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*A Comparative Survey of Procedures for Public  
Participation in the Lawmaking Process- Report for  
the National Campaign for People's Right to  
Information (NCPRI)*

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# *A Comparative Survey of Procedures for Public Participation in the Lawmaking Process*

## **Introduction**

In democratic societies, legislation has the power to effect great transformations if it is responsive to the needs of its poorest and most vulnerable sections. Too often, however, the lawmaking process is dominated by ministers pursuing their own agenda and technocratic civil servants and lawyers, all of whom combine to make the legislative process inaccessible to the general public. Deficiencies in the legislative process can negatively affect the quality of legislation- an empirical study of some developing-world countries suggests that their failure to enact legislation capable of transforming the social and economic order can be attributed in part to the disproportionate influence of the elite during the creation of a bill.<sup>1</sup> A transparent, fair, accountable and participatory legislative process is needed to enact laws that will bring about real change.

India has already taken the first important step towards open government by enacting the robust Right to Information Act in 2005. The National Advisory Council has also voiced the concerns of non-governmental organisations (NGOs) and successfully influenced policy and legislation in recent years. However, the reluctant constitution of a joint government-civil society to draft a strong anti-corruption Bill following Mr. Anna Hazare's campaign highlights the importance of strengthening and institutionalizing public participation in the legislative process in India more generally.

It is in this context that this report surveys the pre-legislative and legislative processes in different democratic countries around the world in order to outline a set of 'best practices' that will ensure the most fair, transparent and effective manner of enabling public participation. This report has been requested by the National Campaign for People's Right to Information (NCPRI), a platform of individuals and organisations committed to making Indian government more transparent and accountable. The NCPRI, along with the Press Council of India has been instrumental in framing the initial draft of the Right to Information Act. Concerned by the passage of legislation which systematically ignores public participation by disadvantaged sections of Indian society, the NCPRI wishes to build a broad-based campaign for more transparent pre-legislative processes, rooted in deeper consultations with citizens. In order to further this objective, NCPRI have requested from us a comparative survey of the mechanism for pre-legislative publication and scrutiny of bills and policies in other democratic jurisdictions, with particular emphasis on the following questions:

(a) Is prior publication of draft bills/policy papers required to inform citizens?

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<sup>1</sup> Ann Seidman, Robert Seidman, 'Beyond Contested Elections: The Processes of Bill Creation and the Fulfillment of Democracy's Promises to the Third World' 34 Harvard Journal on Legislation (Winter 1997).



- (b) Are consultations conducted with citizens during the preparation of draft bills and how does the government respond to public comments? Is it required to give reasons for rejecting suggestions?
- (c) Is there an institutionalized role for public bodies like Human Rights and Equality Commissions in pre-legislative scrutiny?
- (d) Are consultative requirements embodied in constitutional, statutory or non-binding instruments?
- (e) What disadvantages are faced by public authorities in jurisdictions with institutionalized consultative requirements?

This report aims to answer these questions. To begin with, it outlines the manner in which international law has recognized the right of public participation in the legislative process. Thereafter, it focuses on the by describing the public participation mechanisms in Canada (at the federal and provincial level), the European Union (EU), Switzerland, South Africa, the United Kingdom (UK) and the United States of America (USA). The aforementioned questions have been reorganized under the following five heads so that different aspects of the practice in these jurisdictions can be described in a structured manner..

The report begins with a section on obligations in international instruments like the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) in relation to public participation in the political process. Next, the report explains the following aspects of public participation in the legislative process in the jurisdictions under study.

#### **A. The Source of Obligations to ensure Public Participation**

These range from constitutional duties to facilitate public participation (South Africa, Switzerland) to statutory duties to invite and respond to comments from the public (agency rulemaking in the USA). In most jurisdictions, provisions for public participation in the legislative process are generally contained in parliamentary rules and standing orders that are adhered to as a matter of historical convention and precedent. Some countries also have strong policy commitments and guidance documents (Canada, the EU) to encourage public participation.

#### **B. The Types of Instruments for which Public Participation is Encouraged**

Public participation is encouraged at all stages of the legislative process, from policy papers (Green and White papers in the UK, recommendations and opinions in the EU) to draft bills and bills. There also exist procedures to facilitate public participation in the promulgation of delegated/subordinate legislation like rules and regulations (USA) and constitutional amendments (Switzerland).

### **C. The Manner of Facilitating Public Participation**

These include a wide array of procedures such as facilitating access to legislative records, publication of legal instruments in the print and electronic forms, conducting public hearings and consultations, incorporating comments from the public in the final version of bills and rules, providing reasons for rejecting their inclusion and empowering the judiciary to strike down rules adopted in violation of these reasons. The electronic medium in particular has great potential as a participatory tool and this report discusses online consultation processes in several jurisdictions.

### **D. The Groups/Entities Involved in Consultation**

Apart from provisions that exist to allow the general public to participate in the legislative process, there may be special procedures for specific groups, such as NGOs, industry representatives and constitutional/statutory bodies like Equality and Human Rights Commissions (UK, South Africa), the *Conseil d'État* (France) and the European Economic and Social Committee (EU)

### **E. The Practical Problems Hindering Effective Participation and the Drawbacks of Extensive Participatory Procedures**

Factors like the lack of education, inadequate access to information and the cost and infrastructure constraints of public bodies can impede the effective participation of the public in the legislative process. On the other hand, excessively rigorous participatory requirements can cause extensive delays and sometimes paralyse the legislative process altogether.

A discussion of these five aspects throws up interesting features of public participation mechanisms in the various jurisdictions. South Africa, with a constitutional duty to facilitate public participation and the jurisprudence of its Constitutional Court elaborating the scope of this duty undoubtedly has some of the strongest obligations in place to ensure public participation in the legislative process. Rivaling this are the detailed statutory requirements for public participation laid out in the US Administrative Procedure Act (APA) which governs the agency rulemaking process. This Act sets out exhaustively detailed participatory requirements, besides empowering the judiciary to set aside rules promulgated in violation of procedural obligations. Switzerland displays its commitment to direct democracy with constitutional provisions granting its citizens the right to initiate constitutional amendments. *Consulting with Canadians* and *Directgov* (UK), both online consultation portals, demonstrate how the electronic medium can enhance public participation.

These are only some examples of the most striking features of participatory processes in various jurisdictions. Other aspects are set out in greater detail in the next section of the report, which begins with a discussion of the status and content of participatory obligations in international law. At the end of the discussion on each jurisdiction, its key features are summarised. The report concludes with a recommendation of 'best practices'

that suggest ways of facilitating public participation through the lifecycle of the legislative process. These processes are set out as broad guidelines, bearing in mind the limitations of comparative law and the need to adapt foreign practices to local circumstances.

# International Human Rights Law

## A. Source of Obligation

International human rights law recognises a general right to political participation that extends beyond the right to vote in elections. This is reflected in Article 21 of the Universal Declaration of Human Rights (UDHR) which reads:

*‘Article 21*

*(1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.*

*...'*

*(3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.'*

Article 25 of the International Covenant on Civil and Political Rights<sup>2</sup> (ICCPR) gives this right further content:

*‘Article 25*

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

*(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;*

*(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors...'*

Similar provisions are found in regional instruments including the African Charter on Human and Peoples' Rights,<sup>3</sup> the American Convention on Human Rights<sup>4</sup> and the Inter-

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<sup>2</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

<sup>3</sup> African ('Banjul') Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58. Article 13(1) provides that *'[e]very citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.'*

<sup>4</sup> American Convention on Human Rights: 'Pact of San Jose, Costa Rica' (adopted 22 November 1969, entered into force 18 July 1978) 1114 UNTS. Article 23(1)(a) affords the right *'to take part in the conduct of public affairs, directly or through freely chosen representatives'*.

American Democratic Charter<sup>5</sup> as well as non-binding declarations such as the Harare Commonwealth Declaration.<sup>6</sup>

As the next sub-section demonstrates, the nature of the right is broad and open-textured. Consequently, there is no specific entitlement to pre-legislative participation. Instead, the United Nations (UN) Human Rights Committee has held that it is for the ‘legal and constitutional system of the State party to provide for the modalities of such participation.’<sup>7</sup>

## **B. Content of the Right**

The UN Human Rights Committee’s General Comments provide states with interpretative guidance to the rights contained in the ICCPR.<sup>8</sup> General Comment 25<sup>9</sup> on the Article 25 right to public participation outlines the following key features of the right:

- a) The right to take part in public affairs extends to all exercises of political power, including the exercise of legislative powers;<sup>10</sup>
- b) This participation can take two possible forms: direct participation or indirect participation through representatives (the General Comment does not clarify whether both forms of representation must be present in a political system or whether the presence of representative governance obviates the need for direct participation);
- c) Furthermore, citizens exercise their right to participation ‘through public debate and dialogue with their representatives.’<sup>11</sup>
- d) States must take ‘such legislative and other measures as may be necessary to ensure that citizens have an effective opportunity to enjoy’ the right to take part in political processes.<sup>12</sup>

Commentators argue that Article 25 must be interpreted as a ‘programmatic’ right, meaning that its content will evolve with the context and political values of each society:

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<sup>5</sup> Inter-American Democratic Charter (11 September 2001). Article 2 of the Charter provides that ‘[r]epresentative democracy is strengthened and deepened by permanent, ethical, and responsible participation of the citizenry within a legal framework conforming to the respective constitutional order.’

<sup>6</sup> Harare Commonwealth Declaration (1991). Article 4 of the declaration proclaims that the Heads of Government of Commonwealth Nations share a commitment to an ‘individual’s inalienable right to participate by means of free and democratic processes in framing the society in which he or she lives.’

<sup>7</sup> *Marshall v Canada*, Communication No 205/1986, UN Doc CCPR/C/43/D/205/1986 (1991) para 5.4.

<sup>8</sup> These General Comments merely assist states in clarifying the content of these rights, and are not binding law. However, they are highly persuasive authority and may, over time, become binding through their incorporation into customary international law.

<sup>9</sup> UNCCPR, ‘General Comment 25: The right to participate in public affairs, voting rights and the right of equal access to public service’ (1996) UN Doc CCPR/C/21/Rev.1/Add.7.

<sup>10</sup> *ibid* para 5.

<sup>11</sup> *ibid* para 8.

<sup>12</sup> *ibid* para 1.

*'[T]he right to public participation [should] be viewed as a programmatic right, one responsive to a shared ideal but to be realised progressively over time in different ways in different contexts through invention and planning that will often have a programmatic character.*

...

*As societies change through industrialisation or urbanisation, evolving relations between public and private sectors, reorganisation of political and economic life, ideological shifts – the content of the right must be open to experimental reformulation. The notion of what it requires of governments will change significantly with ongoing national experiences.'*<sup>13</sup>

As a consequence, it may be argued that in robust democracies with a strong culture of participation in public affairs, the Article 25 right imposes a duty to ensure participation in law-making processes. At the very least, it grounds a strong principled argument for the recognition of such an entitlement.<sup>14</sup> The manner in which different countries have given effect to this entitlement is discussed in subsequent sections.

International obligations to ensure public participation in the domestic sphere are different from provisions for public participation in international lawmaking processes themselves. The UN Charter provides for the latter. Thus, Article 71 of the UN Charter provides that the Economic and Social Council of the UN 'may make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence'. The relevant rules adopted by the Economic and Social Council (ECOSOC Resolution 1996/31) provide that NGOs granted consultative status may, in their dealings with subsidiary bodies of the Economic and Social Council, propose items for inclusion in the agenda (para. 33); attend as observers to public meetings (para. 35); circulate written statements (para. 36); and be allowed to make oral statements during meetings (para. 38).

As for international agreements which impose obligations on states to facilitate public participation at the municipal level, the United Nations Economic Commission for Europe (UNECE) Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters<sup>15</sup> is a pioneering international agreement that recognises that procedural and participatory rights are an integral component of human rights. This Convention imposes extensive duties on governments to ensure openness, public engagement, accountability and responsiveness in the environmental sphere.

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<sup>13</sup> HJ Steiner, 'Political Participation as a Human Right' (1988) 1 Harvard Human Rights Yearbook 77, 130-2.

<sup>14</sup> See the majority judgment of Ngcobo J in the South African Constitutional Court decision in *Doctors for Life International v Speaker of the National Assembly and Others* [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) (*Doctors for Life*) paras 90-109; see further the dissenting judgment of Yacoob J for scepticism about the status of pre-legislative public participation in international human rights law, paras 327-9.

<sup>15</sup> (Adopted on 25 June 1998, entered into force on 30 October 2001). The text of the convention is available at <http://www.unece.org/env/pp/documents/cep43e.pdf>

## South Africa

### A. Source of Obligations

#### *Constitutional provisions*

Legislative authority in South Africa is divided between the national Parliament (comprised of two Houses: the National Assembly and the National Council of Provinces), the nine provincial legislatures, and municipal councils. The South African Constitution<sup>16</sup> imposes a duty to facilitate public participation on each of these legislative authorities.

At the national and provincial level, sections 59(1)(a), 72(1)(a) and 118(1)(a) of the Constitution impose an identical obligation on the National Assembly (NA), the National Council of Provinces (NCOP) and the provincial legislatures to:

*'(a) facilitate public involvement in the legislative and other processes of the [Assembly / Council / legislature] and its Committees'*

The Constitution does not explicitly specify what type of public involvement is required. The exception is section 74 of the Constitution which sets out a detailed notice and comment procedure for constitutional amendments.

In addition, the national and provincial legislative authorities are empowered, in identical terms, to receive evidence or information. The legislative authority or its committees may:

- '(a) summon any person to appear before it to give evidence on oath or affirmation or to produce documents;*
- (b) require any institution or person to report to it;*
- (c) compel, in terms of national legislation or the rules and orders, any person or institution to comply with a summons or requirement in terms of paragraph (a) or (b); and*
- (d) receive petitions, representations or submissions from any interested persons or institutions.'*<sup>17</sup> *(emphasis added)*

At the local government level, municipalities are enjoined to 'encourage the involvement of communities and community organisations in the matters of local government.'<sup>18</sup> Municipal councils are explicitly required to publish by-laws for public comment. Section 160(4)(b) of the Constitution provides:

*'(4) No by-law may be passed by a Municipal Council unless -*  
...

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<sup>16</sup> Constitution of the Republic of South Africa, 1996.

<sup>17</sup> Section 56 (the National Assembly); section 69 (the National Council of Provinces) and s 115 (provincial legislatures).

<sup>18</sup> Section 151(1)(e).

*(b) the proposed by-law has been published for public comment.*

### **Judicial interpretation**

Since 2006, the Constitutional Court has given substantial attention to the section 59(1)(a), 72(1)(a) and 118(1)(a) duties to ‘facilitate public involvement’ in the ‘legislative and other processes’ of the national and provincial legislatures. In its landmark judgment in *Doctors for Life International v Speaker of the National Assembly*,<sup>19</sup> the Court held that these provisions provide a right and impose a duty to ensure public participation in the law-making process. If a legislative authority fails to comply with this duty in passing legislation, then that legislation is constitutionally invalid and may be struck down.

The Court held as follows:

- a) The constitutional duty to facilitate public involvement and the right to public involvement in legislative processes must be interpreted in light of the international law right to political participation, as enshrined in Article 25 of the ICCPR.<sup>20</sup>
- b) This constitutional duty contains two components:

*‘The first is the duty to provide meaningful opportunities for public participation in the law-making process. The second is the duty to take measures to ensure that people have the ability to take advantage of the opportunities provided.’<sup>21</sup>*

As a result, the legislative authorities must not only provide opportunities for participation (through notice and comment procedures, public hearings etc.), but are also under a duty to provide information and to build the public’s capacity for involvement:

*‘Public involvement in the legislative process requires access to information and the facilitation of learning and understanding in order to achieve meaningful involvement by ordinary citizens.’<sup>22</sup> (footnotes omitted.)*

- c) The legislative authorities have a wide discretion over the appropriate means for facilitating public involvement in the legislative process, allowing substantial room for flexibility and innovation.<sup>23</sup>
- d) However, they must act reasonably in carrying out this duty. The ‘reasonableness’ standard requires a case-by-case assessment, taking into account a range of factors:

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<sup>19</sup> *Doctors for Life International v Speaker of the National Assembly and Others* [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) (*Doctors for Life*).

<sup>20</sup> *ibid* paras 90-109.

<sup>21</sup> *ibid* para 129.

<sup>22</sup> *ibid* para 131.

<sup>23</sup> *ibid* para 145; see also *Matatiele Municipality and Others v President of the Republic of South Africa and Others* [2006] ZACC 12; 2007 (1) BCLR 47 (CC); 2007 (6) SA 477 (CC) (*Matatiele II*) para 67.



*'The nature and importance of the legislation and the intensity of its impact on the public are especially relevant. Reasonableness also requires that appropriate account be paid to practicalities such as time and expense, which relate to the efficiency of the law-making process. Yet the saving of money and time in itself does not justify inadequate opportunities for public involvement. In addition, in evaluating the reasonableness of Parliament's conduct, this Court will have regard to what Parliament itself considered to be appropriate public involvement in the light of the legislation's content, importance and urgency.'*<sup>24</sup>

- e) The failure to take reasonable steps to facilitate public involvement in passing legislation will result in its constitutional invalidity.

The Court has since decided a number of constitutional challenges to legislation on grounds of failure to facilitate public involvement.<sup>25</sup>

### **Statutes**

At the municipal level, the *Local Government: Municipal Structures Act*<sup>26</sup> and the *Local Government: Municipal Systems Act*<sup>27</sup> set out the requirements for public participation in a range of local government affairs, including the making of by-laws.<sup>28</sup>

### **Rules and Standing Orders**

At the national level, the Rules of the National Assembly, the Rules of the National Council of Provinces and the Joint Rules of Parliament regulate public participation procedures. They provide for the following general procedures:

- a) Before an ordinary bill<sup>29</sup> may be introduced in the NA or the NCOP, prior notice of the bill must be published in the *Government Gazette* (including an explanatory summary or a draft version of the bill) which must, in most cases, include an invitation for public comment,<sup>30</sup>

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<sup>24</sup> *Doctors for Life* (n 21) para 128.

