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## **“The Advert Was Put Up Yesterday”: Public Participation in the Traditional Courts Bill Legislative Process**

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## “The Advert Was Put Up Yesterday”: Public Participation in the Traditional Courts Bill Legislative Process

60 N.Y.L. SCH. L. REV. 519 (2015–2016)

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## I. INTRODUCTION

The Traditional Courts Bill (TCB) was introduced first in 2008, and then again in 2012, to provide post-apartheid recognition and regulation of “traditional” forums of dispute resolution. Under apartheid, these forums were governed by the Black Administration Act 38 of 1927 (BAA).<sup>1</sup> This statute provided government officials with the power to group people into “tribes” and appoint “chiefs” as leaders in a separate system of governance for the black majority.<sup>2</sup> Those sections of the BAA dealing with so-called “tribal courts” have not yet been repealed.<sup>3</sup> The TCB was developed to replace this illegitimate regulatory framework and incorporate constitutional values such as equality and accountability in the hopes of facilitating access to justice for the rural poor.<sup>4</sup> To this end, the bill sought to provide “traditional courts,” presided over by senior traditional leaders, with the jurisdiction to adjudicate certain civil and criminal matters and impose sanctions on people within specific geographical areas.<sup>5</sup>

Despite its admirable stated objectives, the TCB was met with fierce opposition while it was before Parliament from members of the public, civil society, and academics.<sup>6</sup> Opponents critiqued the bill’s perpetuation of a separate governance system for black people,<sup>7</sup> lack of protections for women,<sup>8</sup> enforcement of unaccountable and undemocratic powers for traditional leaders,<sup>9</sup> and failure to use living customary law as a regulatory starting point for customary courts.<sup>10</sup> The TCB was attacked for perpetuating, and in some cases intensifying, colonial and apartheid distortions of customary law.<sup>11</sup> These arguments focused on ways that the bill failed to meaningfully reflect and respond to the needs and vulnerabilities that arise from the diverse

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1. See SA Law Reform Commission Report on the Repeal of the Black Administration Act 38 of 1927, at 53 (Mar. 2004) (noting that “[s]ince 1927 tribal government has almost exclusively been governed by the BAA.”).
  2. Sections 2 and 5 of the Black (Native) Administration Act 38 of 1927, as originally published.
  3. Specifically, sections 12 and 20 of the Black (Native) Administration Act 38 of 1927, as amended, still remain in force.
  4. See Traditional Courts Bill, at pmb1.
  5. *Id.* §§ 4–6, 10.
  6. For submissions made by these stakeholders during the various parliamentary processes that dealt with the TCB, see *Traditional Courts Bill (B1-2012)*, PARLIAMENTARY MONITORING GROUP, [www.pmg.org.za/bill/159/](http://www.pmg.org.za/bill/159/) (last visited Apr. 9, 2016) and *Focus Areas: Traditional Courts Bill*, CTR. FOR LAW & SOC’Y, [www.cls.uct.ac.za/research/focus/tcb/](http://www.cls.uct.ac.za/research/focus/tcb/) (last visited Apr. 9, 2016). Specific submissions by stakeholders will be referenced more fully in Part V of this article.
  7. THUTO THIPE, VOICES IN THE LEGISLATIVE PROCESS: A REPORT ON THE PUBLIC SUBMISSIONS ON THE TRADITIONAL COURTS BILL (2008 AND 2012), at 12–18 (2013).
  8. *Id.* at 37–42.
  9. *Id.* at 25–32.
  10. *Id.* at 22–23, 41.
  11. *Id.* at 9–12.

contexts in which customary law is practiced around the country.<sup>12</sup> Closely linked to arguments that the bill's content was disconnected from living customary law were critiques of the procedures used to draft the TCB and deficiencies in the consultation process once the bill entered Parliament.<sup>13</sup> Living customary law has been framed by the Constitutional Court as customary law that is responsive to change and reflects the ways in which people practice custom.<sup>14</sup> Many of the critiques of the TCB consultation process rested on the idea that uneven consultation showed which stakeholders were favored by government, since “[o]nly those voices that are heard are able to influence the direction, principles and content of legislation.”<sup>15</sup> We argue that deficiencies around public participation in the bill's legislative process from 2012 onwards resulted in a bill that fails to be legitimate for those who practice customary law. This piece examines public participation processes surrounding the TCB—exploring the constitutional requirements for consultation and the extent to which the TCB process met them.

In Part II, we examine the spirit in which consultation is captured in the Constitution and some of the motivations for this inclusion in the context of South Africa's political history. This examination focuses on the political significance of public participation in the legislative process and highlights relationships of power that necessitate the opening of spaces for different voices to be heard.

In Part III, we reflect on the South African Law Reform Commission's (SALRC) studies of customary law and how the SALRC developed and conducted consultation on “traditional courts and the judicial function of traditional leaders.”<sup>16</sup> This forms a basis for considering how consultation around customary law has been imagined in the past and what steps have been taken to encourage diversity in contributions and engagement from different sectors of society.

In Part IV, we describe briefly the development of the TCB from its introduction in the National Assembly in 2008 through its withdrawal from Parliament in 2011 and its reintroduction in the National Council of Provinces (NCOP) in 2012. This paper follows the TCB until it lapsed in Parliament in 2014.

In Part V, we analyze the Constitution's inclusion of public participation, focusing on its significance in the legislative process. This section draws on the Constitution and Court decisions to examine the jurisprudential principles that make consultation necessary and underpin the imagining of transformative democracy. This analysis draws on first-hand accounts of the process to evaluate how the different experiences and observations of people compare to the principles of participation and inclusivity set forth in South Africa's legal framework.

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12. *Id.* at 18–25.

13. *Id.* at 4–9.

14. Living customary law is contrasted with “official” customary law found in textbooks and statutes. *See, e.g., Bhe v. Magistrate, Khayelitsha* 2005 (1) SA 580 (CC) at paras. 87, 110–11, 154–55.

15. THIFE, *supra* note 7, at 4.

16. SA Law Commission Project 90 Customary Law: Report on Traditional Courts and the Judicial Function of Traditional Leaders (Jan. 2003).

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This piece examines how the privileging of traditional leaders during the drafting of the TCB, at the expense of people under their leadership, resulted in a bill that did not reflect or protect the needs or interests of the majority. By exploring the legal, political, and social motivations behind consultation, this piece identifies the many levels at which the failure to facilitate effective public participation threatened to undermine the interests of the people who would have been most affected by the TCB, and more broadly the very fiber of democracy. When the TCB was reintroduced to Parliament in 2012 with no changes from its 2008 form, submissions again reflected that people who would be directly affected by the TCB were not adequately informed or consulted before it was presented to Parliament.<sup>17</sup> The continuing failure to meaningfully consult with people over the life of the TCB points to Parliament’s deep inadequacies in its engagement with the public on the bill, and, related to this, to the development of legislation that is more damaging than constructive to the people it is designed to serve.

## II. SPIRIT OF THE CONSTITUTION: WHY CONSULTATION MATTERS

The South African Constitution was born in a moment of political opportunity, uncertainty, and hope as the country sought to break from the violence, oppression, and inequality of colonial and apartheid rule through the reimagining of the national political order. In the spirit of breaking from a past of exclusion and suppression, the Constitution requires that Parliament ensure public participation in the legislative process.<sup>18</sup> The Constitutional Court has further required that such participation be “meaningful.”<sup>19</sup>

Central to the state’s assertion of power under colonialism and apartheid was the epistemic violence that denied and devalued vernacular knowledge and inflicted inauthentic and inorganic systems, structures, values, and identities on African people.<sup>20</sup> Such violence is evident in official representations of customary law, through which custom was manipulated to support colonial supremacy that allowed the state greater control over African people.<sup>21</sup> The constitutional requirement for public consultation means that when drafting statutes dealing with custom, legislators will receive input from the people who practice and are served by customary law, rather than only relying on a damaging “official” misrepresentation of custom.<sup>22</sup>

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17. THIBE, *supra* note 7, at 4.

18. S. AFR. CONST., 1996, §§ 59, 72, 115–116, 118.

19. *Doctors for Life Int’l v. Speaker of the Nat’l Assembly* 2006 (6) SA 416 (CC) at paras. 129, 131, 145, 171, 235.

20. See PAUL S. LANDAU, *POPULAR POLITICS IN THE HISTORY OF SOUTH AFRICA, 1400–1948* (2010).

21. MAHMOOD MAMDANI, *CITIZEN AND SUBJECT: CONTEMPORARY AFRICA AND THE LEGACY OF LATE COLONIALISM* 37–61 (1996).

22. See S. AFR. CONST., 1996, §§ 59, 72, 118. These sections specifically require the legislatures to facilitate input on the substance of draft legislation by ordinary members of the public. This does not exclude the consideration of “official” customary law texts but enables a broader range of views on the subject matter.

Vital to the recognition of people's knowledge through consultation is the space that these processes open for the restoration and protection of human dignity. Sandra Liebenberg has explained the significance of public participation in relation to human dignity:

A major factor contributing to a sense of powerlessness and lack of autonomy is the absence of the opportunity to voice our concerns in relation to decisions which have a major impact on our lives. Meaningful participation in decisions that affect our lives affirms the close interlinkage between freedom and human dignity . . . It not only gives people a sense of control over their lives, but it affirms their equal worth as members of a political society.<sup>23</sup>

Engaging with people about their experience of custom unlocks the potential to develop and support expressions of custom that affirm dignity in the use of justice systems and allow for substantive alignment with the Constitution. Law that does not reflect the realities of the people it serves cannot be expected to protect their interests and adequately provide justice. The failure to listen to people from historically marginalized groups in the legislative process largely results in the perpetuation of power inequalities that limit the realization of rights. Failures in consultation also result in static legislation that is deaf to the dynamism of vernacular systems, structures, and institutions, which evolve in relation to changes in the groupings where they exist. In contrast, listening to diverse views and experiences on the ground promotes sensitivity to context and positionality, allowing greater insight into vernacular realities and promoting values of accountability, responsiveness, and openness that are central to the spirit of the Constitution.<sup>24</sup> Justice Sandile Ngcobo explained:

The participation by the public on a continuous basis provides vitality to the functioning of representative democracy. It encourages citizens of the country to be actively involved in public affairs, identify themselves with the institutions of government and become familiar with the laws as they are made . . . . It promotes a spirit of democratic and pluralistic accommodation calculated to produce laws that are likely to be widely accepted and effective in practice. It strengthens the legitimacy of legislation in the eyes of the people. Finally, because of its open and public character it acts as a counterweight to secret lobbying and influence peddling. Participatory democracy is of special importance to those who are relatively disempowered in a country like ours where great disparities of wealth and influence exist.<sup>25</sup>

Public participation is both practical and symbolic in the conceptualization of South Africa's democracy. An examination of the material impact of public participation demonstrates that the Constitution's emphasis on consultation is not a rhetorical device, or only relevant to representation, but serves as a tool for substantively influencing policy to give it life and legitimacy in the eyes of the people it serves.

