

A Call for Public Participation in the Treaty-making Process in South Africa: What can South Africa Learn from the Kingdom of Thailand?

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Abstract

On 2 August 2002, South Africa signed the Southern African Development Community (SADC) Protocol on Tribunal and the Rules of Procedure Thereof, thus effectively recognising and accepting the jurisdiction of the SADC Tribunal. Among the cases received by the SADC Tribunal was a complaint involving allegations of human rights violations by the government of Zimbabwe. It ruled that the government of Zimbabwe had violated human rights. Consequently, Zimbabwe mounted a politico-legal challenge against the existence of the Tribunal. This resulted in the review of the role and functions of the Tribunal in 2011 which resulted in the Tribunal being barred from receiving new cases or proceeding with the cases that were already before it. Furthermore, on 18 August 2014, the SADC Summit adopted and signed the 2014 Protocol on the Tribunal in the SADC which disturbingly limits personal jurisdiction by denying individual access to the envisaged Tribunal, thus reducing it to an inter-state judicial forum. This article critically looks at the decision of 18 August 2014, specifically the legal implications of the Republic of South Africa's signing of the 2014 Protocol outside the permissible procedure contained in article 37 of the SADC Protocol on the Tribunal. It proposes that South Africa should correct this democratic deficit by introducing public participation in treaty-making processes in order to prevent a future situation where the executive unilaterally withdraws from an international treaty that is meant to protect human rights at a regional level. To achieve this, this article makes a comparative study between South Africa and the Kingdom of Thailand to learn of any best practices from the latter.

Keywords: South Africa; treaty-making; lessons; Thailand; public participation



Introduction

Harrington once stated that:

[...] prerogative powers, by definition, provide the executive with the power to act without the consent of Parliament, treaty making, including treaty ratification, is legally a wholly executive act within ... most Commonwealth states.¹

Indeed, Harrington's views are acceptable because treaty making power in most countries is something that is entirely reserved for the executive. As will be demonstrated later in the majority of jurisdictions, the public has little or no role to play in the treaty-making process.

In 1992 the SADC Tribunal was established as one of the institutions of SADC and in 2005 it became operational.² It was the main judicial organ of SADC as a regional economic community. Its original jurisdiction under the SADC Protocol on the Tribunal and the Rules of Procedure Thereof (SADC Protocol on the Tribunal) included adjudicating over 'disputes between States, and between natural or legal persons and States.'³ Individuals could only approach the Tribunal after they had exhausted local remedies.⁴ The SADC Tribunal operated for a brief period (2005—2010) and was suspended after it had issued unfavourable decisions against the Republic of Zimbabwe regarding its controversial land reform programme which authorised expropriation of land without compensation.⁵

During 2014, the SADC Summit adopted the 2014 Protocol which essentially limits the mandate of the SADC Tribunal to dealing with inter-state disputes only. The Tribunal will no longer have jurisdiction to receive and determine cases brought by individuals, dealing with such matters as allegations of human rights violations. Further, it is not clear whether the 2014 Protocol allows SADC member states to bring cases of allegations of human rights abuse on behalf of their citizens.

Given South Africa's commitment to the protection and promotion of human rights, the decision by South Africa to sign the 2014 Protocol along other SADC member states

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- 1 Joanna Harrington, 'Redressing the Democratic Deficit in Treaty Law Making: (Re-) Establishing a Role for Parliament' (2005) L McGill LJ 473.
 - 2 Admark Moyo, 'Defending Human Rights and the Rule of Law by the SADC Tribunal: Campbell and Beyond' (2009) XI African Human Rights LJ 591.
 - 3 See Art 15(1) of the SADC Protocol on the Tribunal.
 - 4 Article 15(2) of the SADC Protocol on the Tribunal.
 - 5 See inter alia *Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe* (2/2007) [2008] SADCT 2 (28 November 2008); *Campbell and Another v Republic of Zimbabwe* (SADC (T) 03/2009) [2009] SADCT 1 (5 June 2009).

surprised South African citizens.⁶ And all this was done contrary to the amendment procedure provided for in Article 37 of the SADC Protocol on the Tribunal.

Aims and Objectives

The main focus of this article is to discuss the case of *Law Society of South Africa v President of the Republic of South Africa*,⁷ with specific reference to the duty of Parliament to facilitate public participation in the treaty-making and/or treaty-withdrawal process in South Africa.

Research Problem and Method

The main argument presented in this article is that there is a need to introduce the requirement to facilitate public participation by the National Assembly in the treaty-making and/or treaty-withdrawal process in South Africa in order to prevent a reoccurrence of a situation wherein the executive unilaterally withdraws from human rights treaty obligations without the knowledge of South African citizens. In order to support this proposition, the article will make a comparative study with the Kingdom of Thailand. The basis for choosing Thailand for comparative purposes is that Thailand has introduced the requirement for conducting public participation in the treaty-making process in its Constitution of 2007. Consequently, this will provide guidance about how South Africa may reform its treaty-making process to secure public participation that will increase accountability and transparency on the executive when conducting international relations.