<sup>25</sup> See *Matatiele II* (n 25); *Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others* [2008] ZACC 10; 2008 (10) BCLR 969 (CC); 2008 (5) SA 171 (CC) (*Merafong*); *Poverty Alleviation Network and Others v President of the Republic of South Africa and Others* [2010] ZACC 5; 2010 (6) BCLR 520 (CC) (*Poverty Alleviation Network*).

<sup>26</sup> 117 of 1998.

<sup>27</sup> 32 of 2000. See Chapter 4: Community Participation.

<sup>28</sup> See Centre for Public Participation, 'Public Participation and Local Governance' (2007), available at [http://www.cpp.org.za/main.php?include=publications/main.html&menu=\\_menu/pubs.html&title=Publications](http://www.cpp.org.za/main.php?include=publications/main.html&menu=_menu/pubs.html&title=Publications) (last accessed 5 March 2011).

<sup>29</sup> Ordinary bills are all bills that are not money bills or constitutional amendments. See sections 75 and 76 of the Constitution.

<sup>30</sup> Rule 241 of the NA Rules 6<sup>th</sup> ed (2008) provides, in relevant part:

(1) A bill may be introduced in the Assembly only if—  
...  
(b) prior notice of its introduction has been given in the Gazette;  
and

- b) The relevant legislative committees may then consider further submissions, call for oral submissions, stage public hearings or initiate additional public participation measures;<sup>31</sup>
- c) The public is afforded a general entitlement to attend legislative proceedings and committee meetings and to access information on these proceedings, subject to reasonable and justifiable restrictions.<sup>32</sup>

At the provincial level, the individual legislatures have devised their own rules and procedures for public participation. There is a great degree of variation between these rules. Most notably, the Eastern Cape Provincial Legislature's Standing Orders provide detailed, binding requirements for public participation. Rule 32 of the Standing Orders provides:

*'32.1 The Legislature and its committees must facilitate public involvement in its legislative and other processes through implementing the following –*

*...*

*32.1.2 conducting public hearings on all provincial bills, except money and technical bills;*

*32.1.3 conducting public hearings on important national bills;*

- 
- (c) an explanatory summary of the bill, or the draft bill as it is to be introduced, has been published in the Gazette.*
  - (2) If the bill as it is to be introduced is published, the notice referred to in Subrule (1)(b) must contain an invitation to interested persons and institutions to submit written representations on the draft legislation to the Secretary within a specified period.*
  - (3) If the draft bill itself is published, a memorandum setting out the objects of the bill must also be published.*
  - ...*
  - (5) Subrule (1) (b) and (c) does not apply to a bill that has been certified by the member in charge of the bill, in consultation with the Speaker, as an urgent matter.'*

Rule 186 of the NCOP Rules 9<sup>th</sup> ed (2008) provides:

- “(1) A ... Bill ... may be introduced in the Council only if -*
  - (a) prior notice of its introduction has been given in the Gazette; and*
  - (b) an explanatory summary of the Bill, or the draft Bill as it is to be introduced, has been published in the Gazette. The draft Bill itself, as it is to be introduced must be published if the Chairperson of the Council so orders.*
- (2) The notice referred to in subrule (1)(a) must contain an invitation to interested persons and institutions to submit written representations on the draft legislation to the Secretary within a specified period.*
- (3) The Council committee or member intending to introduce the Bill must consult the Chairperson on whether the draft Bill itself or an explanatory summary should be published.'*

<sup>31</sup> Rule 32 of the Joint Rules of Parliament 4<sup>th</sup> ed (2008); Rule 138 of the NA Rules; Rule 103 of the NCOP Rules.

<sup>32</sup> Sections 59, 72 and 118 of the Constitution; Rule 157 of the NA Rules; Rules 6 and 52 of the Joint Rules; Rules 5 and 114 of the NCOP Rules.

32.1.4 receiving and attending to petitions of the public; and  
32.1.5 educating the public on their role in the Legislature

32.2 *The Legislature and its committees must consider all comments and inputs received from the public.*'

This provision gives great clarity to the provincial legislature's section 118 constitutional duties by requiring mandatory public hearings for most provincial bills, requiring public hearings on 'important national bills' and imposing an explicit duty to consider all public comments.

### ***Developing Practice***

Over the past decade the national and provincial legislative bodies have established dedicated offices to coordinate their public participation functions and public education programmes.<sup>33</sup>

## **B. Types of Instruments**

### ***Policy Documents***

There is no express requirement for public consultation or participation in the drafting of Green Papers (discussion) and White Papers (policy). However, section 195(1)(e) of the Constitution enshrines the principle that 'the public must be encouraged to participate in policy-making' as one of the 'democratic principles' governing the public administration. Furthermore, in the light of the *Doctors for Life* reasonableness test, it may be argued that legislation that has a significant impact on the public must involve public participation from its conception. In practice, the executive does engage in extensive consultation with experts, NGOs and the public in the process of drafting its pre-legislative policy documents.<sup>34</sup>

### ***Draft Bills and Bills***

As noted above, the Parliamentary Rules require the publication of a notice of intention to introduce a bill in the *Government Gazette* before it may be tabled in the NA or the NCOP. This notice will usually include an invitation to submit written submissions on the draft bill. Further participation procedures will generally be conducted by the relevant legislative committees.

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<sup>33</sup> See for example the webpage of the KwaZulu-Natal Province Public Participation and Petitions Division, available at <http://www.kznlegislature.gov.za/Default.aspx?tabid=91> (last accessed 12 March 2011).

<sup>34</sup> Institute for Democracy in Africa (IDASA) 'The Role of the Executive' in *A People's Government, the People's Voice: A Review of Public Participation in the Law and Policy-Making Process in South Africa* (2001), available at [http://www.parliament.gov.za/live/content.php?Item\\_ID=302](http://www.parliament.gov.za/live/content.php?Item_ID=302) (last accessed 1 March 2011).

The nature and extent of public participation procedures will depend on the nature of the bill. The Constitution classifies bills into four categories: ordinary bills not affecting the provinces,<sup>35</sup> ordinary bills affecting the provinces,<sup>36</sup> constitutional amendment bills<sup>37</sup> and money bills.<sup>38</sup> The Constitution and the relevant Parliamentary Rules provide for different voting procedures for each of these bills that necessitate different degrees of public participation at the national and provincial level.

### ***Delegated / subordinate Legislation***

Public participation is also required in the adoption of delegated legislation. This involves lawmaking by the Executive (involving the issuing of regulations, proclamations, rules, orders, declarations, directives, decrees or schemes) where so empowered by statute. However, the precise source of this obligation is presently unclear in South African law. In *Minister of Health v New Clicks*<sup>39</sup> the Constitutional Court failed to reach consensus on whether the making of subordinate legislation is appropriately classified as administrative action or non-administrative action. If classified as administrative action, then it would be subject to the detailed public consultation requirements under section 4 of the Promotion of Administrative Justice Act.<sup>40</sup> If it is not administrative action, Sachs J suggests that it would still be subject to public consultation requirements. In his minority judgment, he argues that the Constitution contains an implied duty to engage in transparent public participation procedures in making subordinate legislation.<sup>41</sup>

## **C. Manner of Facilitating Public Participation**

The Constitutional Court has emphasised that the legislative authorities have a broad discretion over the appropriate form of public participation in each case, subject to the requirement that the measures adopted must be reasonable.

### ***Notice and comment procedures***

As noted above, bills must be published together with an invitation for public submissions before they may be introduced in the various legislative bodies. Submissions will usually be in writing, however oral submissions may also be permitted.

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<sup>35</sup> Section 75 of the Constitution.

<sup>36</sup> Section 76. For a brief overview of the different voting requirements applicable to bills affecting provinces see *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others* [2010] ZACC 10; 2010 (6) SA 214 (CC); 2010 (8) BCLR 741 (CC) paras 65-7.

<sup>37</sup> Section 74.

<sup>38</sup> Section 77.

<sup>39</sup> *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* [2005] ZACC 14; 2006 (8) BCLR 872 (CC); 2006 (2) SA 311 (CC).

<sup>40</sup> 3 of 2000. Section 4 provides that the administrator may decide to hold a public inquiry or public hearing, initiate a notice and comment procedure or conduct any other procedurally fair process.

<sup>41</sup> *Minister of Health v New Clicks* paras 628 to 629.

The Joint Task Team on Legislative Process in Parliament suggests that oral submissions should be entertained:

- where the written comments are unclear;
- to accommodate those groupings who for various reasons are unable to submit written comments; or
- where the proposed legislation affects people residing in a specified geographical area within the Republic.<sup>42</sup>

### ***Other Submissions***

The Constitution and the relevant rules and standing orders empower the legislative authorities and their committees to call on individuals or institutions to give evidence or reports.<sup>43</sup>

### ***Public hearings***

Legislative bodies and their committees may initiate public hearings. The Joint Task Team suggests that public hearings should usually be conducted in Parliament or the provincial legislatures except where matters are of ‘extreme interest’ or where ‘specifically located communities are affected’.<sup>44</sup>

### ***Additional public participation procedures***

In *Matatiele II*, the Constitutional Court emphasised that the legislative authorities have the discretion to develop new public participation procedures that, in time, ‘may well go beyond any formulaic requirement of notice or hearing.’<sup>45</sup> At present, additional opportunities for participation are provided through:

- National and provincial legislatures’ public participation offices;
- Access to constituency offices;
- Consultations with individual MPs;
- Parliamentary ‘roadshows’ and workshops.<sup>46</sup>

### ***Access to information***

In addition to the gazetting of draft legislation and invitations for public comment, information on draft legislation and calls for public participation are distributed through newspapers, radio, television and the internet. All legislative proceedings, documents and

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<sup>42</sup> Joint Task Team on the Legislative Process in Parliament, ‘Reviewing the Legislative Process in Parliament’ (2008) para 55(1), see [http://www.parliament.gov.za/live/content.php?Category\\_ID=120](http://www.parliament.gov.za/live/content.php?Category_ID=120) (last accessed 10 March 2011).

<sup>43</sup> See (n 19).

<sup>44</sup> *ibid* para 55(3).

<sup>45</sup> *Matatiele II* (n 25) para 67.

<sup>46</sup> IDASA ‘Appendix Four’ in *A People’s Government* (n 36).

submissions are open to the public, subject to reasonable limitations.<sup>47</sup> Citizens and NGOs may also submit requests for information in terms of the Promotion of Access to Information Act.<sup>48</sup> The Act gives effect to the section 32 constitutional right of access to all information held by the state or private bodies that is required for the exercise or protection of rights.

### ***Duty to consider representations***

The Constitutional Court has emphasised that legislative bodies are under a duty to consider submissions received in public participation processes. However, in *Merafong* the Court stressed that meaningful public participation does not entail that the public's submissions must be reflected in the final legislation. Van der Westhuizen J held that:

*“[B]eing involved does not mean that one’s views must necessarily prevail. There is no authority for the proposition that the views expressed by the public are binding on the legislature if they are in direct conflict with the policies of Government. Government certainly can be expected to be responsive to the needs and wishes of minorities or interest groups, but our constitutional system of government would not be able to function if the legislature were bound by these views.”<sup>49</sup>*

However, the Court was quick to qualify these remarks, stressing that reasonableness requires proper engagement with opposing views:

*‘To say that the views expressed during a process of public participation are not binding when they conflict with Government’s mandate from the national electorate, is not the same as cynically stating that the legislature is not required to keep an open mind when engaging in a process of that kind. Public involvement cannot be meaningful in the absence of a willingness to consider all views expressed by the public.’<sup>50</sup>*

This approach was endorsed in *Poverty Alleviation Network* where Nkabinde J held that:

*‘Although due cognisance should be taken of the views of the populace, it does not mean that Parliament should necessarily be swayed by public opinion in its ultimate decision. Differently put, public involvement and what it advocates do not necessarily have to determine the ultimate legislation itself.’<sup>51</sup>*

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<sup>47</sup> See (n 34).

<sup>48</sup> 2 of 2000.

<sup>49</sup> *Merafong* (n 27) para 50.

<sup>50</sup> *ibid* para 51.

<sup>51</sup> *Poverty Alleviation Network* (n 27) para 62.

## **D. Groups /Entities involved in Consultation**

### ***Public***

The public at large is owed a duty and has the right to participate in the law-making process. However, certain individuals or groups may have a stronger claim to participate, depending on the potential impact of the proposed legislation. In *Matatiele II* the Constitutional Court emphasised that:

*'The more discrete and identifiable the potentially affected section of the population, and the more intense the possible effect on their interests, the more reasonable it would be to expect the legislature to be astute to ensure that the potentially affected section of the population is given a reasonable opportunity to have a say.'*<sup>52</sup>

In *Poverty Alleviation Network* the Court clarified this principle, holding that it does not afford 'discrete and identifiable' groups a right to participate in public hearings to the exclusion of other groups:

*'Properly understood, the statement does not appear to advocate that when seeking to involve an identifiable and discrete group, participation of only this group, to the exclusion of all others, is required. What it indicates, I consider, is that the group must be afforded a reasonable opportunity to participate meaningfully in the law-making processes.'*<sup>53</sup>

### ***Non-Governmental Organisations***

The general reasonableness requirement may also require legislative authorities to actively seek and to give special weight to the submissions of experts or NGOs with unique insight into the subject matter of the legislation.

### ***Statutory / Constitutional Institutions***

A special role is envisaged for the so-called 'Chapter 9' institutions. These are independent institutions established under Chapter 9 of the Constitution which are tasked with strengthening constitutional democracy. They include the Human Rights Commission, the Commission for Gender Equality and the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities. These institutions are empowered to 'monitor, investigate, research,

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<sup>52</sup> *Matatiele II* (n 25) para 68.

<sup>53</sup> *Poverty Alleviation Network* (n 27) para 53.

educate, lobby, advise and report on issues' relevant to their mandates.<sup>54</sup> This role includes making submissions on proposed legislation.<sup>55</sup>

Given this role, legislative authorities may be obliged to seek out and to give special weight to these submissions. Furthermore, these institutions are likely to play an increasing role in monitoring the adequacy of public participation procedures.<sup>56</sup>

### **E. Practical Problems with the Implementation of Participatory Procedures**

Despite the progress made in developing participatory procedures, public participation is hampered by three primary factors: problems of political will, capacity and access.

#### ***Political will***

Prior to the 2006 judgment in *Doctors for Life*, there was widespread inertia in implementing effective public participation procedures.<sup>57</sup> While there has been substantial progress since then, concerns remain over the effectiveness of these procedures in generating meaningful participation. There is a widespread perception that these processes are used as 'rubber-stamping' exercises that are unresponsive to public opposition, as is evidenced in the complaints raised by the litigants in *Merafong*<sup>58</sup> and *Poverty Alleviation Network*.<sup>59</sup>

#### ***Capacity constraints***

The legislative authorities often lack the resources and human capacity to initiate effective public participation, information distribution and education campaigns. For example, a 2005 study of public participation in the Gauteng Provincial Legislature (South Africa's most prosperous and densely populated province) revealed that the Public Participation Unit had only eight staff members, with two staff members responsible for all public education campaigns in the province.<sup>60</sup>

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<sup>54</sup> Sections 184(2); 185(2) and 187(2) of the Constitution.

<sup>55</sup> Section 7 of the Human Rights Commission Act, 54 of 1994; Section 11(1)(c) of the Commission on Gender Equality Act, 39 of 1996; section 5(1)(i) of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities Act, 19 of 2002.

<sup>56</sup> The Human Rights Commission has often been called on to monitor pre-legislative public participation, as is reflected in reports submitted to the Constitutional Court in *Poverty Alleviation Network* (n 25) para 26ff.

<sup>57</sup> IDASA 'Section 3: A Review of Current Practice in the Legislatures' in *A People's Government* (n 36).

<sup>58</sup> *Merafong* (n 27) paras 46-50.

<sup>59</sup> *Poverty Alleviation Network* (n 27) paras 59-63.

<sup>60</sup> MJ Mafunisa and KJ Maphunye, *Public Participation In Decision-Making In The Gauteng Provincial Legislature* (Human Sciences Research Council, 2005) 33 [http://www.hsrc.ac.za/Research\\_Publication-18684.phtml](http://www.hsrc.ac.za/Research_Publication-18684.phtml) (last accessed 2 March 2011).



## *Access*

Problems of access remain the most substantial challenge to effective public participation. South Africa's substantial socio-economic inequalities coupled with the historical exclusion of the majority of South Africans from formal political processes create significant barriers to effective public participation:

*'Very often, it is only the business sector and organised civil society, that has the access to information and resources required to firstly know that relevant legislation is on the cards, understand the complex and intimidating legislative process and language, formulate a submission and deliver it – all within a limited period of time, often only three weeks or less, particularly in the case of NCOP proceedings.*

*As a result, this culminates in the main in NGOs speaking on behalf of community groups, with concerns about the representivity of their views or accountability to these communities. Exacerbating this problem, inadequate information is made available to the public on the legislature's agenda and programme, which is poorly advertised. Public hearings are held in the main in major city centres, and are often also poorly advertised and attended.<sup>61</sup>*

It is possible to isolate six primary barriers to access:

- a) **Problems of physical access.** Most public hearings are held in Parliament or the provincial legislatures which are largely inaccessible to the poor and those from rural areas. However, legislative authorities are increasingly taking greater steps to hold public hearings in communities or to provide transport to those wishing to take part.
- b) **Lack of effective information.** Despite efforts to use the media more effectively, information on pending legislation and opportunities for public participation is often severely limited.
- c) **Insufficient public education.** In a study conducted in 2000, approximately nine out of ten South Africans surveyed reported that they had little or no understanding of national policy- and law-making processes.<sup>62</sup> Despite increasing public education efforts over the last decade, anecdotal evidence suggests that public ignorance of legislative processes and opportunities for public participation remains high.
- d) **Language barriers.** Despite the constitutional recognition of 11 official languages, English remains the primary language of government. This potentially

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<sup>61</sup> J Hicks, *Government Mechanisms for Public Participation: How effective are they?* (Centre for Public Participation, 2003), available at [http://www.cpp.org.za/main.php?include=docs/2003/govt\\_mech.html&menu=menu/pubs.html&title=Publications](http://www.cpp.org.za/main.php?include=docs/2003/govt_mech.html&menu=menu/pubs.html&title=Publications) (last accessed 4 March 2011).

