

Citizen participation and meaningful engagement as effective tools for good governance in policy-making and realisation of economic, social and cultural rights

By

IPELENG JOSEPHINAH MAKABA

(STUDENT NUMBER- 17299285)

DISSERTATION SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUIREMENT FOR THE DEGREE LLM COURSEWORK MULTIDISCIPLINARY HUMAN RIGHTS

IN THE FACULTY OF LAW

CENTRE FOR HUMAN RIGHTS

UNIVERSITY OF PRETORIA

SOUTH AFRICA

AUGUST 2018

PREPARED UNDER THE SUPERVISION OF PROFESSOR DANIE BRAND

AT THE FACULTY OF LAW, UNIVERSITY OF PRETORIA

Declaration of originality

I, Ipeleng Josephinah Makaba, declare the originality of the work presented in this mini-dissertation. I further declare that I have acknowledged the sources where applicable as best I could and that the work has never, be it as a whole or any part thereof, been presented to any institution or elsewhere for the purposes of achieving a degree.

Ipeleng Josephinah Makaba

Signed:.....

Dated:.....

ACKNOWLEDGEMENTS

My profound acknowledgement goes to my Heavenly Father for it is through Him that I had the knowledge, wisdom and strength to complete this work.

My heartfelt humblest gratitude goes to the following:

- My supervisor, Professor Danie Brand for his commitment in guiding me throughout the process of this mini-dissertation
- My loving husband Lentle Makaba for his commitment and support towards the success of this piece of work, let alone during my entire Master's program. Moreover, for having been a good father to our children back home in Botswana during my absence. You really are a rare breed.
- My children Le-teng and Leina who remained composed and strong and made things easy for their father whilst I was away. You are my little stars and my source of inspiration.
- My entire family, particularly my parents, siblings and aunt (Minah Magana) who kept close contact with me throughout my stay in South Africa and showed their full support to my academic pursuit and interest.

LIST OF ABBREVIATIONS

• African Charter on Human and Peoples' Rights	ACHPR
• Alternative Dispute Resolution	ADR
• African Human Rights Law Journal	AHRLJ
• Association of South East Asian Nations	ASEAN
• Chief Justice	CJ
• Centre for Civil and Political Rights	CCPR
• Committee on Economic, Social and Cultural Rights	CESCR
• Convention on the Elimination of Discrimination against Women	CEDAW
• Corporate Governance	CG
• Directorate on Corruption and Economic Crime	DCEC
• Directive of Public Service Principles	DPSP
• Economic, Social and Cultural Rights	ESCR
• Hawaii International Conference on System Sciences	HICSS
• National Human Rights Institution	NHRI
• Municipal Research and Services Center	MRSC
• Public Protector	PP
• South African Human Rights Commission	SAHRC

Table of Contents

Declaration of originality.....	0
Acknowledgements.....	1
List of Abbreviations	2
Table of contents.....	3

CHAPTER 1: Introduction

1.1 Background of the study.....	6
1.2 Research problem.....	6
1.3 Research questions.....	7
1.4 Research methodology.....	7
1.5 Overview of the structure.....	8
1.6 Literature review.....	9

CHAPTER 2: EFFECTIVENESS OF CITIZEN PARTICIPATION AND ENGAGEMENT IN POLICY-MAKING

2.1 Introduction.....	12
2.2 Ways of communication.....	13
2.3 Rules of engagement.....	16
2.4 Achievements of citizen participation.....	18
2.5 Conclusion.....	20

CHAPTER 3: INSTITUTIONS FOR GOOD GOVERNANCE

3.1 Introduction.....	22
3.2 Ombudsman/Public Protector.....	23

3.3 Anti-corruption agencies.....	25
3.4 Human Rights Commission.....	26
3.5 Corporate governance.....	27
3.6 Conclusion.....	29

CHAPTER 4: MEANINGFUL ENGAGEMENT IN THE REALISATION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS

4.1 Introduction	30
4.2 Prior litigation.....	31
4.3 During litigation.....	32
4.4 Post litigation.....	41
4.5 Conclusion.....	42

CHAPTER 5 RECONCILIATION OF CITIZENS' EXPECTATIONS AND WHAT GOVERNMENT CAN AFFORD AND PROVIDE IN REALISING ECONOMIC, SOCIAL AND CULTURAL RIGHTS. ADJUDICATION BY THE COURTS AND OTHER ALTERNATIVE DISPUTE RESOLUTION MECHANISMS

5.1 Introduction	44
5.2 Role of the ombudsman or Public Protector.....	45
5.3 Role of the human rights commission.....	48
5.4 Role of anti-corruption agencies.....	50
5.5 Conclusion.....	51

CHAPTER 6: SUMMARY, GENERAL REMARKS RECOMMENDATIONS AND CONCLUSION

6.1 Summary of the study	52
6.2 General remarks.....	52
6.3 Recommendations	53
6.4 Conclusions	53

BIBLIOGRAPHY.....	i-vi
--------------------------	-------------

Chapter 1

Introduction

1.1 Background of the study

There have been arguments in the past and even in the present that socio-economic rights are matters of policy, but not rights. Those in support of this, predicate their arguments on the assumed fact that these rights are realised progressively and this again is based on the availability of resources. They state, the right's realisation is dependent on the executive, which is an arm of government separate from the legislature and the judiciary.¹ By contrast, others argue that not only civil and political rights are human rights by virtue of their immediate realisation; socio-economic rights are also rights in their own way.² In this study I intend to put together citizen participation, good governance and economic, social and cultural rights in their peculiar way as rights.

1.2 Research problem

Quite a few countries, within their various organisations, institutions, agencies, government ministries and departments, take the option to disregard or reduce public participation at a planning stage, because they regard it to be expensive and time consuming. This in my view has led to what we see the world to be. What is currently being done is to correct the anomalies that have turned into culture and the kind of efforts entailed to uproot such a culture must be strictly focused. There is no public administration that may exist without rules of operation that apply to the people in their various capacities as customers and beneficiaries. This is what makes their involvement critical at the

¹ M Trilsch 'What is the use of socio economic rights in the constitution? Taking a look at the South African experience' (2009) 42 *Law and Politics in Africa, Asia and Latin America* pp 552-575.

² C Fabre *Social rights under the Constitution. Government and the decent life* (2000) Oxford University Press p 67.

beginning regarding support and contributions. It is a World Bank requirement that indicates participation of civil societies in their budget planning, which is an external factor for their inclusion.³ In this dissertation I look into citizen participation and engagement in formulating policies that build towards the realisation of socio-economic rights. Citizen participation and engagement need to be considered before matters are decided before the courts or perhaps by the institutions that oversee governance and also at the time of the adjudication of the second generation of rights by way of laying claims before the courts.

1.3 Research questions

1. What does citizen participation entail in policy-making and good governance?
2. Why does meaningful engagement matter in the adjudication of economic, social and cultural rights?
3. What benefit can be derived from using other alternative dispute resolution forums in the realisation of economic, social and cultural rights?

1.4 Research methodology

The methodology adopted in this dissertation is to rely on library resources, writings on citizen participation, engagement and good governance, together with writings on the realisation and adjudication of economic, social and cultural rights. It also includes case authorities relevant to the subject, mostly those from South Africa, as the citizens in this country have on a number of occasions approached the courts for redress with regards to their constitutional rights, such as the rights to housing, health and social services. Relevant legislation also forms part of the study, including other desk methods.

I also look into the role of civil society in policy-making and the realisation of economic, social and cultural rights and study complaints that have been made to the African Commission on Human and Peoples' Rights through the intervention of civil

³ Civil Society Team, World Bank *Consultations with civil society 2007. A source book working document* (2007) p 3.

organisations, such as the *Social and Economic Rights Action Centre (SERAC) case against the government of Nigeria*.⁴ One other focus area that I explore is what the South African Constitution terms the Chapter Nine Institutions, to be precise, the Public Protector (PP) and the Human Rights Commission (HRC). I look into what contributions these institutions have made on the subject and if there is need for amendment of their mandate to influence governments to move into the area of dispute settlement outside the formal judicial justice system, which is adversarial.

1.5 Overview of the structure

Apart from this introduction (Chapter 1), this dissertation comprises a further four chapters, for a total of five chapters.

In Chapter 2, I discuss the effectiveness of citizen participation in various ways in the daily administration and how it can be achieved with practical examples. In Chapter 3, I focus on institutions that audit administration, government budgets and corruption, such as the office of the Ombudsman, anti-corruption agencies and the Office of the Auditor General. I refer also to the HRC, focusing on what takes place in Botswana and South Africa. Meaningful engagement, with emphasis and specific reference to how the South African judiciary introduced adjudications of socio-economic rights, successes and failures, and what should be done to mitigate the challenges faced by the courts, is dealt with in Chapter 4. South African jurisdiction has quite a number of cases relating to socio-economic rights, particularly within the areas of health and housing. *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg and others*⁵ for example, is a successful case of meaningful engagement; while in *Residents of the Joe Slovo Community, Western Cape v Thubelisha Homes & Others*⁶ there were challenges.

⁴ *Social and Economic Rights Action Centre and Center for Economic and Social Rights v Government of Nigeria*, 155/96.

⁵ *Occupiers of Olivia Road, Berea Township and 197 Main street v City of Johannesburg and Others* 24/07 [2008] ZACC 1; 2008 (3) SA 208 (CC); 2008 (5) BCLR 475 (CC).

⁶ *Joe Slovo Community, Western Cape v Thubelisha Homes & Others* SA 454 (CC) ZACC 16.

Chapter 5 focuses on the reconciliation of the expectations of the citizen's with what the government can afford, more especially in middle income states such as South Africa and Botswana. Chapter 6 comprises the summary, general remarks, recommendations and conclusion.

1.6 Literature review

A presentation made by Elia Armstrong on the role of active participation and citizen engagement in good governance defines citizen participation as the taking part of citizens in various policy-making activities at varying scales, financial priorities of government projects and programs for the benefit of the community, and making sure that the public is included to get their support.⁷

Citizen engagement refers to citizens chosen to be part of the decision-making process in different ways and arrangement by organisations taking into recognition their influence on policies made for the public and keeping up a beneficial position in their economic and social lives.⁸

Good governance means the public sector communicates with the community, respects their human rights and justice is received by everyone. The principles therefore being: legitimacy, accountability, competence and respect for the rule of law.⁹ Enhancing relations between the government and its citizens may seem to take priority in many countries that are democracy oriented. However, on many occasions governments are accused of being too far away from their people and operating with them with minimal contact. There may be a decline in confidence in quite a number of organisations and institutions for the reason mentioned above. There are new intervention strategies that are cropping up in countries.¹⁰ This, however; does not mean there has been no consultations altogether, but that it has been done only at a high level that draws the interest of the public. The use of the internet has brought in developments which enhance

⁷ E Armstrong *The role of active participation and citizen engagement in good governance* (2013) p 5.

⁸ Armstrong (n 7 above) p16.

⁹ As above p 11.

¹⁰ J Caddy *Public management service: why citizens are central to good governance* (2017) p 229.

engagement across the globe and presently we find areas such as foreign policy, budgeting, health care and consumer protection; to mention just a few.¹¹

Engagement provides opportunities for ideas to be put together with information and resources, which contribute to the decision-making process. With no interaction that is well-coordinated by the government representatives there is little impact on the policies that are made and would otherwise benefit the country. To obtain successful results there must be equality in partaking in policy-making.¹²

Fundamental to any consideration of citizen engagement in policymaking and the design of public services is the recognition that the citizens in a democracy have both rights and duties, and that democratic governance provides opportunities for citizens to participate actively in shaping their world.¹³

In many democracies participation of citizens in policy-making and service design has been discussed, attempted, but not realised. Holmes takes this further by mentioning that:

Genuine engagement in the 'co-production' of policy and services requires major shifts in the culture and operations of government agencies. It demands of public servant's new skills as enablers, negotiators and collaborators. It demands of citizens an orientation to the public good, a willingness to actively engage, and the capabilities needed to participate and deliberate well.¹⁴

Local government has to be interested not only to improve its performance, costs and budgeting, but also to maintain the confidence and trust of the public in the implementation of that which is expected by the citizens. However, the efforts to improve the quality of public service often lack a systematic approach. In such cases citizens are the non-useful resources or a type of machine used to improve service delivery. A narrow understanding of citizen participation limits or becomes an impediment to the possibilities to use neighbourhood groups as foundation of community formation.

¹¹ Caddy (n 10 above) p 229.

