public participation in environmental decision-making. Moreover, South Africa may be persuaded to consider becoming a signatory in future years and therefore it would then be binding on the country.

The DEAT document provides for the specific requirements for the environmental assessment of international agreements. These include *inter alia*, requirements for public participation. The DEAT document makes reference to the Aarhus Convention.[408] The Aarhus Convention is the most important agreement with regard to the right of the public to obtain information about the environmental impact of development activities.[409] The purpose of the Convention is to guarantee the following rights: the rights of access to information; public participation in decision-making; and access to justice in environmental matters.[410]

In addition, the Regulations of the European Parliament and of the Council[411] contain provisions which are necessary to apply the Aarhus Convention to European Community institutions and bodies. These provisions, though not

407 DEAT (2005) Series 19 (note 395 above) 16.

408 The United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, also known as Aarhus Convention, was adopted on 25th June 1998 in the Danish city of Aarhus at the Fourth Ministerial Conference in the 'Environment for Europe' process.

409 DEAT (2005) Series 19 (note 395 above) at 15.

410 Article 1, Aarhus Convention.

411 Regulation (EC) No. 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies. Hereafter referred to as Regulation (EC) No. 1367/2006.

binding on South Africa, can be helpful in the implementation of the "right" to public participation in the country. The provisions include: 1) Guarantee access for the public (one or more natural or legal persons, and associations, organisations or groups of such persons) to environmental information held by Community institutions and bodies. 2) Make environmental information available to the public in easily accessible electronic databases. 3) Provide for public participation in the preparation by the Community of plans and programmes relating to the environment. 4) Guarantee public access to justice at Community level in environmental matters.[412] Although South Africa does have regulations and policy regarding public participation,[413] the country can look to such provisions in implementing a "right" of the public to participate in environmental decision-making. What follows below is the discussion of the provisions found in the Aarhus Convention.

4.4.1 Access to environmental information

Access to information is defined as the citizens' ability to obtain information on environment that is in the possession of public authorities.[414] Environmental information includes information about air and water quality, for example, and information about whether any hazardous chemicals are stored at a nearby factory. The Aarhus Convention obligates each Party to

412 Article 1, Regulation (EC) No. 1367/2006 (note 385 above).
413 See section 4, PAJA (note 229 above).
414 Dresang and Gosling (1990) *Politics and Policy in American States and Communities.* 27.

ensure that public authorities within the framework of national legislation make environmental information available to the public, without an interest having to be stated.[415] This is important as it implies that any person, whether affected by the activity or not, can be regarded as an interested and affected party.[416] However, the Convention does provide for a request for information to be refused under certain defined conditions, for example where the confidentiality of commercial information would be affected.[417] In the case of a refusal to provide information, the reason for refusal must be stated.[418]

In terms of the Convention, authorities may charge a reasonable fee for supplying information.[419] However unlike South Africa, the Convention is clear in terms of the charge for the supply of information by the authorities. The Convention prohibits imposing a charge as way of earning money. In *Communication on non-compliance by Spain with the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* (Murcia Urbanization Project on *Huerta Traditional*),[420] the Compliance Committee found Spain to have violated Article 4(8) of the Aarhus Convention.[421] This is when the public concerned requested documents related to decision-making process at different stages.

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415 Article 4(1)(a), Aarhus Convention.
416 DEAT (2005) Series 19 (note 395 above) at 15.
417 Article 4(4), Aarhus Convention.
418 Article 7, Aarhus Convention.
419 Article 8, Aarhus Convention.
420 *Senda Granada* Case. [Online]. Available: <www.**justice**and**environment**.org/wp.../05/case-study-aja-**spain** final.doc> [Accessed: 18/10/2009 19:21].
421 *Senda Granada* (note 420 above) at paras 41-47.

The requests were related to land decisions or project decisions. The City Council of Murcia imposed a charge of 2 Euro per page of copy. According to the Compliance Committee, this clearly violated the requirement of Article 6 which provides that access for examination must be free of charge to all information relevant to the decision making.

The Compliance Committee stated that in a situation where the public concerned had to pay for all the documents relevant to decision-making which affects its well-being and made by the city authorities where they live, a fee of 2 Euro per page cannot be seen as "reasonable". In addition, 2 Euro per page cannot be seen as costs covering the actual expenses made by the city council in order to produce. Clearly, according to the Committee, the wording of paragraph 8 means that the charge for supplying the information is possible to compensate direct costs of information supply incurred by the authorities. This means it prohibits imposing a charge as a way to earn money.

The Committee concluded that the charge of 2 Euro per page for any information requested is not in line with the "reasonable amount" requirement. Finally, the Committee pointed out that the amount of charge was excessive if compared to the level of life in Murcia City. The average household budget per month Murcia was 2,337 Euro and 782 Euro per person. That meant, by requesting just 390 pages of documents, a person was giving up an

equivalent of a monthly budget. This kind of reasoning by the Committee can be supported, since it takes into consideration the socio-economic aspects of the public and encourages participation rather than hindering it. As observed above,[422] the socio-economic aspects of South Africa people should be one of the determinant factors in determining participation in environmental decision-making processes.

Some of the provisions of the Convention which deal with access to environmental information are similar to most South African Information laws. For example, the Convention outlines a general right of access to be restricted only in certain defined circumstances.[423] Similarly, the provisions dealing with dissemination of environmental information have parallels in South African National State of the Environment Reporting, the National Environmental Management Principles,[424] or the Best Practicable Environmental Option (BPEO).[425] NEMA requires that different spheres of government, particularly national DEAT and provincial environmental authorities, and state controlled agencies provide a number of reports concerned with the environment and sustainable development.[426] For example, NEMA requires that every national department exercising functions which may affect the environment and every province must prepare an

422 See para 2.3.1.1 above.
423 Articles 4(3) and (4), Aarhus Convention.
424 See section 2, NEMA (note 228 above).
425 DEA&DP (2009) Guideline on Need and Desirability, NEMA EIA Regulations Guideline and Information Document Series. Western Cape Department of Environmental Affairs & Development Planning (DEA&DP) 6-7.
426 Chapter 3, NEMA (note 228 above).

environmental implementation plan at four year intervals.[427] Furthermore, every national department exercising functions that involve the management of the environment must prepare an environmental management plan (henceforth EMP) at least every four years.[428]

The environmental implementation plans and management plans, discussed above, are aimed at co-ordinating and harmonising environmental policies, plans, programmes and decisions of the various national departments that exercise functions that may affect the environment.[429] This is in line with the standards set out in the Aarhus Convention. However, in South Africa the public is not directly involved in the development of the EMP.[430] This is despite the fact that public issues and concerns expressed in the environment impact assessments (EIAs) are sometimes included into the EMP. A way of eliciting public comment on the EMP is to present it in the Environmental Impact Report (EIR).[431] At this initial stage, to present a comprehensive EMP would not be easy, although an EMP framework is included as part of the EIR. This can draw attention to fundamental environmental issues and identify suitable mechanisms to deal with them.[432] Therefore, this would allow members of the public an opportunity to comment on the mitigation and monitoring specifications.