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23. Sandra Liebenberg, *The Value of Freedom in Interpreting Socio-Economic Rights*, 2008 ACTA JURIDICA 149, 167–68.

24. See S. AFR. CONST., 1996, § 1(d).

25. *Doctors for Life Int'l v. Speaker of the Nat'l Assembly* 2006 (6) SA 416 (CC) at para. 115.

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Responses to the TCB in the 2008 and 2012 public submissions to Parliament reflect the ways in which the failure to listen to experiences of customary law during the bill’s drafting significantly compromised the bill’s content, making it out of touch with the people it was intended to serve.

### III. BEFORE THE TCB: SOUTH AFRICAN LAW REFORM COMMISSION PROCESS

Between 1999 and 2003, the SALRC undertook Project 90 to identify the reforms necessary to support and enhance customary courts and to ensure that they functioned in line with the Constitution.<sup>26</sup> In 2003, following discussions, submissions, and workshops around the country, the SALRC submitted a report and a draft bill to the Minister of Justice with recommendations on governance and administration under customary law and the relationship between customary and civil courts.<sup>27</sup>

This examination focuses on the SALRC’s consultation process, in particular the forums used to solicit public participation, the efforts to hear different perspectives, and the manner in which these different voices influenced both the SALRC’s public participation procedure and its ultimate recommendations.

The SALRC’s Project Committee brought together experts on customary law from different disciplinary backgrounds. The Project Committee worked with a variety of institutions and organizations to host consultation workshops with stakeholders, including traditional leaders, academics, other experts on customary law, and, significantly, different groups governed by customary law.<sup>28</sup> Reflecting on these workshops, the SALRC noted:

[A]lthough the purpose was essentially information-collection on the part of the Commission, the workshops would also afford communities (through their representatives) the opportunity to address the issue of customary law . . . . [T]he workshops were intended to enable people at grassroots level to feel that they “own” the process from its early stages.<sup>29</sup>

By emphasizing the significance of people feeling that they “own” legislation, the SALRC underlined the value of recognizing different perspectives and the space this sharing of knowledge creates to translate realities expressed through practice into legislation that is meaningful to people’s lives.

On September 9, 1999, the Centre for Indigenous Law at the University of South Africa, the Congress of Traditional Leaders of South Africa (CONTRALESA), and the SALRC organized an academic workshop, “Customary Courts,” with experts from around the country.<sup>30</sup> This was preceded by workshops held in June and

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26. See SA Law Reform Commission Project 90 Customary Law: Report on Traditional Courts and the Judicial Function of Traditional Leaders, at 1–3 (Jan. 2003).

27. See *id.*

28. *Id.* at 1–2.

29. SA Law Reform Commission Project 90: Report on the Customary Law of Succession, at 7 (Apr. 2004).

30. SA Law Reform Commission Project 90 Customary Law: Report on Traditional Courts and the Judicial Function of Traditional Leaders, at 1 (Jan. 2003).

July of 1999 in the Eastern Cape, Free State, KwaZulu-Natal, Mpumalanga, North West, and Limpopo.<sup>31</sup> The SALRC reported:

These workshops were well attended with most stakeholders represented. In particular, traditional leaders of all ranks (chiefs, headmen and sub-headmen), magistrates, prosecutors, representatives of the regional offices of the Department of Justice, academics and ordinary people under the leadership of traditional leaders attended the workshops. In some provinces, representatives of provincial houses of traditional leaders, women's groups and local council members also attended.<sup>32</sup>

In addition to the provincial workshops, the Project Committee held meetings between November 2002 and October 2003 and conducted household surveys “in about twelve sections in the townships” to diversify inputs on customary practices in these townships.<sup>33</sup> The SALRC's recognition of diversity in expressions of customary law and its efforts to be sensitive to different methodologies suggest a move away from essentializing custom and towards engaging with its true complexity.

The SALRC briefed the Joint Monitoring Committee on Improvement of Quality of Life and Status of Women on the progress in consultation four times between 2001 and 2003.<sup>34</sup> In the initial stages of the consultation process, the Centre for Applied Legal Studies (CALS) at the University of the Witwatersrand and the SALRC hosted an “expert meeting” to discuss the SALRC's recommendations and to ensure that the necessary measures were taken to make the reform of customary law inclusive.<sup>35</sup> One of the primary critiques of the SALRC's workshops came from women's organizations, which argued that the first discussion document failed to address the problems that women in rural areas face in customary courts.<sup>36</sup> In response to these criticisms, the Commission for Gender Equality, CALS, and the National Land Committee jointly held a series of consultations with women's groups to understand their views on traditional courts.<sup>37</sup> Workshops with women took place in September 1999, in KwaZulu-Natal, Limpopo, the Eastern Cape, and North West, often with local non-governmental organizations (NGOs) in attendance.<sup>38</sup> “The workshops . . . concentrated on rural women and field workers active in the rural development context who [could]

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31. *Id.*

32. *Id.* at 1–2.

33. SA Law Reform Commission Project 90: Report on the Customary Law of Succession, at 8 (Apr. 2004).

34. *Id.* at 7. These briefings occurred on August 29, 2001; October 18, 2002; April 4, 2003; and November 18, 2003.

35. *Id.*

36. *See* SA Law Reform Commission Project 90 Customary Law: Report on Traditional Courts and the Judicial Function of Traditional Leaders, at 2 (Jan. 2003).

37. *Id.*

38. *Id.*

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provide a perspective different [from those] advanced by traditional leaders.”<sup>39</sup> These meetings were the basis for a joint submission by the three organizations.<sup>40</sup> The SALRC’s 2003 final report refers to women’s concerns raised in the joint submission and how it attempted to address them.<sup>41</sup>

Public inputs on the drafting of the TCB revealed that in contrast to the SALRC’s deliberations, traditional leaders were consulted by the department responsible for drafting the bill to the exclusion of other affected groups.<sup>42</sup> No attempts to consult rural women as a specific interest group were reported.<sup>43</sup> This illustrates how the TCB drafting consultation process failed both to consider reservations raised during the SALRC’s consultation and to learn from the responses to these critiques. This omission also raises questions about the meaningfulness of the consultation process, given that a group that makes up the majority in South Africa’s rural areas<sup>44</sup> was not engaged in a way that promoted access and free participation.

Professors Thandabantu Nhlapo<sup>45</sup> and Tom Bennett<sup>46</sup> from the University of Cape Town raised concerns about the TCB process, linked specifically to the SALRC’s prior process, in their 2008 submission to the Portfolio Committee on Justice and Constitutional Development, the National Assembly committee responsible for the TCB. Nhlapo and Bennett argued:

As people who worked directly on producing the original draft bill on Traditional Courts that was attached to the Report of the Law Commission, we are aware that the present Bill bears little resemblance to that original draft. The problem with this is that no parliamentary hearing process could match the Law Commission consultation process that was undertaken in 1999 for depth of debate or width of geographical coverage. . . .

. . .

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39. *Id.*

40. *Id.*

41. *See id.*

42. *See* Law, Race and Gender Research Unit, Submission to the National Council of Provinces 5–6 (2012) [hereinafter LRG Submission 2012]; S. Afr. Hum. Rts. Comm’n, Submission to the National Council of Provinces 6 (2012) [hereinafter SAHRC Submission]; Women’s Legal Ctr., Submission to the National Council of Provinces 6 (2012) [hereinafter WLC Submission 2012].

43. *See* THIPE, *supra* note 7, at 4–6.

44. *See* LRG Submission 2012, *supra* note 42, at 5.

45. Professor Nhlapo was the leader of the customary law project and the Chairperson of the Project Committee during the development of the original draft bill. He also led the national consultation process, both with traditional leaders and later with women’s groups. Thandabantu Nhlapo & Tom Bennett, Submission to Parliament in Respect of the Traditional Courts Bill, § 1.3 (2008).

46. Professor Bennett was “a member of the Project Committee and author of the Discussion Paper and the final Report.” *Id.*

We submit that Parliament should see its way clear to extending the deadline for submissions, and to seek a way to solicit a wide range of views on the Bill, especially those of the rural people whose lives are lived under customary law.<sup>47</sup>

Nhlapo and Bennett “dr[e]w attention to the TCB’s lack of sensitivity to context and diversity and, like many other submissions, link[ed] the TCB’s crude representations of customary law to the poor consultation process” surrounding its development.<sup>48</sup>

One of the significant differences between the SALRC’s recommendations and the TCB was that the SALRC’s recommendations allowed for “opting out” of traditional courts in favor of magistrates’ courts, whereas the TCB forced people within prescribed “tribal” boundaries to use traditional courts exclusively.<sup>49</sup> The SALRC noted that because of the “controversy surrounding the issue of the independence and impartiality of customary courts” it was “safer to leave the door open for objecting to the jurisdiction of the customary court and opting out in favour of a magistrate’s court or other court particularly in criminal proceedings.”<sup>50</sup> One of the primary criticisms of the TCB was that it denied the right to opt out of traditional courts, which illustrated its significant departure from the SALRC’s recommendations.<sup>51</sup> The TCB ignored what public submissions described as a common practice of using different courts for different types of protection in different situations.<sup>52</sup> Many women’s organizations objected to the provision against opting out, arguing that it was common practice for women to use magistrates’ courts in matters such as child maintenance and domestic violence, which state legislation covers comprehensively.<sup>53</sup>

While the SALRC’s draft bill may not have been perfect, its recommendations were significantly more nuanced and responsive to difference and diversity than the TCB. These outcomes are reflective of the SALRC’s more inclusive consultation, which was broader in representation and more rigorous in factoring feedback from affected people into the development of the draft bill. This process engaged with positionality, recognizing the role that identity; localized history; and social, geographic, and political locations play in influencing personal interests and experiences of customary law.

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47. *Id.* §§ 2.2.1, 3.

48. THIFE, *supra* note 7, at 7.

49. LRG Submission 2012, *supra* note 42, at 8.

50. SA Law Reform Commission Project 90 Customary Law: Report on Traditional Courts and the Judicial Function of Traditional Leaders, at 32 (Jan. 2003).

51. THIFE, *supra* note 7, at 14–18.

52. *See* LRG Submission 2012, *supra* note 42, at 9.

53. THIFE, *supra* note 7, at 18.

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#### IV. DEVELOPMENT OF THE TCB IN PARLIAMENT

An explanatory summary of the TCB was published in the *Government Gazette* on March 27, 2008, after which it was introduced in the National Assembly.<sup>54</sup> The Portfolio Committee on Justice and Constitutional Development called for written submissions on April 21, with a deadline of May 6.<sup>55</sup> There were three public holidays and two weekends in this sixteen-day period.<sup>56</sup> The Portfolio Committee received fewer than twenty submissions—most of them were opposed to the TCB, and several people called for an extension of the comment period.<sup>57</sup>

Many submissions communicated that only traditional leaders were actively engaged during the bill’s development. This critique was at the heart of much of the opposition to the bill. The TCB failed both *substantively* in the ways that it gave effect to the bolstering of traditional leaders’ power, and increased the vulnerability of people living within its jurisdiction, and *procedurally* in terms of the right to democratic participation.<sup>58</sup> This position was supported by the Joint Monitoring Committee on the Improvement of Quality of Life and Status of Women in Parliament, which noted that “[t]he Bill has been drafted in consultation with traditional leaders but opinions and feelings of rural communities ha[ve] not been captured anywhere.”<sup>59</sup>

At the TCB hearings on May 13, 14, and 20, 2008, only organizations representing traditional leaders supported the bill in its entirety.<sup>60</sup> The Congress of South African Trade Unions (COSATU), the South African Council of Churches, the Commission for Gender Equality, and other civil society organizations—including those representing rural women and various rural communities—opposed the TCB.<sup>61</sup> The Portfolio Committee accepted in May that it would miss the June 2008 deadline for repeal of the BAA’s tribal court provisions,<sup>62</sup> and resolved on June

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54. Publication of Explanatory Summary of the Traditional Courts Bill, 2008, GN 392 of GG 30902 (27 Mar. 2008).