¹² As above.

¹³ B Holmes *Citizens' engagement in policymaking and the design of public services* (2011) p 1.

¹⁴ As above p1.

Socio-economic rights are regarded as those types of rights that afford people basic necessities of life and give them life that is dignified.¹⁵ Most of the time it is expected of governments to be the providers of these rights to citizens and residents as beneficiaries. This therefore, results in governments being held accountable for the realisation of these rights and talking about beneficiaries, mostly in various communities those who are vulnerable and disadvantaged are those whose lives are improved as they are the people who rely on government facilities and services. Examples of these are; seeking medical facilities at public hospitals, accessing the right to education at public schools and relying on government social and welfare grants. This does not exclude other members of the community, but emphasises that the basic needs of life are met. There are international and regional instruments that guarantee these rights and some specific groups, such as women and children, have their unique benefits with regard to these rights. It is in their nature that they are the type of rights that are realised progressively within the maximum available resources. Governments are therefore required to generate maximum resources through among other things, efficient tax collection and international assistance for their realisation. Adjudication of socio-economic rights has really tested the judiciary both in South Africa and internationally due to their complex nature and definitions and interpretations of words such as 'maximum available resources'.

¹⁵ S Khoza *Socio-economic rights in South Africa* (2007) p 1.

Chapter 2

Effectiveness of citizen participation and engagement in policy-making

2.1 Introduction

Before pondering the effectiveness of citizen participation and engagement by way of introduction, one must look at how, in some quarters and on the surface, it may be perceived to be a carrier of time and expenses; hence, delaying policy-making and or productivity.¹⁶ This view comes from authorities who engage with the public, for example the municipal council imagining having to go through constant hall meetings with residents.¹⁷ The particular section of the society that attends these meetings is the old age group who are often referred to as senior citizens, as they have the time to attend meetings called by the authorities. When dealing with only a certain group of the society, it limits full representation of the citizens and that brings about minimal input.¹⁸ One other misconception relates to citizen ideas being treated as complaints, as ordinarily people never get the full satisfaction of what is availed to them and here the focus is on the progressive realisation of the economic, social and cultural rights.¹⁹ It is noted that in the recent past there has been a move from the vertical type of governance which speaks and gives absolute power to governments to the horizontal one which is viewed as being all inclusive.²⁰ The inclusiveness cuts across the public sector, that is, government departments and parastatals, the private sector, members of civil organisations, the

¹⁶ P Hermann 'Is citizen participation a misconception' 1 September 2016 (accessed 29 August 2018).

¹⁷ As above.

¹⁸ As above.

¹⁹ As above.

²⁰ J Garrigues 'Citizen lab passion for thrilling content creation and citizen empowerment' 3 January 2017 <https://www.google.co.za/searchg=j-garrigues-digital-ninja-citizen-lab-passion-for-thrilling+content-creation> accessed 30 August 2018.

business and religious community. Three explicit differences between citizen engagement and participation according to Julie Garrigues are that citizen engagement comes at the initiative of the government, which actually confirms the shift from the top down approach; further that it is carried out formally with clear structures in place of exactly what is to be done. On the other hand, citizen participation is informal in approach and citizens are key in coming up with such initiatives. These are aimed at enhancing and making better public service delivery, public policies, as well as programs.

Blendi Dibra says 'citizen participation is a fundamental right which shall be considered both by the citizens and government officials to strengthen democracy.'²¹ He outlines in his paper the importance of citizen participation and says that local citizens know what the needs of the community are; secondly that if engaged they get educated and skilled, whilst at the same time educating the policy-makers themselves in different perspectives.²² The other benefit he sees is the one of trust built between the citizens and government and he says in that way, accountability automatically follows regarding decisions made.²³

2.2 Ways of Communication

There is diversity in the way information is received in the community as the community is made of different groups. Nowadays, everybody seems to be busy with their own schedules and yet information has to be disseminated in order to keep the citizens abreast of or informed on government issues and the community ones.²⁴ The ever evolving technology comes to the rescue of this, yet is dependent on accessibility of the e-tools to cover quite a wide range. There are so many reasons why there is a need for communication. For example, government may want to communicate a new service

²¹ B Dibra 'Citizen participation as an important tool to strengthen democracy'

https://www.academia.edu/8492340/Citizens_participation_as_an_important_tool_to_strength_democracy (accessed 18 February 2018).

²² As above.

²³ As above.

²⁴ MRSC *Communication and citizen participation techniques* (2018) p 1.

program it wants to undertake or implement, a service interruption possibly due to reasons that may be beyond its control and also as a means of just making contact with the people for purposes of development, initiatives and solutions to the communities concerned.²⁵ It is against this background that a particular strategy may fit best the type of participation technique. A number of efforts have been on the levels of participation models that may best suit specific solutions. The examples thereto are the International Association of Public Participation (IAP2 – a public participation toolbox), the National Coalition Dialogue and Deliberations and the draft Portland or Public Involvement Toolkit.²⁶

The most effective community approaches in community development are:

1. Public hearings, which are needed a lot of times and are geared at assuring citizenry rights with the limitations to those who have the art of public speaking to forward their comments and contributions and intimidate those who are not public speakers. Comfortable settings are needed to prevail in meetings of this nature to allow maximum contributions.
2. Specific Focus Groups provide a conducive environment and grounds to identify and appreciate the different and specific needs of the community. These are specifically to address unique perspectives on particular groups. Those who are partakers of this model look at all inclusive deliberations that may target different groups of people to their benefit and selection is based on the community. There is encouragement of free and explicit speech as well as relationship due to interaction. Some communities break into small roundtable groups to focus on specific issues after the discussion of a larger group.

Citizen participation programs, if they get to be implemented in an effective way, involves more and more people to be part of the decision-making process and in the end governments get to appreciate and attend to the community needs. That notwithstanding, as everything else, there are challenges that are met in the engagement process such as

²⁵ As above p 1.

²⁶ As above p 2.

long debates with no consensus, lack of focus in the relevant issues than clutter. In order for these challenges to be mitigated, it is important for government to adopt models that can make citizen engagement to yield even more positive results.²⁷

The use of technology can simplify the process by empowerment that must be accorded to the citizens. Information must be easily accessible and stored in the simplest possible way to cater for the majority of the community. It is critical that citizens are given the authority in the decision-making process of issues that relate and are about them. From the community there are different individuals with varying knowledge and expertise. Some are members of the organisations that do work and projects for ordinary beings. Hence, they have close relationships with same and if put on board the expertise and experience they have from such relationships may allow for smooth interaction. Two critical stakeholders to the engagement process are those who act on behalf of the government; that is employees for the dialogue and the citizens themselves.²⁸ With the power being delegated or decentralised, the decision-making process could be shortened. Their frequent contact with the citizens takes them to a better position of understanding their needs. It is therefore crucial that their recommendations are given an ear. This in my view forms a non-monetary form of incentive to them.

Cooper *et al* is quoted by Snhee Kim and Jooho Lee in their study titled “Citizen participation and transparency in local government: Do participation channels and policy-making phases matter?” by saying that relationships in civic engagement bring hope by involving the public and focusing on public management regarding citizen concerns.²⁹ This is viewed by a good number of scholars as the way people could trust their governments. Many governments mostly in the first world countries have devised strategies to see to it that there is as much as possible interaction with the people through

²⁷ www.govtech.com/e-government/5-ways-to-improve-citizen-engagement-initiatives.html. (Accessed 29 August 2018).

²⁸ As above.

²⁹ S Kim and J Lee ‘*Citizen Participation and transparency in the local government: do participation channels in policy making phases matter?*’ (2017) *Hawaii International Conference on System Sciences* p 2734.

the electronic way of doing things.³⁰ These include, but are not limited to online discussions, which can extend to social media and virtual discussion rooms. In spite of the aforementioned, it seems more is still desired, as citizens to date cry for a more inclusive participation process to decision making, which speaks to implementation of adequate policies and practises as a proviso for social and economic developments.

One of the values of democracy, namely transparency, does have an impact in building the trust for government from the citizens. One of the enhancement strategies could therefore be integrity and citizen empowerment, hence taking care of the gaps that exist.

According to the study by the centre for change and conflict management, titled 'participation of citizens and civil society in decision making', participation is categorised into three levels, namely communication, consultation and the actual participation.³¹ Communication is about the government taking the initiative to talk to its people, while consultation means getting their ideas and views on how to attend to issues or address them in the simplest terms. Participation is thus, more focused on the exchange of information and dialoguing. If the public has a responsive government that also provides them with feedback, this creates a good impression of empowering them to appreciate how the government operates together with its agencies.

2.3 Rules of Engagement

One important position regarding citizen participation is that of how relationships between different institutions and actors are moulded through how authority is distributed.³² The public must not be seen as non-active actors, basically operating from behind the scenes, but must actually have the authority to influence and change matters of public affairs. According to one of the political scientists as mentioned in the aforementioned study, democracies must afford on an equal footing and adequately provide resources for citizen

³⁰ As above p 2734.

³¹ 'Participation of citizens and civil society in decision making' Tirana Albania, centre for change and conflict management (2013) p 8.

³² As above p 8.

participation.³³ What actually becomes the role of civil society and non-profit organisations is to encourage citizen engagement. The Albany state study has a quite diverse meaning of civil society, referring it to be non-governmental, voluntary and non-profit organisations, religious and other groups.³⁴

During the first week of October 2017, a short course was conducted by Lee Kuan School of Public Policy under the National University of Singapore. The course was on communication for public policy delivery.³⁵ The program focus mainly was on the conceptual and practical ways of passing information to people on public policy delivery targeted at government officials who are specifically tasked with the development and implementation of public policy in the area of citizen engagement.³⁶ A summary of the program in relation to citizen engagement, which in my view was of high benefit to the participants and essentially reaching out to readers and researchers out there, is that for public policy delivery to be effective there should be effective communication. That only comes to being when governments and public sector organisations understand and engage with citizens. It is even more important in the era of less citizen trust in governments.³⁷ Communication thus, becomes a tool for obtaining feedback from the citizens, that is to understand their behaviours and what informs the said behaviour, psychology behind and other factors.³⁸

According to the House of Commons Public Administration Select Committee second report session of June 2013, when things are done in the appropriate way, there are benefits to public management in policy-making, which also reinforces democratic legitimacy in ensuring influence of people about what obtains in their lives.³⁹ The United

³³ As above.

³⁴ As above.

³⁵ Institution of systems science 'Executive education program the government and public sector practise' October 2017 <https://www.iss.nus.edu.sg/executive-education> accessed 29 August 2018

³⁶ As above.

³⁷ As above.

³⁸ As above.

³⁹ House of Commons Public Administration Select Committee 'Public engagement in policy making, 2nd report of session 2013-14 June 2013'.

Kingdom, according to the report is said to be working on its relationship with the people through big society, communities coming together to the extent of individual opportunity.⁴⁰ This process, the report says, helps organisations to be informed of public concerns and their expectations thereof, hence strengthening accountability and transparency and leading to sound citizens.⁴¹

The law finds public participation and citizen engagement to be fit to be done only when the government has a benefit, but that it is a requirement that people must be engaged. Constitutions and other legislation must have provisos that make citizen engagement compulsory.⁴² One right that immediately comes to mind when we talk of citizen engagement is the right to access to information.

In South Africa, there are some constitutional provisions and policies that make public participation mandatory.⁴³ The law makers at both national and provincial levels are tasked with the responsibility of being promoters of public participation at sections 59, 72 and 118 of the 1996 Constitution of South Africa. This in my view forms the basis and concrete foundation for other pieces of legislation and policies to have the same. There is also a national policy framework for public participation, which was drafted by the department of Provincial and Local Government in 2005.⁴⁴

2.4 Achievements of citizen participation

Benefits of citizen participation are seen under the sustainable development, conflict management, as well as economic benefits as alluded to in the International Journal of Research.⁴⁵ According to Sharma, achievements in sustainable development are based

⁴⁰ As above.

⁴¹ As above.

⁴² International peace building advisory team 'Public participation and citizen engagement' 2015

<https://www.interpeace.org/wp-content/uploads>

[2015/10/2015_10_12_effective_advising_how_public_participation](https://www.interpeace.org/wp-content/uploads/2015/10/2015_10_12_effective_advising_how_public_participation).

⁴³ As above.

⁴⁴ As above.