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427 Section 11(1), NEMA (note 228 above).
428 Section 11(2), NEMA (note 228 above).
429 Section 12, NEMA (note 228 above).
430 DEAT (2004) Environmental Management Plans, Integrated Environmental Management, Information Series 12, Department of Environmental Affairs and Tourism (DEAT) at 11. Hereafter referred to as DEAT (2004) Series 12.
431 *Ibid*.
432 *Ibid*.

Having stated the above, the World Bank has pointed out that there are no formal mechanisms for the public to determine whether the environmental commitments by a government in the EMP are being met.[433] Nevertheless the public may still have an important role to play during the implementation of the EMP. The recommendation is that information on progress with implementing mitigation and monitoring activities should be shared with the affected public.[434] Many of the environmental controls are designed to mitigate potential impacts on neighbouring communities.[435] For this reason, the public can have a specific participatory role to ensure that they are not being unduly affected by the proposed activities associated with the particular project.[436] This means that in terms of the Aarhus Convention, in the development of the EMP the standards and requirements of the Convention would not at present be met.

Other areas concerning the public's right of access to information grants European citizens and residents a right of access to documents of the European Parliament, Council and Commissions.[437] In terms of the E.U.

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433 Environmental Department, World Bank, (1999), *Environmental Management Plans, Environmental Assessment Sourcebook Update* January, Number 25, Washington DC 4. [Online]. Available:<http://siteresources.worldbank.org/INTSAFEPOL/1142947-1116495579739/20507392/Update25EnvironmentalManagementPlansJanuary1999.pdf> [Accessed: 27/10/2009 22:37].

434 *Ibid.*

435 DEAT (2004) Series 12 (note 430 above) at 11.

436 *Ibid.*

437 Article 2 of E.U. Regulation (EC) No 1049/2001 of the European Parliament and of the Council (2001.05.30) regarding Public Access to European Parliament, Council and Commission documents.

Regulation, applicants receive an acknowledgement of receipt, and within 15 days are provided with the item(s) requested or given reasons why the application cannot be granted.[438] The applicant is also entitled to complain to the Ombudsman or institute Court proceedings if a negative reply is received.[439] Twenty pages of A4 text will be photocopied free of charge and any extra charged at cost.[440] South Africa has a similar mechanism, as observed above, where the public can petition parliament where it has been negatively affected.

4.4.2 Access to public participation

Access to public participation is defined as the opportunity for citizens to provide input that is informed, timely, and meaningful which in turn will influence decisions on general policies, strategies, and plans at various levels and on individual projects that have environmental impacts.[441] Individuals may, for example, engage in electoral processes, testify at hearings and meetings, serve on advisory committees, have direct contact with public officials, express views and opinions through the media, or engage in some form of protest action. Public participation therefore is another area which potentially enhances public trust of government decision making, and thus

438 Article 7(1), Regulation (EC) No 1049/2001 (note 411 above).
439 Article 8(3), Regulation (EC) No 1049/2001 (note 411 above).
440 Article 10(1), Regulation (EC) No 1049/2001 (note 411 above).
441 Dresang and Gosling (note 414 above) at 32.

reduces litigation or challenging actions, and serves to co-ordinate and reconcile various environmental strategies.[442]

The Aarhus Convention provides that European Community institutions and bodies must provide for public participation in the preparation of environmental plans and programmes.[443] In *Communication on non-compliance by Spain*, the Compliance Committee held that Spain violated Article 6(1)(a).[444] It stated that while the Aarhus Convention has direct applicability in Spain, the government made certain legislative efforts to implement its provisions into national law, including by means of implementing relevant EC legislation. According to the Committee, public participation procedures are well prescribed in the EIA laws in many other countries of United Nations Economic Commission for Europe (henceforth UNECE) region. Therefore, early and effective public participation in environmental decision making in Spain could only happen through EIA legislation. This is due not only to the procedures available, but also to the substance of the effective participation. Accordingly, if no environmental study is made, the public cannot have access to reports and other documents evaluating environmental and health risks, which would enable the public to develop and express its own opinion on the issue.

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442 Tabb, 'Environmental Impact Assessment in the European Community: Shaping International Norms' (1999) Tulane Law Review, vol.73:923 at 953.

443 Article 6, Aarhus Convention.

444 *Senda Granada* (note 420 above) at paras 54-56.

The Convention further requires that the public participation procedure includes reasonable time frames for informing the public and for them to respond. The Convention also requires that the public must be informed of the following information regarding the process early in the environmental decision-making process of, first, the activity proposed and the application on which the decision will be made. Secondly the public must be informed of the nature of possible or draft decisions. Thirdly, it must be informed of the public authority responsible for making decisions. And fourthly, it must be informed of the procedure envisaged in the proposed activity.[445]

The Convention requires for early provision for public participation, when all options are open and public participation can take place effectively.[446] It also requires that the applicant identifies the affected public, enter into discussions with them and provide information about their application before applying for authorisation.[447] Furthermore, it requires that the public must be involved to the same extent as during the original environmental assessment process,

445 Article 6(2), Aarhus Convention. In violating Article 6(2)(a) and (b), the Compliance Committee in *Senda Granada* (note 419 above) at paras 58 and 59 stated that the fact that one of the key elements of the draft decision (prohibitively high density of construction) was changed (introduced) after public comments period reveals that the public was not aware of the nature of the decision to be taken; therefore, the public was not adequately and effectively informed about the decision-making.

446 Article 6(4), Aarhus Convention. Article 6(4) was also held to be violated by Spain and the Compliance Committee in *Senda Granada* (note 419 above) at paras 60 and 61 stated that all decisions taken (land and project related) resulted from urban agreement between the city and the developer. The public was never informed about plans to develop and sign the agreement, neither about its drafts. Therefore, public participation opportunities came at a time when the city of Murcia already assumed legal obligations towards the developer as to land and project decisions.