55. THIPE, *supra* note 7, at 1.

56. *Id.*

57. *Id.*

58. See Sindiso Mnisi, Submission to the National Assembly on the Traditional Courts Bill [B15-2008], at 1–3 (2008) (on file with authors).

59. Joint Monitoring Comm. on the Improvement of Quality of Life and Status of Women, Submission to the Portfolio Committee on Justice and Constitutional Development on the Traditional Courts Bill [B15-2008], at 3 (2008).

60. See generally *Traditional Courts Bill B15-2008: Department of Justice Briefing and Public Hearings*, PARLIAMENTARY MONITORING GROUP (2008) (on file with authors) (detailing minutes from the May 13, 2008 hearing and noting the subsequent meetings on May 14 and May 20, 2008).

61. ANINKA CLAASSENS, CTR. FOR LAW & SOC’Y, SUMMARY AND ANALYSIS OF THE TRADITIONAL COURT BILL B 15–2008 (2009), [http://www.lrg.uct.ac.za/ust/lrg/docs/TCB/2012/tcb\\_summary\\_analysis.pdf](http://www.lrg.uct.ac.za/ust/lrg/docs/TCB/2012/tcb_summary_analysis.pdf).

62. See generally Publication of Draft Repeal of the Black Administration Act and Amendment of Certain Laws Amendment Bill, 2008, GN 653 of GG 31088 (10 May 2012). The Repeal of the Black Administration Act and Amendment of Certain Laws Act 28 of 2005 § 1(3) previously stated that sections 12 and 20 of the BAA would be repealed either on June 30, 2008 or when a new national law regulating customary courts was implemented—whichever was first in time.

17, 2008 to keep the BAA in force until the end of 2009.<sup>63</sup> The provisions were extended further at the end of 2009<sup>64</sup> and again in 2010<sup>65</sup> until Parliament voted in 2012 to keep them indefinitely.<sup>66</sup>

The TCB was withdrawn from the National Assembly in June 2011. On December 13, 2011, as the holiday season began, the DOJCD unexpectedly announced in a *Government Gazette* notice that the TCB would be reintroduced in the NCOP in January and set a deadline of February 15, 2012 for comments.<sup>67</sup>

The DOJCD briefed the NCOP's Select Committee on Security and Constitutional Development ("Select Committee" or "Committee") on the bill on March 7, 2012 and went on to brief individual provincial legislatures ahead of public hearings, which were held in all nine provinces in the month leading up to May 18, 2012.<sup>68</sup>

Several written submissions from people based in former bantustans,<sup>69</sup> where the TCB would have had effect, communicated that the only information about the bill came from civil society groups.<sup>70</sup> The submissions also detailed the significant personal expense that many undertook to attend hearings in centers far from where they lived. Many said traditional leaders, but not other residents, were transported to the hearings at the state's expense.<sup>71</sup>

The North West, Gauteng, Eastern Cape, and Western Cape delegations rejected the bill in the negotiating mandates submitted to the Select Committee after their provincial hearings.<sup>72</sup> KwaZulu-Natal, Limpopo, the Free State, and the Northern

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63. See Repeal of the Black Administration Act and Amendment of Certain Laws Amendment Act, 2008, GN 709 of GG 31199 (27 June 2008) (amending section 1(3) by replacing the repeal date of June 30, 2008 with December 30, 2009); *Black Administration Act: Adoption; Reform of Customary Law of Succession Bill: Briefing, Child Justice Bill: Deliberations*, PARLIAMENTARY MONITORING GROUP (June 17, 2008), <https://pmg.org.za/committee-meeting/9276/>.

64. Repeal of the Black Administration Act and Amendment of Certain Laws Act 20 of 2009.

65. Repeal of the Black Administration Act and Amendment of Certain Laws Act 20 of 2010.

66. According to the Repeal of the Black Administration Act and Amendment of Certain Laws Act 20 of 2012, only the implementation of a national law to regulate customary courts (such as the TCB) can trigger the repeal of the relevant provisions in the BAA.

67. See Publication of Explanatory Summary of the Traditional Courts Bill, 2012 in Terms of Rule 186 of the Rules of the National Council of Provinces, GN 901 of GG 34850 (13 Dec. 2011).

68. *Justice Briefs NCOP Select Committee on Traditional Courts Bill*, CTR. FOR L. & SOC'Y (Mar. 7, 2012), <http://www.lrg.uct.ac.za/news/?id=40&t=int>. For a list of all hearings held in the provinces during April and May 2012, see NOLUNDI LUWAYA, REPORT ON THE PROVINCIAL TRADITIONAL COURTS BILL HEARINGS: EXPLORING RURAL PEOPLE'S DEMOCRATIC PARTICIPATION AND FREEDOM OF EXPRESSION 39–40 (2013).

69. Bantustans, or Bantu or black homelands, were territories set aside for the black population under apartheid. See *The Homelands*, S. AFR. HIST. ONLINE, <http://www.sahistory.org.za/special-features/homelands> (last visited Apr. 9, 2016).

70. THIPE, *supra* note 7, at 5–9.

71. See *id.* at 5.

72. *Id.* at 2.

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Cape submitted proposals for contradictory amendments.<sup>73</sup> Mpumalanga asked for a three-month extension to prepare its mandate.<sup>74</sup>

The Select Committee resolved at this point to hold another round of hearings rather than debate the provincial mandates on the bill. A May 31, 2012 letter to the chair of the NCOP by the Legal Resources Centre pointed out that this was a procedural anomaly and urged the Committee to consider the negotiating mandates submitted by the provinces as it was supposed to do.<sup>75</sup> This did not happen. Instead, a new call for written submissions was made by the Committee<sup>76</sup> and national public hearings were held from September 18 to 21, 2012 in Cape Town.<sup>77</sup> At least twenty-four oral submissions were made to the Committee during this period, many by people based in rural areas. Of this number, approximately twenty spoke in opposition to the TCB.<sup>78</sup> Unusually, the DOJCD was also permitted to make a “submission” on the bill, rather than merely briefing the Committee at the onset of the hearings.<sup>79</sup> This DOJCD “submission” included responses to arguments raised in other submissions and proposals for a regulatory framework that departed substantially from the content of the bill under consideration in the hearings—the same bill that the DOJCD itself originally tabled in Parliament.<sup>80</sup> It seems that the DOJCD’s “submission” was a dubious attempt to introduce a new government policy position via a public submissions process in the hope that its position would eventually trump the views of the public.

When the Select Committee met on October 24, 2012 to table its report on the hearings, the DOJCD presented a document that summarized only two submissions—those of the South African Human Rights Commission and the Department of

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73. *Id.*

74. *See Traditional Courts Bill [B1-2012]: Briefings by UCT and Deliberations on Process*, PARLIAMENTARY MONITORING GROUP (May 30, 2012), <http://www.pmg.org.za/report/20120530-traditional-courts-bill-briefings-uct-and-deliberations-process> [hereinafter *PMG 2012 Briefings*].

75. Letter from the Legal Res. Ctr. to Mninwa Johannes Mahlangu, Honourable Chair, Nat’l Council of Provinces (May 31, 2012), [http://www.lrg.uct.ac.za/usr/lrg/docs/TCB/2012/LRC\\_Letter\\_NCOP\\_31May2012.pdf](http://www.lrg.uct.ac.za/usr/lrg/docs/TCB/2012/LRC_Letter_NCOP_31May2012.pdf).

76. *Select Committee Calls for More Submissions and Hearings on TCB*, CTR. FOR L. & Soc’y (Aug. 27, 2012), <http://www.cls.uct.ac.za/news/archives/?id=53&t=int>.

77. *TCB Public Hearings Postponed by One Week*, CTR. FOR L. & Soc’y (Sept. 4, 2012), <http://www.lrg.uct.ac.za/news/archives/?id=56&t=int>.

78. *See Report of the Select Committee on Security and Constitutional Development on the Traditional Courts Bill Public Hearings Held in Parliament 18 to 21 September 2012, dated 28 November 2012*, PARLIAMENTARY MONITORING GROUP, <https://pmg.org.za/taled-committee-report/286/> (last visited Apr. 9, 2016); *see also* THIBE, *supra* note 7, at 2.

79. In contrast, the PMG noted that some parliamentary committees have been adamant that government departments not express opinions on bills after they have entered the parliamentary process. *See* SUSAN WILLIAMS, PARLIAMENTARY MONITORING GRP., *OVERVIEW OF FOURTH PARLIAMENT 9* (2014) [hereinafter *PMG OVERVIEW*].

80. *See* Dep’t of Justice & Constitutional Dev., *Submission of the Department of Justice and Constitutional Development to the Select Committee on Security and Constitutional Development on the Traditional Courts Bill* (2012), <http://db3sqepoi5n3s.cloudfront.net/files/docs/120912scsecuritydevelopment.pdf>.

Women, Children and People with Disabilities.<sup>81</sup> One member of the Committee argued that any account of the public hearings that did not represent the opposition to the TCB would not accurately summarize the process.<sup>82</sup> The Committee chairperson said that the majority of submissions had been excluded because they were “irrelevant.”<sup>83</sup> This position disregarded important experiential and contextual contributions by members of the public who could not reasonably be expected to make reference to provisions in the bill as legal experts would.

The DOJCD occupied a dual role as stakeholder with its own “submission” and as gatekeeper of submissions deemed “relevant” for the summary report. It is questionable whether the DOJCD should have occupied either of these roles after the responsibility for drafting the TCB had been transferred from the DOJCD to Parliament by the official tabling of the bill in the NCOP.<sup>84</sup> After uproar by the Alliance for Rural Democracy,<sup>85</sup> the Select Committee adopted a new report on November 27, 2012—rewritten to incorporate all of the submissions made at the national hearings.<sup>86</sup>

There was no further communication from the Select Committee on the status of the bill for almost a year after the report was adopted, until the Committee announced there would be a meeting on October 15, 2013 for the dormant TCB. The Committee resolved again at that meeting not to hold debates on mandates submitted by the provinces, as the mandates needed further clarification.<sup>87</sup> Instead, it decided on more public consultation in the provinces—purportedly to allow provinces more time to resolve “ambiguities” regarding the proposals in their negotiating mandates.<sup>88</sup> Some civil society organizations speculated that members of the Select Committee were being swayed by political concerns that a majority of provinces

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81. Media Release, All. for Rural Democracy, Traditional Courts Bill: Committee Chairperson Compromises Parliament’s Integrity. Civil Society Calls for His Status to be Reviewed (Oct. 24, 2012), [http://www.lrg.uct.ac.za/usr/lrg/docs/TCB/2012/Media\\_Release\\_24102012.pdf](http://www.lrg.uct.ac.za/usr/lrg/docs/TCB/2012/Media_Release_24102012.pdf).