The study is mainly based on desktop research. A detailed review, critical analysis, and interpretation of the relevant provisions, case law, and academic literature is conducted.

The discussion is divided into six parts. Part two deals with literature review on South Africa's constitutional democracy, the nature of South Africa's constitutional democracy in so far as it relates to public participation in the law-making process both at domestic and international levels. In addition, this section discusses and critiques the case in the matter between *Law Society of South Africa v President of the Republic of South Africa*. Part three deals with the Thai constitutional framework in so far as it deals with public participation in the treaty-making process and seeks to ascertain whether South Africa can learn any best practices from Thailand. Part four compares and

6 Gerhard Erasmus, 'The New Protocol for the SADC Tribunal: Jurisdictional Changes and Implications for SADC Community Law' <<https://www.tralac.org/publications/article/6900-the-new-protocol-for-the-sadc-tribunal-jurisdictional-changes-and-implications-for-sadc-community-law.html>> accessed 8 July 2018; *Law Society of South Africa and Others v President of the Republic of South Africa and Others* 2019 (3) BCLR 329 (CC) paras 45, 49 and 56.

7 2019 (3) BCLR 329 (CC).

contrasts South Africa's and Thailand's treaty-making processes. Part five is the recommendations. Part six is the conclusion of the discussion.

Literature Review on South Africa's Constitutional Democracy

Democracy could be generally defined as the rule by the people for the people.⁸ This narration could also be found in the Preamble to the Constitution of the Republic of South Africa which provides that the 'government is based on the will of the people'. The nature of South Africa's constitutional democracy is both participatory and representative.⁹ This is so because on one hand, the public is directly involved in the law-making process at a national level.¹⁰ On the other, at an international level, the elected political representatives act on behalf of the people to negotiate, sign and ratify treaties.¹¹

Broadly speaking, participatory democracy¹² entails active public participation in public affairs.¹³ In some models of participatory democracy, the people are consulted in order to be involved in the decision-making process where they meet in a public forum to discuss issues and 'arrive at decisions by consensus or majority vote'.¹⁴ In Heather's view, 'consultation demands an engagement with the public in order to ascertain what

8 George Okiror, *Concepts and Principles of Democratic Governance and Accountability: A Guide for Peer Educators* (Konrad-Adenauer-Stiftung 2011) 2.

9 Iain Currie and Johan de Waal, *The Bill of Rights Handbook* (5 edn, Juta 2005) 13.

10 See s 59(1) of the Constitution of the Republic of South Africa, 1996 which mandates the National Assembly to facilitate public involvement in the legislative process amongst others.

11 See section 231 of the Constitution of the Republic of South Africa, 1996.

12 Section 72(1)(a) of the Constitution of the Republic of South Africa, 1996 requires the National Council of Provinces to 'facilitate public involvement in the legislative and other processes of the Council and its committees,' section 118(1)(a) mandates a provincial legislature to facilitate public involvement in the legislative and other processes of the legislature and its committees,' section 42(3) provides that the 'National Assembly is elected to represent the people and to ensure government by the people under the Constitution. It does this by choosing the President, by providing a national forum for public consideration of issues.' Section 42(4) provides that the 'National Council of Provinces represents the provinces to ensure that provincial interests are taken into account in the national sphere of government. It does this mainly by participating in the national legislative process and by providing a national forum for public consideration of issues affecting the provinces. Section 59(1) requires the National Assembly to '(a) facilitate public involvement in the legislative and other processes of the Assembly and its committees.' Section 72(1) requires the NCOP to '(a) facilitate public involvement in the legislative and other processes of the Council and its committees.' Section 118(1)(a) requires a provincial legislature to '(a) facilitate public involvement in the legislative and other processes of the legislature and its committees,'

13 Lilian Chenwi, 'Meaningful Engagement in the Realisation of Socio-economic Rights: The South African Experience' (2011) 26 Southern African Public L 129.

14 Okiror (n 8).

the public's wishes and demands are so that policy can reflect those views.'¹⁵ Indeed, in the context of the present discussion, where there is an engagement with the people, the outcome of a treaty-making and/or withdrawal process thereof would be informed by the views solicited from the public.

Representative democracy, on the other hand,¹⁶ is where the citizens elect their political representatives to inter alia make political decisions, make laws and conduct the day-to-day affairs of the country on their behalf.¹⁷ This form of democracy is limited as citizens' participation is confined to choosing their representatives during elections.¹⁸ It is said that this form of democracy is 'democratic only insofar as representation establishes a reliable and effective link between the government and the governed.'¹⁹ In other words, it can be said that there is a disjuncture where the government does what is not known by the governed.

Representative and participatory forms of democracy are mutually supporting and are therefore both significant in any constitutional democracy. The mutual reinforcing nature of these two forms of democracy is vital 'given [the fact] that continuous participation by the public provides vitality to the functioning of representative democracy.'²⁰ These two forms of democracy are dealt with in the context of public participation in the law-making process below.

All in all, democracy can be said to be founded on three pillars namely, representative governance; accountability; and participation of the people in the decision-making process.²¹

15 Deegan Heather, 'A Critical Examination of the Democratic Transition in South Africa: The Question of Public Participation' (2002) 40 *Commonwealth and Comparative Politics* 45.