⁴⁵ SN Sharma 'Participatory planning approaches' (2012) International Journal of Research (IJR) p 2.

on the involvement of stakeholders and the integration of economic, social and environmental objectives that are tools for raising awareness.⁴⁶ The then Secretary General of the United Nations, Kofi Annan said in the introduction to the Aarhus Convention that the emphasis of public participation is on people having access to information, which then keeps them informed, thus making them able to make meaningful and relevant decisions.⁴⁷

The journal views conflict management as it has been stated by the World Bank, that intensive community consultation as early as possible in the project cycle plays a pivotal role in conflict management and acceptance of the people.⁴⁸ An opportunity to debate is then given to stakeholders until common ground is reached and then the way forward is forged. It ignores not the benefits that come in the economic way where involvement of the public in full decision making and at every step of the process, helps to mitigate costs together with delays, because whatever implementation of any policy they would have been partakers and owning it.⁴⁹ Informed as they may be going forward in the same implementation, they understand and create room for amendments if need be, because it is for something they already know. There is, however, the possibility that the community may not agree with the final decision made by the government mostly based on their interests, but if their involvement was made at the beginning of things they are able to appreciate why the decision was made despite their opposition to it.⁵⁰

An illustration that one can give is when the local residents rejected the plan from the management for the Exe-estuary in United Kingdom, which had been made by a team of consultants.⁵¹ The main reason behind the rejection by the locals was that the consultants opted not to consult and engage them to get their views with specific reference to charging estuary users for the harbour services provision. The duty was then upon the policy

⁴⁶ As above.

⁴⁷ www.biodiversity.ru/coast_learn/pp-eng/benefits.html (visited 23 February 2018).

⁴⁸ As above.

⁴⁹ As above.

⁵⁰ As above.

⁵¹ As above.

makers to reconsider their strategy for the estuary. Teams of local topic groups were made and part of the membership was the local residents. A lot of meetings were held and eventually a new strategy was drawn to the satisfaction of all the stakeholders.⁵²

Mugalu Simon says that according to the Mantzara 1998, the community does get the benefit and skills and knowledge to communicate meaningfully and hence empowering them to be responsible citizens and adopt the spirit of patriotism simply because they form part of the process.⁵³ Even if there could be negative elements coming out of policy implementation that they were part of in the planning process there are able to swallow that. Desirable developmental results are products of the benefits of citizen participation and engagement.⁵⁴ There are some rights which get to be realised in the process, such as the right to education, access to water and sanitation, as well as the right to health. The collaborations and network created brings about awareness regarding responsibilities of people to bring forth their contributions to development. With the very contributions they make, based on the knowledge gained government does not get to relax as it knows that some of the decisions they make can be challenged by the public. We then get to see governments that are more responsive and are accountable to the people.⁵⁵

2.5 Conclusion

As we get to conclude this chapter, it is paramount to revisit the variant meanings of public participation and in doing so the academic paper of Mugalu Simon provides such meaning. According to him, public participation is the involvement of the public, which may be recognised as a right by way of principle and practise.⁵⁶ He goes on to say there is a concept of stakeholder involvement, which facilitates the involvement of those who

⁵² As above.

⁵³ M Simon 'Public participation in environmental impact assessment' 2012
www.academia.edu/8603834/public_participation_in_EIA (accessed 29 August 2018).

⁵⁴ As above.

⁵⁵ As above.

⁵⁶ As above.

are to be affected by the decision. In his definition, he mentions that those who are to be affected by a decision in whatever way deserve and are entitled to participate in the decision-making process.⁵⁷ Furthermore that public participation supports democracy and it is the tool to uphold the rule of law.⁵⁸

History is brought into picture by Blendi Dibra when he states as a fact in his presentation that ‘the right for the public to participate in governance has its origin in the ancient Greece since the time of Plato’s republic, and that the principle is further transferred to the Roman Empire as a special republican right’.⁵⁹ The French revolution leaders later on resized it.⁶⁰

Roger Waves mentions that ‘the ability for citizens to participate in the public policy process has long been a tradition in the United States’.⁶¹ Citizens of the United States, he says, can vote, attend public meetings and form part of the committees that are made to develop policies and provide recommendations to public officials. The method of participation has over the years evolved from citizens being informed of what is happening but to participation in the decision-making process.⁶² He continues to state that there are variant reasons as to why people want to participate, as one individual may do it for being part of the democratic process, another may have so much love of their community and partaking in things that affect them, whilst the others may do it after having experienced a previous decision, which they felt had a negative impact on their lives. What basically comes out clearly from the aforementioned is that public participation is not a new phenomenon developed in the recent past, but that even during the old system of governance where leadership was in the hands of kings with absolute monarchical

⁵⁷ As above.

⁵⁸ As above.

⁵⁹ n 21 above.

⁶⁰ n 21 above.

⁶¹ RW Caves *Too much ‘red tape’? Pros and cons of citizen participation*

(2012)<http://www.sandiegouniontribune.com/sdut-the-pros-and-cons-of-citizen-participation-2012feb18-story.html#> (accessed 20 February 2018).

⁶² As above.

powers, the need for the public to have a say in that system of governance was recognised.

Chapter 3

Institutions for good governance

3.1 Introduction

It has been mentioned by Julia Betts and Helen Wedgwood that of late, there are reforms and countries are establishing public institutions desired at improving good governance.⁶³ An achievement of this is through putting in place what will make governments accountable to their people. Much as there has been insignificance in the best ways to embrace the reforms that are meant to improve service delivery owing to the respect of state sovereignty, which essentially limits interference of external forces or contributions, there is direction according to the evaluation insights of the Organization for Economic Co-operation and Development (OECD) and the Development Assistance Committee (DAC).⁶⁴ In as far as their evidence-based report states and attests to the somewhat generally good progress, there is an indication that in countries that provide support to others, for example to the developing countries, accountability and transparency is required, hence this on its own ensures improvement of good governance and economic growth.⁶⁵

According to Annice M. Goetz, '[g]ood governance brings in normative judgement about what constitutes the legitimate acquisition, efficient and equitable exercise of power'.⁶⁶ In other quarters, as governance is viewed from different angles, good governance would mean properly managing national resources in a way that promotes human development. This accordingly comes out in two components as per Goetz, which is the capacity that

⁶³ J Betts Wedgwood 'Effective good governance for development - evidence on progress and the role of aid' No 4 December 2011 www.oecd.org/dac/evaluation accessed 02 March 2018.

⁶⁴ As above.

⁶⁵ As above.

⁶⁶ AM Goetz 'Managing successful governance reforms - lessons of the design and implementation conceptual framework' (20 September 2004) *Institute of Development Studies* p 4.

the state has to exercise its authority and accountability which comes in the form of the acquisition and exercise of its authority.⁶⁷

Michael Johnston says that ‘improved governance requires an integrated long term strategy built upon cooperation between governments and citizens involving both participants and institutions.’⁶⁸ He sees accountability, the rule of law and transparency as primary in fostering the type of governance that is all inclusive and supported by citizens with a strong civil society let alone the media, which is referred to as the Fourth estate.⁶⁹

3.2 Ombudsman/Public Protector

Linda C Reif mentions ‘that [the] public sector Ombudsman is an institution preferably established by the legislative branch of government to supervise the administrative activities of the executive branch’.⁷⁰ The traditional kind of Ombudsman in the public sector is mandated to receive complaints of maladministration in the public sector with no power over private institutions.⁷¹ This type of Ombudsman derives this approach and culture from the Scandinavian countries, which is the geographical area where the first Ombudsman institution was established.⁷² The institution now exists in a number of continents including the African continent. Tanzania is the first country in Africa to establish the office of the Ombudsman in 1967, even before the United Kingdom. Generally speaking, the office of the Ombudsman exists to improve performance of public administration, including improving and enhancing accountability by the executive to its people. As we view the office of the Auditor General to audit public finances, the Ombudsman office audits administration. It applies a non-adversarial model of dispute

⁶⁷ As above p 5.

⁶⁸ M Johnson ‘*Good governance: rule of law, transparency and accountability*’ (2016) 24 Colgate University 2 p 1.

⁶⁹ As above p 1.

⁷⁰ L C Reif *The Ombudsman, good governance and the international human rights system* (2004) p 1, 2, 3.

⁷¹ As above p 2.

⁷² As above p 3.

resolution of disputes arising from improper administration occasioned to people by government agencies and the executive. I find this non-adversarial system to be cheap and speedy as it excludes mostly the technicalities and mechanical way of addressing issues as the judiciary does. It is under this adversarial system that we find justice being not adequately served as some rules may deny one a claim that was initially theirs.

A practical example to this would be an employee who has a right to be paid terminal benefits at the end of their service. Often we find departments failing to prepare timely benefits for an employee who is to vacate office either by retirement, resignation or for any other reason. The delay in paying same on time violates the employee's right to be paid for the service they provided for the government departments and/or parastatals that the Ombudsman has jurisdiction over. In most of the cases, when an employee does not put his claim in with the department immediately and in future lays claim to it, the concerned department would argue the case on the basis of prescription, to say that the right has fallen away by reason of lapse of time. This is when the best administrative practises come in handy to say why the department at the initial time failed to pay such an employee in accordance with the rules of the work contract. In administrative and Ombudsman terms, we say you failed in your duty to pay when you had to, so rectification thereof is to put things right and pay. I discuss in depth the best administrative practices in Chapter 5, which focuses on the role of the Ombudsman in enhancing good governance and accountability.

When we go back in history, international law did not focus much on interfering with the way countries handle their internal affairs and day to day running. In the recent years we see a shift from this, towards greater democratic governance under international law. Reif mentions that '[t]he arguments supporting the emergence of this legal norm rest on the foundational principles of the right to self-determination and human rights to participation in government.'⁷³

As mentioned in the introduction of this chapter, the Ombudsman institution in Africa saw its first light in the late 1960s and in Tanzania to be precise. Thereafter, a greater number

⁷³ Reif (n 70 above) p 6.

of countries came to establish the office in the 1990s. In this era we see Africa encompassing democratisation and increased interest of the international community in good governance and donor funding. It is, however, a concern that to date in Africa the institution tends to come to being through acts of parliament as opposed to being created under national constitutions. This makes the office to have limited powers, hence jeopardising its contribution to good governance to some extent.

3.3 Anti-Corruption Agencies

Let us begin this sub-heading by rather posing a question as to what is corruption? There are varying definitions as to what corruption is in various jurisdictions. In the simplest terms, corruption is referred to as abuse of powers for personal gain.⁷⁴ This is indeed how the World Bank defines it. The bank fights corruption by supporting countries that are in the fight against corruption, being part of international efforts aimed at fighting corruption and protecting the bank's projects by preventing fraud and corruption.⁷⁵ According to Drury *et al*, corruption is the abuse of public office for private gain whether pecuniary or in terms of status.⁷⁶ This gain, they state, may accrue to an individual or a group of people or to those closely associated with such an individual or that particular group.⁷⁷ Janet Minnaar lists a number of crimes, which she says are related to corruption and mentions some of them to be fraud, fronting, embezzlement, extortion, cover quoting, price fixing, amongst others.⁷⁸ Under the South African jurisdiction, there are specific Acts

⁷⁴ <https://www.transparency.org>, transparency international 'The global coalition against corruption' (accessed 27 August 2018).

⁷⁵ As above p 74.

⁷⁶ C Drury *et al* 'Corruption democracy and economic growth' (2006) 27 *International Political Science Review* pp121.

⁷⁷ As above p 122.

⁷⁸ J Minnaar 'Crimes related to corruption' [https:// www.tei.org.za/index.php/resources/articles/fraud-and-corruption/1705](https://www.tei.org.za/index.php/resources/articles/fraud-and-corruption/1705) crimes-related-to-corruption (accessed 30 August 2018).

promulgated to take care of these forms of crimes that are corruption oriented or related to corruption.⁷⁹

Carlo Alberto Brioschi mentions that 'from ancient times to modern times corruption has been ingrained in human society and it is still a powerful issue in the contemporary world'.⁸⁰ To this day, so writes Leslie Holmes, 'corruption is one of the biggest global issues ahead of extreme poverty, unemployment and the rising cost of food and energy, climate change and terrorism'.⁸¹ Its significance in the contemporary world cannot be overvalued. An indication of this is the anti-corruption agencies or institutions that various governments have created, mostly through acts of parliament to address this high level demon to countries' economies.