82. THIBE, *supra* note 7, at 2; *see also* Traditional Courts Bill: Department Responses to Public Hearings, PARLIAMENTARY MONITORING GROUP (Oct. 24, 2012), <https://pmg.org.za/committee-meeting/15098/> [hereinafter *Department Responses to Public Hearings*].

83. *Department Responses to Public Hearings*, *supra* note 82.

84. For additional discussion of concerns about Parliament’s reliance on government departments for drafting and advice, *see* PMG OVERVIEW, *supra* note 79, at 23.

85. *See* Media Release, All. for Rural Democracy, *supra* note 81.

86. *See* Repeal of Black Administration Amd Bill; Prevention & Combatting of Trafficking in Persons Bill: SAPS, Depts of Justice/Social Development Input; Protection of Personal Information Bill; Traditional Courts Bill Committee Report on Public Hearings, PARLIAMENTARY MONITORING GROUP (Nov. 27, 2012), <https://pmg.org.za/committee-meeting/15316/> [hereinafter *Committee Report on Public Hearings*].

87. *See* Traditional Courts Bill: Referral to the Provinces for Further Deliberations; Criminal Law (Forensic Procedures) Amendment Bill: Deliberations, PARLIAMENTARY MONITORING GROUP (Oct. 15, 2013), <http://www.pmg.org.za/report/20131015-traditional-courts-bill-referral-provinces-for-further-deliberations-criminal-law-forensic-procedures-amendment> [hereinafter *TCB Referral to the Provinces*].

88. *See id.*

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might reject the bill.<sup>89</sup> It emerged later that the Select Committee had considered advice received from a parliamentary legal office, which assessed *inter alia* whether the bill should have been withdrawn as some committee members had suggested, or whether there should have been further consultation as the Minister of Justice and Constitutional Development had suggested.<sup>90</sup>

By October 2013, the Minister’s suggestions had prevailed and further rounds of hearings were later held by the Free State and North West provincial legislatures.<sup>91</sup> The Free State retained its negotiating mandate in favor of the bill, while North West converted its negotiating mandate from rejection to support for the TCB.<sup>92</sup>

By February 2014, when the Select Committee was scheduled to finally consider provincial negotiating mandates, four provinces opposed the bill, four provinces supported the bill with amendments, and one province abstained from voting.<sup>93</sup> It became clear at a meeting on February 12 that no province would accept the bill without extensive changes and that suggested amendments were contradictory.<sup>94</sup> One week later, the responses of a parliamentary law advisor suggested that wide-ranging amendments would be necessary to correct defects in the bill.<sup>95</sup>

With only a short period before the rising of Parliament ahead of national elections, and an apparent impasse on the way forward, the TCB was removed from the parliamentary schedule on the technical argument that it had not been properly

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89. See Media Release, Ctr. for Law and Soc’y, Victory for Rural People as Most Provinces Oppose TCB, yet Parliament Wants More “Consultation” (Oct. 15, 2013), <http://www.customcontested.co.za/victory-rural-people-provinces-oppose-tcb-yet-parliament-wants-consultation/>; see also Media Release, All. for Rural Democracy, NCOP Again Ignores Rural Voices on Traditional Courts Bill: A Case of “We’ll Consult Until We Change Your Minds”? (Nov. 21, 2013), <http://www.customcontested.co.za/ncop-ignores-rural-voices-traditional-courts-bill-case-well-consult-change-minds/>.

90. See Media Release, All. for Rural Democracy and the Tshintsha Amakhaya Platform, NCOP Succumbs to Pressure from the Executive Not to Withdraw the TCB (Oct. 22, 2013), <http://www.customcontested.co.za/ncop-succumbs-pressure-executive-withdraw-tcb/>.

91. See *id.*; Media Release, All. for Rural Democracy, Third Round of Hearings on the TCB Fails to Change Minds (Nov. 22, 2013), <http://www.customcontested.co.za/third-round-hearings-tcb-fails-change-minds/> [hereinafter Third Round of Hearings on the TCB Fails to Change Minds].

92. Note that both provinces supported the bill, provided that certain amendments would be taken into consideration. For details of negotiating mandates, see SELECT COMM. SEC’Y, THE TRADITIONAL COURTS BILL: SUMMARY OF THE PROCESS TO DATE 5 FEBRUARY 2014 (Comm. Print 2014), <http://db3sqepoi5n3s.cloudfront.net/files/140204summary.pdf>.

93. *Id.*

94. See *Traditional Courts Bill [B1–2012]: Consideration of Negotiating Mandates*, PARLIAMENTARY MONITORING GROUP (Feb. 12, 2014), <http://www.pmg.org.za/report/20140212-traditional-courts-bill-b1-2012-consideration-negotiating-mandates>; see also Aninka Claassens, *NCOP in Disarray About TCB*, CUSTOM CONTESTED (Feb. 12, 2014), <http://www.customcontested.co.za/ncop-disarray-tcb/>.

95. See *Traditional Courts Bill: Legal Response to Provinces’ Proposals* (Feb. 19, 2014), <http://www.pmg.org.za/report/20140219-traditional-courts-bill-legal-response-provinces-proposals>; see also Mbongiseni Buthelezi, *TCB on Life Support*, CUSTOM CONTESTED (Feb. 19, 2014), <http://www.customcontested.co.za/tcb-life-support/>.

revived since the previous year, as required by procedure.<sup>96</sup> The Alliance for Rural Democracy contended that this was to prevent the humiliation of rejection after so many years in the legislature.<sup>97</sup> In any event, the bill was set to lapse by the close of the parliamentary term in March 2014.

The existence of anomalies in the lawmaking process, coupled with particularly fierce opposition to the TCB by members of the public and civil society, make the TCB's passage through Parliament an interesting case study for the application and effectiveness of the Constitution's parliamentary public participation requirements. The following sections take a closer look at the Constitutional Court's jurisprudence on public participation in the legislative process in light of the TCB's development thus far.

## V. LEGAL REQUIREMENTS FOR CONSULTATION

### *A. Constitutional Framework for Public Participation*

Parliament's rules provide that the public may participate in parliamentary processes by attending meetings, submitting written comments or petitions, or giving oral testimony before Parliament.<sup>98</sup> These rules are rooted in constitutional provisions for public participation in the lawmaking process. For the NCOP, the specific powers and requirements that allow the public to participate are located within sections 69, 70(1)(b), and 72 of the Constitution. Section 72(1)(a) explicitly imposes a duty on the NCOP with respect to public participation: "The National Council of Provinces must . . . facilitate public involvement in the legislative and other processes of the Council and its committees. . . ."<sup>99</sup>

The Constitution contains corresponding provisions for the National Assembly,<sup>100</sup> and for the various provincial legislatures.<sup>101</sup> These provisions allow the legislative bodies to ask for evidence or information, to accept input from stakeholders, and to make procedural rules consistent with principles of transparent and participatory

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96. See Media Release, All. for Rural Democracy, Traditional Courts Bill is Dead! (Feb. 21, 2014), <http://www.customcontested.co.za/traditional-courts-bill-dead/>.

97. *Id.*

98. Rule 6 of the Joint Rules of Parliament, Rule 5 of the Rules of the National Council of Provinces, and to a lesser extent, Rules 203F and 203M of the Rules of the National Assembly provide for this public participation. See also *Doctors for Life Int'l v. Speaker of the Nat'l Assembly* 2006 (6) SA 416 (CC) at para. 144 (noting that Rule 6 of the Joint Rules of Parliament "deals specifically with public participation and provides that members of the public may participate in the joint business of the Houses by attending the sittings of the Houses and their committees; by commenting in writing on bills or other matters before joint committees or giving evidence or making representations or recommendations on a bill before the House.").

99. S. AFR. CONST., 1996, § 72(1)(a).

100. *Id.* §§ 56, 57(1)(b), 59.

101. *Id.* §§ 115, 116(1)(b), 118; see also *Doctors for Life*, 2006 (6) SA 416 at para. 136.

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democracy to fulfill their broad mandate to facilitate public involvement and make lawmaking processes open to the public.<sup>102</sup>

There is a significant body of literature that more broadly examines the Constitutional Court’s framing of meaningful engagement and the role of consultation in transformative democracy and the provision of services by the state.<sup>103</sup> This piece focuses on the role of public participation in the *legislative process* to allow for a richer and more relevant analysis and evaluation of the TCB’s journey so far.

*B. Interpreting the Constitutional Provisions: Doctors for Life Sets the Standard*

In *Doctors for Life International v. Speaker of the National Assembly*, the Constitutional Court discussed at length the legislature’s duty to facilitate public involvement in its lawmaking processes, including those of parliamentary committees.<sup>104</sup> This case arose because the NCOP and provincial legislatures had, for the most part, failed to call for written submissions from the public and to hold public hearings before passing certain bills.<sup>105</sup> Thus, the Court had to determine whether the NCOP and provincial legislatures had failed to honor their constitutional obligation to facilitate public participation.

The Court said that three considerations were necessary for a contextual understanding of the national and provincial legislatures’ constitutional obligation: first, the NCOP’s role in the lawmaking process; second, the right to political participation; and third, the nature of South Africa’s constitutional democracy.<sup>106</sup> The first of these considerations refers to the role played by the NCOP in protecting provincial interests in the national sphere and in involving provincial legislatures in national lawmaking debates, since provincial legislatures provide the NCOP delegates with their voting mandates.<sup>107</sup> The Court’s second consideration was that public involvement in lawmaking forms part of the international right to political participation, consisting of “at least two elements: a general right to take part in the

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102. S. AFR. CONST., 1996, §§ 56, 57(1)(b), 59, 69, 70(1)(b), 72, 115, 116(1)(b), 118.

103. See generally Sandra Liebenberg, *Engaging the Paradoxes of the Universal and Particular in Human Rights Adjudication: The Possibilities and Pitfalls of ‘Meaningful Engagement’*, 12 AFR. HUM. RTS. L.J. 1 (2012); Gustav Muller, *Conceptualising “Meaningful Engagement” as a Deliberative Democratic Partnership*, 22 STELLENBOSCH L. REV. 742 (2012).

104. 2006 (6) SA 416 at para. 1.

105. *Id.* at paras. 2, 4.

106. *Id.* at para. 78. The Constitutional Court defined “public involvement” as “the active participation of the public in the decision-making processes” and noted that it was used interchangeably with the term “public participation.” *Id.* at para. 118.