<sup>62</sup> M Roefs and I Liebenberg 'Public participation in South Africa as we enter the 21st century' in Y Muthien, M Khosa and B Magubane (eds.) *Democracy and Governance Review: Mandela's Legacy 1994-1999* (Human Sciences Research Council, 2000) 279, 283, available at [http://www.hsrc.ac.za/Research\\_Publication-3946.phtml](http://www.hsrc.ac.za/Research_Publication-3946.phtml) (last accessed 12 March 2011).

- excludes a large range of language groups. In addition, the technical language used in legislation and legislative processes is a further barrier to participation.<sup>63</sup>
- e) **Skills for public participation.** Mafunisa and Maphunye note that skills required for effective public participation such as public speaking and community organisation are unevenly distributed and insufficiently developed.<sup>64</sup>

### Key Features

- Constitutional duty to facilitate public participation at the national, provincial and municipal levels
- Duty interpreted by the Constitutional Court to include the responsibility to build public capacity for involvement and to accord appropriate weight to comments from the public
- Courts may strike down as invalid legislation which has been passed without properly observing participatory procedures
- Legislative authorities empowered to receive petitions
- Parliamentary rules provide for the publication of bills in the Government Gazette before introduction. Publication is accompanied by an invitation for public comment
- In addition to oral and written submissions before legislative committees and public hearings, public participation is facilitated by setting up public participation offices, increasing access to constituency offices and conducting parliamentary roadshows
- By-laws may not be passed unless they have first been published for public comment
- Constitutional bodies like the Human Rights Commission and the Commission for Gender Equality are empowered to make submissions on legislation and special weight may be accorded to such submissions

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<sup>63</sup> Mafunisa and Maphunye, *Public Participation in Gauteng* (n 62) 32.

<sup>64</sup> *ibid.*

## Canada

### A. Source of Obligations

Government policy becomes law via a three- step process-

- (a) the Cabinet stage,
- (b) the Parliamentary stage,
- (c) the 'entering into force' stage.

The decision to address a matter through a bill or regulation is made by the Cabinet at the first stage, on the basis of information developed by the relevant Minister's departmental officials. To gather this information, the department should, amongst other things, engage in consultation with those who have an interest in the matter, including other departments that may be affected by the proposed solution.

#### *Permission to Consult*

Unlike South Africa, which has a constitutional duty to facilitate public participation, in Canada, permission to consult must be obtained from either the Cabinet or the Prime Minister depending upon the type of draft bill involved.

The Cabinet Directive on Law-making<sup>65</sup> lays down that as soon as is feasible, after the Cabinet has determined that a bill is to be introduced as part of its legislative programme, the responsible department should arrange for the submission of a Memorandum to the Cabinet (MC). An MC should address the type of public consultation, if any, that the sponsoring Minister has held or expects to hold and should specify whether the Minister intends to consult on the basis of the draft bill. By tradition, draft bills have been treated with strict confidence before being introduced in Parliament. However, in keeping with the Government's commitment to openness and consultation, sponsoring Ministers may wish to consult on the basis of draft bills. This consultation is intended to ensure that bills take into account the views of those concerned; however, it must not pre-empt Parliament's role in passing bills, nor must it arm the party consulted with an unfair economic advantage. Therefore, if a draft bill is intended to be used in consultation before it is tabled in Parliament, the MC should state such intention and request the Cabinet's agreement.

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<sup>65</sup> Guide to making Federal Acts and Regulations: Cabinet Directive on Law-making, available at <http://www.pco-bcp.gc.ca/index.asp?lang=eng&page=information&sub=publications&doc=legislation/cabdir-dircab-eng.htm> (last accessed 26 March 2011).

This Directive sets out the objectives and expectations of the Cabinet in relation to the law-making activities of the Government. Departmental officials involved in these activities are expected to be aware of the Directive and to follow the instructions it contains.

In the case of a draft bill involving changes to the machinery of government, the approval to consult should generally be sought in a letter to the Prime Minister from the sponsoring Minister.<sup>66</sup>

### ***Statutes***

At the federal level, Parliament, comprising the Senate and the House of Commons, derives its authority to summon witnesses, administer oaths and examine them before committees from sections 10-13 of the Parliament of Canada Act, 1985.

At the provincial level, to give one example, this authority is vested in the Saskatchewan legislature by sections 34-37 of The Legislative Assembly and Executive Council Act, 2007. The latter provisions also empower the Legislative Assembly of Saskatchewan to ask witnesses to produce documents necessary for deliberation. In most other provinces, committee proceedings of this sort are governed by the rules and standing orders of the legislative assemblies.

### ***Rules and Standing Orders***

Standing orders govern the legislative process of the House of Commons, including committee proceedings, at which stage witnesses may appear to present their views and answer members' questions.<sup>67</sup> Once the witnesses have been heard, the committee proceeds to study the bill clause-by-clause.

Similar rules, procedures and standing orders govern such committee proceedings in the provincial legislative assemblies as well.<sup>68</sup> The Rules, Orders and Forms of Proceeding of the Legislative Assembly of Manitoba set it apart from the rest of the provinces in relation to public hearings at the committee stage of legislation. While legislation *may* go to a committee in the other provinces, this process is *mandatory* in Manitoba.<sup>69</sup>

### ***Policy/Guidelines***

The strength of the policy commitment towards public consultation is witnessed in the Department of Justice's Policy Statement and Guidelines for Public Participation.<sup>70</sup> It is a

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<sup>66</sup> *ibid.*

<sup>67</sup> Most bills are referred to the standing committee whose mandate most closely corresponds to the bill's subject matter after its first and second readings. The House may also choose to refer a bill to a legislative committee- a distinct type of committee created solely to examine legislation, review the text of a bill, approve or modify it and sometimes even to propose and introduce a bill before the House. It is an *ad hoc* committee and ceases to exist once it presents its report to the House.

<sup>68</sup> See the Rules and Procedures of the Legislative Assembly of Saskatchewan, available at <http://www.legassembly.sk.ca/publications/docs/Rules%20and%20Procedures%20-%20English.pdf> and the Rules and Forms of Procedure of the House of Assembly of Nova Scotia, available at <http://nslegislature.ca/legc/rules.htm> (last visited 27 March 2011).

<sup>69</sup> Emily Katherine Grafton, 'Canadian Study of Parliament Group- Manitoba Legislative Assembly' (2006-2007), available at [http://www.studyparliament.ca/English/pdf/Manitoba\\_Grafton%20May%202010-%20final.pdf](http://www.studyparliament.ca/English/pdf/Manitoba_Grafton%20May%202010-%20final.pdf) (last visited 27 March 2011).

policy tool that enables Department of Justice managers and officials to frame the Department's public participation activities. It outlines a commitment on the part of the Department to involve Canadians in the development of legislation, policies, programmes and services through adequately resourced processes that are transparent, accessible, and accountable, supported by factual information, and are inclusive of Canada's diversity.

The Department must ensure that public participation activities as a part of the policy making process are open, meaningful, timely and adequately resourced. Determining the policy areas that will include a public participation component is the responsibility of the appropriate departmental authority. At a minimum, the Department must ensure the transparency of its policy development process through the timely provision of information and accountability through reporting to citizens on results and how their views have been considered in the decision-making process.

The Guidelines also define the roles of some key functionaries in facilitating the process of public consultation.

- (a) **Minister of Justice and Attorney-General.** Uses the results of public participation processes to make decisions on policy and legislative directions affecting the justice sector.
- (b) **Deputy Minister.** Must ensure that public participation is an integral part of the design, delivery, and evaluation of public policies, programs, and services. Also responsible for ensuring that the outcomes of departmental public participation processes are integrated into the decision-making processes, and that these processes are evaluated.
- (c) **Sector, Branch and Divisional Heads.** They must determine which issues require public participation processes, besides planning, undertaking, and evaluating public participation initiatives. They must also collaborate within the department and, where required, between federal departments and agencies and other levels of government.
- (d) **Consultations Unit, Intergovernmental and External Relations Division.** It provides advice and support for the development of consultation plans and strategies. The Unit is also responsible for ensuring that adequate training opportunities are available for departmental officials and for maintaining a database of key justice sector participants and contacts.
- (e) **Regional Office Heads (including the regional offices of the National Crime Prevention Centre)** They may be called to assist in the execution of public participation initiatives in the regions, and when appropriate, suggest how collaboration could be achieved with other levels of government within their region.
- (f) **Communications Branch.** It is responsible for the provision of communications support for departmental public participation activities.
- (g) **Evaluation Division.** It carries out independent assessments of the Department's public participation processes and provides advice and assistance to managers on

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<sup>70</sup> Available at <http://www.justice.gc.ca/eng/cons/pol.html> (last accessed 27 March 2011).

- self-evaluations, performance measures and results reporting relating to these public participation activities.
- (h) **The Privy Council Office (PCO), the Treasury Board Secretariat (TBS) and Canadian Centre for Management Development (CCMD).** These entities have also been given particular responsibilities to promote and support a consultative culture across the federal government and in the public service.

The Policy Statement notes that public participation is best used where the issues and timeframes permit the early inclusion of citizens in the policy development process — preceding, where possible, the selection of options and decisions concerning plans for action. Thus, it operates with the underlying idea that public participation involves a two-way communication process, in which all parties listen and contribute views, information and ideas, in a process of critical reflection and dialogue.

## **B. Types of Instruments**

### ***Policy Documents***

As the previous section on the Policy Statement of the Department of Justice indicates, the requirement of public participation in Canada is not to be confined only to legal instruments like bill and regulations, but should extend to various policies, programmes, services and plans.

### ***Draft Bills***

As described earlier, draft bills in Canada have traditionally not been discussed with the public before their introduction in Parliament- a bill before tabling used to be considered a Cabinet confidence. However, the Cabinet Directive on law-making issued in March 1999, made draft bills the subject of consultative processes.<sup>71</sup> Now, if a draft bill is intended to be used in consultation before it is tabled in Parliament, the MC should state such intention and request the Cabinet's agreement. In the case of a draft Bill involving changes to the machinery of government, the approval to consult should generally be sought in a letter to the Prime Minister from the sponsoring Minister.

### ***Bills***

Once bills have been introduced in Parliament or the Legislative Assembly, public participation is facilitated at the committee stage both at the federal and provincial levels respectively.

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<sup>71</sup> Privy Council, Cabinet Directive on Law-Making, March 1999.

## C. Manner of Facilitating Public Participation

### *Notice and Comment/ Access to Information*

Pre-publication in Part I of the *Canada Gazette* allows interested groups and individuals, and Canadians in general a final opportunity to review and comment on a proposed regulation at the last stages of the regulation-making process, before it is enacted and published in Part II of the *Canada Gazette*. It also enables them to see whether the final draft is in keeping with previous consultation drafts.<sup>72</sup>

Information is also provided by publication of relevant legislative documents and proceedings in a variety of media. For example, in Manitoba, all the legislative proceedings are made available to the public via *Hansard*, a verbatim transcript of House debates. Sittings are also filmed and broadcast within the Legislative Building. These broadcasts have been made available to the public since 1979, while *Hansard* and sessions of the House are now available on the internet.

### *Online Consultation*

Government of Canada consultations can be accessed through the Government of Canada Consultation Portal, *Consulting with Canadians*.<sup>73</sup> This Consultation Portal provides a list of links to departmental consultation activities and to related information; an example of the format of which is given below.

#### *Department of Citizenship and Immigration*

*Proposed Regulations: Regulations Amending the Immigration and Refugee Protection Regulations*

*RIAS: Regulatory Impact Analysis Statement*

*Date of publication: Saturday, February 26, 2011*

*Number of days for comments: 15 days (Until March 13, 2011)*

*Contact: Heidi Smith*

*Consulting with Canadians* provides a single-window access to a list of consultations from selected government departments and agencies. It provides a structured, single-point of access to online and offline consultations. Consultations listed on this site are updated regularly by participating government departments and agencies.

Key features of the *Consulting with Canadians* site include:

- (a) Current Consultations
  - A list of current consultations under way across participating government departments and agencies
- (b) Past Consultations

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<sup>72</sup> Available at <http://www.gazette.gc.ca/consult/consult-eng.html> (last visited 27 March 2011).

<sup>73</sup> *Consulting with Canadians*, <http://www.consultingcanadians.gc.ca/cpcPubHome.jsp?lang=en> (last visited 27 March 2011).

- A selection of consultations that are now finished, including links to background information and reports, where available
- (c) Consultations can be viewed by
- Title
  - Subject
  - Participating Department or Agency
- (d) Consultations Calendar
- An at-a-glance view of when consultations are scheduled to take place
- (e) Search
- It can be used to find a consultation listed by Title, Subject, or Department or Agency.

*Consulting with Canadians* has three key objectives:

- (a) To enhance public awareness of government consultation activities;
- (b) To provide opportunities for Canadians to participate in government consultations, both online and offline;
- (c) To develop the government's capacity for engaging Canadians online and improve management of government consultations across departments.

As the example shows, each Consultation listing contains the contact information for the department or agency holding the Consultation to allow people who have a question concerning a specific Consultation to directly contact the department or agency. Consultations are created and controlled by their individual departments and agencies. Each Consultation will have its own method for submitting comments and questions.

Consultations also take place online at the provincial level. For instance, in New Brunswick, draft regulations are available for public review and input as a part of government efforts to increase transparency.<sup>74</sup> The draft regulations have been posted publicly (online) to provide individuals and organizations an opportunity to give feedback on the proposed law. Upon consideration of the feedback, decisions are made regarding changes, if any, that are required before the regulation becomes law. Unless significant changes result in major alterations to the draft regulations, the final version of the text will not be re-posted for comment prior to becoming law. The Nova Scotia Legislature also encourages public participation by raising awareness through the use of social media like Twitter and the filing of petitions.<sup>75</sup> Similarly, in Quebec, the National Assembly has an innovative online submissions feature that allows citizens to track all pending legislation and to make online comments.<sup>76</sup> These comments are then delivered to the relevant members of the National Assembly for their consideration.

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<sup>74</sup> Available at [http://www2.gnb.ca/content/gnb/en/corporate/public\\_review\\_ofdraftregulations.html](http://www2.gnb.ca/content/gnb/en/corporate/public_review_ofdraftregulations.html) (last accessed 27 March 2011)

<sup>75</sup> See <http://nslegislature.ca/index.php/get-involved/> (last accessed 27 March 2011).

<sup>76</sup> See 'Voice Your Opinion', available at <http://www.assnat.qc.ca/en/exprimez-votre-opinion/index.html> (last accessed 1 March 2011).



### ***Duty to consider representations***

In terms of the duty to respond, the Policy Statement and Guidelines state that Justice Canada shall ensure that feedback on the outcomes of public participation processes is provided to participants and that it shall also demonstrate how these outcomes have been considered in the policy-making process.

### ***Public Hearings***

Inviting comments from the public and recording the testimony of witnesses is common at the committee stage at both the federal and the provincial level. Committee proceedings contain common elements in the provinces of Alberta, British Columbia, Manitoba, Nova Scotia, Ontario and Saskatchewan and the main features are outlined below.

The referral of legislation to a committee is mandatory in Manitoba. Although not mandatory in other provinces, it is the general practice in any case. Parliamentary committees invite members of the public to provide direct input through written submissions<sup>77</sup> and by participating in public hearings. Committees also consult with expert witnesses and community, professional, business and academic groups.<sup>78</sup> In Nova Scotia and Ontario, those persons wishing to make representations must inform/register with the Legislative Counsel's Office and the Clerk of the Committee respectively. Thus, they can be easily notified of the date and time of committee meetings.

Parliamentary committee meetings are normally open to the public and are advertised widely. Submissions to the committee and recordings of its proceedings are usually made public.

## **D. Groups/Entities Involved in Consultation**

### ***Public***

The Policy Statement and guidelines of the Department of Justice apply to all sectors and should be followed in all public participation processes, whether they are targeted at Canadian citizens in general, special interest groups or voluntary associations.

It also states that Justice Canada shall ensure that there are appropriate measures to ensure that all Canadians, regardless of their linguistic, regional, ethno-cultural or socio-economic background or physical capabilities, are able to participate.

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<sup>77</sup> These can take different forms, including handwritten letters, emails and videotapes.

<sup>78</sup> See *Discover Your Legislature: A Guide to the Legislative Assembly of British Columbia*, available at <http://www.leg.bc.ca/info/2-7.htm#> (last visited 27 March 2011).

### ***Special Interest Groups***

An example of the involvement of special interest groups in the formulation of public policy is provided by the consultation conducted by the Canadian Human Rights Commission between October and December 2004, when it obtained comments on the five guiding principles it had established to focus its actions. Through meetings and written submissions, the Commission consulted with federal government departments, private sector organizations, advocacy groups, unions and employer representatives, groups representing the interests of Aboriginal peoples, visible minorities, persons with disabilities and women and individual experts.<sup>79</sup>

Similarly, Justice Canada is committed to working with many different organizations in the non-governmental, voluntary and private sector and seeks to encourage the participation of all Canadians and interest groups in its policy development and operational activities.<sup>80</sup>

### **E. Practical Problems with the Implementation of Participatory Procedures**

The Policy Statement and Guidelines point out several operational considerations<sup>81</sup> that must be taken into account when implementing comprehensive participatory procedures.

#### ***Costs to participants***

The Policy Statement points out the costs that individuals and groups may incur through participation. These costs must be weighed against the intended purpose and outcome. In cases where public participation is important, but costs constitute an impediment, the Department may make provisions to defray some or all of these costs, subject to the relevant Treasury Board Secretariat guidelines.

#### ***Inadequate Time for Effective Participation***

Resource constraints affect the ability of citizens to effectively provide input. Consequently, they must be given sufficient time to adequately consider, internally consult, and respond to the consultation within time frames which strike a reasonable balance between the Department's need to get something accomplished expeditiously and the need for participants to be involved in a meaningful way. For example, situations like Manitoba must be avoided- committee meetings are called within only 48 hours of the announcement of a committee hearing, making it difficult for the public and interest groups to participate.

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<sup>79</sup> See [http://www.chrc-ccdp.ca/legislation\\_policies/consultation/toc\\_tdm-eng.aspx](http://www.chrc-ccdp.ca/legislation_policies/consultation/toc_tdm-eng.aspx) (last visited 27 March 2011)

<sup>80</sup> Department of Justice, Strategic Plan 2001-2005, p. 4.

<sup>81</sup> Policy Statement and Guidelines for Public Consultation, Department of Justice <http://www.justice.gc.ca/eng/cons/pol.html> (last visited 27 March 2011).