16 Elements of representative democracy can be seen in various provisions of the Constitution such as section 40(1) which provides that: 'In the Republic, government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated.' Section 41(1) provides that: 'All spheres of government and all organs of state within each sphere must—(a) preserve the peace, national unity and the indivisibility of the Republic; (b) secure the well-being of the people of the Republic; (c) provide effective, transparent, accountable and coherent government for the Republic as a whole.' Section 46(1) state that: 'The National Assembly consists of no fewer than 350 and no more than 400 women and men elected as members in terms of an electoral system.'

17 Gaugance Nyirabikali, 'Participatory Democracy, Pluralistic Governance and Peace Education for Leaders: Lessons from the Kenyan Case' (2008) 2 *Conflict Trends* 34.

18 Okiror (n 8) 4.

19 *ibid*.

20 Tebogo Moses, 'A Critical Analysis of the Role and Effect of Public Participation in the Creation and Enforcement of Municipal By-Laws in South Africa' (LLM dissertation, University of Pretoria 2018) 22.

21 Nico Steytler and Jaap de Visser, *Local Government Law in South Africa* (LexisNexis 2007) 24.

Public Participation in the Law-making Process at a National Level

Public participation is at the core of South Africa's new constitutional order. There are various constitutional provisions that require organs of the state to facilitate public participation in the law-making process at various levels in the country.²² This is a major departure from the previous dispensation which disregarded public participation in the law-making process because of 'absence of constitutional safeguards that promoted the right of the people to have a say in the law-making process.'²³ The Constitutions from 1910, 1961 and 1983 made no specific provision on the public's right to participate in the law-making process.²⁴

Even though the Constitution requires the facilitation of public participation in the law-making process, it does not provide any guidance on what that entails. In *Doctors for Life International v Speaker of the National Assembly*,²⁵ the Constitutional Court of South Africa had an opportunity to define the scope and content of the duty to facilitate public participation in the law-making process. The applicant there had challenged the lawfulness of the Choice on Termination of Pregnancy Amendment Act 38 of 2004 and the Traditional Health Practitioners Act of 2004 on the basis that the National Council of Provinces and the provincial legislatures had failed to facilitate public participation when enacting the aforesaid laws as required by the Constitution.

The respondents disputed the applicant's challenge and contended that both the National Council of Provinces and the provincial legislatures had facilitated public participation as per the dictates of the Constitution. In light of these submissions, the court had to

22 See for example, s 72(1)(a) requires the National Council of Provinces 'to facilitate public involvement in the legislative and other processes of the Council and its committees.' Section 118(1)(a) mandates a provincial legislature to facilitate public involvement in the legislative and other processes of the legislature and its committees,' s 42(3) provides that the 'National Assembly is elected to represent the people and to ensure government by the people under the Constitution. It does this by choosing the President, by providing a national forum for public consideration of issues.' Section 42(4) provides that the 'National Council of Provinces represents the provinces to ensure that provincial interests are taken into account in the national sphere of government. It does this mainly by participating in the national legislative process and by providing a national forum for public consideration of issues affecting the provinces.' Section 59(1) requires the National Assembly to '(a) facilitate public involvement in the legislative and other processes of the Assembly and its committees.' Section 72(1) requires the NCOP to '(a) facilitate public involvement in the legislative and other processes of the Council and its committees.' Section 118(1)(a) requires a provincial legislature to '(a) facilitate public involvement in the legislative and other processes of the legislature and its committees.'

23 Moses Retselisitsoe Phooko, 'Conflict between Participatory and Representative Democracy: A Call for Model Legislation on Public Participation in the Law-making Process in South Africa' (2017) *Obiter* 518.

24 Synnove Skjelten, *A People's Constitution: Public Participation in the South African Constitution-Making Process* (Institute for Global Dialogue 2006) 15.

25 *Doctors for Life International v Speaker of the National Assembly* 2006 (12) BCLR 1399 (CC).

determine whether the National Council of Provinces and the provincial legislatures had facilitated public participation when promulgating the aforesaid pieces of legislation. The Court also dealt with the consequences of a failure to facilitate that public participation.

The Court defined public participation in the law-making process as including giving an opportunity to those who are likely to be adversely affected by the proposed law to make submissions either orally or in writing and in the language that will enable them to make meaningful engagement.²⁶ This requires meaningful engagement with the citizens in order to understand what their views or wishes are about the proposed legislation. The purpose of this consultative process is to ensure that laws or policies are largely influenced by the inputs sourced from the public. The Court found that the South African Parliament had failed to facilitate public participation when enacting the laws as required by the Constitution. It therefore declared the impugned laws invalid.

This decision demonstrated the Court's ability to utilise the constitutional principles by emphasising the pivotal role played by participatory democracy in a democratic state. It has been said that engagement with the public does not necessarily entail that the end product will reflect the views of the people.²⁷ There is no defined procedure on how public participation in law-making should be facilitated. Therefore, lawmakers are at liberty to devise a mechanism of conducting public participation in the law-making process.