107. See S. AFR. CONST., 1996, § 42(4); see also *Doctors for Life*, 2006 (6) SA 416 at paras. 79, 81, 86–88, 151, 179; *Matatiele Municipality v. President of the Republic of S. Afr.* 2007 (1) BCLR 47 (CC) at paras. 39, 41, 47. In *Matatiele*, the Court noted that provincial legislatures have a duty to facilitate public participation when they are involved in national legislative processes at the NCOP via their delegations. *Matatiele*, 2007 (1) BCLR 47 at para. 47.

conduct of public affairs; and a more specific right to vote and/or to be elected.”<sup>108</sup> Thus, the South African Constitution incorporates political rights related to an electoral process at section 19,<sup>109</sup> but then also introduces state obligations to facilitate ongoing public participation in lawmaking and other decisionmaking processes.<sup>110</sup>

The Court’s third consideration was the participatory nature of South Africa’s constitutional democracy. It said that because the founding values of accountability, responsiveness, and openness are included in the Constitution, our democracy is not only about *representation* of the people by members of Parliament but also about *participation* by the people themselves in Parliament.<sup>111</sup>

This feature of our democracy finds its origins in the concept of *people’s power*—a concept used during the struggle against apartheid to encapsulate the need to provide South Africa’s majority with the voice that they were denied in national lawmaking and political processes—which saw the rise of community-based groups in opposition to the apartheid system.<sup>112</sup> Many of these same groups were denied a democratic voice during the TCB legislative process.<sup>113</sup>

One criticism of the 2012 provincial and national hearings was that the poor advertisement of and limited accessibility to the hearings were deliberate attempts to exclude those who would be affected by the bill and to silence opposition. Simangele Zungu from KwaZulu-Natal wrote:

The advert about the Public Hearings in Parliament was on the newspapers a week ago and within a week as rural communities we are expected to have organized ourselves and developed submissions and select members of our communities to represent us. . . . All we could see through all of this is that the government is just conducting these hearings for the sake of conducting it

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108. *Doctors for Life*, 2006 (6) SA 416 at para. 90; see also *Poverty Alleviation Network v. President of the Republic of S. Afr.* 2010 (6) BCLR 520 (CC) at para. 34; G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 21 (Dec. 10, 1948) (“Everyone has the right to take part in the government of his country . . . .”); International Covenant on Civil and Political Rights art. 25, Dec. 16, 1966, 999 U.N.T.S. 171 (stating that every citizen shall have the right to take part in public affairs, to vote and to be elected, and to have access to public service).

109. S. Afr. CONST., 1996, § 19 (discussing political rights). The Constitution further states that “[u]niversal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government” are some of the founding values of South Africa. *Id.* § 1(d).

110. *Doctors for Life*, 2006 (6) SA 416 at para. 108.

111. *Id.* at paras. 111, 122. This contextual consideration was confirmed and applied in *Matatiele*. 2007 (1) BCLR 47 at paras. 39–40, 56–65; see also *Poverty Alleviation Network*, 2010 (6) BCLR 520 at para. 33 (discussing the importance of public involvement for a legitimate democratic state); *Merafong Demarcation Forum v. President of the Republic of S. Afr.* 2008 (5) SA 171 (CC) at para. 26 (discussing the importance of public participation as well as representative democracy).

112. *Doctors for Life*, 2006 (6) SA 416 at para. 112.

113. In *Doctors for Life*, the Court noted the special need for consultation with respect to issues that affect groups that were previously discriminated against, so as to prevent their marginalization. See *id.* at para. 174. Persons living in the former homelands of South Africa, for whom the TCB would be most applicable would certainly also fall within this category. See LRG Submission 2012, *supra* note 42.

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and not expecting to listen to our voice as rural communities who will be impacted negatively by this Bill.<sup>114</sup>

The author sees the exclusion from public participation as politically motivated and locates it within a broader trend of legislation on customary law that is focused on the interests of traditional leaders rather than the majority of people who live under traditional leadership.<sup>115</sup> The “Concerned Residents of Herschel,” representing residents from six “Tribal Authority” areas in the Eastern Cape, explained:

There were no notices made to the wider community of Herschel about the hearings. . . . [T]he Herschel hearing was held in Queenstown, more than 200 kilometers from the Herschel District. This is seen as a deliberate attempt by government to exclude the people of Herschel of their constitutional right to participate in the TCB process. If there were any discussion[s] that took place about the TCB, Traditional Leaders kept [it] to themselves. The Concerned Residents of Herschel heard about the hearing from an unofficial source . . . .<sup>116</sup>

The “Concerned Residents of Herschel” illustrate that even when the TCB was reintroduced in 2012, after widespread protest about the poor consultation in 2008, Parliament continued to shape consultation in a way that excluded people who would be affected by the bill.

### C. Content of Parliament’s Duty

With the three considerations enumerated above in mind, the Constitutional Court in *Doctors for Life* examined the content of Parliament’s duty to facilitate public involvement, stating that Parliament must “[take] steps to ensure that the public participate in the legislative process.”<sup>117</sup> However, the Constitution does not specify what steps Parliament should take, instead giving it the discretion to develop its own mechanisms.<sup>118</sup> The Constitutional Court’s duty is then to assess whether the degree

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114. Simangele Zungu, KwaZulu-Natal, Submission on the Traditional Courts Bill of 2012 (2012) (on file with authors); see also THIFE, *supra* note 7, at 6.

115. See *Back to the Dark Day*, MAIL & GUARDIAN, <http://mg.co.za/article/2008-05-16-back-to-the-dark-day> (last visited Apr. 9, 2016); Aninka Claassens, *What’s Wrong with the Traditional Courts Bill*, MAIL & GUARDIAN (June 2, 2008), <http://mg.co.za/article/2008-06-02-whats-wrong-with-the-traditional-courts-bill>; Sindiso Mnisi, *Terror in the Name of Tradition*, MAIL & GUARDIAN (Feb. 26, 2010), <http://mg.co.za/article/2010-02-25-terror-in-the-name-of-tradition>.

116. Concerned Residents of Herschel, Submission on the Traditional Courts Bill (TCB) 1–2 (2012), [http://www.lrg.uct.ac.za/usr/lrg/docs/TCB/2012/herschel\\_apr2012\\_provsubmission.pdf](http://www.lrg.uct.ac.za/usr/lrg/docs/TCB/2012/herschel_apr2012_provsubmission.pdf).

117. *Doctors for Life*, 2006 (6) SA 416 at para. 120; see also *Poverty Alleviation Network v. President of the Republic of S. Afr.* 2010 (6) BCLR 520 (CC) at para. 35.

118. *Doctors for Life*, 2006 (6) SA 416 at paras. 123, 145; see also S. AFR. CONST., 1996, §§ 57(1), 70(1), 116(1); *Moutse Demarcation Forum v. President of the Republic of S. Afr.* 2011 (11) BCLR 1158 (CC) at para. 49; *Poverty Alleviation Network*, 2010 (6) BCLR 520 at para. 35; *Merafong Demarcation Forum v. President of the Republic of S. Afr.* 2008 (5) SA 171 (CC) at para. 27; *Matatiele Municipality v. President of the Republic of S. Afr.* 2007 (1) BCLR 47 (CC) at para. 67.

of participation decided upon by the legislative body in each case has been sufficient to comply with the Constitution.<sup>119</sup>

The Constitutional Court held that the standard to be used in making this determination is *reasonableness*, judged on the following factors: the nature, importance, and potential impact of the legislation; temporal and budgetary constraints on Parliament; Parliament's own assessment of appropriate public involvement in the particular context; and whether Parliament has adopted any rules or policies to facilitate public participation.<sup>120</sup> In this way, the pragmatic difficulty associated with Parliament's mandate is acknowledged and respect is given to its original lawmaking power.<sup>121</sup>

Justice Ngcobo discussed judicial deference to Parliament's legislative powers in the context of public participation in the *Doctors for Life* majority judgment:

[T]he Court must balance, on the one hand, the need to respect parliamentary institutional autonomy, and on the other, the right of the public to participate in public affairs. In my view, this balance is best struck by this Court considering whether what Parliament does in each case is reasonable.<sup>122</sup>

The Court went on to say that the judiciary must establish whether Parliament fulfilled its duty based on whether "the legislature has taken steps to afford the public a reasonable opportunity to participate effectively in the law-making process."<sup>123</sup> This formulation of the reasonableness inquiry has two components: first, whether *meaningful* opportunities had been provided, and second, whether measures were put in place so that people could actually *use* the opportunities that Parliament created.<sup>124</sup>

Interestingly, the Court considered whether the NCOP could forego calling separate public hearings by piggybacking onto public hearings held by the provincial

119. *Doctors for Life*, 2006 (6) SA 416 at paras. 124–25, 199–200.

120. *Id.* at paras. 128, 146; *see also Poverty Alleviation Network*, 2010 (6) BCLR 520 at para. 36; *Merafong Demarcation Forum*, 2008 (5) SA 171 at para. 27; *Matatiele*, 2007 (1) BCLR 47 at paras. 52, 67–68. As discussed earlier, Parliament has indeed adopted general rules and introduced initiatives for the involvement of the public in its processes. *See supra* note 98 and accompanying text. Moreover, the Constitutional Court warns in *Matatiele* that this is not exhaustive of the duty to facilitate public involvement. *See* 2007 (1) BCLR 47 at para. 52.

121. *See Doctors for Life*, 2006 (6) SA 416 at paras. 139–40. Justice Ngcobo for the majority confirms an observation made in *King v. Attorneys' Fid. Fund Bd. of Control* 2006 (1) SA 474 (SCA) at para. 22 that the public participation provision in the Constitution merely "sets a base standard" and that Parliament has the prerogative to decide for itself how best to facilitate public involvement. *Doctors for Life*, 2006 (6) SA 416 at para. 139.

122. *Doctors for Life*, 2006 (6) SA 416 at para. 146; *see also Poverty Alleviation Network*, 2010 (6) BCLR 520 at para. 35 (noting that it is crucial to strike a balance between judicial deference and the public's right to participate).

123. *Doctors for Life*, 2006 (6) SA 416 at para. 129. The Court adds that "[i]nterested parties are entitled to a reasonable opportunity to participate in a manner which may influence legislative decisions." *Id.* at para. 171. This suggests that parliamentarians should enter the legislative process with clear minds, capable of persuasion based on input from the public.

124. *Id.* at para. 129; *see also Moutse Demarcation Forum v. President of the Republic of S. Afr.* 2011 (11) BCLR 1158 (CC) at para. 49; *Matatiele*, 2007 (1) BCLR 47 at para. 54.

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legislatures.<sup>125</sup> It decided that this *was* possible if the NCOP actually took account of provincial interests emerging from local hearings.<sup>126</sup> In the case of the TCB, the NCOP could not claim to be piggybacking onto provincial hearings because it failed to consider the provincial negotiating mandates when they were submitted in May 2012.<sup>127</sup> This arguably forced the NCOP to hold its own national public hearings in September before proceeding with debates on the bill.