447 Aarhus Convention Article 6(5).

should the authority review or update the conditions of an authorisation.[448] It stipulates that the public must have the opportunity to participate in the development of plans, programmes and policies relating to the environment and in the development of legislation.[449]

The provisions of the Convention dealing with public participation in environmental decision-making have parallels in some South African legislation. For example, the DFA provides for members of communities affected by land development to participate actively in the decision-making process of land development decisions.[450] In addition, NEMA provides for public participation to be undertaken in environmental authorisations.[451] Although legislation mentions public participation, the specific implementation is left largely to the discretion of the relative governmental agencies.[452] Interested members of the public may not be presented with opportunities to offer the type of input that they believe would be truly meaningful. Whilst the Convention is to some extent unclear as to whether it supports open standing

448 Article 6(10), Aarhus Convention.
449 Article 7, Aarhus Convention.
450 Section 3(1)(*d*), DFA (note 282 above).
451 Section 24(4)(*a*)(v), NEMA (note 228 above). Murombo (note 40 above) has noted that in terms of the GN R386 of 2006, "the public should be consulted during the EIA study and must be given the opportunity to comment on the EIA reports. Recently the courts confirmed that the public are also entitled to comment on the final report and not only the draft report. This is intended to ensure that the final report submitted to the competent authority has properly taken into account the comments from the public. A critical handicap of the public participation process mandated by the NEMA EIA regulations is that they provide no more guidance other than the size, contents, and place of publication of notices to I&APs. The provision that the practitioner can issue the notice to the I&APs after making the application for authorisation or before is quite worrying".
452 See in this regard Masondo (note 127 above) 6.

to participate in environmental decision-making, it could be argued that the phrase "the public concerned"[453] should be given a wide interpretation.

Although no legislative proposal exists in South Africa at present concerning access to public participation, there is an opportunity to gain insight from the governance practice being developed within European Community structures.[454] In this instance, South Africa can learn and adopt the approach and position by the Commission of the European Communities. In its paper on general principles and minimum standards for the interaction between institutions and society, the Commission must fulfil its legal duty to consult the public.[455] By so doing, the Commission will assist in improving the quality of policy outcome and at the same time, enhance the involvement of interested parties and the public at large.[456] In addition, the Commission has underlined its intention to "reduce the risk of the policy makers just listening to one side of the argument or of particular groups getting privileged access."[457] These minimum standards laid down in the communication were themselves the result of a Europe-wide consultative process.

453 Article 2(5), Aarhus Convention, defines "The public concerned" as the public affected or likely to be affected by, or having an interest in, the environmental decision-making. Non-governmental organisations shall be deemed to have an interest if it promotes environmental protection and meet any requirements under its national law.

454 COM 2002/704 Final, "Towards a reinforced culture of consultation and dialogue – General principles and minimum standards for consultation of interested parties by the Commission".

455 COM 2002/704 Final (note 454 above) 3-4.

456 COM 2002/704 Final (note 454 above) 5.

457 *Ibid.*

4.4.3 Access to justice

It has been reported that a comprehensive and clearly articulated legal system is the basis for access to justice. Such a legal system must provide multiple venues for citizens to seek redress in the event that they are denied access to information and participation.[458] In such a legal system, laws and regulations contain explicit commitments to judicial review processes, and all government agencies are legally bound to consider problems and concerns raised by affected parties after a policy enters into force.[459] Therefore, the law must include an open description of what constitutes "the public" and "the public interest," and thus allowing all participants access to the courts.

Access to justice is defined as the ability of citizens to turn to impartial arbiters to resolve disputes over access to information and participation in decisions that affect the environment. Such impartial arbiters include mediators, administrative courts, and formal courts of law, among others. The rules on access to justice with regard to European Community institutions are laid down in the Treaty of Rome.[460] This means that the Aarhus Convention will have to be ratified by a legislative instrument, taking account of existing provisions, in order to ensure compliance at Community Institution level.

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458 Henninger *et al* (2002) *Closing the Gap: Information, Participation, and justice in decision-making for the environment* at 92.

459 *Ibid.*

460 See Articles 164-188, Treaty of Rome, March 1957. [Online] Available: <http://www.hri.org/docs/Rome57/>[Accessed: 09/11/2010 07:50].

The Aarhus Convention requires that the national legislation of each Party shall provide the framework to ensure that any person, whose request has been affected in terms of the provisions of the Convention, will have access to a review procedure before a court of law or another independent and impartial body.[461] The decision by a court of law or independent and impartial body shall be binding on the public authority holding the information.[462] Similarly, in South Africa, the courts have become crucial in settling most disputes that arise during the EIA process. This is in regard to, for instance, the absence or inadequacy of the public participation process.[463] They are the guardians of the Constitution, the latter being the basis of the right to environment, which is implemented through the enactment of NEMA and the EIA process.[464]

The Convention also requires each Party, within the framework of its national legislation, to ensure members of the public having a sufficient interest or whose right has been impaired, to have access to a review procedure before a court of law.[465] As to what constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law.[466]

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461 Article 9(1), Aarhus Convention.
462 *Ibid.*
463 See Murombo (note 40 above).
464 See *Earthlife Africa* (note 213 above).
465 Article 9(2), Aarhus Convention.
466 *Ibid.*

The access to a review procedure before the court of law shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive.[467] Correspondingly, each Party shall ensure that persons exercising their rights in conformity with the provisions of the Convention shall not be penalized, persecuted or harassed for their involvement.[468] The national courts have the powers to award reasonable costs in judicial proceedings

For example, In "*The Excessive Fees* case"[469] on April 7, 2000, Ms. Chernova, representing the NGO Caspiy Tabigaty, made a comment at a public hearing in conjunction with an EIA of a local development project. She asserted that the company which was seeking permission for the project heavily polluted the site. Her remarks stood in sharp contrast to earlier testimony by LTD Monitoring, a laboratory hired by the company to conduct environmental monitoring onsite. The company testified that no increases in discharges of pollutants were observed. To defend herself against LTD Monitoring claims, Chernova sought representation by the Atyrau Public Prosecutor. The director of LTD Monitoring filed a lawsuit in May 2000, in the Atyrau City Court against Chernova alleging that her remarks damaged the business reputation of the laboratory. The laboratory sought KZT 1 million (USD 7,000) as compensation for "moral harm" done to the company by

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467 Article 9(4), Aarhus Convention.

468 Article 3(8), Aarhus Convention.

469 *Kazachstan* Case 3 as quoted in Stec, S. (2003) *Handbook on the Access to Justice under the Aarhus Convention* 157.

Chernova's statements. After seven months and the calling of several witnesses, the City Court failed to resolve the claim and on December 31, 2000, ruled the matter closed without a decision. However, despite the absence of a court ruling, the Public Prosecutor required a fee of equivalent of USD 141 from Chernova for its representation.