### ***Unequal Access to Information***

The Guidelines recognise that unequal access to information or inaccurate assumptions about the knowledge base of participants can negatively impact the effectiveness of a public participation exercise. As a result, Justice Canada shall endeavour to provide comprehensive background information material to all participants equally.

The Department of Justice has laid down the following guidelines to overcome the abovementioned hurdles:<sup>82</sup>

### **Approval and Planning**

All formal public participation activities require to be submitted for comment and approval of the relevant departmental authority. Policy plans and Memoranda to Cabinet should, where relevant, include a section addressing what public participation activities are envisaged and, if any, a summary plan ought to be included.

### **General Operational Guidelines**

- (a) Provide to participants the context within which public participation is undertaken and in which decisions will be made. Ensure that participants are informed of existing or potential linkages with other policy initiatives, issues or public participation activities;
- (b) Ensure that financial and staff resources correspond to the nature and scope of the public participation. Where resources are limited, this should be communicated;
- (c) Ensure that sufficient staff resources are available to carry out the process and trained adequately for this task;
- (d) Ensure that clear and reasonable timelines are established for participant input and comment and that these timelines are communicated;
- (e) Ensure that the public participation device used is appropriate to the nature of the issue, the target groups affected and the staff and resources available;
- (f) Ensure that feedback to participants is built into the process and that participants have opportunities to bring forward additional comment or input as a result of this feedback;
- (g) Ensure that an evaluation framework is developed and built into the public participation plan;
- (h) Ensure that participants and affected groups are informed of the results of the policy process and how their input was used in devising the policy.
- (i) Ensure that public participation processes adhere to the relevant legislation, regulations, policies or guidelines affecting the rights and responsibilities of individual Canadians, departmental or other officials, or other participants.

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<sup>82</sup> *ibid.*

## Co-ordination and Collaboration

The guidelines also state that where possible, Justice Canada will make every effort to co-ordinate with other federal departments and agencies and, to the extent feasible, with provincial and territorial governments, to address the major issues that impact Canada's system of justice through:

- (a) Joint public participation when topics are related;
- (b) Planning public participation activities so that individuals and organizations affected or interested in justice issues are not forced to address several requests for participation during the same time period;
- (c) Ensure that, wherever possible, Justice Canada's Public Participation Policy and Guidelines are applied to joint processes.

### Key Features

- Since draft bills were formerly treated as confidential before introduction in Parliament, permission to consult on the basis of a draft bill must be obtained from the Cabinet or the Prime Minister depending upon the type of bill. This is done in the form of a Memorandum to the Cabinet addressing the type of public consultation intended to be held
- Strong policy commitment to public consultation contained in guidelines issued by the Department of Justice. Envisages public participation not only in legislation, but also plans, policies, programmes and services
- These guidelines require reporting to the public on the results of consultation and the manner in which their views have been considered in the decision-making process. Database of key interest groups and contacts is maintained
- Besides publication in the Canada Gazette and hearings before legislative committees, an online consultation portal, 'Consulting with Canadians' provides single-window access to all government departmental consultation

## United Kingdom

### A. Source of Obligations

#### *Parliamentary Practice- Scrutiny by Committees*

Parliamentary pre-legislative scrutiny of draft bills is normally carried out by the relevant House of Commons departmental Select Committee<sup>83</sup>, or an ad hoc joint Committee of both Houses, or an ad hoc Commons or Lords Committee, or separate but parallel Committees in each House or two or more existing Committees meeting concurrently.

The Minister concerned is likely to be asked to give oral evidence to the Committee at some stage during the inquiry. In addition to the bill and Explanatory Notes, the department may be asked to submit additional written evidence. The Committee is likely to wish to see a note on compatibility with the European Convention on Human Rights (ECHR) and an Impact Assessment.<sup>84</sup> The evidence will usually be taken in public. In recent cases, bill teams have been asked to attend the public evidence sessions and even to respond to questions put to them in these sessions. This also helps keep the department informed of issues likely to be raised in the Committee's report.<sup>85</sup>

It is for the government to decide whether or not to accept the Committee's recommendations for amendments. The government usually makes a formal response to the Committee's report.<sup>86</sup> In the case of ad hoc or Joint Committees, it will not be possible to respond with a Memorandum, as the Committee will no longer exist, and the response should be published as a Command Paper (the Clerk of the former Committee should be kept fully informed). Copies should also be sent to the members of the former Committee.

In order to inform the Committee and the wider section of the affected public of how the bill has changed as a result of pre-legislative scrutiny; departments should, on introduction of the bill, simultaneously publish a list of changes. These might also be included in a narrative document accompanying publication of the final bill.

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<sup>83</sup> The Committee stage is where detailed examination of the bill takes place. It usually starts within a couple of weeks of a bill's second reading, although this is not guaranteed.

<sup>84</sup> An Impact Assessment is an analysis of the likely impact of a range of possible options for implementing a policy change. An Impact Assessment must set out the risk or problem to be addressed and the options available – assessed against a 'do nothing' option and any non-legislative or non-regulatory options, such as Codes of Practice, industry standards or information campaigns. It must also set out the likely costs and benefits of each option. A final Impact Assessment must be submitted to the Committee before it approves a bill for publication in draft or for introduction in Parliament. Before giving its approval, the Committee will satisfy itself that sufficient work has been done on the Impact Assessment, and the Bill Minister should be able to confirm at this point that s/he has seen the Impact Assessment and on the basis of the available evidence is satisfied that the benefits of the proposal outweigh the costs.

<sup>85</sup> Publication in Draft and Pre-legislative scrutiny, available at [http://interim.cabinetoffice.gov.uk/making-legislation-guide/publication\\_in\\_draft.aspx](http://interim.cabinetoffice.gov.uk/making-legislation-guide/publication_in_draft.aspx)

<sup>86</sup> However, in some cases, where all the Committee's recommendations were accepted or where there is very little time, the bill itself may be sufficient as a response.

## *Code of Practice*

Besides the Parliamentary scrutiny of legislation discussed above, there is recognition of the fact that even if the bill is not formally scrutinised by a Parliamentary Committee, there is still enormous value in publishing it in draft for those who will be affected by the bill and carrying out a consultation exercise.<sup>87</sup>

Thus, immediately after the Queen's Speech, the Leader of the House of Commons writes to the House of Commons Liaison Committee listing the bills which the Government intends to publish in draft during that session along with their provisional date of publication. Before the list is sent to the Liaison Committee, the Secretariat assesses the progress of all bills being prepared for publication in draft and confirms with the relevant departments which bills are to be included. The Government may, however publish draft bills or draft clauses even if they were not included in the letter to the Liaison Committee.

The Cabinet Government website explains that the Departments may therefore wish to publish a consultation document or White Paper at the same time as, or before, the draft Bill.<sup>88</sup> This should include a copy of the Impact Assessment<sup>89</sup> and, where the proposal is significant, of the Impact Statement. Departments will, however, need to consider how this public consultation fits in with the timetable for Parliamentary pre-legislative scrutiny, bearing in mind that the Parliamentary Committee may wish to see the results of the public consultation before reporting.

The Cabinet Government website explains that the Departments may therefore wish to publish a consultation document or White Paper at the same time as, or before, the draft bill.<sup>90</sup> This should include a copy of the Impact Assessment and, where the proposal is significant, the Impact Statement as well. Departments will, however, need to consider how this public consultation fits in with the timetable for Parliamentary pre-legislative scrutiny, bearing in mind that the Parliamentary Committee may wish to see the results of the public consultation before reporting.

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<sup>87</sup> Consultation is about making government more open and policies more effective by listening to and taking on board views of the public and interested groups.

<sup>88</sup> Publication in Draft and Pre-legislative Scrutiny, [http://interim.cabinetoffice.gov.uk/making-legislation-guide/publication\\_in\\_draft.aspx](http://interim.cabinetoffice.gov.uk/making-legislation-guide/publication_in_draft.aspx) (last visited 28 March 2011).

<sup>89</sup> An Impact Assessment is an analysis of the likely impact of a range of possible options for implementing a policy change. An Impact Assessment must set out the risk or problem to be addressed and the options available – assessed against a 'do nothing' option and any non-legislative or non-regulatory options, such as Codes of Practice, industry standards or information campaigns. It must also set out the likely costs and benefits of each option. A final Impact Assessment must be submitted to Legislation Committee before it approves a Bill for publication in draft or for introduction to Parliament. Before giving its approval, the Committee will want to be satisfied that sufficient work has been done on the Impact Assessment, and the Bill Minister should be able to confirm at this point that s/he has seen the Impact Assessment and on the basis of the available evidence is satisfied that the benefits of the proposal outweigh the costs.

<sup>90</sup> See (n 88).

When the bill is ready to be published in draft, the Bill Minister must, similar to the process in place in Canada, seek clearance to do so from the Legislation Committee, which will consider it in the same way as a bill for introduction in Parliament, the difference being that draft bills are normally cleared by correspondence rather than in meeting. To enable the Legislation Committee to reach its decision, the concerned Bill Minister must circulate to it a Legislation Committee Memorandum on the draft Bill, Explanatory Notes, Impact Assessment and ECHR Memorandum. The Legislation Committee reaches its decision taking into account the overall requirements of the legislative programme. Some bills may not be suitable for publication in draft eg bills that are needed to meet international commitments where there is little flexibility regarding implementation, bills to implement Budget commitments or bills which must reach the statute book quickly due to ‘real world’ pressures.

The Cabinet Office’s Code of Practice sets out the approach the Government ought to adopt when it decides to run a formal, written, public consultation exercise. These guidelines help to ensure that a common standard exists across government for consulting the public. The Code does not have legal force and cannot prevail over statutory or mandatory requirements. It recognizes that in some cases, there are legal requirements for the Government to consult certain groups on certain issues, and that these must be respected. All other legal requirements such as compliance with confidentiality issues and equality schemes must be complied with. More information on such matters can be found in the guidance which accompanies this Code.<sup>91</sup>

A list of the UK departments and agencies adopting the Code is available on the Better Regulation Executive’s website.<sup>92</sup> Other public sector organisations are free to make use of this Code for their consultation purposes, but it does not apply to consultation exercises run by them unless they explicitly adopt it.

The Code states that the Ministers retain their existing discretion not to conduct formal consultation exercises under the terms of the Code and that at times, a formal, written, public consultation will not be the most effective or proportionate way of seeking input from interested parties, eg when engaging with affected groups/individuals very early in the policy development process (preceding formal consultation) or when the scope of an exercise is very narrow and the level of interest highly specialised.

The Code notes that there are a variety of other ways to seek input from interested parties other than formal consultation. Although such methods are not governed by the Code, it provides that departments must clearly state the reasons for adopting them in preference to formal written consultations.

The Code makes it amply clear that it is not intended to create a commitment to consult on any given issue, to give rise to a duty to consult, or to be relied on as creating expectations that the Government will consult in a particular case. Nor are the duties set

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<sup>91</sup> See Better Regulation, available at <http://www.berr.gov.uk/bre> (last visited 28 March 2011).

<sup>92</sup> *ibid.*

out in the Code inviolable. In some cases, deviation from the Code will be unavoidable, in which case, departments must clearly state the reasons for the deviation and state which measures will be employed instead to make consultation as effective as possible.

The Code sets out the following guidelines for the Government when it conducts a consultation. It ought to

- (a) Build a realistic timeframe for the consultation, allowing plenty of time for each stage of the process.
- (b) Be clear as to who is being consulted, about what and for what specific purpose.
- (c) Ensure that the consultation document is as simple and concise as possible. It should include a summary and clearly set out the questions it wishes to address
- (d) Always distribute documents as widely as possible, using electronic means (but not to the exclusion of others).
- (e) Make sure all responses are carefully and open-mindedly analysed, and the results made widely available, with an account of the views expressed and the reasons for decisions finally taken.

The Code should also be used in conjunction with the Consultation and Policy Appraisal – Compact Code of Good Practice which supports the Compact on Government’s Relations with the Voluntary and Community Sector<sup>93</sup> and with the Central-Local Government Concordat which establishes a framework of principles for how central and local government work together to serve the public.<sup>94</sup> The Better Regulation Executive in the Department for Business, Enterprise and Regulatory Reform welcomes feedback regarding the effectiveness of the Code and the accompanying guidance.

### ***Statutes***

There may be some legislation which imposes a consultation requirement in specific areas. An example of this is the Equality Act, under which consultations are required to enable the Equality and Human Rights Commission to create clear and authoritative Codes of Practice and guidance. As part of these obligations under the Equality Act, the Equality and Human Rights Commission is hosting a public consultation on the draft Code of Practice for Schools in England and Wales.<sup>95</sup> The Commission in turn has also responded to a number of consultations issued by government departments and other agencies.<sup>96</sup>

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<sup>93</sup> See <http://www.thecomcompact.org.uk/information/100023/publications/> (last visited 28 March 2011).

<sup>94</sup> See <http://www.communities.gov.uk/publications/localgovernment/centrallocalconcordat> (last visited 28 March 2011).

<sup>95</sup> Equality Act Consultations, available at <http://www.equalityhumanrights.com/legal-and-policy/equality-act/equality-act-consultations/> (last visited 28 March 2011).

<sup>96</sup> Consultation responses, <http://www.equalityhumanrights.com/legal-and-policy/consultation-responses/> (last visited 28 March 2011).



## **B. Types of Instruments**

As the earlier section indicates, the Government often publishes a number of bills in draft form before they are introduced in Parliament as formal bills. As a part of the ensuing consultation process, the Government may publish a paper for public discussion and response. The best examples of this are Green Papers and White Papers.

### ***Green Papers***

The government sometimes publishes a ‘Green Paper’ before drafting new legislation. For example, in September 2003, the Department for Education and Skills published a Green Paper on the protection of children at risk.<sup>97</sup> A Green Paper begins a formal period of consultation, usually lasting three months, where the government seeks feedback and ideas from specialists and the general public. Green Papers are consultation documents produced by the Government when it is considering introducing a new law. Green Papers are relatively open-ended in comparison to White Papers (discussed in the next subsection) which set out more definite intentions of Government policy, on the basis of which bills are introduced in Parliament.

The government publishes a consultation document and often a form for marking people’s responses. These are available from Her Majesty’s Stationery Office and from the website of the relevant government department.

### ***White Papers***

After the formal consultation period is over, the government will normally publish a ‘White Paper’. However, the process can begin with a White Paper, skipping the Green Paper stage. In a White Paper, the government states its intention to introduce legislation and indicates its central ideas. Although White Papers do not provide the same scope for the public to get involved as Green Papers, there is still usually a period to make comments on the proposals. Normally, this would involve writing to the relevant government department.

### ***Other Government Consultations***

Consultations are not restricted only to new laws. There are also consultations on smaller rule changes that will not require legislation in parliament. For example, between January and March 2004, there was a public consultation on plans to increase the fees for applying for work permits for foreign workers.<sup>98</sup>

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<sup>97</sup> See *The Process of New Laws*, available at [http://www.policyresearch.org.uk/new\\_laws.php](http://www.policyresearch.org.uk/new_laws.php) (last accessed 28 March 2011).

<sup>98</sup> *ibid.*

## ***Government bills***

Once the government has decided exactly what law it wants to pass, it introduces the bill in Parliament. At any stage during this process, anyone interested may try to influence the outcome by lobbying their own Member of Parliament (MP). As a bill progresses through parliament, amendments are made which affect the final law. If a large number of MPs receive feedback about a particular aspect of a bill, it is more likely to be amended. People can also write to ministers in the department who are introducing a piece of legislation, or to other MPs who are known to take a keen interest in the subject of the bill.

## **C. Manner of Facilitating Public Participation**

### ***Publication/ Access to Information***

The London Gazette (Edinburgh and Belfast editions) contains all the recent notices on consultations. The documents that the Government publishes for consultation can be obtained from Her Majesty's stationary office for response or on the respective Government department's website.

The Code of Practice for public consultation is significant in that it mentions that thought should also be given to alternative versions of consultation documents which could be used to reach a wider audience, eg. a young person's version, a Braille and audio version, Welsh and other language versions and an 'easy-read' version.

### ***Online Consultation***

#### *Directgov*

This website provides information about various government consultations.<sup>99</sup> It allows individuals to read the consultation paper outlining the Government's proposals and then to send in their own comments. A search tool allows searches under various categories such as 'organisation', 'keyword' (eg housing or schools), 'date' and 'status' (eg open or closed). In all, a search may be conducted for consultations run by 21 government departments including the Ministry of Justice, the Department for Transport and the Food Standards Agency.<sup>100</sup> Clicking on the title of the consultation leads one to the website where consultations are published.

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<sup>99</sup> A list of Government Consultation websites is available at [http://www.direct.gov.uk/en/Governmentcitizensandrights/UKgovernment/PublicConsultations/DG\\_170463](http://www.direct.gov.uk/en/Governmentcitizensandrights/UKgovernment/PublicConsultations/DG_170463) (last visited 28 March 2011).

<sup>100</sup> See [http://consultations.direct.gov.uk/search?site=dg\\_default&client=dg\\_default&output=xml\\_no\\_dtd&proxystylesheet=dg\\_default&proxycustom=%3CHOME/%3E&filter=0](http://consultations.direct.gov.uk/search?site=dg_default&client=dg_default&output=xml_no_dtd&proxystylesheet=dg_default&proxycustom=%3CHOME/%3E&filter=0) (last accessed 28 March 2011).

### ***Duty to consider representations***

In the case of online consultations, the duty to respond to public comments is limited. It has been suggested that the results of the consultations be made widely available, with an account of the views expressed and reasons for the decisions finally taken in order to ensure more effective and accountable pre-legislative scrutiny.

In the case of scrutiny by Parliamentary Committees, it is usual for the Government to make a formal response to the Committee's report. It has also been suggested that the departments should publish a document along with the publication of the final bill that outlines the changes made to the bill since its introduction, so that Committees and the general public may observe how the bill has changed as a result of pre-legislative scrutiny.

However, the duty to respond to representations remains unclear and it must be noted that one of the concerns expressed by the Select Committee on Constitution in its 8<sup>th</sup> Report of Session 2009-10 (discussed in greater detail in a later section) is that of appropriate government response to pre-legislative consultation.