In *Doctors for Life*, the two statutes under consideration were declared unconstitutional and Parliament was given the opportunity to re-enact them with proper public participation.<sup>128</sup>

#### *D. Building on Doctors for Life*

A trio of cases (*Matatiele*, *Merafong*, and *Moutse*) concerning the duty of provincial legislatures to facilitate public involvement followed the *Doctors for Life* case. All three cases dealt *inter alia* with the steps taken by provincial legislatures to foster public participation in the process of legislative amendments to the Constitution and other laws that were to alter the boundaries of some provinces.

##### *1. Matatiele Confirms the Reasonableness Standard*

In *Matatiele Municipality v. President of the Republic of South Africa*, a majority of the Constitutional Court confirmed and applied the principles set out in *Doctors for Life* to the conduct of the KwaZulu-Natal and Eastern Cape provincial legislatures.<sup>129</sup> In addition, the Court noted that where legislation is likely to have more of an effect on a “discrete” group of people, that group could more reasonably expect to be heard by legislative bodies.<sup>130</sup>

The Eastern Cape legislature had conducted public hearings in several areas and had accepted written submissions<sup>131</sup> while the KwaZulu-Natal legislature invited no submissions in any form from the public despite having regarded public hearings as

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125. *Doctors for Life*, 2006 (6) SA 416 at paras. 159–64.

126. *Id.* In *Doctors for Life*, this was interpreted to require that all provincial legislatures actually hold public hearings and that the NCOP has access to records of those hearings. Note, though, that the Court stated that each legislative body needs to find its mandate afresh and facilitate its own public participation as a general principle. *Id.* at para. 151.

127. *PMG 2012 Briefings*, *supra* note 74.

128. *Doctors for Life*, 2006 (6) SA 416 at paras. 198–214. A similar declaration and remedy was deemed appropriate in *Matatiele*, 2007 (1) BCLR 47 at paras. 88–99, 109, 114.

129. 2006 (5) SA 47 (CC). Interestingly, judgment for *Matatiele* was delivered on the day following the *Doctors for Life* judgment—although Justice Yacoob noted in *Matatiele* that the two judgments were “considered by the Court side by side.” *Id.* at para. 124.

130. *Id.* at para. 68. James Fowkes, a senior researcher at the Institute for International and Comparative Law in Africa, has pointed out in correspondence with the authors that with respect to the TCB, this principle could support an argument that safe public participation spaces should have been provided for women, particularly from rural areas, as a “discrete” group.

131. *Matatiele*, 2007 (1) BCLR 47 at para. 71.

necessary due to the potential impact of the legislation.<sup>132</sup> Accordingly, it was held that only the Eastern Cape had acted reasonably in trying to fulfill its duty to facilitate public involvement.<sup>133</sup>

Parliament's renewed attempt to alter the boundary between these two provinces was challenged again in *Poverty Alleviation Network v. President of the Republic of South Africa*.<sup>134</sup> Applicants complained *inter alia* that they had not been given a "meaningful opportunity to be heard" separately and exclusively as a "discrete" group in oral submission form.<sup>135</sup>

Unlike in *Matatiele*, the provincial legislature, as well as the National Assembly and the NCOP, did provide some opportunities for the public to submit views on the new boundaries.<sup>136</sup> The KwaZulu-Natal Legislature held four public hearings and specifically invited the applicants to attend.<sup>137</sup> In the National Assembly, full written submissions by the Poverty Alleviation Network applicants and others were considered.<sup>138</sup>

The Court held that while discrete groups could reasonably expect to be heard during lawmaking processes, as per *Matatiele*, this did not mean that they had to be the only groups consulted "to the exclusion of all others."<sup>139</sup> This meant that even if, for example, traditional leaders were considered to be a "discrete" group likely to be more affected by the TCB, they could by no means be consulted to the exclusion of others. That is precisely what occurred during the drafting stages of the TCB.

## 2. *Merafong Considers Meaningful Participation*

*Merafong Demarcation Forum v. President of the Republic of South Africa*<sup>140</sup> was decided in the Constitutional Court two years after *Doctors for Life* and *Matatiele*. This case extended the inquiry to ask whether, notwithstanding the opportunity to be heard, participation by the public had been *meaningful*.<sup>141</sup> The Gauteng legislature had conducted a public hearing and accepted written submissions from several different stakeholders.<sup>142</sup> However, after having absorbed these views into its negotiating mandate before the NCOP, Gauteng adopted a final mandate that was in direct opposition to both its own negotiating mandate and the views of the

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132. *Id.* at paras. 74–83.

133. *Id.* at para. 73.

134. 2010 (6) BCLR 520 (CC).

135. *Id.* at paras. 17, 50. The applicants argued that the *Matatiele* residents' views were "watered down" by others' presence at the public hearings. *Id.* at para. 50.

136. *Id.* at paras. 38, 41–42.

137. *Id.* at paras. 43–45.

138. *Id.* at paras. 57–58.

139. *Id.* at para. 53.

140. 2008 (5) SA 171 (CC).

141. *Id.* at paras. 43, 45.

142. *Id.* at paras. 31–33, 43.

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public.<sup>143</sup> The Merafong Demarcation Forum and other applicants in the case argued that this suggested that Gauteng’s final vote was a “done deal” no matter what emerged from the public engagement process and that the legislature should have consulted the public prior to changing its vote.<sup>144</sup>

The Court dismissed this argument, saying that the Gauteng legislature was clearly intent on considering and incorporating the views of the public and in fact did so.<sup>145</sup> By its nature, a provincial legislature’s *negotiating* mandate could always change during negotiation with other provinces in the NCOP.<sup>146</sup> What emerges as a final mandate is the product of public views, political party policies, discussion in the provincial legislature, and negotiation at the NCOP.<sup>147</sup> The Court noted that “being involved does not mean that one’s views must necessarily prevail”<sup>148</sup> but that this “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.”<sup>149</sup>

Thus, while interested persons have a right to a reasonable opportunity to be heard and to have their views taken into consideration by the legislature, they do not have a right to have their suggestions implemented. Furthermore, while it would have been politically sound for the Gauteng legislature to report back to the public once it was clear that its final mandate would depart from public opinion, there was no legal duty to do so—particularly in light of the fact that it was not legally bound by what had emerged from public consultation.<sup>150</sup>

Similar issues arose later in *Poverty Alleviation Network*. One provincial hearing attracted about 3,000 members of the public, and opposition to the new boundary laws appeared universal.<sup>151</sup> Despite this, KwaZulu-Natal voted in favor of the laws, and the applicants claimed that the public had the impression that the province was acting on orders from the national government.<sup>152</sup>

This caused applicants in the case to argue that the relevant legislative bodies had never actually considered their input and that participation had been a façade for constitutional compliance.<sup>153</sup> The Constitutional Court dismissed the argument and

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143. *Id.* at paras. 34–39.

144. *Id.* at paras. 43–47. Similarly, the applicants in *Poverty Alleviation Network* made the contention that “the impugned legislation was a product of a politically dictated, pre-determined decision.” 2010 (6) BCLR 520 (CC) at para. 18.

145. *Merafong*, 2008 (5) SA 171 at paras. 49, 52–53.

146. *Id.* at para. 49.

147. *See id.* at paras. 49–50.

148. *Id.* at para. 50.

149. *Id.* at para. 51.

150. *See id.* at paras. 54–60.

151. *Poverty Alleviation Network v. President of the Republic of S. Afr.* 2010 (6) BCLR 520 (CC) at para. 48.

152. *Id.* at para. 49.

153. *See id.* at paras. 17–18, 59.

confirmed the assertion in *Merafong* that openness to all views is required to make public participation meaningful, but that Parliament is not bound by those views.<sup>154</sup>

### 3. *Implications of Merafong for the Traditional Courts Bill Process*

Unlike in *Doctors for Life* and *Matatiele*, public participation opportunities in provincial legislatures and the NCOP included both written and oral submissions on the version of the TCB tabled in 2012.<sup>155</sup> The issues, therefore, were whether the public could actually make use of those opportunities and whether, as in *Merafong*, those opportunities were meaningful to the legislative process.

The public's ability to participate in the opportunities provided during the TCB process was hampered by several factors, including inadequate notice and a lack of information.<sup>156</sup> The remaining question about the meaningfulness of participation calls to mind the fate of the original negotiating mandates submitted by provinces to the Select Committee in May 2012. Members of the public and stakeholders endeavored to contribute views on the bill either verbally or in writing to provincial legislatures, despite significant obstacles. It is difficult to assess whether the negotiating mandates purportedly resulting from these views accurately reflected public opinion on the bill throughout each province. Yet, once submitted, these mandates should have been debated in the Select Committee regardless of their flaws, as is required by Parliament's own procedures. The fact that they were not debated casts doubt on how meaningful the provincial public participation actually was. At the time, the public was left wondering whether there was any point in submitting views to provincial legislatures when those views were not being conveyed to the national drafting forum.

As in *Merafong*, one province changed its mandate during the TCB legislative process: while North West initially voted against the bill, it changed its mandate after an unusual second round of hearings in the province.<sup>157</sup> Unlike in *Merafong*, however, the change in North West's opinion was not the result of political discussion and negotiation in the Select Committee to produce a final mandate different from an earlier negotiating mandate. North West reversed the mandate with which it was to enter into negotiation in the first place. In the process, North West appeared to disregard the strong dissenting views presented during the previous round of provincial hearings in favor of supporting views from the second round of provincial hearings.<sup>158</sup>

It is worth noting the Select Committee's reluctance to debate the negotiating mandates when they were first submitted and the unorthodox invitation to repeat public hearing processes in the provinces. The logic behind the Committee's decision

154. *Id.* at paras. 62–63.

155. For a summary of the public participation facilitated by the NCOP, see SELECT COMM. SEC'Y, *supra* note 92. For a comprehensive account of the TCB public participation processes facilitated by the provincial legislatures, see LUWAYA, *supra* note 68.

156. See discussion *infra* Part V.D.5. for a more detailed consideration of these issues.

157. SELECT COMM. SEC'Y, *supra* note 92, § 2(6).

158. See Third Round of Hearings on the TCB Fails to Change Minds, *supra* note 91.

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to invite additional provincial hearings was questioned in an October 15, 2013 meeting by a representative of the Eastern Cape Legislature, as reported in minutes of the meeting:

[The representative] said it would be unfortunate if the Bill had to be taken back to the provinces again . . . . The Eastern Cape had held thorough consultations and public hearings, and the people were saying the Bill was not in the interests of the country . . . . [The representative’s view was] that it was a waste of time to refer the Bill back, as he did not see provinces coming to Parliament again with any other mandate.<sup>159</sup>

Further provincial hearings were permitted nonetheless. In a series of media statements, the Alliance for Rural Democracy questioned whether these procedural manipulations by the Select Committee were politically motivated and underpinned by a rationale of “[w]e’ll consult until we change your minds.”<sup>160</sup> Only two provinces, the Free State and North West, opted to have additional hearings, but the resulting mandate flip by North West was sufficient to prevent a five-province majority voting outright against the bill.<sup>161</sup>

In circumstances such as these, where lawmakers appear to be motivated in the first instance by political considerations<sup>162</sup> and not by genuine expressions of public opinion, the meaningfulness of particular public participation opportunities, as well as public participation in the lawmaking process more broadly, is undermined.<sup>163</sup> It is arguable that if lawmakers cannot take account only of public opinion when drafting laws (as per the Court’s decision in *Merafong*), then they cannot take account only of political considerations, either.