The Constitutional Court of South Africa further reinforced the duty imposed upon legislators by the Constitution to facilitate public participation in the law-making process in *Matatiele Municipality v President of the Republic of South Africa*.²⁸ Parliament had adopted the Twelfth Amendment of 2005 and the Cross-boundary Municipalities Laws Repeal and Related Matters Act 23 of 2005 to alter boundaries of KwaZulu-Natal and the Eastern Cape. The effect of these new laws was to transfer the local municipality of Matatiele from the KwaZulu-Natal Province into the Eastern Cape Province. The applicants challenged the constitutional validity of the laws altering boundaries on the basis that they removed the Matatiele Municipality from KwaZulu-Natal and placed it into the Province of the Eastern Cape without them being consulted as required by the Constitution. Further, the applicants contended that the KwaZulu-Natal legislature had failed to comply with its constitutional obligation to facilitate public participation in the law-making process. As a result, they argued that the

26 *ibid* para 1408–1409J.

27 Phooko (n 23) 41.

28 *Matatiele Municipality v President of the Republic of South Africa* 2007 (6) SA 477 (CC).

provisions of the Twelfth Amendment that relocated Matatiele from KwaZulu-Natal and placed it into the Province of the Eastern Cape were in breach of the Constitution.

The Court ruled that the KwaZulu-Natal legislature had considered public hearings as an effective way of facilitating public involvement in the law-making process and that the legislature had acknowledged its duty to consult the public in making the law that would alter the boundaries of their province. However, the court found that the legislature had failed to hold the public hearings or invite representations. The Court emphasized that the Constitution required the legislature to facilitate public participation in the law-making process in order to offer the public an opportunity to make submissions and influence the end product. Therefore, the legislature was duty bound to consider the representations from the public and then make an informed decision based on those submissions. Ultimately, the Court warned that the duty to facilitate public participation in the law-making process would be meaningless if the legislators did not ‘provide opportunities for the public to be involved in meaningful ways, to listen to their concerns, values, and preferences, and to consider these in shaping their decisions and policies.’²⁹

The above decisions demonstrate the importance of public participation in the law-making process both at a provincial and national level. It is important to mention that in its order, the Constitutional Court of South Africa directed the legislature to go back and facilitate public participation in the law-making process where it had failed to do so and/or inadequately conducted public participation.³⁰ Bronstein’s views are therefore apposite, as she argues that ‘these cases build democracy and accountability at the grassroots level and serve to constrain authoritarian impulses.’³¹

Considering the above exposition, it is evident that the duty to facilitate public participation at both the provincial and national level should always be observed by the legislatures, and where they fail, the courts have been ready to intervene in order to make public participation a reality.

29 *ibid* para 97.

30 See *inter alia* *Moutse Demarcation Forum v President of the Republic of South Africa* 2011 (11) BCLR 1158 (CC); *Merafong Demarcation Forum v President of the Republic of South Africa* 2008 (5) SA 171 (CC); *Poverty Alleviation Network v President of the Republic of South Africa* 2010 (6) BCLR 520 (CC); *Tongoane v National Minister for Agriculture and Land Affairs* 2010 (6) SA 214 (CC); *Matatiele Municipality & Others v President of the Republic of South Africa & Others* 2007 (1) BCLR 47 (CC) (*‘Matatiele II’*) and *Matatiele Municipality & Others v President of the Republic of South Africa & Others* 2006 (5) BCLR 622 (CC) (*‘Matatiele I’*).

31 Victoria Bronstein, ‘Justice Ngcobo’s Rich Legacy at the Intersection of Federalism and Democracy’ (2017) 32 *Southern African Public L* 2.

The next part considers whether the nature of public participation in the law-making process that is envisaged at a national level should be replicated when it comes to treaty making. The next part also looks at whether the duty to facilitate public participation at a national level extends to a treaty-law making and/or withdrawal from a treaty.

Public Participation in the Law-making Process at International Level

It is submitted that the requirement to facilitate public participation in the law-making process as defined by the courts at a national level should also be applicable at a treaty-making level. Indeed, public participation at a treaty-making level would cure the democratic deficit in the current South African practice.

South Africa's legal system is dualistic in nature.³² The dualism theory views international law and domestic law as two distinct legal systems which operate at different levels.³³ Therefore international agreements entered into by the government of South Africa have to be transformed into domestic law through enabling legislation in order to have the force of local law.³⁴ However, the South African legal system is not exclusively dualist as it has some elements of monism, because a self-executing treaty automatically becomes part of South African law upon ratification without the need for further incorporation into the domestic law.³⁵

Monism, on the other hand, views international law and domestic law as a manifestation of a single conception of law.³⁶ Consequently, upon ratification, a treaty becomes part and parcel of the local law. This does not really occur in practice as the domestication of international law into the municipal legal system is regulated by the constitution of a country concerned.

Treaty law in South Africa may be applied by domestic courts only if it has been incorporated into domestic law through enabling legislation.³⁷ Section 231 of the Constitution of South Africa 1996, specifically deals with the negotiation, the signing

32 See s 231(4) of the Constitution of the Republic of South Africa; John Dugard, 'International Law and the South African Constitution' (1977) *European Journal of International Law* 42.