## **D. Groups/Entities involved in Consultation**

### ***Public***

Depending on other priorities in the session, a draft bill may not be selected for formal Parliamentary pre-legislative scrutiny by any Committee. However, it will still benefit from having been published in draft by providing the opportunity for informal scrutiny by Parliamentarians and for public consultation.<sup>101</sup>

### ***Parliamentary Committees***

During Parliamentary scrutiny by specific Committees, the following factors are taken into consideration to ensure that the appropriate entity is consulted: whether the bill is likely to be of particular interest to one House rather than the other, whether the Bill engages the responsibilities of more than one department, whether an existing Select Committee has already built up expertise in the area through a previous inquiry into a related Green Paper, for example.

### ***Statutory Bodies***

As mentioned before, bodies such as the Equality and Human Rights Commission have also responded to a number of consultations issued by government departments and other agencies, but their comments are limited to their area of expertise.

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<sup>101</sup> See (n 94).

## **E. Practical Problems with the Implementation of Participatory Procedures**

The Select Committee on Constitution in its 8<sup>th</sup> Report of Session 2009 - 10<sup>102</sup> states that in the years following the publication of the 2004 report,<sup>103</sup> the amount of pre - legislative scrutiny declined. This report analyses the trends during the past years and identifies the following areas of concern:

### ***Inadequate Time for Effective Participation***

The Committee noted that previously concerns have been raised that draft bills were not published in adequate time. They called on the government to ensure that all draft bills were published in sufficient time (allowing 12 weeks for scrutiny at the minimum, and preferably considerably more). They reiterate the fear that they had expressed in the report on the 2007– 08 session, that the government was ‘too often failing’ to meet its stated commitment to allow at least three months for pre-legislative scrutiny. It also registered its concern about the delays in setting up joint committees on pre-legislative scrutiny.

### ***Inadequate Follow-up***

The Committee notes that there have been concerns ‘at the possibility of draft proposals sinking without trace.’ In such cases, where there is a change of plan, for instance, when a draft bill is not to be pursued in legislation for the time being, where the provisions of a draft bill are substantially amended or combined with other proposals, or where there is cause to delay a response to a committee report on a draft bill, the Committee calls on the government to make a formal response to the relevant report, outlining the change of plan and the reason for such changes being made.

It also recommends that if the measures contained in a draft bill have not been pursued in legislation within one year of its publication, or where the provisions in a draft bill are substantially amended or combined with other proposals in subsequent legislation, the government should make a written statement to the House outlining the reasons for change.

Likewise, where a government response to a committee report on draft legislation is delayed beyond the normal two month interval, the government should write to the Committee concerned to explain the delay, or, in the case of joint Committees where the Committee no longer exists, to make a written statement to the House explaining the delay.

It suggests that the same principle should apply in cases where a draft bill has been announced as part of the government’s legislative programme, but is not subsequently pursued. If a draft bill announced as part of the government’s legislative programme is

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<sup>102</sup> The Select Committee on Constitution, 8<sup>th</sup> Report of Session 2009 – 10, Pre-legislative scrutiny in 2008-09 and 2009-10 sessions (HL).

<sup>103</sup> 14th Report (2003–04): *Parliament and the Legislative Process* (HL 173).

not subsequently brought forward, the government should, by the end of the session, make a written statement to the House to explain the decision not to proceed.

### **Key Features**

- Draft Bills scrutinized by Parliamentary Select Committees. Accompanied by an Impact Assessment and a Memorandum on compatibility with the ECHR. Concerned Minister may be required to give testimony
- Government normally provides a formal response to the Committee's report
- Clearance must be obtained if the bill is to be published in draft
- Formal, written public consultations are governed by a Code of Practice issued by the Cabinet Office
- Results of the consultation are encouraged to be made widely available and reasons for the decision taken ought to be given
- Consultation is not limited to draft bills, but also extends to Green Papers and White Papers, which contain ideas for future government policy
- Online consultation tool called Directgov provides links to consultations conducted by various government departments
- Different types of consultation documents recommended for different audiences eg Braille documents for the blind

## Switzerland

### A. Source of Obligations

#### *Constitution*

The Swiss Confederation or *Confoederatio Helvetica* is a federal state, with a political structure comprising three governmental levels: the Confederation, 26 cantons and 2551 communes. This three-level polity is also mirrored in the concept of a three-fold citizenship- federal, cantonal and municipal.<sup>104</sup> Switzerland has a particularly strong tradition of participatory democracy, with the cantons enjoying wide-ranging powers of ‘self-rule’ and ‘shared rule.’ As regards the former, cantons possess their own legislative, executive, and judicial bodies ie each canton has its own constitution, parliament, government, and courts, with the opportunity of making decisions about its own democratic system and organization.<sup>105</sup> Cantons even have treaty-making powers.<sup>106</sup> By virtue of ‘shared rule’, cantons are guaranteed active participation in the decision-making process at the federal level.<sup>107</sup> Cantons participate in three ways-

- (a) through their elected representatives in the Council of State (one of the chambers of the Federal Assembly<sup>108</sup>)
- (b) in the constitution-making process- according to Article 140(1)(a) of the Constitution, amendments to the Constitution must be submitted to the vote of the people and the cantons. Consequently, revisions of the Constitution are only accepted if a majority of the people and a majority of the cantons<sup>109</sup> approve them.<sup>110</sup>
- (c) in the federal law-making process- when drafting provisions of a federal act, the Federal Council or the Parliamentary committee have to initiate a consultation procedure, which allows the cantons, political parties and other interested groups to express their view about the new law.<sup>111</sup>

Apart from these provisions for cantonal participation, Article 147 also imposes a duty to consult with the public before introducing or amending a law-  
*‘The Cantons, the political parties and interested groups shall be invited to express their views when preparing important legislation or other projects of substantial impact as well as in relation to significant international treaties.’*

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<sup>104</sup> See Article 37(1) of the Constitution.

<sup>105</sup> Thomas Fleiner, Alexander Misić, Nicole Töpferwien, *Swiss Constitutional Law* (2005), p. 23 et seq.; Ulrich Häfelin, Walter Haller, Helen Keller, *Schweizerisches Bundesstaatsrecht* (7th edn, 2008), p. 120 et seq.

<sup>106</sup> Article 56(1) of the Constitution.

<sup>107</sup> See (n 105) p. 102.

<sup>108</sup> The other chamber is the National Council. Each canton has two elected representatives in the Council of State, irrespective of its size and population. See Article 150 (2) of the Constitution.

<sup>109</sup> The vote of a canton is determined by popular vote in the canton -Article 142(3) of the Constitution.

<sup>110</sup> Article 142(2) of the Constitution.

<sup>111</sup> Article 147 of the Constitution.

## ***Federal Acts***

The Consultation Procedure Act<sup>112</sup> sets out the requirements for public participation in the law-making process.<sup>113</sup> The aim of the consultation procedure is to allow ‘the cantons, political parties and interested groups to participate in the shaping of opinion and the decision-making process of the Confederation.’<sup>114</sup> In particular, the following participants are invited to submit an opinion in order to obtain information on the material accuracy, feasibility of implementation and public acceptance of a federal law.<sup>115</sup>

- a. the cantons;*
- b. the political parties represented in the Federal Assembly;*
- c. the national umbrella organisations for the communes, cities and mountain regions;*
- d. the national umbrella organisations for the economic sector;*
- e. any further interest groups relevant to the individual case.’*

## **B. Types of Instruments**

### ***Constitutional Amendments***

As noted above, Swiss governance is based on a system, which allows citizens to exercise important constitutional and legislative powers, ie the right of initiative and the right of referendum.

### **The Right of Initiative or Popular Initiative**

Citizens may request a complete or a partial revision of the Constitution if they can muster 100,000 signatures within eighteen months.<sup>116</sup> The amendments enter into force only if the majority of the people and the majority of the cantons accept them. A popular initiative may be formulated as a general proposal or a specific draft of the provisions proposed. If a general proposal is submitted and the Federal Assembly is in agreement, it drafts a partial revision on the basis of the initiative and submits it to the vote of the of the people and the cantons.

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<sup>112</sup> Federal Act on the Consultation Procedure (CPA, SR 172.601).

<sup>113</sup> Article 3 of the CPA.

<sup>114</sup> Article 2(1) of the CPA.

<sup>115</sup> Article 4(2) of the CPA.

<sup>116</sup> Article 138 of the Constitution reads as follows : ‘*Popular initiative requesting the complete revision of the Federal Constitution (1) Any 100,000 persons eligible to vote may within 18 months of the official publication of their initiative propose a complete revision of the Federal Constitution. (2) This proposal must be submitted to a vote of the People.* Article 139 lays down similar provisions for the partial revision of the Constitution.

Even if the Federal Assembly rejects the initiative, it is submitted to the vote of the people who decide whether to adopt it or not. If there is an affirmative vote, the Federal Assembly is required to draft a corresponding bill.

If a specific draft is submitted, the initiative is directly submitted to the vote of the people and the cantons, though the Federal Assembly may recommend whether to adopt or reject the initiative and may submit a counter-proposal to the initiative.

### **The Right of Referendum**

The right of referendum, similar to a veto, entitles citizens and the cantons to supervise the political process by approving or rejecting constitutional and legislative amendments adopted by the Federal Assembly. Two types of referendum exist at the federal level: -mandatory referendum and optional referendum.

Article 140 of the Constitution provides for the following to be submitted compulsorily to the vote of the people and the cantons

- (a) amendments to the Federal Constitution;
- (b) accession to organisations for collective security or to supranational communities;
- (c) emergency federal acts that are not based on a provision of the Constitution and whose term of validity exceeds one year...

### ***Federal Acts, Decrees and International Treaties***

Article 141 of the Constitution makes provisions for an optional referendum. The following instruments are to be submitted to a vote of the people if within 100 days of the official publication of the enactment, any 50,000 persons eligible to vote or any eight cantons request it

- (a) federal acts;
- (b) emergency federal acts whose term of validity exceeds one year;
- (c) federal decrees, provided the Constitution or an act so requires;
- (d) international treaties that:
  1. are of unlimited duration and may not be terminated;
  2. provide for accession to an international organisation;
  3. contain important legislative provisions or whose implementation requires the enactment of federal legislation.

## **C. Manner of Facilitating Public Participation**

### ***Popular Initiative and Referendum***

The citizens of Switzerland are guaranteed the opportunity to be directly involved in the lawmaking process through the right of initiative. In addition to having elected



representatives who deliberate and vote on constitutional and legislative amendments, the right of initiative allows citizens themselves to request revisions of the Constitution provided they can muster the requisite number of signatures. Even if these proposals are rejected by the Federal Assembly, they must be submitted to the vote of the people, and an affirmative vote requires the Assembly to draft a bill corresponding to the initial proposal.

Similarly, as enumerated above, in the case of referenda, citizens are allowed to vote on specific types of instruments, such as constitutional amendments, federal acts and accessions to treaties. This direct voting in favour of or against particular constitutional and legislative acts constitutes the strongest form of public participation in the legislative process.

### ***Consultation and Committees***

Once a proposal has been put forward by individuals, interest groups, members of the Federal Assembly, sections of the Administration, cantons or the Federal Council, the Federal Council establishes a commission (comprised of experts and persons interested in the new law) and issues it with the task of preparing a first draft. As required by Article 147 of the Constitution, the Cantons, political parties, and other interested groups are invited to express their views and to propose amendments.

The Federal Council examines the text and submits it to Parliament for debate. The presidents of the two chambers discuss which chamber shall debate the proposal first, the National Council or the Council of State. A committee from the chosen chamber presents its view to the chamber, which may close the matter, refer the text back to the Federal Council or to the committee for further revisions or preparation of a new draft, or conduct a detailed discussion and take a decision.

This procedure is then repeated in the other chamber. If the decisions taken by the first and second chamber differ, a conciliation procedure takes place. The new law enters into force unless citizens exercise their right of referendum within a hundred days.

The entire consultation procedure is initiated by the Federal Council or the Parliamentary committee.<sup>117</sup> It lasts three months and is conducted in writing, on paper and in electronic form.<sup>118</sup> The entire procedure is transparent ie opinions are made publicly available, including:<sup>119</sup>

- (a) the consultation documents;
- (b) on expiry of the consultation period, the opinions and the minutes of consultation procedure conferences
- (c) after acknowledgement by the Federal Council, the summary of the results of the consultation procedure.

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<sup>117</sup> Article 5 of the CPA.

<sup>118</sup> Article 7 of the CPA.

<sup>119</sup> Article 9(1) of the CPA.

## **D. Groups/Entities involved in Consultation**

### ***Public***

Switzerland's tradition of direct democracy means that the general public has a very influential role to play in the legislative process, as demonstrated by the Constitutional provisions guaranteeing the rights to an initiative and to a referendum.

### ***Cantons***

Cantons have a strong say not only in the constitution-making and amending process, but also in the federal lawmaking process with constitutional provisions and sections of the Consultation Procedure Act imposing an obligation to obtain the view of cantons on constitutional and legislative changes.

### ***Special Interest Groups and Experts***

Article 4(2) of the Consultation Procedure Act requires different types of participants to be invited to submit their opinion on federal legislation. Apart from cantons, these include political parties represented in the Federal Assembly, the national umbrella organisations for the communes, cities and mountain regions, the national umbrella organisations for the economic sector and any further interest groups relevant to the individual case. Also, once a legislative proposal has been initiated, the Federal Council establishes a commission comprising of experts and other interested individuals who provide their input in order to formulate a first draft.

## **E. Practical Problems with the Implementation of Participatory Procedures**

Legislation is a complex, long-term process, which takes a minimum of twelve months on an average, with more complicated projects taking several years.<sup>120</sup>

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<sup>120</sup> See (n 105) p.51.

## Key Features

- Strong tradition of participation by the cantons in the federal lawmaking process
- Similarly strong tradition of participatory/direct democracy- Constitutional amendments to be put to the vote of the cantons and the people
- Constitutional duty to consult with cantons, political parties and interested groups during the lawmaking process
- Similar obligations imposed by a statute called the Consultation Procedure Act
- Right of initiative allows citizens to propose constitutional amendments upon collection of requisite number of signatures within requisite time
- The right of mandatory referendum confers on citizens a power akin to a veto and allows them to supervise Constitutional amendments and accession to organisations
- An optional referendum may be exercised in relation to federal acts and decrees of desired by 50,000 persons within 100 days of enactment of the instrument
- Transparent consultation procedure initiated by the Federal Council or the Parliamentary committee- consultation documents, opinions and minutes of the consultation procedure conferences and summary of results of the consultation procedure made publicly available

## United States of America (USA)

### A. Source of Obligations

#### *Constitution*

While it is vital to encourage comments from the public on legislation originating in Congress or rules being promulgated by the federal agencies, an even more powerful form of public participation is guaranteeing citizens the right to demand that Congress consider and take up certain issues for legislation. Some form of this right is conferred on US citizens by the First Amendment to the US Constitution and is known as the ‘right to petition.’<sup>121</sup>

The right to petition was perceived as an important form of political participation by the colonists of the early American republic. In this era, petitioners sought ‘individual or collective redress of grievances’ from the colonial assembly, and the government was required to provide a hearing and response, usually in the form of referral to committee.<sup>122</sup>

However, a change in the socio-political meaning of the petition brought about a change in its constitutional status.<sup>123</sup> Today, US citizens cannot expect their legislators to take notice of or provide a ‘substantive response’ to written recommendations; instead, citizens can most effectively exercise their First Amendment right to petition and influence federal policy by hiring a professional lobbyist.<sup>124</sup> Instead of representing a universal right of political participation, the right to petition is now protected as just another form of political speech, without any form of heightened protection.<sup>125</sup>

Thus, the form in which a citizen can ask for consideration of legislative issues has altered from petitioning to lobbying. However, judgments of the Supreme Court<sup>126</sup> indicate that the right to submit a grievance still remains constitutionally protected, although the government is no longer under obligation to respond. The importance of this right has also been acknowledged by Congress, which has enacted legislation to guard against the potential for abuse within the system of lobbying.<sup>127</sup>

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<sup>121</sup> The full text of the amendment reads, ‘Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to *petition the Government for a redress of grievances*.’ (emphasis supplied).

<sup>122</sup> Raymond C Bailey, Popular Influence upon Public Policy: Petitioning in Eighteenth Century Virginia 28-30 (1979), as cited in Stacie L Fatka, James Miles Levien, Protecting the Right to Petition: Why a Lobbying Contingency Fee Prohibition Violates the Constitution 35 Harvard Journal of Legislation 559

<sup>123</sup> Gregory Mark, The Vestigial Constitution: The History and Significance of the Right to Petition 66 Fordham Law Review 2153 (1998)

<sup>124</sup> See (n 122).

<sup>125</sup> See (n 123).

<sup>126</sup> *United States v Rumely* 345 US 41 (1953)

<sup>127</sup> Thus, Congress enacted the Federal Regulation of Lobbying Act in 1946, which laid out registering and reporting requirements for lobbyists with the goal of providing the public accurate information about the

## ***Standing Orders and Rules***

Legislative power is vested in the US Congress by virtue of Article 1, Section 1 of the Constitution. Article 1, Section 5 allows each House to determine the rules of its proceedings. Under this authority, the House of Representatives adopts new rules at each Congress, ordinarily on the first day of the opening session. The Senate operates under continuous standing rules that may be amended periodically.

These rules set out the procedures for referring bills to standing committees and for the conduct of public hearings. They provide for the publication of the date, time and venue of public hearings, govern the recording of testimony of the witnesses and require the proceedings of committee meetings and hearings to be made public in most cases. Public hearings are discussed in greater detail in the section on facilitating public participation.

Thus, rules governing the congressional legislative process are enacted under constitutional authority either as statutory rules or as standing rules. These enacted rules are supplemented by formal precedents, which have force and binding effect almost equivalent to 'common law.'<sup>128</sup> Although these rules have come to be accepted as binding law, it is possible for both chambers of the House to amend or waive them.<sup>129</sup> However, these rules governing the legislative process are not self-enforcing- the presiding officer of each chamber must rule that amendments, motions or other actions are out of order, although this initiative is seldom taken. Nevertheless, there are three ways in which procedural violations can prevent the passage of a bill-

(a) individual members can identify actions that violate the rules and raise a timely 'point of order'. In practice, however, this mechanism is limited because most bills are considered under special rules which waive 'points of order' against the entire bill or major parts of it. Also, if the 'point of order' is not timely raised, it is considered to be waived, precluding the challenge of the rule violation

(b) legislators may refuse to vote in favour of a bill that is enacted in violation of the rules

(c) the Speaker of the House of Representatives and the President of the Senate, who are the legislative officers of the Congress have the power to block procedural violations by refusing to sign bills before presenting them to the President on the ground that they have not been duly approved by the houses.