4. *Moutse Links Timing to Meaningfulness and Leaves Report-Writing to Legislative Committees*

In *Moutse Demarcation Forum v. President of South Africa*, the applicants argued that despite having provided several opportunities for public comment, the Mpumalanga Provincial Legislature failed to meet its constitutional duty to facilitate public participation adequately while considering two laws that would change its provincial boundaries.<sup>164</sup>

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159. *TCB Referral to the Provinces*, *supra* note 87.

160. *See, e.g.*, Media Release, All. for Rural Democracy, *supra* note 81; *see also* Mbongiseni Buthelezi, *The Disturbing Passage of the Traditional Courts Bill*, THE STAR, Nov. 26, 2013; PMG OVERVIEW, *supra* note 79, at 9.

161. *See* SELECT COMM. SEC’Y, *supra* note 92.

162. *See* PMG OVERVIEW, *supra* note 79, at 18, 28. Some parliamentarians have openly admitted that their mandates are obtained from the political parties of which they are elected members, not from the people that they are meant to represent in Parliament. *Id.* at 28.

163. *See id.* at 26.

164. 2011 (11) BCLR 1158 (CC) at paras. 22, 51.

The Mpumalanga legislature held four public hearings, whereafter a committee in the legislature considered submissions and compiled a report.<sup>165</sup> After initially denying the applicants' request for a fifth hearing, and after protest action by the applicants, the committee arranged an additional hearing and incorporated comments from the hearing into a revised version of its report.<sup>166</sup> According to the Court, this revised report formed the basis for Mpumalanga's vote in favor of the laws in the NCOP.<sup>167</sup>

The Court considered the applicants' argument that the people of Moutse should reasonably have been consulted by the Mpumalanga legislature as a "discrete group" since they would be directly affected by the proposed laws.<sup>168</sup> The Court agreed that there should have been a hearing for all Moutse residents in the first instance because of their geographic proximity to the affected boundary and their historical choice to remain part of Mpumalanga but also acknowledged that a hearing was eventually granted to them in amends.<sup>169</sup>

Applicants went on to argue that, because of a short notice period and hearing duration, the hearing was inadequate to fulfill the legislature's public participation duty.<sup>170</sup> Developing a point already made in *Doctors for Life*, the Court drew a connection between meaningful participation and the timing of public invitation:

Two principles may be deduced . . . . The first is that the interested parties must be given adequate time to prepare for a hearing. The second relates to the time or stage when the hearing is permitted, which must be before the final decision is taken. These principles ensure that meaningful participation is allowed. It must be an opportunity capable of influencing the decision to be taken.<sup>171</sup>

As will be discussed in the next section, inadequate notice periods not only affect how *meaningful* participation will be but are also an obstacle to people's ability to make use of participation opportunities in the first place. In the *Moutse* case, however, the Constitutional Court dismissed the applicants' arguments about a short notice period and hearing duration because they had already engaged with the bill long before the public hearing, which apparently ended when all comments were finished.<sup>172</sup>

In relation to the TCB, although some civil society groups had been engaging with the bill since it was first introduced in 2008, many stakeholders made it known in their submissions that they only became aware of the bill's reintroduction upon being notified of provincial legislature hearings in April and May of 2012. Some

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165. *Id.* at paras. 53–54.

166. *Id.* at paras. 54–55.

167. *Id.*

168. *Id.* at paras. 56–60. The Court notes that the "discrete group" argument originated in *Matatiele. Id.* at 57; see also *Matatiele Municipality v. President of the Republic of S. Afr.* 2007 (1) BCLR 47 (CC) at para. 68.

169. *Moutse Demarcation Forum*, 2011 (11) BCLR 1158 at paras. 59–60.

170. See *id.* at para. 65.

171. *Id.* at para. 62.

172. See *id.* at paras. 63–67.

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stakeholders only became aware of the bill through networks with other civil society organizations.<sup>173</sup> Several complained about the short notification periods.<sup>174</sup> There were also accounts of inadequate hearing durations<sup>175</sup>—in one case, a hearing was abruptly ended and oral submissions closed after a traditional leader spoke in favor of the bill.<sup>176</sup> By the Constitutional Court’s own reasoning, there is thus an argument to be made that these circumstances undermined the meaningfulness of public participation processes on the TCB.

The *Moutse* applicants’ final attack was on the revised report tabled by the Mpumalanga legislature’s committee.<sup>177</sup> Again, the Court dismissed their argument, stating that it was within the mandate and decisionmaking role of the committee to reduce the submissions it had received into a summary report.<sup>178</sup>

What does this last finding mean in relation to the Select Committee’s initial acceptance of the DOJCD’s selective summary of TCB submissions? While the *Moutse* decision suggests that the Select Committee had the authority to decide how submissions should be reported, it is precisely because the DOJCD—not the Select Committee—made the decision to summarize two submissions and ignore others that the initial acceptance of the DOJCD summary is so procedurally offensive. It is further questionable whether an analysis of only a small fraction of submissions could ever be a “summary” of public participation proceedings. Reservations about the DOJCD “summary” were later addressed by the Select Committee, which then tabled its own more comprehensive summary of the submissions.<sup>179</sup>

While the TCB legislative process provided opportunities for public participation and some people were able to make use of them, certain circumstances arguably undermined the meaningfulness of the opportunities taken. If the bill is revived and becomes enforceable law in the future, this issue may have to be explored further in court. A related issue is whether people were able to make use of participation opportunities in the first place.

5. *Making Use of Participation Opportunities*

As stated earlier, part of the reasonableness inquiry set out in *Doctors for Life* requires consideration of whether people were actually able to make use of opportunities for public participation. The Constitutional Court has highlighted

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173. THIBE, *supra* note 7, at 6.

174. LUWAYA, *supra* note 68, at 15–18.

175. *See id.* at 10–11.

176. *See id.* at 13–14; Pearlie Joubert, *King has Final Word*, CITY PRESS (Apr. 28, 2012), <http://www.news24.com/Archives/City-Press/King-has-final-word-20150430>.

177. *Moutse Demarcation Forum*, 2011 (11) BCLR 1158 at para. 68.

178. *See id.* at paras. 73–75. Interestingly, the Court accounted for the separate powers of legislative branches of government by stating further that “it is undesirable for this Court to prescribe to the Legislature what a report to it should contain.” *Id.* at 80.

179. *See Committee Report on Public Hearings*, *supra* note 86.

that public participation opportunities cannot be effective without adequate information,<sup>180</sup> prior notice,<sup>181</sup> and access to relevant spaces.<sup>182</sup> The ability of people other than traditional leaders to participate in public comment procedures was severely hampered by the failure of the TCB legislative process to take into account the circumstances of people who would most directly be affected by the bill.

In *Doctors for Life*, the Constitutional Court noted the link between the right to political participation and the right to freedom of expression or information.<sup>183</sup> In elaborating on the legislature's duty to facilitate public involvement, the Court thus stated that "public involvement may be seen as 'a continuum that ranges from providing information and building awareness, to partnering in decision-making.'"<sup>184</sup> As examples, the Court said Parliament could facilitate participation through road shows, workshops, media broadcasts, and publications aimed at educating the public on issues before Parliament.<sup>185</sup> While access to information is crucial to effective participation,<sup>186</sup> an emphasis on public education campaigns has the potential to sidestep the actual participation that should be facilitated. Perhaps the focus should be less on *teaching* the public about the issues before Parliament, and more on the mutual *sharing* of knowledge and ideas between Parliament and the public. Parliamentarians should thus be open to imparting *and* receiving information when engaging with their constituents. As highlighted in *Merafong*, without Parliament's genuine willingness to hear and consider the views of the public, the right to participation would be meaningless.<sup>187</sup>

This principle of sharing knowledge, and recognizing the value of and engaging with different knowledges, was absent from many of the provincial and national TCB hearings. At the provincial hearings, "the presentation of the Bill's substantive content consisted of a guided explanation of the Bill, given by either a 'legal advisor' or a member of the legislature."<sup>188</sup> Only sections of the bill that were identified as important were explained, which in most cases amounted to the reading or translation of the bill's clauses, or of a translated summary document.<sup>189</sup> Since the presenters guided the focus of the explanation, "contentious and heavily criticized provisions . . . received only a cursory mention" without being unpacked or discussed further.<sup>190</sup>

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180. See *Doctors for Life Int'l v. Speaker of the Nat'l Assembly* 2006 (6) SA 416 (CC) at para. 131.

181. See *id.* at paras. 170–71.

182. See *id.* at para. 137.

183. *Id.* at paras. 91–92, 106.

184. *Id.* at para. 129.

185. *Id.* at para. 132; see also PMG OVERVIEW, *supra* note 79, at 25.

186. *Doctors for Life*, 2006 (6) SA 416 at para. 221 (stating that the dissemination of information about pending legislation is a basic element of public involvement).

187. *Merafong Demarcation Forum v. President of the Republic of S. Afr.* 2008 (5) SA 171 (CC) at para. 51.

188. LUWAYA, *supra* note 68, at 6.

189. *Id.*

190. *Id.*

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The records of observers who attended the hearings “show that the presentation and explanation of the Bill was not satisfactory at any of the hearings.”<sup>191</sup> “The sessions that preceded some hearings were used to justify the inadequate explanation of the Bill,” and at many hearings, presenters from the legislatures argued that “hearings were about obtaining people’s views” and not about giving people a detailed explanation of the bill’s content.<sup>192</sup>

At some of the hearings, people were instructed to speak to a particular provision in the bill.<sup>193</sup> Such instructions meant that only those who were familiar with the specific provision could speak freely.<sup>194</sup>

The difficulty of speaking to specific provisions was exacerbated because many people could not study the bill prior to the hearings.<sup>195</sup> In some provinces, including those where public education preceded the hearings, people complained that there had been insufficient time to fully comprehend the bill’s implications.<sup>196</sup> In addition, people tried to make submissions in which they spoke generally about how the bill would worsen their circumstances, but their contributions were deemed irrelevant.<sup>197</sup>

Surely these circumstances prevent the genuine exchange of knowledge between parliamentarians and people? A lack of detailed prior information about the TCB would have silenced or rendered irrelevant numerous valuable insights during public hearings that could have enriched later legislative debates on the bill.

The need for prior information is closely linked to the need for adequate notice. In *Doctors for Life*, the Constitutional Court said short notice of a meeting left insufficient time to properly scrutinize laws before discussion.<sup>198</sup> As alleged in the *Moutse* case, this also detracts from the meaningfulness of the consultation and turns public participation into a charade.<sup>199</sup> The Court acknowledged that there may be times when shortcuts are necessary, but urgency would have to be shown to prove the reasonableness of Parliament’s conduct: “[W]hen it comes to establishing legislative timetables, the temptation to cut down on public involvement must be resisted . . . The timetable must be subordinated to the rights guaranteed in the Constitution, and not the rights to the timetable.”<sup>200</sup>

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191. *Id.*

192. *Id.* at 6–7.