It was suggested that Chernova's statements regarding pollution on-site should not be permitted to be a source of litigation. This was because when speaking in the course of a public hearing, those making comments that are neither malicious nor libellous should be granted immunity from potential lawsuits. In this matter, Chernova's testimony directly related to the EIA and thus was relevant and proper. Allowing parties to bring lawsuits against individuals for such comments made during public hearings prevents greater public participation. For fear of having to go to court and paying significant fees, those who should otherwise testify at hearings will not do so.

The Commission's opinion that the excessive fee required of Chernova for her representation was an additional hurdle to public participation and access to justice is supported. Accordingly, the fee should have been either reduced or waived given the subject matter of the suit and Chernova's status as an NGO representative. In addition, it was suggested that a "fee shifting" or "fee forgiveness scheme" should be used when, as in the case of Chernova, the party suing had not succeeded on the merits and was in a better financial

position than the defendant. In sum, requiring that individuals and NGOs pay extreme fees with no opportunity for fee shifting or waiver prevented socially important litigation from being filed. In addition, as illustrated in this case, it also made it difficult for individuals and NGOs to defend themselves for having participated in public decision-making.

In relation to rights of citizen enforcement or appeal against environmental decisions, the Arhus Convention suggests that standing should be restricted to persons having sufficient interest or whose rights are affected.[470] These provisions are equivalent to that of South African environmental law. Interested and affected parties are defined as "any person, group of persons or organisation interested in or affected by an activity."[471] The Bill of Rights now allows individuals and non-governmental organisations (NGOs) to take action to protect the environment in the public interest.[472] Consequently, community-based conservation groups would be regarded as having sufficient interest to warrant standing under both provisions.

- **Public participation and legitimate expectation**

Any country including South Africa, entering into international instruments will have some direct implication to its citizens. For instance, the Australian High Court decision of *Minister of State for Immigration and Ethnic Affairs v Ah Hin*

470 Article 2(5), Aarhus Convention.
471 DEAT (2005) *Guidelines 4:* (note 83 above) at 4.
472 Section 38, Constitution of the Republic of South Africa Act of 1996.

Teoh[473] is noteworthy in that it gives exceptional significance to the ratification of international instruments by the Executive. Although the case dealt with the Convention on the Rights of the Child (CRC), the majority held that the ratification of such instruments creates the basis for a legitimate expectation for citizens even where those terms have not been incorporated into Australian law.[474]

Arguably, the significance of the *Teoh's* case can be that its decision would confirm what most people would regard as reasonable and common sense. The reason for this argument is that first, the intention behind countries signing international treaties is to influence national policies and actions.[475] Secondly, the public whose rights to participate in environmental decision-making process have been affected by a decision of an administrator, must have a legitimate expectation that the latter will consider national obligations under any international treaty.[476] It is submitted that any other view should be perceived and labelled as 'hypocrisy' by the international community.

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473 *Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh* (1995) 128 ALR 353. The High Court opinions in *Teoh's* case draw on the similar New Zealand case *Tavita v Minister for Immigration* [1994] 2 NZLR 257. In *Tavita*, also concerned the domestic impact of the ratified but unincorporated Convention on the Rights of Children. The New Zealand Court of Appeal intimated that courts should be reluctant to accept an argument by the Government that implied that New Zealand's "adherence to the international instruments has been at least partly window dressing." *Tavita* at 266.

474 *Teoh's* case (note 473 above) at 365 per Mason CJ and Deane J.

475 Fakier *et al* (note 102 above) 15.

476 Section 39(1)(b), Constitution of the Republic of South Africa, 1996 provides: "When interpreting the Bill of Rights, a court, tribunal or forum... must consider international law." Section 2 provides that "The Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid." While this does not render international law superior to legislation or government practice, it does at least ensure that it must be taken into account where human rights issues are raised. See Mendel, T. "Enforcing International Human Rights Standards in Domestic Legal Systems." [1998], Volume 3,

In Australia, the High Court's decision in *Teoh's* Case was however met with reaction from the Federal Government that it would bring about a review by the Government of all international treaties.[477] The government had attempted to do this through detailed pronouncements and joint statements by the Minister for Foreign Affairs and the Attorney-General.[478] It noted that whilst only a few treaties ratified by Australia may create a legitimate expectation, the High Court did not give enough guidance on how those in decision making were to determine which of those treaty provisions will be relevant and to what decisions the provisions might be relevant.[479] It also pointed out that because of the wide range and large number of decisions potentially affected by the decision, a great deal of uncertainty has been introduced into government activity. This according to the government was not in anybody's interests to allow such uncertainty to continue.[480]

It has been argued that the effects of ratification should not be limited to providing a means of interpretation or assisting in the development of the common law by the courts.[481] There are many instances in which a legitimate

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number 1. [Online]. Available: <http://www.fxi.org.za/pages/Publications/Medialaw/legal.htm> [Accessed: 24/09/2009 13:05].

477 Roberts, "Minister Of State For Immigration And Ethnic Affairs V Ah Hin Teoh: the high court decision and the government's reaction to it." [1995] AJHR 10. [Online]. Available: <http://austlii.law.uts.edu.au/au/journals/AJHR/1995/10.html#fnB29> [Accessed: 22/09/2009 22:41].

478 *Ibid.*

479 *Ibid.*

480 *Ibid.*

481 *Ibid.*

expectation can be created. For example, in Australia it can be created by a statement by the House of Representative; by the Minister for Immigration as to deportation policy; or by press releases concerning an amnesty for prohibited immigrants.[482] Therefore, it would appear inconsistent if a legitimate expectation could not arise from the ratification by the Executive of a treaty before the international community

It has been argued that in reacting to *Teoh's Case*, the Government appeared to misinterpret the fact that the effect of the decision is to find that the consequence of ratification is limited to the creation of a legitimate expectation.[483] What is implied in the government's reaction is that the effect of *Teoh's Case* was to confer rights and obligations on individuals. However, the High Court expressly rejected the suggestion that the ratification of international instruments by the Executive could be a direct source of individual rights or impose obligations on individuals.[484] The existence of a legitimate expectation was not the bestowing of rights, benefits or obligations upon an individual. Moreover, it did not compel the decision-maker to act in accordance with the expectation.[485] It only gave rise to a requirement of procedural fairness.