## ***Judicial Review***

The force of judicial review in ensuring compliance with participatory procedures depends upon the type of legislative instrument in focus ie bills passed by Congress and rules promulgated by federal agencies.

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political pressures influencing legislation. In 1995, the Lobbying Disclosure Act was passed to provide more guidance about registration and reporting than the previous law.

<sup>128</sup> Ittai-Bar-Siman-Tov, *Lawmakers as Lawbreakers*, 52 *William and Mary Law Review* 805 (2010)

<sup>129</sup> William Holmes Brown & Charles W. Johnson, *House Practice: A Guide to the Rules, Precedents, and Procedures of the House* 825 (2003)

In relation to the passage of federal bills, federal courts have refused to enforce the internal rules that govern Congress' legislative process.<sup>130</sup> The signature of the legislative officers of Congress that a bill has been duly approved is treated by courts as 'complete and unimpeachable' evidence that a bill has been properly enacted. In fact, in some states, the assumption that Congress has incentives to comply with the law of law-making, has prompted the enactment of constitutional amendments prohibiting judicial review of the legislative process.<sup>131</sup> However, there is much academic debate over whether courts should enforce the 'due process of lawmaking'<sup>132</sup> while in practice, the enforcement of rules regulating lawmaking is heavily dependent on Congress exercising self-discipline.<sup>133</sup>

However, courts have a more important role to play in relation to agency rule-making. Rule-making in the USA is carried out by federal agencies like the Environmental Protection Agency, the Occupational Health and Safety Authority, the Food and Drug Administration, and the Consumer Product Safety Commission. The rule-making process of these agencies is governed by an exhaustive statute, the Administrative Procedure Act, 1946 (APA). The APA lays down extensive duties for the agencies, outlined in greater detail in a later section. These duties relate to public participation in the rule-making process through a 'notice and comment' procedure as well as the publication of a statement of 'basis and purpose' along with the promulgation of the final rule, explaining the reasons for its adoption as well as the rejection of other alternatives. Courts review this rule-making procedure and have the power to strike down rules adopted in violation of these procedural requirements. Courts, through common law reasoning, have also amplified the procedural duties that agencies must observe. Finally, apart from the APA, Congress imposes additional requirements on agency rule-making procedure through amendments to specific statutes.

Thus, depending upon the type of legal instrument, law-making procedures in the USA have their source in a variety of obligations ranging from the Constitution to historical convention and Congressional precedent to administrative statutes.

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<sup>130</sup> See cases ranging from 1892 to 2007- *Field v. Clark*, 143 U.S. 649, 670-71 (1892) and *OneSimpleLoan v. U.S. Sec'y of Educ.*, 496 F.3d 197, 202 (2d Cir. 2007), cited in Ittai-Bar-Siman-Tov, *Lawmakers as Lawbreakers*, 52 William and Mary Law Review 805 (2010).

<sup>131</sup> See *Geja's Cafe v. Metro. Pier & Exposition Auth.*, 606 N.E.2d 1212, 1221 (Ill. 1992), cited in Ittai-Bar-Siman-Tov, *ibid*

<sup>132</sup> Glen Staszewski, *Rejecting the Myth of Popular Sovereignty and Applying an Agency Model to Direct Democracy*, 56 Vanderbilt Law Review 395, 465 (2003, cited in Ittai-Bar-Siman-Tov, *ibid*)

<sup>133</sup> See (n 128)

## **B. Types of Instruments**

### ***Bills***

As mentioned above and discussed in detail in the section on facilitating public participation, the rules and standing orders of the two chambers of Congress provide for limited public participation in the form of open access to standing committee meetings and public hearings during the passage of federal bills. The scope of this report does not extend to the pre-legislative and legislative processes in place in the different states.

### ***Rules and Regulations***

The APA lays down detailed rules for the passage of secondary/delegated legislation in the form of rules promulgated by the federal agencies. This report will discuss those rules that are legislative and substantive in nature. Agencies also issue interpretive rules, rules of procedure and rules that fall within a series of exceptions which can be issued without following any statutorily prescribed procedure, except their publication in the Federal Register.

While this report focuses on informal rulemaking, there is also the less common process of ‘formal’ rulemaking, which begins with public notice of a proposed rule and requires the conduct by the agency of an oral evidentiary hearing along the lines of hearings that place in judicial adjudication. This rulemaking process is also known as ‘adjudicatory rulemaking’ and is generally used for those rules that apply to a limited number of individuals or entities.<sup>134</sup>

### ***Agency Plans and Policies***

Apart from these traditional legal instruments, the Memorandum on Transparency and Open Government, issued on 21 January, 2009 by the Obama Administration requires executive departments and agencies to ensure public participation in the formulation of their ‘Open Government Plans.’ The Memorandum also urges public participation in the form of ‘feedback mechanisms’ to the agencies, thus extending the scope of public engagement from the agency rule-making process to a more general involvement in the formulation of the agency’s policy.

While the APA sets out clear-cut requirements for public participation in the promulgation of agency rules, there is some ambiguity regarding participation in ‘voluntary approaches’ adopted by the federal agencies ie when agencies choose not to issue mandatory regulations, but rely on voluntary efforts to promote their goals. Voluntary approaches might be viewed as ‘general statements of policy,’ for which exceptions exist under the APA.<sup>135</sup>

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<sup>134</sup> See generally Richard J Pierce, Jr, *Administrative Law Treatise* (Wolters Kluwer 2010).

<sup>135</sup> Administrative Procedure Act, 5 U.S.C. §§ 551(4), (5), 553(b)(A) (2000)

In practice, some agency statements betray the assumption that rulemaking is not necessary for “voluntary” or “non-regulatory” approaches to implement policy.<sup>136</sup> However, there are also instances in which rulemaking procedures are adopted to implement voluntary approaches, such as the rulemaking held by the Department of Energy to revise the voluntary greenhouse gas reporting system under Section 1605(b) of the Energy Policy Act, where over 100 diverse entities like the Natural Resources Defense Council, the World Resources Institute, the Competitive Enterprise Institute, General Motors, the American Petroleum Institute, and the Business Council for Sustainable Energy submitted their comments.

Thus, while public participation requirements clearly exist in the case of rules promulgated by federal agencies (irrespective of the legal status of the obligation), their applicability to voluntary approaches adopted by agencies remains unclear, though some agency practice indicates efforts to ensure public engagement.

### **C. Manner of Facilitating Public Participation**

A document prepared by a member of the House of Representatives, John Sullivan<sup>137</sup> is a useful source of information about the relevant Congressional procedures, and the next paragraphs on the various provisions for public participation in the federal legislative process are sourced from this document.

#### ***Publication***

Copies of the bill are sent to the Government Printing House to make copies available in the document rooms of both Houses. Printed and electronic versions of the bill are also made available to the public.

Committees are required to make their publications available in the electronic form, to the maximum extent feasible. Further, a transcript of the proceedings in the House and the Senate is printed daily in the Congressional record. The rules of the House also provide for unedited radio and television broadcasting and recording of proceedings on the floor of the House. These broadcasts may not, however, be used for political purposes or in commercial advertisements.

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<sup>136</sup> *ibid.* See the following extracts from notices in the Federal Register, ‘we are considering how best to [obtain quality input] through actions that do not involve rulemaking or other regulatory methods’ and ‘Instead of a rulemaking, the Coast Guard will proceed with establishing this voluntary experimental approval program using a Coast Guard circular.’

<sup>137</sup> See John Sullivan, ‘How Our Laws Are Made’, H.R. Doc. No. 110-49 (2007), available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110\\_cong\\_documents&docid=f:hd049.110.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_documents&docid=f:hd049.110.pdf). (last visited 13 March 2011).



In the case of public hearings, a transcript of the testimony taken at such hearing is made available for inspection in the office of the clerk of the committee. Often, the complete transcript is printed and distributed widely by the committee.

In the case of rules promulgated by federal agencies, S 552 (a) (1) of the APA requires each agency to publish in the Federal Register ‘rules of procedure...substantive rules of general applicability...statements of general policy or interpretations of general applicability...and ...each amendment, revision, or repeal of the foregoing.’ This requirement is based on the principle that all potentially affected members of the public should have notice of the rules with which they must comply and be given adequate time to conform their conduct to the new rule. If a statement of policy or interpretation is not of ‘general applicability’ an agency need not publish it in the Federal Register, but must at least make it ‘available for public inspection and copying.’ (S 552(a)(2).

### *Access to Standing Committee Meetings*

Once a bill has been introduced in the House of Representatives, it is required by the rules of the House to be referred to the appropriate committee(s) by the Speaker with the assistance of the Parliamentarian.

The referral of the bill to the committees constitutes the most important part of the legislative process, since these committees represent the forum where the public is given an opportunity to be heard. At present, there are 20 standing committees in the House and 16 in the Senate, besides several select committees. The rules of the House define the jurisdiction of each committee by subject-matter, and all measures are referred accordingly. Currently, the rules of the House and the Senate provide for 200 different types of measures to be referred to the committees.

Recognising that consultation procedures can often be lengthy, the Speaker may place time limits on the consideration of bills by all committees. In practice, however, time limits are only placed on the consideration of bills by additional committees to which a bill has been referred after the report of the primary committee.

The committee initially seeks the input of the relevant departments and agencies on the bill. The bill may also be referred to the Government Accountability Office for an official report on the necessity or desirability of enacting the bill. None of these reports is binding on the committee in determining whether or not to act favourably on the bill.

All meetings for the transaction of business of the standing committees or subcommittees, except the Committee on Standards of Official Conduct must be open to the public, except when the committee or subcommittee, in open session, with a majority present, determines by record vote that all or part of the remainder of the meeting on that day shall be closed to the public. However, congressional staff and departmental representatives may be authorized by members of the committee to remain present at any meeting that has been closed to the public. Open committee meetings may be covered by

the media and permission to cover meetings and hearings is granted under detailed conditions laid down in the rules of the House.

Similar provisions for public access exist in the case of Senate committees. Thus, all committee meetings, including those to conduct hearings, are open to the public. However, a majority of the committee, after discussion in closed session, may vote in open session to close a meeting or a series of meetings on the same subject for no longer than 14 days. The reasons for holding such meetings in closed session are more numerous than those applicable to the committees of the House of Representatives. They include matters of national defence, the foreign relations of the United States, internal committee staff management or procedure, tending to charge an individual with a crime or misconduct, disgracing the professional standing of an individual and disclosing information regarding trade secrets.

### ***Public Hearings***

A public hearing, which is different from a meeting from a meeting of the committee that is open to the public, is required to be held only at the discretion of the committee ie if the bill is deemed to be of sufficient importance. Once a decision to hold a public hearing has been made, detailed rules are set out for the conduct of such hearings. The chairman of the committee must make public announcements of the date, place and subject-matter of any hearing at least one week before the commencement of that hearing, unless the committee chairman with the concurrence of the ranking minority member or the committee by majority vote determines that there is good cause to begin the hearing at an earlier date. In case of such a determination, a public announcement to that effect must be made at the earliest possible date. Public announcements are published in the Daily Digest portion of the Congressional record as soon as possible after the announcement is made and are generally noted by the media. In some cases, a personal letter is sent to relevant individuals, organizations, governmental departments and agencies.

Again, except for the Committee on Standards of Official Conduct, all hearings of the committee must be public except when the committee or subcommittee, in open session, with a majority present, determines by record vote that all or part of the remainder of the meeting on that day shall be closed to the public. Reasons for this could be national security, sensitive law enforcement information or the possibility of violating a law or a rule of the House. However, a committee or subcommittee may vote to make public matters that are originally received at a public hearing. Like other committee meetings, public hearings may also be covered by the media under conditions laid down by the rules of the House.

On the day set for a public hearing, an official reporter is present to record the testimony. Testimony is given either voluntarily or by subpoena.<sup>138</sup> Witnesses appearing before the committee are normally required to file a written statement of their testimony in advance of their appearance and limit their oral presentations to a brief summary thereof. Minority party members of the committee (upon request by a majority of them) are entitled to call

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<sup>138</sup> A subpoena is a command to appear at a certain time and place to give testimony upon a certain matter.

witnesses of their own to testify on a measure on at least one additional day of a hearing. This demonstrates a commitment to ensuring that certain interest groups do not dominate the legislative process and that adequate opportunity to participate is given to minority groups.

### ***Notice and Comment***

In the case of rules promulgated by federal agencies, the APA sets out detailed requirements for public participation, which is facilitated mainly by inviting comments from the public on the proposed rule. The duty to respond to these comments is far stronger than in the case of federal bills and is bolstered by judicial review of the rules. The relevant provisions of the APA, as set out by Richard Pierce in *Administrative Law Treatise*<sup>139</sup> are discussed below.

The most common form of rulemaking is the ‘informal’ rulemaking process, also known as the ‘notice and comment’ process that involves three steps- (a) issuance of public notice of the proposed rule (b) receipt and consideration of comments from all interested persons and (c) issuance of the rule, incorporating a statement of its basis and purpose.

S 553(b) of the APA requires general notice of proposed rulemaking to be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice. The notice must contain particulars about the (a) time, place, and nature of public rule making proceedings (b) reference to the legal authority under which the rule is proposed and (c) either the terms or substance of the proposed rule or a description of the subjects and issues involved. These requirements do not apply to ‘interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice.’ They may also be waived in the public interest provided the agency incorporates this finding along with a brief statement of reasons.

Once this notice is given, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose.

The House Committee report on which this provision is based also states that ‘prior to public procedures, agencies must conduct such nonpublic studies or investigations as will enable them to formulate issues, or where possible to issue proposed or tentative rules for the purpose of public proceedings. Summaries and reports may also be issued as aids in securing public comment or suggestions.’

### ***Judicial Review and interpretation***

Judicial review of these rules verifies compliance with the abovementioned requirements. For example, failure to provide adequate technical information in the notices ie time,

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<sup>139</sup> See (n 134).

place, nature of proceedings, legal authority, which adversely affects a party's ability to provide meaningful comments will result in a reviewing court holding the rule invalid.<sup>140</sup>

Pierce states that most challenges to the adequacy of agency notices of proposed rulemaking can be classified into two categories: (1) the divergence between the proposed action and the final action was so great that parties affected by the final action had no way of knowing that the agency was considering one or more critical elements of the final action; and (2) the agency relied on data to support its final action that was not known to affected parties until the agency announced its final action. Both these challenges are based on the principle that parties cannot submit meaningful comments unless they know the issues under consideration by the agency.

—The next part discusses relevant case law from these two categories. As regards the first (divergence between the notice and the final rule), there are two cases representing the opposite ends of the spectrum. In *Wagner Electric Corp v Volpe*<sup>141</sup>, it was held that 'an agency cannot issue a final rule that accomplishes changes in an area in which the agency's notice of proposed rulemaking gave no warning that it was considering changes.' The second case, *South Terminal Corp v EPA*<sup>142</sup> held that 'an agency's final rule can differ substantially from the proposed rule contained in its notice of proposed rulemaking as long as the agency's notice fairly apprised the public of the possibility of changes of the general type that occurred.'<sup>143</sup> In both cases, the courts are attempting to reconcile public participation to the maximum extent possible with regulatory flexibility, except that the balance is struck differently in both cases.

For example, in *Horsehead Resource Development Co v Browner*<sup>144</sup> the EPA rule at issue regulated the burning of hazardous waste as fuel pursuant to the Resource Conservation and Recovery Act. The final rule included a provision that limited the combined emissions of carbon monoxide (CO) and total hydrocarbons (THC) from a kiln that burns hazardous waste as a fuel. The court recognized that the EPA had given notice with respect to each individual component of the final rule, including the possibility that it might limit emissions of either CO or THC. The court held the notice inadequate, however, because the agency did not sufficiently foreshadow the combination of components in the final rule.

The second category of cases (reliance on data unknown to affected parties), is best illustrated by *Portland Cement Association v Ruckelshaus*<sup>145</sup> In this case, the EPA proposed a stationary source standard for cement plants. In the material made available to the public contemporaneously with its notice of proposed rulemaking, EPA stated only that its proposal was 'based on stationary source testing conducted by the Environmental

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<sup>140</sup> See *Global Van Lines v ICC* (714 F.2d 1290 (5<sup>th</sup> Cir. 1983)

<sup>141</sup> 466 F.2d 1013 (3d Cir.1972)

<sup>142</sup> 504 F.2d 646 (1<sup>st</sup> Cir. 1974)

<sup>143</sup> Similar to the latter ruling, courts have developed tests like the 'logical outgrowth' test (See *NRDC v Thomas* 838 F.2d 1224 (DC Cir 1988) and the 'sufficiently foreshadowed' test (See *National Mining Association v Mine Safety and Health Administration* 116 F. 3d 520 (DC Cir 1997) to test the adequacy of the notice.

<sup>144</sup> 16 F.3d 1246 (DC Cir 1994),

<sup>145</sup> 486 F. 2d 375 (DC Cir 1973).

Protection Agency and/or contractors.’ EPA did not reveal the details of the tests and methodology employed until after the time for submitting comments on the proposal had passed, and the proposed standard was adopted by the agency over the objections of the industry. When the description of testing methodology was finally made available to affected members of the cement industry, a consulting engineer retained by the industry showed that the results were ‘grossly erroneous’ due to serious deficiencies in sampling techniques. Because the rule had already been promulgated by the agency, the engineer’s analysis and conclusions were submitted to the reviewing court rather than to the agency. When the case was remanded to the agency, it chose only to reaffirm the original rule and add the engineer’s comments to the record for review. The court reversed and remanded by relying on the principle that ‘It is not consonant with the purpose of a rule-making proceeding to promulgate rules on the basis of inadequate data, or on data, [to a] critical degree, known only to the agency.’

This stringent standard for adequate disclosure of data is qualified by the requirement that a petitioner can persuade the court that it would have been able to draw into question the finding for which the source is cited if it had timely access to the source.