193. *See id.* at 7, 11. One of the authors, Nolundi Luwaya, who attended many of the provincial hearings, also witnessed this.

194. *See id.* at 11. These instructions did not seem to apply to traditional leaders, who were able to speak freely regardless of relevance and specificity.

195. *Id.*

196. *Id.*

197. *Id.*

198. *Doctors for Life Int’l v. Speaker of the Nat’l Assembly* 2006 (6) SA 416 (CC) at paras. 170–71.

199. *Moutse Demarcation Forum v. President of the Republic of S. Afr.* 2011 (11) BCLR 1158 (CC) at paras. 61–62.

200. *Doctors for Life*, 2006 (6) SA 416 at para. 194.

At least one province was unhappy with the time allocated by the NCOP Select Committee for provincial participation on the TCB.<sup>201</sup> Mpumalanga failed to submit a negotiating mandate after provincial hearings in 2012 and, in a letter to the Chairperson of the NCOP, requested that debates on the TCB be postponed for further consultation on the bill.<sup>202</sup> This is perhaps indicative of the legislative body's own assessment that participation was being unreasonably rushed. Last-minute changes to legislative schedules and venues, as occurred during consultation on the TCB, are also arguably inconsistent with the duty to facilitate public involvement in the legislative process.

In certain provinces, people raised serious objections about the advertisement of hearings on the TCB. When asked by monitors, many people in Mpumalanga did not know that the provincial legislature had arranged public hearings on the bill.<sup>203</sup> In Badplaas, Mpumalanga, members of surrounding communities traveled to an advertised venue only to learn after waiting for more than an hour that the venue had been changed to the Mpfuluzi Hall in Mayflower, approximately forty kilometers away.<sup>204</sup> A representative from the Local House of Traditional Leaders complained that traditional leaders would have attended in greater numbers if they had been aware of the meeting.<sup>205</sup>

In KwaZulu-Natal, some members of the public were forced to reroute after hearing about a venue change on their way to a hearing in Port Shepstone.<sup>206</sup> For many, the venue change meant additional travel time and cost, since the hearing was moved from a venue accessible to those from surrounding rural areas to the city center.<sup>207</sup>

In the Northern Cape, participants said that a hearing was advertised at very short notice and the venue was inconvenient, while one traditional leader said that he had heard about the hearing only one day before it was held.<sup>208</sup> One member of the public recounted finding out about the hearing:

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201. SELECT COMM. SEC'Y, *supra* note 92, at §§ 2.1, 2.2. Members of Parliament in NCOP committees seem to have complained generally of short time periods for briefings and debates on legislation. *See* PMG OVERVIEW, *supra* note 79, at 18.

202. *See* Letter from Hon. VS Siwela, Acting Speaker, Mpumalanga Provincial Legislature, to the Chairperson of the NCOP (May 29, 2012), <http://www.pmg.org.za/files/doc/2012/120530negotiating.pdf>; *see also* PMG 2012 Briefings, *supra* note 74.

203. LUWAYA, *supra* note 68, at 15.

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.* at 15–16.

208. *Id.* at 17.

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I was walking in town today and saw posters saying there is a public hearing. The advert was put up yesterday. Today I'm told that I have 10 minutes to read through it and vote on the Bill. This Bill says I can work for free for a chief. How can such a decision be done in 10 minutes?<sup>209</sup>

Complaints about “the advertising of the hearings and the choice of venues surfaced repeatedly” across the provinces.<sup>210</sup> These issues seem to reflect a broader problem of poor communication by Parliament.<sup>211</sup>

Last-minute venue changes impede the ability of people to physically access public hearings. Venues that are far away from the people most directly affected by legislation, or difficult or expensive to travel to, have the same effect. Parliament has acknowledged the inadequacy of “infrastructure and space” for public participation processes even within its own buildings.<sup>212</sup> The Bafokeng Land Buyers' Association submitted as follows:

It is the intention of the Association and other members of the affected public, to hold a peaceful public demonstration, not only against the passing of the bill by our North West Provincial Legislature, but also against the silent endorsement and ‘blackout’ by our traditional authorities on such important bills. Due to resource and time constraints, concerned members will not be able to travel 180km to Mahikeng, the seat of the North West Provincial Legislature, to make their submissions, a fault that mainly lies with the Provincial Legislature for failing to provide for adequate public involvement.<sup>213</sup>

In *Doctors for Life*, the Constitutional Court recognized the importance of physical access to meetings of Parliament,<sup>214</sup> where parliamentarians are briefed by government departments and laws are deliberated.<sup>215</sup> It is true that public access to parliamentary business contributes to the openness of lawmaking and is thus a crucial element of participatory democracy. What the Court does not articulate, however, is the role played by political processes occurring on the sidelines of Parliament's official spaces. The political landscape in which legislation will be drafted is often sculpted in hallways or at breakfast tables outside of Parliament's meeting venues. These political dynamics are unrecorded, invisible to the public, and only accessible to a portion of civil society organizations or journalists.

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209. *Id.* at 17. Members of the public made similar complaints in public hearings about short notice periods for submitting comments on other bills before Parliament. See PMG OVERVIEW, *supra* note 79, at 25.

210. LUWAYA, *supra* note 68, at 16.

211. See PMG OVERVIEW, *supra* note 79, at 25.

212. *Id.* at 5.

213. Letter from Othusitse Rapoo, Sec'y, Bafokeng Land Buyers' Ass'n, to the Speaker, North West Provincial Legislature (Feb. 6, 2012), <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/doc/2012/120921bafokeng.pdf>.

214. Sections 59, 72 and 118 of the Constitution generally require legislative buildings and meetings to be open to the public.

215. *Doctors for Life Intl. v. Speaker of the Nat'l Assembly* 2006 (6) SA 416 (CC) at para. 137.

During the NCOP process on the TCB, some civil society organizations suspected that political concerns were delaying the Select Committee's consideration of initial negotiating mandates and causing the unusual authorization of a second round of provincial hearings.<sup>216</sup> With respect to the latter, the Alliance for Rural Democracy and the Tshintsha Amakhaya platform issued a joint statement asserting that the Committee was acting on "pressure from the Executive not to withdraw the TCB."<sup>217</sup>

Responses to the TCB consultation process illustrate that open access to Parliament and its meetings does not guarantee participation as the Court suggests,<sup>218</sup> because attendance in Cape Town requires time and resources that many South Africans do not have. The proximity of provincial legislatures to their constituencies is important for precisely this reason.<sup>219</sup> If members of the public are unable to attend even provincial lawmaking forums, they have to rely on media reports for up-to-date information on legislative processes. They are also then limited to the submission of written proposals—a problem for those who are illiterate or lack formal education.

Several written submissions on the TCB showed that participation did not depend only on an ability to physically reach hearings, but also on an ability to speak freely at the hearings. In this broader context, access is shaped by political dynamics and power relations. Women's voices in particular were suppressed at many public hearings.<sup>220</sup> The presence of traditional leaders in some provincial hearings had a clear impact on the atmosphere and how people framed their inputs.<sup>221</sup> At hearings across the country, although particularly in the Eastern Cape and Mpumalanga, people were reprimanded for their conduct in relation to the traditional leaders in attendance.<sup>222</sup> In KwaZulu-Natal, the special treatment of traditional leaders was characterized by displays of great deference, including stopping proceedings to introduce traditional leaders who arrived late and giving special thanks for their attendance.<sup>223</sup>

Traditional leaders' participation varied from province to province and from hearing to hearing. Much of their participation took the form of closing remarks and rebuttals to what people had said. In Mthatha, Eastern Cape, a traditional leader said he supported the bill, adding that what he supported, all his people also supported.<sup>224</sup> He warned that any person who did not support the bill was not under

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216. See Media Release, All. for Rural Democracy, *supra* note 96.

217. Media Release, All. for Rural Democracy and Tshintsha Amakhaya Platform, *supra* note 90.

218. See *Doctors for Life*, 2006 (6) SA 416 at para. 161.

219. See *id.*

220. PMG OVERVIEW, *supra* note 79, at 19, 25.

221. LUWAYA, *supra* note 68, at 9.

222. See *id.*

223. *Id.* at 9–10.

224. *Id.* at 13; Joubert, *supra* note 176.

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his chieftaincy.<sup>225</sup> This could be interpreted as a threat of expulsion against people living in the traditional community that he led. There were, however, other hearings in which traditional leaders did not participate.

Although the reasons are not clear, at some hearings the provincial government made a point of saying that the bill had been taken to the National House of Traditional Leaders (NHTL), and to corresponding Provincial Houses.<sup>226</sup> Traditional leaders had therefore already been given “an opportunity to engage with the Bill.”<sup>227</sup> At two hearings in Limpopo, members of the provincial legislature noted that there had been a meeting prior to the official public hearing meeting that was attended exclusively by traditional leaders, who then only spoke at one of the later public hearings.<sup>228</sup> At the meeting in which the traditional leaders did not speak, it was observed that traditional leaders were still compensated for the transportation costs they had incurred to attend.<sup>229</sup> No such accommodation seemed to be made for other participants.<sup>230</sup>

Thus, the hearings illustrate the extent to which people want to be part of legislative processes and their willingness to overcome significant obstacles to make their opinions heard. Some people had to travel great distances using unreliable and costly public transport; many others were not familiar with the bill and had their inputs subjected to restrictions, and still others were informed of hearing schedules and venues at unreasonably short notice. Despite these circumstances, they fought to tell their stories and express their dissatisfaction with the bill and its implications as they understood them.

## VI. CONCLUSION

Consultation processes around the TCB have failed to adequately facilitate meaningful participation by the public, as is required by the Constitution.<sup>231</sup> Public responses to the bill underline how the exclusion of voices at different points of the process substantively compromised the bill’s content and legitimacy—in particular, its ability to promote living customary law. The silencing of large segments of the public during the TCB *drafting* process resulted in a bill that could not speak to or for the majority. The active and passive undermining of public participation in the *legislative* process suggests that a similar outcome would have resulted if the TCB had made it through Parliament.

Notwithstanding these problems, individuals’ and organizations’ endeavors to voice their opposition to the TCB meant that no outright majority in favor of the bill

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225. LUWAYA, *supra* note 68, at 13.

226. *Id.* at 14.

227. *Id.*

228. *Id.*

229. *Id.* at 17.

230. *See id.*

231. S. AFR. CONST., 1996, §§ 59, 72, 118.

could be achieved among the provinces in the NCOP. This is a testament not only to the ability of the NCOP to be a platform for enriched, grounded, and comprehensive debates on legislation, rather than merely a “rubber stamp” for the National Assembly,<sup>232</sup> but also to the power of public participation in the lawmaking process more broadly. Even when deficiently implemented, public involvement can significantly influence a bill’s passage through Parliament.

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232. This has been asserted by the NCOP. *See* PMG OVERVIEW, *supra* note 79, at 22; *see also* Media Release, All. for Rural Democracy and the Tshintsha Amakhaya Platform, *supra* note 90.