Sampling one or two countries in Southern Africa, Botswana has the Directorate on Corruption and Economic Crimes, which was established by the Corruption and Economic Crimes Act of 1994. It has the primary function to combat corruption and economic crimes. This autonomous body has divisions with varying functions such as the corruption and prevention division, which audits systems within government and parastatals to detect loopholes that influence corruption. The investigations division has the power to receive and investigate allegations of corruption in which a number of cases have been established and the matter is referred to the Directorate of Public Prosecutions for prosecution. One of the other divisions is the public education division, with the functions to create awareness on matters of corruption among the public.

In South Africa, a multiple approach anti-corruption entity has been adopted and Pillay says that 'international debate on the issue of multiple or single anti-corruption agencies never ceases mostly because corruption has reached new levels of sophistication demanding greater effectiveness and efficiencies in order to combat unethical behaviour

⁷⁹ Prevention and Combating of Corrupt Activities Act no. 12 of 2004; Municipal Financial Management Act no. 56 of 2003.

⁸⁰ CA Brioschi *Corruption a short story – this short histories* (2017) p 1.

⁸¹ L Holmes *Corruption: a very short introduction* (2015) p 1.

by both public and private sector operators'.⁸² The country has, through law, regulations and rules, a substantial list of anti-corruption institutions and those related thereto.

3.4 Human Rights Commission

'The term human rights was mentioned seven times in the United Nations Founding Charter, making promotion and protection of human rights a key purpose and guiding principle of the organisation'⁸³ and the office responsible for this mandate is the Commissioner of Human Rights. National human rights institutions are creatures of statute with the mandate of investigating violations of human rights.⁸⁴ By extension, their roles also make it possible for collaboration with civil society and government when it comes to addressing issues of human rights.⁸⁵

Whatever has been stated above does not only refer to human rights commissions, but applies to other human rights institutions, such as the Ombudsman. The emphasis is only made here, as the office of the human rights commission in various jurisdictions is exclusively mandated with human rights issues, whether as a separate entity or as an extension made to the ombudsman institution to investigate clear issues of human rights but not only those related to maladministration.

The United Nations has to some extent progressed in providing awareness on the importance of the human rights commission office and to this end we find the office in some of its member states, while not disputing that a lot is desired for creation of same in those countries that have not yet established it.⁸⁶ Where I originate from (Botswana), there have been talks that the office may take shape under the already existing office of

⁸² P Pillay 'Anti-corruption agencies in South Africa and Brazil' (2017) 9 *African Journal of Public Affairs* 1-14 p 3.

⁸³ <http://www.ohchr.org/en/sections/what-we-do/protect-human-/rights/index.html> (last visited 13 March 2018).

⁸⁴ UNHCR 'National human rights institutions, history, principles, roles, responsibilities' (2010) 4 *Professional Training Series* p 13.

⁸⁵ As above p 13.

⁸⁶ As above p 16.

the Ombudsman by way of extension of the mandate. While one cannot provide certainty to this as to whether there will be an extension or a separate institution, there is hope that the issue is under discussion. National human rights commissions are at the bottom of the ladder at the United Nations level, which is then followed by the regional, sub-national and national mechanisms. The African Commission on Human and Peoples' Rights, the Inter American Commission on Human Rights, the European Commissions on Human Rights as well as the ASEAN Inter-governmental Commission on Human Rights serve at regional level for their specific regions.⁸⁷

3.5 Corporate Governance

'The term corporate governance has become an important concept in a variety of different disciplinary and practise arenas including management, public administration, public policy and politics,' states Naomi Chambers and Chris Cornforth.⁸⁸ They also continue to state that 'in the private sector modern systems of corporate governance evolved with the increasing separation of ownership from the control in public companies'.⁸⁹

There are governors who are put into power through the public vote to run public institutions in a democratic setup.⁹⁰ The distinction between organisations in the public sector and the private sector is that there is government and political power in public organisations and one may come to a conclusion that they are not fully independent.⁹¹ This brings about weak institutions which rely on government for funding and operation. Although some members of the executive do take part in the governing bodies to come up with policies, what rather negates their contributions is always their limited numbers.

⁸⁷ https://en.wikipedia.org/wiki/Human_Rights_Commission (last visited 20 March 2018).

⁸⁸ N Chambers & C Cornforth 'The role of corporate governance and boards in organisational performance' in Walsh, Kieran; Harvey, Gill & Jas, Pauline (eds) *Connecting knowledge and performance in public services: from knowing to doing* (2007) 1- 24 p 1.

⁸⁹ As above p 2.

⁹⁰ As above p 2.

⁹¹ As above p 4.

According to Andrei Shleifer and Robert W Vishny 'corporate governance deals with the ways in which suppliers of finance to corporations assure themselves of getting returns on their investment.'⁹² It has been mentioned that this is, however, a narrow definition of corporate governance and some authors such as Gillian and Starks have given broader definitions of this subject. In his article on recent developments in corporate governance, Stuart L Gillian gives an example of what happens in some states in the United States of America where there are laws that may not be accepted into the political environment of the specific community if there is a possibility that operations of such firms have a negative influence on the community.⁹³ The oversight role mandate of governance in the state owned entities or companies are executed by parliament, the executive, as well as boards of such entities.⁹⁴

The United Kingdom Code of Corporate Governance has for some time received accolades regarding its quality – it is flexible and there are concerns that there has been a gap both in the public and private sector identified in this unstable environment.⁹⁵ In 1992, the United Kingdom issued a publication titled the Cadbury report named after the leader of the committee.⁹⁶ The report has become a foundation in which the European Union has created major regulatory instruments from.⁹⁷ It later in the years saw other countries coming up with instruments responsible for corporate governance.

3.6 Conclusion

Institutions stated in this chapter are not the only institutions created to deal and handle human rights issues and matters of good governance. There are other good governance institutions with specific mandates relating to the topic, for example, of the office of the

⁹² A Shleifer & RW Vishny 'A survey of corporate governance' (1997) 52 *Journal of Finance* 737.

⁹³ SL Gillian 'Recent developments in corporate governance; an overview' (2006) 12 *Journal of Corporate Finance* 381.

⁹⁴ H du Toit *Governance oversight role over state owned entities* (2005).

⁹⁵ J Veldman & H Willmott 'Cultural grammar of governance; the United Kingdom code of corporate governance, and the limits of soft regulation' (2016) 69 *The Tavistock Institute* 581-603.

⁹⁶ As above.

⁹⁷ As above.

Auditor General who is responsible for auditing public finances and is a public institution. Non-governmental organisations (NGOs), civil society and the media play a critical role in ensuring that governments are accountable and promote and protect human rights. The last three mostly function outside the purview of the government.

The Republic of South Africa has referred to those that are government funded although autonomous or independent in approach as the Chapter 9 organisations as envisaged in the Constitution of the Republic of South Africa, 1996.⁹⁸ In addition to the ones that have been mentioned above is the Commission on Gender Equality (CGE) and the Commission for the Promotion and Protection of the rights of Cultural, Religious and Linguistic (CRL) Communities.

⁹⁸ Constitution of the Republic of South Africa, 1996.

Chapter 4

Meaningful engagement in the realisation of socio-economic rights

4.1 Introduction

Without strictly getting into meaningful engagement in the realisation of socio-economic rights, as a way of introduction Red Privet says engagement ‘is to attract and hold fast’.⁹⁹ In unpacking this, he proceeds to say that ‘there are two laws at work in the true engagement which are attraction and retention’.¹⁰⁰ This definition of course, relates to a business engagement, where customers are stakeholders that bring business or profit to the business. There is therefore, more value attached to this type of stakeholders and the contributions they make.

Another look at the meaning of ‘meaningful engagement’, with specific reference to the historical and modern relationship with the indigenous people as per the Canadian approach is about free, prior and informed consent. Tory mentions that for too long after confederation, ‘indigenous people were treated as wards of the state but not citizens’.¹⁰¹ They were also subject to an insufficient welfare system and were vastly provided with inadequate education, health care, employment opportunities, portable water, sanitation and other services.¹⁰²

Coming to the subject fully under discussion and in defining ‘meaningful engagement’, I prefer to quote one of the most resourceful authors on the subject of economic, social and cultural rights. ‘Meaningful engagement is an innovative mechanism for realising

⁹⁹ R Privet <https://redprivet.com/our-thinking/what-we-mean-when-we-talk-about-meaningful-engagement/> (visited 17 April 2018).

¹⁰⁰ As above.

¹⁰¹ Torys *Free, prior and informed consent in Canada: towards a new relationship with indigenous people* (2016).

¹⁰² As above.

socio-economic rights and could become central to their enforcement'¹⁰³ said Lillian Chenwi when she opened a roundtable session in 2010 sponsored by the Norwegian Human Rights Commission. She continues: "It is therefore important especially as it recognises the core importance of fostering participation and gives content to the rights of participation of the poor."¹⁰⁴ The lack of participation of people in whatever way does not promote democracy; hence, 'meaningful engagement' is a concept representative of democracy and goes well with the principles encompassed such as transparency, accountability and responsive government.¹⁰⁵ The question now posed is: "When should meaningful engagement take place and become of a greater value to a human approach and democratic kind of governance?" It indeed would make perfect sense if it takes place from the inception of the policy-making process among other things, where it is applicable and required. In the light of this, it is therefore important to look at the concept prior to litigation, during litigation and post litigation.

4.2 Prior to litigation

Economic, social and cultural rights according to E-net, which is constituted of members of social movements and non-governmental organisations across the world, are 'human rights concerning the basic social and economic conditions needed to live a life of dignity and freedom relating to work and workers' rights, social security, health education, food, water, housing, healthy environment and culture'.¹⁰⁶ For forty years the United States of America put less emphasis on economic, social and cultural rights, but only on civil and political rights. It was only during the term of the presidency of Jimmy Carter, that we saw American foreign policy-making considerations brought in to support economic, social and cultural rights. It was at this time that policy makers focused on poverty at the world

¹⁰³ Socio Economic Rights Project of the Community Law Centre and Socio Economic Rights Institute 'Report on the roundtable discussion on meaningful engagement in the realisation of socio-economic rights' (2010) p 1.

¹⁰⁴ As above p 1.

¹⁰⁵ As above p 3.

¹⁰⁶ <https://www.escr-net.org/rights> (accessed 16 April 2018).

circle regarding what hunger brought to life and made fulfilments to the vital needs such as food, shelter, health care and education.¹⁰⁷

The Indian approach towards the above stated rights has always been closely connected to the right to life. This is as per the directive principles of the constitution and recognition under international law, and mainly the interpretation thereof by the courts.¹⁰⁸ In 2009 the municipal corporation of Delhi demolished temporary tent shelters for the homeless and subsequent to that two people were reported dead; the cause thereof having been exposed to the cold.¹⁰⁹ Members of civil society stood up for the rights of the homeless and organised a conference that attracted media attention. It was through this that eventually poor, homeless people had to be provided with food and shelter after the former Chief Justice had issued a notice to the government of Delhi seeking answers on the matter.¹¹⁰ In the end the state entities in all the states were ordered to build well equipped shelter for the needy or homeless and this came to being through the engagement of the civil society in the matter that attracted the attention of the courts hence the *suo motu* case.

Going with what has just been mentioned above; my considered view regarding meaningful engagement is that it is critical at this stage when it comes to the realisation and adjudication of economic, social and cultural rights. This view is predicated on the fact that this does not allow for the violation of the rights by states as dialogue is entailed. Non-violation of these rights then get to speak to promotion and protection of human rights as it is prescribed in international law and national legislation of various states. The African continent is perceived as lagging behind other continents when it comes to the respect and protection of human rights in general. It does become very relevant to applaud the South African judiciary for incorporating meaningful engagement in the

¹⁰⁷ S Moyn 'Economic rights are human rights, united states foreign policy has exacerbated many of the evils it set out to eradicate. It needs an overhaul' (9 April 2018).

¹⁰⁸ The Human rights to adequate housing in India: housing and land rights network – India (May 2012).

¹⁰⁹ See *Suo Motu case on homelessness*, High Court of Delhi.

¹¹⁰ n 1 above, 109.

adjudication of rights, and perhaps it is through the transformative constitution the country has.

4.3 During litigation

Around the world the economic, social and cultural framework is used to bolster actions for justice and against oppression and amplify progressive alternatives to enhance the enjoyment of socio-economic rights.¹¹¹ Activists have brought legal cases before the United Nations treaty and regional bodies, courts and other alternative dispute resolution fora to demand change. They have also documented and publicised recurring violations, mobilised communities and developed legislation.¹¹²

Social and Economic Rights Centre and the Centre for Economic, Social Rights v Nigeria
Communication number 155/96.