Apart from the requirements imposed by the APA, courts have also through common law reasoning added additional requirements to the rulemaking procedure until this was held impermissible by the Supreme Court in *Vermont Yankee Nuclear Power Corp v NRDC* (435 US 519 (1978)). However, courts still continue to affect the rulemaking procedure by adopting new interpretations of the language of the APA.

### ***Duty to consider representations***

The duty to respond to comments from the public is enforced by judicial review of the statement of ‘basis and purpose’ that the agency is required to issue with its final notice. The aim behind this rule is that ‘the agency must analyse and consider all relevant matter presented.’

In practice, courts require considerably more than a ‘concise general statement of basis and purpose.’ Instead, as *Pierce* states, agencies ‘*must set forth the basis and purpose of the rule in a detailed statement, often several hundred pages long, in which the agency refers to the evidentiary basis for all factual predicates, explains its method of reasoning from factual predicates to the expected effects of the rule, relates the factual predicates and expected effects of the rule to each of the statutory goals or purposes the agency is required to further or to consider, responds to all major criticism contained in the comments on its proposed rule and explains why it has rejected at least some of the most plausible alternatives to the rule it has adopted.*’

Cases in support of this assertion are *Prometheus Radio Project v FCC*<sup>146</sup> *American Gas Association v FERC*<sup>147</sup> and *Mobil Co v DOE*<sup>148</sup> Courts derive their authority from S

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<sup>146</sup> 373 F.3d 372 (3d Cir 2004),

<sup>147</sup> 888 F. 2d 136 (DC Cir 1989)

<sup>148</sup> 610 F.2d 796 (TECA 1979).

706(2)(A) of the APA that compels a court to ‘hold unlawful and set aside agency action’ that is ‘arbitrary’ and ‘capricious.’<sup>149</sup> Failure to fulfill the judicial understanding of a satisfactory statement of ‘basis and purpose’ can constitute ‘arbitrary’ or ‘capricious’ action.

The scope and detail of the ‘statement of basis and purpose’ is dependent upon the scope and degree of detail in the comments received from the public. A detailed criticism of the agency’s proposed rule requires a detailed response from the agency. Similarly, the agency must explain its reasons for failing to adopt an alternative suggested in a public comment which appears to resolve the criticism of the rule. Failure to respond in this manner will result in the rule being struck down as ‘arbitrary’ or ‘capricious.’ The burdens imposed on agencies by this requirement of a detailed ‘statement of basis and purpose’ are discussed in a later section.

Apart from the APA, Congress introduces special requirements to the rulemaking procedure in the case of specific statutes. For example, in its 1977 amendments to the Clean Air Act, the Congress required EPA to include in its notice of proposed rulemaking ‘a summary of (a) the factual data on which the proposed rule is based (b) the methodology used in obtaining the data and in analyzing the data and (c) the major legal interpretations and policy considerations underlying the proposed rule.’ Congress also required EPA to make publicly accessible ‘all documents which become available after the proposed rule has been published and which the Administrator determines to be of central relevance to the rulemaking.’<sup>150</sup> It also requires the ‘statement of basis and purpose’ to ‘*set forth or summarise and provide a reference to any pertinent findings, recommendations, and comments by the Scientific Review Committee...and the National Academy of Sciences, and, if the proposal differs in any important respect from any of these recommendations, an explanation of the reasons for such differences.*’

### ***Informal Methods***

Agencies also use less formal methods to encourage public participation than the notice-and-comment process. For example, the Environmental Protection Agency has policies that encourage public participation beyond the statutory requirement.<sup>151</sup> These include press releases, mailings, public meetings, hearings, workshops, and informal communications.<sup>152</sup>

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<sup>149</sup> An agency rule is considered arbitrary or capricious ‘*if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.*’ See *Motor Vehicle Manufacturers Association v State Farm Mutual Automobile Insurance Co* 463 US 29 (1983).

<sup>150</sup> See 42 USC S 7607(d).

<sup>151</sup> Janice Gorin, ‘Caught between Action and Inaction: Public Participation Rights in Voluntary Approaches to Environmental Policy’ 24 *Stanford Environmental Law Journal* 151 (January 2005).

<sup>152</sup> *ibid.*

## **D. Groups/Entities involved in Consultation**

### ***Public***

The general public is involved in the lawmaking and rulemaking process through the different methods described above. The level of participation depends upon the type of instrument, with more extensive opportunities for involvement in the rulemaking process than in the public hearings and committee meetings of the chambers of Congress conducted during the passage of federal bills.

### ***Constitutional /Statutory Bodies***

Some federal bills are referred to the Government Accountability Office for an official report on the necessity or desirability of enacting the bill, while major rules promulgated by federal agencies must be submitted to the Office of Management and Budget to examine compatibility with the programme of the President.

### ***Special Interest Groups***

In some instances of rulemaking, the requirement to publish a general notice of proposed rulemaking in the Federal Register is waived if the persons subject thereto are named and either personally served or otherwise have actual notice, indicating that consultation procedures may sometimes be targeted at specific individuals or groups.

In 1996, Congress amended the Regulatory Flexibility Act (RFA) in ways that add to the procedures agencies must use in rulemakings that affect ‘small entities.’ An important provision of the amendment makes compliance with the RFA subject to judicial review at the behest of any ‘small entity.’ The amendment also adds new procedural requirements to the original version of the RFA, for example, an expanded requirement to describe the agency’s efforts to minimize the adverse effects of the rule on small entities.

The provision for ex parte communications in the APA<sup>153</sup> might seem at first sight, to be according greater importance to comments and communications by certain categories of participants. This was clearly the concern of a panel of the DC Circuit in *Home Box Office, Inc v FCC*<sup>154</sup> when it held that ex parte communications in informal rulemaking were unlawful. The HBO court noted that ‘a number of participants...sought out individual commissioners or Commission employees for the purpose of discussing ex parte and in confidence the merits of the rules under review here’ and was concerned that ‘the final shaping of the rules...may have been by compromise among the contending industry forces, rather than by exercise of the independent discretion in the public interests the Communications Act vests in individual commissioners.’

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<sup>153</sup> S 551(4) states that ‘ex parte communication means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given...’

<sup>154</sup> 567 F.2d 9 (DC Circuit 1977).

However, this holding was rejected in *Action for Children's Television v FCC*<sup>155</sup> and the lawfulness of ex parte communications was emphatically upheld in *Sierra Club v Costle*.<sup>156</sup> Pierce states that in this case, while deciding on a new rule governing sulfur dioxide emissions from electric generating plants, EPA decisionmaking personnel engaged in an extensive series of meetings with representatives of the coal industry, representatives of electric utilities, several members of the House and Senate, and government officials from the White House, DOE, OMB, CEA, CEQ, Office of Science and Technology Policy, and Council on Wage and Price Stability. Several environmental advocacy groups argued that the rule was illegally tainted by these ex parte communications. The court however held that the EPA had complied with its only duty with respect to these meetings- the duty to place in the public record any communications 'of central relevance to the rulemaking.' The court rejected the claim that ex parte communications were illegal, noting that the APA prohibits ex parte communications only in formal rulemakings which relate to individual rights. In issues involving broad policy concerns such as the present case, special consultations with specific groups was permissible. The need to ensure agency flexibility in the promulgation of regulations allows certain recipients to be privileged in the consultation process.

#### **E. Practical Problems with the Implementation of Participatory Procedures**

The exhaustively detailed consultation requirements of the rulemaking process in the APA have created burdens for agencies as they attempt to carry out their primary task of regulation. It is these problems, their causes and some solutions that are discussed in this section.

Pierce identifies some problems that arise from the judicially imposed requirement of a detailed statement of basis and purpose

#### ***Burden on Resources and Delay in Promulgation***<sup>157</sup>

In addition to the strain imposed on an agency's scarce staff resources, rulemaking also increases the time required to act by rulemaking; some agencies have concluded that they cannot issue a major rule in less than a decade, thus reducing the frequency of rulemaking and causing some agencies to abandon rulemaking entirely. This is referred to in the academic literature as the ossification of the regulatory process.<sup>158</sup>

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<sup>155</sup> 564 F.2d 458, 475 (DC Cir 1977).

<sup>156</sup> (657 F.2d 298 (DC Cir 1981).

<sup>157</sup> See Breyer, *Judicial Review of Questions of Law and Policy* 38 *Administrative Law Review* 363, 393 (1986).

<sup>158</sup> See Pierce, *Seven Ways to Deossify Agency Rulemaking* 47 *Administrative Law Review* 59 (1995), *Carnegie Commission on Science, Technology, and Government, Risk and the Environment: Improving Regulatory Decisionmaking* 56-57, 100-101(1993).



Formal rulemaking is even more notoriously tedious and long-winded than informal rulemaking. For example, the FDA took nine years to resolve the question whether ‘peanut butter’ must consist of 90 percent peanuts or only 87 percent peanuts.<sup>159</sup>

However, the decision of the Supreme Court in *United States v Florida East Coast Railway*<sup>160</sup> made it ‘exceedingly difficult to convince a court to compel an agency to use formal rulemaking or to provide an opportunity to present oral evidence or to cross-examine opposing evidence in a rulemaking proceeding.’<sup>161</sup> In *Bell Telephone Co of Pennsylvania v FCC*,<sup>162</sup> the Court stated that ‘non-evidentiary rulemaking permits broad participation in the decision-making process and enables an administrative agency to develop integrated plans in important policy areas.’

### ***Inconsistency of Judicial Review***

Pierce also points out that there is potential for the court to act selectively in the application of the ‘arbitrary’ or ‘capricious’ standard on ideological or political grounds.<sup>163</sup> For example, an agency ‘cannot know in advance which alternatives it must discuss, which aspects of the problem or criticisms made in comments it must discuss, which data it must discuss, or how much discussion of any alternative, aspect, criticism, or datum a reviewing court will consider adequate to satisfy the requirement of reasoned decisionmaking.’<sup>164</sup>

Courts however are aware of these burdens and have devised several means to reconcile the duty to provide adequate notice to with the practical difficulties of the rulemaking process. Thus, in *American Coke and Coal Chemicals Institute* 452 F.3d 930 (DC Cir 2006) petitioners argued that the EPA’s notice was inadequate because it relied on some data sources that were not available at the time the agency issued its notice and on other data sources that were available at the time the agency issued its notice but that the agency only recognized as particularly useful during the rulemaking. The court rejected the arguments on two bases (1) an agency need not provide notice of each source of data on which it intends to rely if the agency identifies ‘the criteria by which it intended to select data, and the range of alternative sources of data it was considering’ and (2) a petitioner can prevail with respect to an argument that an agency failed to disclose data sources in a timely manner only if it can show that it was prejudiced by the agency’s

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<sup>159</sup> *Corn Products Co v FDA* F.2d 511 (3d Cir.). More disastrous attempts by agencies to complete major rulemaking exercises through the use of formal adjudicatory proceedings are listed in Hamilton, Rulemaking on a Record by the Food and Drug Administration, 50 Texas Law Review 1132 (1972) and Hamilton, Procedures for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rulemaking 60 California Law Review 1276 (1979).

<sup>160</sup> 410 US 224 (1973).

<sup>161</sup> See (n 134).

<sup>162</sup> 503 F. 2d 1250 (3d Cir. 1974)

<sup>163</sup> See Richard Revesz, Environmental Regulation, Ideology, and the DC Circuit 83 Virginia Law Review 1717(1997).

<sup>164</sup> See (n 134).

failure by, for instance, showing that the data the agency relied on is inaccurate or that the agency made a miscalculation.

### **Key Features**

- The constitutionally protected ‘right to petition’ under the First Amendment formerly required the government to respond to grievances. This duty no longer exists and the right, now exercised through the lobbying process, is protected as a form of political speech
- The standing orders and rules of Congress that govern access to standing committee meetings and public hearings during the passage of bills are followed as a matter of precedent, but cannot be enforced by the courts
- However, procedural requirements for the passage of delegated legislation ie rules/regulations promulgated by federal agencies may be enforced by judicial review under the Administrative Procedure Act (APA)
- The APA sets out a detailed ‘notice and comment’ procedure for the promulgation of rules. In addition to publishing the proposed rule in the Federal Register and inviting comments, the agency must also incorporate a ‘statement of basis and purpose’ of the rule
- This statement must explain its method of reasoning, respond to the criticism received through public comment and give reasons for rejecting plausible alternatives to the final rule. A rule may be struck down by the courts if the statement does not meet these requirements
- Courts may also strike down the rule because of the inadequacy of the notice. For example, a rule may be struck down (a) if there is great divergence between the rule proposed in the notice and the final rule and (b) if the final rule relies on data not known to the parties and not contained in the notice
- The APA permits ex parte communications in the promulgation of rules ie it allows for special consultations with specific groups that have particular expertise/interest in the rule to be promulgated
- Major federal rules must be submitted to the Office of Management and Budget to examine compatibility with the programme of the President

## The European Union (EU)

A brief introduction to the structure of the EU is provided in order to better understand the mechanisms for public participation in the lawmaking process. The three principal institutions involved in decision-making at the EU level are

- (a) the European Commission- this is a body that is independent of the national governments of the member states of the EU. It represents and upholds the interests of the EU as a whole and drafts proposals for new European laws which it presents to the European Parliament and the Council
- (b) the European Parliament (EP)- this comprises members elected by the citizens of the EU by direct universal suffrage every five years to represent their interests
- (c) the Council of the European Union-this is the main decision-making body of the EU. It represents the member states and its meetings are attended by one minister each from the EU's national governments.

The main forms of EU law are directives and regulations. The rules and procedures for EU decision-making are laid down in the treaties. Every proposal for a new European law is based on a specific treaty article, referred to as the 'legal basis' of the proposal. This determines which legislative procedure must be followed. The three main procedures are 'consultation', 'assent' and 'co-decision'.

In addition to direct public participation in the legislative process, in the context of the EU, it is also useful to discuss provisions for participation by the national parliaments. In the case of a regional organisation, mechanisms for national representation at the supranational level are as pertinent as mechanisms for citizen participation in the domestic context. Consultation procedures amongst the three different EU bodies mentioned above are also discussed because they provide a useful example of the manner in which different organs/bodies of national governments can interact with each other.

### A. Source of Obligations

#### *Treaties*

The equivalent of a domestic constitution for a regional organisation is its constituent treaty. In the case of the EU, these are the Treaty on the European Union (TEU) and the Treaty establishing the European Community (TEC), as amended by the Treaty of Lisbon which entered into force on 1 December 2009. The Lisbon treaty has set up frameworks to give effect to the following three principles of democratic governance:

- (a) **Democratic equality:** The EU must give equal attention to all its citizens.

- (b) **Representative democracy:** This envisages a greater role for the EP and the national parliaments.<sup>165</sup>
- (c) **Participatory democracy:** Greater interaction between European institutions and its citizens.

The most important way in which the Lisbon Treaty has strengthened participatory democracy is through the European Citizens' Initiative (ECI). The legal basis of the citizens' initiative is set out in Article 11, Paragraph 4 of the TEU and Article 24, Paragraph 1 of the Treaty on the Functioning of the European Union (TFEU).<sup>166</sup> The ECI enables citizens to ask the Commission to put forth legislative proposals if the supporters of an initiative number at least one million and come from a significant number of member states.

### ***Regulations***

In order to give effect to the principle of participatory democracy set out in the Lisbon Treaty, on 14 February 2011, the Council adopted a regulation (Regulation No 211/2011)<sup>167</sup> which sets out procedures and conditions for implementing the abovementioned ECI. Citizen's initiatives must fall within EU competence and be consistent with EU values. Support for the initiative may be expressed in the paper form or electronically and organizers of the initiative must also submit information on funding and support in addition to the one million signatures.

Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission Documents recognizes that 'openness' enables citizens to participate more closely in the decision-making process and thus grants citizens of the EU a right of access to documents of the EU institutions subject to the conditions set out in the regulation. These documents are to be made accessible to the public either following a written application or directly in the electronic form or through a register.<sup>168</sup>

The counterpart of the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters at the EU level is Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 which implements the provisions of the Convention and

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<sup>165</sup> The importance of national parliaments in the decision-making process is enhanced by the principle of subsidiarity, which permits the EU to act only in those cases where EU level action would be more effective than at a national level, except in areas where the EU has exclusive powers.

<sup>166</sup> See <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0013:0045:EN:PDF> and <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0047:0199:EN:PDF>

<sup>167</sup> The full text of the regulation is available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ%3AL%3A2011%3A065%3A0001%3A0022%3AEN%3APDF>

<sup>168</sup> Article 2, paragraph 4. The full text of the regulation is available at [http://www.europarl.europa.eu/RegData/PDF/r1049\\_en.pdf](http://www.europarl.europa.eu/RegData/PDF/r1049_en.pdf)

provides the strongest participatory rights to EU citizens, albeit confined to the environmental sphere.

### *Non-binding Instruments*

The provisions for public participation set out in treaties and regulations naturally have the greatest legal authority and binding force. They may be relied upon by citizens to enforce their participatory rights. However, there are several informal declarations, agreements and standards generally issued by the Commission which set out principles governing consultative and participatory procedures. These instruments are not legally binding and legislation promulgated without regard to the standards and principles set out in them cannot be impugned before the European Court of Justice (ECJ);<sup>169</sup> nevertheless, it is worth mentioning them because they set out useful guidelines for public participation.

As a part of its ‘Better Lawmaking’ initiative, the Commission has issued General Principles and Minimum Standards for Consultation of Interested Parties<sup>170</sup> governing open consultations. This document provides that the consultation process should be clear, easy to follow and publicised, open to all those with a potential interest, operate within reasonable time-limits and contributions should be duly considered,<sup>171</sup> although there is no requirement to conduct an open consultation in the first place.

The consultation standards apply in particular at the policy-shaping phase to major proposals before decisions are taken, as also to proposals in the impact assessment process which are included in the Commission's Annual Legislative and Work Programme. Reporting on the Commission's consultation of interested parties is included in the Better Lawmaking Annual Reports.