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482 *Ibid.*
483 *Ibid.*
484 *Ibid.*
485 *Ibid.*

In terms of South African law, De Ville has argued that the requirement of procedural fairness has become more flexible.[486] He has further argued that the circumstances under which legitimate expectation can be said to exist, are by no means 'natural' and depends on the perceived need to expand the scope of application of the requirements of procedural fairness.[487] Such a view is supported by a number of cases. The requirements of procedural fairness are met even where a decision-maker acted in a manner that did not afford hearing; legitimate expectation did not arise from the regular practice of such a decision-maker.[488] The requirements of procedural requirements are also met where a decision-maker gives an applicant who has a legitimate expectation, to respond to the adverse information the former is in possession of.[489]

What is the significance of the legitimate expectation argument in terms of public participation in environmental decision-making? Given the above discussion, it is reasonable to argue that countries must consider the treaties they have signed as particularly important.[490] Usually this is not an issue as the particular international treaty is binding on a particular state. Where this is not the case, such countries will have to address international trends in

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486 De Ville (note 321 above) 233.

487 *Ibid.*

488 *The President of the Republic of South Africa and Others v South African Rugby Football Union and others* 1999 (10) BCLR 1059 (CC) paras 211-212.

489 *Foulds v Minister of Home Affairs and Others* [1996] 3 All SA 478 (W) at 490f-h. See also *Minister of Justice, Transkei v Gemi* 1994 (3) SA 28 (TkA) at 32A in which the Transkei Appellate Division held that legitimate expectation can arise in circumstances not restricted to an express promise or a regular practice.

490 Parnell, *Public Participation in Environmental Decision-Making*. [Online]. Available: <http://www.edo.org.au/edosa/research/aialpaper.htm> [Accessed: 29/10/2009 12:37].

environmental decision-making processes, even if, citizens do not have "legitimate expectation" that their environmental decision-makers would be bound by the terms, the spirit or the purport of international agreements.[491] In other words, non-existence of a legitimate expectation by citizens should not limit a country's obligation to consider international environmental law in decision-making process. Moreover, it is submitted that the obligation of an environmental treaty that promotes public participation should be consistent that a legitimate expectation can arise from the ratification by the executive of a treaty before the international community.

4.5 The Rio Declaration

The Rio Declaration[492] has enshrined public participation in addressing environmental problems, and it has recognised it as an environmental principle. Principle 10 provides that "environmental matters are best handled with participation of all concerned citizens, at the relevant level". The Rio Declaration maintains, drawing a close link between access to information and public participation:

> At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities. This includes information on hazardous materials and activities in their

491 *Ibid.*

492 The Rio Declaration was produced at the United Nations Conference on Environment and Development (UNCED) in June 1992. It consists of 27 principles which are intended to guide future sustainable development around the world. *Rio Declaration on Environment and Development.* [Online]. Available: <http://www.unep.org/Documents.Multilingual/Default.asp?documentID=78&articleID=1163> [Accessed: 25/09/2009 03:30].

> communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. In addition, effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

Thus, principle 10 of the Rio Declaration combines public participation with public access to information and access to remedial procedures. Accordingly, one of the fundamental principles of achieving sustainable development is through broad participation by the public.[493] The Declaration emphasises the importance of the participation of all major groups. In addition, special emphasis has been given, including in legally binding international instruments, to ensuring participation in decision-making of those groups that are considered to be politically disadvantaged. These include indigenous peoples and women.[494]

- **The implications of the Rio Declaration**

The implications are that public participation becomes a key element of all environmental assessment processes.[495] It also means that Interested and affected parties must at all times be able to make inputs to the environmental assessment process, and must have the opportunity to influence the

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493 See also United Nations Conference on Environment and Development (Agenda 21), June 1992. [Online]. Available: <http://www.un.org/esa/sustdev/documents/agenda21/english/Agenda21.pdf> [Accessed: 18/10/2010 20:15].

494 Rio Declaration (note 492 above).

495 DEAT (2005) Series 19 (note 395 above) 8.

decision-making process.[496] For South Africa, the level of public participation is fashioned by both the legal and institutional framework, and the social and economic status of the citizens or interested and affected parties.[497] Therefore, public participation in South Africa must aim at striking a common understanding and bridge gaps between the poor and the rich.

The principle of public participation must be the focal point of implementation of sustainable development in South Africa.[498] The effectiveness of the public's rights to participate critically depends, first, on appropriate access to relevant information, which is often permitted through a right to request relevant data, primarily where environmental matters are concerned.[499] Secondly, it depends on access to judicial remedies and means of redress, mostly as public interest litigation, either in the form of class actions or by standing rights or rights of intervention.

Although, in South Africa, public participation rights are granted through EIA procedures with broad public participation, various sectoral laws need to be adapted to the special circumstances of each sector.[500] For example, the constitutional right to obtain information about the state of the environment, and the right to enforce this and other environmentally related rights, are

496 *Ibid.*
497 Murombo (note 40 above).
498 See *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others* 2007 (10) BCLR 1059 (CC) at paras 49 and 50.
499 *Fuel Retailers* (note 498 above) at para 57.
500 Murombo (note 40 above).

implemented in various sectoral laws. Such implementation would be, *inter alia*, through NEMA, the National Water Act,[501] and the National Environmental Management: Waste Act.[502] NEMA provides the most thorough procedure for public participation in environmental issues.

4.6 The Relevance of International Standards to South Africa

Some legally binding international instruments require South Africa to promote public participation in environmental decision-making. For example, the United Nations Framework Convention on Climate Change (henceforth UNFCCC), obliges parties to promote public awareness and to encourage broad participation in the process, including that of non-governmental organizations.[503] The Convention itself places information and data collecting requirements on all parties, while the developed nations are required to adopt policies and take corresponding measures with the aim of returning to 1990 levels of emissions. Although South Africa has a right of access to environmental information, the Convention does not create such a right.

Likewise, the United Nations Convention to Combat Desertification (henceforth Diversification Convention) recognises the need to combine civil

501 National Water Act, 1998 (Act 36 of 1998).
502 National Environmental Management: Waste Act, 2008 (Act 59 of 2008).
503 UNFCCC was adopted in New York in May 1992 and entered into force on 21 March 1994. South Africa ratified the Convention on 29 August 1997. "Status of Ratification". [Online]. Available: <http://unfccc.int/essential_background/convention/status_of_ratification/items/2631.php> [Accessed: 17/09/2009 22:11].

society with the action of the State.[504] Generally, international legal instruments addressing access to environmental information and public participation are confined to distinct contexts, such as environmental impact assessment. For example, the Convention on Biological Diversity allows for public participation in environmental impact assessment procedures, and addresses the need for public education and awareness.[505]

In line with the UNFCCC, a Long-Term Mitigation Scenario (LTMS) in South Africa in 2006 and was concluded in July 2008.[506] The LTMS was a participatory and research-based-scenario building process. It focused on identifying South Africa's emissions course, which will result in formulating a range of potential strategies that would allow South Africa to lessen its emissions over time in a way that is suitable to its national conditions and capabilities.[507] Consequently, a decision was taken to launch a policy development process that would result in a national Climate Change Response Policy in the form of a White Paper.