33 Melissa Walters, 'Creeping Monism: The Judicial Trend toward Interpretive Incorporation of Human Rights Treaties' (2007) 107 *Columbia LR* 628–705.

34 See s 231(4) of the Constitution of the Republic of South Africa, 1996; *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) para 92.

35 *Glenister* para 90. In fact, in two recent decisions the Constitutional Court of South Africa has applied the provisions of undomesticated treaties in South African jurisdiction. See for example, *Government of the Republic of Zimbabwe v Fick and Others* 2013 (5) SA 325 (CC).

36 John Dugard, *International Law: A South African Perspective* (3 edn, Juta 2005) 47.

37 See s 231 of the Constitution of South Africa, 1996.

and the status of international agreements in South Africa's municipal system. Section 231 of the Constitution provides that:

(1) The negotiating and signing of all international agreements is the responsibility of the national executive.

(2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).

(3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time. (4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

(5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.

The Constitutional Court of South Africa in *Glenister v President of the Republic of South Africa*, ruled that the above provision lays down certain steps that have to be followed before a treaty may become part of the South African law.³⁸ Section 231 gives the executive the power to negotiate and sign a treaty. However, the signed treaty does not automatically bind South Africa unless it is one of an executive nature.³⁹ Further, section 231 requires the resolution of Parliament in order to make a treaty binding unless 'it is a self-executing agreement' that has been approved by Parliament, which becomes law in the Republic upon such approval.⁴⁰ In addition, under section 231, a treaty only becomes law in South Africa when it has been enacted into law through national legislation.⁴¹

An analysis of section 231 reveals that there is nothing that requires the national executive, National Assembly and the National Council of Provinces to facilitate public participation in the treaty-making process. This is a cause for concern as the executive may unilaterally sign a human rights treaty and thereafter also unilaterally withdraw

38 2011 (3) SA 347 (CC) para 89.

39 *ibid.*

40 *ibid.*

41 *ibid.*

from such a treaty regardless of the consequences that the withdrawal may have on citizens.

Section 231 also deprives the public from holding their elected representatives accountable to their actions because the executive can unilaterally withdraw from a treaty that promotes and protects human rights without the public's knowledge. As observed by Harrington, the 'lack of a legal requirement for such consultation supports complaints that a democratic deficit exists in the treaty-making process.'⁴²

Lack of public participation in treaty making is not just a South African malaise. Aoki-Okabe has correctly observed that:

International treaties bind not only the rights and obligations of contracting states, but also those of the individuals who live within them. However, unlike domestic laws, which require legislative approval, international treaties are not necessarily subject to ratification by the legislative body. This provokes the question of how the interests of the people are reflected in international treaties.⁴³

As in the national sphere, it is submitted that the views of the people ought to play an important role in treaty making as well. Moses rightly asserts that 'those in power must therefore initiate mechanisms, processes and procedures to ensure that the people are able to participate effectively in the actions of government.'⁴⁴ History has shown that the people cannot entirely rely on the Parliament/National Assembly to hold the executive accountable especially where the ruling power is in the majority.⁴⁵ For example, *Law Society of South Africa v President of the Republic of South Africa*⁴⁶ is refreshingly disruptive of the classical view which seems to be still part of the jurisprudence of some constitutional democracies, that give too much deference to the executive when it comes to the conduct of international relations including the treaty-

42 Harrington (n 1) 468.

43 Aoki-Okabe Maki, 'Increasing Popular Participation in the Treaty-making Process: The Legislative Process of Section 190 of the 2007 Constitution of Thailand' <https://ir.ide.go.jp/?action=pages_view_main&active_action=repository_view_main_item_detail&item_id=37817&item_no=1&page_id=39&block_id=158> accessed 14 March 2019.

44 Moses (n 20) 22.

45 See for example, *Economic Freedom Fighters v Speaker of the National Assembly and Others* 2018 (3) BCLR 259 (CC); *Democratic Alliance v Speaker of the National Assembly and Others* 2016 (5) BCLR 618 (CC) para 104. The court said: 'the failure by the National Assembly to hold the President accountable by ensuring that he complies with the remedial action taken against him, is inconsistent with its obligations to scrutinise and oversee executive action ... and to maintain oversight of the exercise of executive powers by the President.'

46 Moses (n 20) 22.

making process;⁴⁷ where the executive reigns supreme with very limited, if any, judicial and parliamentary oversight. This case concerned the constitutionality of the president's signature of the 2014 Protocol which limits the SADC Tribunal's jurisdiction over cases involving disputes between individuals and member states including the constitutionality of his participation in the decision that eventually suspended the operation of the SADC Tribunal. In particular, the jurisdictional clause in Article 33 of the 2014 Protocol provides that 'the Tribunal shall have jurisdiction on the interpretation of the SADC Treaty and Protocols relating to disputes between Member States.' The case further concerns the right of access to courts at a regional level. The legal issue before the court was whether the president acted unconstitutionally, irrationally, and unlawfully in participating in the decisions that suspended the SADC Tribunal and limited its jurisdiction.