It was alleged in this complaint made before the African Commission that some economic, social and cultural rights were violated by the government of Nigeria. This was after the government had allowed for operations of oil companies in the land of the Ogoni people who are said to be the minority ethnic group. Among the economic, social and cultural rights, the right to dispose of natural resources, the right to a clean environment and the right to health were said to have been violated. The Niger Delta was basically damaged since the government had facilitated and allowed corporations to operate in the Ogoniland, while the Commission assessing the matter, made considerations into the duty that states bear in order for citizens to fully enjoy rights.¹¹³ States, as according to various international instruments, have the duty to ensure that rights are respected, protected, promoted and fulfilled.

In the case at hand, the Commission applied this principle and concluded that the Ogoni people's right to health was violated in the sense that government was not able to prevent

¹¹¹ n 1 above, 103.

¹¹² See Community watchdog handbook- guide for community based activists on documenting human rights violations (October 2011) p 1.

¹¹³ F Coomans 'The Ogoni case before African Commission on Human and Peoples Rights' 2008.

pollution and ecological degradation. This was in terms of article 16 of the African Charter on Human and Peoples' Rights. We also find as part of the decision the Commission made that government, in their failure to involve the community in the decision made regarding the oil activities, contravened provisions of article 21 of the African Charter that guarantees for people to dispose of their wealth and natural resources. This brings about the issue of engagement by the government in bringing in development to their area where their well-being is going to be affected. The right to housing was also one of the rights that were violated in that houses were destroyed and some residents were subjected to harassment. The Ogoni community's food and water were also contaminated by both the non-state agencies and the state. The following orders were made: that the people be attacked no more; for compensation to be provided; provide information on health and environment risk; and in the future social impact assessment must be done. The decision of the African Commission on this complaint indicates a liberal interpretation of the African Charter, which has been described as modest and very flexible.¹¹⁴ Economic, social and cultural rights by this decision are not regarded as vague and lacking judicial enforcement.¹¹⁵

As previously indicated a number of international instruments call for an engagement in the realisation of economic, social and cultural rights.¹¹⁶ The Committee on the Economic, Social and Cultural Rights emphasises the need for genuine consultation, which is supposed to effectively give dignity to those concerned. When we take the right to housing individually and focus on evictions of members of certain communities for varying reasons, it is a requirement that extensive, genuine consultations with full representation, is achieved.¹¹⁷ This is clearly specified under Comment No 4 of the CESCR. There are

¹¹⁴ JC Nwobike 'The African Commission on Human and Peoples' rights and the demystification of second and third generation rights under the African Charter. *Social and Economic Rights Action Centre and the Centre for Economic, Social and Cultural Rights v Nigeria*' (2005) *African Journal of Legal Studies*, 129-146.

¹¹⁵ As above.

¹¹⁶ L Chenwi 'Meaningful engagement in the realisation of socio economic rights: the South African experience' (2011) 26 *South African Public Law* p131, 132, 133.

¹¹⁷ As above.

basic principles and guidelines which also have been made by the United Nations on forced evictions in that reasonable measures must be taken for protection.¹¹⁸ Consultation, delivery and the sharing of information to them throughout the process is called for. In defining forced evictions M R Islam and N Munga point out that, 'in international law it is permanent or temporary removal against the will of individuals, families and communities from their homes and or on land which they occupy without provision of appropriate alternative accommodation or other protection'.¹¹⁹ They further state in the article that there is a significant difference in the way evictions are conducted in Western countries and Asian ones.¹²⁰ In the American and Western states, it is stated that the principles contained in the United Nations human rights such as consultation, prior notice, offering compensation and prevention of evictions leading to homelessness among others, are somehow complied with, as opposed to the Asian and African continents. Members of civil society are said to be playing a critical role in the former continents more especially when it comes to offering rehabilitation to the evictees post the evictions.

Under the South African jurisdiction, the legal basis of meaningful engagement is found in the supreme law of the land, the constitution and other subsidiary legislation to it such as the Housing Act as well as the Prevention of Illegal Eviction from Unlawful Occupation of Land Act.¹²¹ There are also policies that put a great emphasis on engagement. Under the housing right for example, there is a policy on social housing which needs for participation to take place in the administration of houses. Section 33 of the Constitution mandates the government to respect procedural fairness when dealing with administrative issues. Section 195 speaks explicitly and provides for democratic values to be part of any decision making, including specifically encouraging the public to participate.

¹¹⁸As above.

¹¹⁹ MR Islam & N Mungai 'Forced evictions in Bangladesh: a human rights issue' (2016) 4 *International Social Work* 59.

¹²⁰ As above.

¹²¹ As above.

The Constitutional Court first dealt with the language of engagement in the housing case of *Grootboom*.¹²² A group of people, adults and children evicted from private land brought a case before the courts from where they had found refuge, for the right to access to housing. In considering the matter, the court found the government's obligation for the progressive realisation of socio-economic rights to be not reasonable, but as the emphasis here is on engagement, the court held that the relevant municipality must immediately engage with unlawful occupiers upon realisation of their occupation. In the *Minister of Public Works v Kyalami Ridge Environmental Association*,¹²³ the court agreed with the way the government dealt with the residents who were removed from their area of residence by virtue of acts of God and in this case the floods. The government had planned for temporary accommodation pending the allocation of a permanent housing budget but that the government had to meaningfully engage with the residents from the onset for something that had to be applied in the future.

We find the benefits of meaningful engagement from the beginning under the South African case law in the *Port Elizabeth Municipality*¹²⁴ case directly stating what the judiciary found as benefits to this concept as socio-economic rights get to be realised. 'Evictions cannot proceed without a proper relocation plan based on genuine consultation.'¹²⁵ Benefits thereof are that the costs of litigation get to be reduced as issues get to be ironed out and appreciated during the discussion process for as long it is done genuinely. There is a relationship formed between parties as they get to meet and there is an understanding from each side. Tensions are reduced as discussion brings closeness and equality but only if it is done appropriately. The court in this case stated that in the future any matter brought before the courts on matters of evictions must prove that mediation had already taken place.

¹²²*Government of the Republic of South Africa v Grootboom and Others* (2001) 1 SA 46CC 2000 (11) BCLR1169 CC.

¹²³ *Minister of Public Works v Kyalami Ridge Environment Association* CCT 55/00 (2001) ZACC 19 2001 3 SA 1151 CC.

¹²⁴ *Port Elizabeth Municipality v Various Occupiers* 2004 BCLR 1268 CC.

¹²⁵ As above.

In the cases that the Constitutional Court held on educational rights, meaningful engagement gets to be the remedial answer to those acts that are inconsistent with what the Bill of Rights provides for in the Constitution.¹²⁶ Its role at this stage, however; raises concerns with its alignment with public law's way of remedial decision making. A break in continuity between the right and remedy in constitutional litigation is broad determination that a right has been violated and does not demand or command the form of remedy. The traditional adversarial litigation process is not well suited to rectify the constitutional infringements that are structural.¹²⁷ Sandra Liebenberg speaks of the alternative model that is of participatory deliberative remedial decision making as she cites Susan Sturm¹²⁸ and others on full participation. In her article Liebenberg gets to state what I term the benefits coming with the meaningful engagement concept. Full and fair participation entails all parties to the dispute and those that have interest in whatever way to be given the opportunity on the outcome of the remedial process. The role of the court here is to structure the remedial process to allow for inputs and participation at varying levels such as individuals, groups and organisation as they may facilitate or hinder implementation of remedy.¹²⁹

Meaningful engagement remedies offer a hopeful opportunity for reconciling the principles of respect for the separation of powers. It stimulates participatory agreement on the precise policy measures needed for the remedial action of violation of the constitutional rights. It is on this premise that the courts refrain from stipulating a specific policy stance and that is how it respects the separation of powers theory. Parties get to be involved in the work together with those that may be affected; a departure from the command and judicial control remedy. In the process I also view it to bring on board with no or less costs experts who otherwise the court would have engaged or summoned to impart their

¹²⁶ S Liebenberg 'Remedial principles and meaningful engagement in education rights disputes' (2016) *Potchefstroom Electronic Law Journal* 19.

¹²⁷ As above.

¹²⁸ See 'Thoughts on Susan Storm and full participation' *The College Voice Newspaper* (10 October 2016).

¹²⁹ As above.

knowledge to clarify some aspects on the subject under litigation, for example, policy-making issues.

Walking us through the meaningful engagement concept and process, is the school pregnancy policies, which falls under the realisation of economic, social and cultural rights and in this context the right to education. Dealing particularly with this concept in the *Welkom High School case*,¹³⁰ where a power struggle ensued between the school governing body and the head of the Department of Education, on who ultimately has the final say on the formulation and implementation of school policies and in the case in question, the learner pregnancy policies. The head of department on this matter had dictated for the re-admission of the pregnant learners who had been kept away for a protracted period of time; something that did not sit well with the school governing body, hence they sought an interdictory order against such a move. In the end the school was successful, as the Supreme Court of Appeal upheld the decision of the lower court. In a systemic way of resolving this matter and without restriction to the parties of the case at hand, the Constitutional Court dealt with the policy itself and how it violates constitutional rights, such as the right not to be unfairly discriminated against on grounds of pregnancy and sex, as well as the right of access to basic education. The decision on this aspect then called for the revision of such a policy even at a provincial level. The two parties were to engage meaningfully in the process of reviewing the policy so as for it to be compliant with the Constitution. In their separate judgements, Liebenberg cites Froneman and Skweyiya's emphasis on the importance of engaging meaningfully and in good faith before approaching the courts.¹³¹

To follow is a discussion on the successful case that was decided by the Constitutional Court with a representation of the successful effects of meaningful engagement at the time of litigation with the court fulfilling the role of facilitator. The city of Johannesburg had issued a number of administrative notices requiring the occupants to vacate what was deemed unhealthy and unsafe buildings in *Occupiers of Olivia Road v City of*

¹³⁰ *Department of Education, Free State Province v Welkom High School and Another* CCT 103/12 2013 ZACC 25.

¹³¹ As above p 130.

Johannesburg.¹³² The matter had gone through the High Court and to the Supreme Court of Appeal where the occupants applied for leave to appeal the decision of the Supreme Court challenging the correctness of the judgement and order authorising their evictions. The questions asked at the beginning of the application were, whether the order for eviction had to be granted and whether the city's housing programme complied with the provisions of the Constitution specifically section 26.¹³³ The section is particularly a constitutional proviso for the right to have access to housing; and the government is expected to take reasonable steps to ensure that its people have housing. With regard to evictions before any person may be removed or have their homes demolished, the court must have given an order to that effect.

The Constitutional Court at the time it heard the appeal, immediately issued an interim order with specific contents that the parties had to engage meaningfully on certain issues peculiar to the matter. Issue number one was for meaningful engagement with regard to the values of the constitution and relevant legislation in respect of the rights of the concerned residents. The second engagement aimed at addressing the conditions that the said residents lived under and lastly, that the parties had to issue a report advising on the results of the engagement. The court at the time of issuing such an order did not even attempt to get to the reasoning behind it but wanted immediate action within a stipulated period of time and one would say the rest was going to follow. This shows how important it may be to discuss and just talk about conscientious topics to refine things for easier adjudication.

The city had earlier contended that the occupiers were given a hearing before a decision to evict them was made and that it was an administrative one. One could suppose that this has always been the interpretation of engagement from the government's position in matters of this nature. However, the constitutional provision as was interpreted in the *Grootboom* case, talks of a relationship of state action against the treatment of human being. What the court found was that the municipality had actually made little effort to

¹³² *Occupiers of Olivia road, Berea township and 197 main street Johannesburg v City of Johannesburg and others* (24/07) (2008) ZACC 1 2008 (3) SA 208 (CC); 2008 (5) BCLR475 (CC).