504 Articles 3(a) and 3(c), Desertification Convention was adopted in Paris on 17 June 1994 and entered into force in December 1996.[Online]. Available: <http://www.unccd.int/convention/menu.php> [Accessed: 02/03/2010 13:46].

505 Articles 14(1)(a) and 13, Convention on Biological Diversity. [Online]. Available: <http://www.cbd.int/convention/convention.shtml> [Accessed: 02/03/2010 13:49].

506 See the National Climate Change Response Policy: Discussion Document for the 2009 National Climate Change Response Policy development Summit, Gallagher Convention Centre, Midrand, 3-6 March 2009 22.

507 *Ibid*.

- **Ramsar Convention**[508]

The Ramsar Convention aims at creating an international structure for funding and monitoring wetlands as well as demanding commitments from its parties for national wetlands management.[509] What is essential to the function of Ramsar is the listing of wetlands.[510] According to the Convention, each party is required to "designate suitable wetlands within its territory for inclusion in a List of Wetlands of International Importance."[511] It is moreover required that each contracting party allocate at least one wetland to be included in the List when signing the Convention.[512] Essentially, the Convention requires parties who list wetlands to promote the conservation and 'wise use' of the wetlands. In addition, the Convention requires Parties to establish nature reserves on wetlands.[513]

The Ramsar Convention recognises, as essential, community involvement and participation in management decision-making for sites included in the List of Wetlands of International Importance and other wetlands.[514] However, it

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508 The Convention on Wetlands of International Importance especially as Waterfowl Habitat (also known as Ramsar Convention), named after the city in Iran where it was adopted in February 1971 entered into force on 21 December 1975. South Africa ratified the Convention in March 1975. Contracting Parties to the Ramsar Convention on Wetlands: South Africa. [Online]. Available: <http://www.ramsar.org/cda/ramsar/display/main/main.jsp?zn=ramsar&cp=1-36-123^23808_4000_0__> [Accessed:24/09/2009 15:54].

509 *Ibid.*

510 Article 2, Ramsar Convention.

511 Article 2(1), Ramsar Convention.

512 Article 2(4), Ramsar Convention.

513 Article 4(1), Ramsar Convention.

514 These are referred to as Ramsar Sites. See Guidelines for establishing and strengthening local communities' and indigenous people's participation in the

has been observed that insufficient direction on this topic is available to the Contracting Parties. For this reason, Contracting Parties were called upon to make specific efforts to promote active and informed participation of local and indigenous people at Ramsar listed sites and other wetlands and their catchments. Moreover, local and indigenous people must be directly involved through appropriate mechanisms, in wetland management.[515]

The recommendation of the Conference of the Contracting Parties (COP) assigned the Bureau of the Convention or secretariat, working with international organisations and institutes, the task of commissioning case studies and developing guidelines to assist the contracting parties in such efforts.[516] These guidelines were formulated with the principle that local and indigenous people's participation in wetland management can significantly add to successful management practices that further Ramsar's wise use objectives.[517] Wise use of wetlands is defined as "their sustainable utilization for the benefit of mankind in a way compatible with the maintenance of the natural properties of the ecosystem."[518] The evidence from the 23

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management of wetlands. *People and Wetlands: The Vital Link"* 7th Meeting of the Conference of the Contracting Parties to the Convention on Wetlands (Ramsar, Iran, 1971), San José, Costa Rica, 10-18 May 1999. [Online]. Available: <http://www.ramsar.org/cda/ramsar/display/main/main.jsp?zn=ramsar&cp=1-31-105^20833_4000_0__> [Accessed: 20/09/2009 22:24]. Hereafter referred to as Ramsar Guidelines.

515 Article 9 of the "Recommendation 6.3: Involving local and indigenous people in the management of Ramsar Wetlands". Proceedings of the 6th Meeting of the Conference of the Contracting Parties, Brisbane, Australia, 19 – 27 March 1996.

516 Ramsar Guidelines (note 514 above).

517 *Ibid.*

518 Information on wise use of wetlands specified under Article 3 of the Ramsar Convention The 3rd Meeting of the Conference of the Contracting Parties, Regina, Canada, 27 May - 5 June 1987.

commissioned case studies and other experiences in participatory management shows that local and indigenous people's involvement can contribute significantly to the maintenance or restoration of the ecological integrity of wetlands, as well as contributing to community well-being and more equitable access to resources.[519] However, this should be carried out within the full framework of actions supported by the Convention itself.

South African is vigorously attempting to implement the objectives of the Ramsar Convention. The following are sixteen listed sites in the Republic of South Africa: Nylsvley Nature Reserve, Blesbokspruit, Barberspan, Seekoeivlei, Natal Drakensberg Park, Ndumo Game Reserve, Kosi Bay System, Lake Sibaya, Turtle Beaches and Coral Reefs, St Lucia System, Wilderness Lakes, De Hoop Vlei, De Mond State Forest, Langebaan, Verlorenvlei, and Orange River Mouth Wetland. Four of these have been designated since the end of 1996, and two (Blesbokspruit and the Orange River Mouth) are on the Montreux Record.[520] The Department of Environmental Affairs and Tourism has a Wetlands Conservation

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<http://www.ramsar.org/cda/ramsar/display/main/main.jsp?zn=ramsar&cp=1-31-110^23129_4000_0__> [Accessed: 20/09/2009 22:25].

519 Ramsar Guidelines (note 514 above).

520 The Montreux Record is a register of wetland sites on the List of Wetlands of International Importance where changes in ecological character have occurred, are occurring, or are likely to occur as a result of technological developments, pollution or other human interference. It is maintained as part of the Ramsar List. [Online]. Available: <http://www.ramsar.org/cda/ramsar/display/main/main.jsp?zn=ramsar&cp=1-31-118^20972_4000_0__> [Accessed: 19/09/2009 12:55].

Programme[521] which includes efforts at compiling a national wetlands inventory and the development of a management decision support system for wetlands in South Africa.[522]

4.7 Conclusion

South Africa is obliged, not only to take care of its own environmental interests in the protection of the environment, but also to take into account international guidelines when applying mechanisms that protect the environment. South Africa is accountable, not only to its own citizens in terms of the Constitution, but also to the international community in terms of international law. The country has an internationally recognised obligation to respect, protect and fulfil its citizen's human rights, which includes environmental rights. Therefore, the fulfilment of environmental rights in South Africa, as a result of ratification of international instruments, entails that the public participate in issues that affect the environment.