The Constitutional Court ruled in favour of the applicants and held that the disbanding of the SADC Tribunal and purporting to replace it with a weaker one was contrary to the Constitution and the Treaty of the Southern African Development Community in so far as they guarantee access to justice including access to the courts. The court indicated that the president's actions undermined the aforesaid rights and were contrary to the duty to act in good faith in discharging treaty obligations and not to defeat the object and purpose of the treaty. Consequentially, the South African president's participation in those decision-making processes and his own decisions to suspend the operations of the SADC Tribunal, and his signature on the 2014 Protocol were, by reason of the South African Constitution, unconstitutional, unlawful and irrational in that they violated the amendment procedure of the SADC Protocol on the Tribunal.⁴⁸ The court then ordered the president to withdraw his signature from the 2014 Protocol.

While the above decision is welcomed as it indicates that even when an executive power is exercised on the international level, such power must still be in line with the principles of the Constitution. It is submitted that it is unfortunate that the court failed in a matter that was well within its hands to elevate the right to facilitate public participation at a treaty-making level. Even though the court ruled in favour of the applicants by finding

47 See 'African Peer Review Mechanism Country Review Report No. 8 on The Federal Republic of Nigeria' 91 [Review Report is on file with the author]; Moses Retselisitsoe Phooko and Mkhululi Nyathi, 'The Revival of the SADC Tribunal by South African Courts: A Contextual Analysis of the Decision of the Constitutional Court of South Africa in *Law Society of South Africa and Others v President of the Republic of South Africa and Others* (CCT67/18) [2018] ZACC 51 11-12- 2018)' 2019 (52) De Jure 415.

48 *Law Society of South Africa and Others v President of the Republic of South Africa and Others* para 93; *Southern African Litigation Centre and Another v National Director of Public Prosecutions and Others* 2012 (10) BCLR 1089; *Republic of Zimbabwe v Fick and Others* (657/11) [2012] ZASCA 122 (20 September 2012); *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others* 2016 (4) BCLR 487 (SCA), and *Government of the Republic of Zimbabwe v Fick and Others* 2013 (5) SA 325 (CC).

against the president on the aforesaid grounds, it found the contention by the applicants to the effect that the president had failed to facilitate public participation as required by the Constitution inapplicable in this case. The applicants had argued that the signature of the president was invalid because it ignored the ‘requirements of our participatory democracy.’⁴⁹ All in all, the applicants argued that the president was constitutionally obliged to consult the public before signing the 2014 Protocol. The respondent contended that under section 231(1) of the Constitution, negotiation and signature of international agreements does not require parliamentary approval and/or public participation.⁵⁰ The respondents argued that it is section 231(2) of the Constitution which ‘deals with ratification of an international agreement, which binds South Africa, which requires parliamentary approval or public participation.’⁵¹

In evaluating the aforesaid submissions, the court indicated that public participation is recognised and required by the Constitution in the law-making process. However, the court stated that ‘participatory democracy is not provided for in similar terms in relation to the exercise of presidential or executive power.’⁵² The court further stated that the negotiation and signing of international agreements such as ‘the impugned [2014] Protocol is an exercise of executive power.’⁵³ In light of this, it ruled that ‘there is no legal provision or principle that even remotely imposes an obligation on the Executive to invite the public to participate in its decision-making.’⁵⁴

It is submitted that the court’s reasoning and the respondent’s submissions are misplaced as they go against South Africa’s democracy which is both representative and participatory in nature and demands transparency, responsiveness and accountability at all levels.⁵⁵ The president may not do as he/she pleases as was in the present case when he signed the 2014 Protocol thus effectively denouncing the SADC Tribunal. The executive is in the author’s view required to consult with the public in matters that so fundamentally affect them such as the disbandment of a regional tribunal which is needed to provide access to justice at a regional level especially where the domestic mechanisms are unavailable, inaccessible, ineffective and/or insufficient.⁵⁶ Additionally, the Executive’s signing of the 2014 Protocol which limited the jurisdiction of the SADC Tribunal to inter-state disputes was done outside the permissible procedure

49 *ibid* para 86.

50 States’ written submission para 4.49 [on file with author].

51 *ibid*.

52 *Law Society of South Africa and Others v President of the Republic of South Africa and Others* para 87.

53 *ibid*.

54 *ibid*.

55 *Doctors for Life International v Speaker of the National Assembly* 1440F-G.