In addition, the Commission has recognised the importance of NGO participation in a range of discussion papers and policy documents. Some of these include Commission Discussion Paper ‘The Commission and Non-Governmental Organisations, Building Stronger Partnerships’<sup>172</sup>; Commission White Paper, ‘European Governance’<sup>173</sup>; Commission Green Paper, ‘European Transparency Initiative’<sup>174</sup> and Commission Communication, ‘Follow-up to the Green Paper ‘European Transparency Initiative.’<sup>175</sup>

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<sup>169</sup> See Butler, Israel de Jesus (2008) NGO Participation in the EU-Law-Making Process: the Example of Social NGOs at the Commission, Parliament and Council. *European Law Journal*, 14 (5). pp. 558-582. It is unlikely that failure to adhere strictly to consultation procedures will be considered ‘infringement of an essential procedural requirement’ as provided in Article 230 of the TEC. Such infringement affects the legal validity of an act adopted by any of the institutions of the EU and the ECJ has the power to declare such act void.

<sup>170</sup> ‘Better Law Making 2004’, 3; Commission Communication, ‘Towards a Reinforced Culture of Consultation and Dialogue – General Principles and Minimum Standards for Consultation of Interested Parties by the Commission’, COM (2002) 704 final, 11/12/02 (hereafter ‘General Principles (2002)’).

<sup>171</sup> General Principles (2002), 14-22.

<sup>172</sup> COM(2000) 11 Final, 18/1/00.

<sup>173</sup> COM(2001) 428 final, 25/7/01

<sup>174</sup> COM(2006) 194 final, 3/5/06

<sup>175</sup> COM(2007) 127 final, 21/3/07.

Finally, consultation procedures amongst the various EU institutions are guided by the EP's Rules of Procedure and a variety of declarations and agreements. These include the Joint Declaration on Practical Arrangements for the Codecision Procedure,<sup>176</sup> the Interinstitutional Agreement on Better Lawmaking and the Code of Conduct for negotiating in the context of the ordinary legislative procedures (Annex X of the Rules of Procedure of the European Parliament).

## **B. Manner of Facilitating Public Participation**

### ***Publication***

All legislative proposals are published in the Official Journal of the European Union ('C' Series) on adoption by the College of Commissioners. Moreover, as mentioned earlier, citizens have the right of access to a wide range of public documents by virtue of Regulation 1049/2001. Article 10 of the Regulation provides that the cost of producing and sending copies may be charged to the applicant; however, consultation on the spot, copies of less than 20 A4 pages and direct access in the electronic form or through a register must be free of charge.

All deliberations on legislative matters by national ministers in the Council are also made public, thus promoting transparency by allowing national parliaments and citizens to scrutinize such decisions.

### ***Consultation***

The Commission, which is the primary initiator of most legislative and non-legislative proposals conducts extensive consultations and has even promulgated standards to govern the consultation process<sup>177</sup> as part of its 'Better Lawmaking' initiative.<sup>178</sup> As mentioned earlier, the broad aims of these standards include providing clear consultation documents, consulting all relevant target groups, leaving sufficient time for participation, publishing results and providing feedback. These standards provide a minimum degree of coherence to the consultation process because it is otherwise decentralised and sectoral. The Commission is divided into several departments known as Directorates-General, which deal with specific policy areas. These Directorates-General are responsible for their own mechanisms of dialogue and consultation, permitting the specific nature and conditions of different policy areas to be taken into account. The Directorates also have their own

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<sup>176</sup> (2007/C 145/02)

<sup>177</sup> See (n 200) General Principles and Minimum Standards for Consultation of Interested Parties, 'Better Law Making 2004', 3; Commission Communication, 'Towards a Reinforced Culture of Consultation and Dialogue – General Principles and Minimum Standards for Consultation of Interested Parties by the Commission', COM (2002) 704 final, 11/12/02 (hereafter 'General Principles (2002)').

<sup>178</sup> Since 1995, the European Commission has reported on steps to improve lawmaking as part of the annual reports entitled 'Better lawmaking.' The aim of these reports is to suggest ways in which European citizens can easily follow how European legislation is drawn up and have easy access to legislative texts.

contacts within their respective fields and are in constant touch with external parties like market operators, NGOs, private persons, representatives of regional and local authorities, academics and technical experts or interested parties in third countries while formulating its policies.

In addition, a mechanism called Inter-service Consultation, launches a consultation process regarding a proposal initiated by the Commission among the different Commission departments to ensure that all aspects of the matter in question are taken into account.

The Commission also assesses the social, economic and environmental effects of its measures through ‘impact assessments.’ Consultations form a vital part of these assessments as they ensure that prospective legislation addresses the needs of and does not impose disproportionate burdens on member states and private parties.<sup>179</sup>

There are different methods of consultation and dialogue adapted to different policy fields. The Commission consults through consultation papers (Green and White Papers), communications, advisory committees, expert groups, workshops and forums. Online consultation is commonly used- ‘Your Voice in Europe’ is the Commission’s single access web portal for consultations. Moreover, the Commission may organise ad hoc meetings and open hearings. Often, a consultation is a combination of different tools and takes place in several phases during the preparation of a policy proposal.<sup>180</sup>

### ***Institutionalised dialogue***

During the legislative process, the Commission also consults the European Economic and Social Committee (representing various socio-economic organisations in Member States) and the Committee of the Regions (made up of representatives of local and regional authorities), and seeks the opinions of national parliaments and governments.

Furthermore, the Commission is engaged in other forms of institutionalised dialogue with interested parties in specific domains, the most developed being the social dialogue by which the Commission consults the social partners at European level.

More details about the institutional bodies consulted are provided in the next section.

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<sup>179</sup> Commission Report, ‘Better Law Making 2004’, COM (2005) 98 final, 21/3/05 (hereafter ‘Better Law Making 2004’).

<sup>180</sup> For more details about the consultation procedure, see [http://ec.europa.eu/governance/better\\_regulation/consultation\\_en.htm](http://ec.europa.eu/governance/better_regulation/consultation_en.htm).

## **C. Groups/Entities involved in Consultation**

### ***The European Parliament and Council***

Depending upon the type of legislative procedure adopted- codecision, consultation or assent- the EP and the Council respond to proposals put forth by the Commission and draft their respective positions/opinions. In the case of the EP, these positions are drafted by rapporteurs within the relevant parliamentary committee. The Council prepares its position through working parties that report in turn to the Committee of Permanent Representatives (COREPER) which prepares every Council decision taken at the Ministerial level. The Conciliation Committee may also be used to facilitate agreement between the Council and EP, while the EP, Council and Commission often hold informal tripartite meetings called ‘trilogues’ to reach speedy agreement.

### ***The Economic and Social Committee, the Committee of the Regions***

The European Economic and Social Committee (EESC) and the Committee of the Regions respectively consist of ‘representatives of the various economic and social components of organised civil society...’ and ‘representatives of regional and local bodies.’

The provisions governing the EESC and the Committee of the Regions are contained in Articles 301 to 307 TFEU. These Committees must be consulted by the Commission and the Council where the Treaty so provides or in cases in which the latter consider it appropriate. The Council or the Commission can set a time limit for the submission of opinions. The EP also has the option of consulting the two Committees. In addition, the Economic and Social Committee and the Committee of the Regions may issue opinions in cases considered by them to be appropriate.

The EESC is meant to gather ‘representatives of the various economic and social components of organised civil society, and in particular representatives of producers, farmers, carriers, workers, dealers, craftsmen, professional occupations, consumers and the general interest.’<sup>181</sup> Recently the Commission affirmed the EESC as an ‘institutional intermediary between the institutions of the Union and organised civil society’.<sup>182</sup>

The EESC in 2004 established a ‘Liaison Group’ which formalised relations with various European NGOs, which are not formally represented on the European Economic and Social Committee, in a ‘structured dialogue’<sup>183</sup>. The Liaison Group meets regularly with

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<sup>181</sup> Article 257, Treaty Establishing the European Community

<sup>182</sup> Protocol of Cooperation Between the European Commission and the European Economic and Social Committee, 2005, CESE 1391/2005, FR/HR/CAT/hn, para. 12.

<sup>183</sup> As stated in the operating rules, the Liaison Group is made up of 10 members of the EESC and of representatives of the various types of NGOs at the European level based on existing organisations and networks within these sectors. The EESC President and the Co-chair of the Liaison Group decide on any change to the membership (with the approval of all members). At present 14 sectors are represented in the Liaison Group. The EESC states that the Liaison Group was an attempt to ‘remedy – or at least mitigate’ the ‘shortcomings’ caused by its limited membership. See EESC Report (2004), 1.



representatives of various sectors of ‘organised civil society’ at European level.<sup>184</sup> Through their meetings, the Liaison Group may receive input from interested European NGOs which may then be fed into an Opinion being drafted within the EESC.

### ***Non-Governmental Organisations***

Although the EESC is supposed to be the forum through which NGOs can make their voice heard, its methods of working might mean that the diversity of views within the EESC may not be fed back to the Commission, Council or EP. Since EESC Opinions must be formally approved by representatives divergent views are likely to be lost in compromise and may prevent an Opinion being adopted at all.<sup>185</sup> Moreover, there is no official ‘consultative status’ that NGOs can obtain, nor is there any express legal basis for dialogue or consultation with NGOs.<sup>186</sup> This can be contrasted with other inter-governmental organisations, such as the United Nations.<sup>187</sup>

Therefore, to accord greater representation to NGOs, the Commission has also established a more general ‘structured’ dialogue. This takes the form of meetings (at least once a year) between the relevant Commission DG and a ‘consultative body’. These ‘consultative bodies’ are included within a separate directory of the CONECCS (Consultation, the European Commission and Civil Society) database. Although the Commission does not give associations official endorsement by granting them consultative status, it did launch a voluntary register on 23 June 2008 to allow interest representatives to register certain information about themselves. Representatives are given an opportunity to indicate their specific areas of interest and, in return, will be alerted to consultations in those areas. A Code of Conduct for interest representatives issued by the Commission is an entry requirement for the register.

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<sup>184</sup> See EESC, ‘Representatives of the Various Sectors of Organised Civil Society at European level in the Liaison Group, Members and Alternates’, on <http://www.eesc.europa.eu/sco/group/documents/list.doc>, visited 4/7/06. Between September 2004 and September 2006 the group met ten times. It would appear that although there are no publicised formal criteria for membership of the group, the EESC is conscious of the need for representativeness, as expressed in its own-initiative opinion ‘The Representativeness of European Civil Society Organisations in Civil Dialogue’, SC/023, 14/2/06, cited in (n 169).

<sup>185</sup> See (n 169).

<sup>186</sup> *ibid.*

<sup>187</sup> See Article 71 of the UN Charter

## Key Features

- The European Citizens' Initiative introduced by the Lisbon Treaty allows legislative proposals to be initiated by citizens themselves if they muster sufficient signatures and come from a significant number of states
- Regulation 1049/2001 guarantees EU citizens the right of access to a wide range of public documents, promoting accountability and transparency
- Although there is no obligation to conduct consultations, the importance of NGOs in EU decision-making processes is acknowledged by the Commission in several opinions, recommendations and policy papers. Guidelines and minimum standards of consultation issued by the Commission as part of its 'Better Lawmaking' initiative recommend that clear consultation documents be published, all relevant target groups be consulted, results be published and feedback provided.
- Flexibility in the manner in which consultations are conducted- through consultation papers, communications, advisory committees, expert groups, workshops, forums and online consultations
- In the case of institutionalized dialogue, rapporteurs within parliamentary committees and technical working parties express the opinions of the EP and the Council respectively
- The European Economic and Social Committee (EESC), which is supposed to represent the various NGOs which must be formally consulted by the Commission where the treaty so requires
- The EESC has set up a 'Liaison Group' to conduct structured dialogue with NGOs that are not formally represented on the EESC
- The Commission has set up a voluntary register allowing interest groups to register information about themselves so that they may be alerted to consultations in their areas of interest

## Recommendations

The UN Human Rights Committee, in addition to its General Comment on Article 25 of the ICCPR should compile information on the manner in which different states implement this provision. Such a database will throw up a set of ‘best practices’ which will be useful to states attempting to comply with this obligation. Based on the limited discussion of participatory mechanisms in selected jurisdictions, the following set of recommendations are made to ensure a fair, transparent, efficient and effective legislative process. They are similar to the recommendations of the National Commission to Review the Working of the Constitution in its report of March 2002.<sup>188</sup> They are intended as broad guidelines, which may need modification in light of local circumstances. It may be emphasised that any measures imposing a legal duty to facilitate public participation in legislation must only be adopted after extensive public consultation.

## Source of Obligations

The strongest form of implementing the international obligation under Article 25 of the ICCPR would be through a constitutional amendment imposing a duty to facilitate public participation and conduct consultations, as in South Africa and Switzerland. Thus, a provision along the following lines could be inserted in Part IV of the Constitution which sets out the Directive Principles of State Policy

### *Provision for Public Participation in Lawmaking*

*‘The State shall take steps to ensure full, meaningful and effective public participation in the framing of laws, rules, regulations, schemes, policies, plans and programmes through publication of drafts, public consultations and due consideration of all submissions.’*

Such a broadly worded provision will ensure that the government has sufficient flexibility, while simultaneously empowering the courts to interpret ‘full, meaningful and effective’ such that it does not remain toothless.<sup>189</sup>

If a constitutional amendment is considered too tedious to facilitate public participation, a statute setting out the main requirements governing the legislative and rulemaking process ought to be enacted. It need not be as extensive and detailed as the Consultation Procedure Act in Switzerland or the Administrative Procedure Act in the USA, but it should set out the salient duties of government bodies and empower courts to strike to declare legislation enacted in breach of these duties as invalid. The Right to Information Act is a step in the right direction to promoting accountability and transparency in

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<sup>188</sup> The relevant recommendations are available at <http://lawmin.nic.in/ncrwc/finalreport/v1ch11.htm>, paragraphs 5.10.1 and 5.10.2. The report of the Commission also recommends more focussed use of the Law Commission and the constitution of a new Legislation Committee to oversee and coordinate legislative planning.

<sup>189</sup> Although Part IV of the Constitution is strictly speaking, non-justiciable, courts have recognised and attempted to enforce the duties that they impose on the government, especially in environmental cases.

government. It now needs to be supplemented by an act guaranteeing basic rights of participation in the legislative process.

At the very least, the government ought to issue a policy statement/guidelines/code of practice demonstrating its commitment to facilitating public participation along the lines of the documents published in Canada, the UK and the EU. However, the drawback of such instruments is that courts cannot review legislation for compatibility with the principles set out in them. In the absence of a strong tradition of participatory democracy, such legally non-binding instruments constitute a weak form of implementing the duty to facilitate public participation unless there already exists a strong tradition of participatory democracy.

### **Types of Instruments**

In principle, public participation is desirable in the framing of every kind of instrument-constitutional amendments, primary legislation like bills, delegated/secondary legislation like rules and regulations, policies, plans, programmes and schemes. However, the level and manner of facilitating public participation will differ depending upon the type of instrument.

### **Manner of Facilitating Public Participation**

As mentioned above, different methods may be employed for different types of instruments. Factors like the urgency of passing a particular measure, resource constraints and the need to guard against ‘agency capture’ (disproportionate influence of elite groups- normally industry representatives- in the decision-making process) will also determine how extensive public participatory mechanisms are. At the other extreme, direct democracy of the level and extent as practiced in Switzerland could paralyse the legislative process in India.

The best ways of facilitating public participation are through publication and consultation. All instruments, at each stage (draft and final) must be published in the Official Gazette, which should be available in the paper form and electronically, ideally free of charge. Important legislative measures should be preceded by Green and White papers. Consultations ought to be decentralised. Flexibility ought to be granted to the local authorities to determine the manner in which to conduct consultations; however, certain basic principles must be observed. Thus, consultations ought not to be confined only to inviting written comments; public hearings should also be held. If consultation documents are issued, they should be clear, simple and concise and in a language most suited to the target audience. If the legislation is particularly complex, explanatory notes should supplement the bare text. Reasonable time-frames ought to be set. It is also important for the government to explain the reasons for its final act/rule/decision, by responding to ‘key’ or ‘major’ criticisms and providing explanations for the rejection of ‘significant’ plausible alternatives. However, as the US experience demonstrates, an *obligation* to respond to the numerous views expressed is in danger of paralysing the legislative or administrative process. To avoid undue delay and a burden on resources,

this duty to respond ought to be introduced instead as a ‘best practice’ or with a carefully circumscribed role for judicial review in the area of commercial regulation. Online consultations, which are an efficient and convenient way of gathering public comments are rapidly being implemented in several countries. A large proportion of India’s population lacks access to electronic means of communication- efforts should be made to build this capacity.

Most countries have similar provisions regarding the referral of bills to parliamentary standing committees. There ought to be a presumption in favour of granting access to such committee meetings. Exceptions in the interests of national security etc should be narrowly construed. In any case, the deliberations of the committee ought to be published as far as possible. Committee reports should adequately demonstrate that comments from the public have been accorded appropriate weight and reasons ought to be provided for their rejection.

Legislative initiatives put forth by citizens conceivably allow popular public sentiment to find concrete expression besides easing the burdens on government by permitting NGOs or other interested parties to draft legislative proposals. Thus, the possibility of introducing the right to petition as it formerly existed in the USA and is now to be implemented in the EU via the European Citizens’ Initiative could be considered.

### **Groups/Entities involved in Consultation**

While most consultations should be open to the general public, in the interests of speed and efficiency, more targeted consultations could be held at the earlier stages of the legislative process. Thus, along with inviting public comments after the publication of the draft bill, a first draft of the bill could itself be prepared in consultation with certain NGOs and relevant government/statutory bodies. Of course, any such bill must then be thrown open to a more general consultation.

While exploring suitable mechanisms to implement targeted consultations, the potential for capture of the consultation process by the elite ought to be fully considered. Possible methods could include maintaining a database of NGOs, akin to the voluntary register launched by the Commission of the EU in 2008. Organisations could indicate their specific areas of interest so as to alert them to relevant consultations.

The possibility of conducting targeted consultations in the case of rules/regulations which affect only a very narrow and specific category of persons could also be considered. Similarly, in the case of legislation involving complex and technical issues, expert groups may be consulted before the provisions are finally published for the benefit of the general public in more layman-friendly form. Again, in order to avoid domination of the process by the elite, criteria for implementing targeted consultations ought to be clearly defined in the statute recommended in the earlier part of this section.

The trend in most of the jurisdictions studied in this Report is to move towards a more participative law-making process. Democracies, the world over, appear to be coming to a

consensus that although elected representatives have the necessary democratic legitimacy to make law, the law-making process itself should be open and transparent and facilitate public debate and participation. Some of the recommendations mentioned above may help India move in a similar direction.

## **Indemnity**

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