¹³³ Section 26 of the Constitution of South Africa, 1996.

address the possibilities of what was going to be the results post eviction. It is for this reason that engagement is said to be a two-way process in which parties would look into the consequences of the direct effect of the action. In the matter at hand parties had to look into the consequences of the evictions: whether the municipality would be able to assist in taking care of the occupants; whether the place could be rendered safe and conducive, amongst others. Engagement being a two way process and being at an equal footing means the city looking at the kind of people it is dealing with and in this case, the occupiers were poor, vulnerable people with less knowledge; hence, the process had to be accommodating.¹³⁴

What does this mean? What difference can be made if community involvement, let alone from community organisations is attained from the planning level or at the beginning of any action to be made by the government; more especially at the municipal level? Richard Crisp *et al* say: “There is no silver bullet in terms of a single community led approach that is best placed to tackle poverty.”¹³⁵ Some approaches are about reducing poverty in a material way such as reducing costs in housing. Community led activities often offer benefits on the skills and knowledge of key individuals and can take some of the omissions that can be made by the government.¹³⁶

The outcome of the meaningful engagement order turned out to be an agreement between the parties which included considerations on buildings being rendered habitable and safe and a comprehensive report on alternative accommodation. This agreement eventually became the order of the court and the court also stated that failure by the municipality to engage meaningfully or any unreasonable response in the process would go against the granting of the eviction order.¹³⁷

¹³⁴ S Liebenberg ‘Participatory approaches to socio economic rights: Tentative lessons from South African Eviction law’ (2014) *Nordic Journal of Human Rights*32.

¹³⁵ R Crisp *et al* *Community led approach to reducing poverty in neighbourhoods: a review of evidence and practice* (2016).

¹³⁶ n 1 above 101.

¹³⁷ n 1 above 136.

Joe Slovo v Community of Western Cape Thubelisha has a varying view of the successes of meaningful engagement and finds the courts using the concept to avoid dealing and deciding over complex matters. In fact, Kirsty McLean makes use of the words ‘meaningful engagement one step forward and two back’.¹³⁸ Basically acknowledging that the concept has brought developments to the adjudication of economic, social and cultural rights, but at the same time it has limitations and challenges as in the case referred to above. In analysing the concept, her views are that the court prefers not to dwell on the substantive issues but gives the parties the responsibility to deal with that.¹³⁹ She makes reference to the court hiving off the duty to deal with the permanent housing solutions that were to be addressed by the city in the *Olivia Road case*. The failure does not even consider when parties do not get to an agreement.¹⁴⁰

As per the procedural fairness limitation, the concept is said not to bring anything new as regards prior communication. If an administrative decision is to be effected, the *audi alteram partem* rule has to be applied. If the concept is thus only confined to engagement, it then becomes a narrow contribution of the courts in adjudicating over matters.¹⁴¹ Shanelle van der Berg communicates that authors such as Danie Brand have previously shown that ‘meaningful engagement was originally intended to be issued as a remedy only once the normative and the legal parameters of a case had been established by the court’.¹⁴²

4.4 Post litigation

The formal legal system by, that is the process entailed in litigation, is by nature strenuous, tedious and frustrating and brings about anxiety to parties in litigation. Some stress related illnesses may arise more than anything to the one who claims violation of

¹³⁸ K McLean ‘*Meaningful engagement: one step forward or two back, some thoughts on Joe Slovo*’ (2010) Juta Law Publishing 223.

¹³⁹ As above p223.

¹⁴⁰ As above p 223.

¹⁴¹ As above p 239.

¹⁴² S van der Berg ‘Meaningful engagement: proceduralising socio-economic rights further or infusing administrative law with substance?’ (2013) 29 *South African Law Journal* 376 p376

his/her right. I am of the opinion that even when the decision made by the court favours you, it is in the process that you experience hurdles that have a psychological effect in one's life. The aim under this sub-heading is to establish if meaningful engagement post litigation, where courts have already passed out orders still carry the same benefits as prior. In this instance a restriction to complying with court orders will be made, as there are mostly those cases that would require parties to engage in the implementation of a court order.

The systemic approach to resolving socio-economic rights infringements and violations through meaningful engagement to some extent– according to me – attends to what I may deem a recurrence of such violations. In the process of engagement, prevention of some violations gets to be addressed in only one case. It is indeed what defines the role of the judiciary in its contribution towards precedents that are human rights focused. Whatever the relationship is built through the process from one municipality to the other, may serve as lessons for the realisation of economic, social and cultural rights. The problem may arise, that if parties do not get to an agreement, the court may take the opportunity to proceed by the non-flexible approach of adjudication.

The Koralu Slum Eviction which occurred in April 2012 was one of the gross human rights violations to Economic, Social and Cultural Rights; not only the right to housing.¹⁴³ The said illegal settlement properties were demolished by bulldozers and as a result thereof, families lost possessions as poverty and found its way into their lives. Outside the 2000 families affected others who were beneficiaries to some NGOs fell victim to the same destruction. This meant that a government initiative for empowering its people economically bore fruitless results.¹⁴⁴

Further destructions came into the lives of the people who were affected, as children could not attend school and families were detached together with restriction to access to the essential services for a dignified life.¹⁴⁵

¹⁴³ n 119 above p 109, 498.

¹⁴⁴ As above.

¹⁴⁵ As above.

The case above demonstrates the impact that is made to the lives of people if there is lack of reasonable engagement. Dealing with the outcomes thereafter is a steep cliff to climb as robust, costly measures must be put in place to address the situation. Without referring to any author, it is at this stage whether the case may be decided in favour of any party where emotions need to be taken care of, the psychological aspect of being human comes into play. A multi-disciplinary way of human rights realisation, and in this instance economic, social and cultural rights are pivotal.

4.5 Conclusion

As this chapter mainly focused on the adjudication of economic, social and cultural rights and case law with regard to that, bringing it closer to the mother topic, it is my view that the meaningful engagement concept does make a contribution to the realisation of economic, social and cultural rights. Its contribution is significant in the sense that governments are expected to adhere to the constitution whilst applying legislation that addresses their area of operation and by parties engaging each other, there is a reduction in adjudication of complaints. It is through engagement that the courts had an influence in the development of policies by policy makers that are human rights compliant; hence, the court here being viewed as the secondary law maker because in their interpretation and in the process, revision and amendments befitting the present times do take place. That notwithstanding, the judiciary must also not be seen as deferring issues within matters that it would otherwise handle better to the parties in litigation and simply put to say meaningful engagement applies not in all matters as a remedy but can be a requirement in some instances. Shanelle van der Berg mentions ‘normative content and supervisory control by the courts are necessary both to realise the transformative potential of socio-economic rights for citizens at large, as well as to ensure that poor claimants do not litigate their rights in vain’.¹⁴⁶

¹⁴⁶As above p 142, 387.

Chapter 5

Reconciliation of citizens' expectations and what governments can afford and provide in realising economic, social and cultural rights. Adjudication by the courts and other alternative dispute resolution mechanisms

5.1 Introduction

Alternative dispute resolution is another method of resolving issues and or disputes not through the courts of law.¹⁴⁷ This way of resolving matters reduces the weight the courts carry in dispute resolution. Traditionally, the judiciary is the arm of government that deals with disputes of any nature with the courts having inherent powers to handle any form of complaint and/or dispute. However, there are alternative ways of resolving disputes other than through the courts and in most of these methods, expenses do not compare to those under litigation. Sometimes judicial remedies do not offer the most suitable relief in conflict resolution and thus, exploring other avenues may be the best option. It is my considered view that the non-judicial methods may be used as often as possible, reserving the courts to come into play when these channels have been tried and failed. The most common methods used in alternative dispute resolution approaches are the mediation and arbitration methods. In mediation, we often find the involvement of a third party with the primary purpose of facilitating the process and this party is expected to be neutral and objective in executing their work.¹⁴⁸ The mediator guides the parties involved in the dispute with the aim to reach an amicable resolution. The arbitration method entails an element of formality and it is not as flexible as mediation. That notwithstanding, it carries

¹⁴⁷ <https://legaldictionary.net/alternative-dispute-resolution> (visited 16 May 2018).

¹⁴⁸ As above.

the same functions of dealing with a dispute without containing the full legal process, which is much stricter in approach.

There are institutions that have been set in place by governments with the influence of international law particularly, to deal with the protection and promotion of human rights. Economic, social and cultural rights are no exceptions to this. In fact, some of them like the Ombudsman handle economic, social and cultural rights to a larger extent than others. This could be attributed to the fact that they deal with administrative issues or complaints as their mandates dictate.¹⁴⁹ In this chapter the role of the Ombudsman in dealing with complaints, as well as the roles of the National Human Rights Commission and the anti-corruption entities respectively, are discussed together with the role that they play in the protection and promotion of economic, social and cultural rights aside from the monitoring impact they have.

5.2 Role of the Ombudsman or Public Protector

Regarded as the high ranking official appointed to handle complaints of maladministration and human rights violation is one of the ways the person at the helm of the Ombudsman office is described. The office of the Ombudsman is one of the institutions regarded to be an alternative to the judiciary with the powers to handle complaints and disputes. If we have a look at the United Nations Ombudsman and mediation services, its role is to handle workplace grievances of the members staff for the United Nations.¹⁵⁰ The office executes this mandate under primary values such as impartiality, confidentiality, independence as well as carrying out the mandate in an informal manner. The above values are mostly seen in various Ombudsman institutions in the world regardless of the region. In entertaining complaints, the United Nations Ombudsman and Mediation Services get to address some economic, social and cultural rights issues.¹⁵¹ I refer herein

¹⁴⁹ J Nakuta 'The justiciability of social, economic and cultural rights in Namibia and the role of the non-governmental organisations' in N Horn & A Bösl (eds) *Human rights and the rule of law in Namibia* (2008).

¹⁵⁰ www.un.org/en/ombudsman (last visited 11 June 2018).

¹⁵¹ As above.

to the article that appeared on the United Nations Ombudsletter volume 11 captioned ‘*When will I receive my pension benefits?*’¹⁵² The article decries an increase in the number of complaints lodged by retirees who experience a delay in receipt of their monthly pension benefits since the year 2014, under the United Nations Joint Staff Pension Fund. This is said to have caused financial burdens to retirees including, loss of major investments such as houses and also affects their living conditions.¹⁵³ What then follows is distress, leading to health deterioration and this may eventually affect the financial capacity to approach the best medical care. In an endeavour to curb these challenges following a number of complaints, the Ombudsman came out with valuable recommendations. The recommendations include, among others, for the pension process to commence prior to the retirement date that requires the submission of relevant and correct documentation to the human resource focal person.¹⁵⁴ Further than that, there must be diligent contact between the retiree, the human resource focal person, pay roll unit and the fund itself. This reduces the delays that can take place in the process. The process itself is described as a complex and cumbersome one; hence, funds may not be released immediately upon retirement and as one of the recommendations focused on this, an adequate financial resources plan has to be drafted by the retiree so as to cater for the period immediately after retirement is taken.¹⁵⁵ This responsibility must not only be borne by the person who is to retire, but the pension fund’s contribution is to have regular planning sessions for their outgoing officers so as to provide guidance.¹⁵⁶

‘Administrative procedures are in many countries comprehensively regulated by law, however; it is quite uncommon for good administration, the right to complain and ready access to the Ombudsman to have equal legal status of fundamental rights in legal

¹⁵² Ombudsman <http://fpombudsman.org/wp-content/uploads/2016/04/Ombudsletter-11-Where-is-my-Pension.pdf> ‘Office of the ombudsman for United Nations funds and programmes’ 11.

¹⁵³ As above.

¹⁵⁴ As above.

¹⁵⁵ As above.

¹⁵⁶ As above.

systems',¹⁵⁷ laments John Robert Walters. The classical Ombudsman model primarily focuses on maladministration as from the beginning but with the changing times in societal patterns and governance, the institution is developing new competencies and powers.¹⁵⁸ The systemic approach to complaint resolution in democracies extends to the relationship between human rights violation with maladministration. That is to say even if a complaint only alleges maladministration and the ombudsman in the same complaint picks up a human rights violation, the issue gets to be given attention for redress and for prevention of recurrence in the future. This is done through recommendations targeting at the root cause of such a violation embedded in the procedures, practises, legislation and policies in the government. Much is therefore, achieved in the wholesome way of addressing and preventing future harm. In explicit terms, in the International Ombudsman Institute, ombudsman chair refers to this model as the second form of the ombudsman role in good governance and the protection of human rights.¹⁵⁹ I thus hereunder quote him:

[T]he ombudsman institution has proved remarkable and adaptable over the years, some see the risk of dilution in expanding roles and I prefer to see growth in activity as evidence of the trust in our ability to hold public services accountable and our adaptability in taking on complimentary roles.¹⁶⁰

The South African Public Protector office is established under section 182 of the Constitution and the functions thereof are threefold, according to John Cantius Mubangizi.¹⁶¹ These functions are to 'investigate any improper conduct in state affairs or public administration, to report such conduct and to take appropriate remedial action'.¹⁶²

¹⁵⁷ JR Walters 'The role of the Ombudsman in promoting and protecting human rights-should it become a national human rights institution' (12-16 November 2012) New Zealand 2.