56 *Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe SADC (T) Case 02/2008* (28 November 2008) 21.

as provided for in Article 37 (3) of the SADC Protocol on the Tribunal and deals with a procedure for amendment of a treaty. The above provision requires that any amendments to the SADC Protocol on the Tribunal ‘be adopted by a decision of three (3) quarters of all the members of the Summit, and shall become effective subject to Article 36’ of the same Protocol. In the author’s view the silence of section 231 of the Constitution on the requirement to facilitate public participation in treaty making at all stages and the failure of the court to read in such a requirement where there is both representative and participatory democracy constitutes a ‘democratic deficit’ that needs to be cured sooner rather than later.⁵⁷

It is further submitted that the respondent’s argument is incorrect in suggesting that the signing of a treaty does not require public participation as the public will be consulted prior to the ratification stage. Additionally, it is submitted that the ratification process should also involve direct public participation. The recent practice of the Constitutional Court has been to apply the provisions of a signed but not ratified treaty in the cases before it.⁵⁸ This is a concern because the application of unratified treaties by the courts means that the public did not have an opportunity to make submissions prior to the treaty being enforceable in South African jurisdiction. Finally, it is submitted that public participation is also vital prior to the signing as the act of signing indicates that South Africa is bound by that treaty at an international level and accountable to other states at that level.⁵⁹ This means that the state may be bound at an international level without the public knowing. Some countries, for example, Thailand, have rectified this shortcoming and it is time for South Africa to include the requirement to facilitate public participation in the treaty-making process. The section below discusses how Thailand has introduced public participation in the treaty-making process and seeks to show that South Africa may learn something from the Thai model.

The Thai Treaty-making Process

Thailand has a dualist legal system.⁶⁰ Ratified treaties need to be incorporated into domestic law in order to have the force of local law.⁶¹ The signature of the king is required for the country to enter into an international agreement with other countries.⁶² The constitutions of Thailand from the period 1932 to 1997 did not make provision for

57 Harrington (n 1) 468.

58 See *Government of the Republic of Zimbabwe v Fick and Others* 2013 (5) SA 325 (CC).

59 *Progress Office Machines CC v South African Revenue Services and Others* 2008 (2) SA 13 (SCA) para 6; *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) para 91.

60 Whithit Muntarbhorn, *The Core Human Rights Treaties and Thailand* (Brill 2016) 5–6, 9.

61 *ibid.*

62 Article 178 of the 2017 Constitution of the Kingdom of Thailand.

public participation in the treaty-making process.⁶³ For example, all the previous constitutions merely provided ‘that international affairs were to be the responsibility of the executive branch, but that certain kinds of international agreements must be approved by the legislative branch.’⁶⁴ There was therefore no reference whatsoever to public participation. Even the Thai 1997 Constitution which was regarded as the most progressive and democratic constitution in the history of Thailand was silent on this important aspect.⁶⁵ Treaty law in the Kingdom of Thailand is regulated by article 178 of the 2017 Constitution of the Kingdom of Thailand.

It was only during the adoption of the 2017 Constitution that the Thai people saw a major shift in the treaty-making regime that has been left untouched for centuries.⁶⁶ The 2017 Constitution has introduced the requirement by the executive to facilitate public participation in treaty-making. Maki has described this historic development as:

[A] major shift compared to previous constitutions Section 190 of the 2007 constitution newly created stronger measures to control the government’s authority to conclude international treaties. It expanded the range of treaties which require the approval of parliament. Moreover, it enhanced not only the authority of the National Assembly and the Constitutional Court, but also provided opportunities for direct participation in the treaty-making process by the people. This evokes the nationwide discussion about the balance of the three governmental powers in treaty-making in Thailand.⁶⁷

Indeed, this is a significant departure from the pre-2007 era wherein the executive enjoyed monopoly over the treaty-making process.⁶⁸ This does not only enhance participatory democracy but also builds on ‘democratic accountability in the field of treaty making.’⁶⁹

Article 178 of the 2017 Constitution provides:

The King has the Royal Prerogative to conclude a peace treaty, armistice, and other treaties with other countries or international organisations.

Any treaty which provides for a change in Thai territories or external territories over which Thailand has sovereign right or jurisdiction under a treaty or international law, or

63 Maki (n 43).

64 See s 54 of the Constitution of Thailand, 1932.

65 *ibid.*

66 *ibid.*

67 *ibid* 4.

68 Vivita Chumpicha, ‘The Interpretative Influence of International Human Rights Norms on Judicial Reasoning in Thailand: Lessons from the United Kingdom and the United States of America’ (LLD thesis, Durham University, 2012) 75.

69 Harrington (n 1) 509.

which requires the enactment of an Act for implementation, and other treaties which may have wide scale effects on the security of economy, society, or trade or investment of the country must be approved by the National Assembly. In this regard, the National Assembly shall complete its consideration within sixty days as from the date of receipt of such matter. If the National Assembly does not complete the consideration within such period of time, it shall be deemed that the National Assembly has given approval.

Other treaties which may have wide scale effects on the security of economy, society, or trade or investment of the country under paragraph two are treaties pertaining to free trade, common customs union, or the authorization of natural resources utilisation, or which cause the country to lose rights over natural resources, in whole or in part, or on any other treaties provided by law.

There shall also be a law prescribing procedures for the public to participate in the expression of opinions and to obtain necessary remedy from the effects of conclusion of a treaty under paragraph three.

Where a question arises as to whether any treaty constitutes a case under paragraph two or paragraph three, the Council of Ministers may request the Constitutional Court to render a decision thereon. The Constitutional Court shall complete its decision within thirty days as from the date of receipt of such request.