The Aarhus Convention is the most important agreement with regard to: the rights of access to information; public participation in decision-making; and

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521 The South African Wetland Conservation Programme is an initiative of the Department of Environmental Affairs and Tourism, dedicated to implementing South Africa's obligations to the Ramsar Convention on Wetlands and Convention on Biodiversity, by promoting the conservation and wise use of all wetland resources. [Online]. Available: <http://www.deat.gov.za/soer/nsoer/resource/wetland/index.htm> [Accessed: 19/09/2009 13:22].

522 "South African National Wetland Inventory". [Online]. Available: <http://www.deat.gov.za/soer/nsoer/resource/wetland/inventory.htm> [Accessed: 19/09/2009 13:26].

access to justice in environmental matters. Although some of the provisions of the Convention are similar to that of South Africa,[523] the latter can learn from the practices being developed within European Community environmental governance and structures. For instance, the South African public should have access to environmental information and be given an opportunity to comment on how to improve and sustain the environment. How should the public do this? In terms of the Rio Declaration, and similarly NEMA, public participation is a key element of all environmental assessment processes. This means that Interested and affected parties, regardless of their socio-economic status, must always be able to make inputs to the environmental assessment process and influence the decision-making process. Therefore, the public, especially the affected public, should be involved in the environmental management plan, with the aim of drawing attention to fundamental environmental issues, and identify appropriate mechanisms to deal with them. This may include their implementation, in which information is shared with the public as suggested by the World Bank.[524]

Although section 4 of PAJA provides for administrative action affecting the public, there is no legislative framwork existing in South Africa at present concerning right of access to public participation. However, South Africa can learn and adopt the approach and position of the European Communities, in which the consultation and involvement of the public, by way of interaction

523 See for example access to environmental information at para 4.4.1 above.
524 See at 114 above.

between institutions and society, is the fulfilment of a legal duty in decision-making processes. The results are the following: the quality of policy and decision outcome is likely to be improved; public participation of interested and affected parties is likely to be enhanced; listening to one side of the story by decision-makers is likely to be avoided; and a particular group getting privileged access to participation is likely to be prevented. It is proposed therefore, that in any environmental decision-making and consultative process, the aim is to achieve these results as a minimum standard that should be laid down.

In European Communities, disputes over access to environmental information and participation in environmental decisions, are resolved by impartial arbiters that include mediators, administrative courts and formal courts. This means that in terms of the Aarhus Convention, any person, or members of the public having a sufficient interest or whose rights have been affected will have access to review procedure provided in terms of national legislation. This mechanism is similar to that of South African legal system. However, in terms of both the Aarhus Convention and South Africa, the enforcement and appeal against environmental decisions are restricted to persons whose rights have been affected or having standing a sufficient interest. The problem is that where affected person are affected by their socio-economic factors to enforce and appeal against decisions affecting their environment, such a restriction poses a hindrance to participation.

It has been argued that the underlying intention behind countries signing international treaties is to impact on national policies and actions.[525] The signed treaties are considered important and binding on that particular country. The question is: how does South Africa approach the Aarhus Convention which is not binding on the State? The question is answered by proposing that South African citizens legitimately expect that environmental decision-makers would be bound by the terms, spirit or purport of the Convention. South African environmental decision-makers are not limited by the non-existence of a legitimate expectation to take into consideration international environmental law in the decision-making processes.

525 See para 4.4.3.1 above.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

The incorporation of social, economic and environmental factors into planning, implementation and decision-making, by government, constitutes sustainable development. This is to make certain that development serves present and future generations. Development does not take place in isolation, but in areas where citizens live. Therefore, citizens should take part in decision-making concerning the kind of development that should take place in their areas. The findings reveal that government has created regulatory mechanisms for public participation rights in environmental law. Moreover, it has, to a great extent, successfully inserted participatory rights into broad, far-reaching environmental legislation, in moving towards democratic decision-making in environmental law. However, findings reveal that the majority of South African citizens are still far from enforcing their right to participation in environmental decision-making processes.

Significantly, it has been highlighted that public participation in environmental decision-making stems from the concept of democracy and is an important element of any democratic state. In South Africa, citizen participation is a

foundation laid by the Constitution which demands an open and transparent government. This mini-thesis has endeavoured to identify some of the major obstacles to public participation rights in environmental decision-making in South Africa. What follows are the conclusions made from the findings and thereafter, recommendation will be made.

5.2 Conclusion

5.2.1 The status of public participation in South Africa

The findings reveal that the history of South Africa's public participation is short, but showing a level of maturity. It is observed that environmental policies and legislation have made substantial changes in the context of environmental decision-making and the involvement of the public. Moreover, some citizens have taken advantage of the opportunities for participation that is offered by the Constitution. However, less attention has been given to the question of whether substantial changes have made the environmental decision-making processes more representative of democratic values, human dignity and the advancement of fundamental human rights.

The right to public participation in the processes of making environmental decisions is aimed both at improving the quality of decisions made and providing checks and balances on decision-makers. The system of checks

and balances prevents decision-makers, in the exercise or performance of their duties, from dominating outcomes of environmental decisions in the democratic South Africa. The basis of good quality decisions is founded on the right of the public, whether broad, representative or environmental interest group, to take part in environmental decision-making processes.

5.2.2 The manner of participation

How should the public exercise and achieve their right of access to participation in environmental decision-making processes? The achievement of the right of the public taking part in decision-making processes is dependent on the fulfilment of constitutional and legislative rights, which include the right to environmental information that is accessible to the public and stakeholders; right of the public; to make representations and submissions to the decision-making body; right of the public to request reasons for the decisions; right of the public to appeal against decisions that materially and adversely affect their environmental rights; and rights to have such decisions reviewed by a court of law.

However, findings show that it is difficult for the public to properly exercise this right. The majority of South African citizens are not aware of the right to environmental information. Where this right is violated, its limitation is not clearly defined, and its justification in terms of section 36 of the Constitution is

not straightforward. In addition, environmental information can be costly and discouraging to the public; it can also be time consuming. The public does not always have the same information as the decision-maker. Therefore, it is difficult to monitor participation during the EIAs where, for example, consultants are not appointed by a municipality for a proposed development of land not belonging to the latter.

It is difficult for the public to properly exercise the right to make representations. The prevailing philosophy behind most environmental Acts is that the process of making decisions is generally a matter between the regulator and the regulated. The result is that the public is excluded, even though before making any decision, the decision-maker is legally obliged to take into account all submissions made.