¹⁵⁸ P Tyndall 'Evolving role of Ombudsman, new responsibilities, new opportunities new challenges' (16 May 2017).

¹⁵⁹ As above.

¹⁶⁰ As above.

¹⁶¹ J C Mubangizi 'The constitutional protection of socio economic rights in selected African countries: a comparative evaluation' (2006) 1 *African Journal of Legal Studies* p 1-19.

¹⁶² As above.

In executing these functions, Mubangizi says in the process human rights abuses are not only dealt with, but the office also protects and reinforces the constitutional rights.¹⁶³

In 2011 the former Public Protector gave an address to students at Stellenbosch during the annual human rights lecture. In her address she gave an example of a case they handled against the Department of Western Cape Rehabilitation Centre: a body under the Provincial Department of Health. The complainant's son had been handed over to an old age home for what is called palliative care and the centre refused to take him back at their facility.¹⁶⁴ The patient needed long term nursing care as he had brain damage. In the finding, the Public Protector stated that although the patient needed permanent nursing care, equally his rights to medical care in terms of the Constitution is also guaranteed and in this case the patient had to be provided with assistive devices including provision of a wheelchair.¹⁶⁵ It was through the Public Protector's intervention that the patient's right to medical care was realised.

The Namibian approach to the extra judicial way in the promotion of human rights including economic, social and cultural rights is the use of the Ombudsman office, which is provided for in section 91 of the Namibian Constitution. The Ombudsman office in Namibia has powers to investigate and examine the conduct of government, together with handling complaints of human rights violation by both the government and private entities.

5.3 Role of the Human Rights Commission

A debate has been ongoing for some time on the relationship between human rights and good governance.¹⁶⁶ Many argue that the full enjoyment of human rights relies on good governance; hence, good governance is seen as a precursor to the realisation of human rights.¹⁶⁷ The Australian law for human rights states that without good governance human

¹⁶³ 'Address by the public protector at the annual human rights lecture' (29 September 2011) Stellenbosch.

¹⁶⁴ As above.

¹⁶⁵ As above.

¹⁶⁶ UNCHR 'Good governance practices for the protection of human rights' Geneva (2007).

¹⁶⁷ As above.

rights run the challenges of being realised only on paper but not realised, therefore they consider good governance as a pre-condition to this.¹⁶⁸ The Australian AID views poor governance as breeding not only poor service delivery and non-implementation of human rights based policies, but yet again result in human rights violations.¹⁶⁹ It remains their view that the two play a complementary role to each other, but are not distinct.¹⁷⁰ ‘There is no doubt that nurturing good governance is essential for the respect of human rights.’¹⁷¹

One other human rights institution tasked with the protection and promotion of human rights is the National Human Rights Commission. In most cases these commissions are responsible for assessing and monitoring the realisation of human rights. The South African Human Rights Commission has an extended mandate to look specifically into the realisation of socio-economic rights given its historical background of having excluded in the past enjoyments of some of these rights to its citizens.¹⁷² The Commission is expected to receive annual information and reports stating actions that have been taken by the relevant organs in the realisation of socio-economic rights.¹⁷³ Although the Commission receives complaints of human rights violations, it also has functions relating to advocacy, research and legal functions.¹⁷⁴

Following hereunder is the voice of the Human Rights Commission on human rights violation as reported by news 24 (05 April 2018) on developments relating to farm evictions issues and another one by the same newspaper captioned “another child drowns in a pit toilet’ (05 July 2018). This I deem as a critical role that the commission plays against violations and it is only proper to acknowledge its work and contribution. I

¹⁶⁸ The role of human rights and good governance education ‘chapter 2, the link between human rights and good governance.

¹⁶⁹ Australian AID ‘*Effective governance*’ (2015) *Strategy for Australia aid investments* p. 4

¹⁷⁰ As above p4.

¹⁷¹ Hon John von Doussa ‘Promoting human rights - good governance, the rule of law and democracy’ Pacific judicial conference, Vanuatu, President: Australian human rights and equal opportunity commission (July 2005).

¹⁷² D Holsten ‘The role played by SAHRCs Economic and Social Rights’ (2006) 9 *PER*177.p178.

¹⁷³ As above.

¹⁷⁴ As above.

shall remain specific to violations of socio-economic rights. Before describing the work of the Human Rights Commission of South Africa, it must be mentioned that the Dutch Human Rights Commission has recently criticised the plan by the government to allow employers to pay people leaving with physical and mental disability to be remunerated under the minimum wage.¹⁷⁵ The Commission has come out clear saying it is a gross violation, more especially to the vulnerable.¹⁷⁶ Payment according to the degree of disability does not conform to the international standards of people's living conditions, let alone in their world after work.¹⁷⁷ Non-binding as the recommendations of the Commission maybe, we can only hope that the government will reconsider its position; especially now that several years ago the government closed most of the specialised services which were jobs for the differently-able people.

In South Africa the 2015-2016 report indicates that complaints with regard to violation of socio-economic rights are the third highest number of the kind of complaints the office receives. It is only surpassed by equality complaints and labour related issues violating people's rights under section 27 of the Constitution.¹⁷⁸

5.4 Role of the anti-corruption agencies

As a condition to the allocation of donors and financial aid, international financial institutions and donors require that good governance must be practised in such countries.¹⁷⁹ One of the acts that undermine good governance is corruption.¹⁸⁰ As already alluded to in chapter three, the diversion of public funds and resources from their intended public use by a person for their personal benefit is termed corruption. It is not an argument

¹⁷⁵ Dutch News.nl 'Human rights council slams plan to cut minimum wage for disabled workers' 13 April 2018.

¹⁷⁶ As above.

¹⁷⁷ As above.

¹⁷⁸ SAHRC Media statement trends in human rights violations, annual trends analysis, Gail Smith spokesperson (2018).

¹⁷⁹ M Matenge 'Promoting good governance for ombudsman and anti-corruption offices in public institutions in Africa' (May 2010).

¹⁸⁰ As above.

that corruption impacts adversely on the realisation of social and economic rights and more than anything, hits hard on the poor and the vulnerable. In Africa corruption is said to violate the dignity of citizens and in some parts of Africa, it is responsible for fuelling wars and empowering autocracy.¹⁸¹ In order to address all these there is need for a shift in attitudes as well as political and economic reforms. Steve Feldstein says immediately after the 'Burkina Faso elections since 1978 the first thing that the technocrat government put in action was to pass an anti-corruption law where leaders are expected to publicly declare their assets.'¹⁸² This followed the experience that the country had with the previous government.¹⁸³

Next I will be looking into the bodies that are set by governments to deal with corruption and borrow from the presentation that was made by Dr Maria Matembe when she refers to others, such as those that have existed for a long time, like parliament calling on the government to bring about accountability and transparency.¹⁸⁴ The parliamentary Accounts Committee plays an oversight role on governments to indicate how it has carried out and managed public resources on the everyday mandate of governance.¹⁸⁵ We find under this committee principal officers of various ministries and departments coming before the committee to account for the funds they were allocated at the beginning of the financial year. A regulatory body for public procurement and disposal of public assets is one of these departments with the functions to audit the process and see if it is corruption free.¹⁸⁶

There are mechanisms that have been put in place to curb corruption, which is seen in many countries let alone big organisations. We are now at a point where institutions that have been established to fight crime are empowered for efficiency and effectiveness.

¹⁸¹ As above.

¹⁸² S Feldstein 'New strategies for fighting crime in Africa' The Huffington Post, 28 November 2016.

¹⁸³ As above.

¹⁸⁴ Matenge (n 166 above).

¹⁸⁵ As above.

¹⁸⁶ As above.

5.5 Conclusion

'The fights against corruption like many efforts for the enjoyment of human rights is a long term process demanding a firm grounding in a countries institutions, laws and culture.'¹⁸⁷

'An engaged civil society and media that value and demand accountability and transparency are vital in addressing corruption.'¹⁸⁸ My conclusion to the chapter based on the aforementioned good governance institutions is that they are already making governments to be accountable. Some of these institutions have a proactive role, for example the office of the Ombudsman or the Public Protector by the power of own motion may commence investigations if the office is of the view there lies in an administrative decision or process, a possibility of maladministration, corruption or violation of a right.

¹⁸⁷ UNHR 'The human rights case against corruption – office of the high commissioner'.

¹⁸⁸ As above.

Chapter 6

Summary, general remarks, recommendations and conclusions

6.1 Summary of the study

Accountability, transparency, inclusion of citizen participation in decision making, and responsiveness are core in ensuring good governance and that there is respect for human rights. In summary, this is what this study has unpacked and revealed. The importance of the institutions established to promote good governance, be it through legislation; hence, termed state-based and those that are through civil society and non-profit organisations, has been discussed. It remains critical to refer to the inclusion of citizens, communities, various groups of citizens such as the youth and the elderly. I find it necessary at this point to quote Beth Noveck on what the immediate former president of the United States of America said on transparency: ‘Our commitment to openness means more than simply informing the American people about how decisions are made. This means recognising that government does not have all the answers and that public officials need to draw on what citizens know’.¹⁸⁹ Enquiring into the contribution that meaningful engagement has brought in the adjudication and realisation of economic, social and cultural rights it has been revealed that the courts could be relieved of the role that it is often faced with if meaningful engagement is done prior to an administrative action. We have seen the successes of meaningful engagement in the *Olivia Road* case, which did influence change of housing policies by municipalities so as to be human rights compliant.

6.2 General remarks

On the subject of citizen participation and engagement, those with the expertise in the area inform others of the importance of including public participation at the design of a concept all the way to implementation, review and evaluation. International Peacebuilding

¹⁸⁹ B Noveck ‘Enhancing citizen participation in decision making’ (June 2009) The White House.

Advisory Teams intimate that ‘a social political contract between the governors and the governed requires a process of negotiation and interaction’.¹⁹⁰ It is thus pertinent to remark that governance runs smoothly where the authorities trust their citizens and more importantly, where the people trust their government as there are less chances of friction.¹⁹¹

6.3 Recommendations

Enabling conditions for the achievement of effective public participation and meaningful engagement are among others political motivation, resources being made available by the government of the day, where information sharing and access to information are prioritised, where there is civil society capacitation and the media is independent.¹⁹²

A great deal of what occurs in the current modern times is the use of the internet which in my view, the government must make it accessible to a good part of the public. Other methods of participation that have been used in the past need to be addressed to compliment the use of the internet, such as making the aged, mostly found in rural areas literate. In essence, this takes care of the challenges generally met with these methods mostly done by way of public meetings and often characterised with non-attendance. It is also my view that the non-attendance is a result of calling different segments of the society to a central point without focusing on how to target a particular group.

‘Scholars report that using internet-based interactive technology to facilitate citizen participation programs not only helps to gauge citizen preferences in government decisions, but also improves decision-making and transparency.’¹⁹³

¹⁹⁰ Ipat (n 42 above).

¹⁹¹ As above.

¹⁹² As above.

¹⁹³ Kim & Lee (n 29 above).

6.4 Conclusions

According to the human rights-based approach (HRBA) on the relationship between human rights and good governance ‘human rights strengthen good governance framework and this require going beyond the ratifications of human rights treaties, integration into the legislation state policy and practise.’¹⁹⁴ The ‘credibility of democracy depends on the effectiveness of the state’s response to people’s political, social and economic needs.’¹⁹⁵ What in essence has been the focus in this piece of work in profound terms is democracy and as one of the principles thereof being citizen participation and engagement, inclusiveness, responsiveness and the effectiveness of meaningful engagement in the realisation and adjudication of economic, social and cultural rights. There is no other way this could be discussed without unpacking the responsibilities that are given to the institutions that play an oversight role on governments to be compliant with the standards set in the international arena to enhance good governance and respect for human rights.

National Human Rights Institutions are independent public bodies that fight for the furthering of human rights in their countries by monitoring and reporting on human rights situations in the country.¹⁹⁶ As part of the mandate they are tasked with, they also play an advisory role to the government and parliament on human rights and legislative issues.¹⁹⁷ The United Nations rely on these institutions’ contributions when assessing adherence to the international good governance and human rights standards. In executing their mandate in the furthering, promotion and protection of human rights, they keep checking if the government of the day proceeds in the appropriate way.¹⁹⁸ In what we may term a prevailing burning issue in South Africa regarding the farm evictions, which

¹⁹⁴ <https://hrbaportal.org/faq/what-is-the-relationship-between-human-rights-and-good-governance> (accessed 20 June 2018).