It is evident that article 178 of the Thai Constitution significantly transformed the treaty-making process in Thailand in that it introduced, among other things, direct public participation in treaty-making procedures. The other noticeable change is that the provision puts the ‘negotiation process under direct public scrutiny by mandating information disclosure at the pre-negotiation and pre-signatory phase.’⁷⁰ In addition, there is also a mechanism for judicial review by the Constitutional Court.⁷¹ Furthermore, the new treaty-making regime requires that a national legislation be enacted in order to give effect to the provision dealing with public participation in the treaty-making process.⁷²

The proposals for the law that will spell out the procedure for public participation in the treaty-making process have since been initiated. However, the process is not yet completed. Public participation in treaty-making procedure is therefore at the core of the 2007 Constitution of Thailand. This development is welcomed as it places ‘strong restrictions on the treaty-making powers of the executive branch in the form of checks by the legislative branch, national scrutiny and by judicial review.’⁷³

70 See Article 178 of the 2007 Constitution of Thailand.

71 *ibid.*

72 *ibid.*

73 Maki (n 43) 8.

Comparison of South Africa's and Thailand's Treaty-Making Processes

There are several observations that can be made from the Thai and South African legal systems. First, they are both dualistic in nature and ratified treaties have to be domesticated through enabling legislation before they can become part of domestic law. Second, the Constitutions of both Thailand and South Africa contain a procedure for the incorporation of treaty law into the domestic legal system. Third, the Thai procedure for domesticating international law into domestic law requires the executive to facilitate public participation in the treaty-making process through, *inter alia*, making the proposed treaty available to the public for comments. Fourth, the South African procedure for treaty incorporation into municipal law is silent about the requirement by the legislature to facilitate public participation in the treaty-making process. Fifth, the Constitutions of Thailand during the period 1932 to 1997 did not provide for public participation in the treaty-making process. The requirement to facilitate public participation was only introduced in the 2017 Constitution. The previous constitutions of South Africa since 1910 to 1993 did not make provisions for public participation in the treaty-making process. And neither does the current 1996 Constitution.

The above discussion illustrates that the Thai constitutional framework is more advanced in terms of providing for the right to public participation in the treaty-making process. On the other hand, South Africa has done nothing to ensure that the public directly participate in treaty-making processes. The Thai treaty-making process thus serves as a good example on how South Africa can incorporate the right to public participation in its treaty-making processes.

It could be argued that the current procedure for treaty making in South Africa still reflects the traditional position of international law which regarded states as the only subjects of international law.⁷⁴ There is therefore a need to change it in order to involve the public in treaty-making processes as individuals are now also subjects of international law who possess rights and obligations.⁷⁵

The section below provides a possible solution in addressing the aforesaid gap in the South African treaty-making process.

74 Ernst Scheneberger, 'Responsibility of the Individual under International Law' (1946-1947) 35 *Georgetown LR* 481.

75 Abegunde Babalola, Filani Oluropo, and Barr Joshua, 'X-raying the Evolutionary Trend vis-à-vis the Prospects of the Principle of Individual Criminal Responsibility under International Law' (2017) 3 *International JL* 135; Rein Midlerson, 'Human Rights and the Individual as Subject of International Law: A Soviet View' (1990) *European J Intl L* 34; Samantha Besson, 'The Authority of International Law - Lifting the State Veil' (2009) *Sydney LR* 343; Udoka Nwosi, 'Head of State Immunity in International Law' (LLD thesis, The London School of Economics and Political Science UK) 272.

Recommendations

Given the role played by public participation in enhancing democracy by ensuring that there is transparency, responsiveness and accountability, it is proposed that the legislature should consider including the duty to facilitate public participation in treaty-making processes as done in other countries such as Thailand. This can be done through the amendment of section 231 of the Constitution by including a clause which requires the treaty to be concluded to be made publicly available in all languages prior to signing and ratification. It is further submitted that this should be followed by public consultations in order to solicit the views of the public. The discussion of the proposed treaty can also be discussed in public debates such as various forms of media including radio and television. In the author's view, this supplements representative democracy as the will of the people will be heard through direct participation. Finally, it is submitted that the Executive should at all times respect the Constitution, the rule of law and international obligations.

Conclusion

This article discussion has demonstrated that South Africa's constitutional democracy is both participatory and representative in nature. It further revealed that the constitution requires the legislature to facilitate public participation in the law-making process. This right, applicable at both the provincial and national levels, has been confirmed and elucidated by the Constitutional Court in various decisions.

Further, the article has shown that the Constitution is silent on the treaty-making procedure as to whether the legislature is constitutionally bound to facilitate public participation in the treaty-making process. There is thus a gap as it appears that public participation does not apply in the treaty-making process. This is a constitutional deficit and needs to be addressed. In the Kingdom of Thailand, the old treaty-making regime did not make provisions for public participation. However, this democratic deficit was cured in the 2017 Constitution which requires direct participation by the public in the treaty-making process. This is something good that South Africa can learn in order to prevent a situation wherein the executive acts with impunity when concluding and/or withdrawing from international agreements. Therefore, Parliament should consider amending section 231 of the Constitution in line with the recommendations indicated above in order to include the right to public participation in the treaty-making process. This right should commence before the signing of a treaty, and before the executive withdraws from a treaty.

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