It is difficult for the public to exercise the right to participate in decision-making processes as some decision-makers are hesitant to give reasons, unless they are required by law. However, the recommendation is that giving reasons is a requirement for improved quality of environmental decision-making process. The importance of giving reasons is both a fair way of doing things and instils confidence in the public. Moreover, waste of time arguments can be countered in a manner that is contextual and flexible.

5.2.3 Persons to participate in decision-making processes

Who should be involved in, and influence, environmental decision-making? In South Africa, the major determinant of who should take part in, and influence environmental decision-making processes, is the socio-economic reality of its citizens. Therefore, to the extent that participation is conditioned by unequal and different interests, characteristics and the quality of life of South African citizens, the participatory democracy model and the representative democracy model, cannot succeed without overcoming structural and socio-economic barriers to participation. South African society has continued to be intensely divided between those with access to the resources of the country and those who remain poor and marginalised. The implementation and realisation of, not only public participation in environmental decision-making, but also democracy, remains a challenge. However, the balance of power in public participation is shifting from broad citizen participation to non-governmental environmental groups, which has increased participation rather than distorting it.

5.2.4 Lessons from international law

In South Africa, there is no specific legislation existing at present concerning access to public participation. However, South Africa can learn and adopt the approach and position of the European Communities, in which the

consultation and involvement of the public, by way of interaction between institutions and society, is the fulfilment of a legal duty. The results are the following: the quality of policy and decision outcome is likely to be improved; public participation of interested and affected parties is likely to be enhanced; listening to one side of the story by decision-makers is likely to be avoided; and a particular group getting privileged access to participation is likely to be prevented.

South Africa is obliged to take care of its own environmental interests in the protection of the environment. However, it must also take into account international guidelines when applying mechanisms that protect the environment. It is insufficient for South Africa to confine environmental governance, public participation and decision-making processes to the national level only. As such, South Africa is accountable, not only to its own citizens in terms of the Constitution, but also to the international community in terms of international law. The country has an internationally recognised obligation to respect, protect and fulfil its citizen's human rights, which includes participation in environmental decision-making. Therefore, the fulfilment of environmental rights in South Africa, as a result of ratification of international instruments, entails that the public participate in issues that affect the environment.

The Aarhus Convention is the most important agreement with regard to: the rights of access to information; public participation in decision-making; and access to justice in environmental matters. Although some of the provisions of the Convention are similar to that of South Africa,[526] the latter can learn from the good insight being developed within European Community environmental governance and structures. For instance, the South African public should have access to environmental information and be given an opportunity to comment on how to improve and sustain the environment. How should the public do this? In terms of the Rio Declaration, public participation, as a key element of all environmental assessment processes, means that Interested and affected parties must always be able to make inputs to the environmental assessment process and influence the decision-making process. Therefore, the public, especially the affected public, should be directly involved in the environmental management plan, with the aim of drawing attention to fundamental environmental issues, and identify appropriate mechanisms to deal with them. This may include their implementation thereof as suggested by the World Bank

In European Communities, disputes over access to environmental information and participation in environmental decisions, are resolved by impartial arbiters that include mediators, administrative courts and formal courts. This means that in terms of the Aarhus Convention, any person, or members of the public having a sufficient interest or whose rights have been affected will have

[526] See for example access to environmental information at para 4.4.1 above.

access to have decisions reviewed before a court of law provided in terms of national legislation. This mechanism is similar to that of South African legal system. However, the enforcement and appeal against environmental decisions are restricted to persons whose rights have been affected. In South Africa, the problem is that where affected persons are influenced by their socio-economic circumstances to enforce and appeal against decisions affecting their environment, such a restriction poses a hindrance to participation.

It has been argued that the underlying intention behind countries signing international treaties is to impact national policies and actions.[527] The signed treaties are considered important to that particular country. How does South Africa approach the Aarhus Convention which is not binding on the State? The question is answered by proposing that South African citizens expect that environmental decision-makers would be bound by the terms, spirit or purport of the Convention. South African environmental decision-makers are not limited by the non-existence of a legitimate expectation to take into consideration international environmental law in the decision-making processes.

5.3 Recommendations

The following recommendations are made:

527 See para 4.4.3.1 above.

- In promoting participation by the majority of citizens, priority must be given to those who are the poor and excluded from the mainstream society. Those advocating for broad participation in environmental decision-making, must be sensitive to the multi-dimensional character of South African society.

- Broad public participation in environmental decision-making must be perceived in line with an achievement of an overall improvement in the quality of life for all South African people. Moreover, interests of the public must be supported by socio-economic reforms. The courts are in a better position to settle disputes whether an environmental impact assessment should include socio-economic concerns.

- The outcomes of environmental decision-making processes should reflect the interests of the public in general, the interest of non-governmental stakeholders and the interests of government. In other words, the interests of all stakeholders in the decision-making processes should be reflected in the outcome of decision-making processes.

- In any environmental decision-making issue, decision-makers should identify individuals and groups as important stakeholders in decision-

making processes, not as a legal requirement, but as a requirement that promotes South African democratic values.

- Non-governmental environmental groups must be directly involved in coordinating environmental management and implementation plans, by providing input in the environmental impact assessments. Moreover, where necessary, they should assist persons who cannot take part in decision-making process, but would be adversely affected by the outcome of the decision.

- The public, especially non-governmental stakeholders should assist in identifying who the poor affected person or persons are. They should encourage the latter to be directly involved in the environmental management plan and implementation of these plans, with the aim of drawing attention to fundamental environmental issues. They should also assist them in identifying appropriate mechanisms to deal with these issues.

- Public participation and the environmental rights should be recognised as tools for the protection of the environment for the benefit of present and future generations. In South Africa, the legislative framework concerning access to public participation is section 4 of PAJA. However, South Africa should learn and adopt the approach and position of the European

Communities, in which the consultation and involvement of the public in environmental issues, by way of interaction between institutions and society, is the fulfilment of a legal duty.

- Without a specific legislation for public participation in South Africa, minimum requirements for any environmental decision-making are: access to environmental information by affected and interested persons; consultations with the public and access to administrative justice. Any decision-making process that does enhance not public participation of interested and affected parties, but promotes particular person or groups to have privileged access to participation, must be avoided.

- Since South Africa has an internationally recognised obligation to respect, protect and fulfil its citizen's environmental human rights, it should facilitate its environmental governance, public participation and decision-making processes by taking into consideration international instruments that promote the public to participate in decisions that affect the environment.

- Environmental rights enshrined in the Bill of Rights, in environmental legislation and legislation dealing with administrative justice must be interpreted to both aim at providing checks and balances between

administrative decision-makers and citizens and improve the quality of decisions.

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