¹⁹⁵ As above.

¹⁹⁶ <https://www.humanrights.dk/publications/review-literature-national-human-rights-institutions> (accessed 22 June 2018).

¹⁹⁷ As above.

¹⁹⁸ As above.

by now the South African Human Rights Commission has come out clear to talk about, is the promise that was made by the current president that no farm evictions will take place until the people can be given decent housing.¹⁹⁹ The Commission has raised their concern on the delivery of the promise that was made in 2014 and during April 2018 and has undertaken to demand answers from the executive. It is worth noting that the right to adequate housing is a socio-economic right provided for in section 26 of the South African transformative and progressive Constitution. Through case law, the Constitutional Court has pronounced that evictions can only take place when the government has made available alternative dignified housing for the people. The Commission has also cautioned the government on the recent tragedies that befell pupils who drowned in pit latrines at schools to say that such an environment is not compliant with the realisation of the right to basic education (section 27) in the Constitution, among other rights.²⁰⁰ Being specific to the Public Protector, the office has been able to handle high profile cases of corruption and maladministration in the land and as such has had an influence in the country's political and economic landscape. It is with no doubt that corruption has a strong negative effect on the realisation of economic, social and cultural rights as only a few get to benefit to the detriment of the whole society. The poor remain in poverty. It is against this background that strengthening and adequately providing resources for good governance and human rights institutions are necessary, for their effectiveness is pivotal.

'Civil society is the aggregate of NGOs, institutions, families and even individuals that manifest interest and will of citizens. It works in the interest of citizens but outside the government and profit making sector.'²⁰¹ This definition was shared at a lecture session in Ghana on the role of civil society in promoting and protecting human rights organised by Marian Conflict Resolution Centre. It is indeed desirable that they find support from governments through collaborations since they contribute impeccably well to the subject.

One other important sector's participation in good governance issues is the Media. Its work thus far as the fourth estate does not go unnoticed and is encouraged to remain

¹⁹⁹ 'Ramaphosa's promise on farm evictions, SAHRC wants answers' *News24* 5 April 2018.

²⁰⁰ <http://ewn.co.za/2018/03/21/sahrc-reminds-anc-of-post-1994-human-rights-violations>.

²⁰¹ 'Lecture on the role of the civil society in promoting and protecting human rights' MCRC.

strong in reporting on human rights violations, maladministration and corruption. It is partly through their work that some cases of violations end up with the judiciary for adjudication. And talking about the judiciary, it is only proper to end by quoting the current Chief Justice who said in his presentation at the conference on the role of the judiciary in promoting peace, good governance and sustainable development that ‘there simply can be no state or government without the judiciary in a democracy and when the judiciary enjoys both individual and institutional independence and is faithful to its constitutional mandate, peace, good governance and sustainable economic development is achievable’.²⁰²

²⁰² ‘The role of the judiciary in promoting peace, good governance and sustainable development’ speech by CJ Benin (2013).

BIBLIOGRAPHY

Books

Chatuverdi, H R & Mitra S K (1982) '*Citizen Participation in Rural Development*' Oxford & IBH Publishing Co.

Chirwa, DM & Chenwi, L (eds) (2016) '*The Protection of Economic, Social and Cultural Rights, International, Regional and National Perspectives*' Cambridge University Press

Chenwi, L (2009) '*Meaningful Engagement in the Realization of socio economic rights South African experience*' (2009) Law and Politics in Africa Asia and Latin America

Currie, I & De Waal, J (2005) '*The Bill of Rights Handbook*' Juta

Faber, C (2000) '*Social rights under the Constitution: Government and decent life*' Oxford University Press

Hill, LB (2005) '*The Model Ombudsman: Institutionalizing New Zealand's democratic experiment*' Princeton University Press

Howard, C (2010) '*The Organizational Ombudsman: Origins, Roles and Operations - a legal guide*' American Bar Association

Khoza, S (2007) (ed) '*Socio-economic rights in South Africa: A resource book*' Community Law Centre, University of the Western Cape

Finterman, C (1997) '*Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*' International Commission of Jurists

Journal articles

Amadi, L & Ekekwe, E 'Corruption and Development Administration in Africa: Institutional Approach' (2014) 8 *African Journal of Political Science and International Relations*

Arambulo, K 'Giving meaning to economic, social and cultural rights: A continuing struggle' 2001 *Human Rights and Human Welfare* (111-123)

Ares, Hernandez E 'Corrosive effect of corruption on trust in politicians: Evidence from a natural experiment' (2017) 4 (2) *SAGE* 1-8

Armstrong, E 'The role of active participation and citizen engagement in good governance' (September 2013) *Division for Public Administration and Development Management*

Caddy, J 'Why citizens are central to good governance' (2011) *OECD Observer* 229

Chambers, N & Cornforth, C 'The role of corporate governance and boards in organisational performance' in Walshe, K, Harvey, G & Jas, P (eds) (2010) '*Connecting knowledge and performance in public services: from knowing to doing*' Cambridge: Cambridge University Press 1-24

Chenwi, L 'Engaging meaningfully with government on socio economic rights: A focus on the right to housing' (2011) 26 *Southern African Public Law*

Chenwi, L 'Meaningful Engagement in the Realisation of Socio Economic Rights: The South African experience' (2011) 26 *Southern African Public Law* 128-156

Drury, C Kriekhaus, J & Lusztic, M 'Corruption, Democracy & Economic growth' (2006) 27 (2) *International Political Science Review* 121-136

Girindrawardana, D 'The role of ombudsman institutions in improving public service delivery (2015) *Governance for Development*

Holmes, B 'Citizens' Engagement in Policymaking and the Design of Public Services' Research Paper 1 (2011-2012) *Parliamentary Library Research*

Liebenberg, S 'Engaging the paradoxes of the universal and particular human rights adjudication: the possibilities and pitfalls of 'meaningful engagement'' 2012 12 (1) *African Human Rights Law Journal* 1-29

Liebenberg, S 'Participatory approaches to socio economic rights adjudication: Tentative lessons from South African evictions law' (2014) 32 (4) *Nordic Journal of Human Rights* 312-330

Liebenberg, S 'Remedial principles and meaningful engagement in education rights disputes' (2016) 19 *Potchefstroom Electronic Law Journal*

McLean, K 'Meaningful engagement: one step forward or two back? Some thoughts on Joe Slovo (2010) 3 *Constitutional Court Review* 223-242

Mnamuchi, O & Ortuanya, S 'The human rights to health in Africa and its challenges: a critical analysis of Millennium Development Goal 8 (2012) 12 (1) *African Human Rights Law Journal* 178-198

Nakuta, J 'The justiciability of social, economic and cultural rights in Namibia and the role of NGOs' in N Horn & A Bösl (eds) *Human rights and the rule of law in Namibia* (2008)

Nekola, M 'Political participation and governance effectiveness - Does participation matter?' (2014) *Center for Social and Economic Strategies (CESES)* 1-8

Odongo, G 'Caught between progress, stagnation and in a reversal of some gains: reflections on Kenya's record in implementing children's rights norms' (2012) 12 (1) *African Human Rights Law Journal* 112-141

Pillay, P 'Anti-Corruption Agencies in South Africa and Brazil: Trends and Challenges' (2017) 9 (8) *African Journal of Public Affairs* 1-14.

Ray, B 'Engagement's, Possibilities and Limits as a Socio-economic Rights Remedy' (2010) 9 *Washington University Global Studies Review* 399-425

Rezaul, Islam M & Mungai, N 'Forced evictions in Bangladesh: A human rights issue' (2016) *SAGE* 2016 (15)

Trilsch, M 'what's the use of socio-economic rights in a constitution: taking a look at the South African experience' (2009) 42 (4) *Law and Politics in Africa, Asia and Latin America* 552-575

Van der Berg, S 'Meaningful engagement: Proceduralising socio-economic rights further or infusing administrative law with substance?' (2013) 29 (2) *South African Journal on Human Rights* 376-398

Wiles, E 'Aspirational Principles or Enforceable Rights? The Future for Socio-Economic Rights in National Law' (2006) 22 (1) *American University International Law Review* 35-64.

Table of cases

Government of the Republic of South Africa v Grootboom and Others 2000 ZACC 19
2001 (1) SA 46 CC

Head of Department of Education, Free State Province v Welkom High School CCT
103/12 2013 ZACC 25

Minister of Public Works v Kyalami Ridge Environmental Association CCT 55/00 2001
ZACC 19; 2001 3 SA 1151 CC

*Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City
of Johannesburg and others* 24/07 2008 ZACC 1

Port Elizabeth Municipality v Various Occupiers 200412BCLR CC

Residents of the Joe Slovo Community, Western Cape v Thubelisha Homes and Others
CCT 22/08 (2010 (3) SA 454 CC ZACC 16

Table of Legislation

Constitution of the Republic of South Africa, Act 106 of 1996

Constitution of the Republic of Botswana, 1966 (as amended up to 2006)

Human Rights Commission Act 54 of 1994

Municipal Financial Management Act 56 of 2003

Ombudsman Act 5 of 1995

Prevention and Combating of Corrupt Activities Act 12 of 2004

Prevention of Illegal Eviction Act 5 of 1998

Public Protectors Amendment Act No. 22 of 2003

Table of treaties

African Charter on Humans and Peoples' Rights (1981)

Covenant on Economic Social and Cultural Rights (2008)

International covenant on economic social and cultural rights (CESCR) (1966)

Universal Declaration of Human Rights (1948)

Presentations/Reports/Papers

Abahlalibase Mjondolo 'Meaningful engagement' Centre for applied legal studies' 2009

'Anti-corruption policies and programs: a framework of evaluation' 2014

'A process in which individuals take part in decision making in the institutions, programs and environments that affect them' Helen *et al* 1984: 339

'Botswana country commercial guide – corruption' 2017

'Citizen Participation is not simply volunteering time on resources but occurs when citizens take part in making for the community' Dalton *et al* 2001:342

'Community psychology, power and participation' Paul Docket EGB E48

'Core democratic values' Susanne Beydown

'Coglianese, C, Kilmartin, H & Evan, M 'Transparency and public participation in the role making process- a non-partisan presidential transition task force report'

Van der Berg, S 'Conceptualising meaningful engagement in South African eviction cases' exclusive gem' (2012) *Oxford Human Rights Hub*

WEBSITES

[https://www.academia.edu/8492340/Citizens participation as an important tool to strength d emocracy](https://www.academia.edu/8492340/Citizens_participation_as_an_important_tool_to_strength_d_emocracy)

[www.biodiversity.ru/coast learn/pp-eng/benefits.html](http://www.biodiversity.ru/coast_learn/pp-eng/benefits.html)

<http://www.sandiegouniontribune.com/sdut-the-pros-and-cons-of-citizen-participation-2012feb18-story.html#>

www.oecd.org/dac/evaluation

[http://www.ohchr.org/en/sections/what we do/protect-human-/rights/index.html](http://www.ohchr.org/en/sections/what_we_do/protect-human-/rights/index.html)

https://en.wikipedia.org/wiki/Human_Rights_Commission

<https://redprivet.com/our-thinking/what-we-mean-when-we-talk-about-meaningful-engagement/>

<https://www.escr-net.org/rights>

<https://legaldictionary.net/alternative-dispute-resolution>

www.un.org/en/ombudsman

<http://fpombudsman.org/wp-content/uploads/2016/04/Ombudsletter-11-Where-is-my-Pension.pdf>

<https://hrbaportal.org/faq/what-is-the-relationship-between-human-rights-and-good-governance>

<https://www.humanrights.dk/publications/review-literature-national-human-rights-institutions>

<http://ewn.co.za/2018/03/21/sahrc-reminds-anc-of-post-1994-human-rights-violations>

[https://www.academia.edu/8492340/Citizens participation as an important tool to strength d emocracy](https://www.academia.edu/8492340/Citizens_participation_as_an_important_tool_to_strength_d_emocracy)

[www.govtech.com/e-government/5-ways-to-improve - citizen engagement - initiatives.html.](http://www.govtech.com/e-government/5-ways-to-improve-citizen-engagement-initiatives.html)

www.oecd.org/dac/evaluation

[https:// www.tei.org.za/index.php/resources/articles/fraud-and corruption/1705](https://www.tei.org.za/index.php/resources/articles/fraud-and-corruption/1705)